

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

**Advisory Opinion of 28 May 1951**

The question concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had been referred for an advisory opinion to the Court by the General Assembly of the United Nations (G.A. resolution of November 16, 1950) in the following terms:

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

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

“II. If the answer to question I is in the affirmative,

what is the effect of the reservation as between the reserving State and:

(a) The parties which object to the reservation?

(b) Those which accept it?

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

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

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

Written statements on the matter were submitted to the Court by the following States and Organizations:

The Organization of American States, the Union of Soviet Socialist Republics, the Hashemite Kingdom of Jordan, the United States of America, the United Kingdom of Great Brit-

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ain and Northern Ireland, the Secretary-General of the United Nations, Israel, the International Labour Organisation, Poland, Czechoslovakia, the Netherlands, the People's Republic of Romania, the Ukrainian Soviet Socialist Republic, the People's Republic of Bulgaria, the Byelorussian Soviet Socialist Republic, the Republic of the Philippines.

In addition, the Court heard oral statements submitted on behalf of the Secretary-General of the United Nations and of the Governments of Israel, the United Kingdom and France.

By 7 votes to 5 the Court gave the following answers to the questions referred to:

*On Question I:*

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

*On Question II:*

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

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

*On Question III:*

(a) an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

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

Two dissenting opinions were appended to the Opinion: one by Vice-President Guerrero and Judges Sir Arnold McNair, Read and Hsu Mo, the other by Judge Alvarez.

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In its Opinion, the Court begins by refuting the arguments put forward by certain Governments against its competence to exercise its advisory functions in the present case. The Court then dealt with the questions referred to it, after having noted that they were expressly limited to the Convention on Genocide and were purely abstract in character.

The first question refers to whether a State which has made a reservation can, while maintaining it, be regarded as a party to the Convention on Genocide, when some of the parties object to the reservation. In its treaty relations, a State cannot be bound without its consent. A reservation can be effected only with its agreement. On the other hand, it is a recognised principle that a multilateral Convention is the result of an agreement freely concluded. To this principle was linked the notion of integrity of the Convention as adopted, a notion which, in its traditional concept, involved the proposition that no reservation was valid unless it was accepted by all contracting parties. This concept retains undisputed value as a principle, but as regards the Genocide Convention, its application is made more flexible by a variety of circum-

stances among which may be noted the universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation which the Convention itself has envisaged. This participation in conventions of this type has already given rise to greater flexibility in practice. More general resorts to reservations, very great allowance made to tacit assent to reservations, the admission of the State which has made the reservation as a party to the Convention in relation to the States which have accepted it, all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions. Moreover, the Convention on Genocide, although adopted unanimously, is nevertheless the result of a series of majority votes—which may make it necessary for certain States to make reservations.

In the absence of an article in the Convention providing for reservations, one cannot infer that they are prohibited. In the absence of any express provisions on the subject, to determine the possibility of making reservations as well as their effects, one must consider their character, their purpose, their provisions, their mode of preparation and adoption. The preparation of the Convention on Genocide shows that an undertaking was reached within the General Assembly on the faculty to make reservations and that it is permitted to conclude therefrom that States, becoming parties to the Convention, gave their assent thereto.

What is the character of the reservations which may be made and the objections which may be raised thereto? The solution must be found in the special characteristics of the Convention on Genocide. The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilising. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. This leads to the conclusion that the object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it, that as many States as possible should participate. This purpose would be defeated if an objection to a minor reservation should produce complete exclusion from the Convention. On the other hand, the contracting parties could not have intended to sacrifice the very object of the Convention in favour of a vague desire to secure as many participants as possible. It follows that the compatibility of the reservation and the object and the purpose of the Convention is the criterion to determine the attitude of the State which makes the reservation and of the State which objects. Consequently, question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections depend upon the circumstances of each individual case.

The Court then examined question II by which it was requested to say what was the effect of a reservation as between the reserving State and the parties which object to it and those which accept it. The same considerations apply. No State can be bound by a reservation to which it has not consented, and therefore each State, on the basis of its individual appraisals of the reservations, within the limits of the criterion of the object and purpose stated above, will or will not consider the reserving State to be a party to the Convention. In the ordinary course of events, assent will only affect the relationship between the two States. It might aim, however, at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane: certain parties might consider the assent

as incompatible with the purpose of the Convention, and might wish to settle the dispute either by special agreement or by the procedure laid down in the Convention itself.

The disadvantages which result from this possible divergence of views are real. They could have been remedied by an article on reservations. They are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention.

The Court finally turned to question III concerning the

effect of an objection made by a State entitled to sign and ratify but which had not yet done so, or by a State which has signed but has not yet ratified. In the former case, it would be inconceivable that a State possessing no rights under the Convention could exclude another State. The case of the signatory States is more favourable. They have taken certain steps necessary for the exercise of the right of being a party. This provisional status confers upon them a right to formulate as a precautionary measure objections which have themselves a provisional character. If signature is followed by ratification, the objection becomes final. Otherwise, it disappears. Therefore, the objection does not have an immediate legal effect but expresses and proclaims the attitude of each signatory State on becoming a party.