DISSENTING OPINION OF M. ALVAREZ

I

[*Translation*]

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

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

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

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

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

The multiplicity of reservations made to these multilateral conventions, together with the adhesions to them and the denunciations of them, has produced much uncertainty, because it is difficult to be sure as to the States between which these conventions

are in force. A real crisis, to which some persons—including myself —have drawn attention for some time past, has thus arisen in international treaty law. The task of the Secretary-General of the League of Nations and after that the United Nations in connection with the registration of these conventions has become extremely complicated; and it is without doubt partly to remedy this situation that the General Assembly of the United Nations has sent to the Court the Request for an Opinion which is now before us.

II

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

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

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

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

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

There are stronger reasons why the same course should be followed in regard to international law. After the social cataclysm

which we have just passed through, a *new order* has arisen and, with it, a *new international law*. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.

III

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

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

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

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

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

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

The decisions of these Assemblies are taken upon a majority vote (Art. 18 of the Charter). The old unanimity rule is thus abolished, or rather it exists only in the exceptional cases mentioned in the

said Article 18. This rule of the majority vote is, moreover, in conformity with our ideas of international organization, of the interdependence of States and of the general interest ; national sovereignty has to bow before the will of the majority by which this general interest is represented.

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

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

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

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

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

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

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

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

Secondly, these conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them : such conventions establish a kind of binding custom, or rather principles which must be observed by

all States by reason of their interdependence and of the existence of an international organization.

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

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

IV

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

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

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

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

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

To this it can be replied that, when the said conventions were debated in the Assemblies of the United Nations, the States had an opportunity of making criticisms or objections on any points that they pleased, and that, consequently, they cannot afterwards

return to those points. It would be inadmissible that an instrument approved by the Assembly of the United Nations and designed to form one of the foundations of our international life could be destroyed, or even shaken, by the independent action of one or more States, which actually took part in drawing up the conventions concerned.

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

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

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

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

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

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

If, however, the admissibility of reservations in these conventions is to be maintained, it would be necessary that the conventions should state this fact expressly, and explain the legal effect that

they would possess. In that event the said conventions would become ordinary multilateral conventions; and they would no longer be fundamental conventions of international law.

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

These results could then be as follows:

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

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

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

V

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

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

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

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

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

(Signed) A. ALVAREZ.