

1971

The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the ILO and Council of Europe - Part Two

W. Paul Gormley

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

W. Paul Gormley, *The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the ILO and Council of Europe - Part Two*, 39 Fordham L. Rev. 413 (1971).

Available at: <https://ir.lawnet.fordham.edu/flr/vol39/iss3/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the ILO and Council of Europe - Part Two

Cover Page Footnote

Associate Professor of Law, The University of Tulsa. Member of the District of Columbia Bar.

THE MODIFICATION OF MULTILATERAL
CONVENTIONS BY MEANS OF
“NEGOTIATED RESERVATIONS” AND OTHER
“ALTERNATIVES”: A COMPARATIVE STUDY
OF THE ILO AND COUNCIL OF EUROPE—
PART TWO†

W. PAUL GORMLEY*

V. COUNCIL OF EUROPE

This political institution originally intended to follow the basic rule of ILO that absolutely no reservations or variation from the text as signed would be permitted. Moreover, even the traditional international law norm, permitting reservations if all other parties accepted, was rejected on the seemingly valid theory that all differences could be satisfactorily negotiated beforehand. That is to say, an unusually high degree of homogeneity existed between this select group of states, because of the fact that they had all banded together for the purpose of guaranteeing basic human rights and fundamental freedoms on the continent of Europe, following the failure of the United Nations to implement the Universal Declaration of Human Rights⁸¹ at the global level.⁸² All of these European countries had suffered under Nazi tyranny and it was assumed that their desire to protect human rights against the arbitrary actions of governments—as supported by the common European tradition—would prevent disagreements incapable of solution during negotiations. Logically, continued disagreement similar to that encountered by the states ratifying the Genocide Convention would never arise, since such disputes would have been eliminated by the negotiators. While the Council has largely succeeded in effectively protecting human rights (and even property and economic interests)⁸³ complete solidarity has not been achieved. The reasons need not be recounted here, but two obvious answers are to be found in the resurgence of national sovereignty and the increase in the number of states joining the political union, and the complicated fields covered by European Conventions. Realistically, the European Treaty Series—pres-

† The first part of this article appeared in the October issue of this volume, 39 *Fordham L. Rev.* 59 (1970).

* Associate Professor of Law, The University of Tulsa. Member of the District of Columbia Bar.

81. G.A.Res. 217A, U.N. Doc. A/811 (1948).

82. W. Gormley, *The Procedural Status of the Individual Before International and Supranational Tribunals* 45-49 (1966).

83. *Id.* at 70-126.

ently including over sixty-nine conventions and protocols—covers so many diverse and technical areas that complete agreement cannot always be obtained among eighteen independent nations.⁸⁴ Hence, the Council is facing a dilemma somewhat similar to that confronting ILO and OAS, though admittedly on a smaller scale. The writer does not mean to imply that an extremely high degree of cooperation has not been realized, but differences have arisen necessitating some modification of previously negotiated treaties, because their texts are necessarily based on compromise. Notwithstanding the fact that a much higher standard of unanimity has been obtained than in the larger organizations—namely the United Nations, ILO, and OAS⁸⁵—it was necessary for the Council to develop a unique European law incorporating a special system of negotiated reservations due to the ever present legal clash between preserving the treaty's integrity and at the same time permitting as many Members as possible to ratify. In rejecting both the "developing international norms" and the unlimited-use theory of the OAS, the Council has developed a new solution, in practice very close to the criteria set forth by the International Court of Justice in the *Genocide Case*.⁸⁶

A. *Negotiated Reservations*

The basic rule governing the use of reservations is fairly simple; only those reservations *specifically agreed to in advance will be permitted*. Secondly, such reservations must be set forth within particular articles or sections designated in the main text, supplemental annexes, or protocols, with the result that any Member ratifying is required to accept the convention as negotiated. No additional reservations will be permitted! In reality, then, the Member must accept the "package deal" or remain outside the Convention if it finds some portion incompatible with its national interests. In short, the writer submits that *the Council has developed a unique practice, falling midway between the ILO system of prohibiting all reservations and the older international law standard of allowing reservations only in those situations wherein all other states agreed to accept the unilateral reservations* at signature, ratification, or adherence. As such, no comparison can be made with the OAS system of permitting unlimited reservations because the Latin American and European systems are totally different. The Council, on the other hand,

84. Greece was requested to withdraw from the Council of Europe by a vote of the Consultative Assembly in January, 1969.

85. Ténékidès, Régimes Internes et Organisation Internationale, 110 Recueil des Cours 271 (1963 III).

86. Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15. See analysis in Bishop, *supra* note 5, at 281-93, in connection with Bishop, *supra* note 4, at 348-52.

has chosen the solution of resolving *in advance of signature* those portions (chapters, articles, and paragraphs) *not absolutely necessary to the essential object and purpose of the treaty*. The plenipotentiaries achieve this delicate balance.

The *travaux préparatoires* need not be recounted in a study of this type. Suffice to say, a provisional list of possible reservations is drawn up for the purpose of subsequent negotiation. A selection is then made as to those reservations deemed acceptable, with or without some modification.

Other problems of a highly technical nature must also be considered, primarily whether to place such items—including escalation and flexibility devices—in the main text or in accompanying annexes or protocols. In brief, the normal practices of treaty negotiation are followed; however, the result is similar to the test set down by the International Court of Justice,⁸⁷ but with one major additional advantage. The scope of acceptable reservations is determined beforehand by the negotiating parties, not by an arbitral or judicial tribunal after serious controversy has arisen. Even after an international tribunal has rendered its decision, the status of the Convention remains in doubt for the reason that a depositary may never be absolutely certain whether the required number of ratifications has been obtained.

B. *The Evolution of the Regional Norm*

The above mentioned negotiated reservation should be treated as a philosophical concept rather than a single element of treaty law because it can take several forms. Specifically, the evolution of the Council's reservations can be traced from a simple beginning, such as the single exception, exclusion, or alternative—a practice originally influenced by the ILO system. Accordingly, the main groups of "reservations" to be discussed below are important not only because they show the less sophisticated stages in the emergence of the negotiated reservation, but these more limited devices are still frequently chosen. Not every European Convention will incorporate an elaborate reservations clause. Indeed, the

87. "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the 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 the contracting parties without exception, as would have been the case if it had been stated during the negotiations." Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15, 21.

less complicated articles are employed much more frequently than the elaborate reservations and escalation clauses found in the Convention of Human Rights,⁸⁸ the European Social Charter,⁸⁹ and very recent agreements, particularly the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality.⁹⁰ Furthermore, several types of these more limited qualifications or options can be used together in the same convention or in conjunction with very elaborate reservations clauses as can be seen from Article 31 "Restrictions" of the European Social Charter and the Code of Social Security, discussed below.

C. *Single Option*

This classification comprising a broad group of fairly simple devices—often contained in, or relating to, a single article (or subsection)—might be open to question as a matter of definition on the ground that these options might not even be considered to constitute full reservations. Admittedly, the writer has adopted a very broad standard in order to include this group. Generally, he reaches the conclusion that very few European Conventions exclude all reservations or flexibility devices. Exceptions are The General Agreement on Privileges and Immunities⁹¹ and Protocols⁹² thereto, plus some of the scientific and medical conventions, *i.e.*, the European Agreement on the Exchange of Therapeutic Substances of

88. Europ. T.S. No. 5, art. 64 (1950-1952), 213 U.N.T.S. 221.

89. Europ. T.S. No. 35, art. 20 (1-3) (1961), 529 U.N.T.S. 89.

90. Europ. T.S. No. 43, arts. 7-8 (1963) [hereinafter cited as Convention of Cases of Multiple Nationality]. For other recent Conventions see notes 180 & 183 *infra*.

91. Europ. T.S. No. 2 (1949-1961), 250 U.N.T.S. 12.

92. Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Europ. T.S. No. 10 (1952), 250 U.N.T.S. 32. See also Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Europ. T.S. No. 22 (1956), 261 U.N.T.S. 410; Third Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Europ. T.S. No. 28 (1959); Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, Europ. T.S. No. 36 (1961), 544 U.N.T.S. 328.

Higher standards can be negotiated between the Council and Member States, but these modifications would constitute separate agreements. The General Agreement on Privileges and Immunities of the Council of Europe, Europ. T.S. No. 2, art. 20 (1949), 250 U.N.T.S. 12, maintains: "The Council may conclude with any Member or Members supplementary agreements modifying the provisions of this General Agreement, so far as that Member or those Members are concerned." Similarly, the Amendment to the Statute of the Council of Europe, Europ. T.S. No. 11 (1953), 196 U.N.T.S. 347, does not contain reservation clauses. A more recent example of an instrument containing no reservations can be seen in Protocol to the European Agreement on the Protection of Television Broadcasts, Europ. T.S. No. 54 (1965).

Human Origin,⁹³ which does not have an apparent reservation, but the implementation of assumed duties is left to the states. In addition, some limitations can be inferred simply from the fact that domestic supplies must be deemed adequate before export is permitted under Article 2. Consequently, some variation may be found in the Convention's application, but no reservation clause is present. A similar illustration can be seen in the European Agreement on the Exchanges of Blood-Grouping Reagents.⁹⁴ Very few additional examples exist.⁹⁵

A few corresponding amendments, by no interpretation validly equated with negotiated reservations, should also be cited, such as Protocol Number Three to the Convention of Human Rights and Fundamental Freedoms,⁹⁶ amending Articles 29, 30, and 34. By way of comparison, articles allowing subsequent amendment are often set forth in the treaty, and their significance lies in the fact that the Members can subsequently raise or lower obligations previously accepted. Thus, Article 3 of the Agreement Between the Member States of the Council of Europe on the Issue to Military and Civilian War-Disabled of an International Book of Vouchers for the Repair of Prosthetic and Orthopaedic Appliances,⁹⁷ states: "The Regulations appended to this Agreement constitute an administrative arrangement and may at any time be amended or supplemented by the Governments of the Parties to this Agreement." In reality, by modifying the implementing regulations a change is made in the treaty. But is it valid to conclude that Article 3 constitutes a reservation? Although the answer must be given in the negative, this Article does bear a striking similarity to some of the flexibility devices of ILO, especially when applied in connection with Article 7(2), permitting the extension of the Convention to additional territories, and 7(3), providing for a subsequent withdrawal of coverage.

D. *Exclusion Clauses*

As pointed out earlier, a number of these border-line cases will not constitute true reservations if a narrower definition is chosen.⁹⁸ Although this

93. Europ. T.S. No. 26 (1958), 590 U.N.T.S. 320 [hereinafter cited as Exchange of Therapeutic Substances Agreement].

94. Europ. T.S. No. 39 (1962).

95. E.g., Protocol to the European Convention on the Equivalence of Diplomas Leading to Admission to Universities, Europ. T.S. No. 49 (1964), 514 U.N.T.S. 270 [hereinafter cited as European Convention on Equivalence of Diplomas].

96. Europ. T.S. No. 45 (1963).

97. Europ. T.S. No. 40 (1962), 590 U.N.T.S. 324 [hereinafter cited as Agreement on Military and Civilian War-Disabled].

98. See Anderson, *supra* note 1, at 450-52.

same observation was offered as to ILO Conventions,⁹⁹ an all-inclusive standard was used, which in turn was broken down into five main categories. A similar approach will now be used as the starting point for an examination of European Conventions, although the writer finds it much more difficult to classify the very complicated reservations and flexibility devices of the Council than the alternatives of ILO because the Council of Europe employs a greater number of techniques. Indeed, it is not invalid to conclude that each Convention has incorporated specialized provisions designed to meet the needs not only of the Member States but also of the special subject matter. At the very least, the Council has followed a pragmatic approach and resolved each problem as it arose, rather than first enunciating an unyielding theory of treaty modification.

1. Exceptions

As indicated in the discussion of ILO's conventions, paragraphs or articles enabling a state to exclude certain sections of a treaty can have the same effect as negotiated reservations. This device has been employed by the Council, as governments have previously agreed that the effect of certain conventions need not apply to selected subjects. For example, Article 8 of the European Agreement on Mutual Assistance in the Matter of Special Medical Treatments and Climatic Facilities¹⁰⁰ contains the following exceptions: "The provisions of this Agreement shall not prejudice the provisions of municipal law, bilateral or multilateral treaties, conventions or agreements, or the regulations of the European Economic Community which are already in force or may come into force, under which more favourable treatment would be accorded to the persons referred to in Article 1."¹⁰¹ The similarity of this Article to ILO standards is very striking. Negotiating states have permitted themselves an extremely wide range of discretion without which the six Members of the Common Market might not be able to ratify because of prior international commitments. Specifically, no member of the EEC can adopt any treaty or local law inconsistent with Community obligations, under Article 5 of the EEC Treaty.¹⁰² Thus, a very vital hierarchy of law conflict has been avoided by the use of a reservation.

Other examples of a "border-line classification" can be cited;¹⁰³ how-

99. See Part I of this article, p. 69 *supra*.

100. Europ. T.S. No. 38 (1962), 544 U.N.T.S. 81 [hereinafter cited as *Medical Treatment Convention*].

101. *Id.* art. 8.

102. Treaty of Rome, March 25, 1957, 298 U.N.T.S. 14.

103. E.g., The European Agreement Concerning Programme Exchanges by Means of

ever, the use of the single exception—often in connection with other flexibility and reserving devices—can actually move into the realm of the negotiated reservation. In fact, it is extremely difficult to discover the exact dividing line. Unlike the ILO legal system in which all such devices are treated solely as exceptions and, therefore, alternatives to reservations, the Council takes the position that such articles are in fact *true reservations*.

2. National Legislation

The Council is also employing a technique, that might be held to constitute a very “questionable reservation,” by which general objectives and aims may be implemented by national legislation or administrative regulation. The Exchange of Therapeutic Substances Agreement¹⁰⁴ and Article 5 of the Medical Treatment Convention¹⁰⁵ are rendered effective by national standards. Others are implemented by prior international agreements, such as Article 4 of the European Agreement on Regulations Governing the Movement of Persons Between Member States of the Council of Europe¹⁰⁶ and Article 4 of the European Cultural Convention.¹⁰⁷ Again, this is a case of a clear illustration in which the Council has emulated ILO practice.

3. Territorial Application

This very frequently used option permits Members to exclude non-metropolitan territories in a manner identical to the long line of ILO

Television Films, Europ. T.S. No. 27, art. 5 (1958), which states: “This Agreement shall not affect the following rights, which shall be entirely reserved:

- (a) any moral right recognised in relation to films;
- (b) the copyright in literary, dramatic or artistic works from which the television film is derived;
- (c) the copyright in a musical work, with or without words accompanying a television film;
- (d) the copyright in films other than television films;
- (e) the copyright in the exploitation of television films otherwise than on television.”

104. See note 93 *supra*.

105. See note 100 *supra*.

106. Europ. T.S. No. 25 (1957), 315 U.N.T.S. 139, 142. Article 4 of this Convention appears to be a most favored nation clause. “This Agreement shall not prejudice the provisions of any domestic law and bilateral or multilateral treaties, conventions or agreements now in force or which may hereafter enter into force, whereby more favourable terms are applied to the nationals of other Contracting Parties in respect of the crossing of frontiers.” Accord, European Convention on Establishment, Europ. T.S. No. 19, art. 25 (1958), 529 U.N.T.S. 141.

107. Europ. T.S. No. 18 (1958), 218 U.N.T.S. 139. This example is a bit closer. Article 4 of this Convention holds: “Each Contracting Party shall, insofar as may be possible, facilitate the movement and exchange of persons as well as of objects of cultural value . . .”

precedent.¹⁰⁸ By way of example we may note Article 11 of the European Agreement Concerning Program Exchanges,¹⁰⁹ or the more developed (in the sense of being a clear reservation) Article 27 "Territorial Application" of the European Convention on Extradition.¹¹⁰ Article 27 lists precise territories in addition to a general escalation clause.¹¹¹ Other examples following ILO practices can be noted.¹¹² Sadly, the Council has in isolated instances, such as those cited in the final section, allowed Members to even exclude portions of their metropolitan territory in order to render the treaty palatable.

4. Optional or Alternative Provisions

In addition to the aforesaid, Members may incorporate alternatives—generally speaking, of a more limited nature than the elaborate escalation clause or negotiated reservations to be discussed in the Conclusions—rather than assuming all obligations at the time of original ratification. An illustration can be found in Article 6 of the European Convention on the International Classification of Patents for Invention,¹¹³ providing that the Convention shall not enter into force until other specified states have ratified. Again, the Council has effectively employed a technique originally developed by ILO.

5. Flexibility and Escalation Clauses

In considering the several varieties of flexibility devices (plus the numerous types of reservations) *it is necessary to evaluate the particular flexibility technique in relation to the importance of the convention;*

108. See Agreement on Military and Civilian War-Disabled, art. 7, supra note 97.

109. Europ. T.S. No. 27, supra note 103.

110. Europ. T.S. No. 24 (1957), 359 U.N.T.S. 274.

111. Article 27 states:

"1. This Convention shall apply to the metropolitan territories of the Contracting Parties.
2. In respect of France, it shall also apply to Algeria and to the overseas Departments and, in respect of the United Kingdom of Great Britain and Northern Ireland, to the Channel Islands and to the Isle of Man.

3. The Federal Republic of Germany may extend the application of this Convention to the Land of Berlin by notice addressed to the Secretary-General of the Council of Europe, who shall notify the other Parties of such declaration.

4. By direct arrangement between two or more Contracting Parties, the application of this Convention may be extended, subject to the conditions laid down in the arrangement, to any territory of such Parties, other than the territories mentioned in paragraphs 1, 2 and 3 of this Article, for whose international relations any such Party is responsible."

112. E.g., The European Convention on the Equivalence of Periods of University Study, Europ. T.S. No. 21, art. 9 (1956), 278 U.N.T.S. 73; Convention of the Elaboration of a European Pharmacopoeia, Europ. T.S. No. 50, art. 13 (1964).

113. Europ. T.S. No. 17 (1954-1961), 218 U.N.T.S. 51.

specifically, the mere frequency of use cannot be the primary consideration.

As repeatedly emphasized, the Council has adopted many of the very sophisticated solutions formerly perfected by ILO, but the most significant single instance of such adoption is to be found in the European Social Charter,¹¹⁴ which the writer has previously held to constitute one of the most important accomplishments of the Council; in fact, he would place the Social Charter second only to the European Convention of Human Rights¹¹⁵ in over-all importance.¹¹⁶

The major flexibility device of the European Social Charter is contained in Part 3, Article 20 (1)-(3), as follows:

1. Each of the Contracting Parties undertakes:
 - (a) to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;
 - (b) to consider itself bound by *at least five of the following Articles of Part II of this Charter*: Articles 1, 5, 6, 12, 13, 16 and 19;
 - (c) in addition to the Articles selected by it in accordance with the preceding subparagraph, to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, *provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs.*
2. The Articles or paragraphs selected in accordance with subparagraphs (b) and (c) of paragraph 1 of this Article shall be notified to the Secretary-General of the Council of Europe at the time when the instrument of ratification or approval of the Contracting Party concerned is deposited.
3. Any Contracting Party may, at a later date, declare by notification to the Secretary-General that it considers itself bound by any Articles or any numbered paragraphs of Part II of the Charter which it has not already accepted under the terms of paragraph 1 of this Article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification or approval, and shall have the same effect as from the thirtieth day after the date of the notification.¹¹⁷

As in the ILO, a specified number of designated articles—or parts—must be accepted, thereby establishing a minimum standard. At a later date additional optional parts may be adhered to.

It needs to be stressed here that much of the preparatory work in drawing up the Social Charter actually took place in Geneva. The Social Division collaborated very closely with the larger ILO. This reliance on

114. See note 89 supra.

115. Europ. T.S. No. 5 (1950-1952), 213 U.N.T.S. 221.

116. Gormley, supra note 82, at 87-91; A. Robertson, *Human Rights in Europe* 140-50; (1963). See also Gormley, supra note 13, at 312-16; Tennfjord, *The European Social Charter—An Instrument of Social Collaboration in Europe*, 9 Europ. Y.B. 71 (1962).

117. Europ. T.S. No. 35, art. 20 (1-3) (1961), 529 U.N.T.S. 89 (emphasis added).

ILO experience is very forcefully brought out in Article 20(4) of the Charter, requiring reports by the Secretary-General of the Council to the Director-General of ILO, and in connection with Article 20(5) which requires a system of labour inspection. Similarly, Article 21 setting forth a system of bi-yearly reports represents a duplication of ILO enforcement.¹¹⁸

Article 34, "Territorial Application," Article 36, "Amendments," and Article 37, "Denunciation," permit variation from the substantive rights set forth in Part I of the Social Charter. Moreover, additional flexibility devices are contained in the Appendix to the Social Charter. As is true of a substantial number of European Conventions, *the annexes are deemed to constitute part of the Convention*, and their provisions allow a possible modification of the treaty text. The writer is of the opinion that such annexes represent an adoption of ILO options, since they are not always true reservations. Indeed, some annexes do not modify the treaty to which they are attached.¹¹⁹ On the other hand, an even larger number of instances do exist in which the annexes constitute true reservations.¹²⁰ Consequently, these frequently used attachments must not be overlooked. This conclusion is particularly important when possible modification of the Social Charter is contemplated, because definite limitations are placed on the interpretation of the Convention's articles.¹²¹

Admittedly, it is difficult to draw a sharp division between flexibility devices—an alternative to reservations—and the negotiated reservations,

118. For other articles duplicating ILO practice in the European Social Charter, see arts. 22-26. In addition, art. 31, "Restrictions," is closer to ILO alternative devices than the negotiated reservation. These restrictions do not appear to constitute true reservations.

For an excellent discussion concerning the influence of ILO on subsequent organizations, plus principles of customary law developed by ILO, see C. Alexandrowicz, *World Economic Agencies: Law and Practice* chs. 1-3 (1962). Through municipal law and practice ILO standards arise as principles of international law. *Id.* at 63.

119. E.g., Interpretation of the terms "Nationals" and "Territory" in the European Interim Agreement on Social Security Other Than Schemes for Old Age, Invalidity and Survivors, *Europ. T.S. No. 13* (1953), 218 U.N.T.S. 153 [hereinafter cited as *European Agreement on Social Security*] and European Convention on Social and Medical Assistance, *Europ. T.S. No. 14* (1953), 218 U.N.T.S. 255.

120. E.g., annex III to the European Convention on Social and Medical Assistance and Protocol; annex III to the European Interim Agreement on Social Security.

Even clearer examples are to be found in two recent Conventions. Major negotiated reservations are set forth in the annex to the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, *Europ. T.S. No. 51* (1964) [hereinafter cited as *Convention on Conditionally Released Offenders*] and in annex II to the European Convention on the Punishment of Road Traffic Offences, *Europ. T.S. No. 52* (1964) [hereinafter cited as *Convention on Traffic Offences*].

121. See appendix to the Social Charter.

for most conventions are not as clearly directed toward ILO practice as the Social Charter. However, this *intermediate stage*—still in use—is evident in other treaties, wherein considerable flexibility is permitted. But here the Members have not gone so far as to interpose reservations. To illustrate, the Agreement on the Exchange of War Cripples Between Member Countries of the Council of Europe With a View to Medical Treatment,¹²² and the European Agreement on Travel by Young Persons on Collective Passports Between Member Countries of the Council of Europe,¹²³ are capable of subsequent improvement.

The Council has utilized the prior experience and precedent of ILO; further, its close working arrangements, especially between the Social Division and ILO¹²⁴ will tend to perpetuate the use of similar solutions. Regardless of the unique types of reservations subsequently developed by the Council, some examples of flexibility devices, escalation clauses, plus the other more restrictive alternatives discussed will remain. Often these more limited alternatives will be used as supplements to more elaborate reservation articles.

E. *The Emergence of Negotiated Reservations*

The alternatives to reservations originally perfected by ILO and later carried forward by the Council of Europe have one unique quality (or distinguishing feature). All acceptable modifications from the treaty text have been agreed to in advance of signature. Thus, subsequent disputes, such as those encountered by the United Nations and OAS, are avoided. Moreover, this scheme of prior negotiation has resulted in a new form of reservation. This is to say, the diverse "alternatives" short of reservations subsequently evolved into a fully matured norm of treaty law. While interesting in their own right from an academic standpoint and still employed in Geneva and Strasbourg, these alternatives short of reservations should more properly be thought of as stages in the evolution of treaty law.

1. Simple Reservations

In its simplest form the negotiated reservation appears to be very similar (and in some cases almost identical) to the exception originally found in ILO Conventions. In fact, the difference may only be evident in the jurisprudential approach taken rather than in the functional effect of the item in question. In any event, a relatively short article or sub-paragraph

122. Europ. T.S. No. 20, art. 1 (1955), 250 U.N.T.S. 3.

123. Europ. T.S. No. 37, art. 13 (1961), 544 U.N.T.S. 19.

124. See Council of Europe, European Co-operation in 1962, at 90-149 (1963).

merely says that some phase need not be accepted at ratification. *Only those items set forth in the particular article can be reserved.* For example, Article 7 of the European Convention Relating to the Formalities Required for Patent Applications¹²⁵ maintains: "Each Contracting State, however, reserves the right to prescribe that this declaration should be made within the priority period laid down by that Convention."¹²⁶ Additional examples of simple type reservations can be cited.¹²⁷ They have been deemed to be compatible with the essential aim and purpose of the Convention. To illustrate, Article 1(3) of the European Convention on the Equivalence of Diplomas Leading to Admission to Universities¹²⁸ contains a simple reservation allowing a state to vary the requirements as to its own nationals as follows: "Each Contracting Party reserves the right not to apply the provisions of paragraph 1 . . . to its own nationals" (the recognition of equivalent foreign diplomas).

Simple variations of this type can also be found in conventions containing a longer list of enumerated items that can be excluded, as does Article 3 of the European Agreement on the Protection of Television Broadcasts.¹²⁹ This instrument is even more significant because of the inclusion of a territorial clause in Article 12, by which the Convention can later be extended to non-metropolitan areas. An example of a reservation a bit higher on the scale is to be seen in the Agreement Relating to Application of the European Convention on International Commercial Arbi-

125. Europ. T.S. No. 16 (1953), 218 U.N.T.S. 27 [hereinafter cited as European Convention for Patent Applications].

126. *Id.* art. 7.

127. Admittedly, some variation exists as to the following Conventions but collectively they do represent illustrations of negotiated reservations not incorporating elaborate flexibility devices: European Interim Agreement on Social Security, art. 6; The European Convention on the Academic Recognition of University Qualifications, Europ. T.S. No. 32 (1959), 444 U.N.T.S. 193.

A single exception, typically relating to internal "ordre public, security or public health" is contained in the European Agreement on the Abolition of Visas For Refugees, Europ. T.S. No. 31, art. 7 (1959), 376 U.N.T.S. 85 (emphasis deleted). Cf. the simple reservation set forth in Article 3 (in conjunction with Article 4, permitting higher national standards in a manner similar to ILO practice) in the Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions For Purposes of Diagnosis or Treatment, Europ. T.S. No. 33 (1960), 376 U.N.T.S. 111. Numerous "simple reservation clauses" are used in connection with other devices in the more recent Conventions of a complicated nature. See, e.g., European Agreement For the Prevention of Broadcasts Transmitted From Stations Outside National Territories, Europ. T.S. No. 53, arts. 3 & 4 (1965), 634 U.N.T.S. _____ [hereinafter cited as European Agreement for the Prevention of Broadcasts].

128. See note 95 *supra*. Article 1(3) concerns the recognition of equivalent foreign diplomas.

129. Europ. T.S. No. 34 (1960), 546 U.N.T.S. 247.

tration.¹³⁰ The validity of prior bilateral and multilateral arbitral agreements is not affected. According to the Preamble (which the writer equates as a part of the treaty in connection with Article 4) a condition precedent delaying the entry into force of the Convention is present.¹³¹ As indicated previously,¹³² the condition precedent, standing alone without any other flexibility devices, is not a true reservation in either the ILO or Council practice. Conversely, when used along with a prior reservation, the entire treaty has a less definite status, since a type of built-in veto is present. For instance, in the previously cited Convention on Commercial Arbitration one of the specified powers can prevent the entry into force of the document merely by withholding its ratification. Likewise, a single reservation (such as one specifying that national law will be applied) can very effectively be implemented by several annexes containing enumerated reservations. An illustration can be seen in the European Convention on Social and Medical Assistance and the Protocol thereto.¹³³ Article 6 (in conjunction with Article 5) of the European Agreement on Social Security¹³⁴ is an even clearer example of an agreed reservation since Articles 7 to 11 refer to the force of the annexes. According to Article 10 "[t]he Annexes to this Agreement shall constitute an integral part of this Agreement."¹³⁵ This same rule applies, nevertheless, to all annexes accompanying European Conventions.

2. Limitations on the Use of Reservations

Prior examples have indicated areas to which reservations could be attached. However, an equally important corollary is that *only those reser-*

130. Europ. T.S. No. 42 (1962), 523 U.N.T.S. 93 [hereinafter cited as Convention on Commercial Arbitration].

131. The Convention on Commercial Arbitration can be further compared with the European Convention for Patent Applications, art. 7. Cf. the condition precedent contained in the European Convention on the International Classification of Patents for Invention, Europ. T.S. No. 17, art. 6 (1954), 218 U.N.T.S. 51. A declaration is employed to bring this condition into operation.

Interestingly, the condition precedent can be clothed in a temporary reservation, suspending for a limited period of time the entry into force of the treaty. E.g., Convention on the Unification of Certain Points of Substantive Law on Patents For Invention, Europ. T.S. No. 47, art. 12 (1963).

132. See note 131 supra.

133. See note 119 supra.

134. See id.

135. See the examples of Conventions incorporating extensive annexes and containing reservations in notes 119 & 120 supra. See also the long list of reservations set forth in European Convention on Compulsory Insurance Against Civil Liability In Respect of Motor Vehicles, Europ. T.S. No. 29, Annex II (1959) [hereinafter cited as the European Convention on Compulsory Insurance].

ventions specifically agreed to before signature and set forth in the text of the Convention, in a Protocol, or in an Annex will be permitted. Usually, this fundamental rule is stated negatively; *absolutely no other reservations will be permitted!* A similar rule applies to the simpler flexibility devices employed by both ILO and the Council of Europe. Whereas ILO has not chosen to set forth this provision in the main text but rather has relied upon collateral statements to the League and International Court of Justice, the Council has made the prohibition part of the treaty itself. Accordingly, it is not unrealistic to refer to these articles as lawmaking. To illustrate, Article 26 of the European Convention on Establishment holds: "Reservations of a general nature shall not be permitted . . ." ¹³⁶ The rule that only previously negotiated reservations may be attached becomes even clearer when an examination is made of Conventions drawn up by the Division of Crime Problems. Specifically, Article 2 of the European Convention on Mutual Assistance in Criminal Matters ¹³⁷ sets forth those fields in which national assistance in criminal cases may be refused, whereas Article 5 permits declarations limiting the use of letters rogatory. The Division of Crime Problems holds strictly to the position that no additional reservations may be attached, largely because of the nature of minimum reform contained in such treaties.

Considering the firm and unyielding position taken by the Secretary-General of the Council of Europe that no additional reservations may be attached, it does seem a bit surprising that only a couple of instances can be found wherein such a statement is set forth in the treaty itself. Of course, the answer seems fairly obvious; this norm is so firmly established and beyond dispute that such clauses would merely be repetitious and unduly lengthen the text. This principle of European treaty law is deemed to be certain, even though a serious challenge has yet to arise. This is to

136. Europ. T.S. No. 19 (1955), 529 U.N.T.S. 141. The full text of Article 26 reads as follows:

"1. Any Member of the Council of Europe may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the said provision. Reservations of a general nature shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

3. Any member of the Council which makes a reservation under this Article shall withdraw the said reservation as soon as circumstances permit. Such withdrawal shall be made by notification addressed to the Secretary-General . . . The Secretary-General shall transmit the text of this notification to all the Signatories of the Convention." See European Convention on Establishment of Companies, Europ. T.S. No. 57, art. 7(1) (1966).

137. Europ. T.S. No. 30 (1959), 472 U.N.T.S. 185 [hereinafter cited as Convention on Criminal Matters].

say, the Council has not yet faced the situation where a state attempts to apply a reservation not previously accepted. What will happen in this event? Will the Secretary-General of the Council follow the practice of his counterpart in ILO;¹³⁸ will he follow the precedent of the Secretary-General of the League and transmit the reservation to the other prior signatories (or to every Member of the Council) or merely emulate the United Nations and act strictly as a depository? Furthermore, what action will be taken if another state objects to the reservation? Obviously, definite answers cannot be given at this time. The writer is of the opinion that ILO practice will be followed because of the basic theory that only those reservations set forth in the Convention will be allowed; hence, reservations of a general nature will not be permitted.¹³⁹ Therefore, such state will be forced to withdraw its reservation or remain outside of the Convention. This conclusion seems valid for the immediate future, although a constitutional development could take place that might have the effect of forcing the Council to move closer to the United Nations standard. In other words, it is possible that as the Council continues to deal with very sophisticated and controversial topics, greater discretion may be demanded by ratifying governments. In any event, only future controversies and "case law" will be able to firmly establish the superiority of negotiated reservations.

3. Reciprocity

One further limitation on the use of negotiated reservations must be noted. The doctrine of reciprocity—found in the regional law of the OAS, but completely lacking as to the alternatives to reservations employed by ILO—is applicable to reservations attached to some European Conventions.¹⁴⁰ A good illustration can be seen in Article 5(2) of the previously cited European Convention on Criminal Matters.¹⁴¹ "Where a Contracting Party makes a declaration in accordance with Paragraph 1 of this Article, any other party may apply reciprocity."¹⁴² In a very unfortunate manner, Article 35 of the European Convention for the Peaceful Settlement of Disputes¹⁴³ incorporates self-judging reservations applicable to the acceptance of jurisdiction of the International Court of Justice.¹⁴⁴

138. See note 20 *supra*.

139. However, understandings and interpretive declarations are proper.

140. Reciprocity could not be applied to undertakings and interpretive declarations attached to Council and ILO Conventions. Significantly, the doctrine of reciprocity is being employed in the more recent conventions. E.g., Convention on Traffic Offenses, art. 25(4), *supra* note 120, which states in part, "Any Contracting Party may claim reciprocity."

141. See note 137 *supra*.

142. Convention on Criminal Matters, art. 5(2).

143. Europ. T.S. No. 23 (1957), 320 U.N.T.S. 243.

144. *Id.* art. 35 sets forth the extent of the possible reservation:

Such reciprocity would never apply to ILO instruments; thus, a further point of distinction between the two systems becomes clear. Insofar as the Council of Europe is concerned, a true reservation is used. Not only is the reserving state affected, but all others may apply such reservation against its original user.

F. *The Fully Developed Reservation*

Any breakdown or subdivision of negotiated reservations must necessarily be somewhat artificial and subject to considerable overlapping, although certain generalizations can be made as to a select group of Conventions employing a greater degree of flexibility than the simpler devices discussed in the two prior sections. In the "advanced stage" to be evaluated here, many extremely complicated variations (or levels of acceptance) become possible within a single Convention. Rather than one (or even several) deviations from the main portions of the text, elaborate flexibility and escalation clauses are present. Realistically, the major distinction between the "various stages" set forth in this study lies in the quantitative amount of deviation permitted. The more difficult problem of determining the qualitative factor—primarily the extent to which the essential object and purpose of the treaty is restricted—can only be considered in a few pronounced cases, for it is assumed that the essential object and purpose of the Convention has been determined prior to signature. And it is further assumed that any possible weakening of this vital aim has been prohibited by all negotiating states. As in ILO practice, once the absolute minimum has been determined, deviation will be allowed as to other sections of the treaty but with the hope that eventually all states will conform to higher standards. Consequently, the aim of both the Geneva and Strasbourg groups is similar.

Early in this section the point was made that the importance of the

"1. The High Contracting Parties may only make reservations which exclude from the application of this Convention disputes concerning particular cases or clearly specified special matters, such as territorial status, or disputes falling within clearly defined categories. If one of the High Contracting Parties has made a reservation, the other Parties may enforce the same reservation in regard to that party.

2. Any reservation made shall, unless otherwise expressly stated, be deemed not to apply to the procedure of conciliation.

. . . .

4. If a High Contracting Party accepts the compulsory jurisdiction of the International Court of Justice under paragraph 2 of Article 36 of the Statute of the said Court, subject to reservations, or amends any such reservations, that High Contracting Party may by a simple declaration, and subject to the provisions of paragraphs 1 and 2 of this Article, make the same reservations to this Convention. Such reservations shall not release the High Contracting Party concerned from its obligations under this Convention in respect of disputes relating to facts or situations prior to the date of the declaration by which they are made"

Convention to which the reservation is attached must be considered not just from mere frequency of use. Accordingly, four main groups of important treaties can be considered together as follows: 1) The European Social Charter;¹⁴⁵ 2) Convention of Human Rights and Fundamental Freedoms and Protocol;¹⁴⁶ 3) The Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality¹⁴⁷ (which possesses the fully developed negotiated reservation); and 4) the selected group of Conventions discussed below that clearly contain extremely complicated reservation clauses.

The problem of analysis is somewhat simplified by the fact that the Social Charter does not contain reservations but instead utilizes ILO flexibility devices. Furthermore, it has already been indicated that the most important single Convention is the European Convention of Human Rights.¹⁴⁸ Though one of the earliest multilateral treaties, the basic rationale of its reservations was set forth in that each Member had to specifically ratify particular articles before it could be legally bound. While regretting the required use of a declaration to implement the very vital Article 25, which sets forth the right of an individual to petition the European Commission of Human Rights, a very clear modification of the Convention has been agreed to beforehand by all signatories. In the opinion of the writer, the most essential aim and object of the treaty has been partially defeated; however, the blame must be placed on those states unwilling to surrender portions of their national sovereignty. Pursuant to Article 25(1):

The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, *provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions.*¹⁴⁹

Of course, it may still be asked whether such a declaration is a true reservation or a lower-type flexibility device. The writer concludes that it is a reservation (even though a specific declaration is required). The basis of this conclusion rests on Article 25(3), under which the declaration is treated as a true reservation. Article 25(3) states: "The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and

145. See note 89 supra.

146. Europ. T.S. No. 5 (1950), 213 U.N.T.S. 221 [hereinafter cited as European Convention of Human Rights].

147. See note 90 supra.

148. Cited in note 146 supra.

149. European Convention of Human Rights, art. 25(1) (emphasis added).

publish them."¹⁵⁰ By following this procedure of notification, the Secretary-General of the Council is functioning as a depository in the same fashion as the Secretary-General of the United Nations. An identical requirement is incorporated in Article 46 in that a declaration is required in order for the state to accept the compulsory jurisdiction of the European Court of Human Rights; further, under Article 46(3): "These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties." Repeatedly, declarations limiting the implementation of a treaty are handled as true reservations by the depository. Therefore, it is valid to conclude that they *function* as reservations and not the more limited unilateral declarations employed in international law. This test of looking to the practices of the Secretary-General can be applied to a number of other Conventions in order to show that the clause in question constitutes a full reservation. For example, Article 13 of the European Convention on Compulsory Insurance¹⁵¹ requires notification to the other Contracting Parties by the Secretary-General.¹⁵² As is true of the European Convention of Human Rights, Article 13 adheres to the League and United Nations procedure, insofar as notice to the Secretary-General "of its precise proposal" (plus his duty to notify the other parties) is concerned.¹⁵³

Continuing with the summation of the European Convention of Human Rights, other sections—aside from the tragic Article 25—contain reservations. While some question can legitimately be raised, the writer classifies Articles 15-18¹⁵⁴—limiting the application of the substantive rights set forth in Articles 2 to 14—as agreed reservations because they "contain terms which will limit the effect of the treaty."¹⁵⁵ Article 15 permits states to derogate from their obligations under the Convention during a time of war or other public emergency; however, paragraph 2 limits such suspension of rights, whereas paragraph 3 requires full notification of such

150. *Id.* art. 25(3).

151. See note 135 *supra*.

152. *Id.* art. 13(1) provides: "If, after the entry into force of the Convention in respect of a Contracting Party, that Party deems it necessary to make a reservation, either not provided for in Annex II to this Convention or, if provided for in that Annex, a reservation which it has not made previously or has withdrawn, it shall inform the Secretary-General of the Council of Europe of its precise proposal, of which the Secretary-General shall then notify the other Contracting Parties."

153. Note the very elaborate set of possible reservations contained in *id.*, Annex II. The total effect of the numerous devices contained in this treaty renders it a very sophisticated example of the use of reservations by the Council.

154. See Robertson, *supra* note 116, at 39-42.

155. See Bishop, *supra* note 5, at 249-65. See also Harvard Research, *supra* note 17, at 843.

derogation to the Secretary-General. Consequently, Article 15 functions as a reservation, not a flexibility device. Article 16 protects the Members against political activity by aliens, and Article 17 guards the states against "political" activity aimed at their destruction. Finally, Article 18 maintains: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any other purpose than those for which they have been prescribed." Here, then, a major limitation has been placed on the reservation in question. The writer classifies Article 18 as a further reservation under the broad definition being used, in spite of the fact that it merely complements Articles 15-17.

Article 63—in a very interesting manner—combines the typical colonial-type clause providing for extension of the Convention to non-metropolitan territories (really a simple flexibility device) with a clear reservation. In short, Article 25, by reference, governs all four paragraphs of Article 63. The fully negotiated reservation comes forth in Article 64(1), which states: "Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. *Reservations of a general character shall not be permitted*"¹⁵⁶

Thus, in the European Convention on Human Rights, one of the earliest Conventions, the negotiated reservation emerged but with one limitation not found in the later examples to be cited below. This Convention does not contain elaborate escalation clauses allowing a great deal of flexibility. Only affirmative and negative choices are offered. The precise reason for such restriction is obvious. A treaty guaranteeing fundamental human rights cannot permit a great deal of variation (as can a labour convention) and still possess the required legal force. The guarantees contained in Articles 2 to 14, along with the general aims set forth in the Preamble, constitute the lowest acceptable minimum. Precisely, their integrity must not be restricted by general reservations, since Articles 2 to 14 constitute binding legal rights and duties capable of effective enforcement, not simply broad statements of ideals. Sadly, the negotiating governments still obtained far more "reserving competence" than the substantive rights required. The writer feels that the essential object of the Convention was weakened by "realistic negotiation," since ratification had to be obtained from the Member States, determined to protect their national sovereignty.

The same problems—and similar-type solutions—are evident in Proto-

156. European Convention of Human Rights, art. 64(1) (emphasis added).

col Number Four to the Convention of Human Rights.¹⁵⁷ Protocol Number Four represents a more advanced stage because of the fact that quite a bit of modification is permitted.¹⁵⁸ Article 2(4) holds: "The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."¹⁵⁹ Such language constitutes an agreed reservation instead of an amendment. By definition, the writer has repeatedly treated a "restriction" as an agreed reservation.¹⁶⁰ Moreover, Article 5 contains a clause permitting extensions to non-metropolitan areas and also the subsequent termination as to these territories.

As indicated in the prior examination of ILO, such termination provisions as to territories are used much less frequently than the typical colonial clauses providing for a later extension. In the case of the Council of Europe, broad discretion allowing complete withdrawal is required to pacify those major European powers experiencing difficulty with nationalistic movements. Again, the writer concludes that for reasons of political expediency the essential aim of the Convention has been modified in order to obtain wider participation, and he favors the use of reservations in order to obtain at least some level of acceptance, as a starting point. After all, the practice of reserving was originally perfected for the purpose of meeting situations of this type.

Another illustration is evident. Article 6 incorporates by reference the restrictive Articles 25 and 46 of the European Convention of Human Rights.¹⁶¹ Indeed, Articles 5 and 6 can also be treated as restrictions because of the unfortunate effect imposed upon the implementation of the human rights contained in Articles 1 to 4 of the Protocol. The variation from the rights set forth in the Convention of Human Rights and Protocols is considerable; yet the development of negotiated reservations becomes even clearer at such time as the Protocols are equated with the main document.

157. Europ. T.S. No. 46 (1963).

158. See Protocol No. 1 to the Convention of Human Rights, Europ. T.S. No. 9 (1952), 213 U.N.T.S. 262 which contains some of the devices used in the Parent Convention, but sheds no further light upon the question under examination here.

159. Protocol No. 4 to the European Convention of Human Rights, Europ. T.S. No. 46, art. 2(4) (1963).

160. E.g., European Social Charter, art. 31.

161. Article 6(2) maintains: "[T]he right of individual recourse recognized by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement recognizing such right, or accepting such jurisdiction, in respect of all or any of Articles 1 to 4 of the Protocol."

G. *Fully Matured Reservations*

In its most advanced stage the negotiated reservation in one sense moves back toward the escalating concept of ILO in that considerable variation beyond the minimum obligation is permitted; it is necessary for the plenipotentiaries to establish minimum duties standing a reasonable chance of adoption. At the very least the required number of ratifications must be obtained in order to bring the particular treaty into force; but, as seen in the above examination of the Convention of Human Rights and Protocols, some articles require a specific declaration of acceptance rather than a mere rejection. Fortunately, such provisions are relatively rare. Conversely, the more advanced conventions employ an extensive series of *options* as can be seen in Article 2 of the Convention on the Liability of Hotel-Keepers Concerning the Property of Their Guests.¹⁶²

Each Contracting Party retains the option:

- (a) notwithstanding the provisions of paragraph 3 of Article 1 of the Annex, to limit the liability of the hotel-keeper to at least 100 times the daily charge for the room;
- (b) notwithstanding the provisions of paragraph 3 of Article 1 of the Annex, to limit the liability in respect of any one article to an amount which is not less than the equivalent of 1,500 gold francs or, where the preceding paragraph of this article applies, to a minimum of 50 times the daily charge for the room;
- (c) to adopt the rule laid down in paragraph 2 of Article 1 of the Annex only in respect of property which is at the hotel;
- (d) notwithstanding the provisions of Article 6 of the Annex, to permit hotel-keepers to reduce their liability, in cases to which paragraph 1(a) of Article 2 or Article 4 of the Annex apply, not being cases where intent . . . is involved, by an agreement with the guest signed by him and containing no other terms; the liability of the hotel-keeper may not, however, be reduced to an amount which is less than that provided in the relevant legislation enacted in pursuance of this Convention;
- (e) notwithstanding the provisions of Article 7 of the Annex, to apply the rules in the Annex to vehicles, property left with them and live animals, or to regulate the hotel-keeper's liability in this respect in any other way.

In short, these optional and alternative devices (more sophisticated than the earlier types used by ILO) are set forth in specialized articles or in accompanying protocols and annexes. Additional discretion is present. Article 3(1) establishes the rule that the "Convention shall apply to the metropolitan territories . . ." ¹⁶³ but paragraph 2 permits a declaration excluding such areas. This use of the "declaration" represents an advancement over the older-type colonial clause originally developed by ILO in

162. Europ. T.S. No. 41 (1962) [hereinafter cited as Convention on Hotel Keepers].

163. Id. art. 3(1).

that the Convention *automatically applies* unless the agreed to reservation is attached at signature or at ratification.¹⁶⁴

The precise variations permitted are further spelled out in Annex I, as can be seen from a reading of Article 2 reproduced above. Here, the full impact of a more detailed Annex can be seen. In the earlier cited Annexes¹⁶⁵ less extensive definitions were included. Nonetheless, the evolution of the negotiated reservation is driven home very forcefully from an examination of such Annexes; the European Treaty Series can never be accurately appraised without consideration being given to these supplemental documents.

The fully matured negotiated reservation emerges in the previously cited Convention of Cases of Multiple Nationality.¹⁶⁶ Article 8(1) *is one of the best examples of a fully matured negotiated reservation*. "Any Contracting Party may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention. No other reservation shall be permitted."¹⁶⁷ Furthermore, Article 8(1) is serving as the prototype of future reservations clauses.

The most advanced (and by far the most complicated) Convention available to the writer is the European Code of Social Security and Protocol to the European Code of Social Security.¹⁶⁸ This code has been chosen—perhaps somewhat arbitrarily—because it incorporates a larger number of flexibility devices that appear to be very similar to ILO criteria, but they are used alongside negotiated reservations, particularly in Articles 3 and 6. Article 3 states: "Each Contracting Party shall specify in its instrument of ratification those Parts of Parts II to X in respect of which it accepts the obligations of this Code, and shall also state whether and to what extent it avails itself of the provisions of Article 2, paragraph 2."¹⁶⁹ Not only is a state permitted to reserve specified sections not

164. The spirit of this very important Convention is carried even further in Article 5. "The Committee of Ministers of the Council of Europe may invite any State not a Member of the Council to accede to this Convention." Even though not strictly a reservation, it certainly permits a wider adherence than is found in practically all other such instruments, limited to Members.

165. See note 120 *supra*. Unfortunately, the length of the Annex precludes its reproduction here.

166. See note 90 *supra*.

167. *Id.* art. 8(1). For a further example of a fully matured negotiated reservation, see European Convention Providing a Uniform Law on Arbitration, Europ. T.S. No. 56, art. 8(1) (1966).

168. Europ. T.S. No. 48 (1964), 648 U.N.T.S. — [hereinafter cited as European Code of Social Security].

169. *Id.* art. 3.

encompassing the essential aim and purpose, but it has the *higher affirmative duty of clearly spelling out those portions of the Code it accepts and rejects*. The influence of Articles 35 and 46 of the Convention of Human Rights can be seen. Consequently, it is not unrealistic to conclude that reservations eventually reach a stage at which they also function as reporting devices, especially when periodic reports are required from the Secretary-General to the Director-General of ILO as will be shown in Article 74(4)-(5) below. In short, any really effective escalation concept must be implemented by supervision. The ILO recognized this truism early in its existence; the Council of Europe is also including such supporting machinery within its emerging legal order. Furthermore, an approach similar to that of Article 3 is used in the agreed reservation in Article 6, which states:

For the purpose of compliance with Parts II, III, IV, V, VIII (in so far as it relates to medical care), IX or X of this Code, a Contracting Party may take account of protection effected by means of insurance which, although not made compulsory by national laws or regulations for the persons to be protected,

- (a) is subsidised by the public authorities or, where such insurance is complementary only, is supervised by the public authorities or administered, in accordance with prescribed standards, by joint operation of employers and workers;
- (b) covers a substantial part of the persons whose earnings do not exceed those of the skilled manual male employee, determined in accordance with Article 65; and
- (c) complies, in conjunction with other forms of protection, where appropriate, with the relevant provisions of the Code.¹⁷⁰

Before continuing with the analysis of advanced reservations, it seems wise to first consider a basic portion of the Treaty, namely Article 2, for the reason that a conventional escalation clause is set forth, and the similarity to ILO criteria is apparent. Article 2(1) maintains:

1. Each Contracting Party shall comply with:
 - (a) Part I;
 - (b) At least six of parts II to X, provided that Part II shall count as two Parts and Part V as three Parts;
 - (c) The relevant provisions of Parts XI and XII; and
 - (d) Part XIII.¹⁷¹

Additional escalation is contained in paragraphs 2 and 3 of Article 2.¹⁷²

170. Id. art. 6.

171. Id. art. 2(1).

172. Articles 2(2) & (3) provide:

"2. The terms of sub-paragraph (b) of the foregoing paragraph can be regarded as fulfilled if:

(a) at least three of Parts II to X, including at least one of Parts IV, V, VI, IX, and X are complied with; and

(b) in addition, proof is furnished that the social security legislation in force is equivalent to one of the combinations provided for in that sub-paragraph, taking into account:

(i) the fact that certain branches covered by sub-paragraph (a) of this paragraph exceed

Article 2, as can be determined from a reading of Articles 3 and 6, serves as the basis for the agreed reservations. This example is significant because of the interplay between the escalation clauses and the reservation articles.¹⁷³ The future escalation up to higher levels is set forth in Article 4(1). "Each Contracting Party may subsequently notify the Secretary-General that it accepts the obligations of the Code in respect of one or more of Parts II to X not already specified in its ratification."¹⁷⁴ Again the ILO device is copied. Part II, "Medical Care," likewise contains limitations on the applicability of the Convention; such agreed-to restrictions are similar to ILO practices.¹⁷⁵ Part XII of this long instrument sets forth an elaborate negotiated reservation in Article 68.

A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to X of this Code may be suspended to such extent as may be prescribed:

- (a) as long as the person concerned is absent from the territory of the Contracting Party concerned;
- (b) as long as the person concerned is maintained at public expense, or at the expense of a social security institution or service, subject to a portion of the benefit being granted to the dependents of the beneficiary;
- (c) as long as the person concerned is in receipt of another social security cash benefit, other than a family benefit, and during any period in respect of which he is indemnified for the contingency by a third party, subject to the part of the benefit which is suspended not exceeding the other benefit or the indemnity by a third party;
- (d) where the person concerned has made a fraudulent claim;

the standards of the Code in respect of their scope of protection or their level of benefits, or both; (ii) the fact that certain branches covered by sub-paragraph (a) of this paragraph exceed the standards of the Code by granting supplementary services of advantages listed in Addendum 2; and (iii) branches which do not attain the standards of the Code.

3. A Signatory desiring to avail itself of the provisions of paragraph 2(b) of this Article shall make a request to this effect in the report to the Secretary-General submitted in accordance with the provisions of Article 78. The Committee, basing itself on the principle of equivalence of cost, shall lay down rules co-ordinating and defining the conditions for taking into account the provisions of paragraph 2(b) of this Article. These provisions may only be taken into account in each case with the approval of the Committee, the decision to be taken by a two-thirds majority."

173. In this regard, see *id.* art. 80(2) which provides for extension to non-metropolitan territories.

174. *Id.* art. 4(1). Article 4(2) supplements the above: "The undertakings referred to in paragraph 1 of this Article shall be deemed to be an integral part of the ratification and to have the force of ratification as from the date of notification." See also *id.* art. 5.

175. Part II, art. 9 provides:

"The persons protected shall comprise:

- (a) prescribed classes of employees, constituting not less than 50 per cent of all employees, and also their wives and children; or
- (b) prescribed classes of the economically active population, constituting not less than 20 per cent of all residents, and also their wives and children; or
- (c) prescribed classes of residents, constituting not less than 50 per cent of all residents."

- (e) where the contingency has been caused by a criminal offense committed by the person concerned;
- (f) where the contingency has been caused by the wilful misconduct of the person concerned;
- (g) in appropriate cases, where the person concerned neglects to make use of the medical or rehabilitation services placed at his disposal or fails to comply with rules prescribed for verifying the occurrence or continuance of the contingency or for the conduct of the beneficiaries;
- (h) in the case of unemployment benefit, where the person concerned has failed to make use of the employment services placed at his disposal;
- (i) in the case of unemployment benefit, where the person concerned has lost his employment as a direct result of a stoppage of work due to a trade dispute, or has left it voluntarily without just cause; and
- (j) in the case of survivors' benefit, as long as the widow is living with a man as his wife.¹⁷⁶

The writer submits that this extensive category—applied in conjunction with the elaborate reporting requirements contained in Article 74¹⁷⁷—not only shows the degree to which flexibility devices can be used but also the emergence of the very complicated and matured reservation. By specifying reports to the Secretary-General of the Council, supervision and enforcement are assured. This duplication of one of the most effective ILO procedures—instead of relying upon the existing enforcement organ of the Council, the Committee of Ministers—illustrates the reliance on the Geneva standards. Furthermore, Article 74(4)-(5) requires additional reports to ILO, plus close cooperation between the two groups.¹⁷⁸ Article 79 represents a seldom used option, namely that “the Committee of Ministers may invite any non-member State of the Council of Europe

176. *Id.* art. 68.

177. *Id.* art. 74(1) states: “Each Contracting Party shall submit to the Secretary-General an annual report concerning the application of this Code.”

178. *Id.* art. 74(4)-(5) states:

“(4). The Secretary-General shall send to the Director-General of the International Labour Office the report and further information submitted in accordance with paragraphs 1 and 2 of this Article respectively, and shall request the latter to consult the appropriate body of the International Labour Organisation with regard to the said report and further information and to transmit to the Secretary-General the conclusions reached by such body.

“(5). Such report and further information and the conclusions of the body of the International Labour Organisation referred to in paragraph 4 of this Article shall be examined by the Committee which shall submit to the Committee of Ministers a report containing its conclusions.”

In addition, Article 82 specifies additional reports that must be sent to the Director-General of ILO. Indeed, the full effect of the reporting devices could constitute the subject of further research; therefore, may it be suggested that further investigation into the continued cooperation between ILO and the Council will prove to be of great value as to several areas, including not only ILO-Council relations but the larger problem of cooperation between various institutions. See note 124 *supra*.

to accede to the Code."¹⁷⁹ In view of Article 74(4)-(5), it would appear that ILO members will be encouraged to accede to this instrument. At the very least, this language certainly anticipates unusually wide acceptance.

Article 80(1) specifies that the Convention shall apply to its metropolitan territory, but with one very important reservation: "Each Contracting Party may . . . specify, by declaration addressed to the Secretary-General, the territory which shall be considered to be its metropolitan territory for this purpose."¹⁸⁰ Therefore, a nationality standard has been incorporated for the benefit of major powers—especially France—recently experiencing trouble in some overseas areas considered to constitute part of the Mother Country. Without question Article 80(1) presents a very dramatic example of a negotiated reservation incorporated for the purpose of pacifying a major power; still the writer wonders whether the integrity of the treaty has been preserved. He feels that the prime concern of the plenipotentiaries was to obtain the widest possible acceptance, with the result that a realistic but "lower standard" had to be adopted. Therefore, Article 80 shows the extreme limits to which the High Contracting Parties can employ reservations in order to achieve attainable ends. Accommodations to the vital interests of states prevent deadlocks of the type experienced by the United Nations. At the regional level, more limited objectives, having a possibility of adoption, are set forth in the treaty. Such approach has, sadly, not been tried by the larger United Nations.

Article 80(2) encourages a member state to "extend [coverage] to any part of its metropolitan territory not specified under paragraph 1 of this Article or to any of the other territories for whose international relations it is responsible. Modifications specified in such notification may be cancelled or amended by subsequent notification."¹⁸¹ The third paragraph of Article 80 gives a national government the very important option to "denounce the Code in accordance with Article 81 . . . to any part of its metropolitan territory or to any of the other territories to which the Code has been extended. . . ."¹⁸² As already discussed, the above withdrawal provision represents a major reserved power in the hands of any government; consequently, only a few scattered examples are to be found in the sixty-nine Conventions of the Council or in the one hundred and forty ILO Con-

179. *Id.* art. 79(1). A very similar provision but one that requires a unanimous vote by the Committee of Ministers is contained in the European Agreement on the Abolition of Visas For Refugees, art. 10, *supra* note 127. The use of this option becomes very clear in two later Conventions, namely, Convention on Conditionally Released Offenders, art. 35, and Convention on the Elaboration of a European Pharmacopoeia, art. 12.

180. European Code of Social Security, art. 80(1).

181. *Id.* art. 80(2).

182. *Id.* art. 80(3).

ventions, for the reason that any minimum legal order can be subverted. Even greater danger lies in the possibility that the number of ratifications may fall below the minimum required to bring the Convention into force. It should be stressed, even if reluctantly, that instances of subsequent termination have been inserted into both the ILO and Council Conventions. At the very least, the prestige of these Conventions may be drastically weakened.

The Protocol follows the same approach as the Code, using extensive escalation clauses to supplement reservations. Actually, the Protocol could be analyzed here by way of further illustration, but the discussion would tend to become repetitious. Suffice to say, such analysis would strengthen the above conclusions.¹⁸³

Aside from the observations already offered, a further conclusion becomes desirable: the incorporation of extensive reservations and escalation clauses, along with attached protocols and annexes, can produce a very complicated document. Realistically, a longer period of time will be required for the maximum standards to be accepted than would normally be the case with the simpler multilateral convention analyzed earlier in the study. And, it is not without significance that the Code and its Protocol (and indeed the European Social Charter) had to be implemented by elaborate reporting devices that confer supervisory authority on the Secretary-General. Insofar as the Code is concerned, reports are also submitted to ILO. Therefore, in its most elaborate Convention the Council has, first, emulated ILO procedures and, second, sought to work very closely with this specialized agency of the United Nations. Unfortunately, a sufficient number of Conventions employing similar reporting techniques do not exist at present, with the result that any conclusions must be highly speculative, particularly in view of the fact that the Social Charter (the other major example) has only been in force for ten years. However, by way of tentative hypothesis, there seems to be a possible correlation between the sophistication of the instrument and the need for reporting devices. In effect, then, the emergence of complicated negotiated reservations, employing escalation concepts, is giving rise to additional problems, which subsequently could have a major impact not only on the Office of the Secretary-General but on other organs of the Council.

VI. CONCLUSIONS

The most difficult, but fortunately far from the most important question is what are the precise differences between the treaty law of ILO and Council of Europe? Clearly, in theory at least, they are completely

183. See Protocol To the European Code of Social Security, § I, arts. 1, 2, 4, 80, 81; § IV, arts. 1 & 2.

contrary. The former permits *absolutely no reservations of any type*; and the Director-General consistently reiterates his position at the time ILO's Conventions are registered with the United Nations, whereas the latter has developed a *unique system of negotiated reservations*. While at the outset, a purely subjective test will support the above conclusion, an objective test of the selected treaty texts set forth in this paper leads to a somewhat contrary conclusion.¹⁸⁴ Specifically, the practice of the two groups appears to be very similar and in some instances identical. However, at its more advanced stages *the negotiated reservation constitutes a clear departure from ILO practice!* Still, one very basic rule remains identical as to both institutions; reservations of a general nature will not be permitted! Of course, the previously accepted reservations and extension clauses contained in the treaty are not limited.¹⁸⁵ Only new reservations are completely prohibited. It is submitted that this basic point of departure still represents a great deal more than a mere difference in semantics or even jurisprudence.

Aside from the subjective analysis of basic theory, one very revealing objective test can be used—namely, the role of the Secretary-General of the Council in dealing with reservations, declarations, understandings, etc.¹⁸⁶ As indicated in the main portion of this study,¹⁸⁷ in numerous instances the Depository treats the “declaration” as a reservation. He notifies the Members of the existence of any such statements. Additional support for this conclusion can be found in recent Conventions, especially those deemed to constitute very advanced and sophisticated instruments.¹⁸⁸ The role of the Secretary-General pursuant to the Code of Social Security has been noted at some length.¹⁸⁹ Subsequent illustrations appear in the European Treaty Series: 1) Protocol to the European Con-

184. One very useful objective test can be seen in the following practice of ILO. In registering a convention with the United Nations, pursuant to Article 102 of the Charter, the certificate is always attached by ILO “that the ratifications of the conventions are not subject to any reservations instead of in the form of a statement that the text registered includes all reservations made by the parties.” Memo, para. 22, at 232. Memo, para. 23 distinguishes declarations, understandings, and flexibility devices. Cf. note 186 *infra*.

185. E.g., Convention on the elaboration of a European Pharmacopocia, arts. 11, 12(3).

186. The use of understandings by the Council of Europe would constitute a separate study. Limited space precludes an examination similar to that made of ILO procedures. The reason for this seemingly unequal treatment is to be found in the fact that several ILO understandings, especially those attached by the United States Senate (see Part I of this article, pp. 78-79 *supra*) were deemed by the writer to constitute reservations. Such examples have not yet been discovered in European practice, since such data is not available; however, a separate examination of understandings short of negotiated reservations could prove to be extremely helpful.

187. See text accompanying notes 150-53 *supra*.

188. In particular, see notes 168-82 *supra*.

189. See note 178 *supra*.

vention on the Equivalence of Diplomas Leading to Admission to Universities, Article 2;¹⁹⁰ 2) Convention on the Elaboration of a European Pharmacopoeia, Article 15;¹⁹¹ 3) European Convention on Conditionally Released Offenders, Article 40;¹⁹² 4) Convention on Traffic Offenses, Article 34;¹⁹³ 5) European Agreement for the Prevention of Broadcasts, Article 13.¹⁹⁴

The above cited Article 34 of the European Convention on Traffic Offenses provides an excellent illustration as follows:

The Secretary-General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, of:

- (a) any signature;
- (b) any deposit of an instrument of ratification, acceptance or accession;
- (c) any date of entry into force of this Convention in accordance with Article 29 thereof;
- (d) any notification or declaration received in pursuance of the provisions of paragraph 4 of Article 15, of paragraph 2 of Article 19, of paragraphs 2, 3, 4 and 5 of Article 25, of paragraph 2 of Article 27 and of paragraph 4 of Article 32;
- (e) any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 31;
- (f) any reservation made in pursuance of the provisions of paragraph 1 of Article 32;
- (g) the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 32;
- (h) any notification received in pursuance of the provisions of Article 33, and the date on which denunciation takes effect.

When compared against ILO procedures,¹⁹⁵ the above articles present the clearest objective or extrinsic proof of the basic difference between alternatives to reservations as opposed to true reservations.¹⁹⁶ In other words, these articles are treated as full reservations and not as simpler alternatives. The writer, therefore, places considerable authority on the internal practices of the institution. The same approach is used toward ILO.

The most important and vital issue in this study concerns the *function* of "alternatives" and "true reservations." All of these devices have the *common objective* of the solution of the seemingly unresolvable problem of maintaining the integrity of the treaty, while at the same time obtaining maximum participation. Consequently, the writer concludes that in

190. Europ. T.S. No. 49 (1964), supra note 95.

191. See note 179 supra.

192. See Id.

193. See note 120 supra.

194. See note 127 supra; accord, Protocol to the European Agreement on the Protection of Television Broadcasts, note 92 supra.

195. See note 184 supra.

196. But cf. Minimum Standards Convention, art. 80(3), supra note 46, for an example of a possible ILO reservation.

the first instance the Council of Europe has frequently borrowed the techniques successfully employed by ILO, and rejected traditional international legal norms. However, *from these alternatives to reservations the later negotiated reservation has emerged*; therefore, it is submitted that the more limited alternatives are in reality preliminary stages in an evolutionary process. The real significance of the ILO and Council spheres of "Common Law" lies in the end products—*fully developed techniques capable of conflict-resolving. Such practical success could not be realized by the League or the United Nations!* Precisely, the Council took the additional step beyond the elaborate flexibility devices of ILO and "created" a more sophisticated instrument. Against this background, questions of legal philosophy and jurisprudence are only of secondary importance.

The future development within both organizations will depend primarily on the subject matter of the Conventions, coupled with the ever-present difficulty of obtaining widespread ratification. The variety of subject matter topics covered by the European Treaty Series requires different techniques in each case. The writer strongly favors this functional approach. The "European Common Law" will continue to develop from actual practice—on a "case by case" basis—instead of retaining a rigid legal norm. It appears that this pragmatic orientation has resulted in the diverse number of practical solutions, with the result that it becomes somewhat difficult to detect the underlying similarities in Council practice.¹⁹⁷ This observation leads to one final objective test; the recent conventions which were signed from 1964 to 1969 (Nos. 48 through 69) are extremely complicated documents in comparison with earlier instruments due to the fact that they incorporate a large number of the devices discussed throughout this study. In particular, clauses permitting the adoption of higher standards are very common;¹⁹⁸ therefore, the complexity and sophistication of these recent treaties indicate that the future course of the Council's "European Common Law" is moving toward greater use of escalation concepts. Once minimum standards have been accepted, every opportunity will be given the Members to adopt higher-type obligations.

The major contribution of the Council of Europe to the science of treaty law is that a system has been created whereby the parties can agree in advance of signature to permit only those reservations set forth

197. A few examples can be found, i.e., Convention on Traffic Offenses, art. 32, *supra* note 120 and Convention on Conditionally Released Offenders, art. 38. The language of the two articles is identical.

198. E.g., European Code of Social Security, art. 2, *supra* note 168. See notes 190-94 *supra* and 202-06 *infra*.

in the final instrument, but no others. Thus, a major solution to a very perplexing problem has emerged at the regional level. Furthermore, this unique negotiated reservation has proved to be very successful in resolving the issue of preserving the essential integrity of the multilateral conventions and, at the same time, obtaining a maximum ratification. Because of the importance of negotiated reservations (along with the alternatives previously perfected by ILO) continued study of this area is indicated in order to determine the answer to questions incapable of complete analysis at this time: 1) what will be the final form of the very complicated reservations emerging from Council practice; 2) will the Council be forced to move closer to the International Law standard, or will it be able to retain its negotiated reservation as the only acceptable reserving scheme, at least in the majority of cases; 3) will ILO be influenced by Council practice and thereby modify its traditional stand; and 4) the most speculative point, will other regional and international institutions duplicate the negotiated reservation, perhaps as to a few selected treaty instruments?

Tentative answers have already been given in some detail; yet, the underlying consideration is the special jurisdiction and competence of the particular organization (in consideration of the special topics covered by each multilateral treaty as influenced by current political pressures). In other words, ILO as a specialized agency of the United Nations, including private delegates in its major subdivisions, will not be able to adopt a major system of reservations, although the writer believes that some reservations have inadvertently crept in, oftentimes disguised as understandings or alternatives. Such instances are quite rare, and serious issue can be raised as to this evaluation. Without question, in theory at least, it is certain that ILO will not be influenced by the Council. At the very least, ILO will make every effort to adhere to its prior stand, whereas the Council will become ever more pragmatic; therefore, the future position of ILO seems more firmly established than that of the Council. In general, the same conclusion will not necessarily apply to other institutions. The Organization for Economic Cooperation and Development, an international institution including the United States, Canada, Japan, and major European states as full members, is already in the final stages of developing a practice of specialized reservations.¹⁹⁹

199. As this study is nearing completion, the work of the OECD is still in a preliminary stage. Under consideration is a scheme to limit the use of negotiated reservations to only a few States (or even a single State) and not necessarily to all twenty-one Members. In some instances only the reserving State(s) will be allowed to benefit from the use of a particular reservation. This criterion of the international organization will be contrary to traditional international law, and also to the "European Common Law" of the Council because reciprocity will not apply! By eliminating the doctrine of reciprocity, the OECD—at least as to this

As to the final question posed above, there is strong evidence that the United Nations, through its International Law Commission, has to a significant degree considered the use of negotiated reservations.²⁰⁰ Nonetheless, the writer proposes by way of recommendation that the International Law Commission *at least consider* the Council's unique practice in its future work. Perhaps, in a modified form, or used in connection with traditional reservations, or attached to specialized multilateral conventions, such negotiated reservations (possibly in conjunction with escalation clauses) might help to resolve disputes similar to the *Genocide Case* in which the International Court of Justice, rather than the negotiating parties, had to determine if attached reservations were compatible with the essential aim and purpose of the Convention.

The two earlier questions are the more important and indeed the more difficult to answer. Specifically, in what direction is the Council of Europe moving at the present time? First, the writer is of the opinion that the seventeen-member political group will make every attempt to rely on negotiated reservations and continue to reject the OAS and United Nations systems. Therefore, the Council will continue to employ its unique European law, standing midway between the ILO and International Law criteria. Of course, numerous specific problems must still be resolved, as to each specialized multilateral convention. For example, should optional articles be set forth in the Treaty, or alternatively, be placed in accompanying annexes or protocols? In other words, where is the dividing line between reservations and amendments? This basic issue will not be finally resolved in the near future. Second, he is of the opinion that even greater emphasis will be placed on ILO's *escalation concept* for the purpose of permitting each Member to subsequently withdraw prior reservations. Such a goal will be accomplished by employing all of the flexibility devices discussed in this study; hence, much more frequent use will be made of optional articles that allow subsequent adherence to higher standards.²⁰¹ Individual governments will be encouraged to accept such options, regardless of hesitancy on the part of major states or "blocs" of powers, so as to extend the coverage of European Conven-

norm—is moving closer to ILO; conversely, as regards the use of any reservations, the OECD is more akin to the Council's practice. In any event, the OECD at the international level has changed traditional international law in a highly specialized area—specialized in the sense that its membership consists of highly industrialized and economically advanced States. As this "island of unique international law" develops, additional research could prove highly rewarding.

200. The International Law Commission has devoted some attention to regional practice. See 17 U.N. GAOR, Supp. 9, art. 20, para. 4, U.N. Doc. A/5209, at 19 (1962), "Effect of Reservations," which provides that the general rules will not apply to organizations.

201. This conclusion is supported primarily by the spirit of Conventions Nos. 46-53.

tions.²⁰² In some cases non-members will be encouraged to accede.²⁰³ In short, every possibility will be exhausted for the purpose of making accession as easy as possible, once the basic Parts or Articles have been ratified by the minimum number of Members. The realistic adoption of absolute minimums is fundamental to the entire European legal system. For example, the Council will permit states to adopt higher criteria, even by means of supplemental bilateral and simple multilateral agreements, as one means of extending prior minimums. This technique has often been found useful by ILO.²⁰⁴ In some extreme cases, states may provisionally apply articles not yet in force in order to prevent delay;²⁰⁵ and, in other instances, a Member may treat the obligation as one arising from international treaty law, subject to national implementation.²⁰⁶ In general, the future direction in which European treaty law is moving becomes clear.

By way of further recommendation, a complete re-examination of present practices—and especially future progress within both the ILO and European systems—should be undertaken immediately to clarify remaining unresolved issues. That is to say, the work begun by the International Law Commission²⁰⁷ and the American Law Institute should be

202. E.g., Convention on the elaboration of a European Pharmacopoeia, art. 3; Convention on Conditionally Released Offenders, art. 36; Convention on Traffic Offenses, arts. 31 & 32; European Agreement for the Prevention of Broadcasts, art. 11.

203. E.g., Convention on Conditionally Released Offenders, art. 35; Convention on Traffic Offenses, art. 38.

204. See note 45 *supra*. See especially, Convention on the elaboration of a European Pharmacopoeia, art. 16 which states: "Supplementary agreements may be made concerning the detailed implementation of the provisions of the present Convention."

205. *Id.* art. 17 maintains: "Pending the entry into force of the present Convention in accordance with the provisions of Article 11, the Signatory States agree, in order to avoid any delay in the implementation of the present Convention, to apply it provisionally from the date of signature, in conformity with their respective constitutional systems."

206. This very unusual method of implementation can best be seen in the Convention on Conditionally Released Offenders, art. 38(4) which states: "Any Contracting Party may, on signing the present Convention, or on depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the Council of Europe that it considers ratification, acceptance or accession as entailing an obligation, in international law, to introduce into municipal law measures to implement the said Convention."

207. Since completion of the text there is growing evidence that some United Nations Conventions are adopting the standard originally enunciated in the Genocide Case, *supra* note 3, in that "compatibility . . . with the object and purpose of the Convention" has become the prime test. The adoption of such criterion represents a reversal of the stand taken by the I.C.J. in 1951. See note 2 *supra*. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, 20 U.N. GAOR, Supp. 14, art. 20, para. 2, at 51, U.N. Doc. A/6014 (1965), which states: "A reservation incompatible with the object and purpose of this Convention shall not be permitted . . ."

Paragraph 2 of the above convention also moves closer to the numerical test advocated

duplicated for the primary reason that ILO has already made a significant contribution to its "ILO Common Law;" likewise the Council of Europe has made major contributions to its own "European Common Law" plus the regional law in some other institutions. Now is the time to begin serious re-examination. The Council has survived its first decade, despite the political overtones remaining after World War II. As the Council of Europe perfects its existing machinery greater attention can be devoted to fundamental legal theory and problems of jurisprudence. The sixty-nine European Conventions now constitute the foundation of a "European Common Law" that will continue to grow during the coming decade. As the Council reacts to mounting political and economic crises, its regional law will necessarily be subject to further change. Basic legal norms will reflect practical realities; consequently, constant re-examination is mandatory.

by Anderson, *supra* note 19, to the extent that "a reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it." In short, each signatory and potential signatory must render an independent judgment as to whether every proposed reservation is compatible. As stated by Professor Egon Schwelb: "The provision is rather liberal and goes far in the direction of 'flexibility' in the matter of reservations. If one-third of the States Parties agree with the reserving State, the latter's reservation stands and the reserving State becomes a Party to the Convention. It is necessary for two-thirds of the Parties to object, within a period of ninety days, in order to make a reservation inadmissible." Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 *Int'l & Comp. L.Q.* 996, 1056-57 (1966).

Such major changes in United Nations treaty practice will most certainly be felt by the Council of Europe; therefore, the negotiated reservation may become even more liberal. Conversely, negotiated reservations and escalation devices might also be employed by the United Nations to give greater flexibility and, at the same time, eliminate the necessity of signatories examining the compatibility of all reservations, due to the fact that problems would be resolved in advance of signature. Consequently, the practice developed by the Council still appears superior to that of the United Nations, notwithstanding the above mentioned attempts to liberalize traditional reservation techniques.