COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# RÉSERVES A LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

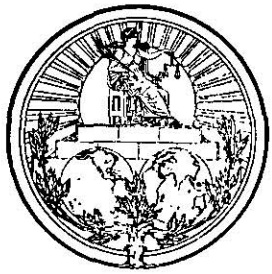
AVIS CONSULTATIF DU 28 MAI 1951

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

ADVISORY OPINION OF MAY 28th, 1951



DEUXIÈME PARTIE

# SÉANCES PUBLIQUES

*tenues au Palais de la Paix, La Haye,*
*du 10 au 14 avril et le 28 mai 1951,*
*sous la présidence de M. Basdevant, Président*

# EXPOSÉS ORAUX

PART II

# PUBLIC SITTINGS

*held at the Peace Palace, The Hague,*
*from April 10th to 14th, and on May 28th, 1951,*
*the President, M. Basdevant, presiding*

# ORAL STATEMENTS

# PROCÈS-VERBAUX DES SÉANCES TENUES DU 10 AU 14 AVRIL ET LE 28 MAI 1951

## ANNÉE 1951

### PREMIÈRE SÉANCE PUBLIQUE[1] (10 IV 51, 11 *h.*)

*Présents:* M. BASDEVANT, *Président;* M. GUERRERO, *Vice-Président;* MM. ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, M. KLAESTAD, BADAWI PACHA, MM. READ, HSU MO, AZEVEDO, *juges;* M. HAMBRO, *Greffier.*

*Présents également:*

Dr Ivan S. KERNO, Secrétaire général adjoint chargé du Département juridique des Nations Unies, représentant du Secrétaire général des Nations Unies, assisté de

M. Gurdon W. WATTLES, du Département juridique des Nations Unies.

*Les représentants des Gouvernements suivants:*

République française : M. Charles ROUSSEAU, professeur à la Faculté de droit de Paris ; conseiller juridique adjoint au ministère des Affaires étrangères ;

Israël : M. Shabtai ROSENNE, conseiller juridique au ministère des Affaires étrangères ;

Royaume-Uni : M. G. G. FITZMAURICE, C. M. G., deuxième Conseiller juridique au Foreign Office.

Ouvrant l'audience, le PRÉSIDENT expose que la Cour se réunit pour entendre les exposés oraux qui seront présentés dans l'affaire relative aux réserves à la Convention pour la prévention et la répression du crime de génocide.

Par une résolution en date du 16 novembre 1950, l'Assemblée générale des Nations Unies a décidé de demander un avis consultatif à ce sujet.

Il prie le GREFFIER de donner lecture de cette résolution.

Cette lecture faite, le PRÉSIDENT rappelle que la requête à fin d'avis consultatif a fait l'objet des notifications d'usage. Conformément à l'article 66, paragraphe 2, du Statut de la Cour, elle a été communiquée à tous les gouvernements des États admis à ester en justice devant la Cour et à toutes organisations internationales jugées susceptibles par la Cour de donner des renseignements sur la question.

[1] Sixième séance de la Cour.

# MINUTES OF THE SITTINGS HELD ON APRIL 10th TO 14th, AND MAY 28th, 1951

## YEAR 1951

### FIRST PUBLIC SITTING [1] (10 IV 51, 11 *a.m.*)

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

*Also present :*

Dr. Ivan S. KERNO, Assistant Secretary-General in charge of the Legal Department of the United Nations, representing the Secretary-General of the United Nations, assisted by

Mr. Gurdon W. WATTLES, of the Legal Department of the United Nations ;

*The Representatives of the following Governments :*

French Republic : M. Charles ROUSSEAU, Professor at the Faculty of Law, Paris, Assistant Legal Adviser of the French Ministry of Foreign Affairs ;

Israel : Mr. Shabtai ROSENNE, Legal Adviser of the Israeli Ministry of Foreign Affairs ;

United Kingdom : Mr. G. G. FITZMAURICE, C.M.G., Second Legal Adviser to the Foreign Office.

In opening the sitting, the PRESIDENT stated that the Court had met to hear the oral statements to be submitted in the case relating to the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

By a Resolution dated November 16th, 1950, the General Assembly of the United Nations had decided to request the Court to give an Advisory Opinion on this subject.

He asked the Registrar to read the resolution in question.

The REGISTRAR read the relevant text.

The PRESIDENT stated that the Request for an Advisory Opinion had been notified in the customary manner. As prescribed in Article 66, paragraph 2, of the Statute of the Court, it had been communicated to all the governments of States entitled to appear before the Court and to all international organizations which were considered as likely to be able to furnish information on the question.

[1] Sixth meeting of the Court.

En outre, par application de l'article 63, paragraphe premier, et de l'article 68 du Statut de la Cour, la requête de l'Assemblée générale a été également communiquée aux gouvernements des États qui ne sont pas admis à ester en justice devant la Cour mais qui ont été invités à adhérer à la Convention sur le génocide en vertu de l'article 11 de celle-ci, à savoir les États suivants : Albanie, Autriche, Bulgarie, Cambodge, Ceylan, Corée, Finlande, Hongrie, Irlande, Italie, Jordanie, Laos, Monaco, Portugal, Roumanie, Vietnam.

Tous ces gouvernements ont été avisés que la Cour serait disposée à recevoir de leur part un exposé écrit sur la question à elle soumise pour avis.

D'autre part, considérant que l'Organisation internationale du Travail et l'Organisation des États américains étaient susceptibles de fournir des renseignements sur la pratique des réserves en matière de conventions multilatérales, la Cour a avisé ces organisations qu'elle était également disposée à recevoir de leur part des exposés écrits.

Par une ordonnance en date du 1er décembre 1950, le délai pour le dépôt des exposés écrits a été fixé au 20 janvier 1951.

La Cour a reçu du Secrétaire général des Nations Unies un exposé écrit ainsi que la documentation que celui-ci était chargé de lui transmettre.

Elle a reçu en outre, par ordre de dates, des observations écrites émanant des gouvernements et organisations dont les noms suivent : Organisation des États américains, Union des Républiques socialistes soviétiques, Royaume hashémite de Jordanie, États-Unis d'Amérique, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Israël, Organisation internationale du Travail, Pologne, Tchécoslovaquie, Pays-Bas, République populaire de Roumanie, République socialiste soviétique d'Ukraine, République populaire de Bulgarie, République soviétique socialiste de Biélorussie, République des Philippines.

La Cour a décidé de tenir à partir du 10 avril, aujourd'hui, des audiences au cours desquelles seraient entendus des exposés oraux.

Le Secrétaire général des Nations Unies s'est fait représenter par M. Ivan Kerno, Secrétaire général adjoint chargé du Département juridique, assisté de M. Wattles. M. Kerno présentera un exposé oral.

Le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, la France et Israël ont fait savoir qu'un exposé oral serait présenté en leur nom. Les représentants de ces pays dans cette affaire sont :

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord : sir Hartley Shawcross, *Attorney-General*, assisté de M. Fitzmaurice, deuxième conseiller juridique au Foreign Office.

Pour la France : M. Charles Rousseau, professeur à la Faculté de droit de Paris, conseiller juridique adjoint au ministère des Affaires étrangères.

Pour Israël : M. Shabtai Rosenne, conseiller juridique au ministère des Affaires étrangères.

Le Président constate la présence devant la Cour du représentant du Secrétaire général des Nations Unies et de ceux des États susmentionnés. Il annonce qu'il donne en premier lieu la parole à M. Kerno, représentant

Moreover, as prescribed by the first paragraph of Article 63, and by Article 68 of the Court's Statute, the Request of the General Assembly had also been communicated to the governments of States not entitled to appear before the Court but who had been invited to sign the Convention on Genocide in accordance with Article 11 of the Convention. These were the following : Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Korea, Laos, Monaco, Portugal, Romania, Viet Nam.

All these governments had been informed that the Court would be prepared to receive a written statement on the question submitted to it for Advisory Opinion.

As the International Labour Organization and the Organization of American States were considered as likely to be able to furnish information as to the practice of reservations in matters of multilateral conventions, the Court had also notified those organizations that it would be prepared to receive written statements from them.

By an Order dated December 1st, 1950, the time-limit for the deposit of written statements had been fixed at January 20th, 1951.

The Court had received a written statement from the Secretary-General of the United Nations as well as the documents which he had been asked to transmit.

It had also received written statements from the following governments and organizations in order of dates : The Organization of American States, Union of Soviet Socialist Republics, Hashemite Kingdom of Jordan, United States of America, United Kingdom of Great Britain and Northern Ireland, Israel, International Labour Organization, Poland, Czechoslovakia, Netherlands, People's Republic of Romania, Ukrainian Soviet Socialist Republic, People's Republic of Bulgaria, Byelorussian Soviet Socialist Republic, Republic of the Philippines.

The Court had decided to hold from to-day, April 10th, public sittings for the hearing of oral statements.

The Secretary-General of the United Nations was represented by Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department, assisted by Mr. Wattles. Mr. Kerno would make an oral statement.

The United Kingdom of Great Britain and Northern Ireland, France and Israel had notified their intention of presenting oral statements. The representatives of these countries in the case were :

For the United Kingdom of Great Britain and Northern Ireland : Sir Hartley Shawcross, Attorney-General, assisted by Mr. Fitzmaurice, Second Legal Adviser to the British Foreign Office.

For France : M. Charles Rousseau, Professor at the Faculty of Law in Paris, Assistant Legal Adviser to the French Ministry of Foreign Affairs.

For Israel : Mr. Shabtai Rosenne, Legal Adviser to the Israeli Ministry of Foreign Affairs.

The President noted the presence in Court of the representatives of the Secretary-General and of the other States mentioned. He would first call on Mr. Kerno, representative of the Secretary-General, and

du Secrétaire général des Nations Unies, et ensuite, selon l'accord intervenu à ce sujet, au représentant du Gouvernement d'Israël, puis au représentant du Gouvernement du Royaume-Uni et enfin au représentant du Gouvernement français.

Puis le Président donne la parole à M. KERNO, qui présente l'exposé reproduit en annexe [1].

L'audience est levée à 13 heures.

Le Président de la Cour :
*(Signé)* BASDEVANT.

Le Greffier de la Cour :
*(Signé)* E. HAMBRO.

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## DEUXIÈME SÉANCE PUBLIQUE [2] (11 IV 51, 10 *h.*)

*Présents :* [Voir première séance.]

Le PRÉSIDENT, ouvrant l'audience, donne la parole au représentant du Secrétaire général des Nations Unies.

M. Ivan KERNO reprend son exposé, qu'il termine (annexe) [3].

Le PRÉSIDENT remercie le représentant du Secrétaire général des renseignements qu'il a fournis à la Cour et donne la parole au représentant du Gouvernement d'Israël.

M. Shabtai ROSENNE présente l'exposé oral reproduit en annexe [4].

(L'audience, interrompue à 13 heures, est reprise à 16 heures.)

Le PRÉSIDENT donne la parole au représentant du Gouvernement d'Israël.

M. Shabtai ROSENNE reprend son exposé [5], dont la suite, interrompue par la clôture de l'audience, est renvoyée par le Président au jeudi 12 avril, à 10 h. 30.

L'audience est levée à 18 h. 20.

[*Signatures.*]

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[1] Voir pp. 306-318.
[2] Septième séance de la Cour.
[3] Voir pp. 319-327.
[4] » » 328-339.
[5] » » 339-352.

afterwards on the representatives of the governments in accordance with the arrangement arrived at with them.

The President called upon Mr. Kerno to address the Court.

Mr. Ivan KERNO, Assistant Secretary-General of the United Nations in charge of the Legal Department, began the statement reproduced in Annex [1].

The Court rose at 1 p.m.

*(Signed)* BASDEVANT,
President.

*(Signed)* E. HAMBRO,
Registrar.

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## SECOND PUBLIC SITTING [2] (11 IV 51, 10 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT declared the sitting open and called on the representative of the Secretary-General of the United Nations.

Mr. Ivan KERNO continued and concluded his statement (Annex [3]).

The PRESIDENT thanked the representative of the Secretary-General for the information he had given to the Court, and called on the representative of the Government of Israel.

Mr. Shabtai ROSENNE presented the oral statement which is reproduced in the Annex [4].

(The sitting was suspended at 1 p.m. and resumed at 4 p.m.)

The PRESIDENT called on the representative of the Government of Israel.

Mr. Shabtai ROSENNE continued his statement [5].

Before adjourning the sitting, the PRESIDENT stated that the Court would meet again on Thursday, 12th April, at 10.30 a.m., when Mr. Rosenne would resume his statement.

The Court rose at 6.20 p.m.

[*Signatures.*]

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[1] See pp. 306-318.
[2] Seventh meeting of the Court.
[3] See pp. 319-327.
[4] " " 328-339.
[5] " " 339-352.

## TROISIÈME SÉANCE PUBLIQUE [1] (12 IV 51, 10 *h.* 30)

*Présents :* [Voir première séance.]

Le PRÉSIDENT, après avoir déclaré la séance ouverte, invite le représentant du Gouvernement d'Israël à continuer son exposé.

La fin de l'exposé de M. Shabtai ROSENNE est reproduite en annexe [2].

Le PRÉSIDENT remercie le représentant d'Israël des renseignements qu'il a fournis à la Cour et, avant de clore la séance, annonce que la Cour se réunira de nouveau le vendredi 13 avril, à 10 heures, pour entendre l'exposé oral du représentant du Gouvernement du Royaume-Uni.

L'audience est levée à 11 h. 40.

[*Signatures.*]

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## QUATRIÈME SÉANCE PUBLIQUE [3] (13 IV 51, 10 *h.*)

*Présents :* [Voir première séance ; est également présent sir Hartley SHAWCROSS, K.C., M. P., Attorney-General, *représentant du Gouvernement du Royaume-Uni.*]

Le PRÉSIDENT, après avoir ouvert l'audience, donne la parole au représentant du Gouvernement du Royaume-Uni.

Sir Hartley SHAWCROSS présente l'exposé reproduit en annexe [4].

(L'audience, interrompue à 13 h. 5, est reprise à 16 heures.)

Le REPRÉSENTANT DU GOUVERNEMENT DU ROYAUME-UNI reprend, sur l'invitation du PRÉSIDENT, la suite de son exposé [5]. Puis il déclare que, rappelé dans son pays par les devoirs de sa charge, il ne sera pas en mesure de terminer lui-même cet exposé.

Le PRÉSIDENT remercie sir Hartley Shawcross des informations dont il a fait part à la Cour et annonce que la Cour se réunira de nouveau le samedi 14 avril, à 10 heures, pour entendre la fin de l'exposé oral présenté au nom du Gouvernement britannique.

Il prononce ensuite la clôture de l'audience.

L'audience est levée à 19 heures.

[*Signatures.*]

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[1] Huitième séance de la Cour.
[2] Voir pp. 352-357.
[3] Neuvième séance de la Cour.
[4] Voir pp. 358-375.
[5] » » 375-394.

## THIRD PUBLIC SITTING [1] (12 IV 51, 10.30 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT, after declaring the sitting open, called upon the representative of the Government of Israel to continue his statement.

The conclusion of Mr. Shabtai ROSENNE's statement is given in the Annex [2].

The PRESIDENT thanked the representative of the Government of Israel for the information he had given to the Court and, before adjourning the sitting, stated that the Court would meet again on Friday, April 13th, at 10 a.m., when the representative of the Government of the United Kingdom would present his oral statement.

The Court rose at 11.40 a.m.

[*Signatures.*]

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## FOURTH PUBLIC SITTING [3] (13 IV 51, 10 *a.m.*)

*Present:* [See first sitting; also present Sir Hartley SHAWCROSS, K.C., M.P., Attorney-General, *representative of the Government of the United Kingdom.*]

The PRESIDENT declared the meeting open and called on the representative of the Government of the United Kingdom.

Sir Hartley SHAWCROSS presented the statement reproduced in the Annex [4].

(The sitting was suspended at 1.5 p.m. and resumed at 4 p.m.)

The REPRESENTATIVE OF THE GOVERNMENT OF THE UNITED KINGDOM, upon the request of the PRESIDENT, continued his statement [5], which he was unable to conclude himself, having to get back on public duties in his country.

The PRESIDENT thanked Sir Hartley Shawcross for the information he had given to the Court and stated that the Court would meet again on Saturday, April 14th, at 10 a.m., to hear the conclusion of the oral statement presented on behalf of the British Government.

He then declared that the meeting was closed.

The Court rose at 7 p.m.

[*Signatures.*]

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[1] Eighth meeting of the Court.
[2] See pp. 352-357.
[3] Ninth meeting of the Court.
[4] See pp. 358-375.
[5] " " 375-394.

## CINQUIÈME SÉANCE PUBLIQUE [1] (14 IV 51, 10 *h.*)

*Présents :* [Voir première séance.]

Le PRÉSIDENT, ouvrant l'audience, donne la parole au représentant du Gouvernement du Royaume-Uni.

L'exposé de M. G. G. FITZMAURICE est reproduit en annexe [2].

Après avoir remercié le représentant du Gouvernement du Royaume-Uni des renseignements qu'il a fournis à la Cour, le PRÉSIDENT donne la parole au représentant du Gouvernement français.

M. le professeur ROUSSEAU présente l'exposé oral reproduit en annexe [3].

(L'audience, interrompue à 12 h. 40, est reprise à 16 heures.)

M. le professeur ROUSSEAU, sur l'invitation du Président, reprend son exposé [4], qu'il termine.

Le PRÉSIDENT remercie le représentant du Gouvernement français des informations dont il a fait part à la Cour. Il prononce la clôture de la procédure orale et précise que le Secrétaire général des Nations Unies et les gouvernements intéressés seront informés en temps utile de la date à laquelle la Cour rendra son avis en audience publique.

L'audience est levée à 17 h. 45.

[*Signatures.*]

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## NEUVIÈME SÉANCE PUBLIQUE [5] (28 V 51, 10 *h.* 30)

*Présents :* M. BASDEVANT, *Président ;* M. GUERRERO, *Vice-Président ;* MM. ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, M. KLAESTAD, BADAWI PACHA, MM. READ, HSU MO, *Juges ;* M. HAMBRO, *Greffier.*

*Sont présents également :*

*Les représentants :*

du Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord ;

du Gouvernement d'Israël.

En déclarant l'audience ouverte, le PRÉSIDENT signale que la Cour tient une audience publique pour prononcer l'avis consultatif qui lui a été demandé par l'Assemblée générale des Nations Unies au sujet des réserves à la Convention pour la prévention et la répression du crime de génocide.

Il prie le Greffier de donner lecture de la partie de la résolution du 16 novembre 1950 où est formulée la demande d'avis.

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[1] Dixième séance de la Cour.
[2] Voir pp. 402-416.
[3] » » 417-421.
[4] » » 421-433.
[5] Quarante-et-unième séance de la Cour.

## FIFTH PUBLIC SITTING [1] (14 IV 51, 10 *a.m.*)

*Present :* [See first sitting.]

The PRESIDENT opened the meeting and called on the representative of the Government of the United Kingdom.

The statement of Mr. G. G. FITZMAURICE is annexed hereto [2].

The PRESIDENT, after having thanked the representative of the United Kingdom for the information he had given to the Court, called on the representative of the French Government.

Professor ROUSSEAU made the oral statement given in the Annex [3].

(The sitting was suspended at 12.40 p.m. and resumed at 4 p.m.)

Professor ROUSSEAU, upon the request of the President, resumed and concluded his statement [4].

The PRESIDENT thanked the representative of the French Government for the information he had given to the Court. He declared the oral proceedings to be closed, and added that the Secretary-General of the United Nations and the governments concerned would be informed, in due course, of the date on which the Court expected to deliver its Opinion at a public sitting.

The Court rose at 5.45 p.m.

[*Signatures.*]

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## NINTH PUBLIC SITTING [5] (28 V 51, 10.30 *a.m.*)

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

*Also present :*

*The representatives of :*

the Government of the United Kingdom of Great Britain and Northern Ireland ;

the Government of Israel.

In opening the hearing, the PRESIDENT stated that the Court was holding a public hearing to give the Advisory Opinion requested by the General Assembly of the United Nations in the matter of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

He called on the Registrar to read the Resolution of November 16th, 1950, stating the Request for Opinion.

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[1] Tenth meeting of the Court.
[2] See pp. 402-416.
[3] ,, ,, 417-421.
[4] ,, ,, 421-430.
[5] Forty-first meeting of the Court.

Le GREFFIER donne lecture de ce texte.

Puis le PRÉSIDENT énonce que, conformément à l'article 67 du Statut, le Secrétaire général des Nations Unies et les représentants des États qui ont pris part aux débats oraux dans la présente affaire, à savoir : Israël, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et la France, ainsi que les représentants des États et organisations internationales directement intéressés ont été dûment prévenus.

Après avoir indiqué que la Cour, en application de l'article 39 du Statut, a désigné comme devant faire foi le texte français de l'avis, le Président donne lecture de cet avis [1].

Il prie le GREFFIER de donner lecture en anglais du dispositif de l'avis.

Cela fait, le PRÉSIDENT fait connaître que M. Guerrero, Vice-Président, sir Arnold McNair, MM. Read et Hsu Mo, juges, tout en admettant que la Cour est compétente en l'espèce, déclarent ne pouvoir se rallier à l'avis de la Cour et se sont prévalus du droit que leur confèrent les articles 57 et 68 du Statut pour joindre audit avis l'exposé commun de leur opinion dissidente. D'autre part, M. Alvarez, dans la même situation, a joint à l'avis l'exposé de son opinion dissidente. Les auteurs de ces opinions ont informé le Président qu'ils ne désiraient pas en donner lecture. Après avoir indiqué que lesdites opinions dissidentes seraient jointes au texte de l'avis, le Président lève l'audience.

L'audience est levée à 11 h. 30.

[*Signatures.*]

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[1] Voir publications de la Cour, *Recueil des Arrêts, Avis consultatifs et Ordonnances 1951*, pp. 15-69.

The REGISTRAR read that text.

The PRESIDENT stated that by application of Article 67 of the Statute the Secretary-General of the United Nations and the representatives of the States which had taken part in the oral proceedings in the present case, namely, Israel, the United Kingdom of Great Britain and Northern Ireland and France, and the representatives of States and international organizations directly concerned had been notified.

By application of Article 39 of the Statute, the Court had decided that the French text should be the authoritative text. The President read the French text of the Opinion [1].

He called on the Registrar to read the operative part of the text in English.

The REGISTRAR read that text.

The PRESIDENT stated that Vice-President Guerrero and Judges Sir Arnold McNair, Read and Hsu Mo, while agreeing that the Court was competent to give the Opinion, declared that they were unable to concur in the Opinion of the Court, availed themselves of the right conferred on them by Articles 57 and 68 of the Statute appending to the Opinion the common statement of their dissenting opinions. Furthermore, Judge Alvarez, in the same situation, had appended to the Opinion the statement of his dissenting opinion. The authors of these opinions had informed the President that they did not wish to read them. These dissents would be appended to the text of the Opinion.

The Court rose at 11.30 a.m.

[*Signatures.*]

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[1] See Court's publications, *Reports of Judgments, Advisory Opinions and Orders 1951*, pp. 15-69.

## ANNEXE AUX PROCÈS-VERBAUX
## ANNEX TO THE MINUTES

### 1. EXPOSÉ DE M. IVAN S. KERNO

(REPRÉSENTANT LE SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES)
AUX SÉANCES PUBLIQUES DES 10 ET 11 AVRIL 1951

[*Séance publique du 10 avril 1951, matin*]

Monsieur le Président, Messieurs les Membres de la Cour,

Une fois de plus, j'ai le grand honneur de paraître devant la Cour en qualité de représentant du Secrétaire général des Nations Unies, dans une affaire pour laquelle l'Assemblée générale demande un avis consultatif.

Dans le passé déjà, à cinq reprises différentes, vous m'avez donné l'autorisation de faire un exposé oral pour des questions importantes pour lesquelles l'Assemblée a voulu recourir aux lumières de la Cour. Le problème de l'effet juridique des objections formulées par certains États contre des réserves à la Convention du génocide est certainement également une question importante et, en me présentant devant la plus haute juridiction mondiale, je sens pleinement ma responsabilité.

La prévention et la répression du crime de génocide ont été pendant longtemps et demeurent des sujets auxquels l'Assemblée générale des Nations Unies porte le plus vif intérêt. Dès la deuxième partie de la première session de l'Assemblée, celle-ci a adopté unanimement une résolution affirmant que le génocide est un crime de droit des gens que le monde civilisé condamne, et pour lequel les auteurs principaux et leurs complices doivent être punis. Cette résolution a été confirmée, au cours de la deuxième session, par une résolution nouvelle de l'Assemblée qui a déclaré en outre que le génocide comporte des responsabilités d'ordre national et international pour les individus et pour les États. Après des travaux prolongés de divers organes qui ont agi sur les instructions de l'Assemblée, le texte définitif de la Convention sur le génocide a été élaboré et approuvé au cours de la première partie de la troisième session, le 9 décembre 1948, à Paris. A cette occasion, le Président de l'Assemblée générale, M. Evatt, a déclaré que l'adoption de ce texte constituait un événement qui ferait époque. Il a ajouté que « c'est l'Organisation des Nations Unies et d'autres organes avec elle, qui seront chargés de contrôler l'application de la Convention sur le génocide et leurs interventions se feront au nom de la loi internationale ».

Il ne saurait donc être douteux que l'Assemblée est fortement intéressée au bon fonctionnement d'une convention établie et approuvée par elle en tant qu'instrument pour la prévention et la répression d'un crime international qu'elle a condamné à maintes reprises. Il est clair que la question qui se trouve maintenant devant la Cour peut avoir une grande influence sur le bon fonctionnement et l'efficacité de la convention.

En outre, la question devant vous a une importance générale considérable. Elle affecte, en effet, la pratique suivie par le Secrétaire général dans l'exercice de ses fonctions de dépositaire, non seulement à l'égard de la Convention sur le génocide, mais aussi à l'égard d'un grand nombre d'autres conventions multilatérales. Lorsqu'elle se prononcera à sa sixième

session à la fin de cette année sur la question générale de l'effet juridique des objections aux réserves aux conventions multilatérales, l'Assemblée ne manquera certainement pas d'accorder à l'avis consultatif de cette Cour toute la valeur que mérite l'opinion réfléchie de la plus haute juridiction mondiale, même si, formellement, cet avis n'a trait qu'à un cas d'espèce. L'avis de la Cour aura donc son importance non seulement pour le Secrétaire général mais aussi pour tous les États du monde qui peuvent devenir parties à des conventions dont le Secrétaire général est dépositaire.

La pratique suivie par le Secrétaire général à l'égard des réserves à la Convention sur le génocide fait partie du problème général qu'il doit résoudre dans l'exercice de ses fonctions de dépositaire. J'ai donc l'intention de faire tout d'abord une étude générale de celles des fonctions de dépositaire à propos desquelles des questions relatives à des réserves peuvent se poser. Dans un deuxième et un troisième chapitre de mon exposé j'étudierai ensuite les problèmes juridiques qui se trouvent impliqués dans ces fonctions et la règle de droit suivie jusqu'ici par le Secrétaire général pour les résoudre. Je passerai en revue, dans une quatrième partie de mon exposé, les autres règles qui ont été suggérées. Je terminerai par un examen des questions soumises à la Cour, à la lumière des considérations précédentes.

## I

Voyons donc d'abord un bref aperçu des fonctions du Secrétaire général en tant que dépositaire.

Le Secrétaire général est le dépositaire de plus de soixante conventions multilatérales qui ont été rédigées ou revisées sous les auspices de l'Organisation des Nations Unies. Ces conventions ont trait, outre le génocide, à des sujets tels que le règlement pacifique des différends internationaux, les privilèges et immunités, le commerce international, les tarifs douaniers, les transports maritimes internationaux, les statistiques économiques, l'opium et autres drogues nuisibles, la santé, la traite des êtres humains, les réfugiés et les personnes déplacées, la déclaration de décès des personnes disparues, les publications obscènes et les questions relatives à la science, l'éducation et la culture.

Vingt-cinq de ces conventions environ disposent que les États ne peuvent y devenir parties que par le dépôt auprès du Secrétaire général d'instruments formels de ratification, d'adhésion ou d'acceptation, suivant le cas. La Convention sur le génocide, qui prévoit des ratifications et des adhésions, rentre dans cette catégorie. Seize autres conventions prévoient que des États peuvent y devenir parties soit en les signant sans réserve quant à l'acceptation, soit par le dépôt auprès du Secrétaire général d'un instrument d'acceptation. Les autres conventions disposent que les États y deviennent parties en les signant.

La plupart des conventions qui exigent le dépôt d'instruments formels stipulent expressément que le Secrétaire général doit procéder à certaines formes de notifications au sujet de ces instruments. Aux termes de sept de ces conventions, le Secrétaire général doit notifier la réception des ratifications ou des adhésions. Dans la plupart des cas, soit douze conventions, le Secrétaire général doit notifier le dépôt ou la date du dépôt des instruments. Trois conventions importantes, à savoir, la Constitution de l'Organisation internationale pour les Réfugiés, la

Constitution de l'Organisation mondiale de la Santé et la Convention relative à la création d'une organisation intergouvernementale de la navigation maritime, chargent le Secrétaire général de notifier aux parties les dates auxquelles d'autres États y sont devenus parties. D'autres conventions contiennent des clauses rédigées d'une façon différente ; c'est ainsi que l'article XVII *a)* de la Convention sur le génocide dispose que le Secrétaire général doit notifier « les signatures, ratifications et adhésions reçues en application de l'article XI ». En outre, trois conventions chargent le Secrétaire général de tenir une liste spéciale des signatures, ratifications et adhésions, qui peut être consultée par les parties et doit être publiée aussi souvent que possible, ou sur les instructions du Conseil économique et social. Dans les conventions auxquelles les États deviennent parties par signature, il est souvent stipulé que le Secrétaire général doit notifier chaque signature.

Les conventions stipulent souvent explicitement à quels États il faut notifier les signatures, ratifications, adhésions ou acceptations. Cependant, dans ce domaine, la pratique du Secrétaire général s'est développée dans une direction très libérale et ne s'est pas bornée à une application stricte des provisions expresses des différentes conventions. Il est certainement conforme à l'esprit général de la Charte des Nations Unies que les engagements internationaux soient rendus publics et que les États qui sont ou qui peuvent devenir parties à une convention, soient tenus au courant de tous les faits nouveaux relatifs à cette convention. Le Secrétaire général procède donc à des notifications même lorsque celles-ci ne sont pas obligatoires aux termes mêmes de la convention. Il les adresse pour toutes les conventions à tous les États Membres de l'Organisation des Nations Unies et à tous les États non membres qui sont susceptibles de devenir parties auxdites conventions.

Le Secrétaire général reçoit également en dépôt certains autres instruments que les États sont tenus de déposer afin de devenir parties à des conventions. Le Règlement intérieur de l'Assemblée générale exige que tout État qui désire devenir Membre des Nations Unies adresse au Secrétaire général une demande à cet effet, contenant une déclaration, faite dans un instrument formel, attestant qu'il accepte les obligations de la Charte. Le Secrétaire général est encore le dépositaire des instruments présentés pour satisfaire aux conditions posées par l'Assemblée générale sur la recommandation du Conseil de Sécurité, par les États non membres de l'Organisation des Nations Unies qui deviennent parties au Statut de la Cour. La question des réserves ne se pose évidemment pas dans le cas de ces derniers instruments.

Le Secrétaire général sert aussi de dépositaire pour un grand nombre d'instruments divers, en plus de ceux par lesquels les États deviennent parties à des conventions. Des États qui sont déjà parties à des conventions peuvent, dans de nombreux cas, augmenter ou restreindre leurs obligations en adressant des déclarations au Secrétaire général. Il convient de citer à cet égard le cas, très important, des déclarations faites en application de l'article 36, paragraphe 2, du Statut de la Cour. En outre, dix-sept des conventions dont le Secrétaire général est le dépositaire, y compris la Convention sur le génocide, contiennent une clause qu'il est convenu d'appeler « la clause coloniale », d'après laquelle les parties peuvent, par une déclaration, étendre l'application de la convention aux territoires qu'elles représentent sur le plan international. La plupart de ces conventions prévoient également que la convention

peut cesser d'être applicable à ces territoires, à la suite d'une déclaration similaire. D'autres conventions prévoient des déclarations de renonciation à certaines réserves expressément autorisées, ou la possibilité soit de faire de nouvelles réserves, soit d'augmenter ou de réduire les obligations des parties à d'autres égards. Il est peu probable que des réserves soient faites dans la plupart de ces diverses catégories d'instruments. Toutefois, le Secrétaire général peut être appelé, à l'occasion de leur présentation, à décider si un État qui formule une réserve a la qualité de partie.

Nous voyons donc que les instruments que le Secrétaire général doit recevoir en dépôt sont non seulement très nombreux mais également très variés. A eux seuls ils démontrent déjà suffisamment la grande étendue des fonctions de dépositaire.

Mais il y a plus. D'autres fonctions que celles qui consistent à recevoir des instruments en dépôt et à faire des notifications à leur sujet, incombent au Secrétaire général en sa qualité de dépositaire. Douze conventions, y compris la Convention sur le génocide, invitent expressément le Secrétaire général à notifier la date de leur entrée en vigueur. Je remarque en passant que six de ces conventions ne sont pas encore en vigueur. Ici aussi, pour la commodité et dans l'intérêt de tous les États intéressés, le Secrétaire général notifie la date d'entrée en vigueur des conventions même lorsqu'il n'est pas expressément tenu de le faire. Tous les États Membres de l'Organisation des Nations Unies et tous les États non membres qui sont ou qui ont été invités à devenir parties à une convention reçoivent une notification.

Dix-sept conventions, y compris la Convention sur le génocide, invitent ou autorisent expressément le Secrétaire général à les enregistrer, à la date de leur entrée en vigueur, conformément aux dispositions de l'article 102 de la Charte. L'alinéa 1 *c)* de l'article 4 du Règlement destiné à mettre en application l'article 102 de la Charte, modifié par la résolution 364 (IV) de l'Assemblée générale, dispose en outre que :

> « Tout traité ou accord international soumis aux dispositions de l'article 1 du présent règlement sera enregistré d'office par l'Organisation des Nations Unies .... quand l'Organisation des Nations Unies est le dépositaire d'un accord multilatéral. »

Le paragraphe 2 de l'article 1 dudit règlement dispose que :

> « L'enregistrement ne sera effectué que lorsque le traité ou l'accord international est entré en vigueur entre deux ou plus de deux parties contractantes. »

En conséquence, le Secrétaire général est tenu d'enregistrer les conventions dont il est le dépositaire, lorsqu'elles entrent en vigueur, qu'elles prévoient ou non, de façon expresse, cet enregistrement, et même lorsqu'une disposition formelle de certaines conventions envisage l'enregistrement avant la date de l'entrée en vigueur, comme c'est le cas, par exemple, précisément pour certaines conventions.

Le Secrétaire général exerce en plus d'autres fonctions en sa qualité de dépositaire ; il reçoit et notifie, par exemple, les demandes de revision et les dénonciations. Seules les parties aux conventions peuvent adresser de telles demandes ou de telles dénonciations, aussi le Secrétaire général est-il parfois amené à décider si un État qui formule une réserve est ou non partie à une convention.

Il ne faut pas oublier non plus que ce n'est pas seulement à l'égard des conventions qui ont été rédigées ou revisées sous les auspices des Nations Unies que le Secrétaire général exerce les fonctions que je viens de citer. Il a en effet succédé au Secrétaire général de la Société des Nations dans les fonctions de dépositaire. Cette succession s'est effectuée en vertu de résolutions adoptées par l'Assemblée générale des Nations Unies et par l'Assemblée de la Société des Nations. Par sa résolution 24 (I) du 12 février 1946, l'Assemblée générale des Nations Unies a déclaré « que l'Organisation est disposée à accepter la garde de ces instruments et à charger le Secrétariat de l'Organisation d'assumer pour le compte des parties les fonctions de Secrétariat précédemment confiées à la Société des Nations ». Le 18 avril 1946, l'Assemblée de la Société des Nations a adopté une résolution invitant le Secrétaire général de la Société des Nations à transférer au Secrétariat des Nations Unies, « pour en assurer la garde et s'acquitter des fonctions exercées jusqu'ici par le Secrétariat de la Société des Nations », tous les textes originaux signés des conventions qui avaient été déposés auprès de la Société des Nations, à l'exception toutefois des conventions de l'Organisation internationale du Travail.

Au 31 juillet 1946, date à laquelle le Service de l'enregistrement de la Société des Nations a cessé de fonctionner, un grand nombre de ces conventions et accords étaient encore ouverts à la signature, à la ratification ou à l'adhésion. Cinquante et une de ces conventions n'ont pas encore été revisées ou remplacées par des protocoles ou des conventions élaborées sous les auspices des Nations Unies. Ces conventions ont trait à des sujets très différents tels que l'unification de la législation, le règlement des conflits de lois et la répression des infractions, les transports et le transit, l'énergie électrique, le commerce international, l'agriculture, certains problèmes d'ordre social ou humanitaire, l'instruction et l'enseignement. Il serait superflu d'examiner ici la question complexe de savoir combien parmi ces conventions sont ouvertes, à l'heure actuelle, à de nouvelles signatures, ratifications ou adhésions. Il suffit de constater que beaucoup d'entre elles le sont encore.

Ces conventions prévoient fréquemment la notification de la réception des instruments de ratification ou d'adhésion, celle de la date d'entrée en vigueur, et d'autres encore. Ici encore, le Secrétaire général s'est conformé à la méthode qu'il suit habituellement et il a avisé de tout dépôt d'instrument de ratification ou d'adhésion tous les États Membres de l'Organisation des Nations Unies, ainsi que tous les États non membres qui *sont ou qui peuvent devenir parties à la convention en question.* Comme la plupart de celles conclues sous les auspices des Nations Unies, les conventions de la Société des Nations ne contiennent, dans le plus grand nombre de cas, aucune disposition visant expressément les réserves. D'ailleurs, jusqu'à présent, aucun cas concret de réserves ne s'est présenté au Secrétaire général des Nations Unies concernant cette catégorie de conventions.

## II

J'arrive maintenant à la deuxième partie de mon exposé.

Plusieurs des fonctions dont doit s'acquitter le Secrétaire général, en sa qualité de dépositaire, soulèvent évidemment des problèmes juridiques dont la solution exige une règle applicable aux réserves, tant d'une manière générale que dans le cas particulier de la Convention sur le génocide.

Permettez-moi tout d'abord de dire quelques mots de la situation dans laquelle s'est trouvé le Secrétaire général lorsque, le 16 décembre 1949, la Convention sur le génocide a été signée par l'Union des Républiques socialistes soviétiques, la République socialiste soviétique de Biélorussie et la République socialiste soviétique d'Ukraine. C'était, en effet, à cette occasion que la question des réserves s'est présentée pour la première fois, les trois États en question n'étant disposés à signer qu'avec certaines réserves. Le Secrétaire général devait tout d'abord décider s'il pouvait accepter ces signatures et sous quelle forme. Sans une telle décision, il ne pourrait pas exécuter évidemment la mission qui lui est imposée par l'alinéa *a)* de l'article XVII de la Convention sur le génocide, et d'après laquelle il doit donner notification à tous les États Membres de l'Organisation et aux États non membres qui avaient été invités à devenir parties à la convention. A cette date, quatre États avaient ratifié la convention, trente-sept États l'avaient signée et un certain nombre d'autres pouvaient la signer. Il fallait donc décider lesquels parmi ces États avaient, éventuellement, des droits spéciaux *vis-à-vis de ces réserves et devaient par conséquent être invités à faire* connaître leur attitude. En outre, ces signatures avec réserves rendaient nécessaire l'adoption d'une procédure à suivre dans le cas où ces États signataires maintiendraient en fin de compte les mêmes réserves dans leurs instruments de ratification. Étant donné que des réserves formulées au moment de la signature impliquaient, d'une manière presque certaine, que les mêmes réserves seraient maintenues au moment de la ratification, il est apparu que la meilleure solution consistait à suivre une procédure de notification analogue à celle qui serait suivie dans le cas d'une réserve au moment de la ratification ou de l'adhésion.

Le problème des réserves dans les instruments de ratification s'est présenté dès le 6 juillet 1950, lorsque le Secrétaire général a reçu de la République des Philippines un instrument de ce genre. Il fallait décider, en premier lieu, si le Secrétaire général pouvait recevoir cet instrument en dépôt immédiatement. Sinon, il fallait déterminer la ligne de conduite à suivre. Il y avait à ce moment des États qui avaient déjà ratifié ou adhéré ; d'autres avaient seulement signé ; certains États Membres n'avaient même pas signé, mais avaient participé à l'élaboration de la convention et pouvaient devenir parties ; il y avait enfin des États non membres qui avaient été invités à devenir parties. Si une ou plusieurs de ces catégories d'États avaient le droit de formuler des objections contre les réserves, il fallait que les États en question soient invités à faire connaître leur attitude. Des problèmes supplémentaires se posaient : quels étaient les droits des États qui ratifieraient ou adhéreraient par la suite ou qui seraient invités ultérieurement à devenir parties à la convention ? Il va de soi que le Secrétaire général était obligé de savoir s'il devait ou non recevoir l'instrument en dépôt si des objections étaient faites par des États rentrant dans l'une des catégories mentionnées. Il fallait enfin déterminer si, dans l'hypothèse où aucune objection n'aurait été formulée contre les réserves au moment où le nombre requis d'instruments de ratification ou d'adhésion auraient été reçus, le Secrétaire général pouvait considérer que les États qui n'avaient soulevé aucune objection expresse contre les réserves, les avaient acceptées.

Chaque nouvelle ratification ou adhésion accompagnée de réserves soulevait des questions analogues dont on voit aisément la gravité et la complexité.

Mais ces problèmes sont loin de surgir uniquement à propos de la Convention sur le génocide, bien que ce soit à son sujet qu'ils se sont posés sous la forme la plus aiguë. Il sera donc utile d'examiner brièvement les difficultés et les problèmes du dépositaire sur un plan plus général.

Comme je l'ai mentionné précédemment, un certain nombre de conventions prévoient que des États y deviennent parties par le dépôt d'instruments de ratification, d'adhésion ou d'acceptation auprès du Secrétaire général. Lorsqu'un instrument est transmis par un État qui souhaite devenir partie à une convention, le Secrétaire général doit s'assurer d'une manière ou d'une autre que l'instrument est juridiquement valable pour produire le but envisagé. Si un instrument contient des réserves, l'attitude, quelle qu'elle soit, adoptée par le Secrétaire général à son sujet — pour autant qu'elle ne se borne pas à conserver l'instrument purement et simplement sans en préjuger les effets — implique l'existence d'une règle de droit relative aux réserves et une conclusion tirée de l'application de cette règle aux faits. Par exemple, si le Secrétaire général reçoit immédiatement en dépôt un instrument contenant des réserves sans soulever aucun problème touchant leur recevabilité, cette attitude implique qu'il admet le principe selon lequel aucune objection soulevée par d'autres États ne peut empêcher l'État formulant des réserves de devenir partie à la convention. Si le Secrétaire général notifie les réserves aux États intéressés et accepte ensuite l'instrument en dépôt après que certains États qui ont déjà ratifié ou adhéré ont soulevé des objections contre les réserves, cette manière de faire implique que l'État qui formule des réserves devient partie à la convention au moins à l'égard de celles des parties qui n'ont pas soulevé d'objections. Le refus du Secrétaire général d'accepter en dépôt un instrument contenant des réserves après qu'une objection a été faite impliquera évidemment un principe différent. De même, le fait d'accepter ou de refuser un instrument en dépôt, dans un autre cas d'espèce quelconque, supposera nécessairement l'application d'une certaine règle.

Il serait vain d'espérer que le Secrétaire général puisse, en l'absence d'une règle juridique, résoudre ces difficultés en demandant aux États intéressés des instructions sur la règle à suivre lorsqu'aucune règle n'a été prévue dans la convention elle-même. Pour commencer, le Secrétaire général ne disposerait même d'aucun critère pour déterminer quels sont les États intéressés. Naturellement, il lui serait possible d'inviter les États à lui faire connaître simplement le fait qu'ils font des objections contre les réserves. Mais il est très probable que leurs vues sur l'effet juridique de ces objections seraient très divergentes et qu'il leur serait impossible de parvenir à un accord à moins de procéder à de nouvelles négociations.

Il serait difficilement concevable que le Secrétaire général, afin d'éviter l'application d'une règle juridique quelconque, conserve indéfiniment un instrument contenant des réserves sans en préjuger les effets. Ceci deviendrait même pratiquement impossible après l'entrée en vigueur d'une convention. Le Secrétaire général doit, dans un délai raisonnable, soit accepter en dépôt un instrument de ratification, d'adhésion ou d'acceptation, soit le refuser une fois pour toutes. Les États doivent être en mesure de savoir s'ils sont liés par une convention et, dans l'affirmative, vis-à-vis de quels autres États. Les principaux organes des Nations Unies ont également intérêt à connaître quels États sont

parties à des conventions conclues sous les auspices de l'Organisation. Si la question de savoir quelles sont les parties à une convention devait rester en suspens pendant plusieurs années, peut-être même jusqu'au moment où un différend s'élèverait au sujet de l'exécution des obligations assumées, il en résulterait certainement de très graves inconvénients pour tous les intéressés.

Lorsqu'ils rédigent des conventions, les États eux-mêmes reconnaissent habituellement cet inconvénient et cherchent généralement à l'éviter en confiant expressément au Secrétaire général le soin de leur adresser des notifications au sujet de la convention.

La Convention sur le génocide prévoit la notification, par le Secrétaire général, des « ratifications et adhésions », c'est-à-dire du dépôt définitif des instruments par lesquels les États y deviennent parties. Ainsi que je l'ai déjà indiqué, une disposition de cette nature est fréquemment rédigée d'une façon encore plus catégorique, pour que le Secrétaire général ait à en tirer des conclusions sur le plan juridique. De nombreuses conventions exigent que le Secrétaire général notifie le dépôt des instruments ou la date du dépôt ; certaines conventions importantes disposent même que le Secrétaire général notifiera aux parties les « dates auxquelles d'autres États deviendront parties ».

Le Secrétaire général a donc la tâche de faire connaître, aussitôt que possible, aux États intéressés l'identité des parties à une convention. Il est clair qu'il lui serait impossible de s'acquitter de cette tâche s'il ne disposait pas d'une règle juridique à appliquer.

Comme dépositaire, il a d'autres obligations qui lui imposent de déterminer quels États sont parties à une convention et d'agir en conséquence. Une de ces obligations, parmi les plus importantes, est celle de notifier la date d'entrée en vigueur. Cette procédure est souvent imposée d'une façon expresse et, dans la pratique, elle est invariablement suivie pour toutes les conventions. Dans le cas de la Convention sur le génocide, cette fonction est liée à celle qui consiste à dresser et à faire circuler un procès-verbal dès le jour de la réception d'un nombre de ratifications ou d'adhésions suffisant pour faire entrer la convention en vigueur. Par un concours heureux de circonstances, des difficultés majeures ont pu être évitées au cours de l'accomplissement de cette fonction relativement à la Convention sur le génocide. Toutefois, ainsi que je l'ai indiqué, de grandes complications peuvent surgir à propos d'autres conventions qui ne sont pas encore en vigueur. En outre, le fait que des difficultés ont pu être évitées à propos de la Convention sur le génocide ne résout pas en lui-même les autres problèmes qui peuvent se poser parallèlement. D'autres fonctions exigent du Secrétaire général qu'il décide, afin de déterminer si certaines conventions sont en vigueur, quels États en sont parties. L'une de ces fonctions est celle de l'enregistrement. J'ai mentionné précédemment que le Secrétaire général y procède d'office pour toutes les conventions dont il est le dépositaire, conformément au règlement adopté par l'Assemblée générale. Il le fait à la date qu'il a déterminée lui-même comme étant celle de l'entrée en vigueur. De nombreuses conventions, y compris la Convention sur le génocide, lui imposent d'ailleurs expressément cette tâche.

Des problèmes relatifs à l'identité des parties peuvent encore surgir dans une certaine mesure, à propos des diverses catégories de déclarations subsidiaires dont j'ai déjà parlé et par lesquelles les États peuvent étendre ou restreindre leurs obligations, conformément aux clauses de

certaines conventions. De telles déclarations n'ont, bien entendu, d'effet juridique que si elles sont faites par des parties. Si, par exemple, un État qui n'est pas partie à la Convention sur le génocide venait à faire, en vertu de l'article XII de la convention, une déclaration tendant à étendre l'application de la convention à des territoires dont ledit État dirige les relations extérieures, il est évident que le Secrétaire général ne serait pas tenu de procéder à une notification en vertu des dispositions de l'alinéa *b)* de l'article XVII. De plus, les demandes de revision prévues par plusieurs conventions, notamment aussi par la Convention sur le génocide, ne peuvent avoir une valeur quelconque que si elles sont formulées par des parties à la convention en question.

Enfin, dans l'avenir, le Secrétaire général pourra avoir besoin d'une règle à suivre pour l'accomplissement des fonctions qui lui sont dévolues concernant l'abrogation éventuelle de la Convention sur le génocide. Nous savons que cette convention pourra être dénoncée après une période de dix ans et elle cessera d'être en vigueur si, par suite de dénonciations, le nombre des parties se trouve ramené à moins de seize. Le Secrétaire général est tenu de notifier l'abrogation, et dans ce cas encore il peut avoir à déterminer quelles sont les parties à la convention.

J'espère avoir amplement démontré que le Secrétaire général doit, afin de pouvoir s'acquitter convenablement de ses fonctions aussi bien dans les circonstances actuelles que dans celles qui pourront se présenter dans l'avenir, disposer d'une règle sur l'effet juridique des réserves et des objections aux réserves. Bien entendu, les parties elles-mêmes peuvent formuler expressément une telle règle, auquel cas le Secrétaire général se borne à l'appliquer. Cette méthode a été adoptée, par exemple, dans deux conventions élaborées ou revisées sous les auspices des Nations Unies. La Convention internationale concernant les statistiques économiques, du 14 décembre 1928, amendée par un Protocole du 9 décembre 1948, dispose, dans le deuxième alinéa de son article 17, que « les gouvernements des pays qui sont disposés à adhérer à la convention en vertu de l'article 13, mais qui désirent être autorisés à apporter des réserves à l'application de la convention, pourront informer de leur intention le Secrétaire général des Nations Unies. Celui-ci communiquera également ces réserves à toutes les Parties à la présente convention en leur demandant si elles ont des objections à présenter. Si, dans un délai de dix mois à dater de ladite communication, aucun pays n'a présenté d'objection, la réserve en question sera considérée comme acceptée. » La Convention concernant la déclaration de décès de personnes disparues, du 6 avril 1950, dispose, dans son article 19, que « tout État pourra subordonner son adhésion à la présente convention à des réserves, ces dernières ne pouvant être formulées qu'au moment de l'adhésion. Si un État contractant n'accepte pas les réserves auxquelles un autre État aurait ainsi subordonné son adhésion, il pourra, à condition de le faire dans les quatre-vingt-dix jours qui suivront la date à laquelle le Secrétaire général lui aura communiqué ces réserves, notifier au Secrétaire général qu'il tient cette adhésion pour non intervenue. Dans ce cas, la convention sera considérée comme n'étant pas en vigueur entre ces deux États. »

Il existe aussi d'autres moyens d'obvier aux difficultés résultant des objections formulées contre des réserves. Le texte de la convention peut contenir une énumération limitative de toutes les réserves admissibles. Citons à cet égard l'Acte général revisé pour le règlement pacifique des différends internationaux, du 28 avril 1949. Tous les représen-

tants à une conférence peuvent aussi signer un acte final déclarant qu'aucune objection ne sera formulée contre des réserves déterminées faites par certains États. C'est cette méthode qui fut adoptée par la Conférence des Nations Unies sur les transports routiers et les transports automobiles, tenue à Genève en août et septembre 1949. Il peut y avoir d'autres méthodes permettant d'éviter que des problèmes ne se posent à propos des réserves.

Toutefois, dans la plupart des cas, les conférences qui établissent le texte de conventions ne donnent pas d'indications aussi précises. C'est donc le Secrétaire général qui doit régler lui-même la question. On pourrait supposer que les travaux préparatoires donnent parfois au Secrétaire général certaines indications permettant de conclure que les parties ont envisagé d'appliquer telle ou telle procédure concrète quant aux réserves. Mais dans la plupart des cas, les travaux préparatoires sont en fait de peu de secours, soit parce que la question des réserves n'a pas été examinée lors de la conférence, soit parce que les débats peuvent donner lieu à des conclusions diverses. Il appartient d'ailleurs, selon mon opinion, à un organe judiciaire plutôt qu'à un organe administratif de décider quelle valeur interprétative il conviendrait d'attribuer à des travaux préparatoires.

Le Secrétaire général n'a donc pas d'autre choix que d'appliquer, en l'absence d'indications contraires dans le texte des conventions, les règles qu'il estime pouvoir déduire des principes généraux du droit international et de la pratique internationale suivie précédemment dans ce domaine. Il sera naturellement très heureux de recevoir un avis autorisé sur cette question.

Il y a un point encore que je voudrais ajouter et qui me paraît avoir une importance considérable.

Le Secrétaire général a toujours estimé et il continue de penser que la règle relative aux réserves, de même que la procédure en découlant, doivent être simples et d'une application facile. Cette simplicité semble essentielle à toute règle qui doit servir de base à une procédure administrative. C'est pour cette raison que le Secrétaire général s'est efforcé d'éviter toute règle établissant une distinction entre différentes catégories de conventions qu'il serait malaisé de distinguer dans la pratique. On peut évidemment admettre qu'une règle établissant une distinction fondée sur de simples considérations de fait ne suscitera pas de grandes difficultés d'application. C'est ainsi qu'une procédure spéciale pourrait être adoptée dans le cas des constitutions d'organisations internationales. Mais des distinctions reposant sur des bases moins évidentes rendraient une règle extrêmement difficile à appliquer.

On pourrait, par exemple, concevoir une règle qui prescrirait une certaine procédure dans le cas des conventions de caractère législatif, dites « normatives », et une procédure différente applicable aux conventions qui constituent essentiellement le point de rencontre de plusieurs séries de relations bilatérales. L'effet juridique pourrait ne pas être le même dans les deux cas. Cependant, une telle règle, ou toute autre qui serait fondée sur une distinction du même ordre, ne serait pas souhaitable du point de vue de la pratique. Ce serait, en effet, au Secrétaire général de décider dans quelle catégorie tomberait chaque convention donnée.

Une telle décision présenterait souvent de grandes difficultés et risquerait, en outre, une fois prise, de soulever des contestations de la part

des États intéressés. De plus, une telle distinction étant établie, il arriverait fatalement que les différentes dispositions d'une même convention rentreraient dans des catégories différentes. Poussée à sa conclusion logique, une telle règle demanderait donc l'application d'une certaine procédure à une réserve formulée à l'égard d'un article d'une convention et d'une procédure toute différente à une réserve touchant un autre article de la même convention.

Au lieu d'y apporter une solution, une telle règle compliquerait donc les problèmes soulevés par les réserves. Il pourrait arriver que des divergences d'opinion quant à la catégorie à laquelle appartient une convention ou même un article déterminé ne pourraient être résolues que moyennant un recours à une procédure judiciaire au moment où le problème se poserait. On voit donc que l'application d'une telle règle nécessiterait fréquemment l'intervention d'une autorité judiciaire plutôt que d'une autorité purement administrative.

Étant donné toutes ces considérations, il serait évidemment désirable que la solution du problème concret soulevé par des réserves à la Convention sur le génocide ne soit pas fondée sur des distinctions qui risqueraient de soulever des difficultés dans le cas de nombreuses autres conventions.

## III

Après avoir exposé les fonctions de dépositaire du Secrétaire général et les problèmes juridiques qu'elles soulèvent, je désirerais maintenant examiner, du point de vue du dépositaire, la règle que le Secrétaire général a suivie jusqu'à présent pour résoudre les difficultés auxquelles peut donner lieu le problème des réserves. Je m'efforcerai de le faire dans un esprit de complète impartialité. Le Secrétaire général a fait de son mieux pour découvrir le droit en la matière et pour appliquer une règle satisfaisante. Je dis une fois encore que le Secrétaire général serait heureux de recevoir toutes directives qu'une plus haute autorité pourrait lui donner.

La règle à laquelle le Secrétaire général s'est conformé jusqu'ici a été examinée en détail dans le rapport qu'il a soumis à la dernière Assemblée générale. La procédure, inspirée par cette règle, qui a été suivie dans le cas de la Convention sur le génocide, a été indiquée en détail dans l'exposé écrit présenté à la Cour au nom du Secrétaire général. Je m'efforcerai donc simplement d'apporter quelques précisions sur ce qui a déjà été dit dans les documents précités au sujet de cette règle et de cette procédure.

Le principe auquel le Secrétaire général s'est conformé jusqu'à présent est basé sur la théorie que les États les plus directement intéressés doivent tous consentir aux réserves, et a été énoncé dans les termes suivants dans le rapport du Secrétaire général à l'Assemblée générale :

> « Un État ne peut formuler une réserve en signant ou en ratifiant une convention ou en y adhérant avant son entrée en vigueur, qu'avec le consentement de tous les États qui, jusqu'à la date d'entrée en vigueur, ont ratifié ladite convention ou y ont adhéré ; il ne peut formuler de réserve après la date d'entrée en vigueur qu'avec le consentement de tous les États qui ont déjà ratifié ladite convention ou y ont adhéré. »

Cette formule générale est une énonciation simplifiée de la règle plus détaillée qui a été suivie dans la pratique. Elle est caractérisée par deux points saillants : 1) elle exige le consentement de tous les États, mais seulement de ces États, qui ont définitivement manifesté leur intention d'être liés par la convention ; 2) elle règle le problème essentiel du moment où la question du consentement doit être résolue pour la première fois. La formule est ainsi basée sur le postulat que les États doivent avoir une grande facilité pour déterminer leur attitude concernant les réserves, mais que cette facilité doit être limitée par la nécessité de dissiper le plus rapidement possible tout doute quant aux obligations des parties. On peut donc, jusqu'à une certaine date, lorsqu'une convention n'est pas encore entrée en vigueur, ne pas préciser l'effet des réserves et laisser à tous les États qui, avant cette date, deviennent parties à la convention, la faculté de faire des objections. Mais après que la date fixée est passée, la question de la recevabilité de chaque réserve doit être résolue et elle doit l'être par les seuls États qui sont alors parties à la convention.

Le moment critique qui sépare ces deux périodes est d'ordinaire la date d'entrée en vigueur, ainsi que l'indique l'énoncé du principe que je viens de citer. Toutefois, dans certains cas, notamment pour la Convention sur le génocide, il s'agira d'une date légèrement antérieure.

Dans le cas concret de la Convention sur le génocide, il était prévu que vingt ratifications ou adhésions étaient nécessaires pour son entrée en vigueur et qu'il appartenait au Secrétaire général de dresser un procès-verbal le jour où les vingt premiers instruments auraient été déposés. La convention devait entrer en vigueur le quatre-vingt-dixième jour qui suivrait la date du dépôt du vingtième instrument de ratification ou d'adhésion. Si donc la ratification ou l'adhésion d'un État, faite avec réserves, avait été acceptée par tous les États qui ont déposé des instruments de ratification ou d'adhésion avant que le procès-verbal ne soit dressé, le Secrétaire général aurait considéré que l'instrument contenant des réserves devait être accepté en dépôt et compté au nombre des instruments nécessaires pour faire entrer la convention en vigueur. Toutefois, un État qui aurait ratifié ou adhéré après la date du procès-verbal, mais avant la date d'entrée en vigueur, n'aurait pas eu le droit de soulever des objections contre les réserves présentées antérieurement à sa ratification ou à son adhésion.

Le Secrétaire général estime que la fixation de la date d'entrée en vigueur d'une convention marque la fin de la période au cours de laquelle l'effet de toutes les réserves peut être laissé en suspens sans inconvénient majeur pour les États intéressés.

Il peut évidemment arriver dans certains cas que la fixation de cette date d'entrée en vigueur devra être suffisamment retardée pour permettre aux États qui ont déjà déposé des instruments de ratification ou d'adhésion de formuler des objections contre des réserves qui n'ont été présentées qu'au dernier moment. Mais dès que la question de la fixation de la date d'entrée en vigueur se pose, il n'est possible de laisser aux États parties à la convention qu'un délai raisonnable pour faire leurs objections. Si aucune objection n'est formulée pendant ce délai raisonnable, le Secrétaire général est en droit de présumer que les parties acceptent les réserves et il peut par conséquent recevoir en dépôt les instruments en question. Toutes objections faites après l'expiration de ce délai raisonnable devraient être considérées comme étant venues trop tard pour avoir un effet juridique.

En outre, le Secrétaire général a considéré que si un État dépose un instrument de ratification ou d'adhésion sans faire d'objection à des réserves antérieures dont il a été dûment avisé, on doit conclure qu'il les a acceptées. Une objection ultérieure d'un État qui a ainsi ratifié ou adhéré en gardant le silence doit donc nécessairement être considérée comme ne produisant pas d'effet juridique.

Le cas de la Convention sur le génocide nécessite directement une solution de cette question de l'acceptation tacite des réserves. Certains États ont, en effet, soutenu, contrairement au point de vue du Secrétaire général, que, pour être lié par une réserve, un État doit l'accepter d'une façon expresse et formelle. Cette manière de voir est contenue dans les communications adressées au Secrétaire général par la France, le Viet-Nam et le Cambodge. Ceylan, qui avait adhéré sans formuler d'objections contre les réserves, a cru pouvoir en formuler après que la date d'entrée en vigueur eut été fixée.

Donc, de l'avis de la France, du Viet-Nam et du Cambodge, un État, pour être lié par les réserves formulées par un autre État, doit les accepter formellement. Si cette manière de voir est exacte, une objection contre une réserve ne pourrait jamais être tardive tant que l'État qui formule l'objection n'a pas formellement accepté la réserve. Si toutes les parties doivent accepter une réserve et si l'acceptation doit être donnée de façon expresse, le Secrétaire général ne pourrait recevoir en dépôt définitif un instrument de ratification ou d'adhésion contenant des réserves avant que toutes les parties lui aient notifié leur acceptation formelle. Pratiquement, ce serait une période d'attente sans fin et cette façon de procéder conduirait probablement au même résultat qu'une règle aux termes de laquelle aucune réserve ne saurait jamais être admise.

Je crois avoir suffisamment démontré que la question de savoir si, pour pouvoir produire des effets, les objections aux réserves doivent être formulées en temps utile, présente une importance exceptionnelle. Il en est de même de la question connexe de l'acceptation tacite. Aussi, le Secrétaire général éprouve-t-il un grand besoin de recevoir à cet égard des directives faisant autorité.

Je crois d'ailleurs pouvoir ajouter que, dans l'opinion du Secrétaire général, le délai raisonnable après lequel il peut conclure à une acceptation des réserves peut être variable et doit s'adapter aux caractéristiques de chaque convention. Si, par exemple, l'objet de la convention présente un caractère très technique ou si les dispositions en sont très complexes et détaillées, il convient d'accorder aux États un délai relativement long pour leur permettre de procéder à l'étude de la réserve, avec tout le soin et tout le loisir nécessaires. D'un autre côté, il peut y avoir des cas où certaines circonstances exigent que l'on détermine d'urgence la situation de l'État formulant des réserves et que l'on prenne rapidement une décision sur l'acceptation ou le rejet d'un instrument de ratification ou d'adhésion. Dans un cas normal comme celui de la Convention sur le génocide, pour laquelle on ne semble pas se trouver en présence de circonstances exceptionnelles, le Secrétaire général a estimé qu'un délai de quatre-vingt-dix jours — délai qui, en deux endroits, est prévu par la convention elle-même pour l'envoi de certaines notifications aux États — est un laps de temps raisonnable pour permettre aux États d'arrêter leur attitude. Ceci est particulièrement vrai pour une convention qui n'a été ouverte à la signature des États qu'après une discussion de plusieurs années dans différents organes des Nations Unies, donc après une préparation des plus minutieuses.

[*Séance publique du 11 avril 1951, matin*]

Dans la troisième partie de mon exposé, je me suis permis de vous parler de la règle suivie jusqu'ici par le Secrétaire général en matière de réserves. On peut la résumer de la manière suivante :

I. Un État qui a formulé une réserve avant que la date d'entrée en vigueur ne soit fixée ne peut être considéré comme partie à la convention aussi longtemps qu'il maintient sa réserve si un État qui est à ce moment partie à la convention fait une objection, soit avant que la date d'entrée en vigueur ait été fixée, soit avant l'expiration d'un délai raisonnable après que la réserve lui a été communiquée. Lorsqu'un État formule une réserve après que la date d'entrée en vigueur a été déterminée, il ne peut être considéré comme partie à la convention si un État devenu lui-même partie antérieurement soulève une objection dans un délai raisonnable après que la réserve lui a été notifiée.

II. Étant donné que, d'après la règle appliquée par le Secrétaire général, une seule objection formulée en temps utile par un État ayant qualité pour ce faire empêche l'État qui formule des réserves de devenir partie à une convention, il est impossible qu'une convention soit en vigueur entre l'État qui formule les réserves et les parties qui les acceptent et ne le soit pas entre ce même État et les parties qui soulèvent des objections.

III. Une objection contre une réserve formulée par un État signataire qui n'a pas encore ratifié la convention ou par un État qui peut la signer ou y adhérer, mais qui ne l'a pas encore fait, ne produit aucun effet juridique.

Il résulte de cette règle qu'une objection élevée en temps utile par un seul État partie à une convention empêche un État faisant une réserve de devenir partie contractante. S'il n'y a pas d'objection, l'État qui formule la réserve devient partie à la convention et se trouve engagé envers toutes les autres parties. Selon l'opinion du Secrétaire général, cette règle est d'une application générale pour toutes les conventions dont il est le dépositaire, à moins que celles-ci ne contiennent des dispositions expresses dans le sens contraire.

Cette règle a le grand avantage d'assurer que les effets de la convention ne seront pas paralysés par des réserves de grande portée. En outre, il est toujours utile, et dans certains cas probablement nécessaire, que chaque partie soit liée d'une manière égale envers toutes les autres. S'il en était autrement, on risquerait de créer un réseau extrêmement complexe de relations différentes entre les parties. Il semble d'ailleurs très peu probable que certaines catégories de conventions, telles qu'en premier lieu les constitutions d'organisations internationales, puissent produire une efficacité suffisante si toutes les parties ne sont pas engagées les unes envers les autres.

Le Secrétaire général se rend bien compte que la règle suivie par lui peut rendre plus difficile pour les États, dans certains cas, de devenir parties à une convention s'ils jugent indispensable de faire des réserves. Il ne méconnaît nullement que d'autres règles seraient plus favorables aux États qui ne croient pouvoir devenir parties qu'avec certaines réserves. Cependant, il est arrivé à la conclusion que la règle qu'il a appliquée était la meilleure qui puisse être suivie uniformément pour

le genre de conventions dont il est le dépositaire. Selon son opinion, c'était en tout cas la solution qui présentait un minimum d'inconvénients. Il faut ajouter qu'au point de vue purement administratif, il est certainement souhaitable d'avoir une règle qui permette d'appliquer la même procédure à toutes les conventions. Il est non moins souhaitable d'avoir une procédure facilement applicable dans la pratique. La règle suivie par le Secrétaire général l'est certainement, comme l'a clairement démontré le cas exceptionnellement compliqué de la Convention sur le génocide. Le Secrétaire général est parfaitement en état de déterminer, après un délai raisonnable, s'il doit accepter ou refuser le dépôt d'un instrument de ratification ou d'adhésion. La certitude qui en résulte quant à l'identité des parties est sans aucun doute avantageuse pour tous les intéressés.

Avant de terminer cette partie de mon exposé, je voudrais souligner une fois de plus que la pratique suivie par le Secrétaire général est la continuation de celle qui a été constamment suivie par la Société des Nations. Il serait certainement difficile de prétendre que le Secrétaire général n'était pas obligé de suivre la pratique de la Société des Nations dans le cas des conventions de la Société des Nations dont il est devenu le dépositaire. La résolution de la Société des Nations qui a décidé de transférer ces conventions au Secrétariat des Nations Unies spécifiait qu'elle le faisait « pour en assurer la garde et s'acquitter des fonctions exercées jusqu'ici par le Secrétariat de la Société des Nations ». Le Secrétaire général des Nations Unies a d'ailleurs estimé que la pratique de la Société des Nations était pleinement justifiée par la raison et par la doctrine. Il l'a donc adoptée sans hésitation, mais après mûre réflexion, lorsque des problèmes relatifs à des réserves se sont présentés à l'occasion de conventions rédigées sous les auspices des Nations Unies. Il serait probablement malaisé dans la pratique de suivre des procédures différentes dans le cas des conventions de la Société des Nations et dans le cas des conventions des Nations Unies. Il serait certainement difficile de justifier une telle distinction par des arguments théoriques.

Quant à la doctrine, je ne voudrais pas revenir sur la longue liste des auteurs éminents [1] qui se sont prononcés nettement en faveur du principe général suivi par le Secrétaire général. Ils appartiennent à tous les continents et à toutes les écoles. Pour s'en rendre compte, il suffit de citer le projet du Harvard Research et l'étude de l'Institut de droit de l'Académie des sciences de l'U. R. S. S.

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[1] « Harvard Research Draft Convention on the Law of Treaties », *American Journal of International Law*, vol. 29, Supplement (1935), pp. 870 *et sqq.* ; *Institut Prava Akademii Nauk SSSR, Mejdunarodnoe Pravo* (Moscou, 1947), p. 388 ; J. L. Brierly, *Rapport sur les traités*, document A/CN.4/23, pp. 49-58 ; C. W. Jenks, « Les instruments internationaux à caractère collectif », *Recueil des cours de l'Académie de droit international*, vol. 69 (1939), pp. 471-472 ; C. G. Fenwick, *International Law* (3me édition, 1948), p. 438 ; P. Fauchille, *Droit international public*, vol. I, 3, pp. 312-313 ; M. O. Hudson, *International Legislation*, vol. I, p. 1 ; C. Rousseau, *Principes généraux du droit international public* (1944), vol. I, pp. 298-299 ; H. Accioly, *Traité de droit international public* (Paris, 1942), vol. II, p. 451 ; L. Podestá Costa, « Réserves dans les traités », *Revue de droit international* (Lapradelle), vol. 21 (1938), p. 16 ; K. Strupp, *Éléments de droit international public* (1930), vol. I, p. 286 ; C. Baldoni, « Le Riserve nelle convenzioni collective », *Rivista di diritto internazionale* (1929), pp. 356 *et sqq.*

## IV

Je m'occuperai maintenant, du point de vue du dépositaire, des autres règles sur lesquelles on a proposé de fonder la procédure que doit appliquer le Secrétaire général au sujet des réserves. Étant donné que ces règles ont été examinées en détail aussi bien dans divers rapports et mémoranda présentés à l'Assemblée générale qu'au cours des débats de la Sixième Commission et enfin dans les nombreux exposés écrits présentés à cette Cour, il ne me paraît pas nécessaire d'étudier les arguments juridiques et les considérations de politique générale que l'on a fait valoir pour ou contre ces règles, quoique ces arguments et ces considérations joueront certainement un rôle de premier plan dans les délibérations de la Cour. Cependant, les règles ont aussi leurs conséquences pratiques, et le Secrétaire général aurait certainement de nombreux problèmes à résoudre dans n'importe quel cas. Je suis sûr que la Cour désirera connaître la nature et l'étendue de ces problèmes.

Il y a d'abord la règle qui permet non seulement aux parties mais également aux simples signataires de faire des objections aux réserves de manière à empêcher l'État qui les formule de devenir partie à la convention. Cette règle exigerait probablement une procédure différente de celle que le Secrétaire général a suivie en ce qui concerne les signatures faites avec réserves. En vertu de la règle qu'il a observée jusqu'ici, la signature ne place pas les États dans une position spéciale à l'égard des autres États intéressés et, en conséquence, le Secrétaire général ne s'est pas cru obligé de consulter ces États avant d'accepter une signature avec réserves. Si toutefois les États signataires ont le droit d'empêcher les États qui font des réserves de devenir parties à une convention, tous les signataires et tous les États parties à cette convention devraient probablement être consultés avant qu'une signature avec réserves ne soit acceptée.

Dans le cas de l'application de cette règle, la question se poserait aussi de savoir si, après avoir reçu une signature avec réserves, on devrait de nouveau obtenir le consentement à ces réserves lorsqu'elles sont formulées dans un instrument de ratification. Il paraîtrait justifié d'admettre qu'au moins les États qui signeraient ou adhéreraient après la date de la signature avec réserves devraient avoir la possibilité de faire des objections à de telles réserves lorsqu'elles sont maintenues dans un instrument de ratification. Peut-être faudrait-il même admettre que les États qui ont accepté des réserves au moment de la signature puissent élever des objections lorsque ces réserves sont formulées de nouveau au moment de la ratification. De toute manière, il semble probable qu'avec cette règle le Secrétaire général aurait parfois à demander à deux reprises le consentement aux mêmes réserves, une première fois lorsqu'elles accompagnent la signature, et — de nouveau — lorsqu'elles figurent dans un instrument de ratification. On voit aisément que dans cette éventualité il serait particulièrement important, dans l'intérêt d'une prompte application de la convention, que le Secrétaire général puisse présumer le consentement en l'absence d'indication contraire (acceptation tacite).

Après avoir déterminé la date d'entrée en vigueur, le Secrétaire général consulterait les signataires ainsi que les parties à la convention chaque fois qu'une réserve serait formulée quel que soit le délai qui s'est écoulé

depuis la signature. Il serait naturellement utile pour tous les États intéressés que le Secrétaire général puisse, dans un délai raisonnable, accepter ou refuser de façon définitive le dépôt d'un instrument contenant des réserves.

L'Assemblée a demandé l'avis de la Cour sur l'effet juridique d'une objection non seulement dans le cas des signataires, mais aussi dans le cas des États qui ont le droit de signer ou d'adhérer, mais qui ne l'ont pas encore fait. La nature des problèmes juridiques et des questions de procédure que le Secrétaire général aurait à résoudre dans ce dernier cas est la même que pour le cas des États signataires. Par conséquent, il ne me semble pas nécessaire d'en faire une analyse séparée.

On a suggéré d'autres modifications partielles à la règle appliquée par le Secrétaire général. Ainsi, par exemple, l'on a proposé de ne pas appliquer une règle unique à toutes les conventions multilatérales.

Tout en maintenant que la règle adoptée par le Secrétaire général devrait s'appliquer à certaines conventions, on a prétendu que la nature d'autres conventions exigeait un principe différent pour les réserves. Des propositions de cette nature seraient beaucoup plus à leur place si elles étaient adressées à des conférences qui préparent des conventions plutôt qu'au Secrétaire général. J'ai déjà fait remarquer que si la distinction à établir entre les diverses conventions n'était pas simple et évidente, les difficultés d'ordre administratif qu'aurait à résoudre le Secrétaire général seraient des plus considérables.

On a également proposé que le Secrétaire général abandonne complètement la règle qu'il a suivie jusqu'ici et en adopte une autre, entièrement différente. Une des méthodes que l'on a suggéré d'appliquer est celle qui a été adoptée en 1932 et en 1938, sous forme de règlement, par l'Union panaméricaine, devenue maintenant l'Organisation des États américains. Cette règle a été énoncée d'une façon remarquable dans l'excellent exposé écrit préparé à l'intention de la Cour par le Département juridique et des organismes internationaux de l'Union panaméricaine. Il est donc superflu que je l'examine ici dans le détail.

Je me permets de répéter, Monsieur le Président, que si je parle de ces problèmes, c'est uniquement dans le but de montrer à la Cour les difficultés d'ordre pratique que rencontrerait le Secrétaire général — dans le cas de la Convention sur le génocide comme dans d'autres cas — s'il devait suivre un avis de la Cour et une décision de l'Assemblée qui seraient basés sur d'autres règles que celles qu'il a appliquées jusqu'à présent.

Je n'analyserai donc pas en détail la théorie dite panaméricaine ; j'en donne seulement un très bref aperçu. Nous savons que cette règle s'inspire du principe qu'une convention entre en vigueur entre un État qui formule des réserves et les États parties à la convention qui les acceptent. Mais elle n'entre pas en vigueur entre l'État qui fait la réserve et les États parties à la convention qui élèvent des objections. Voilà simplement quelques-uns des problèmes que le Secrétaire général, comme dépositaire, aurait à résoudre dans le cas où la Cour baserait son avis sur la théorie panaméricaine.

Les règles qui ont été énoncées pour mettre ce principe en application ne semblent pas être entièrement dénuées d'ambiguïté. Ainsi que le fait remarquer l'exposé écrit présenté au nom de l'Organisation des États américains, un seul cas d'objection à des réserves s'est présenté

depuis l'application de ces règles. Il y a, par conséquent, peu de pratique internationale à laquelle on pourrait recourir pour essayer de résoudre des difficultés qui pourraient surgir. Il semble donc d'autant plus nécessaire d'attirer l'attention sur certains des problèmes juridiques que le Secrétaire général aurait à résoudre s'il devait appliquer ce principe.

Nous savons que la règle adoptée à Lima en 1938 institue une procédure préliminaire permettant aux signataires de faire connaître leur attitude concernant une réserve avant la présentation formelle et définitive de l'instrument de ratification ou d'adhésion contenant la réserve en question. Cette enquête préliminaire peut, sans aucun doute, aider grandement l'État ayant l'intention de faire une réserve pour lui faire apprécier d'avance les conséquences probables du maintien ou de l'abandon de sa réserve. Cependant, le rôle du dépositaire peut ne pas s'en trouver simplifié.

Comment, en effet, l'enquête préliminaire s'intégrera-t-elle dans la procédure finale qui déterminera définitivement les effets de la réserve et des objections éventuelles contre la réserve ? Je citerai quelques-unes des questions et des incertitudes qui pourront se poser :

Quel est l'effet juridique d'une « observation » d'un signataire qui n'a pas encore ratifié et d'un signataire qui a déjà ratifié ? Faut-il qu'un signataire réitère son « observation » au moment de sa propre ratification et encore après le dépôt formel de l'instrument contenant la réserve pour que son « observation » devienne une véritable objection ? Si un État ne fait pas d'« observation » pendant qu'il est signataire, conserve-t-il le droit de formuler des objections au moment de sa ratification ? S'il ratifie ou s'il adhère sans se prononcer, pourra-t-il faire des objections plus tard et jusqu'à quel moment ? Les États qui adhèrent après le dépôt définitif de l'instrument contenant la réserve, donc à un moment où l'État formulant la réserve est déjà devenu partie à la convention, peuvent-ils opter en faveur du texte initial ?

On a suggéré enfin que le Secrétaire général devrait appliquer une règle d'après laquelle les États ont un droit absolu de formuler des réserves, les objections élevées par d'autres États ne pouvant avoir aucun effet juridique. En vertu de cette règle, lorsqu'un État présente une réserve au moment où il devient partie à une convention, celle-ci entre en vigueur entre ledit État et toutes les parties, mais avec les réserves qu'il a formulées.

Du point de vue purement pratique, cette règle est évidemment simple à appliquer pour le dépositaire, quels que puissent être ses autres avantages ou inconvénients. Le dépositaire peut accepter des instruments renfermant des réserves sans appliquer aucune procédure préliminaire pour demander un consentement quelconque. Aucun doute ne s'élève quant à l'identité des parties. Cette règle ne demande donc aucune analyse quant aux problèmes d'application pratique qu'elle pourrait poser au dépositaire.

On voit que dans cette partie de mon exposé j'ai surtout essayé de démontrer quelle serait la position et quelle serait la tâche du dépositaire si l'on adoptait l'une quelconque des différentes règles qu'on a suggérées. Les problèmes administratifs et les difficultés pratiques ne sont naturellement pas identiques dans les différents cas.

La réponse à donner par la Cour aux questions de l'Assemblée est évidemment loin d'être conditionnée uniquement ou même principalement par des considérations relatives à des difficultés administratives

ou à des difficultés d'application pratique. Néanmoins, la Cour, en énonçant des principes juridiques concernant le statut des parties à la Convention sur le génocide, aimera probablement à connaître les problèmes que le dépositaire aurait nécessairement à résoudre pour pouvoir s'acquitter utilement de sa tâche.

## V

Après avoir parlé des différentes règles qui ont été suggérées au cours des débats de la Sixième Commission de la dernière Assemblée comme devant être suivies par le Secrétaire général dans sa pratique générale, y compris naturellement, en premier lieu, pour la Convention sur le génocide, je voudrais, maintenant, pour conclure, présenter quelques observations au sujet des questions qui ont été posées à la Cour.

Il paraît évident que l'Assemblée générale a demandé un avis consultatif non seulement pour résoudre les difficultés concrètes qui se sont déjà effectivement présentées à propos de la Convention sur le génocide, mais aussi pour surmonter les complications qui risquent de surgir à propos de cette convention dans l'avenir. Pour s'en rendre compte, il suffit de faire ressortir que l'Assemblée a demandé l'avis de la Cour au sujet des objections élevées par des signataires contre des réserves, alors qu'en fait, jusqu'à présent, il n'y a eu aucune objection de cet ordre. En d'autres mots, l'Assemblée a voulu être éclairée au sujet de toutes les principales règles de droit relatives à la procédure qu'il y a lieu d'appliquer aux réserves à la Convention sur le génocide.

Ainsi que j'ai essayé de le montrer au cours de cet exposé, il y a trois questions qui sont indissolublement liées et auxquelles il est indispensable de donner une réponse pour que le dépositaire puisse s'acquitter de sa tâche d'une manière satisfaisante. Premièrement : Quel est l'effet juridique des objections aux réserves ? Deuxièmement : S'il est admis que certains États peuvent faire des objections aux réserves, quels sont ces États ? Troisièmement : Si des objections peuvent être faites, à quel moment doivent-elles être présentées pour être valables ? Pour savoir quelle procédure il doit appliquer aux réserves et aux objections que celles-ci provoquent, le dépositaire doit connaître les effets d'une objection, il doit pouvoir déterminer si l'objection émane d'un État ayant qualité pour la faire, et enfin, dans l'affirmative, il doit pouvoir déterminer si l'objection est présentée en temps utile.

La situation de fait existant pour la Convention sur le génocide fait surgir toutes ces trois questions. La troisième se présente sous deux formes principales. Si des objections peuvent être élevées contre des réserves, doivent-elles l'être dans un délai raisonnable après la notification des réserves ? Deuxièmement, une objection est-elle présentée en temps utile si elle est faite après qu'un État qui a été avisé des réserves a pris des mesures positives à l'égard de la convention, en particulier si cet État a déposé un instrument de ratification ou d'adhésion ?

J'ai essayé d'indiquer les principaux problèmes juridiques que rencontre un dépositaire dans l'exercice de ses fonctions, en ce qui concerne notamment la Convention sur le génocide. Le Secrétaire général s'est efforcé de résoudre ces problèmes de son mieux. Cependant, comme je l'ai déjà indiqué, il serait heureux de recevoir des directives autorisées

sur cette question. Dans l'exercice de ces fonctions, le Secrétaire général a eu et continue d'avoir pour seul but de servir les intéressés, les parties contractantes, les États qui peuvent le devenir, et l'Organisation des Nations Unies.

Je me permets donc de répéter et de souligner : le Secrétaire général ne demande qu'à être le serviteur fidèle, consciencieux et impartial de tous les intéressés. Son désir sincère est de pouvoir s'acquitter de ses fonctions de dépositaire à la satisfaction générale. Pour pouvoir le faire, il a cependant besoin d'une règle claire, acceptée universellement et facile à appliquer dans la pratique.

Par conséquent, j'espère et j'ai pleine confiance que l'avis de la Cour sera de la plus grande utilité pour résoudre les difficultés d'application d'une convention dont le bon fonctionnement présente un si grand intérêt pour les Nations Unies. En outre, je suis sûr que l'avis de la Cour aidera dans une très large mesure à résoudre le problème général des réserves à des conventions multilatérales. Il constituera ainsi une contribution importante à la jurisprudence consultative de la Cour qui a eu déjà une si grande part dans la clarification du droit international.

## VI

Monsieur le Président, j'ai terminé mon exposé, mais, avant de quitter cette tribune, je voudrais, avec votre permission, dire quelques mots sur la correspondance que le Secrétaire général a échangée avec plusieurs gouvernements depuis le 15 janvier 1951. Le texte définitif de l'exposé écrit du Secrétaire général a été en effet arrêté à cette date. Il me semble que cette correspondance peut avoir un certain intérêt pour la Cour, car elle complète les informations contenues dans l'exposé écrit. Puis-je le faire, Monsieur le Président ?

Le PRÉSIDENT. — Certainement.

M. KERNO. — D'ailleurs, dans mon texte il y aura des références à certains documents dont le texte intégral sera déposé au Greffe à toutes fins utiles [1].

*A. Équateur.* — L'instrument par lequel l'Équateur a ratifié la Convention sur le génocide a été déposé le 21 décembre 1949. Le 21 novembre 1950, le Secrétaire général s'est enquis de l'attitude de l'Équateur concernant les réserves contenues dans l'instrument d'adhésion de la Roumanie (document n° 50, annexé à l'exposé écrit).

Par une lettre en date du 9 janvier 1951, l'Équateur a répondu qu'il n'acceptait pas les réserves faites par le Gouvernement de la Roumanie (nouveau document n° 6). Le 5 février 1951, le Secrétaire général a communiqué la note de l'Équateur aux gouvernements intéressés (nouveaux documents nos 4 et 8).

Le 29 novembre 1950, le Secrétaire général s'est enquis de l'attitude de l'Équateur concernant les réserves contenues dans l'instrument d'adhésion de la Pologne (document n° 52 annexé à l'exposé écrit). Par lettre en date du 9 janvier 1951, l'Équateur a répondu qu'il n'acceptait pas les réserves faites par le Gouvernement de la Pologne (nouveau document n° 5). Le 5 février 1951, le Secrétaire général a communiqué

[1] Voir pp. 436-449.

la note de l'Équateur aux gouvernements intéressés (nouveaux documents nos 4 et 8).

*B. Iran.* — L'Iran a signé la Convention sur le génocide mais ne l'a pas encore ratifiée. En conséquence, le Secrétaire général a informé l'Iran de la réception de toute nouvelle signature, ratification ou adhésion accompagnée de réserves. Le Gouvernement de l'Iran, afin que son silence ne soit pas interprété dans le sens de l'acceptation des effets des réserves formulées, a adressé au Secrétaire général, le 15 janvier 1951, une lettre par laquelle il réserve sa position à l'égard de toutes les réserves en attendant l'avis de la Cour internationale de Justice et l'opinion de la Commission de droit international (nouveau document n° 9). Dans sa réponse du 12 mars 1951, le Secrétaire général a pris note du fait que l'Iran réservait sa position, mais a déclaré que cette position ne pouvait être envisagée que comme une indication de l'attitude actuelle de l'Iran, et que son silence au moment du dépôt de l'instrument de ratification devrait être interprété dans le sens de l'acceptation des réserves (nouveau document n° 10).

*C. Australie.* — L'instrument par lequel l'Australie a ratifié la Convention sur le génocide a été déposé le 8 juillet 1949. Le 21 novembre 1950, le Secrétaire général s'est enquis de l'attitude de l'Australie concernant les réserves contenues dans l'instrument d'adhésion de la Roumanie (document n° 50 annexé à l'exposé écrit). Par sa lettre en date du 19 janvier 1951, l'Australie a répondu qu'elle n'acceptait pas les réserves formulées dans ledit instrument (nouveau document n° 15). Le 28 février 1951, le Secrétaire général a communiqué la note de l'Australie aux gouvernements intéressés (nouveau document n° 14).

Le 29 novembre 1950, le Secrétaire général s'est enquis de l'attitude de l'Australie concernant les réserves contenues dans l'instrument d'adhésion de la Pologne (document n° 52 annexé à l'exposé écrit). Par lettre en date du 31 janvier 1951, l'Australie a répondu qu'elle n'acceptait pas les réserves formulées dans cet instrument (nouveau document n° 16). Le 28 février 1951, le Secrétaire général a communiqué la note de l'Australie aux gouvernements intéressés (nouveau document n° 11).

Le 19 mars 1951, l'Australie a transmis au Secrétaire général une lettre se référant à sa propre lettre du 15 novembre 1950 (document n° 101 annexé à l'exposé écrit), par laquelle elle déclarait que le Gouvernement australien n'acceptait aucune des réserves jusqu'alors formulées à l'égard de la convention, y compris celles des Philippines, « et qu'il ne considérera donc pas comme valides les ratifications de la convention qui maintiendraient ces réserves ». L'Australie ajoutait dans sa nouvelle lettre que l'exposé écrit adressé par les Philippines à la Cour internationale de Justice faisait mention d'un différend entre l'Australie et les Philippines, qui résulterait du passage précité. La nouvelle lettre faisait savoir qu'après un nouvel examen de la question, l'Australie retirait de sa lettre du 15 novembre 1950 les mots « ne considérera donc pas comme valides les ratifications de la convention qui maintiendraient ces réserves ».

*D. Ceylan.* — L'instrument par lequel Ceylan a adhéré à la convention a été déposé le 12 octobre 1950. Dans sa réponse à la notification du Secrétaire général, en date du 15 novembre 1950, relative au dépôt

de cet instrument d'adhésion, Ceylan a informé le Secrétaire général, par lettre du 27 janvier 1951, qu'il n'acceptait pas les réserves formulées par l'Union des Républiques socialistes soviétiques, la République socialiste soviétique de Biélorussie, la Tchécoslovaquie, les Philippines, la Bulgarie et la Roumanie (nouveau document n° 17).

Le 5 mars 1951, le Secrétaire général a fait savoir au Gouvernement de Ceylan que l'Assemblée générale l'avait invité, en attendant une nouvelle décision, à appliquer la méthode qu'il avait suivie jusqu'à présent à l'égard des réserves, sans préjudice de l'effet juridique que l'Assemblée générale pourrait, à sa sixième session, recommander d'attribuer aux objections élevées contre les réserves. Le Secrétaire général précisait que cette méthode se fondait notamment sur le principe selon lequel un État qui accepte un traité consent implicitement à toutes les réserves dont il a connaissance lors de cette acceptation ; et il ajoutait que, comme l'instrument d'adhésion de la Roumanie avait été reçu par le Secrétaire général postérieurement au dépôt de l'instrument d'adhésion de Ceylan, la position de Ceylan à l'égard des réserves de la Roumanie serait communiquée à tous les États intéressés (nouveau document n° 18). En conséquence, le 7 mars 1951, le Secrétaire général a informé les gouvernements intéressés que Ceylan n'acceptait pas les réserves formulées par la Roumanie (nouveau document n° 20).

*E. Norvège.* — L'instrument par lequel la Norvège a ratifié la convention a été déposé le 22 juillet 1949. Le 29 novembre 1950, le Secrétaire général s'est enquis de l'attitude de la Norvège concernant les réserves formulées dans l'instrument d'adhésion de la Pologne (document n° 52 annexé à l'exposé écrit). Par lettre en date du 9 février 1951, la Norvège a répondu qu'étant donné que la question de l'effet juridique de certaines réserves formulées par divers États avait été soumise pour avis consultatif à la Cour, la Norvège désirait attendre cet avis avant d'exprimer une opinion concernant ces réserves (nouveau document n° 21). Le 16 février 1951, le Secrétaire général a pris note dans sa réponse de cette déclaration de la Norvège (nouveau document n° 22).

Je vous remercie, Monsieur le Président.

## 2. STATEMENT BY MR. SHABTAI ROSENNE

(REPRESENTATIVE OF THE GOVERNMENT OF ISRAEL)
AT THE PUBLIC SITTINGS OF APRIL 11th AND 12th, 1951

*[Public sitting of April 11th, 1951, morning]*

Mr. President and Members of the Court,

Maimonides, the great medieval Jewish sage, jurist and philosopher, basing himself on a Talmudic passage, prescribed that on entering in the presence of men renowned for their knowledge one should praise the Almighty for having given of His wisdom to mortal men.

Permit me, in so doing, to express the appreciation of the Government of Israel at the opportunity of participating in these proceedings before this august tribunal. Although a relative newcomer into the organized international society, in which the International Court of Justice plays so eminent a role, the Government has closely followed the work of the Court and of its illustrious predecessor, realizing that the Court's contribution to the establishment of the rule of law among the nations hastens the day when "nation shall not lift up sword against nation, neither shall they learn war any more".

Added to our special concern for the efficacy of the Genocide Convention, because of the fact that so many Jews have so recently been victims of deliberate acts of genocide, it is also to a large extent out of a disinterested desire to participate in the work of the Court in creating legal certainty in this particular field of international relations that the Government of Israel decided to submit written observations, and to make this oral statement, in the case with which the Court is now seized.

I should also like, at this opportunity, to express my feeling of the great personal privilege accorded me to-day by being enabled to address you on behalf of my Government on the occasion of its first appearance before the Court.

### I.—THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

In considering the problems raised in this case, it has to be kept in mind that the situation is dominated by the provisions of the Genocide Convention considered in the light of the general provisions of international law. Our first task is therefore to analyse the notion of genocide, by outlining historical developments during the Second World War and after it, in the Nuremberg trials, and by examining closely the Convention itself. This will amplify the general remarks contained in the written statement submitted by the Government of Israel, particularly in paragraphs 9 and 10. I shall then follow by stating some general considerations of law which seem to be applicable in this case. Finally, I shall try to dispose of certain possible challenges to the view that only the parties to the treaty are entitled to object to reservations made by other States on their becoming parties to the Convention.

(a) *Genocide in the Second World War*

Although, as indeed was pointed out in the written statement of the Government of the United States, Court Distr. 51/10, at page 21 [1], the practice of genocide has occurred throughout history, the twentieth century has witnessed some exceptionally revolting examples of it, more particularly during the Second World War, when the Nazis deliberately set about exterminating Jews, Russians, Poles, and members of other groups of persons who came within their reach. Thus it has been authoritatively estimated that, referring to the Jews alone, out of 9,270,000 Jews who lived in Europe in 1939, only some 3,000,000 have remained alive after the war, the remainder having perished, as civilians, at the hands of the Germans and their henchmen. (See statement of Mr. Ben Gurion, who is now Prime Minister of Israel, in his testimony before the United Nations Special Committee on Palestine in Doc. A/364/Add. 2, p. 15.) As the judgment of the Nuremberg Tribunal put it:

> "The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale." (*American Journal of International Law*, Vol. 41 (1947), at pp. 243-247.)

It was, indeed, these exceptionally vile manifestations of man's inhumanity that reawakened universal interest and aroused universal concern in the problem. From this interest and concern were born the attempts to provide an adequate statement of the international legal norms of universal application defining the nature of the international crime, as well as to devise agreed means on its prevention and punishment. The very name "genocide" itself dates from this modern period.

Already while the Nazi mass murders, exterminations, enslavements, deportations and other inhumane acts were being committed against the various civilian populations who had the misfortune to fall under their control, the leading members of the United Nations took the first steps to assure that just retribution would be meted out for these misdeeds. I would refer to the Moscow Declaration on German Atrocities of 30th October, 1943: text in the *Charter and Judgment of the Nuremberg Tribunal*, Memorandum by the Secretary-General to the International Law Commission, Doc. A/CN. 4/5 at page 87. Germany's unconditional surrender enabled the first practical steps to be taken. The London Agreement of 8th August, 1945, provided for the establishment of an international military tribunal for the prosecution and punishment of the major war criminals of the European Axis. Article 6 of this Agreement gave the following definition of what are called "crimes against humanity":

> "Crimes against humanity, namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war".

There was here in the original text a semi-colon, subsequently changed into a comma with effects which I shall refer to in a minute.

[1] See p. 25 of this publication.

"or persecutions on political, racial or religious grounds in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." (See A/CN. 4/5, at p. 93.)

In a Protocol signed at Berlin on 6th October, 1945, the four signatory Governments agreed to change into a comma the semi-colon originally appearing after the word "war" in the first paragraph of the above definition in the English and French texts. This change, which brought these texts into conformity with the Russian text, was of great substance. It introduced a considerable limitation on the jurisdiction of the Nuremberg Tribunal in relation to "crimes against humanity", for, to be justiciable, such crimes had to be committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". In other words, they were thus deprived of the independent existence they would otherwise have had. Although many of the genocidal acts of the Nazis were, in consequence of this change in the Charter of the Tribunal, held to be not justiciable in this particular sense, the Nuremberg Tribunal, nevertheless, gave this description of what it did not hesitate to call "crimes":

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany, before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connexion with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939, war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connexion with, the aggressive war, and therefore constituted crimes against humanity." (*Ibid.*, at p. 66.)

With your permission, Mr. President, I should like to give for inclusion in the record a list of some of the doctrinal writings dealing with war

crimes, and a note of some of the cases of lesser war criminals in which genocidal problems were raised [1].

(b) *The drafting of the Genocide Convention and the position of the United Nations*

It is against this background of indescribable mass-suffering, of stern international justice and of doctrinal investigations, that the problem of genocide was brought before the General Assembly, already at the second part of its first session, in the autumn of 1946. The immediate legal task was—looking to the future—to prevent a repetition of the jurisdictional situation such as had existed at Nuremberg, and to respect the basic principle of law *non crimen sine lege*. This was done in Resolution 96 (I) unanimously adopted by the General Assembly on 11th December, 1946, which gave the following description of genocide:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings...."

The resolution went on to affirm that the punishment of the crime of genocide is a matter of international concern, and instructed the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide.

The written statement submitted by the United Nations contains, on pages 82-84, a clear history of the way in which the Genocide Convention was actually drafted. From this emerges clearly the legislative technique which was employed. This technique, in effect, was an ingenious combination of international experts with national political spokesmen. The international point of view was expressed in the main through certain of the functional bodies of the United Nations, for example, the General Assembly Committee on the Development and Codification of International Law, the Economic and Social Council's Commission on Human Rights, and the Commission on Narcotic Drugs. The meetings of the plenary sessions of the General Assembly and the Economic and Social Council, as well as those of the Sixth Committee of the General Assembly and the Social Committee and the *ad hoc* Committee on Genocide of the Economic and Social Council, provided the forum

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[1] For further comment on crimes against humanity, see in particular Schwelb "Crimes against Humanity", in *British Year Book of International Law*, Vol. 23 (1946), p. 178; United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, particularly at p. 196; Goldstein "Crimes against Humanity—Some Jewish Aspects" in *Jewish Yearbook of International Law*, 1948, p. 206; and the literature contained in *Bibliography on International Criminal Law and International Criminal Courts* (prepared by the Secretariat), A/CN.4/28. For the conception of genocide in the trials of war criminals other than the German major war criminals, see the following cases: trial of Ulrich Greifelt and others before the United States Military Tribunal at Nuremberg, in *Law Reports of Trials of War Criminals*, Vol. XIII, particularly at pp. 36 to 42; trial of Goeth before the Supreme National Tribunal of Poland, *ibid.*, Vol. VII, p. 1; trial of Hoess before the same Tribunal, *ibid*, p. 11; trial of Greiser before the same Tribunal, *ibid.*, Vol. XIII, p. 70; trial of Altstoetter and others before the United States Military Tribunal at Nuremberg, *ibid.*, Vol. VI, p. 1 (the so-called *Justice* Trial), and general comment by Brand, *ibid.*, Vol. XV, at p. 122.

in which the political attitudes of the different Member States could be freely expressed. Making due allowance for the institutional pattern necessary because of the United Nations initiative, this process has close similarities with the procedure at ordinary diplomatic conferences, at which the convention is hammered out in plenary sessions and in technical commissions with the assistance of experts where necessary. In fact, the only difference is that here a permanently existing international institution provided the organizational framework in which the work of drafting the Convention was conducted. It is thus not by any chance that the credentials of representatives to the General Assembly are not taken as being full powers to sign conventions "adopted" by the General Assembly, just as the credentials of representatives to a diplomatic conference are not necessarily taken as being full powers to sign the conventions there established. See Mr. Kerno's statement at the 132nd meeting of the Sixth Committee on 1st December, 1948 (G.A.O.R., third session, Part I, Sixth Committee, p. 703). In other words, we do not have a situation in which the Organization —with its own interests—is arrayed on one side of the table, and the individual Members on the other. There are, of course, treaties and other international acts of this character, but they are essentially of a constitutional or institutional nature—and in their case the Organization—to take a phrase once used by the Court—"occupies a position in certain respects in detachment from its Members and .... is under a duty to remind them, if need be, of certain obligations" (*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports*, 1949, p. 174, at p. 179). The most important of this type of treaty are the Convention on the Privileges and Immunities of the United Nations (1 *United Nations Treaty Series*, p. 15), and the Convention on the Privileges and Immunities of the Specialized Agencies (33 *United Nations Treaty Series*, p. 261). These conventions are of a very special nature, and they stand in a very special relationship with the Charter itself. Being part of the constitutional law of the United Nations, it is not possible to refer to such conventions as being illustrative of any general rule.

In the case of the Genocide Convention, the Organization is not in any such special position as it is in the case of the two Immunities Conventions. It is not a party to the Convention, and from the legal point of view its concern with it is essentially one of disinterestedness. That is the main reason why the technique employed in the drafting of this Convention is in its essentials not different from the technique employed when you have a diplomatic conference such as the one, for example, which revised the Geneva Conventions in 1949. The legislative history of this Convention contains nothing to warrant the application of special rules of treaty law said to derive from the fact that this is a "United Nations convention" (whatever that expression might actually mean).

It is not denied for one minute that the Convention has universal characteristics, although it is necessary to be careful because its universalism is qualified owing to the fact that conditions are imposed in the Convention for accession to it by certain States. This universalism is due, however, not to the incidental relationship between the Convention and the Organization, but simply because Resolution 96 (I) was adopted unanimously and affirmed that genocide was a crime under international

law ; and because the Convention itself was approved by a unanimous vote of 56 States. Genocide, as committed during the Second World War, was on a scale to warrant the adjective "universal". The Convention is likewise universal, its universalism deriving from the number of States which took part in its drafting, and which later expressed general approval of it, and not merely from the fact that it was drafted within the institutional framework provided by the United Nations.

The paradigmatic description of the drafting of the Convention given by the United Nations emphasizes in the dry technical language of the law and diplomacy, what were the tragic human causes which inspired the Convention, that insensate slaughter in the war standing in sharp relief against the technical difficulties encountered at Nuremberg. It is interesting to observe how immediately after adopting the Genocide Convention, the General Assembly adopted, as Part B of the same resolution, another resolution relating to the study by the International Law Commission of the question of an international criminal jurisdiction, a matter which arose directly out of the discussions on the Genocide Convention. This has been under close consideration by the General Assembly and the International Law Commission ever since : I would refer to Resolution 489 (V) of 12th December, 1950. For in point of fact the two questions are closely connected, as can be seen from Article VI of the Genocide Convention.

The whole process of drafting the Convention required two years of almost continuous effort in the course of which the government of every State a Member of the United Nations had ample opportunity to present its views and to get to know the views of other governments. This fact may be of some considerable relevance to the Court when it comes to apply the general conclusions which it will reach to the Convention itself. For it may well follow that, having regard to all the circumstances, conventions drafted in this way may not be found to possess those particular characteristics they are sometimes said to have and which would justify appeal to certain special rules of customary international law said to govern the operation of treaties drafted in this way : and that the rules applied to conventions drafted in the more common fashion of a diplomatic conference are substantially applicable here. In connexion with this particular argument it may be pointed out that recent United Nations practice has tended to revert to the more usual type of diplomatic conference. This was done, for example, in the case of the Convention on Declarations of Death of Missing Persons, as well as in that of the Convention on the Legal Status of Refugees.

(c) *Analysis of the Genocide Convention*

I now come to the analysis of the Genocide Convention. In its written statement, the Government of Israel expressed the view that the Convention as a whole possesses a general normative character, and that in addition it contains stipulations of a contractual and of a ministerial character. This view will be further developed in the following analysis of the Convention.

The classification of treaties, if it is a practical proposition at all, and to the extent that it is a necessary function, cannot be a matter that proceeds from their outer form, but from their operation. The development of a satisfactory scientific system of classifying treaties has not

yet crystallized itself to a sufficient degree to permit the drawing of any hard-and-fast conclusions. Furthermore, it is difficult to see what is the real value, in practice, of trying to classify treaties in a generic way. For clearly such theoretical classification can produce no *a priori* legal results in a given concrete situation. We are here engaged in the inverse process of seeking to give a legal character to the various stipulations of the Genocide Convention in order to see how far they are susceptible to reservations.

When we use the word normative, we have in mind what is sometimes known as the "law-making" treaty. We use the term in the sense that what is normative, being valid "at large", operates on the law-making plane, and sets authoritative standards. To the extent that these authoritative standards are, in fact, already existing rules of international customary law set down in written form, the law which they declare is binding on all States, whether or not they are parties to the convention. The matter must not be approached as one of philology, but as one of the intention of the parties viewed from the angle of the actual execution of the convention.

Having said that, the next question that arises is, as a general proposition, how far are conventions to be regarded as a single indivisible whole, and how far can their various stipulations be accorded different treatment in the light of their different areas of operation.

The answer to this question depends upon the terms of the convention itself and the intentions of the parties when they concluded it. If their intention was simply to set up authoritative standards, it may be found that the contractual stipulations, if such there are, are ancillary to the normative ones. In such cases it may well be found to be impossible or impracticable to sever the one from the other, and the general normative character will consequently impress itself on every line of the convention. On the other hand, analysis of the text concerned may make it clear that the intention of the parties was, in one and the same document, to establish authoritative standards and to impose reciprocal rights and duties. In that case the convention will be divisible. It is believed that the Genocide Convention in point of fact does do these two things, having regard for the fact that its Article I specifically refers to an undertaking assumed by its contracting parties in addition to the confirmation which it contains, of the international criminal character of genocide.

This approach to the Convention leads to what we might call a vertical dissection of it. However, some of the written statements, in suggesting a more elaborate form of treaty classification, hint at the existence of what might be termed a horizontal classification, the inference being, of course, that treaties are indivisible, and that the right to make reservations does not extend to the upper horizontal layers. Speaking generally, one way of looking at treaties, for this purpose, is to see what circumstances conditioned the manner of their preparation, and the constitutional rules which governed their actual conclusion. For example, these circumstances and rules show that reservations are intrinsically inadmissible to the international labour conventions, because of circumstances connected with the Constitution of the International Labour Organization. The written statement of the International Labour Organization is a highly interesting and a most useful document. But with respect, its relevance to the problems we are discussing to-day is not readily apparent.

Elsewhere in the written statements we read about the organizational type of treaty. This corresponds to what we have termed the constitutive type. In its Resolution 171 (II) of 14th November, 1947, the General Assembly recognized the existence of an international constitutional law, for which, indeed, much evidence can be found in the *Reports* of this Court and its predecessor. The Secretary-General also referred to this at paragraph 36 of his Report, A/1372. There is little doubt that a distinct international constitutional law is evolving itself, and that special rules are applicable to the treaties operative in this sphere of activity. It does not follow, however, that such rules also apply to every treaty concluded by, with, or under the auspices of the Organization. Furthermore, even if we admit that in the normal course of events reservations are inadmissible to constitutive treaties, it is clear that they are not outside the bounds of possibility. The reservations of Switzerland when that country acceded to the Covenant League of Nations, those of the United States to the Constitution of the World Health Organization (14 *United Nations Treaty Series*, p. 185—see Report of the Secretary-General, A/1372, paragraphs 11 and 12), and of France, Guatemala and the United States to the Constitution of the International Refugee Organization (18 *United Nations Treaty Series*, p. 3) indicate that such reservations may, in fact, be quite far-reaching.

The most serious of the arguments in this direction are those put forward, with great skill and force, by the United Kingdom, which, if I understand them right, are more or less as follows: What has to be looked at is not the *form* of the convention so much as its *operation*. If its operation is essentially contractual, reservations are admissible. The more the convention is "universal", the less likely is its operation to be contractual, and you cannot have a more universal convention than one drafted entirely under the auspices of the United Nations. Parenthetically it may be observed that the view that one should look at the operation, and not at the form, is not disputed, for we are agreed that all treaties are in *form* contractual, and that the whlole basis of any classification of treaty stipulations must be their operation. From this starting point the United Kingdom goes on to indicate its view that conventions of the social, law-making, or status-, régime-, or system-creating type cannot be the subject of reservations. I have already suggested that little purpose would be served by any generalities on the subject of the classification of treaties, and this in itself would be a sufficient answer to this thesis. However, going further and admitting, for the purposes of this argument only, that certain *a priori* assumptions based upon the classification of treaties do exist, the United Kingdom is here putting forward a very heterogeneous collection of treaty types, and the connecting link between them is not easy to find. There is no automatic analogy between the constitutional treaty, and the "social" or the "law-making" treaty, whether such treaty creates new law or merely purports to be, and is, declaratory or confirmatory of existing international law. In these cases the doctrine of indivisibility has no automatic application. It is at best an artificial doctrine made necessary by the delicate system of checks and balances which underly international constitutions. When one is faced with a treaty, part of which is, in operation, law-making or law-declaring—or to use our expression "normative"—and part is, in operation, contractual, the indivisibility is not established, regardless of how the treaty was drafted.

Now the Genocide Convention is clearly not constitutive. It may or may not be social, depending upon what is meant by that. It is not easy to define what is meant by a social convention. Without doubt many, if not all, of the international labour conventions come within this category, but as we have seen, the very question of reservations does not and cannot arise in relation to them, for reasons which make it impossible to draw from this type of convention any general conclusions of law, applicable to all social conventions. Other conventions of this category are probably those relating to narcotic drugs, the Conventions on the Suppression of Traffic in Persons, on Obscene Publications, and many of those classified by Oppenheim as humanitarian conventions. *International Law*, 7th ed., Vol. I, page 890. It is a sweeping statement to say that reservations are inherently inadmissible to conventions of this type, and indeed it may here be recalled that reservations have been made, for example, to the Geneva Convention of 11th February, 1925, concerning the Suppression of the Manufacture and Internal Trade in and Use of Prepared Opium (51 L.N.T.S. 337), the Opium Convention of 19th February, 1925 (81 L.N.T.S. 317), the Geneva Convention of 13th July, 1931, for limiting the Manufacture and regulating the Distribution of Narcotic Drugs (139 L.N.T.S. 301), the Convention for the Supression of the Traffic in Women and Children, of 30th December, 1921 (9 L.N.T.S. 415), the Convention of 12th September, 1923, for the Suppression of the Circulation of and Traffic in Obscene Publications (27 L.N.T.S. 213). Particulars of these reservations will be conveniently found in the publication entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depository* (U.N. Publication Sales No. 1949, V, 9). Each individual convention needs to be thoroughly examined to see how it operates and how it is intended to operate, before reaching the definite conclusion that reservations are inadmissible. To the extent that the treaty as a whole operates "at large", the inherent inadmissibility of reservations as of right seems self-evident. But as soon as one reaches the level of bilateral—or even multilateral—implementive acts relating to stipulations which operate "at large", it is not so apparent why the States concerned should not be permitted to modify, whether by enlargement or by contraction, their contractual obligations. The same applies to a treaty such as the Genocide Convention, in which the distinction between the parts of the treaty operative at large and those operative on the purely bilateral or multilateral level, is well marked.

The Genocide Convention as a whole achieves two main things: it defines certain rules of international law, and it contains multilateral bargains in connexion with some aspects of the implementation of certain requirements which the international community found to be desirable in order to provide a sanction for breaches of the rules of international law. It is thus no argument to say, for example, that the Convention is a code of domestic crimes which are already denominated in all countries as common law crimes: Finch in *American Journal of International Law* (Vol. 43 (1949), p. 732, at p. 735). Kelsen says the same thing, adding that to protect mankind against these crimes, no international agreement is necessary (*The Law of the United Nations*, p. 47). Several delegations made substantially the same point in the 1948 session of the General Assembly. The international agreement is

necessary, not so much to define the crime (although the clear indication that the crime can be committed in time of war as much as in time of peace may go further than the criminal provisions of some systems of municipal law), but to impose the obligation on the contracting parties to co-operate with one another in its suppression and punishment. The municipal qualification does not suffice to subject individuals to the direct obligation and sanction of international law. The fact that stipulations concerning these aspects are, in one way or another, contained in an international convention supplies the requisite international element and concern in the matter and does so subject the individual to the direct obligation and sanction of international law : on this point I should like to refer to Lauterpacht, *International Law and Human Rights*, page 44. At the same time, the Convention itself also subjects States to the direct sanction of international law, because its normative parts, including in particular Article IV, have the effect of excluding the plea of "Act of State". This is why, with all its weaknesses, especially, but not solely, on the jurisdictional side, the Genocide Convention represents a great step forward.

Several articles of the Convention can be called normative in the sense that they establish rules or authoritative standards, whether for the conduct of States or of individuals. The most important is Article I, by which the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law. This confirmation is not confined in its operation solely to the contracting parties. The existence of genocide as a crime under international law is clear from the past history of the notion, and not from the formal definitions in the Convention, or in Resolution 96 (I). The conventional definition is so to speak superimposed upon the definition of the customary law, just as a statutory definition of a crime under municipal law may be superimposed upon the common law definition, without necessarily doing away with the common law crimes. It is always a moot point whether and to what extent in such circumstances a written law-making document is declaratory of existing customary law. But one thing is clear : the written text usually has the effect of rendering the law more certain than it was in its unwritten state, and the positive text will in course of time take the place of the usage. In other words, the text has a profound influence upon the future development of the law, which in one sense it fetters and in another diverts into new channels. Time and experience are needed before such a written text can be fully "declaratory" of existing law. Both these are lacking in regard to the Genocide Convention.

Articles II, III, IV and VI are likewise normative. They all follow on Article I, and with the sole exception of the second half of Article VI, which relates to a future international penal tribunal, neither the definition of acts of genocide and the description of its characteristics, nor the class of persons who may commit it or be tried and punished for it, is limited in any way to the contracting parties, persons under their jurisdiction or their territory. That is why the Israel Crime of Genocide (Prevention and Punishment) Law, 1950, specifically provides that the law shall come into force on the date of its publication in the *Official Records* (which was 7th April, 1950) and shall remain in force *whether or not the Convention comes into force or remains in force*. A translation into English of this law has been deposited with the Registry. For

genocide is a crime under international law and, therefore, the State is under a duty to prevent and punish it, just as it is under a duty to prevent and punish other acts which are crimes *jure gentium*, such as piracy.

The Convention itself does not, however, exist in a vacuum. It operates upon a general base provided by international law which has been painfully developing since 1919, and it partly codifies this law in its latest stage of development. Neither the Genocide Convention nor the resolutions of the General Assembly can change that. Nor can the resolutions, which are practically, it seems, devoid of legal effect, *create* a crime where none existed before, even though they serve as clear notice that those who perpetrate such acts will be brought to trial. But it is not necessary to go deep into this, for neither Resolution 96 (I) nor the Convention purported to do more than confirm existing rules of international law—or at least parts thereof. The Convention may, by its inherent weight, so to speak, change the shape of genocide in the course of time. It will not be overlooked, for example, that the conventional definition is different from that contained in Resolution 96 (I), for the references in the resolution to cultural genocide, i.e. the causing of loss to humanity in the form of cultural .... contributions represented by the human groups the victims of genocidal acts, as well as the inclusion of political groups among the victims of genocide, have been dropped. This does not in itself mean necessarily that cultural genocide, or genocidal acts committed against political groups, are not crimes under international law. What it does mean is that they are not crimes for the purposes of the Convention : that is to say the contractual bargains between the parties to the Convention which are intended to facilitate international co-operation in the prevention and punishment of the crime of genocide do not go so far as to cover them.

By the stipulations termed contractual, the contracting parties have bound themselves to perform certain implementive acts, the desirability for which, in the case of the Genocide Convention, follows from the normative stipulations. This becomes clear from the undertaking to prevent and punish genocide, contained in Article I. These implementive acts include : to enact certain legislation (Article V) : to enable an international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction to try persons charged with genocide—an obligation which requires at least a double contractual engagement before it is executory (Article VI) : to grant extradition for genocide and related acts—this, one of the most important stipulations of the Convention, also may require a multiple bilateral contractual system to be fully executory (Article VII) : to submit to the jurisdiction of the International Court of Justice in certain circumstances (Article IX). The special rights include : to call upon the competent organs of the United Nations to take action for the prevention and suppression of acts of genocide, etc. (Article VIII) : to extend the application of the Convention to certain dependent territories—this also may be regarded as a ministerial provision, to some extent at all events (Article XII) : to denounce the Convention in certain circumstances (Article XIV) : to request the revision of the Convention (Article XVI).

In the performance of these implementive acts and in the exercise of these rights, the word "genocide" has the meaning attributed to it

in the Convention. However, somewhat similar rights and obligations are possessed by States which are not contracting parties, and in exercising them, the parties or organs concerned may not be restricted to the formal definition of genocide contained in the Convention.

The ministerial stipulations present a miscellaneous collection of rules and statements. Article X, for example, establishes certain criteria of importance to the literal interpretation of the Convention. Articles IX, XIII, XIV and XV relate to the coming into force and duration of the Convention, and the methods by which States can sign and ratify, or accede to it. Articles XVII and XIX relate only to the Secretary-General and specify in some detail some of his duties in connexion with the Convention. Other such duties are mentioned in Articles XI, XII, XIII, XIV and XVI. No mention is made of any rights possessed by the Secretary-General in connexion with the exercise of these duties, but of course it is possible that the existence of rights may be derived from Article 97 of the Charter, according to which the Secretary-General is the chief administrative officer of the Organization. Nor does the Convention contain any provision requiring the United Nations to accept upon itself these various duties. However, the approval of the Convention contained in Resolution 260 (III) of the General Assembly probably implies a willingness on the part of the Assembly that the Organization and its Secretary-General should fulfil the functions sought to be imposed upon them by the Convention.

[*Public sitting of April 11th, 1951, afternoon*]

May it please the Court,

When we adjourned, I had just completed my analysis of the Convention, and with your permission, Mr. President, I should like to insert in the record references to some literature which gives further analyses of the Genocide Convention[1].

In our submission, this survey establishes that, even if it is true that the Convention is predominantly of a normative character, the normative rules exist on their own, differing from the customary international law about genocide as it had developed before 9th December, 1948. The basic necessity for the contractual stipulations derives from the decision of the General Assembly of 1946 that international co-operation be organized between States with a view to facilitating the speedy *prevention and punishment* of the crime. In other words, the Convention actually has two quite distinct purposes—as is mentioned in Article I. Consequently, even if they are held to be inadmissible to the normative stipulations, it by no means follows that they are inadmissible to the contractual ones.

[1] For further analysis of the Convention, reference may be made to the following: Nehemiah Robinson, *The Genocide Convention—Its Origins and Interpretation*; Stillschweig, "Das Abkommen zur Bekaempfung von Genocide", in *Die Friedens-Warte*, Vol. XLIX (1949), p. 93; Kuhn, "The Genocide Convention and State Rights", in *American Journal of International Law*, Vol. 43 (1949), p. 498; Finch, *loc. cit.*, Kunz, "The United Nations Convention on Genocide", in *American Journal of International Law*, Vol. 43 (1949), p. 738; Mosheim, "Die Arbeiten der Vereinten Nationen zur Frage der Rechte des Individuums und des Verbrechens des Genocide", in *Archiv des Völkerrechts*, Vol. 2 (1949), p. 180.

Nevertheless, it should be made clear at this stage that if the Court should be of opinion that under no circumstances are reservations admissible as of right to the Genocide Convention, that would put an end to the matter. There would be no need for the Court to proceed to consider the specific questions addressed to it, for the Court is to give its opinion always "in so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide". The questions, in the form they have been put, pre-suppose the admissibility of reservations, and from this starting point do not even seek to enquire into the legal validity of this or that of the reservations actually made. Indeed, to do so is quite irrelevant in these particular proceedings.

In connexion with this, it is necessary to emphasize that the question of reservations was actually considered at every stage of the drafting of the Convention, as is seen from the remarks on page 84 of the United Nations written statement. There is noticeable a striking difference between what happened in the preliminary stages of the drafting, and what happened after the Sixth Committee had approved the full text of the Convention on 1st December, 1948. There was no mention then of the idea, approved earlier by the *ad hoc* Committee, that there was "no need for any reservations" (see Docs. E/CA.25/10, p. 5, and E/CA. 25/SR. 23, p. 7). On the contrary, the Rapporteur, M. Spiropoulos, specifically said that: ".... reservations could be made at the time of the signature of the Convention" (G.A.O.R., third session, Part I, 6th Committee, p. 711). The brief discussion which followed—a discussion which, incidentally, reminds us of that anonymous piece recorded on page 201 of the 1930 volume of the *British Year Book of International Law*—did not concern the Chairman's ruling as to the admissibility of future reservations as such, but simply whether a reserving State could be regarded as being a party to the Convention unless the other contracting parties accepted these reservations, expressly or tacitly. This is the very question now before the Court. As this ruling was not challenged, it must be regarded as adopted by the Sixth Committee which thereby tacitly indicated its view as being that reservations are inherently admissible.

## II.—General considerations concerning reservations

At this point, it is possible to approach more directly the actual problem of reservations in relation to the Genocide Convention. Already in its written statement the Government of Israel gave its views as to the juridical characteristics of reservations, stressing what it conceives to be their essential contractual character, and their inappropriateness to normative and constitutive stipulations. This, of course, is subject always to the agreement of all the other parties, with whom lies the power to admit the inherently inadmissible.

The remarks which follow are to be taken as being, broadly speaking, additional to those contained in the written statement, though here and there they may contain slight modifications of them, induced as the result of further reflexion.

In connexion with reservations, what is of fundamental importance is to fix in our minds the kind of transaction that takes place in connexion with the proposing of, and objecting to, reservations, for once again, by turning aside from the form to the actual substance of operation, we

will obtain a clearer picture of what the essential legal issues are and where they lie. This, in turn, cannot be approached as though it stood in isolation from the problem of the effect of an objection to a reservation. As to this problem, I would refer to paragraphs 20 to 22 of the written statement of the Government of Israel, for I do not consider it necessary to say anything further on this aspect at this stage of the proceedings. Broadly speaking, it is our view that the reserving State becomes a party to the Convention, but the Convention is not in force as between the reserving State and the other parties to the Convention which do not accept the reservation.

(a) *The connexion between ratification and reservations*

In any discussion about reservations, the first thing that has to be stressed is that loose talk about "reservations" and "objections" is liable to be misleading. It is clear that when speaking of reservations, what is actually had in mind is an act of ratification or act of accession—there is, for our purposes, no essential difference between these two acts, and hereafter the word "ratification" is always to be taken as including "accession" unless otherwise indicated—which is accompanied by a reservation, as is pointed out in the written statement of the Government of the United Kingdom. I would go further and suggest that it is not only the reservation which has to be looked at in this way, but the objection to the reservation as well. For it is only by depositing its act of ratification that a State entitled to become a party to the convention takes a necessary step towards realizing its inchoate interests under the convention. In other words, the reservations and the objections are not independent legal transactions which stand or fall on their own merits. They are essentially servient to the dominant act of ratification. From this it follows that in both cases what really is at issue is the effectiveness of the ratification to which the servient act is attached, and not simply the effectiveness of the reservation or the objection thereto as such.

Now the effectiveness of an act of ratification depends primarily upon the terms of the convention. To take an extreme and somewhat absurd example, a purported act of ratification by a State not entitled to become a party to the convention would obviously be of no effect. When you have a convention, like the Genocide Convention, the coming into force of which depends upon the deposit of a fixed number of acts of ratification, ratifications deposited prior to the completion of that number have a somewhat limited effect. They do not, for instance, taken individually, make the ratifying States parties to the convention, because the convention is not in force or in effect. They do not, taken individually, create any *nexus* of legal obligation between the State depositing the ratification and any other States. Having regard to the terms of the convention, they are acts having suspended force. Although complete and valid in themselves as acts of ratification, their effectiveness in producing legal consequences is in suspense until there exists a certain number of like acts on the part of other States. From this the following results. The deposit of an act of ratification will produce certain consequences upon other States, which, initially, cannot be identified. Those are the States which together will make up the number required to bring the convention into force or to maintain it in force when, by effluxion of time, States are entitled to denounce it. In relation to these States, and only

in relation to these States, the deposit of the act of ratification has consequences which transcend the normal consequences of ratification, i.e. the creation of a legal *nexus* between the ratifying State and the other States, for whom also the convention possesses a binding obligatory character. For this reason those States are in a special position. For if, in addition to the general condition of suspense which derives from the terms of the treaty itself, a State desires to attach to its ratification an additional condition, in the form of a reservation, those States are entitled to turn around and say that they are unable to accept the additional condition. If they do this, the ratification then will not possess the transcendental effect which it would otherwise have. But their refusal to accept such additional conditions will not affect the normal consequences attaching to the deposit of such an act of ratification. That is why, in application to the Genocide Convention itself, the Government of Israel suggested in its written statement that, in considering whether a State is a party to the Convention when its ratification is subject to a reservation, the answer will differ according to whether the question is being asked in relation to Articles XIII and XV of the Genocide Convention, or for other purposes. In other words, the expression "parties to the Convention" as used in the Convention itself and in the request for an advisory opinion is thus to a considerable extent an expression with more than one meaning, depending upon who desires to know whether a State is a party to a convention, and for what purpose.

Any other approach would, in the long run, lead to complete chaos. We have seen how under the Genocide Convention there is no difference, from the point of view of the third party rights which the Convention admittedly grants, between signatories, Members of the United Nations and other States invited by the General Assembly to accede. This, obviously, also includes States not yet in existence; in their case the right to accede will, however, only be exercisable from the moment they qualify under the conditions laid down by the General Assembly in application of Article XI of the Convention. Indeed, of the States which have ratified or acceded to the Convention, according to the list on page 92 of the United Nations written statement, three were not in existence (I think it is true to say, from the point of view of the United Nations) on 9th December, 1948, namely: Cambodia, Laos and Viet Nam; and seven were then not entitled to accede because the General Assembly had not at that time established the criteria for the sending of invitations to non-member States, namely: Israel, Bulgaria, Ceylon, Hashemite Jordan, Korea, Monaco and Romania. Logically, if the right to object to ratifications or accessions accompanied by reservations can be exercised by States which are not parties to the Convention, why stop at signatories, or States which participated in its drafting? Why not also include States now, or at a future date, entitled to become parties? These States already possess some third party rights clearly conferred upon them by the Convention. Why should they be discriminated against by not having extended to them the benefits of an alleged rule of international law according to which other rights, additional to those expressly conferred by the treaty, are also exercisable by States not parties to the Convention?

(b) *Points of agreement and disagreement in the various systems for dealing with reservations*

It is useful, at this stage, to indicate very briefly the essential points of agreement and disagreement which exist between the various systems and views prevalent for the handling of reservations, based on the documents which are already before the Court, excluding, however, the practice of the International Labour Organization, in which reservations are inherently disallowed.

The right to accompany the ratification with a reservation is recognized in all systems and statements, with the exception of that of the United Kingdom. According to the United Kingdom, what exists is a right of a State to seek or propose a reservation in order to meet its special difficulties, constitutional and other. There is, however, little practical consequence in this different formulation, having regard to what we conceive to be true of the transaction as explained above.

As for the right to object to reservations, there is a slightly greater divergence of opinion. Under the Pan-American system, this right is given to the signatories, but, if exercised, is only effective when the signatory ratifies the convention. Under the system of the League of Nations and of the United Nations, the right to object is granted to the parties. There is no difference in substance between the two views, which are shared, for example, by the United States and the Soviet Union. Furthermore, this practice accords with the essential nature of the transaction itself. The approach of the United Kingdom is, however, fundamentally different. In its view, the right of effective objection to a ratification accompanied by a reservation is granted to every country having a legitimate or legal interest in the terms of the treaty. This includes at least the signatories, and possibly also all the States entitled to become parties.

As to the effect of an act of ratification accompanied by a reservation to which objection is made, the main difference seems to lie between the Pan-American system on the one hand, and the League of Nations and United Nations systems on the other. Under the former, the act of ratification is effective in relation to those parties to the convention which do not object to the reservation. As to those which do object, the treaty is not in force between them. This practice, which actually seems to have been followed in other cases as well, enables the depository to accept the ratification subject to the reservation, and this is the solution which we would urge the Court to adopt. Under the other system, to which the United Kingdom also lends its support, the act of ratification accompanied by a reservation is a legal nullity if objection is made thereto by a State entitled to do so, and the depository is accordingly not entitled to accept such act of ratification.

It is appropriate here to draw attention to the extensive use made by States of the facility to make reservations. Reference has earlier been made to the reservations made to a number of the conventions of which the United Nations actually acts as depository (see p. 33). As for the Pan-American practice, the 1948 volume of the *Inter-American Juridical Yearbook* contains, on pages 160-171, instructive information on the status of the Pan-American treaties and conventions, revised to 1st January, 1949. Eighty-six treaties and conventions are there described and twenty-one States are concerned. The picture which emerges is the following :

Forty-nine of these conventions are free altogether of reservations. The remainder, thirty-seven, are affected by reservations made and maintained.

Of the conventions adopted at the Fifth Conference at Santiago in 1923, reservations were made in connexion with one, the Treaty to avoid or prevent Conflicts between the American States (33 L.N.T.S. 25).

Of the conventions adopted at the Sixth Conference at Havana, in 1928, reservations were made in connexion with : the Convention regarding the Status of Aliens (132 L.N.T.S. 301) ; the Convention fixing the Rules to be observed for the Granting of Asylum (*ibid.*, 323) ; the Convention regarding Consular Agents (155 L.N.T.S. 289—it was here that one party objected to this reservation, in the circumstances described on p. 15 of the written statement of the Organization of American States, and on p. 32 of the written statement of the Government of the United States) ; the Convention regarding Diplomatic Officers (155 L.N.T.S. 259) ; the Convention on Maritime Neutrality (135 L.N.T.S. 187) ; the Convention concerning the Rights and Duties of States in the Event of Civil Strife (134 L.N.T.S. 45) ; the Convention on Treaties ; the Convention on Commercial Aviation (129 L.N.T.S. 223) ; the Convention on the Protection of Literary and Artistic Property (132 L.N.T.S. 277); and the Convention on Private International Law (86 L.N.T.S. 111).

Of the conventions adopted at the Seventh Conference at Montevideo, in 1933, reservations were made in connexion with : the Convention on the Nationality of Women ; the Convention on Nationality ; the Convention on Extradition (165 L.N.T.S. 45) ; the Additional Protocol to the Conciliation Convention of 1929 ; and the Convention on Rights and Duties of States (165 L.N.T.S. 19).

Of the conventions adopted by the Conference for the Maintenance of Peace, held at Buenos Aires in 1936, reservations were made in connexion with : the Convention for the Maintenance, Preservation and Re-establishment of Peace (188 L.N.T.S. 9) ; the Additional Protocol relative to Non-intervention (*ibid.*, 31) ; the Treaty on the Prevention of Controversies (*ibid.*, 53) ; the Inter-American Treaty on Good Offices and Mediation (*ibid.*, 75) ; and the Convention to co-ordinate, extend and assure the Fulfilment of the existing Treaties between the American States (195 L.N.T.S. 229).

Of the conventions signed at other Pan-American Conferences, reservations were made in connexion with : the Convention for Educational and Publicity Films (other particulars are not given) ; the Washington Convention of 1929 on Inter-American Arbitration ; the Anti-War Pact of Rio de Janeiro of 1933 ; the Pan-American Sanitary Code (86 L.N.T.S. 43) ; the Washington Convention of 1935 on Movable Property of Historic Value ; the Washington Declaration of 1936 relative to Foreign Companies ; the Buenos Aires Treaty of 1935 relative to the Transit of Aeroplanes ; the Washington Protocol on Powers of Attorney of 1940 ; the Havana Convention of 1940 on European Colonies and Possessions ; the Washington Treaty of 1940 on Nature Protection and Wild Life Preservation ; the Washington Regulation of Automotive Traffic of 1943 ; the Washington Agreement of 1943 relating to the Inter-American Institute of Agricultural Science ; the Panama Convention of 1943 on the Inter-American University ; the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2nd September, 1947 (21 *United Nations Treaty Series*, 77).

Finally, of the conventions adopted at the Ninth Conference at Bogota, in 1948, reservations were made in connexion with the American Treaty on Pacific Settlement (30 U.N.T.S. 55); and the Economic Agreement of Bogota.

Similar tabular information about the status of the Hague Conventions can be obtained from J. B. Scotts' *Reports to the Hague Conferences of 1899 and 1907*, pages 898-901. This discloses a state of affairs comparable to that pertaining under the Pan-American system. Forty-five States are concerned. This table, which is correct to 1st October, 1915, discloses that reservations were made to each of the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Twelfth and Thirteenth Hague Conventions. No mention is there made of any objections thereto.

As for the Geneva Conventions of 1949, these were signed by sixty-one States. Thirteen States proposed reservations to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and to the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea. Fifteen States proposed reservations to the Convention relative to the Treatment of Prisoners of War, and nineteen to the Convention relative to the Protection of Civilian Persons in Time of War. However, only a few States have ratified these Conventions to date, and having regard to their complexity, it is not yet possible to assess what effect these reservations have had on the relatively slow pace of ratification.

The foregoing information, apart from its purely statistical interest, illustrates the type of conventions to which reservations have, in the past, been made. It may also be found to show that in practice the differences between various systems tend to become blurred.

The attention of the Court is also invited to the terms of Article 5 of the Regulations for the Registration and Publication of Treaties adopted by the General Assembly in Resolution 97 (I) of 14th December, 1946, to give effect to Article 102 of the Charter. See also 1 *United Nations Treaty Series*, p. XX. Under this article, as amended, the party or specialized agency—and this term now includes the Secretary-General—registering a treaty or international agreement shall certify that the text is a true and complete copy thereof and includes all reservations made by parties thereto. It appears from a Memorandum by the Secretariat (Doc. A/C.6/124) that the Sub-Committee 1 of the Sixth Committee, which discussed this matter with the Secretariat, considered it desirable to require a certification that the text submitted "includes all reservations made by the parties thereto" since the reservations form part of the agreement registered: General Assembly Official Records, first session, Part II, Sixth Committee, page 197; see also page 176 for the brief discussion at the 33rd meeting of the Sixth Committee. Nothing is there said about the admissibility of reservations. This, of course, is not decisive, though it is illustrative of a certain general approach to the problem of reservations and is thus of more than negligible interest.

The question of the admissibility of reservations to general conventions came before the Council of the League of Nations in 1926 and was referred by it to the Committee of Experts for the Progressive Codification of International Law. The Committee of Experts entrusted the task to a sub-committee. The report of the sub-committee was approved by the Plenary Committee on 24th March, 1927, and came before the

Council of the League at its forth-fifth session in June 1927. See League of Nations, *Official Journal*, 1927, p. 880, for the text of the report of this sub-committee (Doc. C.211. 1927.V). The report of the sub-committee, in dealing with the problem of consent to reservations, especially when put forward by States desiring to accede to conventions in the drafting of which they did not participate, states :

> "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."

When the matter came before the Council, the Rapporteur, M. Zaleski, of Poland, proposed including the following paragraph in the report to be adopted by the Council :

> "If the principles of the report (i.e. of the Committee of Experts) are acted upon, this will prevent States from attaching to their signature or accession reservations which are not accepted by the other parties to the convention, but it may well be that a State may desire to make a reservation which, if it had been put forward during the conference, would have been accepted by the other parties, and no one wants a State which finds itself in such a position to be prevented from becoming a party to the convention. What is wanted is some machinery which would enable acceptable reservations to be admitted after the termination of the conference, while excluding others."

In the discussion which followed, M. Scialoja, of Italy, requested an explanation of this paragraph. It seemed to him that the only rule which might be adopted was one which contemplated the acceptance of the reservation by the other States which signed the convention. The President, sir Austen Chamberlain, thought that all were agreed that a reservation must be accepted by the parties to the convention and unless it were so accepted, an adherence accompanied by the reservation had not the effect of an adherence. M. Scialoja, however, repeated his view that a reservation was only valid if ratified by all the States which had signed the convention (League of Nations, *Official Journal*, 1927, pp. 770-772). After a brief adjournment, M. Zaleski amended the passage in his report, which finally read as follows :

> "If the principles of the report are acted upon, this will prevent States from attaching to their signature of accession reservations which are not accepted by the other parties to the convention, but it may well be that a State may desire to make a reservation which, if it had been put forward during the conference, would have been accepted by the other parties. In that case the reservation has every chance of being accepted in order to permit the State in question to become a party to the convention."

This report was adopted by the Council on 17th June, 1927 (*ibid.*, p. 800). Analysis of this discussion shows that the sense of the Council was that the right to object to reservations is given to the parties to the convention, and not to the States which took part in the conference at which

it was drafted, which do not have special rights in this regard. It is on this basis that the practice of the Secretariat of the League, and later of the United Nations, has developed. It will also be noted that this incident did not go so far as to discuss in thorough detail the problem of the legal consequences when a reservation is not accepted by the other parties to the convention.

(c) *General rules of law applicable in the present case*

Faced with these divergencies of practice, the Court has to make its choice. It can only do so on the basis of established rules of law. It is suggested that three general rules of the customary international law relating to treaties generally are applicable and of assistance in the problems facing us. The consequences from the application to the Genocide Convention of each of these rules will accordingly be considered. The rules are:

*(i)* The rule *pacta tertiis nec nocent nec prosunt;*

*(ii)* The rule that the primary objective is to give effect to the intentions of the parties; and

*(iii)* The principle *ut res magis valeat quam pereat.*

*(i)* The rule *pacta tertiis nec nocent nec prosunt.*

It can be stated to be a general principle of customary international law that treaties are confined, both as regards their conclusion and as regards their effects, to the parties which have concluded them. In our present context the existence of this rule gives rise to the problem of what States have concluded the Genocide Convention and what States are to be considered as third States, as well as to consider the position of would-be parties.

In considering this problem we have to proceed from the terms of the Genocide Convention itself. Incidentally, the Convention only once actually refers to the parties to it, that is in Article XV. On the other hand, Articles I, V, VII, VIII, IX, XII, XIV and XVI use the expression "contracting party", which means the same thing.

There is, of course, no doubt that when a State ratifies, or accedes to, the Genocide Convention, that State will have done all that is required of it in order to become a party to the Convention. It will have concluded the Convention. The Convention itself may not necessarily be in force, either generally or in relation to that particular State; for as we have seen the entry into force of the Convention is dependent not merely upon ratification, but also upon certain other factors such as the passage of time—ninety days—and the existence of a certain number—twenty—of other instruments of ratification or acceptance. The implication is that States which have deposited their instruments of ratification are parties to the Convention. Otherwise it is not possible to give any effect to Article XV. That is why a distinction exists between a State which is a party to the Convention actually in force—what we have termed an actual contracting party—and a State which is a party to the Convention which has itself not yet entered into force, what we have termed a potential contracting party.

When each of the individual States has done all that is required of it to make the Convention binding upon it, the *nexus* of legal obligation

will have been established with every other State that does likewise. As the Convention provides that it shall be ratified, and that the instruments of ratification shall be deposited, the individual States will not have done that until they have not merely ratified the Convention, but actually deposited their instruments of ratification. Upon that date they will have concluded the Convention and become contracting parties to it. The same applies, *mutatis mutandis*, not to the signatories but to States which subsequently accede to the Convention, and it is from these contracting parties that the rule *pacta tertiis nec nocent nec prosunt* emanates. They, and they alone, are not third States.

However, as we have seen, the Convention also gives some *rights* to States which are not parties to the Convention. These rights, which are not complemented by any corresponding duty, are enjoyed against a body, the Secretary-General, which likewise is *not* a party to the Convention. Obviously, the *exercise* of these rights, including the right to require performance of those duties, is not necessarily conditional upon the Convention being in force. Pragmatically, indeed, the exercise of some of these rights by at least twenty States is essential for the Convention ever to become in force. It is part of the process of concluding the treaty. The exercise of these third-party rights is so to speak a bilateral transaction between the State concerned and the Secretary-General, which produces effects as regards other parties to the Convention when the quantitative and temporal conditions laid down in the Convention have been fulfilled.

The weight of authority in support of the proposition that the expression "party to a convention" refers only to those States which have done all that is required by the Convention to make themselves legally bound by its terms is overwhelming. Nevertheless, it is sometimes heard that the expression "contracting parties" refers to the signatories, even where the Convention expressly states that it shall be ratified. What is perhaps the most outspoken example of this point of view is provided by the decision of the House of Lords in the case of *Philipson* v. *Imperial Airways:* see *Annual Digest of Reports of International Law Cases*, 1938-1940, Case No. 178. This case turned upon the construction, in municipal law, of the phrase "High Contracting Party" as used in the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air of 12 October, 1929 (137 L.N.T.S. 11). This Convention also states that it "shall be ratified" and that it shall "come into force" on the happening of certain quantitative and temporal events. The decision there that the expression "High Contracting Parties" referred to all the signatories was based upon a close analysis precisely of the formal clauses of the Convention, and not upon the more fundamental basis of its operation, although it was the operation of the Convention that was at issue. Little wonder that the learned editor of the *Annual Digest* referred to it as "an unorthodox interpretation by the House of Lords of a technical term possessing an established meaning in international law". This case gave rise to an exchange of diplomatic correspondence shortly afterwards and the Government of the United States subsequently wrote, in relation to this case and the Warsaw Convention :

> "This Government considers that, in the case of any treaty or convention to which it is a signatory, it has not accepted any

obligations or acquired any rights until it has duly ratified such instrument .... and until the requirements of the treaty or convention with reference to exchange or deposit of ratification also have been fulfilled by it." (Hackworth, *Digest of International Law*, Vol. V, p. 199.)

It may be objected that this criticism of the theory that the expression "Contracting Parties" refers to the signatories, and not merely to the States which have ratified the Convention, as is here put forward, is based upon excessive positivism ; and that if, in relation to the interpretation of treaties and the law of treaties generally, the essential focus point of attention is the operation of the treaty and not its form, one must have regard also to the technique by which the treaty was drafted, the need it was intended to meet and the States given rights under it, even though such States are not contracting parties. Attention to these points might disclose that signatories, and even States entitled to accede, may have rights and may be under duties virtually undistinguishable from the rights possessed or duties owed by States which have ratified the convention, especially when the treaty has been drafted under the auspices of the United Nations. It could be pointed out, for example, that there is a tendency to regard treaties not in force as nevertheless possessing some value at least as evidence of customary international law. A noteworthy example of this line of approach has been furnished only last year by the International Law Commission, which wrote in its Report :

"Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force ; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently, conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. *Even multipartite conventions signed but not brought into force* are frequently regarded as having value as evidence of customary international law." (G.A.O.R. fifth session, Supplement No. 12 (A/1316), paragraph 29.)

This attitude did not pass unchallenged in the Sixth Committee last autumn, where examples of actual State practice to the contrary were given. See A/C.6/SR.230, pages 121, 124, A/C.6/SR.231, page 129. It cannot be regarded as representing an agreed and accepted statement of the attitude of States, and it is, therefore, not yet possible to draw from such a tendency any conclusions which might strengthen the existence of a right to object to reservations to treaties on the part of States for whom the treaty does not possess what is their term "conventional force".

This is a convenient place to refer to the alleged anomaly which is described on page 56 of the United Kingdom written statement, that would exist if the solution of the Court should lead to the situation that two countries can both be parties to the same convention, and yet that

convention may not be in force between them. This state of affairs is, in fact, not unknown to the customary rules of international law applicable to treaties. The commonest instance of a multilateral treaty not being in force as between two parties to it is seen when the severence of diplomatic relations between two governments suspends the operation of treaties between their two States. This example is sufficient, it is submitted, to show that the suggested anomaly is not so far-reaching as might be otherwise inferred.

We have dwelt on this problem of the "parties to the convention" at some length, because it seems to be the most important basis upon which the right of States to object to reservations, even though they have not ratified the convention, can rest. The analysis given above tends to establish, in positive form, that rights connected with the treaty are only given to States which have ratified the treaty, that is to say, which have done all that is imposed upon them in order to become bound by the terms of the treaty. Wording it negatively, no rights of any description whatsoever arising out of the treaty are given to States which have not ratified it, including would-be parties, unless the treaty expressly so provides. In particular, such States have no right to object effectively to proposed reservations, unless and until their objection is appended to a valid and effective act of ratification or accession.

Furthermore, this seems to be the only practical view. Treaty-making in international law has only the most superficial resemblance to contract-making in municipal law. Treaty-making is a long and complex process. The final text may not satisfy every Power. Indeed, the greater the number of States that participate in the drafting, the harder it is to secure universal agreement. The treaty is no more than the common denominator of agreement. For some it may go too far : for others not far enough. Once the text is established, that argument is ended. The making of reservations, which are limited to the framework established by the text of the treaty itself, is a very restricted means by which a State can nevertheless safeguard its point of view. To allow every State individually a say in whether a State putting forward reservations can or cannot be regarded as being a party to the convention would destroy the whole efficacy of the international conference, whether within or outside the United Nations, as a method of drafting treaties, without putting anything in its place. It would be impossible ever to know, in the words of the Preacher, when it is "a time to plant and a time to pluck up that which is planted" (Ecclesiastes 3 : 2).

*(ii)* The intentions of the parties.

The second rule, Mr. President, is that the primary object is to give effect to the intention of the parties. There is no room for doubt as to the intention of the parties to the Genocide Convention. It is to give effect to the universal international desire to define clearly what genocide is and thus to disperse the fog of uncertainty that surrounds customary international law on the topic, and at the same time to establish an obligation to co-operate in the prevention and punishment of the crime so defined. This intention is clearly expressed in the Convention itself—Preamble and Article I. It is also clearly in evidence from the whole history of the United Nations action in relation to the problem of genocide.

It was plainly intended, as a corollary to the above, that a large number of States—the largest possible—should be parties to it : see Articles XIII and XV. Care therefore has to be taken that this intention is not thwarted by artificial limitations said to be based on general principles of law, when the Convention itself clearly establishes a special law for the matter.

The application of the rules of customary international law relating to treaties must therefore be such as not to prejudice the realization of these basic aims.

*(iii)* The principle *ut res magis valeat quam pereat.*

It has been said that the principle of effectiveness has played a prominent and evergrowing part in the administration of international law, and I refer to Professor Lauterpacht's article "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" in *British Year Book of International Law* (Vol. 26 (1949), 48, at p. 67). In one form or another the principle has arisen in many of the cases that have come before this Court, and its elements and extent have been argued at length. In the past, I think it is true to say, the principle has been operative primarily as a guide in the interpretation of treaty texts. Here we are not faced with a simple problem of the interpretation of the text of a treaty, but with the more complex situation arising out of the existence of a gap in the treaty. In filling this gap the Court is being asked to say that the principle *ut res magis valeat quam pereat* is not merely a principle to serve as a guide in the interpretation of a treaty text, but is a principle of the general international law as a whole relating to the operation of treaties, which is to be presumed to have been within the contemplation of those who drafted it. Moreover, in this case there is no conflict between this principle and the intention of the parties. There is no evidence whatsoever to suggest that the parties intended, what Professor Lauterpacht in the cited article has termed : to produce a non-committal political declaration rather than a statement of legal rights and obligations. No difficulty is therefore seen in saying that in order to fill the gap in the Genocide Convention the method adopted must be such as to give the maximum effect to the intention of the parties that the largest possible number of States be enabled to become parties to the Genocide Convention. In other words, the Court is not here being asked to attribute to the Genocide Convention a meaning which would be contrary to its letter and spirit, and to do so on the basis of the maxim : *ut res magis valeat quam pereat.* This enables us to distinguish clearly between the circumstances of the present case and those which arose, for example, last year in the second phase of the *Peace Treaties* case (I.C.J. Reports, 1950, p. 221, at p. 229).

## III.—Possible challenges to the view that only parties to the treaty are entitled to object to reservations made by other states on their becoming parties to the treaty

In addition to possible arguments based upon a wide definition of the term "parties to the treaty", which we have examined earlier in relation to the rule : *pacta tertiis nec nocent nec prosunt*, there are several other possible grounds which, if accepted by the Court, would lead to the creation of a rule to the effect that certain States which are not

parties to the convention are nevertheless entitled effectively to object to reservations made by other States which are parties or intending parties to that convention. I think that there are two broad grounds upon which this thesis could be advanced, and I will deal with them because they seem to be the most extensive and, by implication, to include all other possibilities. The first is based upon what is said to be a new technique in treaty-drafting : the second is based on an alleged rule of law under which States entitled to become parties to the treaty have actual rights to accede to the definitive text of the treaty as finally drafted, so that the parties to it have no right to alter the balance of obligations arising under it. The first thesis is based on the mechanics of treaty-making : the second on the substance of treaty-law.

Before entering upon this examination, this is the place to digress somewhat from our main theme, and to refer to the argument put forward on page 66 of the written statement of the United Kingdom, to the effect that the third question put to the Court assumes a negative answer to the first question, because if it is found that States *can* become parties to the Convention while maintaining reservations which have been formally objected to by other States, then it becomes largely pointless to enquire *who* has the right of objection, since no objection at all can be effective to prevent participation in the Convention by the reserving State. It is at once conceded that a negative answer to the first question would make it pointless to devote much time to the third question. On the other hand, given the conditions under which the Request for the Advisory Opinion was drafted, including the material fact that the important Report of the Secretary-General (Doc. A/1372) was not circulated until 20th September, 1950, the very commencement of the fifth session, and that the debate itself opened in the Sixth Committee on 5th October and the consequent haste and strain in which the discussion proceeded, it is not a matter for surprise that the Request for the Advisory Opinion should perhaps be somewhat imprecise in its wording. It is clear that what the General Assembly desired was an authoritative opinion on all the aspects now before the Court, and it cannot be accepted that the fact that question III is worded as it is worded, implicitely assumes anything as to the answer to be given to question I. Furthermore, this argument does not take into account the possibility that the Court might give a qualified answer to question I, such as is in fact suggested by the Government of Israel. Having regard for the terms of Article XIII and Article XV of the Genocide Convention, it is believed that it is very much to the point to enquire who has the right of objection, and that such enquiry is not postulated upon any pre-conceived notions as to the answer to be given to question I. More than that : it is possible that by examining some of the possibilities inherent in a consideration of question III, the conclusion will be reached that an affirmative answer is the correct answer to question I, subject to the qualification proposed when the matter arises out of Articles XIII and XV of the Genocide Convention.

[*Public sitting of April 12th, 1951, morning*]

May it please the Court,

*(i)* Possible consequences of new developments in treaty-making techniques.

The Genocide Convention is "the first international treaty ever prepared by the United Nations to be proposed for signature and ratification by the States of the world". (Nehemiah Robinson, *The Genocide Convention, its Origins and Interpretation*, p. 1.) The Secretary-General has written that multilateral conventions drawn up under the auspices of the United Nations "by their very nature have a world-wide character by which States in very diverse circumstances agree to be bound, and presumably agree to be bound in exchange for the similar consent of all parties", and he has called the Genocide Convention the "true type of legislative convention having the object of creating rules of law for identical operation in the different States adopting them". See Document A/1372, paragraph 32.

I have tried to give in this statement another analysis of the Genocide Convention as well as certain conclusions which can or cannot be derived from the manner in which it was drafted, and these conclusions are somewhat different from those put forward by the Secretary-General. In the light of these different views the question seems to arise, having regard for the particular universal characteristics of the Genocide Convention : would effect be better given to the intentions of its framers by the application of what the United States has termed "a liberal rule respecting reservations" which will "promote maximum acceptance by the greatest possible number of States of the obligations defined by the Convention and will avoid either a general undermining of the standards accepted by many without reservation, or imposing any new obligations without the necessary consent of all upon whom they fall" ? (Court Distr. 51/10, p. 27[1].) Or is the Secretary-General's approach, which is based upon what I might call the preservation of the wholeness of a legislative text, the more correct ? The Government of Israel believes that for reasons which we have tried to express in these proceedings, there is nothing which would warrant any deviation from the liberal rule, which certainly has a well-established existence of its own in international relations, and in international law.

It has already been explained that, making all due allowance for the institutional framework provided by the United Nations, in which the Genocide Convention was framed, in the ultimate analysis there was no essential difference between the procedure adopted for drafting this Convention and that, say, used in the case of the four Geneva Conventions of 1949, which were also concluded after a diplomatic conference, which itself was preceded by some years of experts' preparatory work ; see *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume I, particularly pages 45-143 and letter and memorandum on pages 147-148. Yet this procedure, what I would call the normal procedure, itself opens the way to another challenge to the view that only parties are entitled to object to reservations. Cast in its widest form, this challenge is based upon what might be termed the analogy of the bi-cameral legislature. Balladore Pallieri, in his recent lectures in this city, has suggested that the modern legislative technique of international law—the conference and signature as one stage and ratification of the convention as the second— has an analogy with the legislative process which is followed in a bi-cameral legislative assembly : "La Formation des

[1] See p. 31 of this publication.

Traités dans la Pratique internationale contemporaine", in *Recueil des Cours* de La Haye, Volume 74 (1949), 469, at page 509.

On the basis of this analogy certain legal effects are attributed to the act of ratification which it otherwise does not have; and this could be taken to justify the view that States not bound by the convention nevertheless have rights in connexion with the making of reservations, at all events if their acts of ratification are part of what might conveniently be termed "the law-making process". Now I think that, speaking generally, there is a logical fault in approaching problems of international law and international administration by the standards of municipal law and municipal practices, and that there is a grave danger in drawing hasty analogies from municipal law and practice—as indeed the Court pointed out in its Advisory Opinion on the *International Status of South-West Africa: I.C.J. Reports 1950*, 128, at page 132. The essence of this system of legislation is that both houses of the Legislature have to pass, in the proper manner, an identical text, and in that process the Chamber which first passes the text has *rights* against that which passes it second: in particular, a right to approve the work of the Second Chamber if it differs from that of the First. Clearly, no such analogy exists with that particular form of international legislative technique known as the diplomatic conference which, as we have seen, was actually the technique employed here. The analogy would only exist if the process of ratification were somehow or other carried out by a collegiate act of all the ratifying States in plenary conference, and the world is still far from that, if such a process will ever be practicable.

*(ii)* Alleged rule of law under which third States do have certain rights under the treaty.

From the starting point, which is not contested, that the treaty itself gives certain rights to States not parties to it, namely, in particular, the right to accede and the right to the benefit of certain ministerial services to be performed by the Secretary-General, the suggestion is advanced with some vigour by the United Kingdom that those States have the right to accede to the definitive text of the convention *as drafted*, and this means that the States which actually take the necessary steps to become bound by the convention are not entitled, by proposing or agreeing to reservations, to alter that text, or rather the balance of legal obligations arising under it, without the consent of all the States entitled to become parties to the convention, or at least of those which took part in its drafting. In this connexion it may be said that there is seen to be no substantial legal difference between the position of States which took part in the drafting of the convention, and that of all other States entitled to accede. The same inchoate character is impressed upon the rights of all States entitled to accede which have not done so, and the fact that some of them participated in the drafting of the convention is, from the legal point of view, an immaterial fact, whatever other implications and importance it might have.

This theory is open to several objections, whether considered in the abstract, or in relation to the Genocide Convention itself.

In the first place, if this rule is correct, it will mean that in actual practice *no* reservations would ever be admissible to any convention whose accession clause is similar to that in the Genocide Convention, for the simple reason that the *corpus* of States entitled to become parties

is never fixed but is, by operation of Article 4 of the Charter, or a resolution such as Resolution 368 (IV) of the General Assembly, always liable to variation. This means, carried to extremes, that it will never be possible to solicit the views *a priori* of all the States entitled to become parties to the convention. But, as we have seen, international practice rejects any solution which would result in excluding reservations altogether.

Secondly : it will be noted that the third party rights given by the Genocide Convention all derive from what are commonly called the formal clauses. The United Kingdom states that, strictly speaking, all such clauses ought to be placed in a separate protocol. (Court Distr., 51/10, p. 68[1], fn. 1.) This is believed to be technically correct, and it follows from it that the third party rights, which derive from the formal clauses which ought to be placed in a separate protocol, are operative only against those clauses, and not in relation to the convention as a whole, which ought to be included in a separate instrument.

Thirdly : even admitting, for the purposes of argument only, that third States do have the right to accede to the text as drafted, this does not affect the question of reservations. Reservations do not alter the definitive text as it exists when the process of negotiation and drafting is completed, or the general balance of obligations deriving from the convention. What they do achieve is admittedly an alteration in the specific balance of obligations in force between the States which accept the reservations and the States making the reservations : and in our view the treaty is not in force at all between the reserving State and the States which object to the reservations. I do not think that the Court is being asked to hold that a State which accedes to a convention at a later date is bound to accept all the reservations antecedently made, at all events if that State was entitled to become a party as from the moment the treaty was open for signature. The position might be different for a State not then in existence, but having regard for the terms of the request for the advisory opinion, neither of these points seem to be up for discussion in these proceedings.

The United Kingdom has stated that it would limit the exercise of this right to a reasonable time. This offer seems to partake of a political character and cannot change the legal situation, nor indeed does it affect essentially their fundamental argument, based as it is on what is termed the provisional or inchoate character of the rights possessed by these States. Furthermore, it raises the question of who shall decide what is a reasonable time. This itself is a question which should be considered during the drafting of the convention, and not subsequently, and it seems rather difficult to see how a law-applying organ can decide this sort of matter.

This thesis is one which, if carried to extremes, would make it practically impossible to conclude international treaties, particularly those of a law-making character. The rule *pacta tertiis nec nocent nec prosunt* is not a simple rule of treaty interpretation. It is one which relates as much to the actual operation of treaties. For this reason alone it is itself subject to an extensive interpretation and application. That is to say : the grant of rights to States which are not parties to the treaty is itself to be regarded as a departure from what international law regards

[1] See p. 72 of this publication.

as the normal state of affairs. The rule applies, therefore, not only to rights, the root of title of which is the convention itself—and this includes the right to become party to the convention—but also to rights relating to the convention and the parties to it, the roots of which lie in general principles of law. This can be demonstrated by several examples. Thus : only the parties to the convention may, subject to any applicable jurisdictional clauses, interpret the convention with binding effect. Only the actual parties are, *prima facie*, entitled to demand the performance of the treaty, and to determine whether it is being duly performed. Only the actual parties to a convention are, *prima facie*, entitled to revise it. Once it is admitted that the inchoate or provisional interests of States entitled to become parties to the convention are wide enough to include not only the right to accede, but *ipso facto* various other kinds of rights as well, themselves not related to the actual operation of the accession clauses, it is difficult to see where these inchoate rights, which are not balanced by any form of duty, would end. The consequences of permitting such extensive and ill-defined rights to States not parties to a treaty, unaccompanied by any form of duty whatsoever, are so far-reaching that they themselves ask the question whether that really is the law.

## IV.—Conclusion

I have, Mr. President, substantially completed my statement ; but before presenting my conclusions in summary form I should like just to say the following.

On reading through the record of yesterday's meeting, I find that I did not perhaps make myself sufficiently clear about one point in connexion with the admissibility of reservations to the Genocide Convention as of right. In our view, it is only possible to assert a right to put forward reservations in connexion with the operation of the contractual parts of the Genocide Convention. There is no right to do so in relation to those parts of the Convention which operate at large—the normative parts of the Convention. The reasons for this distinction have been explained in somewhat greater detail in paragraph 10 of our written statement, to which I beg leave here to refer.

In other words, the views expressed in these proceedings as to the consequences of a reservation and of an objection to a reservation, refer only to the contractual parts of the Convention. As for the normative parts, quite clearly reservations are only admissible with the consent, which may be expressed, implied or tacit, of all the parties to the Convention, the expression "parties", of course, having the meaning which I have tried to give it in this statement. I find it necessary to make this explanation because otherwise there exists a danger that my words could be interpreted in such a way as would end up by destroying the efficacy of the whole Convention. Needless to say, nothing was further from my mind than that.

With your permission, Mr. President, I will now summarize the conclusions contained in the Government of Israel's written statement as supplemented in these oral remarks.

1.—The Convention on the Prevention and Punishment of the Crime of Genocide contains stipulations of a normative character and stipula-

tions of a contractual character. However, as is clear from its text and from the whole history of United Nations dealing with the problem of genocide, the intention of its framers was equally to codify, at least in part, substantive international law, and to establish international obligations to facilitate international co-operation in the prevention and punishment of the crime. Consequently, the Convention cannot be regarded as a single indivisible whole, and its normative stipulations are divisible from its contractual stipulations.

2.—The essential legal characteristics of reservations is that they are contractual. They are admissible as of right in relation to the contractual stipulations of the Convention. As for its normative stipulations, they are admissible only with the consent of all the parties.

3.—The only States which are entitled to make a valid and effective objection to reservations put forward by other States are the parties to the Convention at the time. "Parties to the Convention" means those States which have effectively ratified or acceded to the Convention in accordance with its terms.

4.—As and to the extent that reservations may be put forward as of right, the fact that objection may be made by a State entitled to do so does not normally affect the status of the reserving State as a party to the Convention. But then there will be no *nexus* of treaty obligation between the reserving State and the objecting State. However, for the purposes of Articles XIII and XV of the Convention only, in those circumstances the reserving State ought not to be included in the enumeration of States required to bring the Convention into force, or to maintain it in force.

The application of these conclusions to the Genocide Convention will, it is respectfully submitted, lead to the answers suggested in the last paragraph of the written statement of the Government of Israel.

I thank you, Mr. President, for the great courtesy and attention with which you have heard me.

## 3. STATEMENT BY SIR HARTLEY SHAWCROSS

(REPRESENTING THE UNITED KINGDOM GOVERNMENT)
AT THE PUBLIC SITTINGS OF APRIL 13th, 1951

[*Public sitting of April 13th, 1951, morning*]

Mr. President, Members of the Court,

I must apologize for not having been able to be present during these proceedings from the commencement ; but I am very grateful to you for allowing me this opportunity of presenting in person some part, at least, of the case on behalf of the United Kingdom Government.

My Government was particularly anxious that I, as the present Chief Law Officer of the Crown, should make an appearance here, both because, if I may say so, of the very high respect in which the United Kingdom Government holds the Court—a Court which is entitled to receive all possible assistance from the States which support it, as the British Government traditionally has—and also because of the importance which my Government attaches to the subject-matter which you are considering. I, personally, was also anxious to appear, not only because it is always a pleasure as well as an honour to appear before this great international Court, but because of the fact that I myself had some part in the initial discussions about the question of genocide both at Nuremberg and later at Lake Success and Paris, although I must add that I accept no responsibility for the expression "genocide" itself.

His Majesty's Government in the United Kingdom is in general support of the practice which is growing up now in international affairs, and which is exemplified in the Genocide Convention, the draft Covenant on Human Rights and other conventions, of concluding multilateral treaty arrangements which seek to lay down minimum standards of international conduct in regard to social and humanitarian matters. We view this procedure as being of great importance, especially at this time when there are conflicting ideologies of one kind and another, and where basic principles often seem to be imperilled. We think that if common rules of conduct in these matters can be established between States, it will not only promote humanitarian ideals and protect minimum human rights, but in time it will conduce to better relationships between the States. But, Mr. President, they must be common rules and general minimum standards, and that is why, speaking broadly, we are opposed to any extended right to make reservations to the multilateral conventions which may be concluded about matters of this kind. There is, I venture to suggest, a somewhat dangerous tendency nowadays to lay down ambitious, high sounding, even sometimes extravagant standards, and then because they are too ambitious and too much in advance of general international practice, to permit reservations from them, so that in the end, far from constituting common standards, they really become frauds and delusions. We would sooner see the conventions framed in terms to which every State can honestly adhere without reservations. We would rather see that kind of convention drawn up than something which is in advance of world opinion, cast in over-

ambitious terms to which States may be prepared to give lip-service at the Assembly of the United Nations, but to which they make reservations when it comes to the question of carrying out the obligations which have been agreed to. If the practice of allowing reservations to this kind of multilateral convention is discouraged, States may approach the preparation and the negotiation of these conventions with more realism and honesty, and less lip-service than perhaps they sometimes do.

Mr. President, I venture to say that because that is the general approach which my Government makes to these matters. My learned colleague, Mr. Fitzmaurice, has explained to me the interesting and important arguments which have already been addressed to the Court. I have thought that it would be more courteous and also more effective, if Mr. Fitzmaurice, having heard the arguments in Court himself, should make such comments as may be appropriate about them presently, and I understand you have been kind enough to say that Mr. Fitzmaurice might follow me presently and make some additional comments to my own. That being so, I apologize to my colleagues who have already spoken—my colleague from Israel, and my old friend and colleague, Mr. Kerno—for not having heard their arguments, and for not pretending now to deal in any detail with them. What I propose to do, if it meets with the approval of the Court, is to divide my arguments in this way. First I shall say something about the competence of the Court to give an Advisory Opinion which I see has again been questioned; or at all events it seems to be suggested that the Court, even if strictly competent to give an Advisory Opinion, ought to decline to exercise its jurisdiction in the present case. Next, passing to the substance of the matter, I shall begin by trying to eliminate certain issues which are inclined to obtrude themselves into this matter, but which are in my opinion irrelevant, and which I shall suggest the Court ought to try to exclude from its mind. After that, I shall discuss the three main doctrines which are in existence about this matter or have been advanced on the subject of the validity and the effect of reservations which it may be sought to make to multilateral conventions, thus covering the first and second questions put to the Court. Finally either I, if I have the time, or my colleague, Mr. Fitzmaurice, will deal with the third question.

## II

As regards the question of competence, several grounds are advanced on which it is suggested that the Court is incompetent, or at any rate that it should decline jurisdiction. With some of these we have already been made familiar in the *Peace Treaties* case. It is argued that there is a dispute actually pending between certain States in relation to the subject-matter of the present Request, and it is suggested that, in consequence, the Court should not give an Opinion without the consent of those States—a consent which is not forthcoming. One need not discuss whether a dispute in the normal sense of the term can be said to have arisen solely because certain States have entered reservations to the Genocide Convention to which other States have objected. Even if that were so, the Court, in the *Peace Treaties* case, expressly rejected the view that the existence of a dispute in relation to the subject-matter of a Request for an Advisory Opinion constituted any bar to the exercise of the Court's jurisdiction, and I should like to recall to the Court

what it said on that occasion. I take this passage from page 71 of the Court's Reports for 1950 :

> "Another argument that has been invoked against the power of the Court to answer the questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.
>
> This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.
>
> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character : as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it ; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused."

Mr. President, I suggest that those considerations apply with equal, if not greater, force to the present case. Quite apart from the doubt whether any specific dispute exists, there is the point, to which we directed the attention of the Court in our argument in the *Peace Treaties* case, that Articles 82 and 83 of the Court's Rules expressly contemplate the possibility that a Request for an Advisory Opinion may relate to a dispute which is pending between two States, thus making it clear, by implication at least, that the existence of a dispute is not in itself a bar to the rendering of an Advisory Opinion by the Court. The effect of these two rules of the Court is, first, that if an Advisory Opinion is requested upon a legal question actually pending between two or more States, either of them may be allowed to appoint a judge *ad hoc* if a judge of its own nationality is not already on the Court. Secondly, the effect, taken in conjunction with Article 68 of the Court's Statute, is that the Court is to be guided by the provisions relating to contentious cases "to the extent to which the Court recognizes them to be applicable". In the *Peace Treaties* case the Court dealt with that point also, and with the question how far the non-consent or opposition of States which might be affected by an Advisory Opinion constituted a reason why the Court should not give such an Opinion ; and on page 72 of the *Reports* the Court said :

> "It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases.

> But according to the same article these provisions would be applicable only 'to the extent to which it [the Court] recognizes them to be applicable'. It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter. In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it. That being the object of the Request, the Court finds in the opposition to it made by Bulgaria, Hungary and Romania no reason why it should abstain from replying to the Request."

That, Mr. President, again, I suggest, applies with equal force to the circumstances of the present case. In this passage which I have read, the Court was dealing not so much with the question of actual competence, as with that of the *propriety* of giving an Opinion. As the Court had pointed out in an earlier passage, there were certain limits to its duty to reply to a Request for an Opinion, and Article 65 of the Statute was merely permissive, enabling the Court to give an Opinion, but also empowering it, as the Court put it, "to examine whether the circumstances of the case are of such a character as to lead it to decline to answer the Request". It is clear that in the *Peace Treaties* case the Court, in arriving at the conclusion which it did on this matter, was impressed by the fact that the Opinion was one which was required by the General Assembly of the United Nations for the purposes of carrying out its own functions. But the position, in our submission, is not really different here in the present case. The Genocide Convention was a convention drawn up by the General Assembly itself, after a great deal of labour, in furtherance of one of the principal objects of the United Nations. The Secretary-General of the United Nations is the depository of all ratifications and accessions which may be made to the Genocide Convention. It is essential that the Secretary-General should know, and that the General Assembly should know and the Members of the United Nations should also know, whether ratifications and accessions which are made subject to reservations are valid. It is essential that they should know what the effect of the reservations may be. This question of the effect of any reservation, and of its effect on the validity of any particular ratification or accession, is by no means a matter which solely concerns the interests of two particular States, one of which has entered a reservation and the other of which has made an objection to it ; it is a matter which concerns the Organization as a whole and every one of its Members, and which also affects the functions and position of the Secretary-General. It is therefore a perfectly proper matter for the General Assembly to ask the Court for an Opinion on them, and I respectfully submit that it is a matter on which the Court, as "the principal judicial organ of the United Nations", ought not to decline to give the Opinion requested. Its object is not to settle a dispute between particular States but to enlighten the Assembly, and the individual Members of the United Nations, as to their position, and as to each other's positions, in relation to the Genocide Convention.

There are also certain other grounds on which it is suggested that the Court should decline jurisdiction. One of these is that Article IX

of the Genocide Convention itself should be regarded as a bar to the exercise by the Court of its advisory functions in the present case. This is the article which says that disputes between the contracting parties to the Genocide Convention, relating to its interpretation, application, or fulfilment, shall be submitted to the Court at the request of any of the parties to the dispute. As to this, completely contradictory arguments seem to be advanced in support of the view that this article forms a bar to the jurisdiction of the Court. On the one hand, the Government of the Philippines says, in effect, that there is a dispute between it and the Government of Australia as to the validity of the reservations to the Convention entered by the Government of the Philippines. Therefore, in its submission, this is a matter which ought to go before the Court under Article IX of the Convention, although, according to the Government of the Philippines, only by means of an agreed submission on its part and on the part of the Government of Australia, acting in conjunction. The Government of the Philippines accordingly appears to suggest that the Court should decline jurisdiction in order to enable those two Governments, as parties to this alleged dispute, to bring the matter before the Court themselves by an agreed submission (if indeed one be agreed) under Article IX of the Convention. The Government of Poland, on the other hand, while apparently maintaining that the existence of Article IX of the Genocide Convention prevents the matter coming before the Court in any *other* way, under that article, at the same time seem to imply that it cannot come before the Court even under Article IX, because there is *not* at present any dispute and no party has requested references to the Court. Failing the fulfilment of those conditions, the matter cannot be brought before the Court under Article IX of the Convention, and therefore, according to the Government of Poland, ought not to be brought before the Court by way of a Request for an Advisory Opinion.

It is a curious sidelight on the attitude of the Government of Poland in putting forward this argument, that that Government is itself one of the governments which has entered a reservation excluding the application of Article IX of the Convention to itself. I find some difficulty therefore in understanding its position when it puts forward the existence of this article as a reason why the Court should decline to give an Advisory Opinion.

But in any case I suggest that the views, both of the Government of Poland and of the Government of the Philippines, as to Article IX are totally misconceived. In the first place, they exhibit that confusion between the Court's jurisdiction in contentious cases and its advisory jurisdiction to which the Court drew attention in the relevant passage from the *Peace Treaties* case which I have already quoted. Even if Article IX of the Genocide Convention were applicable in the present case, that would not of itself prevent the Court from giving an Advisory Opinion on the matter to the General Assembly of the United Nations. However, I suggest that Article IX of the Convention is clearly not applicable to the present case for reasons which, I suggest, must be evident to anyone who considers its actual terms in the present context. The article only applies to disputes "between the contracting parties", and the very question involved on the present occasion is whether countries can be regarded as contracting parties to the Convention if they enter reservations which other interested countries object to. That

is a question which lies outside the Convention, and has to be decided before it can be settled whether Article IX is applicable at all. To put the matter in another way, Article IX is itself a part of the Convention. Before it can become applicable, the Convention itself must be applicable. The obligation to refer a dispute to the Court under Article IX can only arise where the Convention is operative between the parties to the dispute. But it is precisely the object of the present Request to discover whether the Convention *is* operative where reservations have been entered, and a difference of opinion on that subject cannot therefore be a dispute under Article IX of the Convention. The Court is not being asked, on the present occasion, to interpret the Genocide Convention itself, but to say whether; in certain circumstances, countries can be regarded as being parties to that Convention at all, and if so with what effect. That is a completely different matter.

That, Mr. President, is equally the answer to a further argument advanced, which is advanced in the written statement of the Government of Poland, namely that "the right to interpret or to seek an interpretation of the text of an agreement has always been reserved to those States only which have signed the instrument or have acceded to it. The request for interpretation of the convention voted upon by a majority of States who are not parties to it constitutes a violation of the undeniable right of its signatories." The short answer to this is that even if this argument were otherwise valid, and I certainly would not concede it without much further examination, it assumes that an interpretation of the Genocide Convention is what is being asked for in the present case, but that is not so. In fact, the General Assembly's request relates to something quite different, and is not directly concerned with an interpretation of the terms of the Convention itself.

There is yet another argument as to competence which is advanced, or apparently advanced, by the Government of Poland, namely, and I quote from their written statement, that Article 96 of the Charter "entitles the General Assembly and the Security Council to request the Opinion of the Court only in cases where this is not excluded by special stipulations or provisions". Mr. President, for my part, I suggest that there is no such limitation to be seen in Article 96, which, on the contrary, says that "the General Assembly or the Security Council may request the International Court of Justice to give an Advisory Opinion on *any* legal question". Article 65 of the Court's own Statute equally says that the Court "may give an Advisory Opinion on any legal question".

On all these grounds therefore, I submit to the Court, that no convincing reasons have been given or can be given why the Court, as the "principal judicial organ of the United Nations", and as the body to which the Assembly of the United Nations naturally looks for advice on juridical questions, should not comply with the present Request for an Advisory Opinion. In my submission, the Court ought not to restrict the exercise of its jurisdiction in assistance of the United Nations, when advice is requested, unless there are compelling juridical reasons to the contrary.

## III

Mr. President, I now pass to the substance of the matter, and I think it may be of assistance, and possibly simplify the task of the Court, if I begin by suggesting a number of questions which, in our submission, the Court is not really called upon to consider in the present case, or at any rate to express any opinion about, though they are admittedly questions which are apt to obtrude themselves into any discussion of the subject of reservations.

First, we suggest that the Court is not, primarily, called upon to consider whether it is or is not *desirable* that the possibility of making reservations to multilateral international conventions should exist; nor whether, assuming that it is desirable, one system of regulating the matter is, so to speak, better or superior to another. These are perhaps hardly legal questions. They are rather questions of policy, or in so far as they are legal questions they appear to fall more within the task assigned to the International Law Commission by the Assembly's resolution embodying the present Request. The Request to the Court relates to a specific convention, the Genocide Convention, and asks whether, in certain circumstances, States can be regarded as being parties to that Convention, and questions of desirability or policy in the broad sense are outside the scope of this Request, in the strict sense.

At the same time, I do not want to suggest that general considerations should or can be wholly excluded from your consideration, and I suppose all would agree at once that, in a certain sense, it *is* desirable that the possibility of making reservations to multilateral conventions should exist, subject to the necessary limitations and conditions. No doubt in the past there have been many international conventions to which reservations have been made, and these reservations have been accepted expressly or tacitly by the other interested parties and have consequently given rise to no difficulty. It is true that many reservations have been of a more or less formal character not affecting the substance of the Convention and not detracting from any general standard which it may seem to lay down. One accepts that the possibility of making such reservations may often assist countries in becoming parties to conventions, and may facilitate the process of ratification or accession. But, Mr. President, all this is rather irrelevant to the present case because we are dealing with an issue which, *ex hypothesi*, and by the very terms of the questions put to the Court, really contemplates something different. There is clearly a great difference between, on the one hand, the possibility of making reservations, or a faculty to do so, which is subjected to certain limitations, safeguards and conditions, and is regulated by means of a recognized practice; and, on the other hand, an unlimited, unrestricted faculty to make whatever reservations even in the face of definite objections made by other interested parties, and still to become a party to the convention in those circumstances. That is quite a different matter. We know that conventions often expressly provide for the making of reservations. Alternatively, we know that at the conference or during the negotiations when the convention was drawn up, States may specifically ask to be permitted to make some particular reservation, and such consent may be given. Or again, at that stage in the drawing up of the convention they may give notice of an intention to make a reservation, and no objection is offered; or it may happen that without any such previous

notice being given in that way, a reservation is in fact entered on signature, ratification or accession, and if no objection to it is then offered, it can be presumed to have the tacit consent of all the other parties, provided it was duly communicated to them. But that is clearly not the present case which the Court has to consider, for here we know that the reservations in question are ones to which objection is made. It is in respect of reservations to which objection has been made that the Court is asked to advise.

I suggest, therefore, Mr. President, that ordinary and well-known international practices already make full provision for, and give full effect to, the possibility of the making of such ordinary reservations as other States are normally prepared to agree to, either expressly or tacitly, and that it is therefore quite unnecessary, and indeed not strictly correct, to relate the present matter to the question of the desirability of permitting reservations to which other countries tacitly or expressly agree. Alternatively, if the two different questions are to be related, then one should be very clear what one means by the *desirability* of permitting reservations. As I have said, there is a very great difference between in fact permitting reservations by a recognized procedure involving the consent, express or tacit, of the other interested countries, and the process of permitting reservations to be made arbitrarily and unilaterally, and to be maintained in the face of the actual disagreement and objection of other interested parties adhering to the convention.

Next, I suggest that the Court is equally not called upon to consider, except by way of illustration, the *nature* of any reservations that have so far been made or may hereafter be made to this particular Convention. Not only do the questions put to the Court not call for a pronouncement on any specific reservation, but it is also not directly material to the issue before the Court what the nature of the reservation is. It is sufficient, in our submission, that it is a reservation to which objection has been offered. Apart from this it is only necessary to note that, as the written statement of the United Kingdom and certain of the other written statements point out, it is not every declaration attached to a signature, ratification or accession that constitutes a reservation in the strict sense of the term.

But, Mr. President, while the nature of the reservation is not directly material to the questions put to the Court, it may well be material by way of illustrating certain principles and theories which must be gone into, and I shall cite certain of the reservations entered by the Genocide Convention for that purpose. Moreover, although the nature of the reservation may not be directly material, apart from the fact that it is a reservation of such a kind as to have drawn objection from other interested States, the very fact that it is a reservation to which objection has been made is itself material, because it gives rise to the inference that the reservation must be of an important character, affecting the substance of the Convention in a definite way, and not something of a purely formal or minor nature. It must be assumed, in my submission, that States do not object to reservations which other States put forward merely for the sake of being troublesome or difficult. If they object, it is because they consider, either that the reservation, if permitted, would impair the value of the Convention so far as they are concerned, or because they consider it to be of such character as to be inconsistent

with, or amount to a rejection of, the substance of the Convention or some vital part of it. I submit therefore that the Court ought to try to exclude from its consideration of this matter the argument which is so frequently advanced in relation to reservations, that they are often of an unimportant or formal character, not affecting the substance of the obligations provided for in the convention, and that States should therefore have a right to make them at will. Even if this were otherwise true, it could not be true of the type of reservation contemplated in the questions put to the Court, for we know, and it is indeed postulated in the questions, that these reservations are of a sufficiently important and substantial character to have drawn actual objection from one or more of the other States concerned.

It also follows from all that I have been saying that the Court is also not called upon to go into such questions as to whether, in any given case, consent to a reservation has in fact been obtained, or as to how and by what means consent has been offered or how it can be manifested. These questions cannot arise in my submission, since *ex hypothesi* the reservations contemplated by the Request are reservations to which consent has not been given, but are on the contrary reservations to which objection has been made.

Before I leave this section of my remarks, I would like to revert for a moment to a point I have already touched upon. The questions put to the Court of course relate to the Genocide Convention. But the Court will see, both from the general way in which the questions are framed, and also from the language of the third operative paragraph of the resolution containing the questions, that the Assembly did hope to obtain some *general* guidance as to reservations to conventions which may be drawn up under the auspices of the United Nations. The third operative paragraph in the resolution makes this clear because it directs the Secretary-General, *pending the rendering of the Advisory Opinion by the Court* (amongst other things), to continue his present practice as the depositary, not merely of the Genocide Convention but of United Nations conventions generally. I suggest therefore that the Court both can and should, while giving its Opinion mainly with reference to the Genocide Convention, frame that opinion in such a way as to be applicable so far as possible to United Nations conventions of this kind, generally.

## IV

I turn now to the actual questions put to the Court. I propose to take the first two questions together, because, although the second question only arises if an affirmative answer is given to the first question, it is in fact very difficult to arrive at the answer to be given to the first question without taking account of the second. The fundamental issue put to the Court on the basis of these two questions is, as I have said, not a matter relative to the desirability of permitting a reservation, or of encouraging as many countries as possible to become parties to international conventions ; it is whether a certain thing is legally possible. The fundamental question which the Court has to answer in relation to the Genocide Convention is whether it is legally possible for a State to become a party to the Convention, and to preserve that status, while maintaining and benefiting from a unilateral reservation made by it, to which objection has been offered by another legitimately interested

State. (The first question assumes that the legitimately interested State is an actual party to the Convention. The problem whether potential as well as actual parties can offer effective objection is posed by the third of the questions put to the Court.)

To the fundamental question I have just mentioned, three completely different answers have been suggested, both in the discussions which took place in the General Assembly last autumn, and in the statements which have been submitted to the Court in the present matter. According to the first answer, it is legally possible to make and maintain a reservation under all circumstances at the simple will of the reserving country, and with the effect of making the reserving country a full party to the convention with the benefit of its reservation, even if this has been objected to by another party. According to the second view, it is *not* legally possible under any circumstances for a country to become a party to a convention while also maintaining a reservation which has been objected to by another State: in other words, according to that view, a country can only become a party to a convention subject to a reservation which it desires to make, if that reservation is consented to (by one means or another) by all the countries which have a right to object to the reservation if they are so minded. Finally, there is the third view, according to which it is legally possible for a country to become a party to a convention while maintaining a reservation objected to by another interested State, but only with limited effect, that is to say the convention will only be in force as between the reserving country and the countries which have not objected to the reservation: it will not be in force between the reserving country and those countries which have objected to the reservation. According to that last view, therefore, you can get the position that a number of countries may all be parties to a given convention and yet the convention will not be in force in the same way between certain of them.

These three views can be called, for short, the *absolute sovereignty view* (involving an absolute unilateral right of participating in conventions subject to reservations made at the will or whim of the reserving country); secondly, the *orthodox view*, as I submit it to be, involving the necessity of consent to a reservation on the part of all those States which are entitled to object to it, with the corollary that a State cannot become a party to a convention while maintaining a reservation which has been objected to, and its ratification or accession is in those circumstances inoperative. Finally, there is what I may, with respect, perhaps call the *Pan-American view*, since that view is based on the system instituted by certain States of the American continent for application to conventions made between themselves. There is, in addition, the theory which, as I have heard, has been expounded and propounded by my colleague from Israel, which consists perhaps of a combination of the orthodox view and of the Pan-American theory. I propose to consider these views in turn, reminding you that the questions of reservations to international conventions is a general question. Many, though not of course all, of the principles which apply in the case of one convention apply equally in the case of another; and it is impossible to arrive at an answer in relation to the Genocide Convention without considering *(a)* certain general principles of law applicable to all reservations to conventions, and *(b)* certain principles applicable to all conventions belonging to the same class or category that the Genocide Convention

belongs to. It is in that spirit that I shall present the substance of my argument.

## V

I will now discuss the absolute sovereignty view, or, as I should prefer to call it, the absolute anarchy view, but I shall not spend a great deal of time on it because I do not think this view can be taken very seriously. The fundamental objection to it, apart from the fact that it finds absolutely no warrant in the authorities or the past practice of nations, is that it makes complete nonsense of the whole process of negotiating and concluding conventions. That process is one which is intended to result in a text which represents the utmost measure of agreement which can be reached in the circumstances; and, as I ventured to submit in the very first remarks that I made, it is of the utmost importance that that process should be a real one. It is then for the countries which have participated in the negotiations, and for such other countries as may be given the right to become parties, subsequently to decide whether the text is sufficiently acceptable to enable them to sign and ratify it, or to accede to it, as the case may be; or whether, on the other hand, it is unacceptable, so that they are not willing to become parties to it. Obviously, that is a situation which only has meaning and reality if the text, as drawn up, is final, something which, in principle, countries must either become parties to as it stands, or not become parties to at all—unless derogations are permitted or agreed to by other States which are prepared to become parties to it as it stands. Clearly, there is no meaning in the process of negotiating and drawing up the text of a convention, which is then opened for signature and ratification or accession, if it is possible for any country at will, and even in the face of objection offered by other interested countries, not only to enter reservations of substance which may materially impair the value of the convention, or which may significantly alter the relations of the parties *inter se*, but also to become a party to the convention in those circumstances, while maintaining and benefiting from the reservations which it is seen fit to make. A classic statement of the objections to any process of this kind was made some years ago by M. Podestá Costa, a former Assistant Secretary-General of the League of Nations, in an article in the *Revue de droit international* (No. 1, 1939) entitled "Les réserves dans les traités internationaux", and I would like to read the Court the following extracts from this article; which I shall translate as I go along:

> "As has already been said, the object of all reservations is to modify in some way the meaning or the legal implications of the treaty.
>
> Every treaty constitutes a balanced body of rights and obligations arrived at by a process of reciprocal concessions. In introducing reservations at the time of its accession, a State puts itself in a privileged position and whilst those States which have made concessions in the first place have made the maximum concessions in order to reach a common basis, a State making such reservations concedes nothing. On the contrary, after having coldly weighed the pros and cons of the stipulations which have already been

agreed, it selects those which suit itself, and rejects those which it does not like. If such a position could be achieved without the consent of the other parties, the latter's position might be untenable. But it is even more serious than that. A State, without having modified its own requirements, without having made any concessions to others, without making any contribution to the collective interest, is able to restrain in its application to itself the sense and effect of a body of stipulations which already constitute a minimum common to all, and thereby upsets the balance in a way which can easily affect the juridical unity of the treaty and compromise the result of an agreement which had been arrived at with much difficulty by the reciprocal process of mutual concession."

In the written statements furnished to the Court, the main argument in favour of the absolute sovereignty theory is that all States must have a right to make what reservations they like to conventions, and to become parties to those conventions subject to those reservations, because this is an inherent right of sovereignty. This view involves a complete misconception of the right place of sovereignty in the relations between States as respects treaty undertakings. It is a view which really makes the conclusion and execution of treaties between States impossible, for every country which enters into an agreement limits to that extent the free exercise of its sovereignty. It is clear—I wish it were more generally realized and more readily acceptable in practice—that every treaty involves a derogation from absolute sovereignty ; but of course, since States enter into treaties voluntarily, no real abrogation of sovereignty without consent is involved. The right sphere of operation for the concept of sovereignty in relation to international agreements is surely this, that it is a matter entirely for the discretion of every State, in the exercise of its absolute sovereignty, to decide whether it will or will not become a party to a given convention. No State is obliged to do so, nor can it normally be made to, and in the exercise of its discretion it can decide whether it will or not (although it may be added of course, that treaty relationships between States, derogating to that extent from their sovereignty, are essential if international affairs are to be conducted in accordance with civilized concepts and are to differ from anarchy). What is quite inadmissible is the argument that it is possible to become a party to a convention but, in the exercise of sovereignty, to pick out some part of that convention which (whether other interested States agree or not) the reserving State will decline to observe.

The theory that because States are not obliged to become parties to a convention at all, they can accept what parts they please and make reservations on the rest, was considered and rejected by the late Sir William Malkin, whose views I think all those who knew him would agree are entitled to be given great weight on this subject. In his article on reservations in the *British Year Book of International Law* for 1926, he said this :

"At first sight it might be thought that, as no State is obliged to sign any convention unless it wishes to do so, any State is entitled to accept as much or as little of a convention as it may think fit, and is therefore in a position to make any reservations which it considers desirable, irrespective of the views of the other contracting parties and without obtaining their consent. But such

a view is not, it is suggested, consistent with sound principle. Multilateral conventions are after all only a form of contract in which the consideration for the acceptance of the contract by any one party is its acceptance by the others. In all conventions of this nature there are probably provisions which do not appeal much to certain signatories but which they are prepared to accept as a return for securing the acceptance of other provisions, to which they attach importance, by the other parties to the convention. If, however, any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious, not only that the object of the convention might be largely defeated, but that the consideration indicated above is impaired or even destroyed; the other signatories are not in fact getting what they bargained for. It would seem, therefore, that in principle a party to a convention is only entitled to make such reservations as the other parties are content that it should make, in which case the offer of the party concerned to accept the convention without these provisions is accepted by the other parties as a sufficient consideration for their acceptance of the convention as a whole. Or it may well be that most, if not all, of the signatories have reservations which they desire to make, in which case the acceptance by each party of the reservations of the others may be regarded as the consideration for their acceptance of its own."

The truth is, Mr. President, that a convention is not, and never can be, a mere framework, within which are located a number of totally independent and self-contained provisions. Broadly speaking, it is necessary to regard a convention as an indivisible whole. In those cases where a treaty is divisible, this is made plain in the text of the treaty. For instance, we have treaties, such as the London Naval Treaty of 1930, where it was possible to become a party to certain parts of the convention, and not to other parts. But this was expressly provided for in the treaty itself, and of course there have been other examples of treaties which provided for divisibility in regard to acceptance. Where a convention does not provide for this, it must be assumed to constitute a single whole and its different parts to be inter-related to each other. A country which purports to make a reservation of substance (and I would remind the Court that it is *ex hypothesi* reservations of substance which we are considering) is in effect not accepting the convention at all. It is really rejecting the convention and proposing to the other parties something different. If they are willing to agree, well and good. If not, then the would-be reserving country must choose either to withdraw its reservation or not to become a party to the convention at all.

Here I would interpolate that the essential indivisibility of treaties constitutes the main objection in my respectful submission, to the theory advanced by my distinguished colleague from Israel. In practice it would be impossible to say definitely whether a given clause was normative or contractual. Treaty clauses are often both, and that is certainly the case with some of the articles of the Genocide Convention, for example, Article VII.

Reverting to the absolute sovereignty theory, the totally arbitrary nature of the sovereignty conception of conventions is readily apparent if you apply the underlying principle in other legal fields. If it is possible for a country to say that it will become a party to a convention, but not to some particular part of it which it dislikes, it should equally be possible for a country, when, for instance, entering into diplomatic relations with another country, to say to the other country that it will receive its diplomatic and consular representatives but will not accord them all the customary diplomatic or consular immunities or privileges. This, I think, would be something quite inadmissible. States, in the exercise of their sovereignty, have discretion whether to enter into diplomatic relations with other States or not. They cannot be compelled to do so, but if they do do so, they must do it under the conditions prescribed by the accepted rules of international law in regard to diplomatic representatives. They cannot receive someone in a diplomatic capacity and not accord the prescribed immunities. In exactly the same way, States are not obliged to become parties to treaties, but if they do, they must become parties subject to the terms of the treaty as it has been drawn up, unless they can obtain the consent of the other parties to some variation or derogation from its terms.

The argument has been advanced that the sovereignty concept would facilitate the process of participation in international conventions. For instance, the written statement of the Government of Czechoslovakia goes so far as to argue that because paragraph 3 of Article 1 of the Charter provides that it is one of the purposes of the United Nations to achieve international co-operation in the social and humanitarian field, and to promote and encourage respect for human rights and fundamental freedoms, therefore it would be contrary to this purpose to prevent countries from becoming parties to such a convention as the Genocide Convention because other States objected to the reservations which those countries wished to make. It would be better if governments were to concern themselves, the Court may think, with the social and humanitarian conditions prevailing within their own borders, instead of advancing arguments of this kind. It is a false argument because there can clearly be no point in promoting the utmost degree of participation in international conventions, if such participation is simultaneously permitted to take place on terms and conditions that would destroy an important part of its value. For again, one must recall that we are neither dealing with, nor can we confine ourselves to the consideration of reservations which might be of a purely formal or unimportant character. According to the absolute sovereignty conception, there could obviously be no limit either to the number of reservations, or to the importance of the reservations which might be made. Indeed, if one looks at the reservations which have been made to international conventions in the past, I mean, of course, permitted and accepted reservations, one sees at once that a great many of them are of a serious character which could not possibly have been allowed without the consent, express or tacit, of the other parties. Nor can one merely look at the matter on the basis of the reservations which have so far been entered to the Genocide Convention. There are still I think another forty States which have not yet acceded, and to whom it is open to ratify or accede to the Convention. It is impossible to foretell what reservations States may try to make to it, especially if the Court

were to endorse the view that they had an absolute right to make them whether the other States consented or not.

In this connexion, attention was drawn in the written statement which we put in, to the dangers which an unrestricted faculty of making reservations would entail in the case of conventions such as the Genocide Convention. We pointed out that conventions such as this one (and indeed, the same would be true of most of the conventions of a social or humanitarian or law-making character drawn up under the auspices of the United Nations), have the peculiarity that they do not consist of an interchange of mutual benefits and obligations of a reciprocal character, or indeed of an interchange of specific benefits at all. They consist for the most part of the assumption by States of a number of obligations or liabilities, with very little in the way of concrete or tangible rights or benefits in return. They are intended to set up standards of international behaviour, benefiting society as a whole and human individuals in particular. The main benefits entailed by these conventions, apart from the knowledge that the State concerned is playing its part as a good member of the international community, are first the long-term benefits to be derived by every State from the eventual improvement in the social or economic conditions of the world, or in the relations between States, which may result from the convention; and secondly the intangible but very real benefits involved in the mere status of *being* a party to a convention of this kind, which involves for the participating States a considerable degree of credit and prestige, and influence in the world.

In such a situation, the dangers of an unrestricted right to make reservations are manifest. In the ordinary case, the making of a reservation may absolve the reserving State from the obligation concerned, but on the other hand it also entails a renunciation by it of the corresponding benefits which follow from the acceptance. In the case of the social or law-making type of convention on the other hand, the making of a reservation which detracts from the norm, absolves the reserving State from an obligation or liability while not entailing the renunciation of any corresponding benefit at all. The other parties are still obliged to carry out the provisions of the convention, and to carry them out in full, while the reserving State only has to carry them out in part, yet retains the status and credit of being a full party to the convention while not foregoing any benefit of a concrete or tangible type. This is a point the full effect of which is more apparent in relation to the Pan-American view of reservations, and I shall refer to it again later in that connexion, but it is also very material in regard to the sovereignty view.

Mr. President, I submit that the Court cannot countenance a theory which would enable States to become parties to social and law-making conventions which are concluded under United Nations auspices, while at the same time liberating themselves from any obligations of the convention which they do not think it convenient to accept. We cannot but assume that if a faculty of this kind existed, it would be at least *liable* to serious abuse, and indeed some of the reservations which have actually been entered to the Genocide Convention lend colour to that view. The argument sometimes advanced that it is better for countries to become parties to a convention such as the Genocide Convention, even in an emasculated form, than not to become

parties at all, is quite unconvincing, for reasons I shall elaborate later on. In any case, as I said earlier, the Court is not called upon to pronounce as to whether it would be better or worse. The legal question for the Court as distinct from the policy question, is whether an unrestricted faculty of making reservations on the basis of sovereignty *is or is not in conformity with the principles of international law* as they now exist. Considered in this way, I should suggest that the Court will not have much difficulty in rejecting a doctrine which is contrary to all normal legal principle, and for which no warrant is to be found in the authorities or in the past practice of the nations.

## VI

I will next turn, Mr. President, to what I have called the orthodox view. This view necessarily excludes the absolute sovereignty theory, and consideration of it will at the same time serve further to emphasize how entirely untenable the sovereignty theory really is. I call the view that in principle consent is required before a valid reservation can be made, the "orthodox" view, because there is as much foundation for it in the sphere of legal doctrine and in the practice of nations, as there is an absence of any foundation for the absolute sovereignty conception. The view that consent is necessary before a reservation which a State wishes to make to a multilateral convention can be accepted as valid, necessarily entails as a consequence that if a reservation is objected to by a country entitled to object, the reservations cannot be maintained, or, if maintained, then the ratification or accession to which it is attached itself becomes inoperative, so that the State seeking to make the reservation cannot be regarded as a party to the convention.

The view that once the text of a contractual instrument has been drawn up, it must either be accepted or not accepted, and that unilateral reservations in favour of one of the parties cannot be made without the consent of the other parties, is so much a self-evident legal principle, inherent in the very nature of the contractual relationship, that it is difficult to see how it could ever have been or could be questioned. If I arrange to sell someone a house for ten thousand Swiss francs, and our lawyers draw up a contract to that effect, the purchaser cannot, when signing it, attach to his signature a reservation that he would only be bound to pay me five thousand francs, and then say that I am still obliged to sell him my house, and for that sum of money. This seems so obvious that it hardly needs saying. Yet it is precisely a contention of that kind which is involved in the absolute sovereignty theory. But even the upholders of that theory would not seek to apply it in the field of domestic relations. On what ground therefore do they suggest that in regard to the international field it is applicable? I shall come back to that. In the meantime let us notice that in the example I have just given, what is really happening is that the other party to the contract is changing his views as to what he can give for the house, and is now in effect saying that he can only give half what he previously thought he could give. He is, therefore, in fact suggesting the conclusion of a different and new contract. I can, of course, accept or reject this. If I reject it, either he must pay the sum originally agreed, or there can be no sale at all.

The classic statement of this view, if I may say so, is contained in the following passage from Sir Arnold McNair's work on the law of treaties:

> "If I sign and submit to you for signature a written contract containing twenty clauses and you sign it after adding some such words as 'excluding clause ten' or some other expression modifying its terms, no contract is concluded, and the only effect of your qualified signature is, firstly, to destroy my offer to you by a refusal of it and, secondly, to make a fresh offer to me in a modified form. If, on the other hand, before making the modification you inquire of me whether I am prepared to assent to this change in the terms of the contract and I assent, or if I sign the contract after you have made your modification and with knowledge of it, the situation is different: a contract is concluded, though differing from that which was originally put forward."

Sir Arnold adds that "these principles have received general recognition as the basis of the law governing reservations to treaties". You find the same principles operating in the sphere of multilateral as well as in the sphere of bilateral domestic relationships. Suppose I own a swimming pool in my garden and I form a little club in the neighbourhood, of persons who will be entitled to use it on condition of paying me a certain subscription. There again, it is clear that none of the parties could validly claim to attach to his signature of the contract, if there was a written contract, a stipulation in the nature of a reservation that he should be entitled to use it on payment of a lesser sum. In this example all the obligations are obligations between myself and each of the other parties, and they have no obligations *inter se*. But the position would be the same if they had. Let us suppose that we have an arrangement in the neighbourhood for the mutual use of certain facilities, gardens, swimming pools, woods, rights of shooting, fishing and so on, each party making available certain agreed facilities in return for being able to use facilities provided by the other parties. Again, it is perfectly clear that after an arrangement of this kind had been reached and reduced to writing no party could, without the consent of all the others, sign it with a reservation attached that he should only be bound to provide something less than the agreed facilities, and yet at the same time claim to retain a full right to enjoy the facilities provided by the other parties. That is a self-evident proposition in the municipal field and equally so in the international one.

What is it that all these situations have in common which so clearly makes the purported reservation invalid unless all the other parties are willing to agree to it? It surely is that a definite arrangement having been arrived at and drawn up by all the interested parties, the party making the reservation is in effect rejecting that arrangement and attempting to substitute for it an arrangement which is different. The variation may be slight or it may be considerable; but it results in a *different* arrangement, and large or small, it is an attempt to alter something already finalized, and therefore it requires the consent of all the other interested parties.

All this is so clear when one considers it on the basis of an ordinary contract of private or municipal law, that it is difficult to see how it

could ever have been doubted that the same situation exists in regard to treaties and conventions between nations, since in this respect, at any rate, there can in my submission be no real difference of principle. It is, I believe, worth enquiring what reasons there can be for even suggesting that there may be a difference between the domestic and the international positions. Enquiry will show, I think, that there are no real reasons, although two or three plausible points that at first sight look like reasons have been advanced, and may suggest that the two cases are capable of being, and ought to be, distinguished in certain respects. I would like to examine these because I think the examination will prove enlightening.

First of all, there is a point to which I have already made some reference, namely, the assumption constantly made, but which is in fact quite unjustified, both in practice and in law, that reservations to international conventions will usually be of a comparatively minor, formal or unimportant character, and therefore States should be permitted to make them as this will facilitate general participation in international conventions. Now, even if it were true that most reservations are of a formal or unimportant character, this would not be a valid ground for giving up the principle of consent, which may indeed constitute precisely the main reason why more general attempts to enter important reservations of substance are not made. They are not made because it is known that the other parties are not likely to consent to them, and consequently it is not worth while to put them forward. Moreover, where a reservation really *is* merely of a formal, minor or unimportant character, the principle of consent forms *in practice* no bar to its acceptance, since the other interested parties normally never object to that kind of reservation, and accept it even if only tacitly. But in fact, of course, by no means all reservations are of that kind and where they are not, the situation is very different. We need not go beyond the Genocide Convention itself in order to see this, because, as I have said, some of the reservations which have been made to that Convention relate to an important article of substance, which many of us who participated in the drafting of the Convention think is vital to the whole of the Genocide Convention, namely, the obligation to submit disputes concerning not only the interpretation, but the execution and enforcement of the Convention to the International Court of Justice. That is a provision in the Genocide Convention which I would have submitted is absolutely vital to the working of the Convention, because it gives the Convention teeth, and that is one of the provisions to which it is desired to make reservations without the consent of the other parties to the Convention.

[*Public sitting of April 13th, 1951, afternoon*]

Mr. President, it is sometimes argued that the right of objection to reservations should not be admitted because it would enable a single State to exclude the reservation and even to prevent altogether the participation of the would-be reserving State in the convention, even if other States did not object to the reservation which had been made. Even if that is theoretically true, the remedy proposed is, in our submission, worse than the disease. It is far better that a State should occasionally—it is not likely to happen often, for in general it is a matter of theory rather than of practice—not be able to participate in a given

convention rather than that an unrestricted right to make reservations should be admitted which might imperil the convention altogether and lead to participation by States on terms which were destructive of the value of the convention. But in fact, the danger of an objection by a single State—of an *unmerited* objection by a single State—having the results suggested, is largely theoretical. There may have been cases, but they must have been very few. In practice, States do not maintain objections to a reservation which are not felt by other States as well, unless the circumstances are special, and the facts are such as to give them a perfect right to object, as for example where they themselves are, or would be, the principal sufferers from the proposed reservation, or the party principally affected by it or there were other circumstances of a special character. Otherwise, in practice, States do not object to reservations unless there is some consensus of feeling against the reservation proposed, and the reservation is one which has a real significance.

In any case, in so far as there is difficulty here, it can only lead to this conclusion, that perhaps some agreed rules should be formulated as to the circumstances in which the initial objection to a reservation can legitimately be maintained. It is not a reason for doing away altogether with the right of objection, or giving to States an unlimited right to make whatever reservations they please in any circumstances whatever, no matter what the objections may be.

In regard to that point, namely, that the existence of a right of objection might enable a single objecting State to exclude the participation of another State, it seems to me that the correct view is to be found, as with many others of the relevant principles, in the *Harvard Research Volume on Treaties*, that is, that in such a matter preference must be given to the State which is prepared to accept the convention as it stands rather than to the State which is only prepared to do so subject to a reservation. This is how the principle is formulated in the *Harvard Research Volume:*

> "Since a choice must be made, reason and the necessity for preserving multipartite treaties as useful and effective instruments of international co-operation, indicate that the preference should be given to the States which find the treaty satisfactory as it stands and that the inconvenience, if any, of non-participation in the treaty should fall upon the State which seeks to restrict its effectiveness by reservations."

That principle is reaffirmed later and I again quote:

> "If any State is to be excluded from the treaty, it should be the one which seeks, by means of reservations, to alter in some way the effectiveness thereof in its own interest."

Implicit in that view is the feeling that States will not be prepared to become parties to international conventions if it is open to other States to become parties subject to any reservations they are pleased to make. For this reason, the *Harvard Volume,* in a final affirmation, goes on to say:

> "If any State is to be excluded, it should be the State which, in exercising the privilege of acceding, seeks in effect, by means of reservations, to write into the treaty provisions which are unac-

ceptable to any State or States which have already become parties to the treaty, or which, as signatories, may wish to become parties to it in its original and unaltered form."

All that leads, and in my submission can only lead, to one conclusion, that there is no difference of principle between the case of international conventions and that of private domestic contracts. If reservations are to be made, they must receive consent in one form or another. The few passages which I have already quoted—and others to which I shall draw attention—all go to show that the volume of authority in favour of the view that a reservation must receive consent to be valid, is very great. Indeed the consensus of opinion in support of that view is overwhelming. If one looks at the books, there is hardly a suggestion to the contrary.

Mr. President, I know that quotation is always wearisome both for the reader and for the listener, and I am very loath to weary the Court with a lot of citations from different books and authorities. With your leave, therefore, I propose to annex to this speech, without reading them now, a series of quotations from the authorities and some references to the actual practice of States [1]. It seems to me that this would be a more convenient course rather than to take up your time by reading them now. When you do have an opportunity of looking at the Annex —it does not purport to give a great many of these authorities, but it will, I think, fairly indicate the general consensus of opinion—it is an interesting commentary, perhaps, on the present position of the United States of America, that the view which is now apparently contended for on behalf of the State Department is wholly opposed to what has hitherto been the clear trend of American authority on this matter. The same I think can be said of the view put forward on behalf of the Soviet Union.

It is not, of course, for the Court to allow any considerations of policy or expediency, if any such there be, to obscure the rules of law about these matters, and the Annex will, I think, make it very clear that there is a most impressive body of authority, with hardly a dissenting voice, in support of the view which I have been expressing, and also that the general practice of States in the past has been in conformity with that view and with that general body of authority. Whether you look at the inherent principle, or whether you look at the views of the authorities on international law or the views which governments have expressed, and which experts have expressed in the past, or again whether you look at the actual practice which has been followed by States in relation to treaties to which they have been parties, you will find an almost universal recognition of the principle that consent is necessary to any reservation which a State desires to make to an already agreed text. It follows that in the absence of such consent—and, of course, more particularly, if an actual objection has been made—the reservation cannot be maintained. If it is maintained, if the State which seeks to make it insists on maintaining it, then the maintenance of the reservation inevitably renders the signature, the ratification, or accession to which it is attached, invalid and inoperative for the purpose of making the State concerned a party to the treaty.

[1] See Annex, p. 394.

VII

Having dealt with the general doctrine applicable to this subject and reviewed the authorities, I want now to apply the general principles involved to the particular case of the Genocide Convention. Here, Mr. President, I think we reach the heart of the matter. I have stated the rules as we believe them to be applicable in principle to all reservations to multilateral conventions. It may be argued however, and I think some of the statements furnished to the Court do argue, that these rules are not applicable to the Genocide Convention because the Genocide Convention is a special one of a social or law-making type and not a convention providing for the exchange of reciprocal benefits and obligations as between the contracting parties. It is, of course, quite true that the Genocide Convention is not of the latter kind and is of the social or law-making kind. But we draw quite a different conclusion from this fact. In our submission this fact makes the principles I have been discussing all the more applicable. Actually, if a choice has to be made, there would be more warrant, in relation to the ordinary convention of the reciprocal benefit type, for taking the view that reservations might be made unilaterally and without the consent of the other parties, than there would be in relation to this kind of social or law-making type of convention. In the case of the ordinary recripocal benefit type of convention, the position is that if one of the parties insists on making a reservation, and is allowed, or is to be allowed, to become a party subject to the benefit of that reservation, at least the other parties are all entitled to deny to the reserving party the benefit of the provision concerned. Therefore it follows that the making of a reservation to this type of convention entails a corresponding relief for the other parties, for they equally are not bound to accord to the reserving State the benefits which that State withholds from them. But of course that position does not arise with the social or law-making type of convention. As we have seen, this type of convention does not provide for reciprocal benefits between the parties of a tangible character. It provides almost exclusively for the assumption by them of obligations of a social or humanitarian or legal description. The obligation assumed by each country which becomes a party to the convention is not dependent on the assumption of a similar obligation by the other parties. It arises simply from the act of becoming a party to the convention itself, and consequently a State which becomes a party to a convention such as the Genocide Convention becomes bound by all the obligations of the convention, whether or not other countries join in, and whether or not the other parties are similarly bound. Once the Convention comes into force for a State, it is not adequate for that State to say that the individuals with whom it was dealing in a particular case were to be the nationals of another State not a party to the Convention. That does not arise at all. If you assume an obligation to prevent and punish the crime of genocide you assume that obligation as, so to speak, an absolute. Your obligation is not dependent on the assumption of a similar obligation by other countries. Nor is it diminished to the extent of any reservation made by another State ; for the obligations of the States which have not made reservations remain the same : they are not in any way diminished, and there can be no question of these States withholding from the reserving State or its nationals the benefits of the provision on which it has made a reserva-

tion. The Convention does not operate in that way. It does not consist of benefits and liabilities exchanged reciprocally between the parties *inter se*.

Now, it may be argued, Mr. President, that the same position arises where a State, instead of making a reservation, does not become a party to the convention at all. States which do become parties are bound by the obligations of the convention, whereas the States which do not become parties are not; but (so it may be urged) that it is not *per se* a reason why a State should refuse to become a party to the convention. This is true in a sense, but it is not really relevant. In the first place States normally become parties to international conventions in the expectation that other States will do the same. If they did not have this expectation, they would be unlikely to become parties, or to remain parties if the expectation were not duly realized. But secondly, a State which does not become a party at all to a convention such as the Genocide Convention, if it loses little (and it may lose but little) in the way of concrete benefits, does at least forego a certain status, and certain advantages which, if of an intangible character, are, nevertheless, very real and count for a good deal in the present climate of international opinion. (I have already used the expression that the States which accede to such conventions can claim to be the good citizens of the world.) A State which, on the other hand, becomes a party, but makes a reservation on an important article of substance, obtains all the credit and ancillary advantages to be derived from the status of *being* a party, while at the same time diminishing the extent of its obligations; whereas the other parties, which have not made any corresponding reservation, assume the full obligations of the Convention without any diminution. There would be very little limit to this process if it were once to be admitted as a possible one. Under the régime of the necessity for obtaining consent to reservations, States are obliged to adopt a responsible attitude, or at least they ought to adopt a responsible attitude, towards the question whether they will or will not become parties to a convention such as the Genocide Convention, and to ask themselves seriously whether they can and are willing to carry out its obligations. If on the other hand unlimited reservations could be made at will, there would be no further need for such an attitude. These conventions, Mr. President, as you know, are often, and may increasingly be the result, in the first instance, of declaratory resolutions of the Assembly of the United Nations intended to set up some general standard of behaviour. That was originally the case in regard to the Genocide Convention. High sounding speeches were made in support of the standards it was sought to establish, but one is compelled to ask whether some of these orators were speaking with their tongues in their cheeks, in that they were getting the credit of accepting these high standards but were already turning over in their minds the reservations which they would ultimately make to any applications in practice of what they had been preaching about. That would certainly not be an attitude of mind to encourage. The truth is that many of the arguments which have been advanced on this matter are based on the assumption that no State would, in fact, seek to limit its obligations beyond a certain point, but the question is what point, and who would be the judge of whether that point had been reached. The only practical answer to this question is the answer we have already noticed, that there is nothing to prevent a State from *seeking* to make a reservation if it wishes, and

that if the reservation is truly in the nature of something formal or non-substantive, it will normally be accepted, expressly, or tacitly, by the States, or at any rate not objected to. The only practical limitation on this process, the only thing that really prevents reservations of a really serious nature being made, reservations which would enable States to obtain all the credit of being parties to a convention like the Genocide Convention, while greatly reducing the extent of their obligations in practice, is the faculty of other interested States to object, and the consequence that such an objection entails the invalidity of the ratification or accession of the reserving State unless the reservation is withdrawn. There is no other safeguard, and under present arrangements there can be no other, because otherwise there can be no means of checking the process, or of saying up to what point reservations may be made, or of defining at what point a reservation ceases to be formal or non-substantial and becomes something which amounts to a sort of rejection of the convention.

Indeed, any one with any experience of these matters can see at once that it would be possible for a State, by means of reservations, to make serious inroads on what would otherwise be its obligations under a given convention, and greatly to diminish the burden of these obligations, without it being possible to say that it had gone quite so far as to reject the convention *in toto*. In relation to this particular Convention for instance, it would be quite a simple matter (if there were no check on the right to make reservations) to subscribe to the fundamental obligation of preventing and punishing the crime of genocide, but to make reservations on a number of the other articles of the Convention, in such a way as seriously to diminish the value of the basic obligation, and I suggest again that an approach to this type of procedure is exemplified in the reservations which have actually been made or are proposed in relation to Article IX of the Convention about which I was talking just before the adjournment. I think all those who participated in the drafting of the Convention and the debates which took place at Lake Success and Paris will agree that the obligation to submit disputes concerning the interpretation or execution of the Convention to the International Court of Justice, was regarded as one of the prime guarantees of the due fulfilment of the basic obligation to prevent and punish the crime of genocide. I remember the debates which took place on the matter very well. I remember that I said then, and I say now, that conventions of this kind are illusory unless there is some machinery such as that of appeal to the International Court of Justice, providing means of recourse if States choose to disregard the obligations that they have undertaken. It is difficult to see why any State which is *in good faith in undertaking these obligations should object to the* reference of disputes to the Court. Consequently a reservation on this article cannot but raise serious doubts as to the value of the signature, ratification or accession to which it is attached. It cannot but cause other States to ask themselves whether it is worth while participating in a convention of this kind, the chief controlling provision of which is inoperative for certain important parties.

I would suggest moreover, that conventions of the social or law-making type are *par excellence* conventions whose provisions constitute an ensemble that must be treated as such. To use the language employed in one of the authorities cited in the Annex, they are agreements "in

which each party finds a compensation for the obligations contracted, in the engagements entered into by the others". In an eminent degree, they are conventions the obligations of which, being of a serious and sometimes onerous character, States are (to quote another of these authorities) in general only willing to assume "on the understanding that the other participating countries are willing to act in the same way and that general benefit will thus result". That theory is the basis of every rule of law of the international field, as in the municipal field. I accept restrictions upon my liberty in favour of the liberty of others because the others accept similar restrictions on their liberty, and so it is with States. As I have already had occasion to point out, it is this anticipated general and long-term benefit to the world social order which constitutes the chief value and *raison d'être* of this type of convention. It is in that belief that States are prepared to join in according those humanitarian rights. An unlimited right of making reservations would clearly be destructive of their primary purpose for conventions of this kind. States, instead of being obliged to choose between not becoming parties at all, and becoming parties on a basis of reality, would be able to become parties on a more or less nominal basis that might have no real value at all. As one of the passages referred to says, "such a practice would tend to defeat the purposes for which multilateral agreements are entered into" ; it would injure the credit of conventions such as the Genocide Convention and of the international organizations under whose auspices they are drawn up.

In this connexion I would draw attention to the very interesting information which has been given in the written statement furnished to the Court on behalf of the Secretary-General of the United Nations, as to the history of the question of reservations in regard to the Genocide Convention. From what is stated on page 84[1] of the printed booklet containing the written statements, it is clear that the possibility of including an article on reservations was considered during the earlier stages of the drafting of the Convention and deliberately rejected as unsuitable. I would ask the Court particularly to notice the terms in which the attention of governments was called to the matter in the comment accompanying the first draft of the Convention. This is what it said :

> "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 group. It is unthinkable that in that respect the scope of the Convention should vary according to the reservations possibly accompanying accession by certain States."

That, if I may say so, was very well put and I do not see how anyone could fail to agree with it. It is equally applicable to any reservations which might be made under the Pan-American system, to which I shall come presently.

What followed ? Only one government commented on the question of having a reservations article. That was the Government of the United

[1] See p. 88 of this publication.

States, which expressed the view that an article on reservations should be omitted. That seems very difficult to reconcile with the attitude the United States Government is taking up at this time. A sub-committee was then appointed to go into the matter, consisting of representatives of Poland, Soviet Russia and the United States. This Sub-Committee reported that it "saw no need for any reservations". This again is very difficult to reconcile with the attitude all three of these Governments are taking up on this subject to-day. They apparently had second thoughts about the view which they expressed at the time when this Convention was under negotiation. The Sub-Committee's report was unanimously adopted by the full *Ad Hoc* Committee that prepared the basic draft of the Convention. This draft accordingly went forward to the Assembly without any article on reservations in it. The matter was then again discussed in the Sixth Committee of the Assembly, and again the decision was to include nothing about reservations. I should like to make one point clear which is not quite fully brought out in those parts of the Secretary-General's written statement which deal with the discussions in the Sixth Committee, i.e. on pages 89-90[1] of the printed booklet. You will find it stated there at the bottom of page 88[2] and the top of page 89[3] that "the United Kingdom representative stated that 'he had abstained from voting in order to indicate the United Kingdom Government's reservations at that time in regard to the draft convention', and indicated that his Government might not find it possible to sign and ratify". What I want to make quite clear about that is something which is consistent with what I said at the outset of my observations to the Court this morning. I suggested that what is desirable in the negotiation of this type of convention is to reach in the preliminary stages of the negotiations a draft of the convention to which everyone, or at any rate the majority, is prepared to adhere, rather than go beyond the general consensus of opinion which most States are prepared to accept and then allow States to come in and make reservations. What the United Kingdom representative was doing in the Sixth Committee was not to make or try to make any particular *reservations*. He was making a general *reserve* of our whole position in relation to the Convention, which is a different thing. He was not entering a reservation as to this or that, but was saying that we thought the Convention in its present form might not be acceptable and that we were not at that stage voting in favour of it. The Secretary-General's statement does not bring out quite clearly the distinction between a reservation and a reserve—i.e. a reservation of position. This is important because the discussion in the Sixth Committee did not—in the main—consist of formal intimations by delegations that they would attach particular reservations to their signatures or ratifications. On the contrary, it consisted mainly of statements by delegations of the difficulties their governments might experience in ratifying, on account of the provisions of certain articles. It was not really suggested that there could be reservations and that States could accede subject to reservations. The question was whether if those articles were included in the Convention at all, some States would be able to accede to the Convention, and that is a far more realistic

[1] See pp. 93-94 of this publication.
[2] ,, p. 92 of this publication.
[3] ,, ,, 93 ,, ,, ,,

and honest way of approaching this type of convention, than the method of speaking in favour of it, voting in favour of it, and then making reservations which detract from some important particular in it. These delegations therefore reserved the positions of their governments, which is not the same thing as making or giving formal notice of an actual reservation.

Be that as it may, it is clear that the idea of reservations in connexion with the Genocide Convention was in substance rejected, and rejected mainly and precisely on account of the unsuitability of allowing reservations to be made to this type of convention. The view taken was that States must accede or not accede, and if they did not accede they must accept the odium in international society in not acceding to this type of social law-making convention. It seems clear that the parties, at the time this draft was being considered and when the Convention was under negotiation, took the view that there should be no reservations. They could have provided for them but they purposely did not provide for them, and the truth is that this kind of convention, the social law-making convention, although contractual in form is not contractual in effect. It operates more like a piece of legislation, and in so far as that is correct it affords still further ground for prohibiting the making of unilateral reservations, for whoever heard of a unilateral right to derogate from a legislative or quasi-legislative enactment—and if these conventions *are* of a quasi-legislative nature there cannot be a unilateral right to derogate from them. From a piece of legislation, derogations can only be made by or with the consent of the entity that passed it. That is a matter to which I want to come back again later.

For all these reasons, Mr. President, I submit that the view that an objection to a reservation renders it invalid and renders the ratification or accession it accompanies invalid unless the reservation is withdrawn, applies with even greater force to, and is even more essential in, the case of a convention such as the Genocide Convention than it is in the case of the ordinary convention providing for reciprocal benefits and obligations between the parties.

## VIII

These considerations are equally applicable when one comes to consider, as I now propose to do, the third principal theory which has been advanced on the subject of reservations, namely, the theory which is exemplified in the Pan-American system. Indeed, I am going to suggest that they apply in exactly the same way because, as I hope to demonstrate, the Pan-American system applied to the Genocide type of convention would merely be an indirect way of allowing an unlimited right to make reservations, a way of introducing by a side wind, the absolute sovereignty theory in disguise.

At first sight, the Pan-American system may appear to reconcile all points of view, and to combine all the advantages of any of them without the disadvantages. It is said: "Yes, it is naturally understood that no country can unilaterally impose acceptance of a reservation on another country. On the other hand, if States are not allowed to make some reservations they may not be able to become parties. Therefore, they should make their reservations and become parties, but let it be

understood that the convention will only be in force as between them and the countries which accept the reservations and will not be in force between them and any country which does not accept the reservations." That course sounds ideal when described in that way. But closer examination suggests that it is illusory, and open to all the objections of the absolute sovereignty theory, when sought to be applied to the social or law-making type of convention, of which the Genocide Convention is an example. The essence of the Pan-American system is the non-applicability of the convention between the reserving State and the States which object to the reservation, but it is precisely there that the system breaks down and is illusory when applied to conventions of the Genocide type.

However, before I come to that, I would like to deal with a preliminary point, which is this. Neither in any of the authorities, nor in the whole field of the practice of States outside the very recent practice of some of the countries of the American continent, will you find the slightest reference to any system or any possibility such as that now under discussion. This system is in fact an entirely new one, which has been instituted in a certain particular field by special agreement between a particular group of States. This is not perhaps surprising because the Pan-American system entails what I think any lawyer would normally regard as an anomalous and legally difficult position to support, namely, that a number of countries may all be parties to the same convention and yet the convention may not be in force between certain of them. It will perhaps have wholly different implications which will vary according to which of the total number of adhering States happen to be involved in any particular question arising under the convention. You may, for instance, have a convention adhered to by twelve States, where one State makes reservation A which is accepted by four of the others, and rejected by the remaining seven, and where another State makes reservation B which is accepted by three States and rejected by the remaining eight ; but that is not really a multilateral convention at all. That is a series of bilateral treaties, some of which overlap. That kind of arrangement, as far as one can see, cannot establish a common standard for all the States parties to the convention. What it does is to set up as many separate standards as there happen to be reservations.

According to all normal legal principles, if a number of individuals or countries are all parties to the same identical contract or treaty, that contract or treaty is *ipso facto* in force between each one of them and each one of the others. A departure from this position is something which could only result from a special and deliberate agreement to depart from it. This is, of course, what we have in the case of the system as it is applied between the countries of the American continent, though strictly, what it results in is not a single multilateral instrument applicable to all, but a complex of individual though related instruments. However, we all of course know that whatever the basic legal principles applicable to any situation, it is always open to a group of countries to depart from these principles by agreement *inter se*, or to institute a special system for application in the relations between themselves. This is what the countries of the American continent have done in relation to the range of conventions drawn up under the auspices of the Pan-American Union. These countries occupy a very special and, in some ways, perhaps peculiar relationship to each other, and the system, as set up by agreement between them, may work very well between them, and possibly it

will be open to the Members of the United Nations to institute and adopt a similar system for application in the case of conventions drawn up under the auspices of the United Nations. I do not know. That may be so. The fact is, however, that, so far, the United Nations have not drawn up any such system and in particular, they have not drawn up any such system in relation to the Genocide Convention, It may, of course, be argued that it would be a good thing if they did, but that is another matter, and not for discussion in this Court. If the Members of the United Nations consider that it would be desirable and appropriate to institute for United Nations conventions a system in regard to reservations similar to that applied to Pan-American conventions, it is open to the Members of the United Nations to take the necessary action. But that is entirely a matter of policy and, therefore, not for the Court. All the Court can do is to say whether the system could, consistently with the rules of international law as they now stand, be applied to conventions such as the Genocide Convention and whether this would be legally appropriate. I shall submit that it cannot be, but even if this were not the case, a system such as the Pan-American system would still require for its institution and establishment in relation to any particular class of convention, a definite act, a definite resolve and agreement on the part of the States concerned, which does not exist in the case of United Nations conventions. In the absence of this special act or agreement, there is no basis for the application of the system, which is, indeed, in some respects, as I have pointed out, at variance with normal legal conceptions, and which, I would have suggested, was wholly inappropriate to the law-making type of multilateral convention, the object of which is to establish a common norm and a common standard. I therefore submit that on this ground alone the Court must refuse to regard the Pan-American system as applicable to the Genocide Convention.

However, I do not want to rest my argument solely on that basis. For actually, I want to go a great deal further and submit that this system is, apart from the fact that there has never been any agreement to apply to United Nations conventions, quite inappropriate to those conventions, for reasons of a legal character. It would, I think, be a great pity if the Court confined its consideration of the Pan-American system solely to the question whether there had been any agreement to employ it for United Nations conventions. For undoubtedly, the General Assembly wishes to be informed of the views of the Court as to the appropriateness of this system from a legal point of view to United Nations conventions. Indeed, I think I may venture to say that that was one of the principal objects of the reference to the Court, so that the point I make about that is, in a sense, a preliminary point.

The fundamental objection of a legal character to the application of the Pan-American system to United Nations conventions of the Genocide type is the fact that when applied to those conventions, this system fails to produce precisely the results which are claimed for it, and which are said to justify it, though it may well produce those results when applied to a different type of convention. The system is one which, if it is to operate as it is intended to do, must relate to conventions which have these three characteristics, namely :

1. the convention must provide *rights* for the parties as well as obligations ;

2. these rights and obligations must involve a reciprocal exchange of benefits and liabilities between each of the parties and each of the other parties;

3. the obligation of any party to the convention towards any other party must be dependent on the other party having that same obligation towards the first party.

Now all these elements are present in the case of many conventions, for instance those of a commercial, financial or technical character, but they are all of them conspicuously absent in the case of the social or law-making type of convention. Indeed, their absence forms one of the chief characteristics of that type of convention. The main advantage claimed for the Pan-American system is that it enables reserving countries to become parties, but does not enable them to impose their reservations on countries which do not accept them. But in fact, this is exactly what the system would do in the case of the Genocide type of convention. In one of the written statements furnished to the Court, it is stated in describing the Pan-American system that "while recognizing the right of a State to make reservations, full recognition would be accorded also to the right of any other State to object to such reservations, and thereby not to be bound by them, with the result that the convention may not be in force between the reserving State and the objecting State". Now unfortunately this is quite misleading, because matters do not work that way in the case of the Genocide type of convention. The application of the Pan-American system to that type of convention would have precisely the effect of imposing a reservation even on a State which objected to it. The reason for that is this. The whole essence of the Pan-American system is that the convention is supposed not to be in force between a reserving State and any State which objects to the reservations. Therefore, the State which objects is not bound to apply the convention in its relations with the reserving State. There is some point in that situation where the convention involves relations between the parties, i.e. provides for rights as well as obligations and which provides for rights and obligations interchanged between the parties *inter se*. In that case, the non-application of the convention as between the reserving and the objecting State means that the objecting State is to that extent released from the obligations of the convention, and does not have to extend these particular benefits to the reserving State. But, it is meaningless to talk of a convention not being in force between the reserving State and the objecting State if, notwithstanding that fact, the objecting State still has to carry out all the obligations of the convention in full, just as if it had not made any objection to the convention at all. Now that is exactly what occurs with the Genocide type of convention, because, as I have said, that type of convention does not operate by means of any mutual interchange of rights and liabilities. The obligations under it are of an absolute character, not dependent on the assumption of corresponding obligations by the other parties. A State may object strongly to reservations made by another party, but if it is a party, and has not itself made a corresponding reservation, it is obliged to carry out the convention in full. In such a case, the whole notion of the convention having force or not having force as between particular parties who have made reservations is misconceived and irrelevant—in fact illusory.

For this reason, the Court will, I think, readily see that what the Pan-American system would really lead to when applied to conventions of the social or law-making type would be the re-introduction by the back-door of the absolute sovereignty conception. The system would provide a means whereby the reserving State could make what reservations it pleased, even if these reservations were rejected by an important number of other States, and even if it were theoretically the position that (owing to these objections) the convention was not in force between the reserving State and the objecting State; for this position would be purely nominal, since the obligations of the objecting States would remain precisely the same. There would in practice be no difference at all between this position and one according to which States had an absolute right to make what reservations they pleased. I suggest that it is clear that the Pan-American system breaks down and is inapplicable to the Genocide type of convention precisely in that respect which is the essence of the system and forms its main justification. Its application to the Genocide Convention would be an indirect application of the absolute sovereignty theory and therefore contrary to all accepted legal principle and the consensus of opinion of all the authorities.

In the written statement furnished by my Government at an earlier stage of the present proceedings, some practical illustrations were given of the illusory nature of the safeguards supposed to be involved in the Pan-American system when applied to conventions of the Genocide type, and I would ask the Court to be good enough, at its convenience, to re-read paragraphs 25 and 26 of our written statement, when they come to consider this matter. This same illusory character can readily be seen with regard to one of the principal reservations which it is now being sought to make to the Genocide Convention, namely the reservation on Article IX, containing the obligation to refer disputes about the interpretation and execution of the Convention to the Court, and I would like to enlarge on that a little because it illustrates very well the inapplicability of the Pan-American system to this type of case. At first sight, it might indeed have seemed as if the Pan-American system would work quite well in regard to a reservation on this article. It would work like this. State A makes a reservation on an article providing for a reference of disputes to the Court. If the reservation is admitted, then State A cannot be taken compulsorily before the Court, but equally it may be said that State A cannot take the other parties before the Court. Therefore, it follows, and this is what the advocates of the Pan-American system suggest, the position works very well in which the Convention, with that reservation, is in force between State A and the parties which accept the reservation, but is not in force between State A and the parties which do not accept the reservation. That would be so in the case of an ordinary convention providing for rights and obligations moving reciprocally between the parties *inter se*. In that kind of case, if some dispute arose between State A and State B as to the rights and obligations which each owed to the other under the convention, then, if State A had made a reservation on the article for reference to the Court so that State B could not take State A compulsorily before the Court about this dispute, equally, State A could not take State B compulsorily before the Court. But that is not how the thing works out at all in the case of a convention such as the Genocide Convention, because there *are* no obligations under the Convention *between* the parties. Each party assumes obligations

it is true, but they are not obligations to be executed towards or for the benefit of the other States. If a certain State, which we will call X, becomes a party to the Genocide Convention, it assumes an obligation to prevent and punish the crime of genocide. If it does not fulfil that obligation, and if it has *not* made a reservation on Article IX, *any* of the other parties can bring it before the Court. The fact that one particular party cannot do so, because it has itself made a reservation on the subject of the obligation to go to the Court, does not in any way affect the position of State X, save in relation to that particular State, nor prevent State X having to go before the Court if it breaks the Convention. The fact that it cannot be taken before the Court by State A is merely incidental and avails State X nothing. Because its obligations are of a general character, and not obligations particularly owed towards State A, it follows that in the event of a breach, State X can be taken before the Court, if not by State A, then by States B, C, D or E. Thus the application of the Pan-American system in this case would merely allow State A to make what reservations it pleased on Article IX of the Genocide Convention, while affording no reciprocal relief to the States which objected to the reservation, or only a nominal and illusory relief in relation to State A itself. This example illustrates very well the unreality of the safeguards supposed to be involved by the Pan-American system when applied to this type of case, for if these are unreal (as obviously they are) in regard to Article IX of the Genocide Convention—a provision which involves a nominal element of reciprocity—how much more unreal and illusory must they prove when applied to reservations on the general provisions of the Convention which contain absolute obligations, not subject to any considerations of reciprocity at all. One cannot assume, I am afraid, that no such reservations will be attempted on the part of some of the forty or so States who may still become parties to the Convention, particularly if in effect we license the making of reservations of any kind by the application of the Pan-American system. There is only one effective safeguard against abuse of the faculty to seek or attempt to make reservations, and that is the knowledge that other States can object, and that their objections can or may be effective to prevent the reserving State becoming a party. Remove that safeguard and the Assembly and the world would very soon have cause to regret the results. This could be done in the case of conventions of the Genocide type just as effectively by admitting the Pan-American system as by admitting the absolute sovereignty theory ; it could be done even more effectively, because the Pan-American system almost invites reservations, treating them as something to be expected, and lending to them an aura of respectability which is absent from the absolute sovereignty theory—an aura of respectability which depends on the supposed existence of a safeguard which proves illusory when applied to conventions of this kind, and merely reintroduces in another form the faculty to make reservations at will.

Now, Mr. President, I frankly admit that the adoption of some such system as this might facilitate accession not only by governments which have no intention of really carrying out the provisions of the convention at all, but also by such governments as my own which traditionally take their international obligations seriously and do not enter into conventions the legal obligations of which are obscure or which they cannot be certain they can carry out. We could come in and make our

reservations in respect of some of the very vague and wholly illusory articles in the convention, and then adhere to the convention as a whole, subject to these reservations. We could then acquire a badge of good citizenship; but we do not think that that is the right course to pursue in conventions of this sort. We all know—this Court knows from the cases it has had to consider—that some States do enter into treaties and conventions without seriously intending to carry them out or do more than give lip-service to the principles embodied in them. That is wrong. We want conventions drafted seriously; conventions, the terms of the articles of which are drawn up properly so that the obligations are concrete, understandable and operable, without the vague and illusory, if perhaps sometimes ornamental, conditions which became embodied in the Convention on Genocide and which made it difficult for us to accede to the Convention with the sincerity which we think is essential in putting our names to international conventions. It is a bad policy and a delusion to include a lot of vague and sometimes perhaps quite meaningless provisions and then try to escape the consequences by permitting States to make reservations and exclude their application.

It has been suggested that public opinion would be a safeguard against those States which purported to accede to the convention but made reservations of a more or less fraudulent type, and it has been urged that if a State made really serious reservations which affected the whole nature of the obligation, those would be rejected by all the other parties, in which event it would be difficult for the reserving State to maintain its reservation or to regard itself as a party to the convention. These safeguards are, however, much more apparent than real, particularly, I am afraid, in the world as it exists to-day. One of the written statements which has been presented to the Court goes so far as to assume and postulate as a safeguard that "*no* party will accept a ratification subject to a completely fraudulent reservation". I am afraid that is simply not true in existing world circumstances, and that is why His Majesty's Government attach so much importance to those conventions being entered into in the first place with a real sense of responsibility by the States who prepare and agree the drafts. It could very easily happen in the world to-day—we can all of us imagine the circumstances in which it could happen that, by arrangement between two or three States who were not minded to carry out the convention, they might nevertheless secure for themselves that aura of respectability which adherence to the convention would give them. The essence of the Pan-American system (I am not suggesting this arises in the American field—I am saying that if that system were applied all over the world you can see how it might arise) is that you are entitled to become a party to a convention if you can get even *one* country to agree to the reservation which you propose to make. Once you get a single country to agree to the reservation you want to make, you are then a party and the convention will be in force between you and the country which has accepted your reservation, although it will not be in force between you and any of the other parties. That really does seem, if I may respectfully suggest it, a very ridiculous situation, and it is hard to imagine one which would be more detrimental to the reputation of the United Nations and to the status of the conventions which are concluded under its auspices.

Theoretically, however, it is clear that such a situation would be perfectly possible. Even if it is unlikely in practice that a proposed reservation would be accepted only by one other State, and objected to by all the rest, something very like that could quite possibly happen. It is not difficult to imagine circumstances in which a particular group of States, directed by a common policy, would by arrangement between themselves make certain reservations to a United Nations convention, each of them accepting the reservations made by the other. According to the Pan-American system, they would then all be entitled to become parties to the convention in question. They would all acquire the status of parties; they would all acquire the badge of good citizenship, and even if all the other Members of the United Nations rejected those reservations, the reserving States would still have that status. On the other hand, they would have succeeded in arranging between themselves to be relieved from carrying out the obligations in respect of which they had made reservations, whereas, owing to the nature of this type of convention, the other Members of the United Nations who had not made these reservations would be obliged to carry out these obligations to the full, and, of course, in favour of the nationals of the States which had made the reservations, because these things do not depend on the nationality of the particular individual who may be affected.

As we said in our written statement, the social and law-making type of convention has this peculiarity, that the maximum benefit in regard to it would be obtained by the State which succeeded in obtaining for itself the status of being a party, while assuming as little as possible of the obligations involved. We added that it was hardly too much to say that the Pan-American system could not be more ideally suited to the achievement of this purpose if it had been specially devised to make it possible. Under this system you would have a situation in which *all* the benefits would accrue to the reserving State, and *all* the disadvantages to the non-reserving State whose objections would be without effect, since the non-application of the convention between them and the reserving State would be purely nominal and theoretical, and would not in any way diminish the full extent of their obligations. That is a solution which is really indistinguishable from that which would be brought about by the application of the absolute sovereignty theory.

Can we really regard such a position as tolerable when we remember the principle formulated for instance in the *Harvard Research Volume*, that if any preference is to be given in the matter it should be given to the State which is willing to accept the convention without modification? The effect of the Pan-American system may be ideal in regard to the mutual and reciprocal type of treaty to which no doubt it has been applied in the Pan-American Union; but its effect when applied to social or law-making conventions would be precisely the opposite of that which the *Harvard Research Volume* lays down—and in my submission very correctly lays down—as one of the basic principles in regard to this matter. The application of the Pan-American system would not even put reserving and objecting States on a footing of equality. It would give all the preference and indeed a high degree of *privilege*, to the reserving State. Moreover, this privileged position is one which any State could create for itself, provided only that it could find *one* other State willing to accept its reservations, perhaps as the price for

the reciprocal acceptance of some reservation which that other State itself desired to make. I suggest that one must remember that in the world as it exists to-day, it may well be precisely those States which most wish to make reservations to social and law-making conventions which can also most easily find other States willing to accept them, and indeed to make the same reservations themselves. I do seriously submit to the Court that this situation is one which would be derogatory, quite unacceptable and detrimental to the United Nations conventions. It would encourage the present tendency which I deplore, of drawing these conventions in a way which is sometimes less than responsible by the inclusion of vague and even meaningless provisions in them, and which would greatly discourage the gradual process of establishing humanitarian standards in the world. That tendency would, I suggest, merely be encouraged by the application of the Pan-American system, just as it would be encouraged by the application of the absolute sovereignty doctrine.

Apart from the purely legal aspect there is also the question of the good taste and suitability of this method. The system of cross relationships entailed by the Pan-American system, with the convention being enforced between some of them and not enforced between others of the States concerned, and in force between yet other parties subject to certain modifications and so forth, may be quite appropriate to ordinary reciprocal conventions, but is wholly inappropriate and wrong in principle when applied to conventions of the social and law-making type. Such a position was never intended for conventions like the Genocide Convention, or conventions like the one which is in draft—the Covenant on Human Rights—and it would, I suggest, be quite contrary to the whole spirit and philosophy of those conventions. These conventions are, or at any rate, ought to be (and this is what I particularly stress because I say again that sometimes there are attempts to introduce in these conventions, sometimes with lack of responsibility, clauses which are so vague as to be meaningless) solemn enactments or declarations of principle embodying rules held to be fundamental to the dignity of man, or to his well-being, or to that of the social order of the world, and rules to which it is expected everyone will generally adhere. How can a multiplicity of different reservations having different effects between different parties be tolerated in this kind of case ? The intention was, and surely must be, that if countries become parties to these conventions they do so to the conventions as they stand, and not subject to a whole set of particular reservations of a diverse character which the parties make unilaterally and accept, or do not accept, *inter se*. Here I want to recall again my earlier observations on the history of the question of reservations in relation to the Genocide Convention, and the grounds which were given for not having a reservations article in the Convention. One of those grounds, as stated in the commentary which accompanied one of the earlier drafts, was that it was "unthinkable that .... the scope of the Convention should vary according to the reservations possibly accompanying accessions by certain States". Now it is precisely such a situation which the application of the Pan-American system would not only permit of, but would license and indeed encourage, and one might even say, invite. Here again we must bear in mind that we are not dealing with unimportant or formal reservations. We must presume that reservations which have, or are likely to draw forth objection, are reservations of

substance. Then, one must ask, is it really tolerable that, despite these objections, reservations of substance should be maintained in regard to these conventions, and that perhaps a whole number of different reservations of this sort should be superimposed upon the text of the convention, some of them in force between certain parties, some of them not ; others in force between other parties, so that there is no uniform set of obligations, no standard, no norm, applicable to all the parties alike. There is nothing fanciful in that idea. I do not think that anyone who has attended the meetings at which the Covenant on Human Rights has been drafted, could have any doubt that the application of any system which facilitated and, indeed, like the Pan-American system, even invited, the making of reservations, might very well result in the kind of situation that I have suggested.

Personally, as I have said, I doubt whether reservations to United Nations conventions are desirable at all. I have said, and I repeat, that the matter to which the United Nations should devote itself, is the drawing up of serious responsible conventions which the great mass of the nations —not all, but at any rate the great mass of the nations—can be expected to accept without reservation at all. If you go beyond that, as I am afraid sometimes we have in the United Nations, you produce something which may be a fraud and a delusion to the world at large. Even if it were thought desirable to institute some means of enabling States to make reservations under proper safeguards, there are other methods of doing it which would not be open to the objections involved both by the absolute sovereignty theory and the Pan-American system, and which would, at the same time, enable harmless or legitimate reservations to be made with relative ease. I am not speaking officially now, but if one takes the view that United Nations conventions, such as the Covenant on Human Rights for instance, have a semi-legislative aspect—precisely for the reasons which I have indicated, that they do not operate as an interchange of rights and obligations between the parties *inter se*—it might be possible to institute a system whereby any subsequent reservations an intending party desired to make, would be submitted to the body which framed the Covenant in the first instance, i.e. the General Assembly, and admitted if approved by that body perhaps by a two-thirds majority. In that way, reservations for which there was fairly general agreement could not be blocked, while, on the other hand, reservations could not be made unilaterally or without a wide measure of consent, and, if admitted, would not be likely to upset the standard or the norm which the convention had intended to secure.

I said that by way of parenthesis. The institution of any such system is, of course, necessarily a matter for the United Nations Assembly and not for the Court, which can only take the law as it finds it. The basic legal principle involved, which I suggest the Court must apply, is that consent to reservations is necessary on the part of all the States having rights in the matter. The application of that principle necessarily leads to the rejection of the absolute sovereignty view, and so far as the Genocide type of convention is concerned, also to the rejection of the Pan-American system which would equally permit unilateral reservations to be made at the will of the reserving State, and, in practice, to be imposed on the rest of the States concerned.

To conclude, then, on the first and second questions, I would submit, Mr. President, that for all the reasons which I have tried to indicate,

the answer to the first question must be in the negative. An affirmative answer could only be given either by applying the absolute sovereignty conception, which I cannot believe the Court would endorse, or by applying the Pan-American system, which, as I suggest, would, in the case of the Genocide Convention, merely amount to applying the absolute sovereignty conception under another name. Any attempt to divide a convention into parts in respect of some of which reservations might be made, and in respect of others might not be made, as proposed by my distinguished colleague from Israel, would, as I have ventured to suggest, be impracticable. In addition to that there is the extreme inappropriateness and unsuitability of these theories to the whole philosophy and spirit of United Nations conventions, and there is the fact that there has been no agreement to apply them or to admit reservations. Indeed, as I have endeavoured to show, from the discussions in the Assembly, rather the contrary was the case.

If the answer to the first question is in the negative, as I submit it must be, then of course, the second question does not arise. That being the position, the next matter to which the United Kingdom wishes to devote itself is the third question, and you may think it convenient that my learned friend, Mr. Fitzmaurice, should follow me to-morrow morning on that part of the matter. If that is so, I should like in conclusion to express my personal appreciation of the fact that you made it possible for me to appear here at any rate to-day. I hope you will acquit me of any discourtesy if I am not here to-morrow, but I have to fly back to-night on important public duties in my own country.

It has been a very great privilege to appear in this matter, about which my Government are greatly concerned because of the view that they have always taken, that the important thing in entering into international conventions and in drawing them up in the first place, whether between the parties or under the auspices of the United Nations, is to approach them in a spirit of responsibility which will ensure that the clauses which are put into the treaties or conventions in the first place, are serious, are understandable, and are enforceable ones, and ones which the great majority of nations will accept, and are, therefore, ones to which there is no necessity to make reservations at all. We think that it is only in that way that the United Nations will be able to establish the standards and norms of world behaviour in these humanitarian and social matters, which it is so desirable should be established. It is because that course was not, as we think, pursued in the case of the Genocide Convention, that we have not yet found it possible—although we are still giving the most serious consideration to the matter—to accede to the Convention. I said that it would be easy if we could make reservations. We do not invite you to say that reservations can be made in order to facilitate our position. We shall consider our position, and are considering our position, in relation to the Convention as it stands. I must not say what our position will eventually be, although it is right to say that my Government has from the beginning, from the time of Nuremberg, always supported and worked to secure the basic principles for suppressing genocide, and that it has been concerned only at the attempt to extend these principles in what we think to be a vague and perhaps inoperative way. We want this kind of convention (this is why we press the view that reservations ought not to be permitted without consent) concluded with responsibility by all concerned, those

who vote in favour of the draft at the Assembly being prepared to sign the conventions for which they vote without subsequently making reservations to them. That we think is the responsible way of going about this important matter, and we feel that the possibility of making reservations at will would merely lead to the encouragement of those elements in the world which seem to put out a lot of paper ideals, to enter into paper conventions which are given no teeth, which are far in advance sometimes of the possibility of world enforcement, and which consequently really act as a fraud and delusion upon world opinion.

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## ANNEX OF AUTHORITIES [1]

### I. — GENERAL OPINIONS OF JURISTS

OPPENHEIM (Vol. I, Sixth Edition 517 *(a)*) says :

> "Reservations raise an important question of principle because they modify the terms of the offer which a State in signing or ratifying or acceding to a treaty purports to accept. A reservation is upon analysis the refusal of an offer and the making of a fresh offer. Therefore in principle it seems necessary that the other party should assent to the reservation either expressly or by implication arising from acquiescence, and practice accords with this view. It not infrequently happens that this assent is given in advance in the course of the sessions of a conference preceding a treaty, it being tacitly agreed that a State which declares a reservation at that time shall be allowed to renew its declaration on signing the treaty."

The same view is expressed by the great French authority FAUCHILLE (*Droit international public*, Vol. I, Part 3, para. 823, pp. 312-313). He says :

> "Comment admettre, au surplus, qu'une même convention n'entraîne pas les mêmes droits et les mêmes obligations sans distinction vis-à-vis de ceux qui y participent ? Entre un contractant qui signe la convention en bloc, purement et simplement, et un autre qui la signe partiellement, avec des réserves, la situation n'est vraiment pas égale.... Pour nous, des réserves à la signature ne sont acceptables que si toutes les Puissances contractantes consentent à y donner, expressément ou tacitement, leur adhésion : il y aura alors finalement un traité nouveau, entièrement distinct de celui qu'on avait primitivement négocié. Si les signataires purs et simples ne consentent pas, ils seront en droit d'obliger leurs contractants qui ont fait des réserves à y renoncer ou à souffrir que la convention ne s'applique pas dans les rapports des Puissances intéressées."

Coming to more recent writers, Professor Jean SPIROPOULOS, in his *Traité de droit international public*, makes the following statement on the subject :

> "En principe, un traité est obligatoire dans *l'ensemble* de ses dispositions. Aussi ne doit-on pas reconnaître comme établie en due forme une ratification qui contiendrait certaines réserves. Le traité,

[1] Additional to those cited in the body of the speech of Sir Hartley Shawcross.

pour être obligatoire, doit être ratifié tel qu'il est et sans réserve, la ratification sous réserve ne devant être considérée que comme proposition d'un nouvel accord qui pourra être adopté ou non par le co-contractant."

A recent statement of the same view will be found in an article in the *Revue générale de droit international public* by M. SABA of the United Nations Secretariat :

"La réserve formulée par un État à un traité, qu'elle soit faite au moment de la signature ou de la ratification, a toujours posé des problèmes délicats. En effet, la réserve constitue quant au fond un amendement unilatéral à un accord multilatéral. Pour qu'elle soit valable, il faut donc qu'elle soit acceptée par les co-contractants."

"L'adhésion sous réserve exige cependant dans ce cas l'acceptation au moins tacite de tous les contractants, et le refus par un seul des contractants pourra empêcher une adhésion pourtant jugée extrêmement utile par tous les autres contractants."

A classic statement of the doctrine of the principle of consent is contained on pages 870 to 871 of the *Harvard Research Volume*, where the following passage occurs :

"When a State proposes to make a reservation to a multipartite treaty, whether at signature, ratification, or accession, it seeks in effect to write into the treaty at that time 'certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States' which are or which become parties to the treaty. It proposes, in effect, to insert in the treaty a provision which will operate to exempt it from certain of the consequences which would otherwise devolve upon it from the treaty, while leaving the other States which are or which become parties to the treaty fully subject to those consequences in their relations *inter se* and possibly even in their relations *vis-à-vis* the State making the reservation. It seems clear that a State should be permitted to do this only with the consent of all other States which are parties, or which, as signatories, are likely to become parties to the treaty, and this because, as has been said, States are willing in general to assume obligations under a multipartite treaty only 'on the understanding that the other participating Powers are prepared to act in the same way and that general benefit will thus result'. A multipartite treaty is 'an agreement in which each party finds a compensation for the obligations contracted in the engagements entered into by the others'. [League of Nations Document A.10.1930.V, p. 2.]"

The view expressed in the *Harvard Volume* finds support in the opinion of other eminent United States authority, for instance in Volume V of HACKWORTH'S *Digest* where the following passage occurs on page 130 :

"If reservations are not made at the time of signing a multilateral treaty, ratifications with reservations, in order to be binding, must be brought to the knowledge of the other contracting Powers and receive their approval, unless otherwise specified in the treaty, since they constitute a modification of the agreement."

The same view is taken by Professor Manley HUDSON. Writing in the *American Journal of International Law for 1938* (Vol. XXXII, p. 335), he drew attention to the fact that

> ".... when reservations other than those agreed to at the time of signature are proposed, the alternatives are absence of objection from any State consulted, on the one hand, and abstention from proceeding to deposit of a ratification or accession on the other hand".

A similar view is expressed in HUDSON'S *International Legislation*, where it is stated (Vol. I, p. 1) that

> "Similarly, an adhesion subject to reservation cannot be received in deposit without the consent of all States which have previously ratified or adhered, and possibly without the consent of all signatory States."

Of the duty of a depositary authority HUDSON'S *International Legislation* says:

> ".... an authority designated as the depositary of ratifications would not be justified in allowing a definitive deposit of a ratification which is subject to a reservation unless the consent of other signatory States were obtained, though the consent may, in some cases, be inferred from a failure to object after adequate opportunity".

Professor HYDE also (*International Law*, Vol. II, p. 442), speaking of the practice of the American State Department, says:

> "The Department of State has found occasion to declare that reservations to a multipartite treaty should be made and recorded at the time of signature in order that all parties to the treaty may, previous to and in considering ratification, understand to what extent each signatory is bound by the terms of the agreement."

An American judicial view to the same effect was expressed by Mr. Justice BROWN, in the case of *Fourteen Diamond Rings* v. *the U.S.* [1901, 183 U.S. 176]. With reference to an amending resolution which the United States Senate sought to introduce into a treaty with Spain which the Senate was asked to ratify, Mr. Justice Brown said:

> "It can not be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting Power.... The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory on the other Power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty.... But it could not, in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizenship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners."

It is equally difficult to reconcile the views now put forward by the Government of the Soviet Union, and by the other governments supporting the Soviet view, with the quite recent and apparently officially approved expressions of high Soviet legal opinion. These are

quoted in the Report of the Secretary-General of the United Nations (Document A/1372) which forms part of the dossier of the Court in this case, and I would like to recall them here. Thus a study recently published by the Institute of Law of the Academy of Sciences of the U.S.S.R. favours the making of any reservations prior to signature so that

> ".... the parties to the treaty become familiar with them prior to signature and agree to them (if only by remaining silent). As a general rule reservations must be accepted and countersigned by all parties to the treaty."

In a connected publication on the same subject it is stated that

> "Reservations at the time of ratification cannot be unilateral: they must receive the agreement of the States who are parties to the international agreement."

### 2.—VIEWS EXPRESSED BY JURISTS AT OR IN CONNEXION WITH INTERNATIONAL CONFERENCES

The representative of Poland at the Conference which drew up the Convention on Customs Formalities (1923) announced his intention of making reservations to certain substantive articles of the Convention. It was thereupon pointed out by M. SERRUYS, of the Economic Committee of the League of Nations, that the Polish delegate

> " .... had made so wide a reservation as to include at least one question of principle and three questions of application.... In his opinion, no reservations could be made on clauses containing questions of principle.... The question of the publication of import and export prohibitions was, for instance, essential for the commercial world, and to make a reservation regarding it would be to run counter to one of the vital principles which the Conference was seeking to establish in the Convention.
>
> In conclusion he desired to point out to M. Rasinski that certain reservations made by a State to a convention could not be of such a nature as to render null and void the principal obligations assumed by that State, and particularly onerous the obligations assumed by other States which had adopted the convention as a whole and did not thereby obtain reciprocal advantages." [League of Nations Document C.66.M.24.1924.II, p. 123.]

M. RENAULT, as rapporteur of the Drafting Committee of the conference at which the Declaration of London of 1909 on Maritime Warfare was drawn up, made the following statement:

> "The rules contained in the present Declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the delegations. Concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory and a legitimate expectation would be falsified if one Power might make reservations on a rule to which another Power attached particular importance." [8 *American Journal of International Law*, (1914), Supplement, pp. 88, 142.]

The sub-committee of the Committee of Experts for the Progressive Codification of International Law which sat in 1927, consisting of Messrs. FROMAGEOT, DIENA and MCNAIR, made the following statement in their report on the admissibility of reservations to conventions :

> "It no doubt frequently happens that, in the course of the negotiation of a treaty, agreement is reached between the contracting parties regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party may naturally, when appending its signature to the act concluded, mention and maintain its reservation. The other contracting parties, when they also append their signatures, signify thereby that they have accepted the reservation and consent thereto.
>
> But when the treaty declares, as we have seen above, that it permits signature by Powers which have not taken part in its negotiation, such signature can only relate to what has been agreed upon between the contracting Powers. 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."

### 3.—VIEWS AND PRACTICE OF GOVERNMENTS

The United Kingdom Government, in a Memorandum which it addressed to the Secretary-General of the League of Nations in regard to certain reservations which had been entered to the Opium Convention of 1925, made the following statement :

> "It may be said that such conventions [i.e. multipartite conventions] are, in their essence, a matter of offer and acceptance. Individual States may well undertake particular obligations which are inconvenient or disadvantageous to themselves as part of a general bargain on the understanding that the other participating Powers are prepared to act in the same way and that general benefit will thus result.
>
> But if individual States are to be entitled, without consultation with other signatories, to accept an agreement as a whole while declining to adopt those of its provisions which may be unwelcome to them, there is a danger that such a practice would tend to defeat the purposes for which multilateral agreements are entered into." [League of Nations *Official Journal*, 1926, pp. 612-613.]

In its written statement to the Court, the Government of the Netherlands refers to the case where several governments wished to make a reservation to an article of one of the Hague Conventions drawn up in 1899. The Netherlands Government, as headquarters government, observed that the only reservations which could be admitted were those which had been expressly made at an earlier date and recorded in the minutes of the conference. It went on to say :

> " .... If this were not so, any State might sign one of the conventions with a reservation as regards its most important provisions and thus be relieved of a heavy obligation, while the other Powers,

> who had already signed without any reservation, would nevertheless be bound by those obligations *vis-à-vis* of the State in question. The Dutch Government, therefore, could not accept the reservation without referring it to the other signatories, but they were willing to do so and recommend its acceptance."

Paragraph 22 of the Secretary-General's Report (Document A/1372) describes an occasion when the French Government took a similar line.

A striking case is also given in paragraph 23 of the Secretary-General's Report. Germany proposed to sign the White Slave Traffic Convention of 1920 subject to a reservation in practically the same terms as a provision she had sought to introduce at the conference, but which had been rejected. Objection to the reservation was made and Germany was eventually obliged to abandon it.

This may be compared with the action of the Soviet Government in the present case in relation to its reservation on Article IX of the Genocide Convention. During the drafting of the Convention, the Soviet Government consistently opposed this article and formally proposed its deletion. The General Assembly however insisted on retaining this article and rejected the Soviet proposal to delete it. The Soviet reservation on the subject is therefore a unilateral attempt to secure for the benefit of the Soviet Union the elimination of a provision the inclusion of which was expressly insisted on at the drafting of the Convention.

Another case was the Cuban ratification to the Protocol of Revision of the Statute of the Permanent Court of International Justice. The Cuban ratification contained a reservation in regard to Article 23 of that Statute, which corresponds to Article 23 of the present Statute of the Court. To this reservation a number of States made definite objection. Upon it being pointed out that (quoting from the *Harvard Volume*, p. 864) the Cuban reservation "would amount to a modification, at the request of a single State, of an instrument already accepted by a large number of signatories, Cuba eventually withdrew her reservation and gave an unqualified ratification to the Protocol".

It seems clear, therefore, that there is no basis of fact for the view that reservations are usually confined to formal or unimportant matters, and no real ground of principle for distinguishing between substantive and non-substantive reservations, except in the sense that non-substantive reservations are often unobjectionable, could therefore be permitted, and normally will be permitted. Such reservations can indeed be taken to have been consented to if no objection to them is offered. But none of this applies to reservations on matters of substance, and if objection to these is made they must be regarded as inadmissible.

### 4.—PRACTICE IN RELATION TO PARTICULAR TREATIES

The *Harvard Research Volume* (p. 876) sums up the practice relative to reservations appended to a signature as follows :

> "Furthermore, although there may be relatively few cases where, as a result of objection by other signatories to its signature with reservation, a State has either abandoned the reservation or else foregone signing a treaty, it can be said that in practice reservations at signature have generally been made in such manner and under

such circumstances as to lend support to the rule here laid down. That is, reservations at signature have usually been so made as to indicate that the other signatories did, as a matter of fact, consent thereto either expressly or by implication, and there seem to be no precedents to suggest that such consent is not necessary. See, in this sense, Malkin, article cited, 7 *British Year Book of International Law* (1926), p. 159.

States have sometimes made reservations at signature simply by appending to their signatures, where all the other States signing the treaty could readily see and read them, the complete terms of their reservations. Where this has been done, and the other States have affixed their signatures at the same time, the latter fact may in itself be taken to indicate that the other signatory States consented to the making of the reservations. It is not important that at the time of signing some States necessarily signed immediately before and some immediately after the State making the reservations; the significant fact is that, under the circumstances, and even if they had no previous knowledge of the proposed reservations, all States signing the treaty presumably had notice of the reservations and made no objection thereto. See 1 Hudson, *International Legislation* (1931), p. xlix and n. 3.

Frequently, in the case of multipartite treaties concluded at large conferences, the reservations made by States at the time of signature have been previously announced at one of the formal sessions of the conference or commissions and duly recorded in the *procès-verbaux* or minutes."

In relation to this the *Harvard Research Volume* gives a great many instances of conventions which either expressly permitted reservations to be made, or where, the question of the making of reservations having arisen, it was made quite clear that none would be permitted which did not secure general consent. The following are the principal conventions cited in this connexion by the *Harvard Research Volume*:

Convention on the Simplification of Customs Formalities, 1931;
Convention providing for a Uniform Law of Bills of Exchange and Promissory Notes, 1930;
General Act for the Pacific Settlement of International Disputes;
Conventions for the Codification of International Law, 1930;
The Hague Conventions of 1899;
The International Conference of American States on Conciliation and Arbitration, 1929;
The Convention on Economic Statistics;
The Treaty of Versailles, 1919;
The Convention for the Suppression of the White Slave Trade, 1910;
Protocol of Signature of the International Sanitary Convention of 1903;
The International Sanitary Convention for Air Navigation, 1933;
The Havana Convention on Treaties.

In his article in the *British Year Book of International Law* on reservations to multilateral conventions, already referred to, Sir William MALKIN similarly undertook a review of a large number of international multilateral conventions entered into during the last three quarters of a century. These included the following:

Treaty respecting the Navigation of the Danube, 1883;
International Sanitary Convention, 1892;
International Sanitary Convention, 1893;
International Sanitary Convention, 1894;
International Sugar Convention, 1902;
International Sanitary Convention, 1903;
Act of Algeciras, 1906;
Geneva Red Cross Convention, 1906;
Agreement for the Unification of Pharmacopæial Formulas, 1906;
International Copyright Convention, 1908;
White Slave Traffic Convention, 1910;
Conventions relating to Collisions and Salvage at Sea, 1906;
International Sanitary Convention, 1912;
Opium Convention, 1912;
Radio-Telegraphic Convention, 1912;
Industrial Property Agreement, 1920.

Sir William MALKIN also cited the Hague Conventions of 1899 and 1907, the Treaty of Versailles, 1919, and the Treaty of Lausanne, 1923. He then pointed out, in the following passage, that in virtually every one of these cases consent, express or implied, was given to the reservations to these Conventions which were admitted:

> "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. It is unlikely that a wider examination of the precedents would lead to a very different result, and, if so, it may fairly be said that the practice of nations is strongly in favour of the view which it was suggested at the beginning of this article is the only one consistent with sound principle."

### GENERAL CONCLUSION FROM THE AUTHORITIES

Whether it be the views of authorities on international law, of governments or of experts, or the actual practice followed by States in relation to the treaties which they have drawn up, there is a quasi-universal recognition of the principle that consent is necessary to any reservation a State desires to make to an already agreed text; and from this it follows that in the absence of such consent, and more particularly if an actual objection has been made, the reservation cannot be maintained. If it is maintained, it inevitably renders the signature, ratification or accession to which it is attached invalid, and inoperative for the purposes of making the State concerned a party to the treaty.

## 4. STATEMENT BY MR. FITZMAURICE

(REPRESENTING THE UNITED KINGDOM GOVERNMENT)

AT THE PUBLIC SITTING OF APRIL 14th, 1951, MORNING[1]

Mr. President, I am aware that a great deal of indulgence has been extended to the United Kingdom in the course of these proceedings, and I shall endeavour to say what I have to say very briefly. When Sir Hartley Shawcross terminated yesterday evening, he had not yet dealt with the third of the three questions put to the Court, and my principal task will be to deal with that question. But the Court will recollect that, earlier in the day, Sir Hartley asked that I might be allowed to reply to one or two points which had been made previously by the distinguished representative of Israel, Mr. Rosenne. Most of the points which Mr. Rosenne made were in connexion with the third question, and so I shall deal with them in connexion with that question. But there were also one or two points that arose on the first questions, and I should like to begin by dealing with those very shortly. Now, Mr. Rosenne put forward a very interesting theory. He suggested, in relation to the Genocide Convention, that the articles of the Convention could be divided into what he called normative articles and contractual articles, and he suggested that whereas there could clearly be no right to make reservations to normative articles—and on that I entirely agree with him—there was on the other hand an inherent right to make reservations to the contractual articles, subject only to this proviso, that in the event of such a reservation being objected to by any State, the Convention would not be in force between the reserving State and the objecting State.

Mr. President, whatever merits this theory may have, one can, I think, say this about it, that it is entirely new. I for my part know of no existing rule of international law which says that there is any inherent right to make reservations to contractual articles, even with the proviso which Mr. Rosenne attached to it, namely, that the convention would not be in force between the reserving and the objecting State. We have there, I think, a completely new theory, and in so far as it derives partly from the same idea as the Pan-American theory, we have, I think, the same position. In the case of the Pan-American system, we have something which has been instituted by special agreement for use in a special case which would need agreement to be applied in another field. The position at present, at any rate, certainly is that there has been no agreement on the part of any of the States concerned in the Genocide Convention to apply such a system to any reservations that may be made to that Convention, and in the absence of an agreement to that effect, I do suggest that it would not be possible to regard this system as applicable in the case of the Genocide Convention.

But let us assume that I am wrong; let us assume for the sake of argument that there might be an existing rule of international law which gave an inherent right to make reservations to articles so long as they were of a contractual character. Nevertheless, even if there

were such a rule, at least it would be necessary to know, and to know for certain, which articles of the convention were purely contractual, and which were purely normative. There, I think, one comes up against the great practical difficulties which would be involved in the theory which the distinguished representative of Israel put forward.

Here I would digress a moment to remind the Court that of course it does often happen that countries, when concluding a convention, specify certain particular articles in respect of which reservations can be made. We all know of cases of conventions which contain a reservations article, and very often that reservations article says that reservations may be made to articles X, Y and Z of the convention; and that works perfectly well because, but only because, it is known in advance to which of the articles of the convention the reservations can be made. I suggest that that practice demonstrates by implication that unless the articles concerned are specified, or unless there is a very definite and certain way of identifying them, it is not possible or practicable to work a system by which reservations can be made to some articles of a convention and not to others.

Now I should like to ask the Court to look with me at some of the articles of the Genocide Convention with a view to seeing whether the difficulties I have been speaking of are real or not. Of course, in any convention of this type you find certain articles which are clearly normative, and you will probably find certain other articles which are clearly and solely contractual, but I suggest that you will find a good many articles as to which it is very difficult to say whether they are normative or contractual, and indeed in respect of which you can say that they are *both* normative *and* contractual. I will not go through the whole of the articles of the Convention, but we might have a look at Article I. That article says that the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, *which they undertake to prevent and punish*. Now there, in the very first article of the Convention, and the most important article of all, you have an evident ambiguity. By ambiguity I mean from the point of view of determining whether it is normative or contractual. It begins with something normative, a declaration of the principle that genocide is a crime under international law, but then it goes on with an undertaking on the part of the parties to prevent and to punish; and therefore I suggest you have the introduction of something which has a contractual element. There may be room for argument about that, but the point I am making is that there *is* room for argument. It is not clear into which category Article I falls. It is normative, but also partly of a contractual nature.

Now let us look at Article IV, which reads:

> "Persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals."

Is that a normative article or is it a contractual article? I am really not quite sure, and I think it could be argued to have elements of both. Then we come to an even more striking case, Article V:

> "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect

to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."

I should have said that that was on the whole a contractual article rather than a normative article, but I am sure Mr. Rosenne would be the first to agree that that is not an article upon which any inherent right to make reservations could be permitted, because clearly the article by which the parties undertake to enact the necessary legislation to give effect to the provisions of the Convention is a thoroughly fundamental article on which no reservations could be permitted. But to me it is not clear that that article is really normative in character. It seems to me to be a contractual article.

Finally, I might ask the Court to look at Article VII. Article VII has two paragraphs. The first one is normative:

"Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition."

Then there is another paragraph as follows:

"The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

Well, that second paragraph is *clearly* contractual, the parties pledging themselves to granting to each other extradition in cases which may arise under the Convention, of crimes of genocide which may be committed by a national of one country in the territory of another. Therefore, in Article VII we have a clear case of an article both normative *and* contractual.

I do not want to take up the time of the Court and I will not go through any further articles, but I hope I have said enough to show that the question of whether provisions are normative or contractual is very far from an easy or simple one, and it is very far from being self-evident whether a provision is normative or contractual. I would ask the Court to consider the extraordinarily difficult position in which the Secretary-General of the United Nations would be placed in the case of the Genocide Convention if this theory were adopted. There are still a great number of countries which can become parties to the Convention. At any time the Secretary-General might receive a ratification or accession with a reservation attached to it, that the reserving country would maintain it had a right to make, because in its view the reservation was in respect of a contractual article, but the Secretary-General might consider that the article was of a normative character, or even if the Secretary-General did not consider that, some other State, a party to the Convention, might take that view, and then, far from the matter being in any way clear or settled, there would be a controversy over that. Therefore I suggest, Mr. President, that this particular system is one which, at the very least, for its application, needs a clear understanding in advance laid down by the parties themselves, and agreed upon by them, as to which articles of the Convention fall into which category, so that it is possible for the Secretary-General and other countries concerned, to know from the start what are the articles to which a reservation can be made. That brings me to a point about the will of the parties which I will speak about after the translation.

Mr. President, the distinguished representative of Israel laid very great stress in this matter on the will of the parties. That, of course, is a very important factor. If I understood him correctly, what he suggested was this, that it was the will, or it must be assumed to have been the will of the parties, that as many countries as possible should become parties to the Genocide Convention. He went on to say that it must, therefore, so to speak, be *presumed* that the parties intended that that process should be facilitated by giving a faculty to countries to make reservations, at any rate, to certain articles. Clearly there is nothing to that effect in the Convention. The Convention, as we know, contains no provision on reservations, and one would have thought that if the parties had intended that the process of becoming a party to the Convention should be facilitated by the faculty to make reservations, and if they had really attached importance to that, they would have included an article to that effect in the Convention, or, at any rate, they would have made some mention of the matter expressly in a separate protocol or taken some step about it. As we know, however, nothing of the kind was done, and it seems to me that what Mr. Rosenne is really asking the Court to do is to read into the Genocide Convention a provision which is not there. I think that on analysis it will be found that he is asking the Court to read into the Genocide Convention a reservations article, or to imply a right to make reservations as a necessary consequence of what must be assumed to have been the will of the parties.

The Court has had occasion to consider that type of contention before in at least three cases, I think, which have been before the Court. In those cases—the first case on the admission of new Members, the South-West-African case, and the second phase of the Peace Treaties case—the Court had to consider whether it was possible to imply in an international instrument provisions which were certainly not written into those instruments, and each time the Court rejected the idea and refused to imply such provisions. The striking thing is this, that in each case it was suggested to the Court that the provision in question ought to be implied in order to give effect to the presumed will of the parties; and if I have read the opinions of the Court correctly on that subject, in each case they rejected the idea, and said that it was not possible to read into an international instrument provisions which were not part of that instrument merely in order to give effect to the presumed intentions of the parties.

It is more than that in this case. Not only is there no evidence that the intentions of the parties were what the distinguished representative of Israel suggests that they were in regard to reservations, but there is a great deal of evidence to the contrary. I shall not go into all that because Sir Hartley Shawcross went into it yesterday ; but we know that at several stages of the preparation of the Genocide Convention express consideration was given to the possibility of including an article on reservations, and the matter was fully discussed in several committees, and each time the idea was rejected. There may have been intimations by individual delegations that they would have difficulty in becoming parties to the Convention unless they were permitted to make reservations, but certainly those who framed the Convention rejected the idea of any general right to make reservations, and refused to include an article on the subject in the Convention.

Therefore, it seems to me, Mr. President, quite clear that, in so far as this depends on the will of the parties, that will was certainly in the sense of rejecting the making of any reservations.

In parenthesis I should like to make one point clear arising out of something which Sir Hartley Shawcross said. He mentioned that certain governments, the Governments of Poland, the Soviet Union and the United States had at that time taken a view different from that which they all appear to take now. That is true, but I should like to make it clear that of course there is a considerable and, I think, important difference in the reasons on which the views of those three Governments are now based, because whereas the Government of Poland and that of the Soviet Union are in favour of what Sir Hartley Shawcross called the absolute sovereignty theory, the Government of the United States does not put forward that theory but favours something more in the nature of the Pan-American theory.

There is one other point which was made by Mr. Rosenne about which I should like to say a few words before I come to the third question. There was a part of the United Kingdom's written statement in which we said that the application of the Pan-American system would lead to what we characterized as a curious and rather unusual position, in that two parties might both be parties to the same convention and yet the convention would not be in force between them. Mr. Rosenne, I think, said that there was nothing particularly unusual in that situation, and that it arose whenever two States broke off diplomatic relations. Well, with great respect, I do not think that there is any rule of international law which causes treaties to cease to have force between parties merely because diplomatic relations between them are suspended or broken off. The suspending or breaking off of diplomatic relations does not stop all intercourse between countries. For instance, ordinary commercial intercourse continues, and very often the consular representatives of the two countries remain. The utmost effect that the suspension or breaking off of diplomatic relations might have would be to render the actual operation of some treaties difficult in practice, and there might be a temporary suspension in their *operation;* but that is quite a different thing from saying that the treaties between those countries cease entirely to be in force.

## II

I now come to the third question and I should like to begin with a reference to what I might call the "bad boy argument". There are suggestions—several have been made in the course both of the oral proceedings and of the written proceedings—that countries which do not immediately, as it were, ratify or accede to a convention are really behaving rather badly, and that they should in some way be penalized because they have not immediately become parties. It is on some such conception I think—because I cannot otherwise account for it—that the idea is founded that countries which are only potential parties to a convention are absolutely devoid of any right of objecting to a reservation which it may be attempted to make.

I should like to ask the Court just to consider the facts in relation to the Genocide Convention. The Genocide Convention was originally framed and adopted by the Assembly in December 1948, and it was opened for signature. Quite a number of countries signed it, but I think I am right in saying—if necessary I am sure the representative of the Secretary-General will correct me—that a year later, in the autumn, say, November 1949, only about four countries had then ratified the Genocide Convention. So for a whole year after the Convention was open for signature hardly any country had become a party even to the extent of ratifying it, and of course the Convention was not in force. Then a year later, two years after the Convention had been open for signature, I think I am right in saying that in October of last year there were still only about fifteen countries which had ratified or acceded. By November a certain number of other countries had ratified or acceded—just over twenty—which was sufficient therefore to start the process of bringing the Convention into force. Even to this day there are not more than about thirty countries out of seventy which are actual parties to the Convention. Therefore, you see that very considerable periods may elapse during which countries for various reasons are not able, or do not ratify or accede to international conventions. I suggest that it is really much too sweeping a proposition to say that during those periods only countries which have ratified or acceded have rights in the matter of objecting to reservations, and that the other countries have no rights at all.

It seems to me that there is really only one ground on which this can be suggested. It is that a potential party must not be regarded as having any rights in the matter because if it had, then even although it did not intend to become an actual party to the Convention, it could, nevertheless, prevent a State which wished to make a reservation from becoming a party, even although all the other States were prepared to accept that reservation.

Assuming that there is some reality in this difficulty, that it is something which is at all likely to occur in practice (personally I think it is very unlikely that one single State would hold up a reservation which another State wished to make and which all the other interested countries were prepared to admit), it seems to me that it can be met by the method which we proposed towards the end of our written statement and about which I shall have more to say later on, that method being to impose some kind of time-limit on the period during which potential parties would have the right to make or maintain objections. Since the difficulty, if it exists, can easily be met in that way, it can, I think, constitute no valid reason for denying to potential parties the right of effective objection. In our written statement we suggested that a potential party must have a definite legal right of, at any rate, an *initial* character, to make effective objection to reservations which other States seek to make, because if the potential party did not have this right, another right, which no one can seriously doubt it does have, would be prejudiced. This other right is the right of the potential party to become an actual party to the Convention. That is a definite legal right arising out of the Convention itself, which either specifies or indicates in some way what are the countries who are entitled to become party to the Convention.

I might pause here to mention a point which was made by Mr. Rosenne. Referring to a passage in our written statement in which we pointed out that strictly speaking all such clauses ought to be put into a separate

protocol—of course they never are because it is inconvenient to do so but from the strictly legal point of view they ought to be—Mr. Rosenne, on the basis of that observation, said that it showed that the potential parties, in so far as they had any rights in this matter, had rights only in relation to the formal clauses of the convention which might figure in a separate protocol but had no rights in regard to the rest of the convention. Well, that may be true, but it seems to me to leave the position exactly the same, because even if you put the formal clauses into a separate protocol, the right which you would be giving to a potential party under the separate protocol would still be a right to become a party to a particular convention. There would still be that right as a definite legal right, and whether you embody that right in the convention itself or in a separate protocol seems to me to be completely immaterial. Whichever method you adopt you are conferring on the potential party a right to become a party to a convention and to a particular convention having a particular text. For that reason I suggest that Mr. Rosenne was not strictly correct when he spoke of potential parties as being in the position of "third States". He quoted the maxim *pacta tertiis nec nocent nec prosunt*. It is a perfectly correct maxim, but in relation to this matter the potential parties are not third States ; they are directly interested States. They are States which under the convention have vested in them an actual right to become parties to a particular convention having a particular text.

I wonder whether I might explain in French one point which was not quite clear from the translation. It is this : *M. Rosenne a dit que si on mettait les clauses formelles dans un protocole séparé il serait alors évident que les parties potentielles, en puissance, auraient des droits seulement en ce qui concerne les clauses formelles et ils n'auraient pas de droits sur les clauses substantives de la convention. A cela, je réponds que la chose est la même, parce que, ou bien le droit de devenir une partie à la convention est inséré dans la convention elle-même, ou bien on le met dans un protocole spécial. Mais c'est toujours le même droit. C'est un droit acquis. Ce droit peut provenir du protocole ou de la convention. Mais ce n'en est pas moins un droit de devenir une partie à une convention déterminée qui a un texte déterminé.*

On this question of the text of the convention, my contention is that the right of the potential party relates to a particular convention having a particular text, and that the party is not entitled to have that text changed, as it were, before it has had an opportunity of ratifying or acceding to the convention. One point which was made against that argument was that a reservation does not change the actual *text* of the convention. In the purely literal sense of the term it is no doubt true that a reservation leaves the actual text of the convention unchanged, but it does, or it can, very much alter the general balance and effect of the convention. If you get reservations of a sufficiently important character made to sufficiently important articles by important States, you have a situation which, I suggest, does alter the whole general balance of the convention. It can be a very serious factor. Let me give an example in relation to the Genocide Convention. It is not an extreme example but it is a possible example. I should like to quote once more the article on extradition. That is a very important article of the Convention, but it is an article on which reservations would be extremely likely to be made, if the faculty of making reservations on such articles

existed, because the article declares that genocide can never be regarded as a political offence for the purpose of extradition, and involves an obligation to extradite persons for the offence of genocide. This is one of the articles which has caused very considerable difficulty to a number of countries in becoming parties to the Genocide Convention. It is at least one of the reasons why my own country has hesitated and is still hesitating on that subject. We have traditionally granted political asylum, and while I am not for a moment suggesting that asylum ought to be granted to persons who have been guilty of the crime of genocide, nevertheless, it is not altogether easy to reconcile that article of the Genocide Convention with the traditional right of granting political asylum. Therefore, it is an article to which, if it were possible to make reservations to the Genocide Convention, it would probably be found that reservations would be made.

Now I suggest that that is eminently a case where the balance and intended effect of the Convention would be considerably altered if a large number of important States made reservations to that article. And, of course, the same applies *a fortiori* to other articles of the Convention, but I purposely chose an article which is perhaps not absolutely fundamental to the Convention, but on which reservations might quite reasonably be made, and I suggest that even there it would have an effect on the general balance of the Convention.

Here I should like figuratively to ask the distinguished representative of Israel a question—I will not actually ask him to answer it, but I pose to him, as it were a rhetorical question. How would he deal with the period during which there are no parties to a convention—because we know of course, that when a convention is opened for signature, some States sign but do not ratify, and some can accede but do not accede, and there is a period during which there are no parties. According to the theory that only the actual parties to a convention are entitled to object, then at that point—and it is a period which may last quite a long time, a year or two or even more—according to that theory I say, there is no one who can object to any reservations. Therefore during all that period, according to this theory, people can make what reservations they like. They can come in, quickly ratify or accede with some important reservation which no one can prevent them making. Moreover, two or three countries acting in conjunction could not only make those reservations at a time when no one was in a position to object, because there were no parties to the convention : they could also often bring the convention into force on that basis, and once a convention has come into force with reservations, it is too late—those reservations can never afterwards be altered or cancelled. To be effective, the reservations must be objected to and must be withdrawn in consequence, either before the convention comes into force, or at least before the ratification or accession of the State is admitted, but here we have a situation in which no one can challenge a ratification or accession with a reservation because there are as yet no parties to the convention. Therefore, two or three countries acting together perhaps could bring a convention into force like that, with reservations which thereafter could not be altered.

Now, that is not at all a fanciful danger, because it is often purposely provided that a convention shall come into force upon ratification or accession by a very small number of States, and an extreme case often mentioned in connexion with the present proceedings is the case of the

Geneva Conventions of 1949 which came into force on ratification by only two States, and that is done to bring them into force as quickly as possible. Incidentally, they are very important conventions on the treatment of prisoners of war, the sick and wounded in the field, and civilian internees. Those are conventions to which countries might want to make serious reservations, and according to the system propounded by Mr. Rosenne and many others, it would be quite possible to bring those conventions into force, that is for two countries to bring them into force, the two countries attaching to their ratification important and far-reaching reservations which no one would be in a position to object to, because there would be no other actual parties, and according to this system, merely potential parties have no rights of objection.

The Court can, I think, easily see the serious objections to which that position would lead, and we submit that that is a position which could only be avoided by giving to the potential, as well as to the actual parties, at any rate an initial right to object, which will last for a certain period. Now, for my part, I really see no good answer to the argument I have just put forward, but it has been suggested in one of the written statements, I think the statement of the United States, that whatever force that argument might have, it has none to-day in relation to the Genocide Convention because that Convention requires twenty ratifications or accessions to bring it into force, and it is now in force having secured that number. Therefore, according to what is stated in the United States written statement, we are past the period when this particular danger arises.

On that point I want to say this. I submit that the Court, which is asked to pronounce on a general question of principle in relation to the Genocide Convention, namely, whether potential as well as actual parties to that Convention possess the right of effective objection to reservations, must begin at the beginning and not in the middle of things. We must begin by placing ourselves at the point when the Convention was first opened for signature. I submit that at *that* date, when none but potential parties existed, those potential parties must have possessed the right to make objections to any reservations that another State might then have purported to make on signing or ratifying. Otherwise, there would have been nothing to prevent any State immediately signing and ratifying subject to some important reservations expressly rejected during the drawing-up of the Convention.

Now, if I am correct in saying that this right must at least have existed for the potential parties to the Genocide Convention when that Convention was first drawn up or adopted by the Assembly, then it becomes simply a matter of determining how long that right of objection continues and how and at what point it is eventually lost. The question becomes one not of the initial existence of the right but of the extent to which it can be indefinitely maintained. If we can agree that what is really involved in the third question addressed to the Court is not whether the potential parties have a *prima facie* right of objection, but how long they can continue to have that right if they remain only potential, and do not become actual parties, I think the task of the Court would be greatly simplified.

Before I come to the question of the period, Mr. President, I should like to say just a little more about the right itself, the initial right of potential parties to object. I suggest that that right must exist, not

only for reasons of principle such as I have indicated, but that its existence is really essential for the orderly conduct of the conclusion of international conventions. Consider the process of framing such a convention. States come to the conference with many different ideas. At length, with more or less difficulty, a text is established which embodies the greatest common factor of agreement which can be achieved and the convention is then open for signature. I suggest that at that point it is essential that there should be some measure of finality and certainty about the text of the convention, and that it should not be immediately susceptible of alteration by a process of entering reservations to which no one can object. It is not difficult to see why it is essential for good order that this should be so. Having, perhaps after a great deal of difficulty, framed a convention and established a definite text, States then wish to reflect on the result, and consider whether they can become parties. They have constitutional processes to go through, consultations to carry out, perhaps in distant territories, and legislation to be enacted. All that takes time, and not only that, it requires the existence of a text which is a definite and certain text and which is not susceptible to alteration, or to having its balance or effect altered, as it were, in the middle of the whole process, when States are considering the matter and endeavouring to carry out their consultations and their constitutional processes leading to eventual ratification or accession.

Unless there is, so to speak, a "closed period" during which no alterations can be effected in the text of the convention or in its general balance or effect, I suggest that the carrying out of the necessary constitutional processes becomes extremely difficult, and that is the reason why I think the potential parties must be regarded as having the right to object to any attempt during that period to change the convention. Then, of course, it is necessary to take account of the different rates at which countries accomplish the processes necessary preliminary to ratification or accession. The constitutions of certain countries enable them to act very quickly once the government has made up its mind it wishes to become a party to the convention. With other countries the process is slow and difficult, and here I should again like to say that I could not agree with the suggestions made that countries which do not, as it were, immediately and speedily ratify or accede to a convention are in some way blameworthy and have only themselves to thank if they do not have any right of objecting to reservations. I do not think that that takes a realistic view of the situation that exists after an important international convention has been drawn up and is opened for signature. These constitutional processes may quite easily, and in many countries do normally, take a matter of two or three years, and even this is not a long period when set against the background of a convention intended to last for decades or indefinitely. If the position of the slower States—and there are many of them—is to be protected, or if it is not protected, they may well find, by the time they do come to ratify and have completed their internal processes, that they are then confronted by reservations already made, to which they have not been able to object and which they must accept or not become parties to the convention.

To my mind no clearer prejudice to the rights of potential parties could be imagined, and it is a prejudice which can only be avoided if those States are regarded as endowed with a *prima facie* right of objection to any attempted reservations. I would therefore ask the Court,

and I attach particular importance to this point that, if the Court agrees with me, then whatever it may decide as to the position of potential parties in relation to the Genocide Convention at the point of time at which we now find ourselves, it should make it clear that, in principle, at least a *prima facie* initial right of objection must be regarded as existing for potential parties, and it is merely a question of *how long* this right continues to exist for a State, which despite the passage of time, has not proceeded to become an actual party. Even if the Court should decide that at the date at which we now find ourselves, countries which have not by this time ratified or acceded have no right to object to reservations, I would ask the Court at least to make it clear that those countries *had* such a right when the Convention was first open for signature, and that that right existed for a considerable time, and that if it is lost now, it is not lost because it never existed, but because of the passage of time or for other reasons.

That view seems to me to be supported by the main weight of international authority. It is implicit in many of the passages which Sir Hartley Shawcross read yesterday, and it will be found implicit in many of the passages which I shall insert in the Annex of Authorities which we shall give to the Registrar[1]. Sometimes we find that view expressly stated. For instance, there is an interesting passage on page 871 of the *Harvard Research Volume*, where the view is expressed that a State should only be permitted to enter a reservation to an international convention "with the consent of all the other States which are parties, or which, as signatories are likely to become parties to the treaty". Equally, on page 887 of the same volume, the view is expressed which is exactly that which we are contending for, namely, that "although not yet parties" States "should not, without their consent, be confronted with a reservation written into a treaty which may be of such a nature as to cause them to refrain from ever becoming parties". That is precisely the danger and it could not have been more effectively stated.

Now there was one point which was material here, mentioned by Mr. Rosenne. He said that if a right of objection was given to potential parties, there would never be an end of the matter, because of the possibility that at any time a new State might emerge, and that is a position which always exists and may occur at any time in the future, so that there would always be some State in a position to object to reservations which other States wanted to make. Well, in so far as that danger exists, I think it is a purely theoretical one. It is true that in recent times there has been a marked number of emergences of new States. Whether that process will go on, we cannot tell, but at any rate the emergence of a new State is ordinarily a comparatively rare thing and I venture to say that it is exceedingly unlikely in practice that a new State would rush in and persist in being the only State which objected to a reservation which some other country wanted to make and to which other countries were willing to agree. That is the only case that has any reality in support of Mr. Rosenne's theory because, of course, if other States also objected to reservations, it would be immaterial whether the new State objected or not. This danger only exists in the case of a new State coming into existence and immediately proceeding to put itself in the position of being the *only* State which objects to a reservation which

[1] *See pp. 394-401.*

some other country wants to make to a convention. Personally I think it is a case of *de minimis non curat lex*. A situation of that kind is so extremely unlikely to occur in practice that the Court need hardly consider it.

In addition to that, I think it will be found that if the various stages of a convention are considered, as to its coming into force, that danger really has no substance. If a new State comes into existence before a convention comes into force, I, for my part, see no particular reason why it should not have the same rights of objection as any other potential party to the convention. If the convention has come into force, then any reservations admitted up to that time are in force and no one can afterwards object to them. States which ratify after the convention comes into force may seek to attach reservations to their application. Those reservations may or may not be objected to. According to my view, if objected to, they must be withdrawn or the country cannot ratify. Again, if at that period and at the moment when a ratification is deposited after a convention has come into force—that is if a ratification with reservations is deposited—and if at that period a new State comes into existence which has a right to become a party to the convention, I do not see why it should not have the same right as any other State to make objection to the reservations. The fact that yet another new State may come into existence still later is immaterial, because once a reservation has been admitted it cannot subsequently be objected to by a State coming into existence at a future date. So apart from the unlikelihood of a State putting itself in the position of being the sole objector, I do not think that in practice the danger has any reality.

## III

Mr. President, I now come to the question of duration, and I think we have a clue to the correct principle to be applied in the concluding words of one of the passages of the *Harvard Research Volume* which I quoted earlier, where the Court will remember there was a reference to States "likely to become parties to the treaty", and it was suggested that reservations ought not to be made without the consent of States which either were parties, or which were likely to become parties to the treaty. I fully admit, and indeed I put it forward as part of my case, that not only would it be inequitable that a State which did not intend or was never likely to become a party to a convention should not be able indefinitely to block the ratification by other parties—but also the existence of such an unlimited right would also be contrary to the very basis and principle on which the initial right itself is founded. The right itself of a potential party to object to a reservation is founded on the need to protect the right of States to become parties to the convention in the form in which the convention was originally framed and drawn up. The right of objection can therefore only be used for that purpose, and not merely for the purpose of blocking the participation of another State. Once it is clear that the potential party does not intend to become an actual party or is unlikely to do so, there no longer remains any right to protect, or at any rate the need for protecting it disappears, and the same would apply where a State had so delayed its ratification or accession that it could reasonably be regarded as having lost or renounced its original interest in maintaining the text

or the effect of the convention in the form in which it was originally drawn up.

At such a point the right of objection has lost its *raison d'être* and its legal justification, and the State concerned cannot make objections any longer, or maintain as effective, objections which may have been valid and effective at the time when they were originally put forward. Here I think we may profitably recall a test to which Sir Hartley Shawcross alluded yesterday, applied by the *Harvard Research Volume*, that preference should be given to the State prepared to accept the convention as it stands rather than to the State that wishes to alter its effect by means of reservations. That, of course, assumes that the objecting State to whom preference is to be given is prepared to accept the convention, to become a party to it or, at any rate, that has the possibility of becoming a party under consideration. By a parallel test we might say that if the question arises of choosing between a State not prepared to accept the convention *at all*, and a State which is prepared to accept it, though only subject to certain reservations, preference should go to the latter State, and this test is equally applied by the *Harvard Research Volume*. I quote the following from page 887:

> ".... it being necessary in the circumstances to deprive some possible signatories of the right to object to reservations, it may properly be done with respect to States which are even more dilatory about signing the treaty than the State which makes the reservation".

Now, Mr. President, of course, in admitting this, I am not suggesting that a potential party should *immediately* be deprived of the right to make an effective objection to a reservation. Here we reach the question of the moment at which it can reasonably be said that the initial right of objection to reservations can no longer be maintained by a State which is still only a potential party to the convention. Clearly, if this right is to have substance, and be something more than nominal, and is to serve the purpose for which it exists, it must endure for some time, at least for a sufficiently long time to give the States concerned time to complete the constitutional processes of ratification and accession. Therefore the actual period can really only be determined in relation to the circumstances of the case and there may be a number of factors to be taken into account besides the actual length of time involved, such as the attitude of the State concerned. Sometimes States make it clear that they have no intention of becoming parties to a convention, and then there is the nature and degree of complication of a State's constitutional processes, the nature of the convention and so forth. So far as the Genocide Convention is concerned, bearing in mind that three or four years is not in any way an uncommon period for States to require before deciding to ratify or accede to major conventions, and that the Genocide Convention itself only came into force a few weeks ago, and that even now some twenty to thirty States out of a possible seventy or more are parties to it, I would have said that the period within which valid and effective objections to reservations can be made by potential parties cannot yet be regarded as exhausted.

Now, on this matter, Mr. Rosenne with his customary skill asked a very pertinent question, and he posed this difficulty. He said, admitting that the matter can be dealt with on the basis that there is an initial right of objection but that that right does not last indefinitely, how are

you going to *decide* at what point that right is lost ? As to that I should like to say two things. Where a clear right exists, the fact that there may be certain difficulties in giving effect to it, cannot ever be a reason *per se* for saying that the right must be cancelled. If the Court agrees that it really *is* essential, both legally and for other reasons, that at the time a convention is opened for signature, all those who have a right to become parties must have the right, for the time being, of entering an effective objection to any reservations, then I do suggest that it would not be possible to say that that right must be regarded as not existing merely because there might be some difficulty in deciding how long it went on. But actually, I do not think that in practice there would be very great difficulty. What would happen is that at some point now or in the future, some State would maintain that it has objected to a reservation and therefore that reservation was invalid and the ratification to which it is attached was invalid. However, the reserving State would contend that the objection itself was invalid because the country concerned was not a party to the convention, and, moreover, that a long period had elapsed and it must be presumed that the objecting country did not intend to become a party and was objecting for purely obstructive reasons. If such a situation arose—I think it is a very unlikely situation to arise, because we must impute to States some sense of responsibility, and for my part I do not think that a State which had decided that it was not going to become a party to a convention, or had no interest in the convention would continue to seek to maintain objections to reservations desired by other countries. Assuming that States act on the whole with due sense of responsibility, I do not think that that situation would arise. But supposing it did, I see no reason why it should not be settled in the way in which any disputed question is settled internationally. It could be referred to the Court by the parties themselves or, since we are talking of the Genocide Convention, which is a United Nations convention, the matter could be referred to the Court by the Assembly for an Advisory Opinion as to the validity and effect at that time, or at that date, of the objection in question.

I venture to suggest that that is not a matter on which the Court would have any difficulty in giving an Opinion. It would, of course, be a question of appreciating facts and circumstances, but after all that is one of the functions which courts have to carry out, and I see no reason to suppose that this august Court is any less able to carry out that type of function than any other court. Indeed, I think we have proof to the contrary because in the Corfu Channel case the Court was called upon to deal with most difficult questions of elucidating and appreciating the facts, and weighing up the responsibility of States in different circumstances. If I may say so with very great respect, it seems to me that the Court acquitted itself of that task extremely well, and if this particular question came before the Court at any future date as to whether in all the circumstances a particular objection to a reservation could be regarded as being a valid objection, I can see no reason at all why the Court should not be able to resolve that question perfectly easily and effectively.

To conclude, then, Mr. President, my submission on the third question is this, that in *principle* an objection to a reservation offered by a signatory State which has not yet ratified, or by a State entitled to sign or accede but which has not done so—in other words an objection offered by a potential party—has the same effect as an objection made by an

actual party—it prevents the reserving State from becoming a party unless it withdraws its reservations; but that the right of a potential party to offer or maintain a valid and effective objection to a reservation is lost when it becomes clear either that the objecting State does not intend to become a party, or that its participation seems likely to be unduly or indefinitely delayed.

Thank you, Mr. President.

## 5. EXPOSÉ DE M. CHARLES ROUSSEAU

(REPRÉSENTANT DU GOUVERNEMENT FRANÇAIS)

AUX SÉANCES PUBLIQUES DU 14 AVRIL 1951

[*Séance publique du 14 avril 1951, matin*]

Monsieur le Président, Messieurs les Membres de la Cour,

La Cour est appelée à se prononcer sur la validité des réserves auxquelles certains États ont subordonné, les uns leur signature à la Convention pour la prévention et la répression du crime de génocide, les autres le dépôt de leur instrument de ratification ou d'adhésion à cette convention.

Le gouvernement que j'ai l'honneur de représenter ici est heureux que la Cour soit amenée à donner un avis consultatif devant lequel, je n'ai pas besoin de le dire, ce gouvernement, pour sa part, s'inclinera sans aucune peine.

Avant d'entrer dans l'examen au fond du problème qui se pose à la Cour, je crois qu'il ne sera pas inutile d'en circonscrire exactement l'objet puisque, dans certains exposés écrits qui ont été présentés à la Cour, des divergences se sont fait jour sur ce point.

I. — Une délimitation du problème me semble devoir être faite à un double point de vue : d'abord sur le point de la compétence même et ensuite en ce qui concerne la question de fond qui est présentée à la Cour.

A. — En ce qui concerne la compétence de la Cour, celle-ci a été contestée dans les exposés écrits présentés par certains gouvernements : notamment par la Pologne, la Roumanie et les Philippines.

A vrai dire, on discerne assez mal pourquoi cet effort a été tenté, car la Cour n'est appelée aujourd'hui qu'à émettre un avis consultatif dans un problème qui, à aucun degré, ne présente un aspect contentieux. Cette compétence consultative s'exerce évidemment dans les conditions qui ont été fixées tant par la Charte des Nations Unies que par le Statut de la Cour, et le fondement de cette compétence ne nous semble guère soulever de difficultés.

Présentée en termes généraux par le Gouvernement polonais, cette thèse a été exposée d'une manière plus détaillée dans l'exposé écrit de la République des Philippines.

J'aurai peu à dire sur l'argumentation présentée par le Gouvernement des Philippines dans l'exposé écrit qu'il a déposé au Greffe il y a quelques mois. Ce gouvernement estime en effet que la Cour devrait se refuser à émettre l'avis qui lui est demandé parce qu'en réalité la question qui est posée sous les numéros I et II de la Résolution de l'Assemblée générale du 16 novembre 1950 serait en liaison directe avec le point principal d'un différend concret qui opposerait ce gouvernement à un autre gouvernement partie à la convention, en l'espèce le Gouvernement australien.

Ici encore, il semble bien qu'il y ait abus de qualification. Le prétendu différend qui existerait ainsi entre deux États parties à la convention : les Philippines et l'Australie, résulte simplement, rien de moins et rien de plus, d'une divergence de vues qui s'est produite entre ces deux États relativement aux réserves formulées par l'un d'eux, en l'espèce le Gouvernement des Philippines. Ces réserves, le Gouvernement des Philippines les a énoncées quand il a déposé son instrument de ratification, le 6 juillet 1950.

Quelques mois plus tard, le 15 novembre 1950, le Gouvernement australien avisait le Secrétaire général des Nations Unies que, pour sa part, il ne considérait pas comme valide une ratification accomplie dans ces conditions et, à son tour, le 15 décembre 1950, le Gouvernement des Philippines informait le Secrétaire général des Nations Unies qu'il ne reconnaissait pas la validité des objections ainsi énoncées par le Gouvernement australien.

Je n'examinerai pas ici s'il suffit que deux États soient en désaccord sur un point de fait ou de droit pour que cette situation soit qualifiée de « différend ». Sans doute la Cour permanente de Justice internationale a répondu affirmativement à cette question dans son premier arrêt sur la compétence rendu le 30 août 1924, dans l'affaire *Mavrommatis*, à la page 11 de l'arrêt. Mais encore faut-il, semble-t-il, que ce différend se traduise sur le plan juridictionnel par une prise de position qui nous paraît, en l'espèce, faire défaut. Je sais bien que, pour sa part, le Gouvernement des Philippines s'est « déclaré prêt », suivant ses propres termes, à soumettre l'affaire à la Cour. Mais se déclarer prêt à porter une affaire devant la Cour et l'y porter effectivement sont deux choses différentes.

Par ailleurs, si l'on devait admettre l'argumentation des Philippines, ce n'est pas un différend unique que la Cour aurait à résoudre, mais une trentaine ou une quarantaine de différends analogues : en effet il y a déjà huit États au moins qui ont fait des réserves lorsqu'ils ont adhéré ou ratifié la convention ; il y en a au moins cinq autres qui n'ont pas souscrit à ces réserves. Si l'on admet qu'il existe un différend entre tout État qui a formulé des réserves à la convention et tout État qui a présenté des objections à ces réserves, ce n'est pas un seul mais une infinité de différends que la Cour aurait devant elle. Énoncer une telle conséquence suffit à juger le système dont elle s'inspire.

Pour nous, nous constatons que la Cour est saisie d'une demande d'avis, dans les conditions habituelles, par une résolution de l'Assemblée générale des Nations Unies en date du 16 novembre 1950. Cette résolution pose, en termes généraux, un certain nombre de questions dont aucune ne permet de supposer qu'elle se réfère à un litige né et actuel entre deux États parties à la convention. Nous nous en tiendrons donc au texte de la requête de l'Assemblée, laquelle ouvre une procédure qui est consultative — et qui n'est que consultative — tant dans la forme que dans le fond. Au surplus, et s'il était vraiment nécessaire de justifier la compétence de la Cour, il serait facile de le faire. Il suffirait pour cela de faire appel à la jurisprudence de la Cour elle-même. Je ne veux pas infliger à la Cour une longue énumération. Qu'il me soit permis seulement de rappeler le passage suivant de son avis consultatif du 30 mars 1950 concernant l'interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie : « Le consentement des États parties à un différend est le fondement de la juridiction de la Cour en matière contentieuse. Il en est autrement en matière d'avis, alors même que la

demande d'avis a trait à une question juridique actuellement pendante entre États. » (P. 71.) Je considère comme close la controverse sur ce point.

B. — Une seconde objection a été, il est vrai, présentée par le Gouvernement polonais, qui a reproché à la procédure adoptée en l'espèce par l'Assemblée des Nations Unies, de constituer ce qu'il appelle « une tentative inadmissible » en vue de reviser la Convention sur le génocide. Je me permets de lire le passage suivant de l'exposé écrit présenté par ce gouvernement :

> « Le Gouvernement de la Pologne désire souligner que, conformément aux principes du droit international, la référence à un organe international quelconque de questions nées de conventions constitue une tentative inadmissible de reviser ces conventions si celles-ci ne prévoient pas la compétence de ces organes internationaux. »

On pourrait déjà observer que la Cour internationale de Justice n'a pas le pouvoir de reviser les traités et que certainement la résolution de l'Assemblée générale ne le lui attribue pas en l'espèce.

Si l'on va au fond des choses, on s'aperçoit que les critiques formulées par le Gouvernement polonais semblent manquer de pertinence. De quoi, en effet, s'agit-il en l'espèce ? La question posée à la Cour consiste à déterminer la portée juridique des réserves énoncées par certaines parties à la Convention sur le génocide dès lors que d'autres États ont fait des objections à ces réserves. Au sens matériel, intrinsèque du mot, ce n'est certainement pas là une question « née de la convention ». Le problème qui se pose à la Cour n'est pas d'apprécier le contenu de la convention, mais d'apprécier l'attitude de certains États relativement à cette convention. Il ne serait même pas difficile de soutenir que, une réserve constituant par définition une modalité extérieure à la convention à laquelle elle s'applique, la question dont la Cour est saisie est précisément une question extérieure à la convention à l'égard de laquelle l'argumentation développée par le Gouvernement polonais reste inopérante.

Nous croyons ainsi avoir justifié la compétence de la Cour.

II. — Il reste maintenant à opérer une deuxième délimitation en ce qui concerne le fond même du problème que celle-ci a à examiner.

De quoi, en effet, la Cour est-elle saisie ? Il s'agit uniquement pour elle de répondre à une demande d'avis consultatif, qui lui est adressée par l'Assemblée générale de l'Organisation des Nations Unies et qui est relative aux effets juridiques des réserves énoncées par certains États lors de la signature, de la ratification ou de l'acceptation de la Convention sur le génocide, lorsque ces réserves ont fait l'objet d'objections de la part d'autres parties à la convention.

Le problème est ainsi parfaitement délimité. La Cour n'a pas du tout à se prononcer sur le problème général de l'admissibilité des réserves dans les traités multilatéraux et, d'autre part — c'est un point qui mérite d'être indiqué, au moins brièvement —, le problème ne se pose que dans la mesure où il y a véritablement réserve au sens technique du mot.

C'est uniquement sur ce terrain limité qu'entend se placer le Gouvernement français.

Les observations que je serai amené à présenter en son nom n'ont trait qu'au seul problème des réserves énoncées relativement à la Convention sur le crime de génocide, et elles ne sauraient préjuger de la position que ce gouvernement pourrait être appelé à prendre sur le problème général de l'admission des réserves dans les conventions multilatérales.

Le problème se pose tout d'abord uniquement en fonction de la Convention sur le génocide. Reste donc entièrement hors des débats devant la Cour le problème général de l'admissibilité des réserves dans les traités multilatéraux lorsque ces traités ne contiennent aucune disposition à cet égard. C'est là un problème d'ordre général et théorique qui est du ressort de la Commission du droit international des Nations Unies, dont la solution pourra éventuellement être affectée par l'avis consultatif que la Cour est appelée à émettre, mais c'est là un problème qui doit rester complètement en dehors de nos préoccupations.

S'agissant du cas particulier de la Convention sur la prévention et la répression du crime de génocide, le problème ne se pose, d'autre part, que dans la seule mesure où il y a techniquement « réserve », c'est-à-dire dans la mesure où nous nous trouvons en présence d'une limitation unilatérale, de la part d'un État, des obligations énoncées dans cette convention.

Cette interprétation est d'ailleurs conforme à l'opinion commune touchant la définition des réserves.

Sans abuser des citations, et sans vouloir fatiguer la Cour, à cet égard, il me suffira de prendre les définitions bien souvent citées et qui figurent dans le *Harvard Research in International Law*. Nous y lisons que « la réserve est une déclaration formelle par laquelle un État, lors de la signature d'un traité, de sa ratification ou de son adhésion, stipule, comme conditions de son consentement à devenir partie au traité, certaines conditions qui limitent l'effet du traité dans la mesure où ce traité s'applique aux relations entre cet État et l'autre ou les autres États qui peuvent être parties au traité ».

Le commentaire détaillé qui accompagne cette définition est encore plus explicite. Il précise, en effet, que :

> « la phrase « limitent l'effet » implique une diminution ou une restriction des conséquences qui découleraient ordinairement du rapport juridique institué par le traité s'il n'y avait pas de réserve ».

Le problème est, je crois, ainsi parfaitement défini. On ne peut certainement pas qualifier de « réserves » les déclarations unilatérales par lesquelles un État précise le sens qu'il convient de donner selon lui à telle ou telle disposition du traité ou la portée des obligations issues de celui-ci, dès lors, encore une fois, que cet effort d'interprétation n'a pas pour objet de restreindre la portée des obligations conventionnelles assumées par cet État.

De ce point de vue, je laisserai de côté l'examen de la portée à attribuer à la réserve faite à l'article XII de la convention par certains États — en l'espèce sept sur huit — réserve qui n'en est pas véritablement une.

L'article XII de la Convention sur le génocide est en effet un article qui limite l'application géographique de cette convention :

> « Toute partie contractante pourra à tout moment, par notification adressée au Secrétaire général de l'Organisation des Nations

Unies, étendre l'application de la présente convention à tous les territoires ou à l'un quelconque des territoires dont elle dirige les relations extérieures. »

Peut-on vraiment parler de « réserves » en la circonstance, lorsqu'un État annonce ainsi, comme certains l'ont fait, qu'il n'accepte pas cette disposition du traité ? Ce qui est qualifié ici de réserve constitue en réalité un effort pour étendre les obligations des autres co-contractants. Cela n'est donc pas une réserve mais se présenterait plutôt comme un amendement indirect à la convention et cela en dehors de toute référence à la seule procédure fixée par la convention pour sa propre revision, telle qu'elle est définie et prévue par l'article XVI de celle-ci.

C'est bien plutôt dans cette hypothèse et si une telle réserve devait être admise qu'il serait légitime alors de parler d'une « revision » de la convention comme certains l'ont fait à tort quand ils ont cherché à qualifier par cette expression singulière le libellé de la demande d'avis consultatif.

*[Séance publique du 14 avril 1951, après-midi]*

Le problème qui se pose devant la Cour est un problème d'ordre juridique international concernant une convention multilatérale déterminée — la Convention sur le génocide —, convention élaborée elle-même par un organe déterminé : les Nations Unies. C'est donc, me semble-t-il, dans une triple direction qu'il convient de rechercher la solution du problème en examen. D'une part, il conviendra de s'attacher aux principes généraux du droit international concernant la conclusion des traités ; il importera également de dégager la pratique suivie en la matière par les Nations Unies ; enfin il y aura lieu de ne pas perdre de vue que la Convention sur le génocide est un type particulier de convention qui a son caractère propre. C'est sur cette base que j'envisagerai, dans un premier développement, la réponse aux deux premières questions posées à la Cour qui, liées dans l'énoncé de la demande d'avis, le sont également dans la réponse à fournir ; je consacrerai un second développement à élucider la troisième question posée à la Cour : la détermination des États ayant qualité pour adresser éventuellement des objections aux auteurs de réserves.

III. — Demandons tout d'abord quel va être l'effet juridique des objections aux réserves. Sur ce point il y a des considérations auxquelles on doit tout d'abord nécessairement faire appel, ce sont celles qui sont tirées du droit international des traités. Je ne les examinerai pas très longuement, car elles ont déjà été présentées à diverses reprises devant la Cour. On ne peut cependant en faire entièrement abstraction car certaines de ces données déterminent directement le règlement du problème en cause. Si l'on se place sur le terrain des principes, il semble que la solution du problème soit commandée par deux considérations décisives touchant l'une à la nécessité de consentement des parties contractantes pour que les réserves soient opérantes, l'autre aux formes et aux modalités que doit revêtir ce consentement. Je demanderai à la Cour la permission d'insister quelque peu sur ce dernier point, qui intéresse particulièrement le Gouvernement français.

A. — Il convient de rappeler tout d'abord que les réserves à un traité n'ont de validité juridique que si elles sont acceptées par les autres parties contractantes. Comme Rivier l'a dégagé jadis dans une analyse devenue classique, la présentation d'une réserve s'analyse comme le rejet du traité ou d'une clause du traité accompagné d'une offre nouvelle de négocier. Si l'offre est acceptée par l'autre partie contractante, le traité se reconstitue dans des conditions nouvelles ; mais si l'offre est rejetée par la partie contractante, l'accord de volontés n'est pas réalisé et le traité n'est pas conclu, à moins que la partie auteur de l'offre ne renonce à la réserve. La validité juridique du traité est ainsi subordonnée au consentement ou, si l'on préfère, à l'acceptation de la partie ou des autres parties contractantes.

Ce point de vue est affirmé d'une façon très générale par la doctrine. Il serait inutile et fastidieux de multiplier les citations. Je me bornerai à rappeler trois opinions récentes et importantes qui présentent ce trait commun qu'elles sont collectives et résultent d'études attentives sur le problème. Je citerai tout d'abord le rapport présenté le 15 juin 1927 au Conseil de la Société des Nations par le Comité d'experts pour la codification progressive du droit international (*Journal officiel* de la Société des Nations, 1927, pp. 880-882). Dans ce rapport on trouve l'affirmation suivante :

> « Pour qu'il puisse être valablement fait une réserve quelconque sur telle ou telle clause du traité, il est indispensable que cette réserve soit acceptée par tous les contractants, comme elle l'eût été si elle avait été exprimée au cours de la négociation. Sinon, la réserve, comme la signature elle-même subordonnée à cette réserve, est sans valeur. »

Cette opinion est confirmée dans le projet de convention sur le droit des traités, élaboré en 1935 par la *Research in International Law* de Harvard, et auquel on s'est souvent référé devant cette Cour. Ce projet dispose, dans ses articles 14 et 15, qu'un État ne peut valablement formuler une réserve à une convention qu'avec le consentement de tous les États signataires de la convention. Il existe enfin un précédent plus récent : nous le trouvons dans le commentaire adopté l'an dernier par la Commission de droit international des Nations Unies après étude du professeur Brierly sur les traités ; la plupart des membres de la commission ont accepté, comme allant de soi, « qu'une réserve doit être acceptée, à tout le moins par les parties, pour pouvoir prendre effet ».

Il serait superflu d'ajouter d'autres exemples.

En ce qui concerne la pratique internationale, je me bornerai à rappeler un précédent célèbre. Au moment de l'élaboration du Traité de Versailles, le 6 mai 1919, la délégation chinoise avisa officiellement la Conférence de la paix qu'elle avait l'intention de formuler une réserve aux articles 156 à 158 relatifs au Chantoung. Le 26 mai suivant, le Secrétaire général de la conférence informa la délégation chinoise que sa réserve ne serait pas acceptée. La délégation chinoise insista en modifiant le texte de sa réserve et en proposant de l'introduire dans une annexe au traité. Le 24 juin, le Secrétaire général informa la délégation chinoise qu'il était impossible d'accepter une signature donnée dans ces conditions. En raison de l'opposition manifestée contre ses réserves, la délégation chinoise s'abstint de signer le Traité de Versailles.

B. — Un problème différent est le point de savoir sous quelle forme et suivant quelles modalités ce consentement doit être exprimé. L'examen de la pratique nous révèle sur ce point que le consentement peut être donné tantôt sous une forme expresse, tantôt sous une forme tacite. Quelquefois, les réserves sont acceptées par une déclaration expresse ; parfois aussi cette acceptation découle du fait que les autres contractants signent sans objection l'acte de dépôt des ratifications dans lequel la réserve est mentionnée ; enfin, dans de nombreux cas, le silence gardé d'une façon persistante par les autres parties vaudra acceptation des réserves.

C'est un problème dont la solution offre un intérêt direct pour l'espèce soumise à la Cour, puisque celle-ci a à se prononcer sur le régime juridique des objections faites aux réserves. Encore que l'énonciation de ces objections ne soit pas astreinte à des formes sacramentelles, l'État qui formule des réserves est en droit de s'attendre à ce que les objections éventuelles à ses propres réserves soient présentées dans une forme non équivoque. La seule difficulté consiste à déterminer si le silence persistant gardé à cet égard par un État partie à la convention, au moment du dépôt d'instruments d'adhésion ou de ratification impliquant une réserve, doit être assimilé à une absence d'objections. Ce problème n'est pas seulement un problème théorique, il a surgi à différentes reprises au cours de la phase préliminaire précédant l'entrée en vigueur de la Convention sur le génocide ; il serait d'un grand intérêt juridique pour les États « objecteurs », s'il m'est permis d'employer ce néologisme, d'être fixés exactement sur l'étendue des devoirs qui leur incombent dans cet ordre d'idées.

Si nous examinons, en effet, certaines des réponses présentées au Secrétaire général des Nations Unies par les États signataires de la Convention sur le génocide, nous constatons que dans cet ordre d'idées « défaut d'objections » n'est pas nécessairement synonyme d'approbation, même tacite ; cette situation peut, dans certains cas-limites, recouvrir un désaccord véritable, voire même une désapprobation catégorique de certaines réserves formulées antérieurement.

Tel est le cas, par exemple, en ce qui concerne l'Équateur. Le 10 février 1950, ce Gouvernement notifiait aux Nations Unies qu'il n'avait pas d'objections aux réserves énoncées antérieurement par certains États ; le 31 mars suivant, il exprimait sa désapprobation. Quant au Salvador, il notifie, le 28 septembre 1950, qu'il ne fait pas d'objections aux réserves. Par une lettre du 6 octobre 1950, le Secrétaire général interprète cette formule comme une acceptation des réserves ; le 27 octobre 1950, le Salvador déclare qu'il ne peut partager cette manière de voir. C'est également le cas du Gouvernement de la République française, autorisé par la loi du 1er août 1950 à ratifier la Convention sur le génocide ; l'instrument de ratification est transmis par lui aux Nations Unies le 26 septembre 1950. Quelques jours plus tard, le 14 octobre 1950, le dépôt de cet instrument est effectué sans observations de la part du Gouvernement français. Dans ces conditions, le Secrétaire général des Nations Unies adresse au Gouvernement français, le 15 août 1950, une lettre où figure le passage suivant :

> « Le dépôt par votre Gouvernement de l'instrument de ratification ayant été effectué sans aucune observation relative aux réserves ci-dessus mentionnées, le Secrétaire général comprend que votre Gouvernement accepte ces réserves. »

Cette interprétation a été contestée par le Gouvernement français dans sa lettre du 6 décembre 1950, dont je me permets de rappeler les termes :

> « J'ai l'honneur de vous rappeler que la thèse du Gouvernement français, longuement exposée par son représentant devant la Sixième Commission de l'Assemblée générale des Nations Unies et dont vos services ont certainement eu connaissance, est que les réserves formulées par un État lors de la signature ou de la ratification d'une convention ou de son adhésion à celle-ci ne sont opposables à une partie contractante qu'après avoir fait l'objet d'un accord formel de sa part. L'absence d'observations du Gouvernement français ne saurait donc, dans le cas présent, être considérée comme une acceptation desdites réserves. »

Nous trouvons un processus analogue dans l'examen des réponses adressées au Secrétaire général, d'une part, par le Vietnam, le 11 août et le 3 novembre 1950, d'autre part, par le Cambodge, le 14 octobre et le 6 décembre 1950.

Comment résoudre un tel problème ? Je ne crois pas qu'il soit possible de le trancher par des formules *a priori*, dans un sens ou dans un autre ; il n'est pas possible, pour des raisons pratiques, d'adopter ici un critère trop rigide. C'est dans l'examen de chaque cas d'espèce qu'il conviendra de rechercher les éléments d'une solution appropriée. Ce problème ne paraît d'ailleurs pas s'être posé dans la pratique antérieure, problablement parce qu'on a interprété en pareil cas le silence comme une acceptation tacite des réserves.

Le problème a été cependant soulevé à deux reprises aux États-Unis, notamment lors des réserves formulées au moment de la discussion du Traité de Versailles en 1919, et dix ans plus tard, en 1929, au moment du vote par le Sénat américain de dispositions interprétant le Pacte général de renonciation à la guerre. L'idée semble s'être fait jour aux États-Unis qu'une distinction était possible entre les réserves au sens technique du mot — dispositions limitant les effets du traité — et les clauses purement interprétatives par lesquelles une partie indique quel sens elle donne à telle ou telle disposition du traité. Dans la première hypothèse, l'acceptation des réserves proprement dites serait subordonnée au consentement exprès des États contractants ; au contraire, pour les clauses interprétatives, le consentement tacite suffirait. Cette interprétation a été présentée notamment dans une lettre de M. Charles Evans Hughes au sénateur Hale, le 24 juillet 1919, et dans l'exposé présenté par le sénateur Lodge, le 19 août 1919. Un point de vue analogue s'est exprimé au cours des discussions engagées devant le Sénat américain à propos du Pacte Briand-Kellogg, et plus précisément en ce qui concerne le sens à attribuer au rapport interprétatif présenté le 15 janvier 1929 au Sénat par le sénateur Borah au nom de la Commission des Affaires étrangères. Certains sénateurs, comme le sénateur Swanson, avaient en effet envisagé l'idée d'une acceptation tacite de ce rapport par les autres États parties au Pacte Kellogg.

On peut néanmoins se demander si cette distinction ingénieuse offre une base solide de solution. Car de deux choses l'une : ou bien la disposition en face de laquelle on se trouve constitue véritablement une réserve au sens technique du mot — auquel cas le consentement des autres signataires est juridiquement nécessaire, qu'il soit donné d'une façon

expresse ou tacite — ou bien elle est une clause interprétative et dès lors sa validité n'est subordonnée à aucune acceptation — fût-ce même tacite — de la part des autres États intéressés.

L'application des principes généraux sur la portée du silence en droit international conduirait à décider qu'il dépend des seuls signataires d'empêcher, s'ils le désirent, que la réserve n'acquière validité : s'ils ne le font pas, c'est à eux, semble-t-il, qu'il conviendrait d'imputer les conséquences juridiques de leur inaction. On peut se demander cependant si, dans le cas de la convention qui nous intéresse, cette solution stricte n'est pas trop rigoureuse. L'attitude adoptée par certains États signataires de la Convention sur le génocide montre qu'un certain libéralisme s'impose dans l'appréciation du défaut d'objections. Au surplus, même les gouvernements, comme par exemple le Gouvernement du Royaume-Uni, qui assimilent en principe le défaut d'objections à une acceptation tacite des réserves admettent qu'il n'en est ainsi que « dans certains cas ». Ce qui est décisif dans ce domaine, c'est la volonté de l'État ; dès lors que cette volonté s'exprime d'une manière claire et dépourvue d'ambiguïté, elle s'impose à l'autorité, étatique ou inter-étatique, dépositaire du traité et chargée de recevoir comme telle les instruments de ratification et d'adhésion.

Sur ce point, le Gouvernement français s'est volontairement abstenu d'adopter une attitude trop catégorique. Dans la réponse qu'il a adressée, le 6 décembre 1950, au Secrétaire général des Nations Unies, il a bien marqué que la position qu'il adopte, il ne l'adopte qu'envers la convention en cause, et qu'il conserve à cet égard une position d'attente. Il s'est exprimé comme suit :

> « Le Gouvernement de la République française ne pourrait éventuellement modifier son point de vue en ce qui concerne la validité des réserves aux traités multilatéraux qu'après que se seront prononcées, conformément à la résolution de l'Assemblée du 16 novembre 1950, la Cour internationale de Justice et la Commission du droit international. »

C'est là une position qui, encore une fois, n'est pas rigide et qui pourra être modifiée dans l'avenir. Ce seront, d'une part, l'avis consultatif que la Cour est appelée à émettre et, d'autre part, les résolutions qui seront éventuellement proposées par la Commission du droit international qui détermineront la portée exacte à attribuer sur ce point au silence de l'État signataire d'un traité multilatéral appelé à se prononcer sur les réserves énoncées par d'autres États parties à ce traité.

La Convention sur la prévention et la répression du crime de génocide ayant été élaborée par l'Assemblée générale des Nations Unies, il est naturel, pour résoudre le problème qui est posé devant la Cour, que nous nous tournions maintenant vers la pratique suivie en la matière par l'Organisation des Nations Unies.

Cette pratique a été exposée avec beaucoup de précision et de pertinence aussi bien dans l'exposé écrit du Secrétaire général des Nations Unies que dans l'exposé oral du représentant du Secrétaire général devant la Cour.

Il me suffira de retenir que cette pratique confirme les principes généraux du droit international en la matière. Elle admet que, lorsqu'une convention multilatérale élaborée par les Nations Unies ne contient aucune clause particulière sur les réserves, l'usage est que, dans ses

fonctions de dépositaire des instruments de ratification ou d'accession, le Secrétaire général se conforme au principe général suivant lequel une réserve ne peut être valablement acceptée que lorsqu'elle ne soulève aucune objection de la part des autres États signataires.

L'acceptation de ces États est donnée soit de façon expresse soit de façon tacite. Ce système pourrait évidemment avoir un inconvénient, car il risquerait de laisser peser une incertitude prolongée sur le sort de la convention. En général, on a paré à cet inconvénient en laissant aux parties contractantes un court délai pour prendre une décision. Lorsque la convention est en vigueur, ce délai est conçu comme un délai « raisonnable » ; lorsqu'elle ne l'est pas, c'est en général la date d'entrée en vigueur qui marque l'expiration de la période dans laquelle les États doivent avoir accepté ou refusé les réserves.

C'est cette procédure qui a été appliquée, par exemple, en ce qui concerne les réserves exprimées par certains États comme la Nouvelle-Zélande et la France lors de leur accession à la Convention sur les privilèges et immunités des Nations Unies.

C'est également cette procédure qui a été appliquée pour les réserves formulées par les États-Unis lors de leur acceptation de la Constitution de l'Organisation internationale des Réfugiés et de celle de l'Organisation mondiale de la Santé.

Ce système a également été suivi pour les réserves formulées par la Rhodésie et l'Union sud-africaine lors de leur acceptation du Protocole de La Havane du 24 mars 1948, modifiant certaines dispositions de l'Accord général sur les tarifs et le commerce.

Cette pratique des Nations Unies n'est que l'expression particulière — en somme, l'application à un milieu donné qui est celui des Nations Unies — de la pratique générale qui s'appliquait antérieurement et qui correspond au principe suivant : pas de réserve valable sans acceptation, soit expresse soit tacite, de la part des autres États parties au traité.

A ce titre, cette pratique apporte une confirmation intéressante à la règle d'après laquelle le désaccord d'un seul ne peut pas modifier ce qui a été établi par le consentement de plusieurs.

Il convient maintenant de faire application de ces données générales à la convention particulière qui est en cause aujourd'hui : la Convention sur la prévention et la répression du crime de génocide. Y a-t-il quelque raison de s'écarter, s'agissant de cette convention, des principes généraux auxquels je viens de me référer ?

Je ne le pense pas, mais il faut reconnaître que la thèse inverse a été soutenue et développée, d'ailleurs avec beaucoup d'ingéniosité, notamment dans certains exposés écrits. C'est notamment en ce sens que s'est prononcé le Gouvernement des États-Unis, qui estime que l'objet propre de la Convention sur le génocide commande en l'espèce une solution différente.

Je me permets, à cet égard, de citer le passage ci-après de l'exposé écrit du Gouvernement des États-Unis :

> « L'acceptation générale de la convention et la ferme reconnaissance de celle-ci, en tant que règle de droit universelle, constituent un objectif qui dépasse de loin toutes les considérations subtiles visant l'opportunité de décourager des réserves peu désirables, mais dont les conséquences néanmoins ne sont pas fatales. Ici, en fait, nous nous trouvons en présence d'une convention destinée,

de par son caractère et son objet, à demeurer au-dessus du pouvoir, pour les États individuels, d'exclure la participation d'autres États, même si cette participation peut paraître à certains peu judicieusement conditionnée. »

Voilà, par conséquent, un point de vue catégorique. On peut néanmoins se demander si un examen attentif de la convention ne mènerait pas à une conclusion différente.

La convention dont il s'agit est une convention multilatérale élaborée par l'Organisation des Nations Unies et qui se propose un objet bien déterminé. Elle vise à assurer l'unité de la qualification et de la répression d'un crime « particulièrement odieux » — je cite le préambule — le crime de génocide. C'est un « crime du droit des gens — déclare encore le préambule — en contradiction avec l'esprit et les fins des Nations Unies et que le monde civilisé condamne », « crime que les parties contractantes — dit l'article premier — s'engagent à prévenir et à punir ».

Il peut évidemment sembler désirable — et je ne m'inscrirai pas du tout en faux contre ce souhait — qu'une telle convention recueille l'assentiment du plus grand nombre possible d'États ; mais il n'est pas moins désirable que les États signataires ne portent pas atteinte, en multipliant leurs réserves, à l'unité de la réglementation juridique que la convention a eu pour but d'énoncer. C'est cependant à cette conséquence qu'on aboutirait nécessairement si les réserves devaient être acceptées malgré les objections qui pourraient leur être opposées.

Je n'ai pas à examiner ici les mérites propres des différentes réserves qui ont été énoncées, mais il est difficile de ne pas envisager ce qui se passerait si l'on acceptait des réserves à l'article IX, qui est peut-être l'article capital de la convention, puisqu'il établit un contrôle juridictionnel. On sait assez quelle importance peut avoir un tel contrôle pour la vie d'une institution ou l'application d'un régime juridique dans l'ordre international.

Comme n'importe quel traité, la Convention sur le génocide forme un tout. S'il était possible à un État d'accepter un article en en refusant un autre, c'est tout l'équilibre du traité qui se trouverait altéré.

Plus encore peut-être qu'un traité bilatéral, un traité multilatéral — on l'a indiqué hier avec beaucoup de force démonstrative — constitue un ensemble équilibré de droits et d'obligations entre lesquels il n'est pas possible de choisir arbitrairement. Si l'on adoptait une solution différente, le traité multilatéral se diluerait en une série d'engagements bilatéraux, ce qui, je crois, ne serait certainement pas un progrès technique.

Une solution transactionnelle a été suggérée, il est vrai, avec beaucoup de finesse et de sens des nuances, par le distingué représentant du Gouvernement d'Israël, lorsqu'il a dit qu'il serait possible, dans la convention, de faire une distinction suivant la nature matérielle des clauses. On pourrait distinguer, par exemple, les clauses contractuelles, les dispositions qu'il appelle administratives, et enfin les dispositions normatives.

L'éminent représentant du Royaume-Uni a apprécié ce matin ce système avec un certain scepticisme. A mon tour, sans vouloir répéter ce qu'il a parfaitement énoncé, il me semble bien difficile de choisir entre les clauses, et tout d'abord parce que, dans la Convention sur le génocide, il n'y a pas, si je peux dire, de clause contractuelle à l'état pur. On

trouve beaucoup de clauses mixtes et on en arrive à se demander si, toutes les clauses de la convention étant en partie ou en totalité des clauses normatives, les seules clauses contractuelles ne seraient pas dès lors, pour le représentant d'Israël, celles qui renvoient à chaque contractant pour l'exécution, par des moyens de droit interne, des obligations qu'il a souscrites en acceptant la convention, ce qui serait un peu surprenant. En effet, les obligations issues d'un traité multilatéral sont par définition des obligations que chaque État exécute par son action propre et qu'il s'engage à faire passer dans son droit interne. Si l'on devait attribuer la qualification de « contractuelles » à de telles dispositions, on trouverait bien peu de traités multilatéraux qui seraient véritablement normatifs.

On peut aussi faire valoir que, si cette thèse devait triompher, elle ajouterait un fardeau extrêmement lourd aux tâches du Secrétaire général de l'Organisation des Nations Unies en l'obligeant à des discriminations nécessairement arbitraires et qui pourraient prêter à critique.

En vérité, il est un principe essentiel qui doit être maintenu. Il n'a peut-être pas produit jusqu'ici en droit des gens toutes les conséquences qu'on pouvait en attendre : c'est celui de l'intégrité ou de l'indivisibilité du traité. Ce principe s'applique notamment en matière d'interprétation, où l'on a fait plus d'une fois appel au contexte d'un article ou à d'autres articles du même traité pour éclairer une disposition donnée. Ce principe s'applique également en ce qui concerne l'extinction des traités : lorsqu'un traité tombe, il tombe tout entier ; il ne subsiste pas à l'état fragmentaire.

Ce principe de l'intégrité du traité devrait, à mon sens, inspirer la réponse à donner à ce problème. D'ailleurs — je m'excuse auprès de mon collègue d'Israël — je me demande si la solution qu'il suggère ne serait pas pire que l'ancienne façon de procéder. Autrefois, lorsqu'on voulait conclure un traité multilatéral, c'était sous la forme bien compliquée d'une série de traités bilatéraux entre les mêmes États. Les rapports juridiques entre les États A, B, C, D, E, par exemple, ne s'exprimaient pas dans la forme unique d'un traité multilatéral ABCDE, comme aujourd'hui ; il y avait des traités entre A et B, A et C, A et D, A et E, B et C, B et D, etc. Ce système était médiocre, mais il avait tout de même un avantage, c'est que le contenu de ce système diversifié était le même, tandis qu'ici avec la conception proposée, il y aurait bien une pluralité d'engagements bilatéraux mais dont le contenu serait différent :

Il y aurait tout d'abord une série d'engagements bilatéraux entre les États n'ayant fait aucune réserve ;

Puis d'autres engagements bilatéraux entre les États ayant fait une réserve et ceux qui auraient présenté des objections ;

Enfin, une troisième série d'engagements bilatéraux entre les États ayant fait des réserves et ceux qui les auraient acceptées.

On a parlé dans le passé de droit naturel à contenu variable. Je me demande si, en l'espèce, nous ne nous trouverions pas en présence d'un droit positif à contenu variable.

Il est un dernier argument auquel je pourrais faire appel, mais dont je n'abuserai pas, car il n'a peut-être pas une très grande force en l'espèce, c'est l'appel aux travaux préparatoires de la Convention sur le génocide. On a indiqué, en effet, que les auteurs de la convention avaient été d'accord pour exclure toute référence formelle aux réserves dans le

texte de la convention. Toutefois, la valeur de cet argument est peut-être discutable, car les travaux préparatoires n'ont pas une force déterminante pour l'interprétation d'un traité multilatéral ; mais il est bien certain que, si l'on devait faire appel aux travaux préparatoires, cet argument conduirait plutôt à exclure les réserves à la Convention sur le génocide qu'à les admettre.

Pour toutes ces raisons, le Gouvernement de la République française estime qu'il convient de refuser toute valeur juridique aux réserves énoncées par certains États à la Convention sur le génocide, dès lors que ces réserves n'ont pas été acceptées, soit expressément, soit, d'une manière non équivoque, tacitement, par les autres parties contractantes.

Telle est, semble-t-il, la réponse qu'il convient de faire à la première question.

Quant à la deuxième question, elle ne pourrait se poser, semble-t-il, d'après la forme même dont elle a été libellée, que si la réponse à la première question était affirmative. Comme nous venons d'y répondre par la négative, il ne me semble ni nécessaire ni pertinent d'envisager ce deuxième problème.

Avant de passer à l'examen de la troisième question qui fait l'objet de la demande d'avis, je voudrais répondre brièvement à un argument qui dépasse le plan de la technique juridique dans lequel s'est déroulé ce débat, et qui a été présenté par sept des huit États qui ont formulé des réserves. Ces États ont justifié leur attitude par un appel à la notion de souveraineté. C'est ainsi que, dans l'exposé adressé à la Cour le 13 janvier 1951 par le Gouvernement de l'Union des Républiques socialistes soviétiques, nous trouvons cette phrase :

> « Chaque État, se basant sur les principes de souveraineté, a le droit incontestable de faire une réserve à n'importe quel traité. »

Des formules très voisines, sinon dans les termes tout au moins dans l'inspiration, figurent dans les réponses d'autres gouvernements.

Il ne semble pas que l'appel à une telle argumentation soit de nature à faire progresser le débat devant la Cour, tout d'abord pour la raison très simple que la faculté de conclure des engagements internationaux est précisément un attribut de la souveraineté de l'État. C'est ce qu'a exprimé la Cour permanente de Justice internationale dans son arrêt du 17 août 1923, dans l'affaire du *Wimbledon*, page 25.

Si l'on voulait pousser cet argument jusqu'à l'absurde, on en arriverait à dire que la seule manière pour un État de sauvegarder pleinement sa souveraineté, ce serait de ne jamais conclure de traité. Dès lors qu'un État souscrit un engagement, il ne peut le faire qu'aux conditions du droit commun, c'est-à-dire en s'abstenant d'altérer la règle générale par une modification unilatérale de ses dispositions.

On pourrait alléguer, il est vrai, que la Charte des Nations Unies, dans son article 2, paragraphe 1, est fondée sur l'« égalité souveraine » des États. Précisément, cette expression a été textuellement reprise dans les exposés écrits des Gouvernements polonais et tchécoslovaque. Mais alors il faut bien admettre qu'un droit égal et compensatoire de s'opposer aux réserves appartient aux parties originaires au traité et qu'il a exactement la même valeur que celui d'en énoncer.

IV. — Il reste à déterminer un dernier point : la question de savoir à qui appartient le droit de s'opposer aux réserves. Si l'on s'en tient

au libellé de la demande d'avis adressée à la Cour, la question se pose essentiellement, d'une part, pour ceux des États signataires qui n'ont pas encore ratifié la convention, d'autre part, pour les États qui, ayant le droit de signer la convention ou d'y adhérer, ne l'ont pas encore fait. C'est encore un de ces problèmes que l'on ne peut prétendre résoudre sur la base de principes abstraits. Il est bon de rappeler comment se présente à cet égard la situation pour les États qui sont parties à la Convention sur le génocide et d'avoir présents à l'esprit les articles X, XI et XIII. L'article X stipule que la Convention sur le génocide portera la date du 9 décembre 1948. L'article XI est ainsi rédigé :

> « La présente Convention sera ouverte jusqu'au 31 décembre 1949 à la signature au nom de tout Membre de l'Organisation des Nations Unies et de tout État non membre à qui l'Assemblée générale aura adressé une invitation à cet effet.
>
> La présente Convention sera ratifiée et les instruments de ratification seront déposés auprès du Secrétaire général de l'Organisation des Nations Unies.
>
> A partir du 1er janvier 1950, il pourra être adhéré à la présente Convention au nom de tout Membre de l'Organisation des Nations Unies et de tout État non membre qui aura reçu l'invitation susmentionnée. »

L'article XIII est ainsi conçu :

> « Dès le jour où les vingt premiers instruments de ratification ou d'adhésion auront été déposés, le Secrétaire général en dressera procès-verbal. Il transmettra copie de ce procès-verbal à tous les États Membres de l'Organisation des Nations Unies et aux non membres visés par l'article XI.
>
> La présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt du vingtième instrument de ratification ou d'adhésion.
>
> Toute ratification ou adhésion effectuée ultérieurement à la dernière date prendra effet le quatre-vingt-dixième jour qui suivra le dépôt de l'instrument de ratification ou d'adhésion. »

Si l'on s'en tient au texte même de la convention, on voit que celui-ci nous invite, en réalité, à nous placer à deux moments bien différents pour apprécier la qualité des États ayant droit d'objections : le problème ne se pose pas en effet dans les mêmes termes avant et après l'entrée en vigueur de la convention.

La Convention sur le génocide a été ouverte, à partir du 9 décembre 1948, à la signature des États Membres des Nations Unies et de certains États non membres invités à cet effet par l'Assemblée générale. Le jeu de cette signature différée n'était pas indéfiniment extensible dans le temps : le délai expirait exactement, d'après l'article XI, le 31 décembre 1949. Pendant cette période de treize mois, qui constitue un délai raisonnable, les États ont eu tout le temps nécessaire pour prendre position à l'égard de la convention et pour manifester leur volonté. Durant cette période de treize mois, on doit admettre que tous les États signataires avaient le droit d'élever des objections contre les réserves qui viendraient éventuellement à être formulées par certains États. On pourrait de même admettre durant cette période qu'un État qui n'a pas fait d'objections aux réserves et dont on aurait pu inter-

préter le silence comme une acceptation tacite prenne définitivement position en sens contraire. Mais les choses changent, semble-t-il, après l'entrée en vigueur de la convention. Ce droit des États signataires ne peut pas s'étendre indéfiniment dans le temps car il risquerait alors de laisser peser sur l'étendue et la portée de la convention une incertitude extrêmement dangereuse. D'autre part, on ne peut oublier qu'une *signature non suivie de ratification n'engage pas l'État dont elle émane.* Il y aurait quelque chose de choquant à voir un État simplement signataire — dont on ne sait s'il ratifiera jamais la convention — paralyser par son opposition l'entrée dans le système de la convention d'un État ayant signé et ratifié celle-ci et dont les réserves ont pu être acceptées par la plupart des États parties à la convention.

A partir du moment où la convention est entrée en vigueur, le régime juridique auquel elle sert de support est devenu une réalité positive. Les parties qui jusque-là étaient quelque peu fluides sont déterminées et individualisées ; les « parties » au sens technique du mot, ce sont les États qui ont signé et ratifié la convention, ce sont tous les États dont les ratifications ou les adhésions ont été déposées en temps utile auprès du Secrétaire général des Nations Unies et en nombre suffisant pour que la convention soit juridiquement applicable. Seuls ces États peuvent élever des objections aux réserves qui seraient énoncées par la suite. C'est normal puisqu'ils sont seuls à être liés par la convention et qu'ils ont un intérêt non pas virtuel, potentiel ou éventuel — comme certains l'ont prétendu — mais un intérêt actuel, définitif à ce que la convention soit appliquée. Pour ma part, d'ailleurs, je ne sais pas trop ce qu'est *une partie « éventuelle » ou « virtuelle » à un traité.* Mais, par contre, je vois bien que, dans les traités multilatéraux comportant une clause d'accession illimitée — tel le Pacte général de renonciation à la guerre du 27 août 1928 — rien ne distingue plus alors, dans cette conception, les parties effectives au traité des États tiers. C'est là un système qui ne trouve aucun appui en droit positif.

Pendant combien de temps peut-on reconnaître le droit aux objections ? L'article XIII, paragraphe 2, a lui-même prévu que la Convention sur le génocide n'entrera pas en vigueur par la seule addition d'un nombre déterminé de ratifications ou d'adhésions ; la convention n'entrera en vigueur qu'après un minimum de temps. Je cite l'article XIII :

> « La présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt du vingtième instrument de ratification ou d'adhésion. »

Même si cette disposition n'a pas eu pour objet direct de réglementer l'époque durant laquelle peut se déployer la faculté d'objection aux réserves, il n'est pas déraisonnable de penser que l'existence d'un tel délai permet également aux États ayant signé ou adhéré à cette date de prendre parti sur des réserves dont ils auraient été saisis et de manifester à cet égard leur opinion.

La seule difficulté vise l'hypothèse où le nombre des ratifications ou des adhésions intervenues avant l'entrée en vigueur de la convention dépasse le chiffre de vingt qui est prévu par l'article XIII comme devant déterminer l'entrée en vigueur. L'hypothèse du reste s'est vérifiée en fait puisqu'à la date du 12 janvier 1951, la convention avait recueilli non pas vingt mais vingt-quatre adhésions ou ratifications. On pourrait dès lors se demander si les quatre États ayant ratifié posté-

rieurement au vingtième mais toujours antérieurement à l'entrée en vigueur de la convention, bénéficient à leur tour d'un nouveau délai de quatre-vingt-dix jours pour prendre parti sur les réserves ou bien si ces États ont simplement le droit d'épuiser la partie résiduelle du délai de quatre-vingt-dix jours comprise entre le dépôt du vingtième instrument de ratification et la date d'entrée en vigueur de la convention.

Le Gouvernement français, pour sa part, ne pense pas que ce soit là une difficulté majeure et il s'en remet entièrement sur ce point à la décision de la Cour.

Nous nous écartons ainsi de l'opinion libérale, peut-être trop libérale, qui réserve ce droit d'objection indistinctement à tous les États signataires, un État signataire n'étant pas une « partie contractante » au sens plein du mot.

Il est difficile pour la même raison d'adhérer à la thèse transactionnelle présentée par le Gouvernement des Pays-Bas. Ce gouvernement a, en effet, proposé d'attribuer le droit d'objection non seulement aux États ayant ratifié mais aux États signataires ayant déclaré leur intention de ratifier. Une déclaration d'intention en cette matière n'a de valeur que si elle émane de l'organe ayant qualité au point de vue constitutionnel pour engager valablement l'État.

Or, il arrive fréquemment qu'une ratification soit subordonnée par le droit public interne à une autorisation préalable du parlement. Dans ces conditions, il est impossible de considérer comme « partie contractante » un État dont la ratification est hypothétique et dont on ne sait pas dès lors s'il « contractera » jamais.

Postérieurement à l'entrée en vigueur de la convention, d'autres ratifications ou adhésions pourront naturellement intervenir. Les États qui ratifieront alors la convention ou qui y adhéreront devront, bien entendu, prendre celle-ci telle qu'elle se présente au moment où elle entre en vigueur, c'est-à-dire éventuellement assortie des réserves qui ont été acceptées par les États qui étaient en situation de le faire.

Faut-il aller plus loin et reconnaître aux États qui ratifieront ultérieurement la convention ou qui y adhéreront ultérieurement le droit d'élever à leur tour des objections contre les réserves formulées avant son entrée en vigueur ?

Nous ne le pensons pas et cela pour une raison très simple : il serait singulier qu'un acquiescement tardif à la convention permette à son auteur de remettre en cause un régime juridique accepté peut-être plusieurs années auparavant par vingt ou trente États.

La faculté d'élever des objections aux réserves ne doit pas être une prime offerte à la négligence ou à la tardivité ; elle ne doit pas davantage récompenser ceux qui ne s'engagent pas.

Cette solution pourra sembler rigoureuse ; mais il dépend de l'État intéressé de l'éviter en ratifiant à temps, c'est-à-dire suffisamment tôt pour faire valoir ses vues propres. La situation de cet État n'est d'ailleurs pas sans remède, l'article XVI de la convention lui permettant de formuler à toute époque une demande de revision de la convention en se conformant aux prescriptions de celle-ci, c'est-à-dire en adressant par écrit une notification au Secrétaire général de l'Organisation des Nations Unies.

Je remercie Monsieur le Président et les Membres de la Cour de la bienveillante attention qu'ils ont bien voulu témoigner à cet exposé oral.

En terminant, je me permettrai de donner lecture des conclusions auxquelles est parvenu le Gouvernement de la République française sur l'ensemble du problème soumis à la Cour :

1° l'État qui a formulé une réserve à la Convention pour la prévention et la répression du crime de génocide ne peut être considéré comme partie à la convention aussi longtemps qu'il maintient sa réserve si une ou plusieurs parties à la convention font une objection à cette réserve ;

2° le droit de faire des objections aux réserves appartient à tous les États signataires lorsqu'il s'exerce dans le délai réservé à la signature de la convention.

« Passé cette date, ce droit appartient aux seuls États ayant ratifié la convention ou y ayant adhéré, dès lors que le dépôt par ces États de leur instrument de ratification ou d'adhésion est intervenu antérieurement à l'entrée en vigueur de la convention. »