

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

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

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

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

In considering the requirements of international law as to the proposal of reservations and the conditions of their effectiveness, the Court is not confronted with a legal vacuum. The consent of

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

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

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

"In our opinion, reservations on signature are not admissible unless all the contracting States agree to accept them, whether expressly or tacitly : the final result would be a new treaty, quite different from that first negotiated. If the States which sign without reservations do not agree, they will be entitled to insist that the contracting States which made reservations must either withdraw them or accept the position that the convention will not apply in relation to other interested States."

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

"It will be seen that of all the cases examined above where an actual reservation was made to any provision of a convention, there is hardly one as to which it cannot be shown that the consent of the other contracting Powers was given either expressly or by implication. Where the reservation is embodied in a document (which must have formed the subject of previous discussion and agreement) signed by the representatives of the other contracting Powers, consent is express ; where the reservation had been previously announced at a sitting of the conference and was repeated at

the time of signature without any objection being taken, consent is implied. And certainly there is no case among those examined which could be quoted as a precedent in favour of the theory that a State is entitled to make any reservations it likes to a convention without the assent of the other contracting parties."

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

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

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

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

The application of this rule in practice is illustrated by the Slavery Convention of 1926. It was an important humanitarian convention and, after prolonged study of slavery by the League of Nations Assembly, a convention was drafted by a committee appointed by the Assembly. It was approved by the Assembly on September 25th, 1926 (apparently without dissent), and then opened for signature, ratification and accession. On August 11th, 1930, the Secretary-General made a report (A.17.1930.VI) upon the state of the signatures, ratifications and accessions. The following passage may be extracted from page 2 of this document:

"The accessions by *Hungary* (April 16th, 1927 and by the *United States of America* (March 21st, 1929) were given with certain reservations, which have been submitted for acceptance to the parties to the Convention. Fourteen States have not yet replied as regards

the Hungarian reservations ; ten replies have still to be received regarding the United States reservations."

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

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

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

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

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

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

Thereupon, the Codification Committee approved the Report and sent it to the Council of the League of Nations. The Council adopted it on June 17th, 1927, directed it to be circulated to the Members of the League and requested "the Secretary-General to

be guided by the principles of the Report regarding the necessity for acceptance by all the contracting States when dealing in future with reservations made after the close of a conference at which a convention is concluded, subject, of course, to any special decisions taken by the conference itself”.

The Council of the League of Nations had, of course, no power to make law. What it did was to give its approval to the statement of the law prepared by the Codification Committee. The law, as thus stated, was followed by the League of Nations thereafter and has later been followed by the United Nations, as we shall see in the case of the Genocide Convention.

* * *

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

“5. In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned....”

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

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

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

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

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

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

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

The Genocide Convention was approved by the General Assembly on December 9th, 1948, and was opened for signature two days later.

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

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

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

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

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

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

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

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

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

“The Pan-American Union procedure permits a State to proceed with its ratification in spite of the fact that one or more of the signatory States may object to the reservation, whereas the procedure followed by the Secretary-General of the United Nations has the effect of preventing the particular State from becoming a party to the convention if any single State among those which have already ratified voices its disapproval of the proposed reservation.” (Italics ours.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“It is inevitable that any rule followed by the Secretary-General, in the absence of express provisions in the convention, will not suit the circumstances of every convention or every relationship proposed between given parties. This difficulty can be met by the conscious use, in the drafting of such a convention, of final articles best adapted to any special situation. *If, for example, it is desired to forestall certain objections in order to make a convention acceptable to a maximum number of States, it is always possible to include an article expressly approving specified reservations*²⁷. (Italics ours.) If it is desired in special cases to permit signatories, and not only parties, to reject proposed reservations, the League of Nations formula mentioned above, used in the Convention for the Prevention and Punishment of Terrorism, might be applicable²⁸.”

(Footnote 27 refers to Article 39 (1) of the Revised General Act for the Pacific Settlement of International Disputes ; footnote 28 to Article 23 of the Convention on Terrorism.)

* * *

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

"Article XVII

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

Comment.

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

We shall restrict ourselves to the following remarks :

- (1) It would seem that reservations of a general scope have no place in a convention of this kind which does not deal with the private interests of a State, but with the preservation of an element of international order.
For example, the convention will or will not protect this or that human group. It is unthinkable that in this respect the scope of the convention should vary according to the reservations possibly accompanying accession by certain States.
- (2) Perhaps in the course of discussion in the General Assembly it will be possible to allow certain limited reservations.

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

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

The Draft Convention was first referred to all the Member States for comment. The United States of America was the only one that commented on this part of the Draft, and its comment was limited to the statement : "An article on the subject of 'reservations' should be omitted." The Draft was then referred to a body known as the "*Ad Hoc* Committee on Genocide", which appointed a

sub-committee, consisting of the representatives of Poland, the Union of Soviet Socialist Republics, and the United States of America, to study it. This sub-committee "saw no need for any reservations" (Document E/AC/25/10, page 5), and this conclusion was unanimously adopted by the full *Ad Hoc* Committee on 27th April, 1948 (E/AC/25/SR/23, page 7). Accordingly, the Draft prepared, as revised by the *Ad Hoc* Committee, contained no provision concerning reservations. No proposal for a reservations article was made in the Sixth Committee or in the plenary meetings of the General Assembly and, accordingly, the text of the Convention as now in force contains no provision on this subject.

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

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

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

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

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

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

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

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

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

* * *

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

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

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

(a) It propounds a new rule for which we can find no legal basis. We can discover no trace of any authority in any decision of this Court or of the Permanent Court of International Justice or any

other international tribunal, or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a State to make such a distinction and base a reservation upon it. Nor can we find any evidence, in the law and practice of the United Nations, of any such distinction or power.

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

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

On the contrary, such a rule is so new, and the test of the compatibility of a reservation with "the object and purpose of the Convention" is so difficult to apply, that it is inconceivable that the General Assembly could have passed the matter over in silence and assumed that all the contracting States were fully aware of the existence

of such a test in international law and practice and were capable of applying it correctly and effectively. We feel bound therefore to conclude that the parties entered into this Convention on the basis of the existing law and practice, and in these circumstances we do not see how one can impute to them the intention to adopt a new and different rule.

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

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

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

of its individual appraisal, may consider a reserving State as a party or not.

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

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

(v) When the question of reservations to this Convention first arose in the fifth session of the General Assembly, the conditions required for bringing the Convention into force did not yet exist. It was necessary to consider how Article XIII, which requires twenty ratifications or accessions to bring the Convention into force, was going to work in the event of some of the ratifications or accessions being accompanied by reservations. Suppose that one of the first twenty ratifications or accessions tendered to the Secretary-General had been accompanied by a reservation which one or more of the States previously ratifying or acceding were prepared to accept, while the other States previously ratifying or acceding were not prepared to accept it, what is the position according to the new rule ? In the view of some States the requirement of twenty ratifications or accessions would have been satisfied and the Convention would enter into force on the ninetieth day after the date of the last deposit. In the view of others, the requirement would not be satisfied. Would the Convention be in force ? And suppose later that it was judicially determined that the reservation referred to was not "compatible with the object and purpose of the Convention", what would happen ? Would the Convention cease to be in force from that moment ? And would it be regarded *ab initio* as never having been in force ? Such problems are bound to arise when the question whether a State is or is not a party remains in doubt, and, as we have already indicated, the importance of that question is not confined to Article XIII. In addressing the

Court on April 10th, 1951, the representative of the Secretary-General showed, by means of numerous examples, how essential it is to the discharge of his functions as depositary of this Convention and many other multilateral conventions that he should know definitely whether a State is or is not a party; he told the Court that the Secretary-General is the depositary of more than sixty multilateral conventions which have been drafted or revised under the auspices of the United Nations.

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

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

It is an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States. So, when a common effort is made to promote a great humanitarian object, as in the case of the Genocide Convention, every interested State naturally expects every other interested State not to seek any individual advantage or convenience, but to carry out the measures resolved upon by common accord. Hence, each party must be given the right to judge the acceptability of a reservation and to decide whether or not to exclude the reserving State from the Convention,

and we are not aware of any case in which this right has been abused. It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires the consent of all parties to any reservation to a multilateral convention. In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.

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

* * *

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

* * *

On Question I our reply is in the negative.

Accordingly, Question II does not arise for us.

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

(Signed) J. G. GUERRERO.

(Signed) ARNOLD D. MCNAIR.

(Signed) JOHN E. READ.

(Signed) HSU MO.