(d) Final Form of the guide to practice

In the opinion of the Special Rapporteur the guide to practice in respect of reservations which the Commission intends to prepare could be divided into six Chapters covering (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;(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.

(iii) Final Form of the Study

Unity or diversity of the legal regime for reservations to multilateral 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, 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 term of the problem are, partially, the same regardless of the provisions in question ; (jj) 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) this question is related to reservations to human rights treaties, which justifies placing the emphasis on the consideration of the specific problems that concern them.

Defination 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 and it seems useful to link the consideration of this question to that of other procedures, which, 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 alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome

some problems linked to reservations.

The Special Rapporteur 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 for reservations could have been envisaged, it appears at first glance that the question relates to a different problem.

Formulation and withdrawal of reservations, acceptances and objections

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 practical question which arises constantly, and one could hardly conceive of a "guide to practice" which did not include developments in this regard.

Effects of Reservations, Acceptances and Objections

Effects of Reservations, Acceptances and Objections is indubitably the 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 premissible (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 Rapporterur, it would be premature to take a position at this stage.

The general outline did 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 when it is permissible on the one hand and when it is nonpermissible 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' 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 *priorito* depart from this practice in most cases. In his 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. 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.

FORTY NINTH SESSION OF THE ILC

Owing to the priority attached to the completion of the second reading of the articles on the Draft Code of Crimes Against the Peace and Security of Mankind as well as the first reading of the draft articles on State Responsibility the consideration of the Second Report of the Special Rapporteur on Reservations to Treaties presented at the 48th Session of the Commission had had to be defered. The Commission at its forty ninth Session considered that Report which presented an overview of the study of the question of reservation to treaties.

At its 49th Session the ILC adopted a set of **Preliminary Conclusions on Reservations to Normative Multilateral Treaties**.[29] 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 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.

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[29]. For the full text of the Preliminary Conclusions on Reservations to Normative Multilateral Treaties i Including human Treaties as adopted by the Commission at its 49th Session see Annexure VII, *infra*.

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.

The Preliminary Principles adopted by the Commission recognize that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the Human Rights 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 had however disagreed with this principle as incorporated in paragraph 5 of the preliminary conclusion

The competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties 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 has proposed 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 findings 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 has called upon States to cooperate with monitoring bodies and give the 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.

VI.WORK OF THE AALCC

A Sub-Committee on the Law of Treaties appointed at the Tenth Session of the AALCC held in Karachi in January 1969 had proposed that the definition of the term "reservation" in subparagraph (d) of paragraph 1 of Article 2 as drafted by the International Law Commission may be maintained. The Sub-Committee did not find acceptable an amendment , moved by Hungary at Vienna which "intended to include under the concept of "reservation" a totally different category of legal acts which are mere 'declarations' ". The Delegate of the United Arab Republic pointed out that declarations do not exclude or vary the legal effect of certain provision of a treaty and that interpretative statements clarifying a State's position cannot be considered as "reservations" within the meaning of the original text[30].

Considering the important and complex questions raised by draft Articles 16 and 17 (corresponding to Articles 19 and 20 of the Convention on the Law of Treaties, 1969) and keeping in view the necessity of maintaining a balance between the principle of integrity of treaties and the principle of freedom of State to make reservations, the Sub-Committee had agreed that :

(i) Article 16, (now article 19 of the Convention) as unanimously approved by the Committee of the Whole at Vienna, was acceptable. The Second Sub-Committee had considered an amendment submitted by Japan, Philippines and the Republic of Korea proposing a collegiate system for determining the compatibility of a reservation with the object and purpose of a treaty as containing a useful innovation in the law of treaties. While the majority had supported this amendment in principle, the Delegate of India was, however,

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[30].See Report of the Second Sub-Committee on the Law of Treaties in Asian African Legal Consultative Committee..Report of the Tenth Session, Karachi, 1969, p 357 at 361-62

not clear as to how it will function in view of the provisions of Article 17(4) (a) now article 20 (4) (a)}3)[31].

(ii) With regard to Article 17, the Second Sub-Committee had expressed support for the deletion of the words "or impliedly" from paragraph 1 as they introduce a subjective element and could give rise to uncertainties[32]

(iii) The majority of the members opposed the amendment moved at Vienna seeking to replace the words "the treaty" where it first occurs, by the words "a general multilateral treaty or other multilateral treaty, with the exception of cases provided for in paragraphs 2 and 3" on the ground that such formulation would re-introduce the doctrinal and unnecessary distinction between "general multilateral treaties" and "restricted multilateral treaties".

(iv) The Second Sub-Committèe was not in favour of the joint amendment, tabled at Vienna , seeking to replace the original text of Article 17, paragraph 2 by another formulation referring explicitly to the concept of "restricted . multilateral treaty" which requires, as in the case of reservations to a bilateral treaty, acceptance by all the contracting States. The non-acceptance of the joint French-Tunisian amendment was a logical consequence of the aforementioned attitude of the Sub-Committee regarding the inadvisability of introducing a definition of the term "restricted multilateral treaty" in Article 2.

(v) The majority of the members of the Second Sub-Committee was not in favour of the joint amendment moved at Vienna to delete, paragraph 3 of Article 17 dealing with reservations to treaties which are constituent instruments of international organizations. The provisional text of paragraph 3 as suggested by the Drafting Committee and as amended by the Committee of the Whole, is acceptable.

[31] *Ibid. p.*
[32] *Ibid.*

(vi) The majority of the Second Sub-Committee did not favour the proposed amendment to paragraph 4 of Article 17 embodying the principle that a treaty enters into force between a reserving State and an objecting State, unless the objecting State expressly declares to the contrary. In its opinion the original text of paragraph 4 (b) prevented the creation of a complex situation with regard to the application of treaties by assuming that the objection to a reservation precludes, in principle, the entry into force of the treaty between the objecting and reserving State[33]

(vii) The Second Sub-Committee unanimously approved the amendment to insert the words "unless the treaty otherwise provides" in paragraph 5 of Article 17. This amendment introduces a certain flexibility missing in the International Law Commission's text, as it gave to the negotiating States the power of stipulating in the treaty itself a period shorter or longer than twelve month.[34]

SUMMATION

The Special Rapporteur has observed that in its Advisory Opinion regarding *Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide* '.the ICJ had, *inter alia,* noted the disadvantages that could result from the profound divergence of views of States regarding the effects of reservations and objections and 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. organ of the United Nations , Specialized Agencies and States should, in the course of preparing multilateral conventions, consider the insertion of provisions relating to the inadmissibility of reservations and the effect to be attributed to them.[36]

[33] *Ibid*
[34] *Ibid.*
[35] *I CJ Reports (1 95 1) p.26*
[36] See General Assembly Resolution 598 (VI).

Whilst introducing the Report of the International Law Commission on the Work of its Forty Ninth Session at the recently concluded 52nd Session of the General Assembly the Chairman of the Commission stated *inter alia* that the preliminary conclusions on the reservation to treaties adopted by the Commission were intended to help clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights. The Commission had also decided that the result of its work would be to adopt a guide to practice on the topic of reservations to treaties in the form of a set of draft articles with commentaries.

A number of issues arise from the preliminary conclusions on the reservation to treaties adopted by the Commission. On the one hand it has been stated that that the Vienna regime is rather deficient on a number of subjects dealing with reservations to treaties in as much as clear and precise criteria for judging the admissibility of reservations was wanting. In this regard it is expected that the principles that the Commission had enunciated would clarify the reservations regime applicable to normative multilateral treaties. On the other hand . it has been pointed out that the Vienna legal regime was universally applicable to all treaties without any distinction aimed at excluding a particular type, of treaty, including human rights treaties. It has been clearly stated that there is no necessity for a separate regime for human rights treaties. States alone are competent to freely determine the extent to which they would be bound by international contractual obligations. It is a sovereign attribute of every State to negotiate with other States and decide on the extent to which it committed itself to the obligations it would enter into with other States.

At the 52nd session of the General Asseynbly the view was expressed that some of more important questions remained unanswered in the Commission's conclusions or in the Vienna regime, viz. (i) to which normative treaties did the principles apply; and (ii) did, the right of treaty monitoring bodies to judge a reservation apply when a treaty was silent on the role, of the monitoring bodies or when it was silent on reservations as a whole?

Several delegates emphasized that the competence of treaty-monitoring bodies to judge reservations could only be assessed with respect to the rights given to them by State parties. If those bodies were established by State

parties, they could not judge the admissibility of reservations and they should not be handed such power now. That power would run counter to the rights of States to decide on their own accord the admissibility or inadmissibility of reservations to treaties. If monitoring bodies were allowed to make conclusions on reservations, States might be discouraged from becoming party to treaties in general. Thus, any overstepping of their competence would be counter productive.

Thus the view was expressed at the 52nd Session of the General Assembly that, insofar as the existing general regime could accommodate changes, a separate regime on reservations for human rights treaties would not be a viable option in practice Besides , since several bodies and agencies dealt with human rights within the United Nations system, conferring additional powers on those bodies with respect to reservations could further complicate matters in the present reservations regime. It was suggested that the Commission study the proposals that would have States indicate the parameters for non-application of a provision of a human rights treaty and define the exact nature of human rights monitoring bodies. A system of collaboration between States and monitoring bodies within an expanded framework of the Vienna regime, it was suggested, could be a workable solution.

Human rights treaty-monitoring bodies, it was pointed out , were solely for the purposes for the functions ascribed to them by the States parties and those bodies could only exercise the functions that their constitutive treaties entrusted to them. In accordance with the Vienna Conventions, it was up to the State that made the reservation to determine whether its reservation was consistent with the purposes and objects of the treaty. States parties should be the ones that determined the consequences of reservations and the kind of treaty relationship between them.

The view was also expressed that while treaty-monitoring bodies could comment and express recommendations with regard to the admissibility of reservations made by States in order to oversee the implementation of the treaties they however had no competence to make legal determinations on the validity of particular reservations unless otherwise specifically authorized to do so by the express provisions of the treaties. The basic rule of consent by