convention of 1969 and 1986 and, where apporpriate by the organs for settling any dispute that may arise concerming 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 of States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was pointed out 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 vested in them for the performance of their general monitoring role. It has also called upon States to co-operate 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.

Finally, he stated that the ILC had invited comments on the Preliminary Conclusions adopted on the Reservations to Normative Multilateral Treaties, including Human Rights Treaties and consideration could be given to forwarding the views of Member States of the AALCC on the issue of reservation to treaties expressed during the Special Meeting together with any report or recommendation that the Committee may adopt at this Session.

The discussions during the Special Meeting revolved largely around the presentations made by a group of experts specially invited to make presentations. These included Mr. B.Sen (Member of UNIDROIT Governing Body and former Secretary General of The AALCC); Professor (Ms) S.K.Varma (Dean, Faculty of Law, University of Delhi); Professor M.K. Nawaz (Visiting Professor, National Law School, Bangalore);Professors R.P. Anand; V.S Mani and Y.K. Tyagi (all of the School of International Studies, Jawaharlal Nehru University). A paper on "Reservations to Normative Multilateral Treaties and Human Rights Treaties" written by Professor M.K. Nawaz was circulated during the Meeting.

It may be stated that Ambassador Chusei Yamada, Member of the International Law Commission represented the Chairman of the Commission and Special Rapporterur of the topic Professor Alain Pellet.

Following the presentations by the six Special Experts, delegates of 8 Member States, one observer State and two international organizations made statements. These included China, Egypt, Ghana, India, Islamic Republic of Iran, Kuwait, Sri Lanka and Sudan from among the Member States;Sweden from among the Observer States; and the International Law Commission and the Organization of Islamic Conference from among the International organisations.

The Special Meeting considered the relevant provisions of the Vienna Conventions of the Law of Treaties, 1 969 viz. Articles 19 to 23. It also took note of the relevant provisions of the 1978 Convention and the 1986 Convention on the subject. The Special Meeting also considered the Preliminary Conclusions on Reservation to Multilateral Normative Treaties including Human Rights Treaties adopted by the International Law Commission. The Meeting also recalled that the General Assembly at its 52nd Session had drawn the attention of Governments to the importance for the International Law Commission, of having their views on the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties.

The view was expressed that while the Vienna Regime of Reservations to Treaties was based on the assumption that a multilateral treaty is in effect a combination of several bilateral treaty relationships there were a certain category of treaties which, by the very nature of the subject matter addressed by them did not admit of any reservations. Treaties relating to the protection and preservation of the Enviromnent , Disarmament Treaties and Human Rights Treaties were identified as the category of treaties which are applicable and binding upon not only the States Parties but on all members of the international society. . The United Nations Convention on the Law of the Sea, 1982 was yet another example of a treaty which by the nature of being a "package deal" did not admit of reservations.

The Special Meeting considered the functions and role as well as the competence of the monitoring bodies to appreciate or determine the admissibility of a reservation. The view of the Commission that the legal force of the findings made by such bodies in the exercise of their functions could not

exceed those resulting from the powers given to them, met with approval. However, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation met with resistance.

Many of the participants addressed themselves, to the provisions of the international instruments on human rights. The right to religion , the right to work, right to health and the right to compulsory education were among those that were cited and debated. Several views were expressed on the specific provisions of human rights treaties and the reservations thereto. While some identified the lack of resources, unrealistically high international human rights standards, among others, some participants listed the different sociol-economic, cultural and political backgrounds of the people and states as the reasons for the formulation of reservations to human rights treaties. It was pointed out that the provisions of some of human rights treaties could be sub classified as those (i) requiring intervention of States; and (ii) those not requiring any action or intervention by States parties.

Points of Convergence

The deliberations in the Seminar revealed convergence of views on a wide range of issues. These included:-

(i) The law of reservation ushered in by the Vienna Convention has, by and large, served well the needs of the international community of States. It may be unwise to derail the Vienna regime on reservations. The provisions of the Vienna Convention on Treaties had been and continue to enjoy wider acceptance . In as much as these provisions had stood the test of time they should not be tampered with. There was no need to amend or alter them.

The majority of participants were of the view that the right to formulate and express reservations to one or more provisions of a convention is an attribute of State sovereignty and power to make or express reservation can only be restricted by a treaty.

(ii) The existing regime of reservations as incorporated in Articles 19 to 23 of the Vienna Convention on Law of Treaties, 1969 were sufficiently flexible and whilst recognizing the inherent right of a State to make a reservation merely restricted that right by stipulating that the reservation or declaration made by a state be "compatible with the object and purpose of the treaty concerned". In this regard it was pointed out that the Commission itself had in paragraph I of the Preliminary Conclusions on Reservations to Normative Multilateral Treaties including Human Rights Treaties had recognized that "Articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that in particular, the object and purpose of the Treaty is the most important of the criteria for determining the admissibility of reservations." It (the Commission) "considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty. and universality of participation in the treaty."

One view was that a monitoring body lacked the competence to adjudge the admissibility or legality of a reservation unless it had been specifically authorized to do so by the treaty itself. The view was also expressed that a strict regime of reservations with a monitoring body at its apex would impair the objective of universality of participation in the treaty. The treaty regime including the regime of reservations should aim at promoting the objective of universality of participation rather than hinder the process of ratification .

(iii) Although one expert had categorised treaties as (a)Treaties valid erga omnes ; (b) constitutive treaties; (c) Humanitarian Conventions/ Treaties; and (d) Codification treaties, the majority view was that while such a classification was useful no distinction needed to be drawn between Human Rights Treaties and other Treaties with respect to the regime of reservations. One expert raised the question whether reservations to human rights treaties were any different from reservations to other nominative treaties. Almost all treaties stipulate normative and contractual obligations. The question was also posed whether human rights treaties deserve to be classified in the category of treaties which admit of no reservations. It was pointed out in this regard

that the Human Rights Covenants had been adopted a good two years before the Conference of Law of Treaties' was convened in 1968 and that the Vienna Conference on the Law of Treaties had not deemed it necessary to differentiate human rights treaties from any other set of normative treaties. It was stated in this regard that what the conference of plenipotentiaries had not done the International Law Commission could not do because what can not be done directly can not be done indirectly.

(iv) In so far as paragraph 3 of the Preliminary Conclusions adopted by the Commission sought to differentiate between normative treaties and treaties in the field of human rights the participants in the Special Meeting could not agree with the formulation or text of paragraph 3.

(v) Most participants could not accept paragraph 5 of the Preliminary Conclusions adopted by the International Law Commission relating to the role of the monitoring bodies of human rights treaties. One expert took exception to the use of term 'monitoring body' since the term monitor implied an element of surveillance. He therefore proposed the use of the term "'supervisory body" in lieu of the present term "monitoring body" employed by the Commission.. Yet another expert was of the view that the proposed role of the monitoring bodies was a dangerous proposition. It was stated in this regard that the passing of value judgements on the admissibility of reservations and the practice of States, by a monitoring body, would be unacceptable to States. A third expert characterised the proposed role and function of monitoring bodies, as regards the admissibility of reservations to human rights treaties, as the opening of Pandora's box . A participant from one member state expressed the view that formulation of a reservation constitutes sovereign right of the States and the provision embodied in paragraph 5 of the Preliminary Conclusions is in contradiction with this cardinal principle of the Law of Treaties.

(vi) The view was also expressed that while the monitoring bodies ought not to make value judgements on the validity or otherwise of a reservation to a treaty they could , however, make recommendations as to the effect of a reservation.

(vii) Paragraph 10 of the Preliminary Conclusions was considered by some to be a "creeping" clause and one that may be amenable to misuse. It was stated in this regard that the Commission should avoid handing out political handles which could result in the defeating the very object of universality of participation in a treaty.

Recommendations__

A number of recommendations were made in the course of the Special Meeting. The proposal advanced included :

(i) One view suggested that the International Law Commission undertake an empirical study of state behaviour and study the reservations to treaties and if feasible the motives thereof. It could thereafter seek to develop the reservation regime by way of interpretative codification".

(ii) Another view emphasized the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on, the existing provisions of the Vienna Convention. He favoured the preparation of a guide to state practice rather than the formulation of model clauses or a protocol.

(iii) It was recommended that the ILC consider concluding its work on this topic not on the basis of "intuitive feeling" but on the basis of an empirical study of the behaviour of States .

(iv) The Commission should approach its future work on the subject with due caution and not be guided by the European precedents which may not always be relevant or appropriate to the universal context . One view was that a realistic stance would require taking note of the different political, social economic and cultural milieu of the States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

The Secretariat reported the debate of the Special Meeting to the International Law Commission . It also requested the Representative of the

International Law Commission to report his findings to the Commission at its 50th Session.

(ii) Decision on the 'Reservation to Treaties'

(Adopted on 18.4.98)

The Asian-African Legal Consultative Committee at its Thirty-seventh Session

Having considered the Note of the Secretary General on the Reservation to Treaties Doe. No AALCC/XXXVII/New Delhi/ 98/ SP.1;

Having considered also the Preliminary Conclusions on the Reservations to Multilateral Treaties including Human Rights Treaties adopted by the International Law Commission at its 49th session

Recalling General Assembly Resolution 52/ 156 on the report of the International Law Commission on the work of its forty ninth session ;

Recognizing the significance and complexity of Reservation to Multilateral Treaties including Human Rights Treaties;

1. **Expresses its gratitude** to the Government of the Republic of India for hosting the Special Meeting on the Reservation to Treaties;

2. **Expresses its appreciation** to the Secretary General for the Background Note;

3. **Also expresses Its appreciation** to the experts for their contribution in the consideration of the item

4. **Requests the Secretariat** to continue to monitor and study developments in regard to the Reservation to Treaties;

5. **Requests** the Secretary General to convey to the International Law Commission the views of the Committee on the Preliminary Conclusions on the Reservations to Multilateral Treaties including Human Rights Treaties.

(iii) Secretariat Study : Special Meeting on the Reservation to Treaties

The Work Of The International Law Commission On The Law Of Treaties

It will be recalled that the General Assembly had by its resolution 478(V) invited the ILC *to inter alia* "study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon especially as regards multilateral conventions....."

In its report to the General Assembly theCommission had stated that the criterion of compatibility of a reservation with the object and purpose of a convention - as applied by the international Court of Justice in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* - would not be suitable for application to multilateral conventions in general. It also said that while no single rule uniformly applied could be wholly satisfactory , a rule suitable for application in the majority of cases could be found in the practice, with some modifications, therefore followed by the Secretary General.

Be that as it may , in the opinion of the current Special Rapporteur , Mr. Alain Pellet, the topic has a long history starting in 1950 with the consideration ofthe first report of the then Special Rapporteur, Mr. Jaines Brierley, and ending in 1986 with the adoption of the Vienna Convention on Treaties between States and International organizations or, between International Organizations. In his opinion , the five important stages in that process have been the (i) Advisory Opinion of the International Court of Justice in1951on *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide;* (ii) first report of the then Special Rapporteur, SirHumphrey Waldock, in 1962 which had led to the Commission's adoption of a flexible system; (iii) adoption in 1969 of article 2 Paragraph 1(d) and articles 19 to 23 of the Vienna Convention onthe Law

of Treaties; (iv) adoption in 1978 of article 20 of the Vienna Convention on theSuccession of States in respect Of Treaties[1] (iv) adoption in 1978 of article 20 of the Vienna Convention on the Succession of States in respect of Treaties[2] ; and finally (v) adoption in 1986 Of articles of theVienna Convention on the Law of Treaties between International Organizations[3] which essentially reproduced the corresponding Provisions of the Vienna Convention on the Law of Treaties 1969.

The provisions of Articles 19-21 of the Vienna Convention on the Law Of Treaties, 1969[4] while following the principles laid down by the ICJ in the *Genocide case*[5] made a concession to the supporters of the traditional rule by recognizing that every reservation is incompatible with certain types of treaty unless accepted unanimously. Article 19 of the Convention stipulates that reservations may be made when.signing, ratifying, accepting, approving or acceding to a treaty, but they cannot be made where the reservation is prohibited by the treaty or where the treaty provides that only specified reservations may be made not including the reservations in question, or where the reservations not compatible with the object and purpose of the treaty. Article 20 provides that where a reservation is possible the traditional rule requiring acceptance by all States would apply where "it appears from the limited number of the negotiating States and the object and purpose of the

1. The Vienna Convention on the Law of Treaties.1969 entered into force on 27th January 1980. As of 31st December 1996 81 States including 15 member States of the AALCC are parties to that Convention.
2. The Vienna Convention onSuccession of States in Respect to Treaties, 1978 entered into force on 6th November 1990. As of 31st December 1996 15 States including 2 member States of the AALCC are parties to the Convention.
3. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 is yet to enter into force. Cyprus is the sole member State of the AALCC among the 23 parties to the Convention. The AALCC is a signatory to the Final Act of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in March 1986.
4. For the text of the relevant articles of the Convention on the Law of Treaties 1966 see Annexure IV, infra.
5. *ICJ* Reports 1951 .

treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty."[6]

Paragraph 4 of Article 20 thereafter outlines the general rules to be followed with regard to treaties not within Article 20(2) and not constituent instruments of international organizations.[7] The flexible approach was designed to permit the maximum scope for reservations while preserving the binding character of the treaty.[8]

Article 21 of the Convention sets out the effect of reservations. A reservation established with regard to another party modifies for the reserving State in its relations with the other party the provision of the treaty to which the reservation relates, to the extent of the reservation. The other party is likewise affected in its relations with the reserving State. The reservation does not, however, modify the provision of treaty for the other parties to the treaty as between themselves.

In general reservations are deemed to have been accepted by States that have raised no objections to them at the end of a period of twelve months after notification of the reservation by the date on which consent to be bound by the treaty was expressed whichever is later.[9]

6. Article 20 paragraph 2 of Convention on the law of treaties. 1969.

7. Article 20 paragraph 4 of the Convention stipulates 4 "in cases not falling under the preceding paragraphs and unless the treaty otherwise provides: (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) an objection by another contracting State to a reservation does 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.not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting States. (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

8. International Law, it has been said, has preferred increasing the number of parties to international treaties to maintaining the unilateral consistency of the treaty itself. See M. Shaw *International Law.*

9. See Article

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.

The Provisions of the Vienna Convention on the Law Of Treaties between States and International Organizationsor between International Organizations essentially reproduced the provisions of the Convention on the Law of Treaties, 1969.

Solutions had in the ast, in the opinion of Alain Pellet the current Special Rapporteur,been arrived at the cost of "judicious ambiguities" and there had been a clear development in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment to the right of other contracting States to oppose such reservations,even of the right of other contracting States to oppose on an individual basis the entry into force of the treaty between themselves and the reserving State was maintained. The Convention on the Succession Of States in respect Of Treaties, 1978 by express referral and the Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 by virtually reproducing the provisions of the Convention on the Law of Treaties, 1969 had strengthened the system established by the 1969 Convention and which given its many ambiguities and gaps had little that was systematic about it.

PRACTICE RELATING TO RESERVATIONS

Various methods have been tried to overcome the complications caused by reservations.These have included (i) the provision of a special clause in the

Convention that no reservations at all are permissible,[10] (ii) or none with regard to certain important provision[11]; and (iii) the normal stipulation that reservations and exceptions may be made provided they are not contrary or inimical to the object and purpose of the treaty itself.

Law of the Sea: The Geneva Convention on High Seas, 1958 made no mention of reservation at all. The Geneva Convention on the Continental Shelf allowed no reservation as to the provisions of Articles 1 to 3.

Article 309 of the United Nations Convention on the Law of the Sea, 1982 entitled 'Reservations and Exceptions' stipulates " NO reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." (Emphasis added) .Article 310 of that Convention on Declarations and Statements however, provides that "Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention from making declarations or statements, however phrased or named with a view , inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State."

The 1994 Agreement Relating to the Implementation of Part XI of the Convention adopted by the General Assembly[12] does not contain a provision relating to reservations.

Human Rights: Article 20 of the Racial Discrimination Convention which States that a reservation is "incompatible or inhibitive if at least two thirds of the contracting parties object to it, uses a "mathematical" test for determining whether a reservation is incompatible with its object and purpose.

[10] Article 39 of the Convention on Damage caused by Foreign Aircraft to third parties on the Surface, 1952.

[11] The Geneva Convention on the Continental Shelf allowed no reservation as to articles 1 to 3.

[12] See General Assembly Resolution 48/263 of July 28, 1994. The Agreement entered onto force on 28th July 1996.

Genocide Convention : It has been suggested that the most controversial reservations to the Genocide Convention are those made by a number of States not accepting Article IX of the Convention which provides for the compulsory jurisdiction of the International Court of Justice in disputes arising under the Convention. Objections to such reservations have been registered by a number of States.

In the field of International Environment Law many Conventions clearly and explicity stipulate that no reservation may be made. The Vienna Convention for the Protection of the Ozone Layer, 1985[13] and the 1987 Protocol thereto[14] the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1991;[15] the Convention to Combat Desertification;[16] the Basel Convention on the Transboundary Control of Hazardous Wastes, 1989;[17] 157the United Nations Framework Convention on Climate Change;[18] the Convention on Biological Diversity[19] fall in this category of Conventions.

[13] See Article 18 of the Convention which prides that no reservations may be madetothis Convention.

[14] See the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987. No reservations may be made to this Protocol.

[15] Article 26, paragraph 1 of this Article does not preclude a State when signing, or acceding to this Convention, from making declarations or statements, however phrased or named" with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.

[16] See Article 37 "Reservations" No reservations may be made to this Convention.

[17] See Article 26. Reservations and Declarations. No reservation or exception may be made to this Convention.

[18] See Article."Reservations" No reservations may be made to the Convention.

[19] See Article 37, on "Reservations" No reservations may be made to this Convention.