RESERVATION CLAUSES IN TREATIES CONCLUDED WITHIN THE COUNCIL OF EUROPE

SIA SPILIOPOULOU ÅKERMARK*

I. INTRODUCTION

THE purpose of this article is to analyse the practice regarding reservation clauses within the Council of Europe. In spite of a vast amount of literature on the issue of reservations in general and on reservations to specific treaties in particular, little has been written about the regional practice in Europe and then especially within the framework of the Council of Europe.[1] This is quite remarkable since a large number of treaties have been concluded under the auspices of the Council and its Secretary General has the role of their depositary. One of the reasons for this absence of academic work on reservations within the Council of Europe as a whole is probably the lack of well-organised and easily accessible documentation on reservations, declarations and objections regarding the treaties of the Council of Europe. Only very recently has the organisation started making such information available on its

* Jur. dr., Senior Lecturer, Faculty of Law, Uppsala University, Sweden (sia@jut.uu.se). This article was written during a post-doctoral research stay at the Centre de droit international, Université de Paris-X, Nanterre in the autumn of 1998. The research was made possible thanks to the assistance of Prof. Alain Pellet and the financial support of the Swedish Foundation for International Cooperation in Research and Higher Education (STINT). I wish to thank Director Pierre-Henri Imbert, Council of Europe, and Olle Mårsäter, University of Uppsala, for their comments on earlier drafts, as well as my husband, Torbjörn Åkermark, techn. dr., for valuable help concerning the statistical data presented.

1. See the Bibliography concerning Reservations to Treaties, presented by the Special Rapporteur of the International Law Commission (ILC), Alain Pellet, in his *Second Report on Reservations to Treaties* (1996) UN Doc.A/CN.4/478. No general studies on Council of Europe practice are to be found apart from those concerning the reservations to the European Convention on Human Rights. In fact, most studies concerning reservations have used the UN publication *Multilateral Treaties Deposited with the Secretary General* as their core source of State practice. A writer who has analysed the practice within the framework of the Council of Europe is Pierre-Henri Imbert—see his doctoral thesis *Les resérves aux traités multilateraux* (1979)—and a number of articles which will be mentioned *infra*. His contribution is considerable in particular as he has an in-depth insight into the work of the Council after many years in the service of that organisation. However, although this is an impressive and most valuable work, it does not give an overview of the law and practice of the Council of Europe in respect of reservations.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

website.[2] The first edition of the collection *European Conventions and Agreements* contained information on reservations and declarations but such information was omitted in the publication after 1989.[3] However, this should not be taken to mean that the Council of Europe has been uninterested or unaware of issues regarding reservations. On the contrary, as will be shown below, the Council was—and is—one of the few international organisations to try to address constantly reservation issues, notably through the harmonisation of reservation clauses. This practice has its roots in the model final clauses adopted in 1962. The present article discusses this practice putting emphasis on the period from 1962 to 1998, thus covering a period of more than 35 years. The long experience of the regional organisation is especially worth highlighting this year (1999) when the Council of Europe celebrates its 50th anniversary.

By June 1998, 170 treaties had been adopted within the Council of Europe.[4] These treaties are published in the already mentioned *European Conventions and Agreements*. Treaty texts are however, officially published in the European Treaty Series (E.T.S.), to which reference will be made in this article. "Conventions" and "agreements" have the same legal effect. A European convention is usually the object of the deposit of an instrument of ratification, acceptance or approval, while an agreement may be signed with or without reservation as to ratification, acceptance or approval.[5] For example, Article 27 of the Agreement on Illicit Traffic by Sea, implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, thus provides:[6]

> 1. This Agreement shall be open for signature by the member States of the Council of Europe which have already expressed their consent to be bound by the Vienna Convention. They may express their consent to be bound by this Agreement by:

2. The website address is: www.coe.fr/tablconv. In this article use has been made of the website for the conventions which are available there (the site address and the date of last up-date will be indicated). The list available on the Internet is still, however, far from complete so material was requested and received from the Treaty Office of the Council of Europe. In such cases reference to the texts of reservations and declarations will be made in the following format: Council of Europe, E.T.S. No., "Reservations and Declarations", Date of edition.

3. As a consequence, the second edition of *European Conventions and Agreements* (Vol.I, covering 1949–1961, reappeared in 1993) does not include information on signatures and ratifications nor on reservations and declarations (the first edition of the first five volumes, i.e. until 1989, contained such information including the full text of reservations and declaration).

4. *European Treaty Series* (E.T.S.). The last treaty taken into consideration in this examination is the Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, E.T.S. 170, adopted June 22, 1998.

5. Council of Europe, *European Conventions and Agreements* (1993), Vol.I: 1949–1961, preface.

6. E.T.S. 156 (1995).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

(a) signature without reservation as to ratification, acceptance or approval; or
(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

As we will see, this recent agreement follows the model final clauses adopted by the Committee of Ministers in 1962.[7] We find here the use of the term "reservation" in the sense of a precondition for the State to be legally bound, without, however, any modification or exclusion of the legal effect of provisions of the agreement. Therefore, this "reservation as to ratification" is not a "reservation" in the sense of Article 2, paragraph 1(d) of the Vienna Convention on the Law of Treaties 1969, which reads as follows:[8]

> "reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

This is also in line with the recent conclusions of the Special Rapporteur of the International Law Commission, Mr Alain Pellet, who notes that the emphasis on the excluding or modifying effect of a reservation is useful precisely as it excludes from the scope of the term "reservation" two other phenomena, namely "conditional ratifications" and "interpretative declarations".[9] For those reasons this use of the term "reservation", i.e. reservation as to ratification, will not be further discussed in the present article.

II. WHO CAN BECOME A CONTRACTING PARTY TO COUNCIL OF EUROPE TREATIES?

THE aim of the Council of Europe is, according to its statute, to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim is pursued mainly in two ways: (a) discussion of questions of common concern by the organs of the Council, and (b) agreements and common action in economic,

7. Conclusions of the 113th meeting of the Ministers' Deputies, 10–18 Sept. 1962 and Doc. CM (62)148.

8. Vienna Convention on the Law of Treaties (VCLT, 1969). 1155 U.N.T.S. 331. Essentially the same definition is found in the Vienna Convention on Succession of States in respect of Treaties (1978) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). The ILC Special Rapporteur, Alain Pellet, has in his latest report combined all the earlier definitions in a composite text (*Third Report on Reservations to Treaties* (1998) UN Doc.A/CN.4/491/Add.1, para.82). It may be noted that the Council of Europe signed the 1986 Convention on 11 May 1987. The Convention has, however, not yet entered into force.

9. *Third Report idem*, Add.3, para.167. See also other examples given by F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988) pp.98–100.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.[10] It is thus logical to assume that treaties concluded within the framework of the Council of Europe are open to the members of the Council. This is "the logic of the organisation, which results in a distinction between member States and non-member States".[11] This has also been and still is the main rule as regards participation in treaties negotiated within the Council of Europe. Other States, and in some cases intergovernmental organisations, can become parties by accession only after the invitation of the Committee of Ministers of the Council of Europe.[12] This means that the Council of Ministers reserves for itself the control of which States or organisations become parties to the treaties.

However, there are several important additional possibilities which result in there being no automatic equation between members of the Council and participation in treaties. These are:

(1) "Partial agreements" (*accords partiels*), to which only some of the member States of the Council of Europe are entitled to become signatories. These include the Convention on the Elaboration of European Pharmacopoeia and its Protocol[13] and the European Agreement on the restriction of the Use of certain Detergents in Washing and Cleaning Products.[14] The former Convention, for example, is open for signature to Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Switzerland and the United Kingdom (original signatories), while Article 12 provides that the Committee of Ministers may invite other member States of the Council of Europe to accede to the Convention.

(2) Conventions and agreements where the European Economic Community is among the original signatories. This practice

10. Art.1(a) and (b) of the Statute of the Council of Europe, E.T.S. 1 (1949).

11. Imbert talks of "la logique de l'organisation, qui aboutit à la distinction entre Etats membres et Etats non membres" P.-H. Imbert, "Organisation de l'Europe—La Convention relative à la Conservation de la vie sauvage et du milieu naturel de l'Europe. Exception ou étape?" (1979) Annuaire français du dr. int. 726, 727.

12. This is provided for in the model final clauses adopted by the Committee of Ministers in 1962 (Doc.CM(62)148) and is used in a great number of conventions and agreements. The model article provides for invitation by the Committee of Ministers after the entry into force of the agreement or convention. Apart from the EC, which can be invited to accede (as in the European Convention on Cinematographic Co-production, E.T.S. 147 of 1992, and the European Convention on the Exercise of Children's Right, E.T.S. 60 of 1996) such invitation may cover international intergovernmental organisations in general. This is the case in the Convention on Insider Trading, E.T.S. 130 (1989) and its Protocol E.T.S. 133 (1989).

13. E.T.S. 50 (1964) and E.T.S. 134 (1989). Note that this treaty is simply entitled "Convention" and not "European Convention", which is the usual format. The protocol is open only to those States which have signed or acceded to the original Convention of 1964.

14. E.T.S. 64 (1968).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

started in the mid-1970s with the European Convention for the Protection of Animals kept for Farming Purposes.[15] Originally, the Committee of Ministers of the Council of Europe wished to retain the option of inviting the Community to accede to treaties of the Council. This was not acceptable to the Community.[16] In recent years the Community has been among the original signatories (or, more correctly, those entitled to sign) more and more often.[17] In a few cases concerning protocols to earlier conventions signature by the Community has even been made a precondition for the entry into force of the treaty.[18]

(3) Treaties open not only to members of the Council of Europe but also to members of other intergovernmental organisations of importance for the treaty. The Convention on the Unification of Certain Points of Substantive Law on Patents for Invention is open also to members of the International Union for the Protection of Industrial Property;[19] the Convention on Mutual Administrative Assistance in Tax Matters is open for signature also to members of the Organisation for Economic Co-operation and Development.[20]

(4) Finally, in a recent trend which has its origins in environmental treaties of the Council of Europe, treaties are made open to all those who have participated in their elaboration. After the new trend was set in 1979 with the Convention on the Conservation of European Wildlife and Natural Habitats,[21] the practice has been used in the European Convention on the exercise of

15. E.T.S. 87 (1976)

16. Imbert, *op. cit. supra* n.11, at p.729.

17. See E.T.S. 102 (1979) European Convention for the Protection of Animals for Slaughter; E.T.S. 104 (1979) Convention on the Conservation of European Wildlife and Natural Habitats; E.T.S. 123 (1986) European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes; E.T.S. 132 (1989) European Convention on Transfrontier Television; E.T.S. 145 (1992) Protocol of Amendment to the European Convention for the Protection of Animals kept for Farming Purposes; E.T.S. 153 (1994) European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite; E.T.S. 164 (1997) Convention on Human Rights and Biomedecine.

18. This is the case with E.T.S. 145 (1992), *idem*, E.T.S. 170 (1998) Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes.

19. E.T.S. 47 (1963).

20. E.T.S. 127 (1988).

21. E.T.S. 104 (1979).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

Children's Rights,[22] and the Convention on Human Rights and Biomedicine.[23]

What are the consequences of all this as regards reservations? First of all, invited States may wish to make reservations which were not at all envisaged and discussed during the negotiations. Parties acceding to a treaty at a later stage did not have a chance to make their voice heard during negotiations.[24] The reservation clauses of the treaty may then not be adapted to the wishes of newcomers.

Second, in cases where there is a committee for the supervision of the treaty—usually called steering committees or standing committees or committees of experts—it will potentially have to deal with reservations of parties not members of the Council of Europe on which the jurisdiction of the committee is problematic. The issue of participation of members and non-members in these committees becomes of importance as well as their competence to address recommendations to the parties to the treaty. Some of the committees have been specifically given the competence to address issues of reservations in addition to the general supervision of the implementation of the conventions.[25] In addition, the role of the Committee of Ministers is of relevance. According to the Statute of the Council of Europe,[26] the Committee of Ministers is the organ ultimately entitled to address recommendations and resolutions to the governments of members States on all matters of relevance to the activities of the Council. Should there then be two different procedures for recommendations to members and non-members? Should the committees of experts have the right to address recommendations equally to members and non-members? Can resolutions of the Committee of Ministers be addressed to non-member States?

Finally, there is the issue of the use of other methods of limiting the undertakings of the parties, e.g. through various choices such as opt-in or opt-out clauses, *à la carte* systems, possible derogations and restrictions.[27] More than 20 years ago, Héribert Golsong draw attention to the fact that

22. E.T.S. 160 (1996). Among those who participated in its elaboration and who may sign one notes the Holy See.

23. E.T.S. 164 (1997). Apart from EC the Convention on Biomedicine is open for signature to Australia, Canada, the Holy See, Japan and the US. Other non-member States may accede to the Convention.

24. I refer here to States but this may well cover also intergovernmental organisations in the relevant treaties.

25. For instance the Standing Committee of the Convention on Conservation of European Wildlife and Natural Habitats (E.T.S. 104, Arts.9 and 14) has the general task of promoting and supervising the Convention, including monitoring exceptions made by the contracting parties (see *infra* Part VII). The Standing Committee of the European Convention on Transfrontier Television (E.T.S. 132, art.21) has competence, *inter alia*, in questions concerning the interpretation of the Convention.

26. Arts.15–20.

27. We will discuss these methods in more detail *infra* (Part VII).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

choices and derogations have a meaningful purpose only in a homogeneous regional setting where a sense of unity and "solidarity" and existing control mechanisms help to avoid the erosion of treaties.[28] This seems to imply that if the homogeneity disappears through a wide participation in Council of Europe treaties then the practice of derogations and other restrictive options should be avoided.

It is not the purpose of the present article to pursue in every detail all the above questions, but they need to be signalled out at this early point since they show that reservations and reservation clauses may be expected to become a more complicated issue in the Council of Europe in coming years due to the fact that participation in treaties of the Council has been opened up for many more parties.

In what follows I will concentrate on the issue of reservation clauses as it has been developed within the Council of Europe. The main questions to be addressed are: what types of reservation clause have been used within the Council of Europe? What other methods are used for limiting the undertakings of States (such methods being in their nature often very similar to reservations)?

III. RESERVATION CLAUSES BEFORE 1962

UNTIL 1962 there was no clear practice as regards reservations within the Council of Europe. The first material treaty to be concluded within the Council of Europe was the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[29] The Convention provides for reservations in Article 64:

> 1. 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.

28. Talking of choices and derogations he concludes: "Pour qu'une clause de cette nature puisse trouver une interprétation et une application aussi objective que possible, il faut qu'elle se trouve placée dans un contexte de solidarité qui, à présent et dans pareille matière, ne peut être trouvé que dans un ensemble régional homogène. Aussi peut-on s'attendre que le droit à une dérogation de cette nature ne puisse se développer que dans une enceinte régionale": H. Golsong, "Le développement du droit international régional", in Société française pour le droit international, *Régionalisme et universalisme dans le droit international contemporain* (1977), pp.221–242, at p.230.

29. E.T.S. 5 (1950). E.T.S. 1 to 4 are: the Statute of the Council of Europe (1, 1949), the General Agreement on Privileges and Immunities of the Council of Europe and its Supplement (2, 1949 and 4, 1950) and the Special Agreement relating to the Seat of the Council of Europe (3,1949). The constitutive texts of the Council of Europe do not contain any provisions relating to reservations and have not encountered problems of this kind. On reservations to constitutive acts of international organisations see Imbert, *op. cit. supra* n.1, at pp.40–44 and S. Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), pp.431–434.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

Reservations of a general character shall not be permitted under this Article.

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

The wording limits reservations to conflicts between the Convention and domestic law at the time of signature or ratification and prohibits reservations of a general nature. Nothing is, however, said on the legal effect of reservations or about the possibility of objecting to reservations.

It has been noted by Judge Matscher that the Court's progressive interpretation of certain provisions in the Convention (such as Article 6) in combination with the Court's jurisdiction in issues of reservations has rendered many original reservations more or less obsolete. In *Fischer* v. *Austria* Judge Matscher said in his concurring opinion:[30]

> The Chamber reached the finding of a breach by interpreting the scope of Austria's reservation in respect of Article 6 extremely narrowly. This is in keeping with the Court's tendency, first shown in the *Belilos* v. *Switzerland* judgment of 29 April 1988 (Series A no.132), to restrict the scope of reservations and interpretative declarations, and even to eliminate them as far as possible. From the point of view of international law, this practice strikes me as highly questionable, given that Article 64 expressly authorises States to make reservations, even if the Convention makes them subject to certain conditions. The Contracting States which made such reservations in respect of a Convention Article or one of its Protocols did so in good faith, trusting to the interpretation of certain provisions of the Convention that were current at the time of ratification, and they could not foresee the steady development that the case-law would undergo in the future. In this way, many reservations and interpretative declarations have become obsolete or, to put it another way, the mutual trust has been betrayed.

This has also given an advantage to States ratifying the Convention late and which are thus able to take into consideration the jurisprudence of the Court.[31]

30. E.Ct.H.R. Ser.A. No.312, judgment of 26 Apr. 1995. For a discussion of the jurisprudence of the European Court of Human Rights regarding reservations see J. Dhommeaux, "La coordination des réserves et des déclarations à la Convention européenne des droits de l'homme et au Pacte international relatif aux droits civils et politiques", in J. F. Flauss and M. de Salvia (Eds), *La Convention européenne des droits de l'homme: Développements récents et nouveaux défis* (1997) (*idem*, p.28) pp.13–37. Dhommeaux asks whether, in the light of the jurisprudence of the Court, it should not be possible for States to update their texts at any time (presumably he refers to texts of reservations): "On peut se demander si, à la lumière des nouvelles exigences de la jurisprudence, il ne serait possible, pour les Etats, de préciser à tout moment, leurs textes."

31. See e.g. the reservations and declarations of Estonia (1996), Finland (1990, with partial withdrawals in 1996 and 1998), Liechtenstein (1982 with update in 1991), Moldova (1997), Ukraine (1997) and the long declaration of Switzerland in 1988 as a consequence of the *Belilos* case revealing the irritation of the Swiss government. The Swiss declaration gives an account of legislation in all of Switzerland's cantons. Council of Europe "Chart of Signatures and Ratifications" http://www.coe.fr/tablconv/5t.htm, update: 19 Aug. 1998.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

A different provision was introduced in the European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors 1953.[32] The Agreement provided in Article 9:

> 1. Annex III to this Agreement sets out the reservations hereto made at the date of signature.
> 2. Any Contracting Party may, at the time of making a notification in accordance with Article 7 [re social security schemes covered by the Agreement] or Article 8 [re other agreements concluded by the parties], make a reservation in respect of the application of this Agreement to any law, regulation or agreement which is referred to in such notification. A statement of any such reservation shall accompany the notification concerned; it will take effect from the date of entry into force of the new law, regulation or agreement.
> 3. Any Contracting Party may withdraw either in whole or in part any reservation made by it by a notification to that effect addressed to the Secretary General of the Council of Europe. Such notification shall take effect on the first day of the month following the month in which it is received and this Agreement shall apply accordingly.

This model permits the continuous update of reservations but covers also the ability to withdraw reservations. According to Articles 7 and 8 "notifications" can be made at any time when a new law, regulation or agreement is adopted by the State concerned. A special list in the form of an annex (which is an integral part of the Agreement according to Article 10) covers all reservations made at the time of signature.

The 1955 European Convention on Establishment[33] provided in Article 26 and 27:

> *Article 26*
>
> 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 of the Council and shall take effect from the date of the receipt of such notification. The Secretary General shall transmit the text of this notification to all the signatories of the Convention.

32. E.T.S. 13 (1953).
33. E.T.S. 19 (1955).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

Article 27

A Contracting Party which has made a reservation in respect of a particular provision of the Convention in accordance with Article 26 of this Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

The European Convention for the Peaceful Settlement of Disputes and the European Convention on Extradition (both of 1957)[34] gave more freedom to States making reservations. According to Article 35(1) of the former, States parties may make reservations "which exclude from the application of this Convention disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories". According to the latter, reservations may be made upon signature, ratification or accession "in respect of any provision or provisions of the Convention"[35] In these treaties reservations do not necessarily have to be linked to a conflict between the treaty and domestic law.

Most other conventions and agreements of this early period do not include any specific reservation clauses while a few combine elements of the above models. In this last category particular mention should be made to the 1959 European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles, which not only includes wide reservation possibilities and other options,[36] but even allows explicitly late reservations requiring the written agreement of the other contracting parties.[37]

Until now we have seen that reservations are in most Council of Europe treaties permitted only where there is a conflict with domestic law and a statement of that law is required; general reservations are prohibited; and withdrawal of reservations is encouraged. In addition, the legal effect of reservations is sometimes specified. Nothing is, however, said about objections to reservations.

IV. THE MODEL FINAL CLAUSES ADOPTED IN 1962

IN 1962 the Committee of Ministers asked the Secretariat to prepare a document on the model final clauses appropriate to agreements and conventions concluded within the Council of Europe. This took place at the time Sir Humphrey Waldock presented his first report on the law of treaties for the International Law Commission.[38] The memorandum

34. E.T.S. 23 and 24 (1957).
35. Art.26 (1).
36. On other methods of choice see *infra* Part VII.
37. E.T.S. 29 (1959), Art.13.
38. (1962) Y.B.I.L.C. Vol.I, 637th Session, and in Vol.II the first report of Sir H. Waldock: A/CN.4/SR.144 and Add.1. However, the ILC had started its work on the law of treaties much earlier. The first report by Brierly, the first Special Rapporteur on the matter, was presented in 1950, UN Doc.A/CN.4/23 (1950) II Y.B.I.L.C. 222.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

presented by the Secretariat was discussed and approved by the Ministers' Deputies in September 1962.[39]

The memorandum includes the following model clause in respect of reservations. The model clause is common to both conventions and agreements:[40]

> 1. Any Contracting Party may, at the time of signature or when 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 this Agreement.
> 2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe, which shall become effective as from the date of its receipt.
> 3. Contracting Party which has made a reservation in respect of any provision of this Agreement may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

The Secretariat includes also a model annex on reservations.[41]

> Any Contracting Party may declare that it reserves the right:
>
> 1. to .....
> 2. to .....

This proposal was not wholly uncontroversial. The representative of the Netherlands had proposed a wider formulation of paragraph 1 as well as the omission of paragraphs 2 and 3. The Dutch draft formulation of paragraph 1 suggested that reservations may be made only in respect of certain articles.[42] The UK government on the other hand was of the view that the reservation clauses should be left to the responsibility of each committee of experts (which supervise many of the Council of Europe treaties).[43]

The Secretariat rejected these proposals with the following arguments: (a) the Dutch proposal would give States parties complete freedom concerning the content of the reservations they would be entitled to formulate on the enumerated articles; (b) practice had shown that most committees of experts supported the model of "negotiated" reservations, i.e. reservations whose content is agreed during the negotiation process of a treaty and their text becomes a part of the main body of the treaty or an

39. Conclusions of the 113th meeting, *supra* n.7. The memorandum of the Secretariat is entitled "Modeles de clause finales", CM(62)148, 13 July 1962.
40. CM(62)148, pp.6 and 10.
41. *Idem*, p.6, n.3.
42. *Idem*, p.2.
43. *Idem*, p.3.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

appendix thereto.[44] It is noteworthy that the Secretariat puts much emphasis on the work of the committees of experts. The Secretariat was of the view that the model clauses had considerable advantages as compared to a system of free reservations. As regards paragraphs 2 and 3 concerning the withdrawal of reservations and the legal effect of reservations, the Secretariat explained that their purpose was to accentuate the possibility of withdrawal and to clarify the effect of reservations.[45] These were important elements at a time when the International Law Commission had not yet concluded its work on the Vienna Convention on the Law of Treaties.

V. RESERVATION CLAUSES: PRACTICE AFTER 1962

AFTER the adoption of the model final clauses one would expect that reservation clauses would be found in most Council of Europe treaties. This is, however, not really the case. When looking more closely at reservation clauses in treaties E.T.S. 38 to 170, i.e. between 1962 and 1998, we find several treaties without reservation clauses and we can also see that many treaties allowing for specific reservations even include other option-systems (choices) for the contracting parties. The following categories appear among the 133 treaties[46] adopted in the period under examination:

(1) those with no reservation clause;
(2) those expressly prohibiting all reservations;
(3) those expressly permitting all types of reservations;
(4) those permitting only (more or less) specified reservations;
(5) negotiated reservations.

44. The term "negotiated reservations" ("réserves négociées") is used by the Secretariat in its wider sense. "Negotiated reservations" in its strict (and proper) meaning concerns cases of reservations when not only the content but even the States entitled to formulate them are indicated in the treaty. These will be further discussed *infra* Part V(E). See also Imbert, *op. cit. supra* at pp.196–199.

45. *Ibid.*

46. As will be obvious the total number of treaties under all categories exceeds 133. This is for two reasons: the European Convention on Consular Functions (E.T.S. 61, 1967) is here counted as three treaties since it has two protocols with separate reservations clauses (all under E.T.S. 61; see also Imbert, *idem*; p.185, n.85) and, more importantly, many treaties fall into two categories, e.g. most often because they combine an authorisation of specific reservations with other options (such as various choices and the possibility, of derogating). Even though other models of presenting them might had been used—see e.g. the somewhat different analysis contained in the report of the Council of Europe Parliamentary Assembly, *Rapport sur les réserves formulées par des Etats membres aux conventions du Conseil de l'Europe*, Doc.6856, 3 June 1993, Rapporteur: M. Gundersen—it is the purpose of this overview to show the main proportions and trends in the practice of the Council of Europe. In contrast to earlier examinations of the issue, this article places greater emphasis on other varieties of options for limiting treaty undertakings.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

A. Treaties with no Reservation clause

Fifty-seven treaties do not incorporate any reservation clause.[47] This means that more than half (57 per cent) incorporate some kind of reservation clause. This result is slightly higher than the study by Imbert, who reported reservation clauses in approximately 50 per cent between 1949 and 1978.[48] This indicates that the 1962 model final clauses have indeed had some effect in recent years.

More than half of the treaties with no reservation clause are protocols to earlier treaties.[49] This results of course in an uncertain legal situation. What rules apply regarding reservations to protocols of amendment?

The European Convention on Human Rights with its 11 protocols presents a complicated picture. Most of its protocols do not include any reservation clause but they provide that their provisions "shall be regarded as additional articles to the Convention, and *all the provisions of the Convention shall apply accordingly*" (emphasis added). This includes Article 64. When formulating reservations to the protocols States often make direct mention of Article 64. Albania's recent reservations to Protocol No. 1 are introduced with the following words: "In compliance with Article 64 of the Convention, the Republic of Albania wishes to present its reservations in relation to Article 3 of the Protocol.[50]

This is supported by Imbert, who is of the view that "généralement, de tels instruments n'ont pas d'existence indépendante ... et les dispositions non amendées de la convention restent applicables entre les Etats parties au protocole".[51] So, according to Imbert, when the protocol does not have an independent existence—and this is the situation in most cases—the reservation clause of the main treaty applies also to its protocol.

Only in Protocol No. 6 to the European Convention on Human Rights, concerning the death penalty, are reservations expressly prohibited. This is done by disapplying Article 64 of the Convention. Article 4 of Protocol

47. E.T.S. 39, 40, 42, 44, 45, 46, 49, 50, 54, 55, 62, 63, 64, 65, 66, 67, 69, 78, 80, 81, 82, 84, 87, 89, 95, 96, 103, 109, 110, 111, 112, 113, 115, 117, 118, 120, 129, 131, 133, 134, 137, 138, 140, 142, 143, 146, 151, 152, 155, 157, 158, 161, 162, 167, 168, 169, 170. It may be noted that even though the Framework Convention for the Protection of National Minorities (E.T.S. 157, 1995) does not include a reservations clause, the explanatory report States that "reservations are allowed in as far as they are permitted by international law" (para.98). We will return to this Convention when discussing the options method for the limitation of treaty obligations.

48. Imbert, *op. cit. supra* n.1, at p.185.

49. These are E.T.S. 44, 45, 46, 49, 54, 55, 81, 89, 95, 96, 103, 109, 110, 111, 113, 115, 117, 118, 131, 133, 134, 137, 140, 142, 146, 151, 152, 155, 158, 162, 167, 168, 169, 170. This is amounts to 34 protocols with no reservation clauses (approx. 26%; of the total number of treaties examined).

50. Reservations made at the time of ratification in Oct. 1996. E.T.S. 9, "Reservations and Declarations" www.coe.fr/tablconv, update: 2 Apr. 1998.

51. Imbert, *op. cit. supra* n.1, at p.213. Imbert also gives some examples of conflicts between a protocol and its convention.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

No. 6 provides: "No reservation may be made under Article 64 of the Convention in respect of the provisions of this Protocol."

In the explanatory report to Protocol No. 11 to the European Convention it is made clear that it "excludes the making of reservations" due to its very nature as a protocol restructuring the control machinery of the Convention. It is highly unsatisfactory that this was not included as a provision in the Protocol itself. However, it makes clear that there is a distinction between protocols which include material provisions and protocols which introduce solely procedural provisions, such as those concerning the control mechanism of the Convention. Reservations are not permitted to this second category of protocols.

Many other protocols explicitly prohibit reservations. The two protocols to the European Convention on Consular Functions prohibit reservations, providing, however, that reservations made to the main Convention apply to the protocols.[52]

For the remaining treaties, which are not protocols to earlier treaties, the rules of customary law (for those treaties concluded before 1969) or the Vienna Convention on the Law of Treaties (after 1969) would apply. This means, in particular, that reservations should be specific and not incompatible with the object and purpose of a treaty.[53] The requirement of specificity is indeed found in the definition of "reservation" in Article 2(1)(d) Vienna Convention, which requires that a reservation "purports to exclude or modify the legal effect of *certain provisions* of the treaty". It has been rightly pointed out by authors such as Imbert and Pellet that it is unfortunate that the requirement of specificity was introduced in Article 2(1)(d), because this has as a consequence the confusion of the definition of reservations with that of their permissibility.[54] The International Law Commission Rapporteur has therefore not included the element of

52. See also the Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality (E.T.S. 149).

53. Art.19(c) of the VCLT prohibits the formulation of reservations incompatible with the object and purpose of the treaty. The I.C.J. had the opportunity to discuss the issue of reservations contrary to the object and purpose of a treaty in its famous opinion in the *Genocide* case, I.C.J. Rep.1951, p.15. Even though the legal effect of impermissible reservations is still much debated and will be a part of the current examination of reservation issues by the ICL, there seems to be general agreement that there are reservations contrary to the object and purpose and such reservations should not be formulated. See Pellet, *op. cit. supra* n.1 (A/CN.4/477), esp. at paras.42–45 and the discussion of it by the ILC in *Report of the ILC on the Work of its Forty-Ninth Session, 12 May–18 July 1997*, A/52/10, paras.100–111. The obligation to respect the object and purpose of the treaty is not only linked to the formulation of reservations; Art.18 of the VCLT sets at the obligation of States not to defeat the object and purpose of a treaty prior to its entry into force, i.e. usually between signature and entry into force.

54. Imbert, *op. cit. supra* n.1, at pp.14–15; Pellet, *op. cit. supra* n.8, at Add.3 paras.151–162—see esp. guideline 1.1.4,.which states "une réserve peut porter sur une ou plusieurs dispositions d'un traité ou, d'une façon plus générale, sur la manière dont l'État entend mettre en oeuvre l'ensemble du traité".

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

specificity in his draft guideline concerning the definition. What is important, however, for the purposes of the present article, is that the requirement of specificity has developed within the Council of Europe into a strong tradition, which has indeed become a part of (regional) customary law. The logic of this requirement is that the exact scope of a reservation must be deducible from the terms of the reservation. A prohibition of general reservations is, for instance, found in the first treaty of the Council, i.e. in Article 64 of the European Convention on Human Rights, and is repeated in many other treaties, and not only those concerning human rights, while a great number of treaties require reserving States to submit a brief statement of the relevant domestic legislation. State practice in Europe shows respect for such requirements.[55]

B. Treaties Expressly Prohibiting all Reservations

Nineteen treaties have an express prohibition of reservations.[56] The subjects of the treaties range from broadcasting to children's rights and it seems difficult to draw any conclusions from this perspective. What is most intriguing in this is the fact that some of these treaties include other

55. The Secretary General receives and registers all such statements, even in cases where they are not particularly brief. See e.g. the extensive clarifications of the government of Switzerland in the aftermath of the *Belilos* case (www.coe.fr/tablconv, update: 19 Aug. 1998) and the Romanian declaration concerning the domestic law relevant to the European Convention on the Legal Status of Children Born out of Wedlock, E.T.S. 85 (1975). The Romanian declaration was communicated through a Note Verbale in Sept. 1993 and contains also a useful comparative table of provisions in Romanian legislation and the Convention. Council of Europe, E.T.S. 85, "Reservations and Declarations", Date of edition: 2 Nov. 1998. Reservation clauses similar to the one in the ECHR are found e.g. in: Art.35 of the European Convention for the Peaceful Settlement of Disputes, E.T.S. 23 (1957); Art.7 of the European Convention on Establishment of Companies, E.T.S. 57 (1966); Art.25 of the European Convention on the Adoption of Children, E.T.S. 58 (1967); Art.14 of the European Convention on the Legal Status of Children born out of Wedlock, E.T.S. 85 (1975); Art.22 of the Convention on European Wildlife and Natural Habitats, E.T.S. 104 (1979); Art.35 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, E.T.S. 150 (1993).

56. E.T.S. 53, 61(1) and 61(2), which are protocols to the European Convention on Consular Functions but have their own reservation clauses (while the Convention authorises specific reservations), 72, 74, 76, 77, 86, 94, 108, 114, 124, 126, 139, 145, 149, 153, 159, 160. One could possibly add E.T.S. 130 (Convention on Insider Trading) to this list. It provides in Art.17: "Without prejudice to the application of Article 6, no reservation may be made to the Convention." However, since Art.6 authorises in fact three specific reservations (called "derogations") which have to be reported to the Council of Europe (even though not at the time of ratification, but at the time of designation of the responsible national authority), it was found appropriate not to include this Convention in the current category. Such examples may serve to illustrate the difficulty of borderline cases. A similar problem occurs with regard to E.T.S. 86 (Additional Protocol to the European Convention on Extradition), which on the one hand prohibits reservations (Art.6.3) and on the other gives contracting parties the opportunity to declare whether they "accept one or the other of Chapters I or II" (Art.6.1). Issues of option methods will be further discussed *infra* Part VII.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

options notwithstanding the explicit prohibition of reservations.[57] This means that the absence of a possibility to make reservations does not necessarily indicate an absence of freedom for the contracting parties. An example of this is the European Convention on the Service Abroad of Documents relating to Administrative Matters,[58] which prohibits reservations in Article 21 ("*no reservations may be made to this Convention*") but at the same time provides the following options:

> *Article 1(3)*
> Each State may [at the time of signature etc.] ... give notice, by a declaration addressed to the Secretary General of the Council of Europe, of the administrative matters with regard to which it will not apply this Convention. Any other Contracting State may claim reciprocity.
>
> *Article 10(2)*
> Each State may [at the time of signature etc.] ... object by means of a declaration addressed to the Secretary General of the Council of Europe to such service [i.e. service by consular officers and diplomatic agents] within its territory in the case of documents to be served upon its nationals or upon nationals of a third State, or upon stateless persons. Any other Contracting State may claim reciprocity.
>
> *Article 11(2)*
> Each State may [at the time of signature etc.] ... or within five years after the entry into force of the Convention in respect of itself, by a declaration addressed to the Secretary General of the Council of Europe, object, in a general manner or partially, either because of the nationality of the addressee or for defined categories of documents, to such service [i.e. service by post] within its territory. Any other Contracting State may claim reciprocity.

The Convention also provides for the opportunity to withdraw the above-mentioned declarations. One may at this point ask whether these options do not in reality amount to authorised reservations. We will have the opportunity to return to this issue below when discussing the category of treaties offering options to the contracting parties.

C. Treaties Explicitly Permitting all Kinds of Reservation

We encounter in this category only one treaty, namely the European Convention on the Compensation of Victims of Violent Crimes.[59] The Convention provides in Article 18(1): "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession declare that it avails itself of one or more reservations."

57. These are notably E.T.S. 86, 94, 108, 124, 139.
58. E.T.S. 94 (1977).
59. E.T.S. 116 (1983).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

In paragraphs (2) and (3) of the same Article provision is made concerning the opportunity to withdraw the reservations made and the principle of reciprocity.[60] The only possible explanation for the inclusion of such a clause instead of the more often preferred model of no reservation clause (see above) may be that the contracting parties wished to emphasise their freedom in the formulation of reservations and to contrast this to the 1962 model clauses in which there is a presumption of an authorisation only for some specified reservations. The inclusion of the provision leaves no doubt whatsoever as to the freedom of the contracting parties, even though of course the reservations made still need to be specific (not too vague and general) and not contrary to the object and purpose of the treaty.[61]

D. Treaties Permitting only some (More or Less) Specified Reservations[62]

There are in total 45 such treaties.[63] This category covers both treaties with a provision or an appendix giving an exclusive list[64] of authorised reservations (following the format of the 1962 model clauses)—this type forms the majority of cases[65]—as well as treaties where reservations are

60. Following the guidelines in the above-mentioned paras.(2) and (3) of the 1962 model clause on reservations.

61. See e.g. the reservation provision in the recent European Convention on Nationality (E.T.S. 166, 1997), which permits reservations only on some of its chapters but only "so long as they are compatible with the object and purpose of this Convention" (Art.29.1).

62. Imbert, *op. cit. supra* n.1 at pp.167–172, speaks of "l'autorisation de réserves determinées" under which he distinguishes four main categories: (1) clauses specifying the object of the authorised reservations; (2) clauses specifying in the provisions which can be the object of reservations; (3) clauses specifying the actual content of the authorised reservations; (4) finally, he discusses other methods of choices limiting the undertakings of the contracting parties. In the first category he gives as examples some early treaties of the Council of Europe (E.T.S. 12, 13 and 14 concluded in 1953). It may be noted that E.T.S. 13 also includes appendices defining the scope of the reservations permitted (Arts.7–9), hence it may be said that in some cases categories 1 and 3 are very similar to each other. Imbert does not seem to lay any importance on the number of reservations authorised, but we find this aspect of value in the effort of the contracting parties to limit the extent of reservations. In the present article Imbert's fourth category (methods of choice) will be treated separately since it is not evident that they fall under the term "reservations". Imbert, *idem*, p.169, explains his presentation with the words: "De ces différentes clauses il convient de rapprocher celles qui, sans autoriser de réserves au sens strict du terme (bien que parfois la distinction soit délicate à faire) permettent aussi aux Etats de déterminer eux-mêmes l'étendue de leurs obligations conventionelles."

63. E.T.S. 43, 51, 52, 56, 57, 58, 59, 60, 61, 68, 70, 73, 75, 83, 85, 88, 90, 91, 92, 93, 98, 99, 100, 101, 104, 105, 107, 119, 121, 123, 125, 127, 130, 132, 135, 136, 141, 144, 147, 148, 150, 156, 164, 165, 166.

64. It may well be only one authorised reservation as in the European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle (E.T.S. 88, 1976), where Art.8 says that a State may reserve the right that any relevant documents be accompanied by a translation.

65. This seems to be the case even before 1962. See Imbert, *op. cit. supra* n.1, at p.169.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

permitted only to certain provisions or parts of the treaty or where only a certain number of reservations (often one or a limited few) are permitted.[66] While the content of the potential reservations in the first case is clear, in the second case only the general subject and/or the maximum number of authorised reservations are given. One may speak of "generally authorised reservations" and of "specifically authorised reservations" following the terminology adopted by Horn.[67]

The question arises whether both these categories are considered as "expressly authorised reservations" following the terminology of Article 20(1) of the Vienna Convention on the Law of Treaties. Horn seems to regard them both as "expressly authorised reservations" and draws convincing arguments from the Vienna Conference where even "impliedly" authorised reservations were proposed for inclusion in the draft article which later became Article 20(1).[68]

The second—and more important—question is that of the practical significance and legal effect of such expressly authorised reservations. The Vienna Convention says very little on expressly authorised reservations. Article 20(1) states simply: "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides."

The Convention does away only with the need for acceptance of the expressly authorised reservation. It does not seem to exclude the right of other contracting parties to object to such reservation. The argument is supported by the fact that, at least within the Council of Europe, when States, on rare occasions, wish to exclude the right to object to authorised reservations they have explicitly stated so in the treaty itself; this is the case, for example, in Article 32 of the European Convention on

66. In this last category fall the following treaties: E.T.S. 58, 85, 93, 123, 156, 164 and 166. The reservation clauses in this category take three forms: (1) either they designate the provisions to which reservations can be formulated, or (2) they prohibit reservations to certain provisions or parts of the treaty, leaving open the right to formulate reservations to the remaining provisions. These designations are usually accompanied by a maximum number of reservations permitted. (3) Finally, the form used in the Convention on Human Rights and Biomedicine (E.T.S. 164, 1997), which permits only one reservation to any provision of the Convention (Art.36.1). This reservation has, however, to be due to a conflict with national law and a brief statement on this legislation is required according to the second para.of the provision (Art.36.2).

67. F. Horn, *op. cit. supra* n.9, at pp.132–134

68. *Idem*, p.132.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

Transfrontier Television 1989.[69] This is also the view of Imbert, who explains:[70]

> Dans le même ordre d'idée, nous pensons qu'une réserve expressément autorisée par le traité devrait dorénavant pouvoir être objectée ... Une réserve exprèssement autorisée par le traité doit être présumée compatible avec l'objet et le but de ce traité cela explique que l'Etat qui formule puisse devenir partie dès le dépôt de son instrument de ratification ou d'adhésion. Mais c'est la seule conséquence quil soit possible de tirer de cette autorisation expresse. Interdire aux autres Etats de s'opposer à la réserve revient á conserver une règle qui se justifiait lorsqu'une objection pouvait modifier le statut de l'Etat réservataire—ce qui n'est plus le cas—et à dénier tout effet à l'objection fondée sur d'autres motifs que l'incompatibilité avec l'objet et le but du traité—ce qui serait contraire à la logique même du système "souple".

In may be wise in this context to return to the distinction between "generally authorised reservations" and "specifically authorised reservations" discussed above. It would seem that the clarity and with it the presumption of permissibility of a "specifically authorised reservation" are much greater than those of a "generally authorised reservation". If the other parties were to object to a reservation which is permissible and which has been expressly authorised, they would not be applying the treaty in good faith (Articles 26 and 31 of the Vienna Convention on the Law of Treaties). An objection to a "generally authorised reservation", on the other hand, should be fully possible in cases where the reservation falls outside what has been authorised or is otherwise impermissible, e.g. if it is incompatible with the object and purpose of the treaty.

An interesting trend one may discern is that of a preference in recent years for expressly authorised reservations to be placed in the main body of the treaty, i.e. in one or more of its provisions, and not as an appendix to it. The change in practice seems to have taken place in the early 1980s. The European Agreement on Transfer of Responsibility for Refugees

69. E.T.S. 132 (1989).

70. Imbert, *op. cit. supra* n.1, at pp.151–152. Horn's view, *op. cit. supra* n.9, at p.132, is unclear: "It is less clear if 'expressly authorized reservations' become operative and opposable on the date of formulation or entry into force of the treaty irrespective of any subsequent acceptance and in spite of any objection." This seems to imply that authorised reservations may be opposable. At p.133, however, and while discussing optional commitments, he writes: "Normally the distinction between treaties presenting optional obligations and treaties authorizing specific reservations will not be felt. In neither case will an objection be permitted under the treaty and the reciprocity of obligations will operate in the same way in both cases." This seems to imply that objections to authorised reservations are not permitted. For more discussion on option systems see *infra* Part VII.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

1980[71] is the last one to include an appendix permitting two reservations. Article 14(1) of the Agreement provides:[72]

> Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or both of the reservations provided for in the Annex to this Agreement. No other reservations may be made.

Later, and starting with the European Convention on Offences relating to Cultural Property 1985[73] the expressly authorised reservations have always been incorporated in the main body of the treaty. In reality—and legally—there is no difference in the legal status and effect of the clauses since the appendices are usually considered as an integral party of the treaty.[74] However, the inclusion of the clauses in the main body of the treaty—at least in those cases where the clauses are not too extensive—enhances the clarity of the treaty as a whole and promotes a better understanding of the treaty obligations.[75]

E. Negotiated Reservations

As mentioned earlier the Secretariat of the Council of Europe used in 1962 the term "negotiated reservations" in a wide sense covering all reservations whose content is agreed during the negotiation process of a treaty and whose text becomes a part of the main body or an appendix thereto.[76] This is the way the term was used also by Héribert Golsong at the 1976 conference of the Société française pour le droit international.[77] Imbert on the other hand maintains that the only correct use of the term (negotiated reservations *strictu senso*) is in the case of reservations specifically authorised in the treaty not only as to their content but also as to the potential beneficiary (or beneficiaries), i.e. with mention of the State (or States) entitled to make a reservation.[78] In agreement with this view we have dealt with other forms of authorised reservations above and will here examine only the "negotiated reservations *strictu senso*". In the

71. E.T.S. 107 (1980).

72. The fact that most such specific reservation clauses repeat that "no other reservations may be made" clarifies that the Council of Europe sees such clauses in a restrictive way. This is not always the case in other organisations. See Imbert, *op. cit. supra* n.1, at pp.209–210.

73. E.T.S. 119 (1985).

74. This is sometimes specifically emphasised in the treaty itself. See e.g. Art.10 in E.T.S. 13.

75. In addition, it has happened that annexes are not published in the collection *European Conventions and Agreements*, which makes knowledge about the treaty more difficult to come by since one has to find the E.T.S. See e.g. E.T.S. 13.

76. See *supra* n.44.

77. Golsong, *op. cit. supra.* n.28, at p.228. Golsong was at the time Director of Legal Affairs of the Council of Europe.

78. Imbert *op. cit. supra* n.1, at pp.196–197.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

period under examination (i.e. 1962 to 1998) there are only two treaties with such clauses. The 1973 European Convention on Civil Liability for Damage caused by Motor Vehicles[79] provides in an annex that Belgium may reserve the right to exclude from the scope of the Convention material damage to vehicles, but only for a period of three years from the date the Convention enters into force for it. The second case is that of the 1989 European Convention on Transfrontier Television,[80] which in Article 32(1)(b) provides:[81]

> The United Kingdom may declare that it reserves the right not to fulfil the obligation, set out in Article 15 paragraph 1, to prohibit advertisements for tobacco products, in respect of advertisements for cigars and pipe tobacco broadcast by the Independent Broadcasting Authority by terrestrial means on its territory.

In line with the arguments of Imbert on authorised reservations in general, there is no reason States should be prohibited from objecting even to *strictu senso* negotiated reservations. This is supported by the exception to this rule, a unique exception found in the 1989 European Convention on Transfrontier Television mentioned above. Article 32(1) includes, in addition to the negotiated reservation of the United Kingdom, a clause providing for a specifically authorised reservation regarding advertisements for alcoholic beverages. In Article 32(2) it is provided that "a reservation made in accordance with the preceding paragraph may not be the subject of an objection".

VI. TEMPORARY RESERVATIONS

ANOTHER form of reservation clause which appears within the Council of Europe is that of *temporary reservations* (reservations with a temporal limitation of their validity) without possibility of renewal. Only four examples are found in the period being examined.[82] We have already seen the *strictu senso* negotiated reservation clause allowing Belgium to make a specific reservation valid for three years after entry into force of the 1973 European Convention on Civil Liability for Damage caused by Motor Vehicles.[83] It may be noted that this reservation—if made—cannot be renewed. The 1963 Convention on the Unification of Certain Points of Substantive Law on Patents for Invention[84] provides that contracting parties may "temporarily reserve for the limited period stated below " in

79. E.T.S. 79 (1973).
80. E.T.S. 132 (1989).
81. In this Convention there is in Art.32(1)(a) also a clause providing for a specifically authorised reservation regarding advertisements for alcoholic beverages (this not being a "negotiated reservation" *strictu senso*).
82. E.T.S. 47, 58, 79 and 85. All four of them date prior to 1975.
83. E.T.S. 79, Art.17 and annex.
84. E.T.S. 47 (1963).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

respect of two provisions of the Convention. The limited periods are ten and five years respectively.[85] There is no possibility of a renewal of formulated reservations.

A different solution is followed by the 1967 European Convention on the Adoption of Children and the 1975 European Convention on the Legal Status of Children born out of Wedlock.[86] Reservations are valid for five years from the entry into force of the Convention and may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period. The depositary notes the non-renewal of reservations made. For instance, the depositary has noted that the reservation of Austria has not been renewed while several other States have renewed continuously their original reservations.[87]

This model has the advantage of placing on States the burden of regularly evaluating and reconsidering their reservations in the light of, *inter alia*, changed legislation. On the other hand, such provisions create an additional responsibility for the Secretary General, who in his function as depositary of the treaties has to monitor the renewal of reservations. This task would be excessively complicated if the non-renewed reservations were not automatically considered null and void. The fact that the use of temporary reservations has been abandoned since 1975 indicates that there is not much support for it in the practice of member States of the Council of Europe.

VII. OTHER FORMS OF LIMITING UNDERTAKINGS ("LIMITATION CLAUSES")

WE have seen above that approximately 34 per cent of the Council of Europe treaties include a reservation clause or clauses which allow States to make specific reservations. In about 43 per cent of the treaties examined there was no reservation clause while relatively few treaties (about 14 per cent) exclude explicitly the possibility of making reservations. However, parallel to the practice of reservations there is the practice of *derogation and restriction (limitation) clauses* and that of other *choice systems*. Their purpose is to allow contracting parties to limit their undertakings—we here use the umbrella term "limitation clauses".

A. Derogation and Restriction Clauses

These are known mainly for their function in human rights treaties. The best-known example is the European Convention on Human Rights,

85. *Idem*, Art.12.
86. E.T.S. 58 (1967) and E.T.S. 85 (1975).
87. Council of Europe, E.T.S. 85, "Reservations and Declarations", date of edition: 2 Nov. 1998.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

according to Article 15 of which derogations can be made to some of the provisions only in time of war or other public emergency and according to the requirement of proportionality. Such derogations must be reported to the Secretary General of the Council of Europe. Restrictions can be made, e.g. to the right to freedom of peaceful assembly, only if they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Article 11.2). Such restrictions need not be reported to the Council of Europe and the other treaty parties, but can be ultimately controlled by the European Court of Human Rights. These two possibilities (of reported derogations and non-reported restrictions) are also found in more recent human rights treaties such as the Revised European Social Charter of 1996.[88]

As will be shown below, these terms are not always used consistently in the treaties concluded within the Council of Europe. The term "derogation" seems to be used whenever there is reference to public emergency notions even if no reporting to the Council is required. Thus Article 15 of the European Convention on Establishment of Companies[89] permits derogations in time of war and public emergency without mention of an obligation to report them to the depositary and the other contracting while Article 9 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[90] provides:

> *Exceptions and restrictions*
>
> 1. No exception to the provisions of Articles 5, 6 and 8 of this Convention shall be allowed except within the limits defined in this Article.
> 2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:
>   (a) protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences;
>   (b) protecting the data subject or the rights and freedoms of others.
> 3. Restriction on the exercise of the rights specified in Article 8, paragraphs (b), (c) and (d), may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects.

This clause exists while, as already noted, Article 25 of the same Convention does not allow for reservations to be made. One of the main

88. E.T.S. 163 (1996).
89. E.T.S. 57 (1966).
90. E.T.S. 108 (1981).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

differences between reservations and derogations is that reservations are, as a general rule, made at the time of signature, ratification or accession[91] while derogations are made *ad hoc* when the need or situation arises and are presumed to be of a temporary nature.

Derogation clauses do not always make reference to war and public emergency. Article 17 of the European Convention for the Protection of Animals for Slaughter[92] makes possible derogations from the provisions regarding slaughtering for religious reasons, derogations which do not, however, need to be notified.

The situation is indeed complicated with regard to the Revised European Code of Social Security 1990.[93] While Article 87 forbids reservations, derogations can be made to a large number of provisions following Article 7 and in this case they need to be notified to the Secretary General of the Council of Europe. On the other hand, there is no reference in Article 7 to war or public emergency. According to the second paragraph of this provision some of the derogations need even be approved by the Committee of Ministers on the basis of a proposal by the Committee which supervises the Code. In this last-mentioned case the other parties to the Code have the oppportunity, at least theoretically, to react to the derogations in the discussion of the Council of Ministers.

Certain "exceptions" are made permissible by Article 9 of the Convention on the Protection of European Wildlife and Natural Habitats.[94] However, such exceptions are to be reported every two years to the standing committee which supervises the Convention (Article 9.2.).[95]

Another method used in order to permit States to limit the scope of their undertakings is for them to define central concepts in the treaties. The European Convention on the Punishment of Road Traffic Offences[96] gives States the chance to limit the scope of offences covered by the Convention (Article 25 and Annex I). The European Convention on the Repatriation of Minors[97]provides that States may make a declaration "defining as far as it is concerned the term 'nationals' as used in this Convention" (Article 25).

91. Pellet, *op. cit. supra* n.8, at para.135, is of the view that "l'idée d'inclure des limites *ratione temporis* à la possibilité de formuler des réserves dans la définition même de celles-ci ne va pas de soi et, à vrai dire, ces limitation constituent d'avantage un élément de leur régime juridique qu'un critère à proprement parler."

92. E.T.S. 102 (1979).

93. E.T.S. 139 (1990).

94. E.T.S. 104 (1979).

95. The Convention provides also for specific reservations under Art.22.

96. E.T.S. 52 (1964).

97. E.T.S. 71 (1970). A similar clause can be found in E.T.S. 78 (1972). The Convention on Mutual Administrative Assistance in Tax Matters (E.T.S. 127, 1988) lets States define which taxes will be covered by the Convention as well as the term "nationals".

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

It is clear that such derogations and exceptions when permitted by the treaty itself, may be regarded as expressly authorised reservations.[98]

B. Options

Apart from derogations or restrictions, several treaties in the period being examined include various models for *options* by the contracting parties. This is provided for by Article 17 of the Vienna Convention on the Law of Treaties:

> 1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.
> 2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

The provision was not particularly controversial and was not very much debated when the International Law Commission adopted the draft articles on the law of treaties in 1965–1966.[99] The reference in this provision to the rules relating to reservations makes evident that there is indeed a relation between the system of options and the opportunity to make reservations. It is also implied that it is not always easy to make the distinction between option systems and reservations. This may be illustrated by Article 9 in the Second Additional Protocol to the European Convention on Extradition.[100] This Article provides in paragraph 1 that reservations made to the original Convention on Extradition of 1957 shall apply also to the Protocol, unless States otherwise declare. Paragraph 2 provides that a State may "declare that it reserves the right not to accept" Chapter I, II, III, IV or V of the Protocol. Article 9, paragraph 3 states that contracting parties may withdraw reservations "made in accordance with the foregoing paragraph", while the fourth paragraph mentions the effect of reservations on reciprocity. Finally, paragraph 5 states that "no other reservation may be made to the

98. This view is supported by the UN Secretary-General as depositary. See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc.ST/LEG/8, 1994, p.62.

99. See the inconclusive discussions in Y.B.I.L.C. (1965) I regarding what was then Art.15 which later became Art.16 and is now Art.17 in the VCLT (787th and 812th meetings, at pp.80–86, 261–262 and 281–282) and *Report of the International Law Commission on the Work of its Eighteenth session, May—July 1966* (1966) II Y.B.I.L.C. 201–202. Several members of the ILC, including its Special Rapporteur Sir Humphrey Waldock, emphasised the close relationship between ratification of a part of a treaty and reservations. It is also clear that so-called "*À la carte* systems" where States may chose more or less freely among many provisions were not what the ILC had in mind. See also S. Rosenne, *Law of Treaties, Guide to the Legislative History of the Vienna Convention* (1970), pp.168–169.

100. E.T.S. 98 (1978).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

provisions of this Protocol". This Protocol was mentioned earlier among the examples of treaties allowing only for specific reservations but it is now evident that it is also an example of a choice system.

The 1966 Commentary of the International Law Commission on the draft articles which it had adopted reveals that the Commission did not believe at that time that such choices were particularly frequent.[101] The question is whether such a liberal view can be maintained today since it is now clear that—at least within the Council of Europe—such options are widely used.[102]

The options take many different forms. The two main categories are "opt-in" and "opt-out" clauses.

With opt-in clauses, contracting parties are allowed to choose which provisions they will be bound by. Such *à la carte* provisions—one could perhaps call them "positive *à la carte* provisions" since the State chooses the provisions it will be bound by—are found, for instance, in the European Code of Social Security,[103] the Additional Protocol to the European Convention on Information on Foreign Law,[104]the European Charter of Local Self-Government,[105] the Revised European Code of Social Security[106] and the European Charter for Regional or Minority Languages.[107] In these treaties a minimum number of provisions that parties must accept is often indicated.[108] In this case the freedom offered to contracting parties is extensive.

According to a number of treaties the contracting parties may exclude (opt out of) the application of one or several provisions for themselves. This may be done directly, i.e. through exclusion of a particular provision. Article 9(3) of the Convention on Mutual Administrative Assistance in Tax Matters[109] provides that a party may inform one of the depositaries of its "intention not to accept, as a general rule, such requests as are referred to in paragraph 1" but at the same time it is made clear that a withdrawal

101. ILC, *Report*, *loc.cit. supra* n.99, with commentary on draft Art.14 (which later became final Art.17).

102. Various forms of possible exclusions, derogations and option systems are found in E.T.S. 38, 41, 43, 48, 52, 56, 57, 58, 64, 69, 71, 74, 78, 86, 94, 97, 98, 102, 104, 105, 106, 108, 119, 122, 124, 127, 128, 130, 136, 139, 141, 144, 148, 154, 157, 163, and 169. This gives a total of 37 treaties, i.e. approx. 28%.

103. E.T.S. 48 (1964).

104. E.T.S. 97 (1978).

105. E.T.S. 122 (1985).

106. E.T.S. 139 (1990). As noted above, the Code includes also derogation clauses.

107. E.T.S. 148 (1992).

108. A special form of indication of a minimum level is included in the European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (E.T.S. 64, 1968). As noted above the Agreement does not have any reservation clause but Art.1 requires that at least 80%; of detergents are susceptible to biological degradation. This may, however, hardly be seen as a (permissible) reservation, since, in fact, there are no treaty obligations regarding biological degradation for the remaining 20%.

109. E.T.S. 127 (1988).

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

of such a declaration is possible. The Additional Protocol to the European Social Charter[110] includes in Article 2 provisions on the right to information and consultation of workers. Article 2(2) says that the contracting parties may "exclude" from the field of application of this right those "undertakings employing less than a certain number of workers to be determined by national legislation or practice".

Of particular interest is the European Convention on Certain International Aspects of Bankruptcy,[111] which provides:

> *Article 40—Reservations*
>
> 1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it will not apply either Chapter II or Chapter III of the Convention.
> 2. A Party which has declared that it will not apply Chapter III shall nevertheless be bound, except where it has made an express declaration to the contrary, to apply Article 20, paragraph 2, 23 and 24. Where a Party has made a declaration of non-application of these articles, the Party on whose territory a secondary bankruptcy is opened shall not be bound to apply Article 21 in its relations with the Party which made the said declaration.
> 3. No other reservation may be made in respect of the provisions of this Convention.

It is obvious here that the contracting parties regard the options as reservations since they place them under such an unambiguous heading.

The examples show that the presumption in such opt-out clauses is that States are in principle bound by the entire treaty, but they may exclude the legal effect of certain provisions. On the contrary, opt-in clauses start from a presumption that parties are not bound by anything other than they have explicitly chosen. In other words, opt-out clauses seem to be much closer to reservations than opt-in clauses.[112] This is also supported by the use of the term "reservation" in the European Convention on Certain International Aspects of Bankruptcy and the Second Additional Protocol to the European Convention on Extradition discussed above. If this view is accepted, the rules on reservations should apply also to opt-out clauses.[113] This seems essentially to be the view also of Imbert.[114]

On the other hand, one may ask why opt-in and opt-out clauses should be seen as being essentially different, even though they both give parties an opportunity of limiting their undertakings. Another question is why

110. E.T.S. 128 (1988).
111. E.T.S. 136 (1990).
112. Imbert, *op. cit. supra* n.1, at pp.169–172.
113. See also *supra* regarding the right of parties to object to expressly authorised reservations.
114. Imbert, *op. cit. supra* n.1, at pp.169–172 and in particular p.171, n.36.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

the International Law Commission in its discussions in 1962 and 1965 did not say anything about the possibility of applying the rules on reservations (above all concerning the right to object) in spite of the fact that several members of the Commission pointed to the similarity between ratification of part of a treaty and reservations.[115] Was it because partial ratification was seen as a rather unusual phenomenon which did not need regulation? What is the legal meaning of the reference in Article 17 ("without prejudice to . . . ") to Articles 19 to 23 of the Vienna Convention on the Law of Treaties, if not to imply that in some cases options amount to reservations?

It is particularly interesting that not only are there treaties with no reservation clause but with derogation or option clauses, but also that such clauses are often included in treaties which have specific reservation clauses. In the first category we find the European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products,[116] the European Agreement on continued Payment of Scholarships to Students studying abroad,[117] the European Convention on Social Security,[118] the Framework Convention for the Protection of National Minorities[119] and the Second Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Interterritorial Co-operation.[120] In the second—and perhaps more interesting—category (i.e. when reservation clauses exist side by side with option systems) we find several treaties.[121]

Two main conclusions may be drawn: limitation clauses (including option systems) are used extensively within the Council of Europe; and limitation clauses (including option systems) are often combined with specific reservation clauses.

These two conclusions show the importance of looking not only at reservations in a strict sense and the practice related to them, but also at other limitation clauses and the relevant practice. This task belongs to the various committees of the Council of Europe, the Secretary General as depositary and the Parliamentary Assembly as well as to academics, other experts and non-governmental organisations. This is of course quite a difficult task since many of the limitation clauses do not require any registration with the Secretary General and are thus hard to find. Such a task can be fulfilled only through close co-operation between national

115. See *supra* nn.99 and 101.
116. E.T.S. 64 (1968).
117. E.T.S. 69 (1969).
118. E.T.S. 78 (1972).
119. E.T.S. 157 (1995).
120. E.T.S. 169 (1998).
121. E.T.S. 52, 56, 57, 58, 98, 104, 105, 119, 127, 130, 136, 141, 144 and 148. E.T.S. 98 and 136 have been discussed *supra*.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

and international law experts. A possible way of enhancing greater clarity regarding the actual treaty obligations of States is to require in future Council of Europe treaties that all kinds of derogations, restrictions and options should be reported to the Secretary General and be regularly updated. An example in this direction is the above-mentioned Convention on the Conservation of European Wildlife and Natural Habitat, which permits certain exceptions but they have to be reported biannually to the Standing Committee of the Convention.

Finally, and even though it may sound banal, contracting parties and the Secretary General should strive towards greater terminological clarity; when statements in fact amount to reservations, other terms should be avoided. This is particularly important with regard to derogations, restrictions and opt-out clauses which all have an excluding effect. Here, the guidelines currently under development by the International Law Commission may prove to be of help to contracting parties depositaries and monitoring organs.[122]

As noted above, Golsong is of the opinion that options and derogations have a meaningful purpose only in a homogeneous regional setting where a sense of unity and "solidarity" and existing control mechanisms enable the erosion of treaties to be avoided.[123] In addition, States parties have recognised that the treaties can function properly only in a homogeneous setting; thus when signing the European Convention on the Suppression of Terrorism in 1977 France declared: "it is also clear that such a high degree of solidarity as is provided for in the Council of Europe Convention can only apply between States sharing the same ideas of freedom and democracy."[124] These concerns imply two things: now that the Council of Europe has greatly expanded, such options and derogations should be used as restrictively as possible (unfortunately, this is, it seems, not the way things have been in recent years); and, additionally, that the methods of control in respect of reservations as well as of other limitations and options should be strengthened. This covers not only the responsibility of the contracting parties, of the European Court of Human Rights and of other monitoring organs but also the role of the Secretary General as depositary.

VIII. CLAUSES CONCERNING TERRITORIAL DECLARATIONS

ACCORDING to Article 29 of the Vienna Convention on the Law of Treaties, concerning the territorial scope of treaties, a treaty is binding

122. See the draft *Guide to Practice* by Mr Pellet A/CN.4/491/Add.6 (1998).

123. Golsong, *loc. cit. supra* n.28.

124. E.T.S. 90 (1977). Council of Europe, "Reservations and Declarations" date of edition: 2 Nov. 1998. This declaration comes after declaratory statements on the need to combat terrorism while respecting the fundamental principles of criminal and constitutional law as well as the right to asylum.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

upon each party in respect of its entire territory. This rule is, however, facultative and the parties may decide otherwise. The question then arises whether such territorial declarations amount to reservations. Imbert seems to support this view[125] while Horn holds a much narrower position according to which territorial statements are reservations only with regard to treaties dealing with territorial matters (e.g. demilitarisation, conservation zones).[126] Practice within the Council of Europe seems to support the former view.

Within the Council of Europe there is a long tradition of territorial clauses in the treaties concluded. The European Convention on Human Rights included in Article 56 (former Article 63) a territorial clause, whose purpose, though, is not to exclude the legal effect of the Convention in certain territories of the State party but, on the contrary, to extend the effect of the Convention "to all or any of the territories for whose international relations it is responsible". Such declarations have been made by France regarding its overseas territories,[127] by the Netherlands concerning the Netherlands Antilles and Aruba, and by the United Kingdom with several updates concerning its overseas territories. In addition, territorial declarations have been made by the United Kingdom and Cyprus upon declaration concerning the competence of the European Commission under Article 25.

Two additional cases are worth particular mention. The first, and well-known one, is the Turkish declaration of 1987 under Articles 25 and 46 of the Convention. It may be noted that the declaration has (inexplicably?) not been registered by the Secretary General of the Council of Europe in the Chart of Signatures and Ratifications, nor have the objections of other parties been registered. They are, however, presented and discussed in detail in the recent case of *Loizidou* v. *Turkey*.[128] The Turkish declaration included territorial and temporal restrictions concerning Northern Cyprus. We will here focus only on issues *ratione loci*. The Turkish territorial declaration said that the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed "within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable". In the *Loizidou* case the Court had the chance to

125. Imbert, *op. cit. supra* n.1, at pp.236–237.

126. Horn, *op. cit. supra* n.9, at pp.100–103.

127. The French declaration is rather a restatement of what is already provided for in the ECHR: "The Government of the Republic further declares that the Convention shall apply to the whole territory of the Republic, having due regard, where overseas territories are concerned, to local requirements, as mentioned in Article 63": Council of Europe, "Chart of Signatures and Ratifications" www.coe.fr, update: 19 Aug. 1998.

128. *Loizidou* v. *Turkey*, Preliminary Objections, ECHR Ser.A, No.310, 23 Mar. 1995. See also the judgment on the merits of 18 Dec. 1996 and the subsequent judgment on Art.50 (regarding compensation) of 28 July 1998.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

pronounce on the temporal and territorial declarations of Turkey. It found that Turkey had jurisdiction for matters concerning Northern Cyprus and that the territorial restrictions attached to Turkey's Article 25 and 46 declarations were invalid.[129] The Court noted the limited opportunity to make reservations under Article 64[130] and the lack of any provision regarding restrictions *ratione loci* to Articles 25 and 46. It pointed also to the fundamentally different object and purpose of Article 25 and Article 63:[131]

> Article 63 concerns a decision by a Contracting Party to assume full responsibility under the Convention for all acts of public authorities in respect of a territory for whose international relations it is responsible. Article 25, on the other hand, concerns an acceptance by a Contracting Party of the competence of the Commission to examine complaints relating to the acts of its own officials acting under its direct authority. Given the fundamentally different nature of these provisions, the fact that a special declaration must be made under Article 63 para. 4 accepting the competence of the Commission to receive petitions in respect of such territories, can have no bearing, in the light of the arguments developed above, on the validity of restrictions ratione loci in Article 25 and 46 declarations.

What is of importance in the present context is that both the Court and several objecting States considered that the declarations of Turkey were in effect reservations.

A more recent example is given by the declaration of Moldova which was deposited on 12 September 1997. The Republic of Moldova declared that "it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled".[132] The legal effect of such a declaration is not completely clear; it seems, though, that it is a reservation concerning the territorial scope of the convention. The Republic of Moldova seems to be excluding any responsibility for the Trans-Dniester territory. This example shows quite clearly that the provisions concerning limitations, derogations (Article 15) and reservations were designed with a relatively homogeneous and peaceful region in mind. In times of war and public emergency States may

129. *Idem*, paras.55–98. For a comment see G. Cohen-Jonathan, "L'affaire Loizidou devant la Cour européenne des droits de l'homme—Quelques observations" (1998) I Rev. Générale de Dr. Int. Public 123–144.

130. I refer here to the numbering of provisions prior to the entry into force of the 11th Protocol since this was the situation when the Court decided the case.

131. *Loizidou*, *supra* n.128, at para.88.

132. Council of Europe, "Chart of Signatures and Ratifications", www.coe.fr, update: 19 Aug. 1998.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

resort to derogations. The Republic of Moldova chose, however, not to use the derogation method, which only allows for certain derogations to be reported to and be placed under the supervision of the Secretary General (Article 15), but made instead a much broader territorial reservation. It is highly questionable whether such reservations are permissible under the Convention and it can be asked why other State parties have not reacted to this reservation.

The examples above show that territorial declarations can indeed amount to reservations.[133] The final clauses of 1962 already included a model clause on territorial declarations.[134] Such territorial clauses are now included in most Council of Europe treaties. As an example one could mention Article 22 of the European Convention for the Protection of Animals for Slaughter, which provides:

> 1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
> 2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
> 3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General. Such withdrawal shall take effect six months after the date of receipt by the Secretary General of such notification.

In relation to this Convention Denmark has made a declaration excluding its application to Greenland and the Faroe Islands, the Netherlands has accepted the Convention with respect not only to the kingdom in Europe but also to the Netherlands Antilles and Aruba, while Germany has made a declaration that the convention applies also to *Land* Berlin.[135] In this case it is clear that we have to deal with expressly authorised declarations which exclude the effect of the Convention in a part of the territory of the contracting party, i.e. with expressly authorised reservations.[136]

133. This is also the view of Pellet, *op. cit. supra* n.8. at Add.3, para.185.

134. The model clause was: "Toute Partie Contractante peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation ou d'adhésion, désigner le ou les territoires auxquels s'appliquera le présent Accord." Modèles de clauses finales, CM(62)148, p.6.

135. E.T.S.102 (1979), Council of Europe, "Chart of Signatures and Ratifications" www.coe.fr, update: 28 Oct. 1998.

136. For a discussion of the possibility of objecting to authorised reservations see text accompanying *supra* nn.69–70.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

The examples above of territorial declarations to the Protection of Animals for Slaughter Convention can also serve as support for the view that such territorial declaration clauses are meant to be used restrictively. This is in fact emphasised by the Secretariat of the Council of Europe in its response to the questionnaire of the International Law Commission on the issue of reservations. Commenting on the question of territorial declarations the Secretariat summarises the practice of the Council in the following words:[137]

> Dans la pratique des Etats membres du Conseil de l'Europe, les clauses territoriales ont toujours été utilisées d'une manière restrictive, en s'appliquant uniquement aux:
> —territoires d'outre-mer (voir notamment la pratique du Royaume-Uni et des Pays-Bas);
> —territoires qui, tout en faisant partie du territoire national, jouissent d'un statut particulier. Ces territoires peuvent se situer aussi en Europe (voir sur ce point l'affaire Gillow, arrêt du 24 Novembre 1986, série A no 109, paragraphe 62). Leur exclusion du champ d'application d'un traité est souvent due au fait que les organes représentatifs n'avaient pas (encore) donné leur consentement à ce que le traité en question s'applique à leur territoire (îles Feroe et Groenland pour le Danemark; Svalbard (Spitzbergen) et Jan Mayen pour la Norvège; Bailliages de Jersey et Guernesey et l'Île de Man pour le Royaume-Uni).
> —Land de Berlin avant la réunification de 1989 pour la République Fédérale d'Allemagne.

The Secretariat clarifies also that the territorial clauses are not applied to the individual units of federal contracting parties. Special "federal clauses" are used exceptionally, as in article 25 of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.[138] If different legislation exists in the federal units of a contracting party, it may declare that the Convention applies to all or only some of them.

This practice of the Council of Europe shows a restrictive view regarding territorial declarations. Such declarations amount to (permissible or impermissible) reservations and should be used only in very specific situations (overseas territories and autonomous regions).[139] The example, mentioned above, of the declaration of Moldova concerning

137. Council of Europe, Reply to the Questionnaire of the International Law Commission, letter dated 7 Mar. 1997, pp.23–24.

138. E.T.S. 105 (1980)

139. Recently more and more interest is shown in autonomy as a method to avoid conflicts. See several relevant contributions in M. Suksi (Ed.), *Autonomy: Applications and Implications* (1998). There is here a possible risk that territorial declarations would be used in order to exclude the legal effect of treaties in more and more autonomous regions even within the Council of Europe. This would of course erode the whole effect of the treaties.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

Trans-Dniester was not intended to be covered by the concept of territorial declarations.

IX. CONCLUSIONS

A statistical overview of the data discussed above reveals the following (the first figure gives the total number, the second the percentage of that total):

Total number of treaties 1962–1998:	133	100%
Treaties with no reservation clause:	57	43%
including protocols:	34	26%
Treaties prohibiting all reservations	19	14%
Treaties permitting all reservations	1	0.75%
Specific reservations permitted	45	34%
Option systems	37	28%
Combination of prohibition of reservations with options	5	3.8%
Combination of specific reservations with options	15	11%
Clauses covering negotiated reservations *strictu senso*	2	1.5%
Temporary reservations	4	3%

It has been rightly said by Imbert that reservation clauses as such are not necessarily the ideal solution to all problems concerning reservations and are not a sufficient protection against abusive reservations.[140] However, they constitute one of the methods of controlling the extent and scope of reservations that are made. States parties seem very seldom to violate explicit reservation clauses.[141] The constant effort by the Council of Europe in this field has produced results since the issue of reservations is not be considered a major problem within the Council. This may of course also be due to other reasons, notably to the fact that the contracting parties have often all participated in the negotiations and they have common or similar legal and value systems.

Some regional principles can be discerned following the examination of the Council of Europe's practice on reservation clauses. They can claim to have become regional customary rules:

(1) Reservation clauses are included in most Council of Europe Treaties (57 per cent).
(2) Reservation clauses are as detailed as possible. Lists of specific permissible reservations are preferably included in the core text of the treaty, or otherwise as appendices to the treaty text.
(3) Reservations are in most cases permitted only when a contracting party can claim that its legislation in force presents an

140. Imbert, *op. cit. supra* n.1, at pp.206 and 214.
141. *Idem*, p.206 and n.22 where there are also examples to the contrary.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

obstacle to the full realisation of the treaty. Parties making reservations are requested to give a brief account of relevant domestic legislation.

We have seen that in spite of the constant efforts of the Council of Europe there are problems regarding the uncertainty about reservations to protocols which do not have reservation clauses as well as the extensive use of territorial declarations, derogations, exceptions and option systems.

As regards protocols amending earlier treaties, the contracting parties should include reservation clauses or clear references to the rules of the original treaty in order to avoid the existing legal uncertainty. Most of the recent treaties without reservation clauses are protocols to earlier treaties.

One of the conclusions of the present examination is that opt-out clauses have often been considered within the Council as reservations. In future this should be reflected also in the practice of the depositary and of other contracting parties.

The most important concern is still the need to clarify the terminology used in the process of registration by the Secretary General in his function as depositary. States seem to make little effort to choose the most appropriate term for their various statements. Today all statements are put by the depositary under the heading "Reservations and Declarations" unless the contracting party explicitly uses one or other term. With the exception of the correspondence regarding the Turkish declarations to the European Convention on Human Rights, discussed above, little effort seems to be made to clarify the nature of statements or draw the attention of other contracting parties to unclear statements. However, in its response to the questionnaire of the International Law Commission the Secretary General of the Council of Europe maintains that he makes an independent evaluation of all statements on the basis of Article 2(1)(d) of the Vienna Convention on the Law of Treaties. If necessary he will informally consult the State concerned.[142] No examples are given of this in the response, and in any case the number of ambiguous statements which have been registered indicates that there is still wide room for action by the Secretary General.[143]

A great challenge lies ahead with the expansion of the Council of Europe and with the recent trend to broad participation clauses in the

142. Council of Europe, *op. cit. supra* n.137, at p.5.

143. Such activity would be useful e.g. regarding the "declaration" of Sweden to the European Agreement on the Exchange of Therapeutic Substances of Human Origin (E.T.S. 26, 1958) by which the Agreement is to be applied only to human blood; another example is the earlier mentioned recent territorial "declaration" to the European Convention of Human Rights by the Republic of Moldova concerning the Trans-Dniester territory.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press

treaties of the Council. If the current practice of an extensive combination of reservations and options continues to be used, there is evident risk of an erosion of the whole system. A more restrictive approach seems therefore necessary, preferably combined with a more strict monitoring of reservations and other limitations.

https://doi.org/10.1017/S0020589300063417 Published online by Cambridge University Press