The Special Rapporteur pointed out that the decision to preserve what has been achieved by the Vienna Conventions of 1969, 1976 and 1986 while providing a firm basis for the future work of the Commission was a constraint in that the Commission must ensure that the draft articles eventually adopted by it conform , in every respect, to the provisions with regard to which it should simply clarify any ambiguities and fill in any gaps. He therefore deemed it advisable to quote the actual text of the existing provisions at the beginning of each chapter of the draft guide to practice in respect of reservations.

(b) Draft articles accompanied by commentaries

The text of the articles shall be followed by a statement of additional or clarificatory regulations which would comprise the actual body of the Commission's work on the subject and would be presented in the form of draft articles whose provisions would be accompanied by commentaries".

(c) Modol Clauses

The Special Rapporteur proposed that the draft articles be followed by model clauses be phrased in such a way as to "minimize disputes in the future". Emphasizing the function of these model clauses needed to be clearly understood the Special Rapport pointed out that the proposed "guide to practice" should consist of general rules designed to be applied to all treaties, regardless of their scope, in cases where the treaty provision are silent. Like the actual rules of the Vienna Convention and the customary norms which they enshrine, the rules relating to reservations would be purely residual where the part concerned have no stated position. These rules cannot be considered binding and the State Parties will always be free to disregard them. The negotiators need only to incorporate speci fic clauses relating to the reservations into the treaty.

The Special Rapporteur pointed out that in its Advisory Opinion regarding Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide"[9] the ICJ had, *inter alia*, noted the disadvantages that could result from the profound divergence of views of States

[9] ICJ Reports (1951) p. 26.

regarding the effects of reservations and objections asserted that "an article concerning the making of reservations could have obviated such disadvantages".

Attention was also drawn to the recommendation of the General Assembly that the organs of the United Nations , specialized agencies and States should, in the course of preparing multilateral conventions , consider the insertion of provisions relating to inadmissibility of reservations and the effect to be attributed to them.[10]

The three fold functions which the model clauses may have would be to (1 refer to the rules articulated in the three Conventions explicitly or implicitly by reproducing the wording of their provisions ; (ii) fill in gaps and clarify ambiguities by simplifying obscure points not addressed in those Conventions; and (iii) derogate from the "Vienna rules by stipulating a special regime in respect of reservations which contracting parties would consider more suitable for the purposes of the particular treaty they had concluded.' The sole aim of the model clauses to be appended to the draft articles, however, would be to encourage States to incorporate in. specific treaties the model clauses concening reservations, which derogate from general law and are better adapted to the special needs of these treaties or the circumstances in which they are concluded. This approach would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances and thus preserve its flexibility without calling in question the unity of the law applicable to reservation to treaties.

(d) Final Form of the study

In the opinion of the Special Rapporteur the guide to practice in respect of reservations which the Commission intends to prepare could take the form of a set of draft articles with commentaries accompanied, if necessary, by model clauses be divided into six Chapters. The chapters could, in his opinion, take the following form :(i) a review of the relevant provisions of the Vienna Conventions of 1969,1978 or 1986; (ii) Commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein;

[10] See General assembly Resolution 598(VI)

(iii) draft articles aimed at filling the gaps or clarifying the ambiguities; (iv)commentary to the draft articles; (v) model clauses which could be incorporated in specific treaties and derogating from the draft articles; and (vi) commentary to the model clauses.

The provisional general outline of study, which the Special Rapporteur had stated may require to be "adapted, supplemented and revised in the course of further work" which could uncover new difficulties or reveal the artificial nature of some of the problems anticipated, envisaged six segments viz. (i) Unity or Diversity of the Legal Regime For Reservations to Multilateral Treaties; (ii) Definition of Reservations ; (iii) Formulation and Withdrawal of Reservations, Acceptance and Objections, (lv) Effects of Reservations, Acceptance and Objections; (v) Fate of Reservations, Acceptance and Objections in the Case of Succession of States; and (vi) the Settlement of Disputes Linked to the Regime of Reservations.

(I) Unity or Diversity of the Legal Regime For Reservations To Multilateral Treaties

Unity or diversity of the legal regime for reservations to treaties is one of the general question of determining whether the legal regime for reservations, as established under the Convention on the Law of Treaties 1969 is applicable to all treaties regardless of their object. The Special Rapporteur had enumerated three reasons for conducting a separate preliminary study, viz.: (i) the terms, of the problem are, partially the same, regardless of the provisions in question; (ii) its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done in limine ;and (iii) the question is related to reservations to human rights treaties,which justifies placing the emphasis on the consideration of the specific problems that concern them.

It also involves one of the main difficulties which were stressed by both members of the Commission at its 47th session as well as the representatives of States in Sixth Committee at the fiftieth session of the General Assembly.

II. Definition of Reservations:

The question of the definition of reservations is linked to the difference between reservations and interpretative declarations and to the legal regime for the latter.It seems useful to link the consideration of this question to that of other procedures, while not constituting reservations, are, like them, designed to and do enable States to modify obligations under treaties to which they are parties, is a question of alternative reservations, and recourse to such procedures may likely make it possible, in specific cases to overcome some problems linked to reservations.

The Special Rapporteur had proposed to deal with reservations to bilateral treaties in connection with the definition of reservations. The initial question posed by reservations to bilateral treaties is whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Although consideration of the question relating to the unity or diversity of the legal regime reservations could have been envisaged, it appears at first glance that the question relates to a different problem.

III. Formulation and withdrawal of reservations, acceptances and objections

The Special Rapporteur has emphasized that save for some issues relating to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions, this part does not appear, to involve questions giving rise to serious difficulties. it is nevertheless necessary to include it in the study as it is a matter of practcal question which arises constantly, and one could hardly conceive of a "guide to practice" which did not include developments in this regard.

IV. Effects of Reservations, Accptances and Objections

Effects of reservations, acceptances and objections is, without any doubt, most difficult aspect of the topic. This is also the aspect with regard to which apparently irreconcilable doctrinal trends have been expounded while none denies that some reservations are prohibited, as is, clearly stipulated in

article 19 of the 1969 and 1986 Vienna Conventions. Disagreement arises with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either permissible (or impermissible), or necessary (or superfluous). This is at the heart of the opposition between the schools of "admissibility" or "permissibility" on the one hand, and "opposability" on the other. In the opinion of the Special Rapporteur, it would be premature to take a position at this stage.

The general outline does not take any position, even implicitly, on the theoretical questions that divide doctrine. Assuming that there are, without any doubt, permissible and impermissible reservations, the Special Rapporteur felt that the most "neutral" and objective method would be to deal separately with, the reservation is permissible on the one hand and when it is non-permissible on the other, since it is necessary to consider separately two specific problems which, prima facie, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves.

V. Fate of reservations, acceptances and objections in the case of succession of states

The Vienna Convention on Succession of States in respect of Treaties 1978 left numerous gaps and questions with regard to the problem on fate of reservations, acceptance and objections in the case of Succession of States. Article 20 of that Convention deals with only as concerns the case of newly independent States without addressing the question of the fate of the acceptances of the predecessor States's reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

VI. The Settlement of Disputes linked to the regime for reservations

Although the Commission does not provide, the draft articles that it elaborates, with clauses relating to the settlement of disputes, the Special

Rapporteur expressed the view that there is no reason a priori to depart from this practice in most cases. Inhis opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration and strictly speaking gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. In his opinion, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated in the form of an optional protocol, for example, in the body of codification conventions.

As some members of the Commission pointed out during the debate on the subject at the 47th session, although there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty. Moreover, when such mechanisms exist as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations.

Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for either in standard clauses that States could insert in future treaties to be concluded by them or in an additional optional protocol that could be added to the 1969 Vienna Convention on the Law of Treaties.

Chaipter II of the Second Report of the Special Rapporteur on the Reservation to Treaties dealt with two substantive questions, that of the unity or diversity of the rule applicable to reservations to treaties and that of the reservations to human rights treaties 'These questions while closely linked, the Special Rapporteur had observed, were "highly sensitive and controversial." The Special Rapporteur stated that he had made an attempt to answer two questions. First, whether the reservations regime should be adapted to take account of the object and/or nature of the treaty concerned and second whether specific regimes regarding reservations need to be applied in the case of human rights treaties. He was of the view that the reservations regime was and should

remain homogenous. It follow that there was no reason to exempt human rights instruments front the general rule governing reservations.

It was pointed out in this regard that a perusal of provisions of articles of Vienna Conventions of 1969 and 1986 laid down specific conditions governing the validity of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations. This indicated that the authors of the 1986 Convention had been aware of the problem of the unity or diversity of the applicable rules and had not hesitated to differentiate the reservations regime where it was deemed appropriate. Normative treaties it was said must be understood as referring in reality to treaties in which normative provisions (provisions that were neither contractual nor reciporcal) prevailed in quantitative and qualitative terms. In most cases a treaty contained both "contractual clauses", in which states recognized mutual rights and obligations, and "normative clauses"

At its 49th Session the ILC adopted a set of Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties. In the course of the consideration of the Preliminary conclusions a view was expressed that the Commission was faced with a contradiction in that it was just commencing its work on the topic and did not know where that work might take it.

Paragraph 1 of the set of preliminary conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the Commission at its 49th session reiterates that articles 19 to 23 of the Vienna Convention on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the object and purpose of the treaty is the most important criteria for determining the admissibility of reservations. The Commission considered the flexibility of that regime to be suited to all treaties, of what ever nature or object, as one that strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty.

The Commission considered the objectives, of the preservation of the integrity of the text of the treaty and universality of participation in the

treaty,applicable equally in the case of reservations to normative multilateral treaties including treaties in the area of human rights and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. However, the establishment of monitoring bodies by many human rights treaties had given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.

Paragraph 5 of the Preliminary Principles recognizes that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to them.. Several members of the Commission disagreed with the Principle incorporated in paragraph 5 of the preliminary conclusions.

The competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties , on the one hand , in accordance with the provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.

The Commission suggested providing specific clauses in multilateral normative treaties , including human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was noted in this regard that the legal force of the finding made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers to them for the performance of their general monitoring role.

The Commission called upon States to cooperate with monitoring bodies and give due consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

The Commission has invited comments on the preliminary conclusions adopted on the Reservations to Normative Multilateral Treaties , including human rights treaties It has also invited the monitoring bodies set up by the relevant human rights treaties to comment on these conclusions.

4. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

At its 45th Session in 1993, the Commission decided to include this item in its agenda and the General Assembly at its 48th Session endorsed the Commission's decision on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to it (the General Assembly). Thereafter, at its 46th Session the Commission appointed Mr. Vaclav Mikulka Special Rapporteur for the topic. The Commission considered the Special Rapporteur's first report at its 47th Session.

At its 48th Session the Commission had considered the second Report of the Special Rapporteur, Mr. Vaclav Mikulka. The purpose of that report was to enable the Commission to complete its preliminary study of the topic and to thus comply with the request of the General Assembly. The report was designed to facilitate the task of the Working Group on the topic, which the Commission had established at its 47th Session and had decided to reconvene at the 48th Session, in its preliminary consideration of the questions of the nationality of legal persons, the choices open to the Commission in the substantive study of the topic and a possible timetable.

Chapter II of that report had dealt with the Nationlity of Natural Persons and summarized the result of the work undertaken on that aspect of the topic. It had classified the problems and issues relating to the nationality of natural person in two broad categories viz. "General Issues" and "Specific Issues" and identified the legal material for analysis at a later stage of the Commission's work.

It may be recalled that while the protection of human rights and the

principle of effective nationality were the two general issues dealt with in the second report, the Special Rapporteur had emphasized 7 specific issues viz. (i) the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State Succession; (ii) granting of the nationality of the Successor State; (iii) withdrawal or loss of the nationality of the predecessor State; (lv) the right of option, (v) criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option; (vi) non-discrimination; and (vil) the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality.

The Nationality of Legal Persons dealt with in Chapter III of that report was intended to be the main focus of the Working Group at the 48th Session. Accordingly that Chapter had outlined the scope and characteristics of the subject and its many complexities including the various forms that legal persons could take. It was pointed out that apart from State Succession the problem of the nationality of legal persons arose mainly in the areas o conflicts of laws, the law on alien and diplomatic protection and in relation to State Responsibility. At the 47th Session of the ILC, the Special Rapporteur had, advocated focussing on the nationality of natural persons and, for the present time setting aside the issue nationality of legal persons.

In the Recommendations concerning- future work on the topic set out in Chapter IV of his second Report the Special Rapporteur had proposed dividing the subject into two parts viz. "Succession of States and its impact on natural persons" and "Succession of States and its impact on legal persons". He had emphasized that the former be studied first but cautioned that the division did not mean that the Commission should ignore certain links between both parts of the topic. He had also recommended leaving the question of the rule of continuity of nationality for further consideration within the framework of the topic "Diplomatic Protection" especially as the Commission was considering proposing that topic as a future agenda item.

Apropos the form which the outcome of the work might take the Special Rapporteur had indicated his favour of elaborating a declaratory instrument made up of articles together with commentaries thereto.

Work of the Commission at its forty ninth session

At its forty ninth Session the Commission had before it the Third Report of the Special Rapporteur[12], containing a set of 25 draft articles together with commentaries on the "Nationality of Natural Persons in Relation to the Succession of States." The draft article were divided into two parts. Part I of the draft articles on "General Principles Concerning Nationality in Relation to the Succession of States consisted of a set of 16 draft articles and the commentaries thereto. The provisions incorporated in Part Iof the draft articles set out the general principles which would be applicable to all cases of State succession. Part 11 of the draft articles on the "Principles Applicable in Specific Situations of Succession o States". As the title suggests Part 11 of the draft articles dealt with the principles governing specific cases of State succession and was divided into 4 sections viz. (i) "Transfer Part of the Territory"; (ii) the "Unification of States"; (Iii) the "Dissolution of States ; and (lv) the "Separation of Part of the Territory."

Introducing his third report at the forty ninth session the Special Rapporteur said, among other things, that the draft articles "incorporated the conclusions of the Working Group , which had met during the past two sessions relating to the main principles or rules which constituted the subject of the draft articles and the overall structure." The Commission after due consideration of the Third Report of the Special Rapporteur referred the same to the Drafting Committee. Thereafter it considered the report of the Drafting Committee and adopted on first reading a draft preamble and a set of 27 draft articles on Nationality of Natural Persons in Relation to the Succession of States." The Commission at its forty ninth session decided to transmit the draft articles to Governments for comments and observations.

Following the scheme proposed by the Special Rapporteur the Commission at its 49th Session adopted a preamble and a set of 27 draft articles. The draft articles adopted on first reading by the ILC are divided in 'to two parts. Part 1 of the draft articles which incorporates the text of draft articles 1-18 sets out the General Provisions and Part II consisting of the text of

[12] See A/CN.4/ 480 and Add. 1

draft article 19-26 sets out the Provisions Relating To Specific Categories of Cases. The Commission also adopted the text of a draft article 27 but has left the decision on its final placement for the second reading.

The first of the eight preambular paragraphs indicates the *raison d'etre* of the draft articles , the concern of the international community as to the problems of nationality arising from succession of States. It emphasizes that nationality is essentially governed by internal law within the limits set by international law. The third preambular paragraph affirms that the legitimate interests of both States and individuals should be considered. The next three paragraphs recall international instruments of relevance. Paragraph six corresponds to the Special Rapporteur's formulation on Guarantee of the human rights of persons concerned and expresses concern about the protection of human rights of persons whose nationality may be affected by a succession of States. It emphasizes that the rights of such persons must be fully respected.

Part 1 , General Provisions of the draft articles as adopted by the Commission on first reading addresses such issues as (i) right to nationality; (ii) use of terms; (iii) prevention of statelessness;(lv) presumption of nationality; (v) legislation concerning nationality and other connected issues; (vi) effective date; (vii) attribution of nationality to persons concerned having their habitual residence in another State; (viii) renunciation of the nationality of another state as a condition for attribution of nationality; (1x) loss of nationality upon the voluntary acquisition of the nationality of another state; (x) respect for the will of persons concerned; (xi) unity of family; (xli) child born after the succession of states; (xiii) status of habitual residents; (xiv) non-discrimination; (xv) prohibition of arbitrary decisions concerning nationality issues; (xvi) procedures relating to nationality issues; (xvii) exchange of information, consultation and negotiation; and (xviii) other States.

Needless to say, draft article 1 on the Right to Nationality is the key provision concerned with the right to nationality in the exclusive context of State succession. It confers on every individual the right to the nationality of at least one of the "States concerned". This provision, however, is given further specific form in subsequent provisions and cannot therefore be read in isolation. The mode of acquisition of the predecessor's State's nationality has no effect

on the scope of the right to nationality of the individual. It is irrelevant whether the nationality of the predecessor State was acquired by jus soli or jus sanguinis or by naturalization or even as a result of a previous succession of States.

Draft article 2 on the Use of Terms sets out the definitions of seven terms viz. (a) succession of States; (b) predecessor State; (c) successor State; (d) State concerned; (e) third State; (f) person concerned ; and (g) date of the succession of States. Five of these definitions are identical to the respective definitions embodied in Article 2 of the Vienna Conventions on the Succession of States. The Commission decided to leave them unaltered so as to ensure consistency in the use of terminology. While these may require little or no consideration, the definitions of the terms "State concerned" and "person concerned" have been added for the purpose of the present subject.

Sub-paragraph d of draft article 2 defines the term State concerned to mean, depending upon the type of territorial changes, the states involved in a particular succession of States. These are the predecessor State in the case of a transfer of part of the territory;[13] the successor state alone in the case of unification of States[14]; two or more successor States in the case of dissolution of States[15]; and the predecessor State and one or more successor State in the case of a separation of part of the territory[16]. The term "State concerned" has nothing to do with the concern that any other State may have about the outcome of a succession of States in which its own territory is not involved.

The term " person concerned " is defined in draft article 2 as an individual who had the nationality of the predecessor State and whose nationality may be affected by such succession. The term encompasses only individuals who, on the date of succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession. It includes neither the nationals of third States nor stateless persons who were present 'in the territory of any of the States concerned.

13. See draft article 20
14. See draft article 21
15. See draft articles 22 and 23.
16. See draft articles 24 to 26.

These two terms to some extent, implicitly determine the scope of the draft articles. They delimit the scope ratione personae of the draft articles what is more the term "person concerned" also determines the scope ratione materiae. Accordingly, the draft articles deal both with the loss and acquisition of,nationality although in the exclusive context of State succession . In that respect, following the right to nationality provided for in draft article I, it also detemines the scope of the draft articles ratione temporis.

Draft article 3 on the Prevention of statelessness is a corollary of the right of the persons concerned to a nationality. It may be stated that draft article 2 as formulated by the Special Rapporteur in his third report to the Commission had been termed "Obligation of States concerned to take all measures to avoid statelessness."

Draft article 4 on the Presumption of nationality addresses the problem of time lag between the date of succession of states and the adoption of legislation or the conclusion of a treaty between States concerned on the question of nationality of persons following the succession. Since such persons run the risk of being treated as stateless during this period the Commission deemed it important to express as a presumption the principle that on the date of the succession of States the successor state attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. While it is a rebuttable presumption and its limited scope is clear from the restrictive formulation of the provision, it underlies the solutions envisaged in Part II for different types of succession of States.

Draft article 3 addressed to Legislation concerning nationality and other connected issues as proposed by the Special Rapporteur in his third report to the Commission comprised two paragraphs. The text of these two paragraphs proposed by the Special Rapporteur has furnished the basis of draft articles 5 and 6 as adopted on first reading by the International Law Commission. Introducing the draft article the Special Rapporteur had observed that it presupposed that nationality was essentially an institution of the internal laws of States and that the international application of the notion of nationality in any particular case had to be based on the internal laws of the State in question. Draft article 5 Legislation concerning nationality and other connected