

TREATY-MAKING IN THE COUNCIL OF EUROPE

JÖRG POLAKIEWICZ

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Jörg Polakiewicz

Council of Europe Publishing

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PREFACE

When this book goes to press, the celebrations for the fiftieth anniversary of the Council of Europe will be well under way. Fifty years in the life of the Organisation have also been fifty years of treaty-making. More than 170 international conventions and agreements have been concluded with a view to fostering international co-operation, establishing common European standards and harmonising the legislation of European states. The treaties cover a wide range of subjects such as human rights, culture, education, the media, public health, social security, law and judicial co-operation. They address traditional themes of international co-operation (such as extradition and the recognition of diplomas) as well as new challenges posed by scientific and technological development (for example, data protection, genetic engineering and bioethics). In many fields they have not only set standards for Europe, but also created enforceable rights for all citizens living on this continent.

Although the treaties are the most visible contribution of the Council of Europe to the creation of a common European legal space, the procedures of treaty-making are not very well known. The same is true for the mechanisms of follow-up and monitoring which have increasingly been introduced to ensure that the treaties are not only ceremonially signed and ratified but also effectively applied for the benefit of all citizens of Europe. Except for the European Convention on Human Rights, which has been the subject of numerous publications, literature dealing in general with the treaties of the Council of Europe is scarce.

The present publication thus corresponds to an eminently practical need. It not only gives an exhaustive description of the procedures of treaty-making and treaty application in the Council of Europe, but also analyses in detail many of the legal problems involved (reservations and declarations, territorial application, participation of the European Communities, treaty amendments and state succession). The information given will be of great value to all those who in their daily work are confronted with the European treaties (parliamentarians, lawyers, judges, national and international civil servants, etc.).

Such an analysis can only be provided by someone with first-hand experience of the Council of Europe's treaty practice. The author has worked for the last six years in the Department of the Legal Adviser and Treaty Office. The Department gives legal opinions concerning the interpretation and application of Council of Europe treaties, carries out the depositary functions, and participates in the elaboration of new treaties. Before joining the Organisation, the author had worked for many years as a research fellow at the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg. Combining a research background with

practical experience, he was uniquely placed to provide this thorough analysis of treaty-making in the Council of Europe.

I am confident that this publication will provide practitioners as well as researchers with valuable information about the procedures and mechanisms governing the international treaties of the Council of Europe. It is hoped that it will also contribute to promoting a better knowledge and understanding of the conventions and agreements.

Daniel Tarschys
*Secretary General
of the Council of Europe*

CHAPTER 1: INTRODUCTION

Statutory framework

It is the aim of the Council of Europe to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage. The conclusion of conventions and agreements constitutes one of the most effective means of achieving this aim, with a view to fostering international co-operation, establishing common European standards and harmonising the legislation of European states.

The Statute of the Council of Europe, signed in London on 5 May 1949, after declaring the aim of the Organisation states in Article 1.*b*:

“This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms”.

Article 15.a of the Statute adds that:

“On the recommendation of the Consultative Assembly [now the Parliamentary Assembly] or on its own initiative, the Committee of Ministers shall consider the action required to further the aims of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General”.

To date, 173 European conventions and agreements have been concluded within the Council of Europe.¹ They are prepared and negotiated within the institutional framework of the Council of Europe. Negotiation culminates in a decision of the Committee of Ministers establishing *ne varietur* the text of the proposed treaty. All treaties have officially been published in chronological order as separate titles of the *European Treaty Series*. In addition, seven volumes of a collection entitled *European Conventions and Agreements*, each containing a certain number of treaties, have been published since 1971.² As from January 1999, the treaties are published in the *Official Gazette of the Council of Europe* which contains all official texts of

1. See the list of conventions and agreements contained in Appendix II.

2. The volumes of this collection were published by the Council of Europe in 1971, 1972, 1975, 1983, 1990, 1994 and 1999 respectively.

the Organisation. The texts of the treaties can also be consulted in English and French on the Internet, at the Council of Europe's website:³

It should be stressed that the treaties are not legal instruments of the Organisation as such, but owe their existence to the consent of those member states that sign and ratify them. Under a statutory resolution adopted by the Committee of Ministers at its 8th Session in May 1951, any agreement or convention is submitted by the Secretary General to all member states for ratification, and is binding only to those members that have ratified it. Even though they have a life of their own, it cannot be denied that the conventions and agreements concluded within the Council of Europe continue to have certain ties with that Organisation. In view of the fact that the treaties have been drafted under the aegis of the Council of Europe, that they refer to the Council in their text and preamble, and that their implementation is in many cases followed by expert committees set up within the Organisation (see Chapter 8), they involve the moral and sometimes material credit of the Organisation as such.

The treaties and their application are governed by the general principles of international law, in particular by the Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969.⁴ From a strictly legal point of view, the Vienna Convention is not directly applicable to most Council of Europe treaties which were concluded before it came into force on 27 January 1980 (Article 4). It should also be kept in mind that the Vienna Convention has not been ratified by all member states. It is generally recognised, however, that many of the rules laid down in that convention can be considered as a codification of existing customary law.⁵

The rules of the Vienna Convention apply to Council of Europe treaties without prejudice to any relevant rules of the Organisation, either those which are extant or those which might be established in the future (Article 5). In the case of the Council of Europe, such rules can be found in the Organisation's Statute (in particular in Chapter IV, regulating the composition, powers and voting procedures of the Committee of

3. <http://www.coe.int/>. See also the Council of Europe's loose-leaf publication, *Chart showing signatures and ratifications of Council of Europe conventions* (updated every two months). Information concerning the treaties may also be obtained on request from the following address: Council of Europe, Directorate of Legal Affairs, Treaty Office, F-67075 Strasbourg Cedex. Fax: (+33) 03 88 41 37 38. E-mail: treaty.office@coe.int.

4. United Nations Treaty Series, Vol. 1155, 331, *ILM*, 8 (1969) 681. The convention's *travaux préparatoires*, including the International Law Commission's commentary on the draft convention, are reproduced in R.G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978).

5. ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports*, 1971, 47; *Fisheries Jurisdiction (UK v. Iceland)*, *Jurisdiction of the Court*, judgment, *ICJ Reports*, 1973, 18; *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, judgment of 25 September 1997, *ICJ Reports*, 1997, 32.

Ministers), in resolutions of a statutory character which were adopted in 1951⁶ and 1993,⁷ and in the rules of procedure of the Committee of Ministers, and for meetings of the Ministers' Deputies (this applies to voting rules).

The *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, which the Committee of Ministers approved in 1962 and revised in 1980,⁸ are not, strictly speaking, "relevant rules of the Organisation". However, they give an indication of the Council's established practice. As these clauses are habitually inserted into the treaties concluded within the Council of Europe, they take precedence over the general rules of the Vienna Convention.

Terminology used

The treaties are officially referred to as "conventions and agreements", although individual treaties are also entitled "charter",⁹ "code",¹⁰ "general agreement"¹¹ or "protocol".¹² These variations in terminology do not indicate any differences in the legal nature and effects of the treaties.

Originally a clear distinction was made between a "convention" and an "agreement". A convention usually required the deposit of an instrument of ratification, acceptance or approval, whereas an agreement could be signed with or without reservation as to ratification, acceptance or approval.¹³ This distinction was enshrined in the *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe* (Article a). Following changes in the practice of member states, the distinction is no longer followed systematically. Nowadays even some

6. Resolution adopted by the Committee of Ministers at its 8th Session, May 1951, reproduced in Appendix III.

7. Statutory Resolution (93) 27 on majorities required for decisions of the Committee of Ministers, adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session, reproduced in Appendix IV.

8. *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe* (1980).

9. For example, European Charter of Local Self-Government (ETS No. 122, 1985), European Charter for Regional or Minority Languages (ETS No. 148, 1992).

10. For example, European Code of Social Security (ETS No. 48, 1964).

11. For example, General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2, 1949).

12. The term "protocol" is usually used for treaties which amend (for example, Protocol Amending the European Social Charter, ETS No. 142, 1991) or complete (for example, Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, ETS No. 159, 1995) a convention.

13. E. Harremoës, Preface, in *European Conventions and Agreements*, Vol. I, 1949 to 1961 (1993), 4-5.

conventions can be signed without reservation as to ratification, acceptance or approval.¹⁴

Council of Europe treaties are usually opened for signature by member states, and sometimes by other states which have participated in their development. The participation of the European Community is governed by special provisions (see Chapter 6). "Signature" designates the act of signing the original of the convention, which is done by a representative of a state or an international organisation which is duly authorised by full powers. The signature does not commit the state or international organisation to implement the convention, but only marks its intention to become a party to the convention in question, usually after ratification, acceptance or approval (see Chapter 3).

"Ratification, acceptance, approval or accession" each refer to the international act whereby a state establishes at international level its consent to be bound by a treaty (Article 2.b of the VCLT). All Council of Europe treaties allow that the instruments of ratification, acceptance, approval or accession be deposited with the Secretary General of the Council of Europe who acts as "depository" of the treaties. The depositary functions for all treaties are carried out by the Department of the Legal Adviser and Treaty Office which is part of the Directorate of Legal Affairs. Two treaties provide for a joint exercise of depositary functions: The *Convention on Mutual Assistance in Tax Matters* (ETS No. 127, 1988, Article 32), which was drafted jointly with the OECD, and the *Convention on the Recognition of Qualifications Concerning Higher Education in the European Region* (ETS No. 165, 1997, Article XI.9), which was drafted and adopted under the joint auspices of the Council of Europe and Unesco.

Conventions and agreements of the Council of Europe must be distinguished from partial agreements which are not international treaties but merely a particular form of co-operation within the Organisation. Partial agreements allow member states to abstain from participating in a certain activity advocated by other member states. From a statutory point of view, a partial agreement remains an activity of the Organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by the members of the partial agreement.

According to a resolution adopted by the Committee of Ministers at its 9th Session, on 2 August 1951, and *Statutory Resolution (93) 28 on partial and*

14. For example, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990); European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (ETS No. 153, 1994); European Convention on Nationality (ETS No. 166, 1997); Criminal Law Convention on Corruption (ETS No. 173, 1999).

enlarged agreements, two conditions have to be met in order to set up a partial agreement:

- an authorisation by the Committee of Ministers for the establishment of a partial agreement; and
- a resolution setting up the partial agreement which contains the agreement's statute and is adopted only by those states that wish to do so.

Accession to a partial agreement does not require an instrument of accession to be formally deposited. Member states of the Council of Europe may accede to a majority of partial agreements by simple notification addressed to the Secretary General (Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs [Pompidou Group], Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters, European Centre for Global Interdependence and Solidarity [Lisbon Centre], European Commission for Democracy through Law [Venice Commission], Youth Card, European Centre for Modern Languages), and Group of States against Corruption [Greco]). Special rules are in force for the Social Development Fund, the Partial Agreement in the Social and Public Health Field, the European Pharmacopoeia,¹⁵ the European Support Fund for the Co-production and Distribution of Creative Cinematographic and Audiovisual Works (Eurimages),¹⁶ and the European Audiovisual Observatory. As in the case of treaties, the accession of non-member states usually requires an explicit invitation by the Committee of Ministers.

Subjects covered by the European treaties and their impact

Council of Europe treaties cover a vast variety of subjects which reflect the wide range of activities of the Organisation. The Statute names in particular human rights and fundamental freedoms, and economic, social, cultural, scientific, legal and administrative matters (Article 1.*b*). Only matters relating to national defence are explicitly excluded from the scope of activities of the Council of Europe (Article 1.*d*).

The *Chart of signatures and ratifications*, which is a regularly up-dated publication of the Directorate of Legal Affairs, uses the following classification:

- Statute/Privileges and Immunities (10 treaties);

15. This partial agreement is based on a treaty, the Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50, 1964); see Chapter 6 pp. 74-76.

16. The rules governing the accession of member states were modified by Resolution (98) 10 modifying Resolution (88) 15 setting up a European Support Fund for the Co-production and Distribution of Creative Cinematographic and Audiovisual Works (Eurimages), adopted at the 638th meeting of Ministers' Deputies on 2 July 1998.

- European Convention on Human Rights (12 treaties);
- Prevention of Torture (3 treaties);
- Minorities (2 treaties);
- European Social Charter (5 treaties);
- Social Matters (15 treaties);
- Public Health (18 treaties);
- Education/Culture/Sport (14 treaties);
- Radio/Television (10 treaties);
- Protection of Animals/Environment (10 treaties);
- International Law/Movement of Persons (14 treaties);
- International Law/Nationality (5 treaties);
- Commercial Law (10 treaties);
- Civil Law/Bioethics (15 treaties);
- Public Law/Data Protection (9 treaties);
- Criminal Law (13 treaties).

The 173 treaties which have so far been concluded cover these subjects in a more or less coherent manner.¹⁷ It is in particular in the field of human rights, criminal law and culture that a systematic approach based on a certain number of basic conventions and developing protocols has been adopted. In some cases, conventions constituted an *ad hoc* reaction to a particular problem which, according to the political actors, required a European response.

The strength of the treaties lies in their formality and the fact that they are legally binding on those states which have accepted them. States which become parties to a convention incur legal obligations which are enforceable under international law. Wherever it is felt necessary to adopt legally binding norms, this can only be done through securing states' acceptance of a treaty.

A potential weakness of international treaties is the slowness of the ratification process. There is no obligation to ratify, even after having voted in the Committee of Ministers in favour of the text of a treaty, because such a vote does not entail any commitment to proceed to ratification. Ultimately the decision whether or not to ratify lies with each state individually and there is no way of guaranteeing that all member states will ratify a treaty. It can be said, however, that the record of ratifications of Council of Europe treaties is more favourable than that of many other international or European organisations.

17. Brief descriptions of the treaties' contents are given in the Council of Europe publication *Summaries of Council of Europe Treaties* (1999).

Many of the Council of Europe treaties have an immediate impact on the life of European citizens. This is obvious for the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) and its additional protocols which set out inalienable rights and freedoms for each individual and commit states to guarantee these rights to everyone within their jurisdiction. Under the Convention, machinery for international enforcement was set up allowing states and individuals to have human rights violations examined and judged. The European Court of Human Rights renders binding decisions for the states concerned, which have prompted or accelerated legislative reforms in many countries.¹⁸ The protection of human rights has been extended by numerous other instruments, covering in each case specific fields, such as the *European Social Charter* (ETS No. 35, 1961) which protects fundamental social rights, the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108, 1981), the *Framework Convention for the Protection of National Minorities* (ETS No. 157, 1995) and the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (ETS No. 164, 1997).

Council of Europe conventions in the legal field are vital for the fight against crime and for co-operation between judicial authorities all over Europe. They regulate questions such as extradition and mutual assistance in criminal matters as well as money laundering and confiscation of the proceeds of crime. The multilateral conventions often replace hundreds of bilateral treaties between the member states. A treaty which is in force for the forty-one member states has the potential to replace 820 bilateral treaties. In the field of judicial co-operation in civil matters, one important example is the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ETS No. 105, 1980), which ensures that children of divorced parents can be returned to their legal guardian quickly.

The *European code of Social Security* (ETS No. 48, 1964) and the Protocol thereto guarantee a minimum level of protection, including medical care, sickness, maternity, unemployment, invalidity and survivors' benefits, as well as family allowances and pensions. The code has prompted legislative reform in many countries. Other treaties in the social field facilitate international mobility for workers and their families. The *European Convention on Social Security* (ETS No. 78, 1972) secures co-ordination of social security legislation by ensuring equality of treatment, the conservation of rights already acquired or in the process of acquisition and the transfer of welfare

18. See the European Court of Human Rights publication, *Survey. Forty years of activity. 1959-98* (1999) [this publication is prepared by the Registry of the Court and regularly updated].

benefits abroad. It is based on the principle that in individual cases the national legislation of a single country should be applied. The *European Convention on Social and Medical Assistance* (ETS No. 14, 1953) is designed to eliminate discrimination against foreigners who are nationals of contracting states. In this context mention should also be made of the standard European form for medical care abroad which was originally launched by the Council of Europe on the basis of a recommendation of the Committee of Ministers.¹⁹

The *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50, 1964) guarantees the quality of medicine in Europe by the systematic use of analysis procedures and reference substances.²⁰ Parties are under an obligation to take the necessary legislative and administrative measures in order to render the specifications of the European Pharmacopoeia concerning medicines for human and veterinary use binding to all manufacturers and importers. The European Pharmacopoeia takes its place alongside the two other major pharmacopoeia of Japan and the United States.

The *European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities* (ETS No. 106, 1980) has greatly improved co-operation in a wide range of areas between towns, villages and territorial communities on either side of Europe's frontiers. It has been completed by two additional protocols recognising the right of territorial communities to conclude transfrontier co-operation agreements and extending the convention's scope of application to interterritorial co-operation.²¹

The *European Convention on Transfrontier Television* (ETS No. 132, 1989) facilitates the circulation of television programme services all over Europe by guaranteeing freedom of reception and retransmission of such services on the territories of the parties. It also contains a minimum set of requirements concerning programme content (for example, right of reply; rules on advertising and sponsorship).

Paraphrasing Lord Denning's colourful description of the effects which Community law produces in the member states of the European Union,²² it has been said that European law emanating from the Council of Europe will

19. See also Recommendation No. R (86) 4 of the Committee of Ministers to member states on the use of a standard European form for the provision of medical care to persons during temporary residence abroad, adopted by the Committee of Ministers on 17 February 1986 at the 393rd meeting of the Ministers' Deputies.

20. See *European Pharmacopoeia*, 3rd edition, starting from 1995, published by the Council of Europe.

21. Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 159, 1995); Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 169, 1998).

22. *H. P. Bulmer Ltd v. J. Bollinger SA*, (1974) Ch. 401, 418.

never be “like an incoming tide [which] flows into the estuaries and up the rivers”.²³ Although the Council of Europe has more than twice as many member states as the European Union, its activities and achievements are less widely known and the impact is less strongly felt than that of European law emanating from the Community institutions in Brussels. Whereas legal instruments adopted by the Community organs produce, under certain conditions, an immediate and direct effect in each member state, the Council of Europe has no such legislative power. Legal instruments prepared within the Organisation require adoption or transformation into domestic law before they become effective in the member states (see Chapter 9).

23. H.-J. Bartsch, Council of Europe, *Yearbook of European Law*, Vol. I (1981), 417 (417).

CHAPTER 2: DRAFTING, ADOPTION AND OPENING FOR SIGNATURE

Introduction

The drafting of the treaties is governed by a rather flexible procedure based on the Organisation's practice which was supplemented on a particular point in 1993 by *Statutory Resolution (93) 27 on majorities required for decisions of the Committee of Ministers*.²⁴

No general conclusion can be drawn as to the speed of preparation and entry into force of a treaty. The periods involved may range from a couple of months to several years, depending not only on the nature and degree of the problems to be solved, but also on the political will of member states. If there is a pressing problem and a clear political will to tackle it, the drafting can be done rather quickly. One example is the *European Convention on Spectator Violence and Misbehaviour at Sport Events and in particular at Football Matches* (ETS No. 120, 1985). Following the tragic events at the European Cup Final match on 29 May 1985 at the Heysel stadium in Brussels, the European Ministers for Sport agreed on 11 June 1985 that the Council of Europe should draw up a convention on this topic. The text of the convention was adopted by the Committee of Ministers on 23 July 1985 and the convention was opened for signature on 19 August 1985. It entered into force on 1 November 1985, only 155 days after the tragic incident. The *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine on the Prohibition of Cloning Human Beings* (ETS No. 168, 1998) which was drafted in a couple of months is another example of a very rapid adoption and opening for signature of a treaty.

Initiative and drafting

The initiative to draft a new treaty may come from the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities of Europe, a conference of specialised ministers or a steering committee. Conferences of specialised ministers which cover the various areas of the Council of Europe's activities are held regularly.²⁵ For example,

24. Adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session, reproduced in Appendix IV. Generally, on the procedure: F. Albanese, "Le processus législatif du Conseil de l'Europe", *Revue trimestrielle de droit européen*, 1986, 391-416.

25. See Resolution (71) 44 on the conferences of specialised ministers, adopted by the Committee of Ministers on 16 December 1971.

the European Ministers of Justice have launched the preparation of the *European Convention on Information on Foreign Law* (ETS No. 62, 1968), the *European Convention on State Immunity* (ETS No. 74, 1972), the *European Agreement on the Transmission of Applications for Legal Aid* (ETS No. 92, 1977) and the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ETS No. 105, 1980). Statistically it is the Parliamentary Assembly which is at the origin of the biggest number of treaties, the most prominent example being the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950).

Any initiative to draft a new treaty has to be formally approved by the Committee of Ministers, the Organisation's executive organ. It is then inscribed in the annual programme of activities. The Committee of Ministers usually entrusts a steering committee, or a committee of experts acting under the authority of one of the steering committees, with the task of drafting a new treaty. Steering committees are committees which are answerable directly to the Committee of Ministers and responsible for a substantial portion of the Council of Europe's intergovernmental activity (for example, human rights, crime problems, legal co-operation, cultural co-operation, social security, public health, etc.). In exceptional cases, the drafting can also be done by an *ad hoc* committee which is answerable directly to the Committee of Ministers. This happened in the case of the *Framework Convention for the Protection of National Minorities* (ETS No. 157, 1995) which was prepared by the *Ad hoc* Committee for the Protection of National Minorities (CAHMIN).

Each committee is given specific terms of reference which define its task, its membership, and the duration of the terms of reference.²⁶ It is not unusual to give an "exploratory mandate", inviting the committee to study a certain problem and propose an appropriate instrument (a recommendation or a convention) for adoption by the Committee of Ministers.

The committee's activity is governed by *Resolution (76) 3 on committee structures, terms of reference and working methods*, which was adopted by the Committee of Ministers on 18 February 1976, at the 254th meeting of Ministers' Deputies.²⁷ This resolution applies to all committees which are composed of persons designated by the governments of member states and set up by the Committee of Ministers, or with its authorisation.

26. The terms of reference are regularly published in a *Compendium of Terms of Reference of Intergovernmental Committees*, published by the Council of Europe's Research and Planning Unit and regularly updated.

27. Resolution (76) 3 has been amended several times, notably by the decisions taken by the Ministers' Deputies at their 455th meeting in March 1991.

The general terms of reference contained in Appendix I mention the “preparation of a draft convention or agreement” (Part one).

Unless the terms of reference provide otherwise, the members of a committee of experts are designated by the governments of the member states. Participation in the work of expert committees is voluntary. With regard to the *European Convention on Foreign Money Liabilities* (ETS No. 60, 1967), the British Government declared for example:

“Her Majesty’s Government are sympathetic towards attempts to bring European laws into harmony, and in principle would like to see a convention on monetary law for this purpose. They have, however, found that the present draft convention is based on ideas which, having regard to business and legal opinion in the United Kingdom, they would not be able to accept. In these circumstances, while sending this message of interest and sympathy, they feel that they could not properly participate in the detailed examination and drafting work of the Expert Committee”.²⁸

Governments may designate more than one member for a particular committee. However, only one of them will be entitled to take part in the voting (Article 14.a of Appendix II to Resolution (76) 3 – Rules of Procedure for Council of Europe committees). It must be emphasised that formal voting is relatively rare. The committees “shall state their conclusions in the form of unanimous recommendations, or, if this proves impossible, they shall make a majority recommendation and indicate the dissenting opinions” (Article 14.c of Appendix II to Resolution (76) 3). The principle of unanimity is important, because frequent resort to majority decisions would diminish the convention’s chances of being ratified by a significant number of member states. Committees may appoint a rapporteur or drafting committees in order to carry out preparatory work (Article 19 of Appendix II to Resolution (76) 3). They may be assisted by consultant experts.²⁹

Non-governmental and professional organisations as well as non-member states are playing an increasingly active role as observers to the expert committees. In 1972, *Resolution (72) 35 on the relations between the Council of Europe and non-governmental organisations* was adopted. It was later replaced by *Resolution (93) 38* which contains rules on the granting and withdrawal of consultative status to international non-governmental organisations. Currently more than 350 NGOs enjoy consultative status with the Organisation. The terms of reference of an expert committee may explicitly authorise non-member states, intergovernmental or non-governmental organisations to participate as observers. If they are not

28. *Explanatory report on the European Convention on Foreign Money Liabilities* (1968), 6 (§ 7).

29. See Resolution (76) 4 on consultants, adopted at the 254th meeting of Ministers’ Deputies on 18 February 1976.

mentioned in the terms of reference, the relevant steering committee may, by a unanimous decision, admit observers (paragraph 5 of Resolution (76) 3). The participation of observers should be in the interest of the committee in question and should not affect the efficiency of its work.³⁰ Observers have no right to vote. However, with the chairperson's permission, they may make oral or written statements. Their proposals may be put to a vote if sponsored by a committee member (Article 9 of Appendix II to Resolution (76) 3).

There is a sharp contrast to the usual practice within the United Nations where treaties are drafted by plenipotentiaries of individual states acting within the framework of diplomatic conferences. Although the experts sitting on Council of Europe committees are appointed by the governments of member states, they are also answerable to the Committee of Ministers. To a certain extent, they act under their own responsibility without directly committing their governments. These features provide the committees with some freedom of action which places their work in a collective perspective.³¹ Although the experts are usually public officials who are subject to instructions from their governments, the weight of individual states is less important than in a diplomatic conference. The influence of individual states is further weakened by the intervention of the Parliamentary Assembly. Under these circumstances, a truly collective will can often develop and prevail over purely national differences.

Once a committee of experts has finalised the text of a draft treaty, this is submitted to the competent steering committee. The steering committee approves the text and submits it to the Committee of Ministers for adoption.

Consultation of the Parliamentary Assembly³²

Under Article 23.a of the Statute of the Council of Europe, the Committee of Ministers may ask the Parliamentary Assembly for an opinion on any draft treaty. As long ago as May 1952 the Ministers' Deputies adopted *Resolution (52) 26 on Consultation of the Consultative Assembly*. The resolution provided that the Committee of Ministers may in appropriate cases

30. Messages from the Committee of Ministers to steering committees and *ad hoc* committees of experts concerning the admission of observers, adopted at the 347th and 420th meetings of Ministers' Deputies held respectively in May 1982 and October 1988. See also the criteria for granting non-European states observer status with cultural co-operation bodies (CDCC and CDSS) which were approved by the Committee of Ministers during the 628th meeting of Ministers' Deputies on 16 April 1998 (Item 7.1).

31. H. Golsong, "Quelques remarques à propos de l'élaboration et de la nature juridique des traités conclus au sein du Conseil de l'Europe", in *Mélanges offerts à Polys Modinos* (1968), 51 (55).

32. See W. Schwimmer, "Der Einfluß der Parlamentarischen Versammlung auf die Konventionen des Europarates", in B. Haller/H. C. Krüger/H. Petzold (eds.), *Law in Greater Europe: Towards a common legal area? Essays in honour of Heinrich Klebes* (1999), 376-408.

invite the Assembly to give its reasoned opinion, to be presented within a fixed time-limit, on draft conventions drawn up by the Committee of Ministers. Subsequently, at its 76th Session, held in April 1985, the Committee of Ministers approved the conclusions of the Ministers' Deputies on working methods in the Council of Europe which stated, notably, that the Assembly should, as a rule, be given the possibility of expressing an opinion on draft conventions through committees concerned.³³

In recent years the Committee of Ministers has regularly sought the opinion of the Parliamentary Assembly on most draft conventions, notably with respect to the *Criminal Law Convention on Corruption* (ETS No. 173, 1999), *Convention on the Protection of the Environment through Criminal Law*, the *European Convention on Nationality* (ETS No. 166, 1997), the *Convention on Human Rights and Biomedicine* (ETS No. 164, 1997), the *European Convention on the Exercise of Children's Rights* (ETS No. 160, 1996) and *Protocol No. 11 to the ECHR* (ETS No. 155, 1994). However, the Assembly was not systematically consulted on all draft treaties, in particular as far as additional or amending protocols of a more technical nature were concerned. It should be added that the Parliamentary Assembly is also formally represented in certain steering committees, such as the European Committee on Legal Co-operation (CDCJ) and the Council for Cultural Co-operation (CDCC).

The opinions which have been given by the Parliamentary Assembly often contain most valuable comments which are taken into account by the Committee of Ministers when it finalises the draft. Consultations of the Parliamentary Assembly also allow the political acceptance of the draft instruments to be gauged, thereby avoiding the adoption of treaties which will later not be ratified by national parliaments.

In 1998, the Parliamentary Assembly went a step further and requested to be formally associated with the adoption of conventions and agreements. Recommendation 1361 (1998)³⁴ asked the Committee of Ministers to commit itself immediately, through the adoption of a statutory resolution, to systematically submit all draft conventions and agreements to the Assembly for approval, prior to their adoption. In case of disagreement, the matter should be referred to a joint working group. In addition, the Assembly recommended the inclusion of the principle of co-decision in the Statute when the latter is amended in the course of structural reforms. The propos-

33. Conclusions of the Ministers' Deputies on working methods in the Council of Europe, approved by the Committee of Ministers at its 76th Session in April 1985.

34. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 18 March 1998. See also Parliamentary Assembly Doc. 8017, *Modification of the procedure for adoption of Council of Europe conventions*, Report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Schwimmer).

al was clearly inspired by the co-decision procedure in the EC Treaty (Article 251 [former Article 189b] which had been inserted by Article G (61) of the *Treaty on European Union*). The proposals were also examined by the Committee of Wise Persons which had been set up following the Second Council of Europe Summit in October 1997. This committee endorsed the Parliamentary Assembly's recommendations as far as systematic consultation and the setting-up of a joint working party are concerned.³⁵ In its reply to Recommendation 1361 (1998), the Committee of Ministers agreed

“that it will consult the Parliamentary Assembly in the future on all draft treaties. However, in practice, a small number of treaties, of an exclusively technical nature, may not require such a consultation”.³⁶

The Committee of Ministers also stressed the importance of active participation of the Assembly in the work of the steering committees on which it is represented.

Adoption by the Committee of Ministers

Before the adoption of a treaty is formally put on the agenda of the plenary Committee, the text is often discussed within the competent rapporteur group. Rapporteur groups have been set up for the different fields of activity of the Council of Europe (human rights; legal co-operation; education, culture and sport; social and health questions; environment and local authorities; etc.). They are responsible for preparing the debates on certain subjects of particular importance.³⁷

Discussions within the Committee of Ministers are unlikely to produce major changes in the text of a draft treaty. There are, however, instances when the Committee of Ministers takes a more active role in overcoming the deadlock reached on questions of a rather political nature. For example, it was only within the Committee of Ministers that a compromise could be found for the drafting of Section IV of the *Framework Convention for the Protection of National Minorities* (ETS No. 157, 1995) which provides for the monitoring of the implementation of the convention. The committee responsible for the drafting, the *Ad hoc* Committee for the Protection of National Minorities (CAHMIN), had proposed different options including supervision by the Committee of Ministers, the establishment of a special committee and the creation of a committee of independent governmental experts. Finally, it was decided to entrust the Committee of Ministers with

35. *Building greater Europe without dividing lines. Report of the Committee of Wise Persons to the Committee of Ministers* (1998), 8 and 20 (§ 48). The report was presented at the 103rd Session of the Committee of Ministers, Strasbourg, 3-4 November 1998.

36. Decision adopted on 27 April 1999 at the 668th meeting of Ministers' Deputies (Item 10.3).

37. See in particular Resolution (89) 40 on the future role of the Council of Europe in European construction, adopted during the 506th meeting of Ministers' Deputies in January 1994; G. De Vel, *The Committee of Ministers of the Council of Europe* (1995), 88-92.

the monitoring task, but to set up at the same time an advisory committee which would assist the Committee of Ministers (Articles 24 to 26 of the convention).³⁸ It was also only on the level of the Committee of Ministers that a compromise regarding the maximum number of reservations permitted under the *Criminal Law Convention on Corruption* (ETS No. 173, 1999) could be found (see Chapter 7 pp. 86-88).

In accordance with Article 20.d of the Statute of the Council of Europe, the adoption of the treaty text by the Committee of Ministers requires a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.

Opening for signature

Until 1993, the decision to open a treaty for signature was based on a "reversed unanimity" rule. It was presumed that, once the two-thirds majority had been obtained for the adoption of the text, there was unanimous agreement in favour of opening it for signature unless any representative in the Committee of Ministers expressly objected.³⁹

Although rather flexible, this practice had the disadvantage of allowing a single state to block the opening of a convention for signature. This problem arose with regard to the *draft European convention on the protection of the underwater cultural heritage* and the *draft European convention for the protection of international watercourses against pollution*, which had been presented to the Committee of Ministers for adoption in 1985 and 1987 respectively. Neither text was ever opened for signature, in the case of the first draft treaty as a result of political difficulties over the question of the convention's jurisdictional scope and consequent potential problems of delimitation between Greece and Turkey in the Eastern Aegean.⁴⁰ Some of the less controversial provisions of the draft convention were later included in the *European Convention on the Protection of the Archaeological Heritage* (revised) (ETS No. 143, 1992) which applies also to archaeological heritage situated underwater (Article 1.3). The project of a *European convention for the protection of international watercourses* was eventually abandoned.

In order to avoid similar difficulties in the future, the Committee of Ministers adopted on 14 May 1993 Statutory Resolution (93) 27 on majorities required for decisions of the Committee of Ministers, according to which:

38. See Chapter 7 pp. 145-147.

39. See H. Golsong, "Ouverture à la signature des Etats membres de conventions et accords adoptés au sein du Conseil de l'Europe", in *Miscellanea W.J. Ganshof van der Meersch*, Vol. 2 (1972), 151-61.

40. J. Blake, "The Protection of the Underwater Cultural Heritage", *ICLQ*, 45 (1996), 819 (824-27).

“[d]ecisions on the opening for signature of conventions and agreements concluded within the Council of Europe shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on Committee, as set out in Article 20.d of the Statute”.

Explanatory report

In 1965 the Parliamentary Assembly recommended the publication of the *travaux préparatoires* of Council of Europe conventions and agreements.⁴¹ In view of the confidentiality of the experts' working documents, the Committee of Ministers could not accept this proposal. At the same time, the Ministers' Deputies agreed that it would be appropriate to publish a report which, without revealing the attitudes of the various experts of governmental delegations during the proceedings, would be of a nature to facilitate the application of their provisions.⁴² It was decided that henceforth committees of experts, on concluding their work, would issue an explanatory report.⁴³

Since the mid-sixties the same committee that prepares the text of a draft convention also issues an explanatory report which does not normally reveal the attitude of the various committee members. When the Committee of Ministers adopts a convention or agreement it also authorises the publication of the explanatory report by the usual two-thirds majority (Article 20.d of the Statute). However, the explanatory reports for the *European Convention on Extradition* (ETS No. 24, 1957) and the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30, 1959) were published in 1969, long after their opening for signature. A commentary on the *European Convention on Establishment* (ETS No. 19, 1955) was adopted by the Standing Committee of the convention at its 12th session in 1979 and published in 1980.⁴⁴ Only in 1998, did the Committee of Ministers authorise the publication of the explanatory report to the *Revised European Code of Social Security* (ETS No. 139, 1990).⁴⁵

The explanatory report cannot constitute a source of authoritative interpretation of the text of a given treaty. Only the parties to a treaty have the

41. Recommendation 417 (1965) of 25 January 1965.

42. Reply by the Committee of Ministers to Recommendation 417 (1965), adopted during the 145th meeting of the Ministers' Deputies in October 1965.

43. All official publications of explanatory reports can be obtained for a fee in English or French from: Council of Europe Publishing, Council of Europe, F-67075 Strasbourg Cedex. Fax: (33) 03 88 41 27 80. E-mail: publishing@coe.int.

44. *Commentary on the European Convention on Establishment adopted by the Standing Committee* (1980).

45. At the 641st meeting of Ministers' Deputies held on 15 and 18 September 1998 (Item 6.2).

right to give an authoritative interpretation of its terms.⁴⁶ The official publication of the explanatory report usually contains the proviso “this report does not constitute an instrument providing an authoritative interpretation of the text of the convention although it may facilitate the understanding of the convention’s provisions”.

However, given the fact that the treaty and the explanatory report are negotiated simultaneously, the latter constitutes at least a supplementary means of interpretation (Article 32 of the VCLT). With regard to the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ETS No. 126, 1987), the Rapporteur Group on Legal Co-operation acknowledged unanimously in 1991 that “the explanatory report is of great value for the interpretation of the convention, but that it does not have the same value as the text of the convention”. The explanatory report has to be taken into consideration when giving an opinion concerning the interpretation of the convention. However, “any such interpretation cannot be an authoritative and therefore binding interpretation, regardless of the weight of the arguments based on the explanatory report”.⁴⁷

In some cases, the explanatory report may even contain elements which were not included in the text of the final treaty, spelling out the intention of the drafters with regard to specific provisions. The explanatory report to *Protocol No. 11 to the ECHR*, restructuring the control machinery established thereby (ETS No. 155, 1994) contains important indications of how the drafters envisaged that the new system would operate (for example, the term “judge rapporteur” can only be found in the explanatory report, not in the convention itself). It has therefore been suggested that in such cases the explanatory report may even be considered as part of the context in which the meaning of certain terms used in the treaty is to be ascertained (Article 31, paragraphs 1 and 2, of the VCLT).⁴⁸

While the publication of an explanatory report has now become the norm, it is not mandatory. Protocols which introduce only minor amendments to

46. The Permanent Court of International Justice declared in its Advisory Opinion of 6 December 1923 in the *Jaworzina* case (*PCIJ*, Series B No. 8, at 37) that “the right to give an authoritative interpretation of a legal rule belongs to the person or body who has the power to modify or suppress it”.

47. Report prepared by the Deputies’ Rapporteur Group on Legal Co-operation (CM (91) 55, reproduced in European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), *Some Issues concerning the interpretation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf (93) 10 of 3 May 1993, 9 (11).

48. A. Drzemczewski, “A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol No. 11”, *Collected Courses of the Academy of European Law*, Vol. VI, Book 2 (1997), 73. This was also the position taken by the CPT, *ibid.*, 13. See also Italian Court of Cassation, Judgment No. 7950 of 21 July 1995, *RDI*, 79 (1996), 524 concerning the European Convention on the Adoption of Children (ETS No. 58, 1967).

a treaty may well not be accompanied by an explanatory report. This is for example the case of the two protocols to the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* which were adopted in 1993 (ETS No. 151 and 152, 1993).

So far, only in the case of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) the whole of the *travaux préparatoires* has been published. The material was first disseminated during the years 1961-64 in a roneotyped edition, which was confidential and only for the use of governments and of the Commission and the Court. Since there was a great interest in the *travaux préparatoires* from persons interested in the history of the European Convention on Human Rights, including scholars, research workers and practising lawyers, the Committee of Ministers decided in 1972 to authorise their publication.⁴⁹ In 1998, the Steering Committee on Bioethics (CDBI) recommended, for the time being, not to declassify the *travaux préparatoires of the Convention on Human Rights and Biomedicine* (ETS No. 164, 1997).⁵⁰

49. *Collected Edition of the Travaux Préparatoires*, 8 volumes (1975 to 1985).

50. See Decisions adopted by the Ministers' Deputies at their 620th meeting on 12 February 1998 (Item 10.1).

CHAPTER 3: EXPRESSION OF CONSENT TO BE BOUND, TERMINATION AND SUSPENSION

Expression of consent to be bound

Member states of the Council of Europe

In accordance with the 1969 *Vienna Convention on the Law of Treaties*, the consent to be bound by a treaty is usually expressed by ratification, acceptance or approval. Contrary to the usual practice within the United Nations, Council of Europe treaties do not specify a certain deadline for signatures. Even treaties which were drafted during the 1950s remain open for signature by the member states. Non-member states which participate in the elaboration of a treaty are usually also authorised to sign it. For instance, several treaties in the fields of legal co-operation, education and sport may be or have been signed by the United States and Canada which regularly participate in the work of a number of expert committees.⁵¹ Finally, there is a group of treaties which are related to the *European Cultural Convention* (ETS No. 18, 1954).⁵² Non-member states which are parties to this convention are automatically entitled to become parties to these related treaties, usually by signature and ratification.

51. Canada and the United States have ratified the Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983). Canada is also a party to the Anti-doping Convention (ETS No. 135, 1989), the United States to the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127, 1988). Both states are entitled to become parties to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990); Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164, 1997); Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165, 1997); European Convention on Nationality (ETS No. 166, 1997); Criminal Law Convention on Corruption (ETS No. 173, 1999). 52. European Agreement on Continued Payment of Scholarships to Students Studying Abroad (ETS No. 69, 1969); European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985); European Convention on Transfrontier Television (ETS No. 132, 1989); Anti-Doping Convention (ETS No. 135, 1989); European Convention on the General Equivalence of Periods of University Study (ETS No. 138, 1990); European Convention on the Protection of the Archaeological Heritage (revised) (ETS No. 143, 1992) which replaced the European Convention on the Protection of the Archaeological Heritage (ETS No. 66, 1969); European Convention on Cinematographic Co-production (ETS No. 147, 1992); European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (ETS No. 153, 1994); Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165, 1997).

If the treaty provides it, the signature alone can express the consent of a state to be bound by the convention (“signature without reservation as to ratification, acceptance or approval”). In recent years, such clauses have been introduced increasingly into Council of Europe treaties.

If ratification, acceptance or approval is required, the mere signature does not commit the state to implement the convention, but only marks its intention to become a party. According to Article 18 of the *Vienna Convention on the Law of Treaties*, the signature entails the obligation not to defeat the object and purpose of a treaty prior to its entry into force, at least until the state has made its intention clear not to become a party to the treaty. The International Law Commission remarked in its commentary that it appears to be generally accepted that “an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a state which has signed a treaty subject to ratification”.⁵³

The precise scope of this obligation has nevertheless remained controversial. In the case concerning certain German interests in Polish Upper Silesia, the Permanent Court of International Justice acknowledged that, notwithstanding its signature of the Treaty of Versailles, Germany had retained its right to dispose of property situated in the plebiscite area.⁵⁴ The International Court of Justice adopted a similar position in the North Sea Continental Shelf case. It declared that a state which, though entitled to do so, had not ratified or acceded to a convention, could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.⁵⁵

The obligation not to defeat the object and purpose of a treaty prior to its entry into force can be seen as an obligation of good faith. Especially as far as the “normative” treaties of the Council of Europe are concerned, the signature may have a “chilling effect” on the existing legislation and practices which already conform to the standards of the treaty.

During their accession to the Council of Europe, many new member states have undertaken a number of commitments which often coincided with conventional obligations that the states formally accepted only much later. Pending the adoption of the requisite legislation abolishing capital punishment, some states decreed for example a *de facto* moratorium on the enforcement of the death penalty (for example, Albania, Latvia,⁵⁶

53. *Yearbook of the International Law Commission*, 1966, Vol. II, 202.

54. PCIJ, Judgment No. 7 of 25 May 1926, *Series A*, No. 7, 30.

55. ICJ, judgment of 20 February 1969, *ICJ Reports*, 1969, 25-6.

56. Latvia signed Protocol No. 6 to the ECHR on 26 June 1998.

Lithuania,⁵⁷ Ukraine,⁵⁸ the Russian Federation⁵⁹). If such a state later signs the *Protocol No. 6 to the ECHR* (ETS No. 114, 1983) which abolishes the death penalty, it can be argued that a resumption of executions would not only violate the commitments entered into during the accession procedure, but also defeat the object and purpose of Protocol No. 6. The political consensus over this question found a very clear expression in the Final Declaration of the second Council of Europe summit (10-11 October 1997) in which the heads of state and government called for the universal abolition of the death penalty and insisted on the maintenance, in the meantime, of existing moratoria on executions in Europe.

It is common procedure that the signature of a treaty or the deposit of an instrument of ratification, acceptance, approval or accession be carried out by a representative of the state concerned in the presence of the Secretary General of the Council of Europe or their deputy. In the case of member states, it is usually the Permanent Representative in Strasbourg who performs these acts. For any signature, full powers are required unless the treaty is signed by the head of state, head of government or minister for foreign affairs (Article 7.2 of the VCLT). Full powers should be issued, in accordance with the constitutional requirements of each state, either by the head of state, the head of government or the minister for foreign affairs. They should clearly indicate the instrument referred to, giving its exact and full title and date of opening for signature. In exceptional cases and for reasons of urgency, for example to allow a state to sign the treaty on the day of its opening for signature, a letter, fax or telex evidencing the granting of full powers, sent by the competent authority of the state concerned, is accepted provisionally, subject to the demonstration in due course of full powers executed in a proper form. The practice of the United Nations to have "general" full powers for all treaties deposited with the Secretary General has so far not been followed in the Council of Europe. From a legal point of view, there are no objections against the use of such full powers.⁶⁰

57. In 1991, the Law on Amending and Supplementing the Republic of Lithuania Criminal Code, the Code of Criminal Proceedings and the Code of Correctional Labour, reduced the number of crimes which incurred the death penalty to one (premeditated murder with aggravated circumstances). Since 1996, the death penalty has not been put into effect. On 9 December 1998, the Constitutional Court of Lithuania declared that capital punishment was in contradiction with Articles 18, 19 and 21 of the Constitution (LTU-1999-1-003 in the Codices database of the European Commission for Democracy through Law – Venice Commission, CD-ROM or <http://www.venice.coe.int/codices>). On 18 January 1999, Lithuania signed Protocol No. 6 to the ECHR.

58. Ukraine signed the Protocol on 5 May 1997 after establishing a *de facto* moratorium on executions on 11 March 1997. On 9 October 1997, the President of Ukraine submitted to the Verkhovna Rada a draft law on the ratification of Protocol No. 6 to the ECHR.

59. Russia signed Protocol No. 6 to the ECHR on 16 April 1997. In a judgment of 2 February 1999, the Russian Constitutional Court effectively imposed a suspension of capital-sentencing, *Rossiyskaya Gazeta*, 10 February 1999 (RUS-1999-1-001 in the Codices database, CD-ROM or <http://www.venice.coe.int/codices>).

60. See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc. ST/LEG/8 (1994), § 102.

Occasionally, the Secretary General has accepted signatures *ad referendum* although this procedure is not provided for in any of the treaties concluded within the Council of Europe. Signatures *ad referendum* which also require full powers should be expressly confirmed (Article 12.2.b of the VCLT). This can also be done implicitly by the subsequent deposit of an instrument of ratification.

In each case, a *procès-verbal* is signed by both parties. The member states of the Council of Europe and the other parties to the convention concerned are notified of any signature and any deposit of an instrument.

A departure from the usual practice had to be invented when “the former Yugoslav Republic of Macedonia” became a member state of the Council of Europe on 9 November 1995. In accordance with the usual practice of the Organisation, the country had to sign the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) on the day of its accession to the Council of Europe. Due to a long-standing difference with Greece over the name of the country, it was impossible to agree on an official name to be inscribed in the original of the treaties. Invoking the practice of the United Nations, Greece had insisted on using the denomination “the former Yugoslav Republic of Macedonia”.

When inviting the country to become a member of the Council of Europe, the Committee of Ministers decided that it would provisionally be referred to as “the former Yugoslav Republic of Macedonia” in all documents and publications of the Organisation and would be placed according to the English alphabetical order in accordance with United Nations practice, that is, after Switzerland in the current order.⁶¹

During the preparation of the accession procedure in November 1995, it became obvious that no Macedonian representative was willing to put his or her signature under this denomination. After prolonged discussions with the representative of “the former Yugoslav Republic of Macedonia” in Strasbourg and the Minister for Foreign Affairs, Mr S. Crvenkovski, who had arrived for the accession ceremony, a solution was found. Instead of signing the original of the European Convention on Human Rights, the Minister for Foreign Affairs handed over a letter. This letter read as follows:

“We hereby declare that the Government of the Republic of Macedonia agrees with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), as amended by Protocol No. 3 of 6 May 1963, amending Articles 29, 30 and 34 of the Convention (ETS No. 45), Protocol No. 5 of 20 January 1966, amending Articles 22 and 40 of the Convention (ETS No. 55) and Protocol No. 8 of 19 March 1985 (ETS No. 118), and

61. Decision adopted during the 547th meeting of Ministers' Deputies on 19 October 1995 (Item 2.1).

as completed by Protocol No. 2 of 6 May 1963, conferring upon the European Court of Human Rights competence to give advisory opinions (ETS No. 44), which was opened for signature by the members of the Council of Europe, in Rome, on 4 November 1950; and with Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (ETS No. 155), which was opened for signature by the member states of the Council of Europe signatories to the Convention, in Strasbourg, on 11 May 1994.

The ratification procedure before the competent organs of the Republic of Macedonia shall be initiated pursuant to Article 66 of this Convention.

We consider that with this instrument the Republic of Macedonia becomes a signatory state to the Convention for the Protection of Human Rights and Fundamental Freedoms and to Protocol No. 11 to the said Convention for restructuring the control machinery.

At the same time we should like to declare our readiness to sign directly the said Convention and Protocol No. 11 at a later date, as soon as possible".⁶²

Since the dispute with Greece has not been resolved until now, the same procedure had to be repeated with a number of other Council of Europe treaties.

Non-member states of the Council of Europe

Participation in most Council of Europe treaties is not exclusively limited to the member states of the Council of Europe. The treaties concerned are "open" ones, that is, open to accession by non-member states, in most cases even non-European states, provided that they have been formally invited to accede by the Committee of Ministers of the Council of Europe. In most cases, such invitations can only be made once the treaty in question has entered into force.

The *Bern Convention* (ETS No. 104, 1979) and the *Framework Convention for the Protection of Minorities* (ETS No. 157, 1995) constitute the only exceptions in that they anticipate the possibility of inviting non-member states to sign and ratify the treaty even before their entry into force. In both cases, there was a need to give non-member states the opportunity to adhere immediately to these two important instruments.

The invitations can be construed either as unilateral acts which are issued by the Committee of Ministers acting in accordance with the powers con-

62. Letter by the Minister for Foreign Affairs, attached to the notification of signature JJ3485C of 13 November 1995.

ferred upon it under the relevant treaties, or as some sort of consensual agreement with the candidate country. Although the first hypothesis appears to be more plausible, there are certain elements of a contractual nature in the case of an invitation to sign a treaty or to accede to it. The Committee of Ministers takes its decisions in response to an explicit request by the authorities of the candidate country. Having accepted this request, it might be argued that a *pactum de contrahendo* has been concluded, which would create certain mutual procedural obligations concerning the subsequent signature of or accession to the Council of Europe treaty.

Irrespective of the exact legal qualification of the invitations, it can hardly be denied that they constitute binding commitments. International practice provides examples of a certain number of cases in which the binding force of a unilateral transaction was recognised.⁶³ The Committee of Ministers acts within its competence under the treaties in question and with the intention of being bound. An invitation to accede to an international treaty is not merely a legally non-binding statement of intent, but constitutes an unconditional and definitive undertaking to accept the requesting state as a future party to the treaty.

This does, however, not preclude the possibility of suspending or even revoking it. It is generally recognised in international law that obligations which arise from treaties or unilateral undertakings may be suspended or annulled. There are several reasons which may be invoked in order to justify the non-institution of a treaty (material breach, supervening impossibility of performance, fundamental change of circumstances, extinction of a party, etc.). Similar observations are made with regard to unilateral acts.⁶⁴ In particular, a fundamental change of circumstances (*clausula rebus sic stantibus*) could be invoked. The corresponding provision, Article 62 of the VCLT, has been considered as a codification of existing customary international law.⁶⁵ It may only be applied if the existence of the circumstances at the material time constituted an essential basis of the consent given. The negative and conditional wording of Article 62 of the VCLT is a clear indication that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.⁶⁶

63. See in particular the Ihlen declaration, *PCIJ, Series A/B*, No. 53, 70-71; declarations made by France in 1974, promising to abstain from future nuclear tests in the atmosphere, *ICJ, Nuclear Tests Cases*, judgments of 20 December 1974, *ICJ Reports 1974*, 267-8 (*Australia v. France*) and 472-73 (*New Zealand v. France*).

64. See W. Fiedler, "Unilateral Acts in International Law", in *Encyclopedia of Public International Law*, Instalment 7 (1984), 522.

65. *ICJ, Fisheries Jurisdiction Case (UK v. Iceland)*, judgment of 25 July 1974, *ICJ Reports*, 1973, 18. See also Court of Justice of the European Communities, Case 162/96, *A. Racke GmbH & Co. and Hauptzollamt Mainz*, judgment of 16 June 1998.

66. *ICJ, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, judgment of 25 September 1997, *ICJ Reports*, 1997, 55.

It should be noted that an invitation to accede to a Council of Europe treaty has so far never been suspended or revoked. The suspension or revocation could only be justified if the candidate country departed from basic principles of democracy and human rights. Adherence to democracy, human rights and the rule of law are preconditions for membership in the Organisation (Article 3 of the Statute of the Council of Europe). It should, however, be recalled that Greece remained a party to a number of important Council of Europe conventions and agreements even after the establishment of a military dictatorship and the country's withdrawal from the Organisation in 1969. In January 1970, the Committee of Ministers, arguing that the conventions and agreements were not legal acts of the Organisation, decided that Greece retained "the right to sign and ratify conventions and agreements which were opened for signature by member states before 12 December 1969, with the exception, of course, of 'closed' conventions".⁶⁷

The procedure for the accession of a state which is not a member of the Council of Europe can be summarised as follows:

In principle, the Committee of Ministers may take the initiative of inviting a non-member state to accede to a specific convention. It is nevertheless customary for the non-member state (in the person of the minister for foreign affairs or via a diplomatic mission) to request accession in a letter addressed to the Secretary General of the Council of Europe.

The state concerned may ask the Secretariat, before formally inscribing the point on the agenda of the Committee of Ministers, to ascertain informally the opinion among member states' delegations and other parties with regard to a possible request to be invited to accede to a convention. This informal procedure has been used frequently in the past.

Before taking a final decision on a request for accession, the Committee of Ministers instructs the Secretariat to consult the other non-member states, if any, which are parties to the convention. In certain cases, the Committee of Ministers may request that an expertise be carried out, concerning the compatibility of the domestic law of the state concerned with the standards of the treaty. Although there is no explicit provision in any of the European treaties for such a procedure, it takes place particularly if the subject of the treaty renders it advisable and if at least one member state so requests during the deliberations of the Committee of Ministers. For instance, as far as treaties concerning extradition and mutual assistance in criminal matters are concerned, it is important that the judicial system and procedures of candidate countries respect certain minimum standards of human rights.

67. Decision adopted at the 186th meeting of the Ministers' Deputies held from 19 to 26 January 1970 (point XXIII).

The intervention of an expert mission necessarily prolongs the procedure which may easily last more than a year.

Following possible consultation of the non-member states which are parties to the convention, the Committee of Ministers takes up the matter again and makes a formal decision on inviting the non-member state. This decision is usually taken at the level of the Ministers' Deputies.

An invitation to accede to one of the European treaties is issued to the state concerned which, prior to acceding, has to take the necessary measures to ensure that its domestic law allows the convention to be implemented. Within the Council of Europe, there are various committees of experts who monitor the application of treaties by the parties (see Chapter 8).

It is customary for the instrument of accession to be deposited at the seat of the Council of Europe in Strasbourg, in the presence of a representative of the acceding state and of the Secretary General of the Council of Europe or his or her deputy. The representative of the acceding state brings with him or her the instrument of accession, and a *procès-verbal* of deposit is signed by both parties. Should it prove difficult for the acceding state to send a representative to Strasbourg, the instrument of accession may be sent by diplomatic courier. Deposit of the instrument of accession is notified to the members of the Council of Europe and to the other parties to the convention concerned.

On 13 June 1994, in the case of Ukraine's accession to the *European Cultural Convention* (ETS No. 18, 1954) and to the *European Convention on Information on Foreign Law and its Protocol* (ETS No. 62, 1968 and ETS No. 97, 1978), the transmission of instruments by fax was for the first time provisionally accepted as valid accession to European treaties, subject to the production of the original instruments which were later transmitted by courier.⁶⁸ On 29 December 1994, Bosnia and Herzegovina transmitted by fax its notices of succession to various treaties to which the Socialist Federal Republic of Yugoslavia had been a party.⁶⁹

Termination and suspension of treaties

In accordance with the *Model Final Clauses* (Article f),⁷⁰ provisions relating to denunciation have been inserted in practically all Council of Europe treaties:

68. Notifications JJ3190C and JJ3192C of 28 June 1994. On the questions of state succession see Chapter 11.

69. Notifications JJ3317 (17 January 1995); JJ3330 (28 February 1995); JJ3337-JJ3341 (1 March 1995); JJ3346-JJ3350 (9 March 1995); JJ3354-JJ3356 (22 March 1995). On the questions of state succession see Chapter 11.

70. *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe* (1980). The clauses were approved by the Committee of Ministers at the 315th meeting of Ministers' Deputies in February 1980.

“1 Any Party may at any time denounce this Agreement/Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2 Such denunciation shall become effective on the first day of the month following the expiration of a period of ... months after the date of receipt of notification by the Secretary General”.

The period following the expiration of which the denunciation becomes effective has been fixed at three, six or twelve months. Sometimes more restrictive modalities have been provided for, such as six months' or even one year's notice coupled with the requirement to have been a party to the treaty in question for at least five years.⁷¹ An unusual clause is contained in Article 13 of the *European Agreement on the Protection of Television Broadcasts* (ETS No. 34, 1961):

“1. This Agreement shall cease to be effective, except in regard to fixations already made, at such time as a convention on neighbouring rights, including the protection of television broadcasts and open to European countries, amongst others, shall have entered into force for at least a majority of the members of the Council of Europe that are themselves Parties to the Agreement.

2. The Committee of Ministers of the Council of Europe shall at the appropriate time declare that the conditions laid down in the preceding paragraph have been fulfilled, thereby entailing the termination of this Agreement”.

The denunciation clauses have been used rarely. Examples are two treaties relating to patents which have been denounced by almost all parties.⁷² The denunciations were prompted by the conclusion of the *European Convention on the Grant of European Patents* of 5 October 1973 which had submitted the grant of European patents to new regulations. parties to the *European Convention on the Protection of the Archaeological Heritage* (ETS No. 66, 1969) must denounce it if they want to become parties to the *Revised European Convention on the Protection of the Archaeological Heritage* (ETS No. 143, 1992) which has replaced the original treaty.⁷³ In

71. See Article 58.1 (former Article 65.1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950); Article 33.1 of the European Convention on Establishment (ETS No. 19, 1955); Article 37.1 of the European Social Charter (ETS No. 35, 1961); Article 81 of the European Code of Social Security (ETS No. 48, 1964); Article 78.2 of the European Convention on Social Security (ETS No. 78, 1972); Article 17.1 of the European Charter of Local Self-Government (ETS No. 122, 1985); Article M.1 of the Revised European Social Charter (ETS No. 163, 1996).

72. European Convention relating to the Formalities required for Patent Applications (ETS No. 16, 1953); European Convention on the International Classification of Patents for Invention (ETS No. 17, 1954).

73. Article 14.2 of the Revised European Convention on the Protection of the Archaeological Heritage (ETS No. 143, 1992).

other cases, treaties that have become obsolete were not formally denounced.

Some treaties contain specific provisions governing the consequences of termination. Treaties in the field of social security sometimes stipulate that in case of denunciation by any of the parties, all rights acquired by virtue of the provisions of the treaty shall be maintained. Article 79 of the *European Convention on Social Security* (ETS No. 78, 1972) provides as follows:

“1. In the event of denunciation of this convention, all rights acquired under its provisions shall be maintained.

2. Rights in process of acquisition in respect of periods before the date on which the denunciation takes effect shall not lapse as a result of the denunciation; their subsequent continued recognition shall be determined by agreement or, failing such agreement, by the legislation which the institution concerned applies”.⁷⁴

Article 58.2 (former Article 65.2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950), Article 33.2 of the *European Convention on Establishment* (ETS No. 19, 1955) and Article 40.2 of the *European Convention for the Peaceful Settlement of Disputes* (ETS No. 23, 1957) provide that denunciation shall not have the effect of releasing the party concerned from its obligations under the treaty in respect of any situation or fact constituted or performed before the date at which the denunciation becomes effective. On the basis of this provision, the European Commission of Human Rights could declare an application by Denmark, Norway and Sweden against Greece admissible even after Greece had denounced the convention on 12 December 1969.⁷⁵ Faced with the refusal of the Greek authorities to co-operate, the Commission could not, however, accomplish its mission.⁷⁶ Following the restoration of democracy, Greece ratified the Convention again on 28 November 1974.

A particular problem relating to the denunciation of the additional protocols to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) should be mentioned. None of the protocols mentions denunciation. Instead, all protocols contain what Pierre-Henri Imbert has called a “*clause de rattachement*”:⁷⁷

74. Similar provisions are contained in Article 12 of the two European Interim Agreements on Social Security (ETS No. 12 and 13, 1953).

75. *Yearbook of the ECHR*, 12 (1969), 81-83 and 13 (1970), 5.

76. Application No. 4448/70, *Denmark, Norway and Sweden v. Greece*, *Yearbook of the ECHR*, 13 (1970), 121. See A.-C. Kiss/P. Vegleris, “L’affaire grecque devant le Conseil de l’Europe et la Commission européenne des droits de l’homme”, *AFDI*, 17 (1971), 889 *et seq.*

77. P.-H. Imbert, “Article 65”, in Pettiti/Dcaux/Imbert (eds.), *La Convention européenne des Droits de l’Homme* (1995), 943 (946).

“As between the states parties the provisions of Articles ... to ... [the substantive articles] of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly”.⁷⁸

The question of whether a protocol could be denounced separately has been raised in particular with regard to *Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty* (ETS No. 114, 1983). In France⁷⁹ and Switzerland,⁸⁰ the view was expressed that a separate denunciation was possible since every protocol constituted a separate legal instrument. After a thorough analysis of the *travaux préparatoires* and the nature of the treaties in question, Pierre-Henri Imbert reached the opposite conclusion.⁸¹ According to this view, the rights contained in the protocols are integrated into the Convention, thereby forming one sole *corpus juris*. It is therefore only possible to denounce the Convention and the protocols as a whole, and not any of the protocols separately. Otherwise the rights guaranteed by the protocols would have an inferior status compared with the rights contained in the original Convention. *Protocol No. 11 to the ECHR* (ETS No. 155, 1994) confirms the indissoluble ties between the Convention and its additional protocols. Protocol No. 11 restructured the control mechanism not only for the Convention rights, but also for the rights contained in Protocols Nos. 1, 4, 6, and 7.

Finally, it is noteworthy that a different drafting was used in the *Additional Protocol to the Convention on Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Biomedicine on the Prohibition of Cloning Human Beings* (ETS No. 168, 1998). The Protocol contains not only a “*clause de rattachement*” identical to those contained in the additional protocols to the European Convention on Human Rights (Article 3), but also a separate denunciation clause (Article 7), which is evidence of the drafters’ intention to permit a separate denunciation.

In accordance with general principles of international treaty law, a material breach of a multilateral treaty by one of the parties entitles the other parties

78. Article 5 of Protocol No. 1 (ETS No. 9, 1952); Article 6 of Protocol No. 4 (ETS No. 46, 1963); Article 6 of Protocol No. 6 (ETS No. 114, 1983); Article 7 of Protocol No. 7 (ETS No. 117, 1984). The wording given in the citation is contained in the two latter protocols and differs slightly from the two previous ones.

79. See in particular the declarations by Messrs Dumas and Badinter before the National Assembly (2nd session of 21 June 1985, 1872 and 1873), and by Mrs Lalumière and Mr Badinter before the Senate (session of 30 October 1985, 2643, 2653 and 2656). See also Decision No. 85-188 DC of the *Conseil Constitutionnel* of 22 May 1985, which affirmed that Protocol No. 6 “*peut être dénoncé dans les conditions fixées par l’article 65 de la Convention européenne des droits de l’homme*”.

80. “*Message du Conseil fédéral relatif à l’approbation des Protocoles N^{os} 6, 7 et 8 (7 May 1986)*”, *Feuille fédérale*, 1986 II, 605 (§ 23).

81. Imbert, op. cit. *supra* Note 77, 946-56. This view is shared by R. Errera, *Conseil d’Etat, rapport public*, 1992 EDCE No. 44, La Documentation française 1993, 327.

to suspend the operation of the treaty in whole or in part, or even to terminate it (Article 60 of the VCLT).⁸² The *Convention on Insider Trading* (ETS No. 130, 1989) is one of the few Council of Europe treaties which contains an explicit clause which authorises parties to partially suspend its application in case of a substantial breach (Article 10):

“1 Any Party which has ascertained that there has been a substantial breach by the requesting authority of the confidentiality of the information provided may suspend the application of chapter II of this Convention with respect to the Party which has failed to discharge its obligation and shall notify the Secretary General of the Council of Europe of its decision. The Party may lift the suspension at any time and shall notify the Secretary General accordingly.

2 Any Party which intends to make use of the procedure provided for in paragraph 1 must first give an opportunity to the Party concerned to make observations on the alleged breach of confidentiality.

3 The Secretary General of the Council of Europe shall inform the member states and the parties to this Convention of any use made of the procedure provided for in paragraph 1”.

The *European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe* (ETS No. 25, 1957) and the *European Agreement on the Abolition of Visas for Refugees* (ETS No. 31, 1959) can be temporarily suspended on grounds relating to *ordre public*, security or public health (Article 7 of each of the agreements):

“Each Contracting Party reserves the option, on grounds relating to *ordre public*, security or public health, to delay the entry into force of this Agreement or order the temporary suspension thereof in respect of all or some of the other parties, except in so far as the provisions of Article 5 are concerned. This measure shall immediately be notified to the Secretary General of the Council of Europe, who shall inform the other parties. The same procedure shall apply as soon as this measure ceases to be operative.

A Contracting Party which avails itself of either of the options mentioned in the preceding paragraph may not claim the application of this Agreement by another Party save in so far as it also applies it in respect of that Party”.

On the basis of this provision several parties to the *European Agreement on Regulations governing the Movement of Persons between Member states of the Council of Europe* (ETS No. 25, 1957), having reintroduced visa requirements for Turkish nationals, suspended its application with regard to

82. See ICJ, Case concerning the Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), judgment of 25 September 1997, ICJ Reports 1997, 55 (§§ 96-110).

Turkey.⁸³ Following the perpetration of acts of terrorism in Paris in autumn 1986, France completely suspended the application of the two agreements.⁸⁴ At that time the French Government introduced visa requirements for all countries with the exception of EEC member states, Switzerland and Liechtenstein. Subsequent developments and tighter cooperation between European states in the fight against terrorism prompted the French Government to rescind the suspensive measure in 1988.⁸⁵ The earlier suspension with regard to Turkey was, however, maintained. Turkey regarded these acts as discriminatory and suspended the application of the *European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe* (ETS No. 25, 1957) "in accordance with the principle of reciprocity and of Article 7.2 of the said Agreement".⁸⁶

83. Germany (notification JJ927 of 22 July 1980); France (notification JJ959C of 26 September 1980); Belgium, Luxembourg and the Netherlands (notification JJ977C of 24 October 1980); Switzerland (notification JJ1254C of 7 July 1982); Austria (notification JJ2337C of 19 January 1990).

84. Notification JJ1901C of 16 September 1986.

85. Notification JJ2178C of 2 February 1989.

86. Notifications JJ2355C (12 February 1990), JJ2390C (11 June 1990), JJ2688C (18 December 1991).

CHAPTER 4: TERRITORIAL APPLICATION

In accordance with the *Model Final Clauses* (Article *d*),⁸⁷ most Council of Europe treaties contain the following territorial clause:

“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 [this Agreement] shall apply”.

In some cases, it is explicitly laid down that the treaty shall apply only to the metropolitan territory of the parties (e.g. Article 27.1 of the *European Convention on Extradition*, ETS No. 24, 1957; Article 34 of the *European Social Charter*, ETS No. 35, 1961; Article 80.1 of the *European Code of Social Security*, ETS No. 48, 1964).

The territorial clause is usually accompanied by a provision which stipulates that any party may, when expressing its consent to be bound by the treaty, or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend the treaty's application to any other territory or territories specified in the declaration and for the international relations of which it is responsible, or on behalf of which it is authorised to give undertakings.

At first sight, this drafting practice of the Council of Europe cannot be easily reconciled with the general principle contained in Article 29 of the *Vienna Convention on the Law of Treaties*:⁸⁸

“Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.

According to the International Law Commission's commentary, the expression “the entire territory of each party” is a comprehensive term designed to embrace all the land and appurtenant territorial waters and air space which constitute a state's territory.⁸⁹ It follows that under the Vienna Convention a treaty is presumed to apply to all the territory for which a

87. *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe* (1980). The Committee of Ministers approved the clauses at the 315th meeting of Ministers' Deputies in February 1980.

88. In the written statement submitted in 1968 by the Council of Europe to the United Nations Conference on the Law of Treaties, it was already observed that the provision proposed by the International Law Commission was not entirely clear. UN Doc. A/CONF.39/7 of 27 March 1968, 31.

89. R.G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978), 225.

party is internationally responsible, whereas the model territorial clauses in Council of Europe treaties seem to imply that it is a matter of each state's discretion to indicate the parts of the national territory to which a particular treaty shall apply.

The long-standing practice of Council of Europe member states reveals, however, a much more restricted scope of the provision. Only the following two categories of territories have been considered to fall outside the automatic scope of application of a European treaty (and have therefore been covered by declarations extending the scope of application of such treaties):

- overseas territories: This is in particular the practice of the United Kingdom and the Netherlands. The situation is different for France. Under the French Constitution of 1958, an international treaty which has been ratified or accepted by the French Republic applies automatically to all overseas departments. This principle of assimilation of overseas departments was recognised by the *Conseil constitutionnel* in its Decision No. 82-147 DC of 2 December 1982.⁹⁰ French overseas territories on the other hand, though being an integral part of the French Republic, have a separate status which may vary from one territory to the other.⁹¹ Nevertheless it is presumed that the provisions of an international treaty to which France is a party are also applicable in the overseas territories, unless it results from the terms of the treaty or from a declaration made by France when expressing its consent to be bound that this was not intended,⁹²
- territories which, though belonging to the national territory in Europe, enjoy some form of autonomy or special status. In the practice of the Council of Europe, the use of territorial clauses is not exclusively confined to states with overseas territories or possessions outside Europe. The territories to which the scope of application of a treaty must be extended by a special declaration may also be situated within Europe (for example, the Faroe Islands and Greenland as far as Denmark is con-

90. "Décision relative à la loi portant adaptation de la loi no 82-213 du 2 mars 1982 relative aux droits et libertés des communes, des départements et des régions à la Guadeloupe, à la Guyane, à la Martinique et à la Réunion", *Recueil*, 1982, 70.

91. See F. Luchaire, "L'application des conventions internationales dans les territoires d'outre-mer", *Revue de droit public et de science politique*, 109 (1993) II, 1495. On the special status of New Caledonia following the Nouméa agreement of 5 May 1998, see J.-Y. Faberon, "La Nouvelle Calédonie, 'pays à souveraineté partagée'", *Revue de droit public et de science politique*, 114 (1998) II, 645-8.

92. See the judgment of 14 May 1993 by the highest French administrative tribunal, the Conseil d'Etat, in the case of Mme Smets, concerning the extradition treaty between France and Australia of 31 August 1988, *Actualité juridique de droit administratif*, 1993, 500. In its submissions, the *Commissaire du gouvernement*, C. Vigouroux, declared that "le cocontractant de la France est en droit de penser, dans le silence de la Convention, que celle-ci régit, au nom de 'l'effet utile' des traités, tous les territoires unis par les articles 2 et 72 de la Constitution en une République indivisible".

cerned;⁹³ Svalbard (Spitzbergen) and Jan Mayen with regard to Norway; Gibraltar, the Isle of Man and the Bailiwicks of Jersey and Guernsey in relation to the United Kingdom).⁹⁴ It is therefore not correct to speak of "colonial clauses".⁹⁵ The exclusion of such territories is often due to the fact that the local representative bodies had not yet been consulted on the application of the treaty when it was ratified in Strasbourg. Finally, it should be mentioned that all declarations made by Germany with regard to the special status of Berlin have become obsolete following the unification of Germany in 1990.⁹⁶

The explanatory reports of two recent conventions make the restrictive scope of the model territorial clause explicit. It is stated that the provision "applies essentially to overseas territories as it would be contrary to the philosophy of the convention for a party to exclude parts of its metropolitan territory from the application of this instrument".⁹⁷

In the case of treaties which, due to their object and purpose, already have a limited territorial scope of application, the model territorial clause with its potentially unlimited scope was even formally abandoned. This is in particular the case as far as treaties for the protection of national minorities are concerned.

The *European Charter of Regional or Minority Languages* (ETS No. 148, 1992) does not contain among the final provisions a territorial clause enabling states to exclude part of their territories from the scope of the charter. This approach was justified because it is an intrinsic characteristic of the charter that it is concerned especially with particular territories, namely those in which regional or minority languages are used. Under Article 3.1 of the charter, contracting states have the right to specify those regional or minority languages to which their detailed undertakings will apply.⁹⁸

93. The constitutional situation in Denmark is particularly complex, see A. Olafsson, "A note on the Faroe Islands – Home Rule case", in European Commission for Democracy through Law, *Local self-government, territorial integrity and protection of minorities* (1996), 103-11; B. Dahl/T. Melchior/L. Adams/D. Tamm (eds.), *Danish Law in a European Perspective* (1996), 85-7; H.W. Poulsen, "Faroese Home Rule: some considerations regarding its place in constitutional and international law", in G. Alfredsson/P. Macalister-Smith (eds.), *The Living Law of Nations. Essays in memory of Atle Grahl-Madsen* (1996), 287 (296-7).

94. See Court H.R., Gillow judgment of 24 November 1986, *Series A*, No. 109, § 62.

95. See M. Akehurst, "Treaties, Territorial Application", in *Encyclopedia of Public International Law*, Instalment 7 (1984), 510-11.

96. See the German *note verbale* of 2 October 1990, notified by the Secretary General on 3 October 1990 (JJ2446C).

97. *Convention on Biomedicine and Human Rights and explanatory report* (1998), § 173; a similar wording can be found in the *European Convention on Nationality and explanatory Report* (1997), § 147.

98. *European Charter for Regional or Minority Languages and explanatory report* (1993), § 134.

The following declaration was made by Croatia when it ratified the charter on 5 November 1997:

“The Republic of Croatia ... declares, with regard to Article 1, paragraph *b*, of the charter, that pursuant to Croatian legislature, the term ‘territory in which the regional or minority language is used’ shall refer to those areas in which the official use of minority language is introduced by the by-laws passed by the local self-government units, pursuant to Article 12 of the Constitution of the Republic of Croatia and Articles 7 and 8 of the Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities on the Republic of Croatia”.⁹⁹

This declaration, which was not objected to by any party, has to be seen against the background of the division of powers between the Republic and the units of local self-government. In a judgment of 2 February 1995 (U-II-433/1994), the Croatian Constitutional Court had examined the constitutionality and legality of the Statute of the County of Istria which regulated *inter alia* the use of minority languages.¹⁰⁰ The Court had held that the exercise and protection of national rights of minorities fell within the jurisdiction of the republic and was not a matter to be regulated by a county statute. According to the Court, only the units of local self-government (a municipality, a district and a township), but not a county, may introduce into official use two or more languages and scripts, respecting of course the conditions specified by law.

The charter acknowledges that each party is entitled to define more precisely the territory referred to in Article 1.*b*.¹⁰¹ However, any such definitions must respect the wording and spirit of the charter and in particular the provisions of Article 7.1.*b* regarding the protection of the territory of regional or minority languages. The delimitation of the charter’s territorial scope of application cannot be left to the unfettered discretion of local self-government entities. It would for example be contrary to the obligations under the charter to apply its provisions only in municipalities where members of a national or ethnic minority represent the majority of the total population. In any case, a party to the charter is responsible for acts and omissions by local self-government entities. Principles of domestic law, including the constitution, cannot be invoked in order to evade international responsibility. It should be added that the concrete measures taken by the parties to implement the charter’s principles will be examined by the committee of

99. Declaration contained in the instrument of ratification, deposited on 5 November 1997 – Or. Cro./Engl.

100. CRO-1995-1-003 in the Codices database of the European Commission for Democracy through Law, CD-ROM or <http://www.venice.coe.int/codices/>.

101. See § 34 of the explanatory report.

102. See Chapter 8.

experts which monitors the charter's application (Articles 15 to 17 of the charter).¹⁰²

As far as the *Framework Convention for the Protection of National Minorities* is concerned (ETS No. 157, 1995), a party may only make territorial declarations with regard to "the territory or territories for whose international relations it is responsible" (Article 30.1). This provision is similar to the one which was already used in 1950 for the *Convention on the Protection of Human Rights and Fundamental Freedoms* (Article 56 [former Article 63] of the ECHR).¹⁰³

103. M. Wood gives an excellent commentary, in L.-E. Pettiti/E. Decaux/P.-H. Imbert, *La Convention européenne des Droits de l'Homme* (1995), 915-21.

CHAPTER 5: FEDERAL STATES

The treaty-making power of European federal states

There are a certain number of federal states in Europe where the treaty-making power is to varying degrees shared between the central state and the constituent entities (Austria, Belgium, Germany, Russia and Switzerland). The precise division of powers between central and federated authorities varies from one federation to another.¹⁰⁴

So far, the phenomenon of federal states has had comparatively little impact on the treaty practice of the Council of Europe. This can be explained by the fact that the treaty-making power in most European federal states is exercised predominantly by the authorities of the central state. In most cases, the central state enjoys largely unfettered power to conclude international treaties, even in respect of matters for which the entities are responsible internally.¹⁰⁵

In most federal states, the constituent entities are consulted and sometimes even participate in the negotiating process of international treaties affecting their interests, but once a treaty is finalised, it will only be signed and ratified by the federation. This is the case in Germany. The *Länder* may, with the consent of the federal government, conclude international treaties concerning subjects which fall into their legislative competence (Article 32.3 of the constitution). In practice, however, the federation exercises a parallel treaty-making power even as far as these subjects are concerned, in particular culture and the media. While there has always been some controversy about the exact distribution of power, the federation and the *Länder* concluded on 14 November 1957 the so-called "Lindau agreement", which contains a *modus vivendi* regulating the procedure for negotiating treaties concerning matters which fall into the legislative competence of the *Länder*.¹⁰⁶ The negotiation of such treaties takes place in close co-operation with the *Länder*, which are sometimes even directly involved. In the fields of cultural co-operation and the media, representatives of the

104. For a general overview covering all European states see the European Commission for Democracy through Law's publication, *Federal and Regional States* (1997). The practice of Germany (J.A. Frowein and M.J. Hahn) and Switzerland (L. Wildhaber) is described in S.A. Riesenfeld/F.M. Abbott (eds.), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (1994).

105. See generally B.R. Opeskin, "Federal States in the International Legal Order", *Netherlands International Law Review*, 43 (1996), 353-86.

106. *ZaöRV*, 20 (1959-60), 116-7.

Länder participate regularly in Council of Europe expert committees alongside representatives of the federation.

In Austria, the federal states (*Bundesländer*) must be given a hearing prior to the conclusion of international agreements affecting their interests. In the Russian Federation, international treaties affecting areas which fall under the jurisdiction of the subjects of the federation are concluded in agreement with the bodies of the state authorities of those subjects.¹⁰⁷ Swiss cantons may conclude international treaties on matters concerning the public economy, relations with neighbouring states and the police (Article 9 of the constitution). However, the conclusion of such treaties usually takes place via the Federal Council.

Belgium, which has become a truly federal state only since the constitutional revision in 1993, is the only European federal state where the constituent entities enjoy an “exclusive” competence in international relations.¹⁰⁸ Belgium is now composed of three regions and three communities to which the revised constitution assigns some external powers. International competence corresponds roughly to internal competence in the sense that the communities and the regions alone conclude treaties concerning matters which are their exclusive preserve. The federal authorities may take action to oppose the conclusion of such treaties, but only for reasons strictly enumerated in a special law. Three categories of treaties have to be distinguished:

- treaties which are concluded by the federal state;
- treaties which are concluded only by the communities and/or the regions;¹⁰⁹
- “joint treaties” which affect both community or regional powers and federal powers. On 8 March 1994, the state, the communities and the regions concluded a co-operation agreement fixing the procedures for concluding joint treaties.¹¹⁰ Such treaties must be approved by all the legislative assemblies concerned.

The new treaty-making powers of the Belgian communities and regions had to be reconciled with the traditional final provisions used in Council of Europe treaties. According to the *Model Final Clauses* (Article a), all Council of Europe treaties are opened for signature and ratification by the member states of the Organisation. Only the federal state that is a member of the Council of Europe and not its constituent entities can therefore

107. See the “Federal Law on International Treaties of 16 June 1995”, *ILM*, 34 (1995), 1370.

108. Y. Lejeune, “Le droit fédéral belge des relations internationales”, *RGDIP*, 98 (1994), 577-628.

109. See, for example, the agreements on the protection of the rivers Meuse and Scheldt, *ILM*, 34 (1995), 851-63.

110. Lejeune, op. cit. *supra* Note 108, 602.

become a party. Constituent entities of a federal state are not parties to a single European treaty.

It follows that Council of Europe treaties which, under Belgian constitutional law, relate to both community or regional powers and to federal powers, must still be signed "for the Government of the Kingdom of Belgium". They may be signed by a representative of the federal, regional or community authorities who must be authorised to do so by full powers issued by the competent authorities. In order to reflect the new division of powers, the signature of a treaty which is considered a "joint treaty" according to Belgian constitutional law will be accompanied by a statement referring to the communities and regions which have approved the treaty. In 1996, when signing the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (ETS No. 158, 1995) and the *Revised European Social Charter* (ETS No. 163, 1996), the following statement had to be inscribed in the originals of the treaties, below the signature of the representative of the Belgian state:

"Cette signature engage également la Communauté flamande, la Communauté française, la Communauté germanophone, la Région flamande, la Région wallonne et la Région Bruxelles-capitale" [This signature also binds the Flemish Community, the French Community, the German-speaking Community, the Flemish Region, the Walloon Region and the Region of Brussels].

The statement constitutes a modality of signature rather than a declaration relating to the interpretation or application of the treaties and was not notified as such to the other member states of the Council of Europe. It is only mentioned in certified copies of the treaties in question.

The statement in no way affects the geographical scope of application of the treaty or the federal state's responsibility for its observance. Under the principle of the "unity of the state", international law makes no distinction between components of the state for the purposes of state responsibility. Federal states are held fully responsible for compliance with their international treaty obligations, irrespective of whether the treaty's implementation falls within the jurisdiction of the federal government or of that of the component entities. Federal states may even be held responsible if they lack the means to compel the organs of component states to abide by the federal state's international obligations. A different situation arises only when the obligation in question is incumbent on the component entity, as distinct from the federal.¹¹¹

111. See Article 7.1 of the International Law Commission's draft articles on "state responsibility", *Yearbook of the ILC*, 1980 II, (Part 2), 30; Commentary to Article 7 of the Commission's draft articles on "state responsibility", *Yearbook of the ILC*, 1974 II (Part 1), 279-80 (§§ 5-10); Opekin, op. cit. *supra* Note 105, 379-84.

The following statement which was made by Belgium on 12 June 1995 at the Council of the European Union can therefore be applied *mutatis mutandis* to treaties concluded within the Council of Europe:

“The Kingdom of Belgium intends in future to proceed as follows on the occasion of the signing of international agreements to be concluded jointly by the European Community and its member states:

- a. only one signature will be appended to those agreements on behalf of the Kingdom of Belgium, whether that signature is appended by a Federal, Regional or Community Minister;
- b. a statement will appear below that signature referring to the Communities and Regions of the Kingdom of Belgium where such an indication is imposed by Belgian constitutional law;
- c. the Kingdom of Belgium confirms that it will in all cases be the Kingdom as such that is bound, in respect of its whole territory, by the provisions of the international agreements which it has concluded;
- d. the Kingdom of Belgium confirms that the Kingdom alone, as such, will bear full responsibility for compliance with the obligations entered into in the international agreements concerned, with regard to both the European Communities and the other contracting states”.¹¹²

Federal and territorial clauses

International treaties drawn up within the United Nations and the Hague Conference on Private International Law often use so-called “federal clauses” in order to accommodate the interests of federal states.¹¹³ In view of the exclusive legislative competence of constituent entities, such clauses may either limit the obligations of federal states with respect to subject matters which fall within the competence of the entities¹¹⁴ or allow them to limit the geographical scope of application of the treaty to those entities that have agreed to implement it. Article 93.1 of the *United Nations Convention on Contracts for the International Sale of Goods* of 11 April 1980 provides an example the latter category:

“If a Contracting state has two or more territorial units in which, according to its Constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of the signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or

112. *Official Journal of the EC*, C 157/1 of 23 June 1995. See also the declarations made on the occasion of the signature by Belgium of the treaty of accession of Norway, Austria and Sweden to the European Union, *Official Journal of the EC* of 29 August 1994.

113. A.H. Leal, “Federal State Clauses and the Conventions of the Hague Conference on Private International Law”, *Dalhousie Law Journal*, 8 (1984), 257 *et seq.*

114. Opeskin, *op. cit. supra* Note 105, 370-4.

only to one or more of them, and may amend its declaration by submitting another declaration at any time".

Implicit in the formulation of such clauses is the recognition that entities of federal states may have separate legal systems which have to be respected by the central state even as far as the implementation of international treaties is concerned. In most cases, the power to execute international treaties is shared between the central state and the entities in the same way as the purely internal powers (for example in Austria, Belgium, Germany and Switzerland). The execution of international treaties concluded by the Russian Federation is the joint (concurrent) responsibility of the federation and its subjects.¹¹⁵

Federal clauses have only exceptionally been introduced into Council of Europe treaties. An example of a federal clause similar to those used in the United Nations Convention on Contracts for the International Sale of Goods or in the conventions of the Hague Conference on Private International Law is Article 25 of the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ETS No. 105, 1980):

"1. A state which has two or more territorial units in which different systems of law apply in matters of custody of children and of recognition and enforcement of decisions relating to custody may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that this Convention shall apply to all its territorial units or to one or more of them.

2. Such a state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territorial unit specified in the declaration. In respect of such territorial unit the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territorial unit specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General".¹¹⁶

115. *Federal and Regional States*, op. cit. supra Note 104, 33.

116. See also Article 7.1 of the European Convention on Compulsory Insurance Against Civil Liability in respect of Motor Vehicles (ETS No. 29, 1959): "Motor vehicles normally stationed outside the territory of a contracting state shall be exempt in that territory from the application of Article 2 of the annexed provisions if they are provided with a certificate issued by the government of another contracting state stating that the vehicle belongs to that state, or, in the case of a federal state, to the federal state or one of its constituent members; in the latter case, the certificate shall be issued by the federal government".

The insertion of a similar clause was envisaged but finally abandoned in the case of the *Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data* (ETS No. 108, 1981).

The special situation of federal states was also taken into account in the *Convention on the Recognition of Qualifications concerning Higher Education in the European Region* (ETS No. 165, 1997)¹¹⁷ and the *European Convention on State Immunity* (ETS No. 74, 1972). Article 28 of the latter convention provides as follows:

- “1. Without prejudice to the provisions of Article 27, the constituent states of a federal state do not enjoy immunity.
2. However, a federal state party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent states may invoke the provisions of the Convention applicable to states, and have the same obligations.
3. Where a federal state has made a declaration in accordance with paragraph 2, service of documents on a constituent state of a Federation shall be made on the Ministry of Foreign Affairs of the federal state, in conformity with Article 16.
4. The federal state alone is competent to make the declarations, notifications and communications provided for in the present Convention, and the federal state alone may be party to proceedings pursuant to Article 34”.

The model territorial clause (*Model Final Clauses, Article d* – see Chapter 4) has never been applied to federated entities within a federal state. The use of territorial clauses to limit the application of a treaty to certain of the constituent entities of a federal state only would seriously impair the parity of obligations of all parties. It would give federal states the possibility of choosing more or less freely the territorial scope of application of a given treaty because, contrary to states with overseas or autonomous territories,

117. Article II.1 of the convention provides as follows:

“1. Where central authorities of a Party are competent to make decisions in recognition cases, that Party shall be immediately bound by the provisions of this Convention and shall take the necessary measures to ensure the implementation of its provisions on its territory.

Where the competence to make decisions in recognition matters lies with components of the Party, the Party shall furnish one of the depositaries with a brief statement of its constitutional situation or structure at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or any time thereafter. In such cases, the competent authorities of the components of the parties so designated shall take the necessary measures to ensure implementation of the provisions of this Convention on their territory.

2. Where the competence to make decisions in recognition matters lies with individual higher education institutions or other entities, each Party according to its constitutional situation or structure shall transmit the text of this convention to these institutions or entities and shall take all possible steps to encourage the favourable consideration and application of its provisions.

3. The provisions of paragraphs 1 and 2 of this Article shall apply, *mutatis mutandis*, to the obligations of the parties under subsequent articles of this Convention”.

federal states are entirely composed of federated entities. Such use of territorial clauses would undermine the efficacy of treaties the success of which depends on their uniform application by all parties. It may even be argued that it would run counter to the aim of the Council of Europe to achieve a greater unity between its members (Article 1 of the Statute of the Council of Europe).

Federal declarations

Federal states have sometimes made use of declarations in order to accommodate the difficulties arising from the often rather complex internal distribution of powers. When acceding to the *European Cultural Convention* (ETS No. 18, 1954) in 1962, Switzerland made the following declaration:

“In view of the federal structure of Switzerland and the powers in educational and cultural matters conferred on the cantons by the Federal Constitution, the said powers are reserved so far as concerns the application of the Convention by Switzerland”.¹¹⁸

In 1991, Switzerland formulated a similar declaration with regard to Council of Europe treaties in the field of education:

“The Swiss Federal Council declares that the competence of cantons in the field of education, as established by the Federal Constitution, as well as the autonomy of universities are reserved for the implementation of the Convention”.¹¹⁹

These declarations, though not foreseen in the respective treaties, did not give rise to objections by non-federal states. The absence of any objections shows that non-federal states are prepared to tolerate such declarations, which are prompted by the fact that some federal states lack the power to implement international obligations in matters over which they have no legislative authority. Such internal limitations are not grounds which could be invoked by a federal state to justify or excuse non-compliance with the treaty.

118. Reservation made at the time of deposit of the instrument of accession, on 13 July 1962 – Or. Fr.

119. Declaration contained in a letter from the head of the Federal Department for Foreign Affairs, dated 25 April 1991, handed to the Secretary General at the time of signature and of deposit of the instruments of ratification for the treaties ETS Nos. 15, 49, 21, 32, 69 and 138, on 25 April 1991 – Or. Fr.

CHAPTER 6: PARTICIPATION OF THE EUROPEAN COMMUNITY

General framework of co-operation between the European Community and the Council of Europe¹²⁰

Article 303 (former Article 230) of the *Treaty establishing the European Community* (hereinafter EC Treaty)¹²¹ states:

“The Community shall establish all appropriate forms of co-operation with the Council of Europe”.

In Council of Europe *Resolution (85) 5 on co-operation between the Council of Europe and the European Community*, adopted on 25 April 1985 at its 76th Session, the Committee of Ministers expressed a determination to foster European solidarity by strengthening and consolidating institutional ties between the Council of Europe and the European Community, while fully respecting the differences in the respective nature and procedures of each organisation. In particular, that resolution recognised that the Council of Europe and the European Community were essential organs of European construction and emphasised the desirability of establishing a flexible framework for co-operation between the organisations.

A concrete legal result of Resolution (85) 5 was the *Arrangement between the Council of Europe and the European Community*, which was concluded by an exchange of letters between the President of the European Commission and the Secretary General of the Council of Europe on 16 June 1987.¹²² The arrangement was intended to update and supersede an exchange of letters of 18 August 1959 between the Council of Europe and the Commission of the European Communities.

The arrangement provides for the systematic exchange of information between the organisations in areas of mutual interest, as well as the participation of representatives of the European Commission in expert committees and in the elaboration of draft conventions or agreements. In addition, the arrangement emphasises “the desire to act in a pragmatic manner without creating new bureaucratic structures”, and agrees, as regards relations between the Committee of Ministers and the Commission of the

120. G. De Vel, “L’Union européenne et les activités du Conseil de l’Europe”, in D. Dormoy (ed.), *L’Union européenne et les organisations internationales* (1997), 105-122.

121. Provisions of the EC Treaty are cited taking into account the renumbering made by the Treaty of Amsterdam. The amendments and the renumbering made by the Treaty of Amsterdam have become effective as from its entry into force on 1 May 1999.

122. Council of Europe, *Compendium of texts governing the relations between the Council of Europe and the European Union*, new edition 1995, 1-5.

European Communities, to exchange annual and statutory reports. The annual report on the status of European co-operation by the Secretary General of the Council of Europe is to be transmitted to the Commission.

Further, the Committee of Ministers may invite the Commission to participate in its discussions on the progress of European co-operation as well as other questions of mutual interest. The Secretary General of the European Commission participates, usually once a year, in an exchange of views with the Ministers' Deputies on the state of co-operation between the two organisations.

In *Resolution (89) 40 on the Future Role of the Council of Europe in European Construction*, adopted by the Committee of Ministers on 5 May 1989,¹²³ the co-operation was reinforced by the institution of regular "quadripartite meetings" to be held at least once a year.¹²⁴ They are usually attended by the President of the Committee of Ministers and the Secretary General on behalf of the Council of Europe, and by representatives of the President-in-Office of the Council and the European Commission on behalf of the European Union. Since the 6th quadripartite meeting in April 1995, such meetings have usually been held twice a year. The 13th quadripartite meeting was held in February 1999.

In November 1996, the 1987 Arrangement was updated by a new exchange of letters.¹²⁵ Representatives of the European Commission are now allowed to attend the meetings and activities of the Council of Europe's Committee of Ministers, including rapporteur groups and other working parties. Since the European Commission has no membership rights, it was expressly stated that "the Commission will not enjoy voting rights and will not be involved in the Organisation's decision-making process". For its part, the Commission affirmed its willingness "to consider requests for participation by the Council of Europe in Commission departmental meetings whose work has not yet been submitted to the Community's internal decision-making process".

In December 1996, the European Union's Council in Dublin recognised that the "Council of Europe has a crucial role to play in upholding human rights standards and supporting pluralist democracy".¹²⁶ As far as the accession of new countries to the European Union is concerned, it is now widely acknowledged that membership in the Council of Europe and ratification of the European Convention on Human Rights, together with other important

123. At its 84th Session.

124. See paragraph I.5.

125. Exchange of letters between the President of the European Commission and the Secretary General of the Council of Europe, agreed at the 575th meeting of Ministers' Deputies, held from 14 to 17 October 1997.

126. Presidency Conclusions, Dublin European Council, 13-14 December 1996.

standard-setting treaties and control instruments, are of significant relevance for the fulfilment of some of the requirements for accession.¹²⁷

Since the *Treaty on European Union* has come into effect, co-operation between the two organisations has intensified, notably in the fields of justice and home affairs. Since 1997, regular exchanges of views between the Troika of the K4 Committee of the Council of the European Union (co-ordinating committee of senior officials in the fields of justice and home affairs)¹²⁸ and Council of Europe delegations have been taking place. During these meetings matters of common concern are discussed, in particular work being carried out in the field of judicial co-operation. Their purpose is to establish practical formulae for working relations between the committees or other structures working in the same fields. In its Joint Action of 29 June 1998, the Council of the European Union acknowledged that reports drawn up within the Council of Europe on the implementation of Council of Europe conventions and recommendations will be taken into account when evaluating the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of justice and home affairs.¹²⁹

The European Community's treaty-making power

Under the existing treaty arrangements, each of the European Communities enjoys legal personality and can conclude international agreements with states or international organisations. The European Union as such does not yet possess the requisite legal personality to become a party to the multilateral treaties of the Council of Europe. Proposals to confer legal personality on the European Union as such and to merge the existing legal personalities of the three Communities into a single legal entity¹³⁰ were finally not included in the *Treaty of Amsterdam* which was signed on 2 October 1997.

127. See *Council of Europe's conventional "acquis" which is of interest for accession to the European Union*, Doc. JUR/DIR (99) 2 of 27 January 1999; *The Council of Europe's contribution to the enlargement of the European Union – Fields of Justice and Home Affairs covered by Title VI of the Treaty on European Union*, Doc. DIR/JUR (98) 5 rev. of 27 January 1999; see also the decisions taken at the 628th meeting of Ministers' Deputies on 16 April 1998 (Item 2.3).

128. Following the entry into force of the Treaty of Amsterdam, Title VI of the Treaty on European Union (Articles 29 to 42) contains only provisions on police and judicial co-operation in criminal matters. The "K4 Committee" has become the "Article 36 Committee".

129. Article 3.2 of the "Joint Action of 29 June 1998, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of justice and home affairs", *Official Journal of the EC*, L 191/8 of 7.7.1998.

130. See conference of the representatives of the governments of the member states, *Addendum to the Dublin II General Outline for a draft revision of the treaties*, Brussels, 20 March 1997, 46-9.

However, Article 24 (former Article J.14) and Article 38 (former Article K.10) provide for procedures to conclude international agreements with third states or international organisations if this is necessary for the implementation of Title V (Common Foreign and Security Policy) or Title VI (Police and Judicial Co-operation in Criminal Matters). Such agreements are to be concluded by the Council, acting unanimously on a recommendation from the Presidency. Although the provisions do not specify that the agreements will be concluded on behalf of the Union, this would be logical, bearing in mind that Community powers will remain limited in these areas even after the entry into force of the Treaty of Amsterdam.¹³¹

Among the three communities, only the European Community (previously the European Economic Community) enjoys wide external treaty-making powers which are either explicitly recognised or “implied”¹³² by the Treaty of Rome.¹³³ If the Community has the sole treaty-making competence in a given area, acts alone in entering into agreements with third countries that will bind the Community and its member states. The Court of Justice of the European Communities has rejected the idea of “parallel” or “concurrent” competences between the Community and its member states when the Community has a clear legal mandate for a particular area. This is the case as regards the common commercial policy (Article 133 [former Article 113] of the EC Treaty),¹³⁴ customs treaties, co-operation agreements with developing countries (Article 177 [former Article 130u] of the EC Treaty)¹³⁵ or association agreements with third states (Article 310 [former Article 238] of the EC Treaty).

On the other hand, the European Court of Justice upheld in 1996 that the Community had no competence to accede to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950).¹³⁶ Although respect for human rights is a condition for the lawfulness of Community acts, accession would, according to the Court,

“entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as

131. S. Langrish, “The Treaty of Amsterdam: Selected Highlights”, *European Law Review*, 1998, 3 (13-14).

132. Case 22/70, ERTA, *Commission v. Council*, judgment of 31 March 1971, [1971] ECR 263.

133. A survey of the EC’s participation in multilateral agreements is given in the European Commission’s *Participation des Communautés européennes aux accords multilatéraux*, Brussels, 1 June 1997.

134. See M. Maresceau (ed.), *The European Community’s Commercial Policy After 1992: The Legal Dimension* (1993).

135. See Case C-268/94, *Portuguese Republic v. Council*, judgment of 3 December 1996, [1996] ECR I-6177.

136. Opinion 2/94 of 28 March 1996, *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECRI-1763.

integration of all the provisions of the Convention into the Community legal order ...

Such a modification (...) would be of constitutional significance and (...) could be brought about only by way of treaty amendment".¹³⁷

The consistency of the Court's reasoning has been questioned by drawing a comparison between the jurisdiction of the European Court of Human Rights and the competences of the World Trade Organisation.¹³⁸ While imposing a formal treaty amendment for acceptance of the former, the Court in Luxembourg did not require any particular legal basis for the integration of the European Community into the compulsory dispute resolution mechanism of the latter, which directly affects essential competences of the Community, such as the free movement of goods and services, or competition. The resulting situation has the disadvantage that the two European Courts in Luxembourg and Strasbourg may adopt divergent interpretations of the same rights under the European Convention on Human Rights. Only accession to the Convention would ensure uniform and coherent protection of human rights by the European body specifically set up for that purpose and thereby increase legal certainty both for the individual and the Community institutions.¹³⁹

The procedure for the conclusion of agreements on behalf of the European Community is governed by Article 300 (former Article 228) of the EC Treaty. International agreements are concluded by the Council after having consulted the European Parliament. Association agreements (Article 310 [former Article 238] of the EC Treaty) and other agreements "establishing a specific institutional framework by organising co-operation procedures", agreements "having important budgetary implications for the Community", and agreements entailing amendment of an act adopted under the co-decision procedure (Article 251 [former Article 189.b] of the EC Treaty) require the assent of the European Parliament.

Multilateral treaties concluded within the framework of the Council of Europe may contain certain obligations which fall within the competence of the Community and certain obligations which fall within the competence of the member states. The precise scope of the Community's treaty-making

137. *Ibid.*, paragraphs 34-5.

138. See P. Alston/ J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights"(under point 8.B), available on the Internet at <http://www.law.harvard.edu/Programs/JeanMonnet/>.

139. J. Kokott/F. Hoffmeister, "Opinion 2/94 (Case Note)", *AJIL*, 90 (1996), 664 (666-7). See also Parliamentary Assembly's Recommendation 1365 (1998) – Relations with the European Union (follow-up to the European Union's Amsterdam Summit), adopted on 21 April 1998; Written Question No. 373 on the Luxembourg Court of Justice and the European Court of Human Rights by Lord Kirkhill (Parliamentary Assembly Doc. 7852 of 26 June 1997) and the reply by the Committee of Ministers, adopted during the 601st meeting of Ministers' Deputies on 17 September 1997.

powers has to be determined in each case, taking into account a number of factors, in particular the relevant provisions of the *Treaty establishing the European Community* and the effective exercise of "internal" legislative powers by the Community.¹⁴⁰ The actual determination of the division of competence is an internal matter to be resolved in each case by the Community institutions according to their own procedures.

From the point of view of the European Community, participation in Council of Europe conventions has so far proceeded along the lines of the "mixed" agreement formula. A "mixed" agreement has been defined as:

"Any treaty to which an international organisation, some or all of its member states and one or more third states are parties and for the execution of which neither the organisation nor its member states have full competence".¹⁴¹

The sometimes rather complicated "internal" division of powers between the Community and its member states can be illustrated by the example of the *European Agreement on the Exchange of Therapeutic Substances of Human Origin* (ETS No. 26, 1958). The agreement notably provides for the relief from custom duties and value added tax for "therapeutic substances of human origin" (Article 5). Since this matter is covered by Community legislation,¹⁴² the agreement was classified as a customs treaty and, on the basis of Council Decision 87/67/EEC, the Community became a party to it. As to the pharmaceutical aspects covered by the agreement, the Community competence extended only to stable blood derivatives.¹⁴³ Labile blood components on the other hand fell within the scope of national legislation.¹⁴⁴ As a result, the European Community and its member states had to be parties to the agreement in order to make it applicable in the territories of the member states.

In areas of concurrent competence, the Community and its member states are under an obligation to ensure close co-operation, both in the process of negotiation and conclusion and in the fulfilment of the commitments

140. See in particular Opinion 2/91 of 19 March 1993, *ILO Convention No. 170*, [1993] ECR I-1061; Opinion 1/94 of 15 November 1994, *Community Competence to Conclude Certain International Agreements*, [1994] ECR I-5276; Opinion 2/94 of 24 March 1995, *OECD*, [1995] ECR I-521.

141. H. Schermers, "A Typology of Mixed Agreements", in D. O'Keefe/H.G. Schermers (eds.), *Mixed Agreements* (1983), 23 (25-26). See also P. Demaret, "External Policy of the European Community," in the European Commission for Democracy through Law publication *Law and Foreign Policy*, 1998, 143 (163-68).

142. See in particular Regulation No. 918/83; Directives 83/181/EEC and 77/388/EEC.

143. See particularly Council Directives 89/381/EEC, 91/356/EEC and 91/507/EEC.

144. This changed following the entry into force of the Treaty of Amsterdam which confers on the Community the competence to adopt "measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives" (Article 129 of the EC Treaty as revised by the Treaty of Amsterdam – Article 152 in its consolidated version).

entered into.¹⁴⁵ “Mixed” agreements have been “increasing in number”, “spreading to a wide variety of matters” and might even be considered “more important than agreements concluded by the Community alone”.¹⁴⁶ They are a convenient legal and political mechanism that has helped ease the dislocations arising from the progressive evolution of the Community’s powers in external relations. It has been suggested that “mixed agreements” can have the effect of making “Community participation acceptable without creating inter-institutional tension”.¹⁴⁷

Survey of European Community participation

European treaties

The 1987 *Arrangement between the Council of Europe and the European Community* provides that:

“[a]s regards any new draft European conventions and agreements, consideration will be given to the appropriateness of inserting a clause allowing for the European Community to become a Contracting Party to the convention or agreement; it is understood that the insertion of such a clause would in no way prejudge the decision which the competent bodies of the Community might finally take with regard to the conclusion of the convention or agreement by the Community”.

Since 1987 the insertion of such clauses has become a regular feature.¹⁴⁸ Even for some extant treaties, accession clauses have been inserted by means of a protocol. The inclusion of such clauses in no way prejudices the decision of the competent Community institutions as to whether to become a party or not.

Currently, the European Community is a party to the following eight Council of Europe treaties:

- European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS No. 26, 1958) as completed by its Additional Protocol (ETS No. 109, 1983) [entry into force with respect of the EC on 1 April 1987];
- Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment (ETS No. 33, 1960) as completed by its Additional Protocol

145. Case C-25/94, *Commission v. Council*, judgment of 19 March 1996, [1996] ECR, I-1469, paragraph 48.

146. C.-D. Ehlermann, “Mixed Agreements: A List of Problems”, in D. O’Keeffe/ H.G. Schermers, *Mixed Agreements* (1983), 3 (3).

147. *Ibid.*, 7-8.

148. See the study by R. Brillat, “Participation de la Communauté européenne aux conventions du Conseil de l’Europe”, *AFDI*, 37 (1991), 819-31.

(ETS No. 110, 1983) [entry into force with respect of the EC on 1 April 1987];

– European Agreement on the Exchange of Blood-Grouping Reagents (ETS No. 39, 1962) as completed by its Additional Protocol (ETS No. 111, 1983) [entry into force with respect of the EC on 1 April 1987];

– Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50, 1964) as amended by its Protocol (ETS No. 134, 1989) [entry into force with respect of the EC on 22 September 1994];

– European Agreement on the Exchange of Tissue-Typing Reagents (ETS No. 84, 1974) as completed by its Additional Protocol (ETS No. 89, 1976) [entry into force with respect of the EC on 22 November 1977];

– European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 87, 1976) [entry into force with respect of the EC on 19 April 1989];

– Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979) [entry into force with respect of the EC on 1 September 1982];

– European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS No. 123, 1986) [entry into force with respect of the EC on 1 November 1998].

The European Convention relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (ETS No. 153, 1994) was signed by the European Community on 26 June 1996, but has not yet been accepted or approved.

The European Community may also become a party to the following treaties:

by signature:

– European Convention for the Protection of Animals during International Transport (ETS No. 65, 1968) as completed by its Additional Protocol (ETS No. 103, 1979);

– Protocol of Amendment to the European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 145, 1992);

by signature followed by ratification, acceptance or approval:

– European Convention for the Protection of Animals for Slaughter (ETS No. 102, 1979);

– European Convention on Transfrontier Television (ETS No. 132, 1989);

– Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No. 150, 1993);

- Convention on Human Rights and Biomedicine (ETS No. 164, 1997);

by accession (at the invitation of the Committee of Ministers):

- Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121, 1985);
- Convention on Insider Trading (ETS No. 130, 1989) as completed by its Protocol (ETS No. 133, 1989);
- European Convention on the General Equivalence of Periods of University Study (ETS No. 138, 1990);
- European Convention for the Protection of the Archaeological Heritage (Revised) (ETS No. 143, 1992);
- European Convention on Cinematographic Co-Production (ETS No. 147, 1992).

Finally, after their entry into force, the Community may be invited to accede to the following treaties:

- European Code of Social Security (Revised) (ETS No. 139, 1990);
- European Convention on the Exercise of Children's Rights (ETS No. 160, 1996).
- Criminal Law Convention on Corruption (ETS No. 173, 1999).

As regards the *Convention on the Recognition of Qualifications concerning Higher Education in the European Region* (ETS No. 165, 1997) the European Community may only accede upon a request by its member states (Article XI.3.3).¹⁴⁹

In 1997, the European Communities applied for accession to the *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (ETS No. 108, 1981). In a letter dated 22 October 1997, the Secretary General of the European Commission notified the Secretary General of the Council of Europe of the Communities' application for accession to the convention and of the decision by the Council of the Union on 22 July to authorise the Commission to begin negotiations with a view to acceding to the convention as soon as possible. According to the original text of the convention, only states may become parties to it.

At the 675th meeting of Ministers' Deputies on 15 June 1999, the Committee of Ministers adopted amendments to the convention which will enable the Communities to accede to it. According to the procedure fore-

149. This provision stipulates as follows: "After the entry into force of this Convention the European Community may accede to it following a request by its member states, which shall be addressed to one of the depositaries. In this case, Article XI.3.2 shall not apply".

seen in Article 21 of the convention, the amendments must be accepted by all parties before the Communities will be able to accede.

The co-operation agreement between ECRI and the EU Monitoring Centre

The Council of Europe has been working for many years to combat racism and xenophobia. Since 1993, this has become the specific mandate of a committee composed of independent experts nominated by their respective governments for their high moral authority and recognised expertise, the *European Commission against Racism and Intolerance* (ECRI), which was set up in the wake of the Vienna Summit meeting held in October 1993. At this summit, the heads of state and government of the Council of Europe member states expressed their alarm at the rise of racism, xenophobia, anti-Semitism and intolerance across Europe, and approved a plan of action to be implemented by the Council of Europe over the coming years.

ECRI has the task of examining and assessing the effectiveness of the range of measures (legal, policy and other) taken by member states to combat racism, xenophobia, anti-Semitism and intolerance. It was asked to propose further action in this field at local, national and European level. It also formulates general policy recommendations to member states and studies international legal instruments applicable in this area.¹⁵⁰

The European Union is also active in this field. On 2 June 1997, the Council of Ministers of the European Union adopted Regulation (EC) No. 1035/97, setting up a European Monitoring Centre on Racism and Xenophobia in Vienna.¹⁵¹ The Monitoring Centre has essentially the task of collecting information and data which are relevant to the free movement of persons and goods, information and the media, education, social policy and culture. It has no standard-setting competences.

In view of the Council of Europe's experience in combating racism and xenophobia, Article 7.3 of this regulation provides that, in accordance with the procedure laid down in Article 228 of the EC Treaty,¹⁵² the Community shall conclude an agreement with the Council of Europe on close co-operation between the Council of Europe and the Monitoring Centre.

Following negotiations between the Council of Europe and the European Commission, the Council of the European Union approved the text on

150. See ECRI General Policy Recommendation No. 1: Combating racism, xenophobia, anti-Semitism and intolerance (a comprehensive strategy for outlawing racism, covering in particular legislation, law enforcement and judicial remedies); ECRI General Policy Recommendation No. 2: Specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level (advocating the establishment of an independent specialised body in this field). 151. *Official Journal of the EC*, L 151 of 15.6.1997, 1.

152. Article 300 according to the renumbering provided for in the Treaty of Amsterdam.

153. At the 657th meeting of Ministers' Deputies held from 20 to 21 January 1999 (Item 2.5).

21 December 1998. The Committee of Ministers approved it on 21 January 1999.¹⁵³ The "Agreement between the European Community and the Council of Europe for the purpose of establishing, in accordance with Article 7.3 of Council Regulation (EC) No. 1035/97, a European Monitoring Centre on Racism and Xenophobia, with close co-operation between the Centre and the Council of Europe" was formally concluded on 10 February 1999 in Strasbourg, on the occasion of the 13th quadripartite meeting.¹⁵⁴ Apart from the arrangement of 1987, it constitutes the first international treaty concluded directly between the two organisations. The agreement provides for an exchange of information, regular consultations and the appointment of a member of ECRI to the centre's management board, which held its first meeting on 21 January 1998. It is the aim of the consultations to ensure that the programmes of ECRI and the centre complement each other and to avert, as far as possible, any unnecessary duplication of effort in the work of the two bodies.

The effects of international treaties in Community law

On the basis of the relevant case-law of the Court of Justice of the European Communities, the legal system of the European Communities can be characterised as monist.¹⁵⁵ Provisions of an international treaty which create unconditional and judicially ascertainable legal rights are deemed to be directly enforceable by the affected individuals. The EC Court of Justice has stated this principle as follows:

"A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject in its implementation or effects to the adoption of any subsequent measure".¹⁵⁶

Once a treaty has become an integral part of Community law, its provisions will operate as a uniform and harmonised set of rules within the Community's legal order. The treaty provisions take precedence over secondary legislation (regulations and directives) and other Community acts.¹⁵⁷

154. *Official Journal of the EC*, L 44/33 of 18.2.1999. The text is also contained in Doc. CM/Inf(99)5 of 18 January 1999.

155. See in particular Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, judgment of 26 October 1982, [1982] ECR 3641.

156. Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, judgment of 30 September 1987, [1987] ECR 3719, paragraph 14. See also Case 162/96, *A. Racke GmbH & Co. and Hauptzollamt Mainz*, judgment of 16 June 1998, paragraph 31.

157. Cases 21-24/72, *International Fruit*, judgment of 12 December 1972, [1972] ECR 1219; Case 9/73, *Schlüter*, [1973] ECR 1135; Case C-61/94, *Commission v. Germany*, judgment of 10 September 1996, [1996] ECR I-3989. See also Joint Cases C-364/95 and C-365/95, *T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas*, judgment of 10 March 1998, [1998] ECR I-1023.

The same should apply with regard to binding decisions adopted by conventional committees.¹⁵⁸ Where more than one interpretation can be given to a provision of secondary Community legislation, it must be interpreted as far as possible in a way which is consistent with the treaty.¹⁵⁹

The special relations or “disconnection” clause

“Mixed agreements” which are concluded simultaneously between the Community, its member states and third states are in principle capable of creating rights and obligations between all the parties and therefore also between the European Union’s member states. From the Community’s point of view, such a result may be inappropriate if and when Community law (directives or regulations) has been enacted on the same subject-matter. When the Community intends to adopt exhaustive regulations as far as the relations between member states are concerned, it becomes a particularly important objective to safeguard the application of Community law between the member states against different provisions of an international treaty.

To this end, special relations clauses have been introduced into some Council of Europe treaties, each time at the explicit request of the European Community.¹⁶⁰ Their wording was inspired by provisions which had been introduced in certain conventions in order to accommodate the special situation of the nordic countries with their uniform laws.¹⁶¹ By virtue of these clauses, two or more state parties which have regulated their relations in a particular matter on the basis of uniform legislation or of some other special system, or are expected to do so in the future, are entitled to regulate their relations accordingly, notwithstanding the terms of the Council of Europe treaty in question.

158. However, in Case C-1/96, *The Queen v. Minister of Agriculture*, judgment of 19 March 1998, the Court of Justice did not accept the binding force of recommendations of the Standing Committee set up under the European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 87, 1976), see *infra* p. 139.

159. Case C-61/94, *Commission v. Germany*, judgment of 10 September 1996, [1996] ECR I-3989.

160. Brillat, *op. cit. supra* Note 148, 828-29.

161. See, for example, Article 28.3 of the European Convention on Extradition (ETS No. 24, 1957): “Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph”. Similar provisions are contained in Article 26.4 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959); Article 37.3 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51, 1964); Article 27 of the European Convention on the Punishment of Road Traffic Offences (ETS No. 52, 1964).

It should be emphasised that special relations clauses are not inserted into Council of Europe treaties as a matter of course. The necessity of such a clause must be evaluated on a case-by-case basis, taking into account the object and purpose of the treaty in question. The standard formula of the special relations clause can be found in the *European Convention on Transfrontier Television* (Article 27.1), which was drafted almost simultaneously with EC Directive 89/552/EEC of 3 October 1989:

“In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned”.

For the *Convention on Insider Trading* (ETS No. 130, 1989), this clause was added by a protocol (ETS No. 133) which was opened for signature on 11 September 1989 and came into effect at the same time as the convention, on 1 October 1991.

The explanatory report to the transfrontier television convention describes the purpose of such clauses as follows:

“Paragraph 1 is designed to cover the particular situation of those Parties which are members of the European Economic Community. It states that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between the Parties, members of the European Community, this paragraph is without prejudice to the application of this Convention between those Parties and Parties which are not members of the European Economic Community”.¹⁶²

In applying this clause, the Court of Justice of the European Communities has confirmed that a member state of the European Union is not entitled to invoke the transfrontier television convention in order to justify non-compliance with the provisions of Directive 89/552/EEC on the same subject.¹⁶³

Special relations clauses are valid from a legal point of view since they are freely negotiated and accepted by the parties. Their use corresponds to a legitimate interest of the European Union to avoid international treaty obligations becoming an obstacle to the further development of Community law.

¹⁶². *Explanatory report on the European Convention on Transfrontier Television* (1990), § 279.

¹⁶³. Case C-222/94, *Commission v. United Kingdom*, judgment of 10 September 1996, [1996] ECR I-4025, paragraph 53.

From a political point of view, the principle issue raised by the special relations clause is its potential for the division of Europe into two different legal areas; one for the European Union and its member states and one for the other parties. Since conventions of the Council of Europe are intended as a means to foster greater unity between the member states, a fair balance must be struck between the European Union's desire to evolve towards greater integration and the Council of Europe's commitment to achieving common legal standards throughout Europe. A harmonising and non-discriminatory approach is warranted, especially in the case of standard-setting treaties.

The exercise of competences in conventional committees

Following the "mixed agreement" formula, the Community is a party to Council of Europe treaties alongside its member states. For the practical application of the treaties, it is necessary to determine the respective competences of the Community and its member states, especially with regard to the work carried out by committees set up under conventions. The actual determination of the division of competence in each case is an internal matter that the Community must resolve according to its own procedures.

Typically, as regards the Community's participation in Council of Europe treaties, the EU's Council of Ministers adopts a decision that gives the Commission representative a specific mandate to represent the unified position of the Community on matters that fall within the scope of Community competence.

When operating within the context of a conventional committee, the European Commission tries to co-ordinate the unified position of the Community's member states on matters that are within the ambit of Community law. It is the role of the Commission's representative to advise the participants of the requirements of Community law and to promote the adoption of a common position. In the context of the work of conventional committees, "co-ordination" meetings are often held before or directly after the opening or closure of a particular day's proceedings. The Commission makes a proposal to the representative of the EU Council Presidency, who usually chairs the "co-ordination" meeting. The chair opens the matter for discussion among the representatives of Community member states who act as a sort of miniature EU Council of Ministers. After achieving a common position, the chairperson gives the Commission a mandate to represent that common position when the matter arises for discussion during the course of the meeting.

Usually every attempt is made to co-ordinate the Community's position in Brussels – before the meeting of the committee is convened. In cases where circumstances require that a draft text be modified or finalised in the course of a particular meeting, a "co-ordination" meeting may be organised on an

ad hoc basis. Owing to the scope and nature of the work conducted in the conventional committees, a matter may arise that is not the subject of a specific act of Community legislation but may, nevertheless, have consequences for Community law.¹⁶⁴ In these circumstances, the Commission representative will convene an *ad hoc* meeting of the member states which are parties to the convention and work out provisional measures for the particular circumstance in question.

Voting procedures may differ from one treaty to another. They can be regulated either by a "fixed" or by an "flexible" clause. For the purposes of voting in the standing committees which were set up under the *Convention on the Conservation of European Wildlife and Habitats (Bern Convention)* (ETS No. 104, 1979)¹⁶⁵ and the *European Convention on Transfrontier Television* (ETS No. 132, 1989),¹⁶⁶ a flexible clause was chosen which takes into account the evolution in the distribution of competences between the Community and its member states (Article 13.2 of the Bern Convention; Article 20.2 of the Transfrontier Television Convention). In the fields of its competence, the Community exercises the right to vote with the same number of votes as the number of its member states which are parties to the convention. The Community cannot exercise the right to vote when its member states vote and conversely:

"Any Contracting Party may be represented on the Standing Committee by one or more delegates. Each delegation shall have one vote. Within the areas of its competence, the European Community shall exercise its right to vote with a number of votes equal to the number of its member states which are Contracting Parties to this Convention. The European Community shall not exercise its right to vote in cases where the member states concerned exercise theirs, and conversely".

The voting arrangement included in the *Bern Convention* (ETS No. 104, 1979) and the *European Convention on Transfrontier Television* (ETS No. 132, 1989), that is, the Community voting with a number of votes equal to its member states, follows the prevailing practices in many international instruments of widely varying character.¹⁶⁷ A similar rule is contained in the Rules of Procedure of the Standing Committee acting under the *European Convention for the Protection of Animals kept for Farming Purposes* (ETS No. 87, 1976), not in the actual text of the convention itself.¹⁶⁸

164. On the subject of possible contradictions between a Community directive and a recommendation adopted by a conventional committee, see [1996] ECR I-3989; Case C-1/96, *The Queen v. Minister of Agriculture*, judgment of 19 March 1998.

165. The European Community is a party since 1 September 1982.

166. The European Community is not yet a party to this convention.

167. See in particular Article II, § 9 of the FAO Constitution; Article IX of the WTO Agreement.

168. The Rules of Procedure were adopted by the Standing Committee on 22 February 1979 and amended subsequently.

The *Treaty of Amsterdam* of 1997 introduced a greater extent of “variable geometry” into the treaty arrangements governing the European Union which may have repercussions for the exercise of voting rights in conventional and other committees established under Council of Europe treaties. A new title in the Treaty on European Union (“Title VII [former Title VI.a] – Provisions on closer co-operation”) sets out the conditions under which a “vanguard group” of member states may proceed to closer integration among themselves in certain areas.¹⁶⁹ The United Kingdom, Ireland and Denmark will enjoy a special status with respect to the Schengen *acquis* and certain policies regarding visas, asylum and immigration (Title IV [former Title III.a] of the EC Treaty). The rather simple alternative used hitherto, by which the member states either vote individually or the European Commission voted with a number of votes corresponding to the total of EU member states, may no longer reflect the rather complex distribution of competences within the European Union.

Under the *Treaty of Amsterdam*, there are bound to be areas where the Commission may only represent a limited number of EU member states, namely those which have consented to a transfer of competences. The other member states (for example, Denmark, Ireland and the United Kingdom as regards certain measures adopted under Title IV of the EC Treaty) cannot be represented by the Commission. Though members of the European Union, they will in principle be entitled to exercise their voting rights independently. Taking into account the object and purpose of the standard clause on the exercise of voting rights in conventional committees or multilateral consultations, it should be possible to interpret it in the sense that the European Commission will only be entitled to represent only those member states which have effectively transferred their competences. However, when the amendments to the *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (ETS No. 108, 1981) allowing the accession of the European Communities were adopted in 1999, reasons of legal security were invoked to complement the standard formula in the following way:

“Concerning questions within their competence, the European Communities exercise their right to vote and cast a number of votes equal to the number of member states that are Parties to the Convention and have transferred their competencies to the European Communities in the field concerned. In this case, those member states of the Communities do not vote, and the other member states may vote. The European Communities do not vote when a question, which does not fall within their competence, is concerned.”¹⁷⁰

169. Langrish, *op. cit. supra* Note 131, 5-7; C. D. Ehlermann, *Differentiation, flexibility, closer co-operation: The new provisions of the Amsterdam Treaty* (1998).

170. New paragraph 3 of Article 20 of the convention. The amendments were adopted at the 675th meeting of Ministers' Deputies on 15 June 1999.

Procedures governing Community voting have so far not resulted in significant problems. Formal voting is relatively infrequent in conventional committees or multilateral consultations and every attempt is made to reach important decisions by consensus. Provided that the meetings are well prepared on both sides, the co-operation with the European Commission can be very efficient. In the field of animal welfare, for example, the preparation of legislative proposals in Brussels has often closely followed the standing committee's related recommendations, and can be considered as an example of the complementary nature of the work done in the Council of Europe and the European Community.

Dispute settlement

Any clauses concerning the settlement of disputes between the parties must take into account the distribution of competences between the European Community and its member states. The following flexible clause was introduced in 1979 by an additional protocol into Article 47.2 of the *European Convention for the Protection of Animals during International Transport* (ETS No. 65, 1968):¹⁷¹

“In the event of a dispute between two Contracting Parties one of which is a member state of the European Economic Community, the latter itself being a Contracting Party, the other Contracting Party shall address the request for arbitration both to the member state and to the Community, which jointly shall notify it, within three months of receipt of the request, whether the member state or the Community, or the member state and the Community jointly, shall be party to the dispute. In the absence of such notification within the said time limit, the member state and the Community shall be considered as being one and the same party to the dispute for the purposes of the application of the provisions governing the constitution and procedure of the arbitration tribunal. The same shall apply when the member state and the Community jointly present themselves as party to the dispute”.

According to this clause, the Community and its member states may choose to take part either jointly or separately in dispute settlement proceedings. In case of a conflict between the Community and one of its member states as to which is competent, it is provided that the Community and the member state will jointly participate in the proceedings.

Identically worded provisions concerning the position of the European Community are contained in Article 18.3 of the *Convention on the Conservation of European Wildlife and Habitats* (Bern Convention) (ETS

¹⁷¹ The Additional Protocol to the European Convention for the Protection of Animals during International Transport (ETS No. 103, 1979) came into effect on 7 November 1989. So far the European Community has not become a party to the convention.

No. 104, 1979) and in the appendix to the *European Convention on Transfrontier Television* (ETS No. 132, 1989). It should, however, be emphasised that the whole Chapter IX of the latter convention (settlement of disputes) will be of little relevance for the European Community in the event of its accession. By virtue of the special relations clause (Article 27.1 of the convention), any disputes between EU member states concerning matters within the competence of the European Community will in any case remain within the exclusive jurisdiction of the Court of Justice in Luxembourg.

In the event of its accession, the European Community is not likely to become involved in any disputes concerning the alleged violation of the convention's principles by broadcasters (potentially the most likely source of disputes). Responsibility of a party in such disputes will be based on the criteria of jurisdiction. However, under the rules of jurisdiction laid down in Article 5 of the convention, there are no broadcasters which come within the jurisdiction of the European Community. The rules of jurisdiction laid down in Article 5 of the convention do not leave any room for a subsidiary or vicarious responsibility of the European Community for acts or omissions by member states which are not parties to the convention (for example, if a broadcaster under the jurisdiction of an EU member state not party to the convention broadcasts a programme service with special advertising windows targeting the audience of a party which is not a member state of the EU, in breach of the convention). Even in cases where the subject falls within the exclusive competence of the European Community, only a party exercising jurisdiction over the broadcaster may be held responsible under the convention. If the state under whose jurisdiction the broadcaster comes is not a party to the convention, the procedures foreseen in the convention cannot be applied.

The Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50, 1964)

As far as the European Pharmacopoeia is concerned, a special voting arrangement had to be adopted. The 1989 Protocol to the convention (ETS No. 50, 1964), which "opened" this treaty to accession by the European Community, also modified the voting procedures.

The European Pharmacopoeia Commission (EPC), working within the framework of the convention and under the supervision of the European Public Health Committee, sets official criteria and descriptions for the evaluation of medicinal substances with the intention of ensuring public safety in these matters. This is done by the publication of monographs, which can be characterised as scientific articles on one particular substance, comprising the definition, description, methods for assessing purity, and so on. The monograph constitutes the "official standard" for the substance in

question. Parties are under an obligation to take the necessary legislative and administrative measures in order to render the specifications of the European Pharmacopoeia concerning medicines for human and veterinary use legally binding. Directive 75/318/EEC of 20 May 1975 of the Council of the European Communities made the monographs of the European Pharmacopoeia obligatory when constituting marketing authorisation dossiers on medicines for human use. Directive 81/852/EEC of 28 September 1981 did the same concerning medicines for veterinary use.

Article 4 of the Pharmacopoeia convention stipulates that the Public Health Committee exercises a general supervisory function and receives reports, after each session, of the EPC. The committee also approves all decisions of the EPC, except those relating to technical or procedural matters. Broadly speaking, this encompasses decisions such as proposing dates for the implementation of technical monographs, determining the composition of groups of experts, and so on.

Regarding voting rights the following text was agreed and became Article 7 of the convention:¹⁷²

- “1. Each of the national delegations shall be entitled to one vote.
2. On all technical matters, including the order in which the monographs referred to in Article 6 are to be prepared, decisions of the Commission shall be taken by a unanimous vote of national delegations casting votes and a majority of the national delegations entitled to sit on the Commission.
3. All other decisions of the Commission shall be taken by a three-quarters majority of the votes cast. For the decisions, from the time of entry into force of the Convention in respect of the European Economic Community, the latter's delegation shall vote in place of its member states' delegations. It shall have a number of votes equal to the number of its member states' delegations.

However, should a Contracting Party alone possess the required majority, the Contracting Parties undertake to renegotiate the voting modalities no sooner than five years after the entry into force of the Protocol, at the request of one of them addressed to the Secretary General of the Council of Europe”.

The Community acceded to the convention as amended by the protocol on 21 June 1994.¹⁷³ It should be noted that representatives of the European Community are not allowed to vote on technical matters, for example, the adoption of technical standards for the monographs. For all other decisions, generally arrived at by consensus, but which can be taken by a two-thirds

172. Following the entry into force of the 1989 Amending Protocol on 1 November 1992.

173. See Decision of the Council of 16 June 1994, *Official Journal of the EC*, L 158/17 of 25.6.1994.

majority of the votes, the EC expresses a vote which corresponds to the sum of the votes of its member states which are parties to the convention. There is a duty to renegotiate the voting modalities on non-technical matters in the event that one of the contracting parties, by itself, constitutes a majority.

On 26 May 1994 another step was taken in the co-operation between the Council of Europe and the European Union. The European Pharmacopoeia Secretariat took on new responsibilities in setting up a European network of laboratories involved in the quality control of medicines for human and veterinary use. Consequently, the European Pharmacopoeia Secretariat changed its name to the European Department for the Quality of Medicines (EDQM) to cover these new activities in addition to its other activities.

Conclusions

The distinctive international legal status of the European Community as an institution with continually evolving competences that often oblige the organisation to enter into international legal obligations alongside of, or in the place of, its member states, has had an important impact on treaty-making within the Council of Europe.

The legal flexibility of many of the conventions, particularly in matters of membership and participation in the substantive work of the convention, tends to facilitate *ad hoc* solutions to the problems which may arise in connection with the changing distribution of competences between the Community and its member states. The state of co-operation between the Council of Europe and the European Community indicates that in keeping with the legal structure and spirit of each of the Council of Europe conventions, pragmatic solutions to the pressing questions of mutual co-operation have been achieved. Indeed, the Community's participation has been seen to facilitate the application of convention law in matters related to European wildlife and natural habitats as well as making an important contribution to the harmonisation of European laws relating to animal welfare.¹⁷⁴

174. Some of the provisions of the Council of Europe conventions and recommendations have been taken up and developed in the legal instruments of the European Community; see in particular Directive 77/489 EEC of 18 July 1977 on the transport of animals (Convention ETS No. 65, 1968); Directive 86/609/EEC of 24 November 1986 (Convention ETS No. 123, 1986); Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter for killing (Convention ETS No. 102, 1979); Directive 98/58/EC of 20 July 1998 on the protection of farm animals.

CHAPTER 7: RESERVATIONS AND DECLARATIONS

Introduction

Most treaties concluded within the framework of the Council of Europe provide a common framework for international co-operation or contain minimum standards intended to be acceptable to all member states. Full participation of as many states as possible is a prerequisite for achieving the goals pursued by these treaties. Without the possibility of making reservations, it would be impossible to extend participation in a particular treaty to those member states which are generally prepared to adhere to the treaty, provided that they can exclude the application of a particular provision which appears to be in contradiction with important principles of their domestic law. On the other hand, the possibility of making reservations is a potential threat to the integrity of the final text of a treaty which has been drawn up through lengthy negotiations and often constitutes a compromise between differing national positions. It must be ensured that the harmonising effect of the treaty cannot be offset by too numerous and extensive reservations.

In 1993, the Parliamentary Assembly adopted *Recommendation 1223 (1993) on reservations made by member states to Council of Europe conventions*. This recommendation and the reply adopted by the Committee of Ministers on 17 February 1994 at the 508th meeting of the Ministers' Deputies are reproduced in Appendix V. They contain elements which are important to understanding the Organisation's practice with regard to reservations.

Reservations and interpretative declarations under the Vienna Convention¹⁷⁵

The practice of the Council of Europe and its member states with regard to reservations is guided by the provisions of the Vienna Convention on the Law of Treaties of 23 May 1969. Articles 19 to 23 of the convention introduced a fairly flexible system for reservations, designed to facilitate widespread participation in international treaties. Its provisions represent

175. On reservations see in particular P.-H. Imbert, *Les réserves aux traités multilatéraux* (1979); F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988); R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen* (1986); see also the extensive bibliography contained in Appendix 1 to the second report on reservations to treaties presented by A. Pellet to the International Law Commission in 1996, UN Doc. A/CN.4/478, 13 *et seq.*

progressive development as well as codification of existing international law.¹⁷⁶

Based on the definitions of the term "reservation" contained in each of the three Vienna Conventions of 1969, 1978¹⁷⁷ and 1986,¹⁷⁸ the following composite text was established in 1998 by the International Law Commission:

"'Reservation' means a unilateral statement, however phrased or named, made by a state or an international organisation when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a state when making a notification of succession to a treaty, whereby the state or organisation purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state or to that international organisation".¹⁷⁹

This definition has been confirmed in state practice and judicial decisions.¹⁸⁰ The goal pursued by making a reservation is to exclude or modify the actual terms of the treaty or the legal effect of certain provisions in their application to the reserving state or organisation.¹⁸¹ In most cases, the reserving state wishes to limit its obligations under the treaty.

Reservations have to be distinguished from interpretative declarations.¹⁸² States resort to interpretative declarations in order to make known their understanding or interpretation of a treaty or a particular provision thereof. Such declarations may be prompted by uncertainty as to the existence of a conflict between domestic legislation and the treaty obligations. A distinction is sometimes drawn between simple and conditional or qualified interpretative declarations.¹⁸³ Simple interpretative declarations are mere clarifications of the state's position which may be given up once a certain interpretation has been authoritatively established by common agreement between the parties or by an international tribunal.

176. Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (second edition 1984), 13-14; C. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment" No. 24 (52), *ICLQ*, 46 (1997), 390 (398).

177. Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations Conference on the Succession of States in respect of Treaties, *Official Documents, Vol. III – Conference Documents*.

178. Vienna Convention on Treaties between States and International Organisations or between International Organisations of 16 March 1986.

179. *Draft report of the International Law Commission on the work of its fiftieth session*, UN Doc. A/CN.4/L.564 (1998), 1. See A. Pellet, *Third report on reservations to treaties*, UN Doc. A/CN.4/491/Add.1 (1998), §§ 51 *et seq.*; Imbert, *op. cit. supra* Note 175, 14 *et seq.*

180. A. Pellet, *Third report on reservations to treaties*, UN Doc. A/CN.4/491/Add.2 (1998), §§ 108-20.

181. *Anglo-French Continental Shelf* arbitration, decision of 30 June 1977, *ILM*, 18 (1979), 397 = *RIAA* XVIII, 3 (§ 55).

182. Horn, *op. cit. supra* Note 175, 229 *et seq.*; A. Pellet, *Third report on reservations to treaties*, UN Doc. A/CN.4/491/Add.4 (1998), §§ 236 *et seq.*; *Anglo-French Continental Shelf* arbitration, decision of 30 June 1977, *ILM* 18 (1979), 397 = *RIAA* XVIII, 3.

183. Horn, *op. cit. supra* Note 175, 238 *et seq.* and 325-37.

An interpretative declaration may also constitute an absolute condition for the state's consent to be bound by the treaty. Such conditional interpretative declarations can be considered as "dormant" reservations which reveal their true nature only once a different interpretation has been agreed upon as the correct one. When ratifying the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) in 1974, the Swiss Government had made the following "interpretative declaration":

"The Swiss Federal Council declares that it interprets the guarantee of free legal assistance and the free assistance of an interpreter, in Article 6, paragraph 3.c and e of the Convention, as not permanently absolving the beneficiary from payment of the resulting costs".¹⁸⁴

In 1978 the European Court of Human Rights adopted precisely the interpretation which had been rejected by Switzerland. In the *Luedicke, Belkacem and Koç case*, it held that Article 6.3.e of the ECHR absolved the accused permanently and without any conditions from the payment of costs for interpretation.¹⁸⁵ When the European Commission of Human Rights had to examine the Swiss "declaration" in 1982, it came to the conclusion that, having regard to the terms used and the preparatory work, it amounted in fact to a reservation.¹⁸⁶

The admissibility and opposability of reservations under the Vienna Convention

The reservations system under the Vienna Convention contains some limitations to a state's discretion to make reservations. It sets out a two-stage test of admissibility (Article 19) and opposability (Article 20).¹⁸⁷

Article 19 of the Vienna Convention enumerates three categories of reservations which are deemed to be inadmissible:¹⁸⁸

- a. reservations that are *expressly prohibited* by the treaty;
- b. reservations that do not belong to those reservations that are *preclusively permitted* by the treaty;
- c. reservations that are *incompatible with the object and purpose* of the treaty.

The second stage is the opposability of admissible reservations as against the other parties to the treaty. Article 20 of the Vienna Convention, which

184. Declaration contained in the instrument of ratification, deposited on 28 November 1974 – Or. Fr.

185. *Luedicke, Belkacem and Koç* judgment of 28 November 1978, *Series A*, No. 29.

186. Eur. Commission HR, *Temeltasch* case, Decision of 5 May 1982, DR 31, 120 (§ 49).

187. D.W. Bowett, Reservations to Non-Restricted Multilateral Treaties, *British Yearbook of International Law* 48 (1976-77), 67 (88-90); R.Y. Jennings/A.D. Watts, *Oppenheim's International Law* (9th edition), Vol. I (1992), 1247; Redgwell, *op. cit. supra* Note 176, 404 speaks of "compatibility" and "opposability".

188. Horn, *op. cit. supra* Note 175, 112.

is an expression of the consensual character of international law, envisages a number of different possibilities. Expressly authorised reservations do not require any subsequent acceptance by the other parties (Article 20.1 of the VCLT). Article 20.2 of the VCLT deals with a category of treaties which, due to the limited number of negotiating states and their object and purpose, can only be accepted in their entirety. Treaties concluded within the Council of Europe do not normally fall into this category. Article 20.3 of the Vienna Convention contains a special rule for treaties, such as the Statute of the Council of Europe, which are constituent instruments of an international organisation. In this case, reservations must be accepted by the competent organ of the organisation.

In all other cases, admissible reservations must in principle be accepted by the other parties which may even object to the entry into force of the treaty as between themselves and the reserving state (Article 20.4 of the VCLT). In accordance with Article 20.5 of the Vienna Convention, a state may raise objections to a reservation made by another state by the end of a period of twelve months after it was notified of that reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. If no objections are made, the reservation will be considered as being tacitly accepted by the other parties. Due to the general reluctance of states to object, the tacit acceptance rule ensures in most cases that reserving states become parties to international treaties.

The Vienna Convention contains no rule concerning objections to interpretative declarations. It has, however, been suggested that, in the case of conditional interpretative declarations, the one-year period should run from the date the true character of the declaration as a reservation has finally been determined.¹⁸⁹

The effects of reservations and objections thereto under the Vienna Convention on the Law of Treaties

According to Article 21.1 of the Vienna Convention, a reservation modifies “for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation”. The same idea can be found in Article e of the *Model Final Clauses*, according to which a party which has made a reservation “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”.

189. Horn, “Making Reservations to the European Convention on Human Rights”, in *The European Convention on Human Rights and Reservations*, Council of Europe Doc. H (96) 18 (1996), 3 (18).

The Vienna Convention respects the principle of reciprocity by providing that a reservation “modifies those provisions to the same extent for that other party in its relations with the reserving state” (Article 21.1.b). The other parties nevertheless have the possibility of refusing the modification resulting from the reservation. According to Council of Europe practice, the acceptance of a reservation does not necessarily lead to the intervention of the rule of reciprocity. It only deprives, “on the one hand, the state which has formulated the reservation of the right to claim on the international level and in relation to the other parties the application of the provision to which the reservation refers, and on the other hand, the other parties of the right to raise against this state the treaty obligations covered by the said reservation”¹⁹⁰.

The legal relationship between the reserving state and other non-reserving parties is not affected (Article 21.2 of the VCLT). States that do not agree to certain reservations or even judge them inadmissible may formally object to them (Article 20.5 of the VCLT). However, according to the Vienna Convention, the legal effects of objections are somewhat limited. An objection “does not preclude the entry into force of the treaty as between objecting and reserving states unless a contrary intention is definitely expressed by the objecting state” (Article 20.4.b of the VCLT). Under these conditions the treaty becomes applicable in a modified form. The provisions to which reservations have been formulated “do not apply as between the two states to the extent of the reservations” (Article 21.3 of the VCLT).

As far as reservations excluding the application of a particular clause are concerned, there is thus no practical difference between the legal effect of a reservation accepted by a party and one objected to by a party which has not opposed the entry into force of the treaty in question. The same cannot be said, however, for a reservation modifying the application of a clause. Here, the modification can only be invoked *vis-à-vis* the accepting parties.

Shortcomings of the Vienna Convention’s reservations regime¹⁹¹

In recent years, there has been growing concern that the Vienna Convention has achieved its goal of widespread participation in treaties at

190. Written statement submitted in 1968 by the Council of Europe to the United Nations Conference on the Law of Treaties, UN Doc. A/CONF.39/7 of 27 March 1968, 29.

191. The articles on reservations are presently under review by the International Law Commission (ILC), which took up the topic of reservations to treaties in 1994 and appointed Professor A. Pellet as Special Rapporteur. His first preliminary report is contained in UN Doc. A/CN.4/470 (1995); the second report in A/CN.4/477 (“overview of the study”) and A/CN.4/477/Add. 1 (“unity or diversity of the legal regime of reservations to treaties”) (1996); the third report in A/CN.4/491 and addenda (1998). See also the *Preliminary conclusions of the ILC on reservations to normative multilateral treaties including human rights treaties*, UN Doc. A/CN.4/L.544/Add. 2 (1997).

the expense of the integrity of these treaties, which is increasingly being impaired by sweeping reservations.¹⁹² This concern has been expressed in particular with regard to human rights treaties.¹⁹³ In 1993, the World Conference on Human Rights encouraged states "to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them".¹⁹⁴

Within the Council of Europe, the *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI), which is composed of the legal advisers of all member states, is examining the question of reservations to multilateral treaties. During its 16th meeting held on 17 and 18 September 1998, the CAHDI agreed regularly to undertake the observation of reservations to international treaties. For this purpose, a group of experts on reservations to international treaties (DI-E-RIT) was set up, with responsibility for assisting the CAHDI in carrying out the observation procedure in the form of a European observatory of reservations to multilateral treaties.¹⁹⁵ The observation procedure covers reservations and interpretative declarations to multilateral treaties of significant importance to the international community and reactions by Council of Europe member states party to these instruments.

In the case of multilateral treaties of a normative character, the formulation of numerous reservations may lead to the fragmentation of a coherent multilateral agreement into bilateral treaties of variable content. The original arrangement continues only among those states that have become parties without any reservations. As between reserving and accepting or objecting states, different regimes prevail, the exact scope of which is determined in

192. B. Simma, "Reservations to Human Rights Treaties – Some Recent Developments", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenveldern – in honour of his 80th birthday* (1998), 659-82; J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997); E. Lijnzaad, *Reservations to UN Human Rights Treaties. Ratify and Ruin?* (1995); W.A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Canadian Yearbook of International Law*, 32 (1994), 39-81; Redgwell, *op. cit. supra* Note 176, 392.

193. See with regard to the UN Covenant on Civil and Political Rights the *General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 6, adopted by the Committee at its 1382nd meeting (52nd session) on 2 November 1994, reproduced in HRLJ 15 (1995), 464.

194. Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I), chap. 3, HRLJ 14 (1993), 352.

195. The terms of reference for the DI-E-RIT were approved during the 649th meeting of Ministers' Deputies held on 17 November 1998 (Item 10.1). See F. Cede, "European Responses to Questionable Reservations", to be published in *Developing and Development of International and European Law. Essays in honour of Professor K. Ginther*, (1999).

each case by the nature and scope of reservations and objections made by the parties.

The “permissive” tendency of the Vienna Convention’s reservations regime is exacerbated by the fact that the tacit acceptance clause (Article 20.5 of the VCLT) may even be invoked with regard to inadmissible reservations. There are good reasons to apply this clause only to reservations which have passed the compatibility test (Article 19 of the VCLT) with the legal consequence that a state which formulates inadmissible reservations cannot become a party to the treaty.¹⁹⁶ The Vienna Convention is, however, not particularly clear with regard to the consequences of inadmissible reservations.¹⁹⁷ Due to the general inertia of states and, at least in most cases,¹⁹⁸ the absence of a supervisory organ which would be competent to determine incompatible reservations, the tacit acceptance clause may result in even states which have formulated inadmissible reservations becoming parties to multilateral treaties.

Another shortcoming of the Vienna Convention’s reservations regime is that its provisions are ill-suited to international treaties which operate mainly “internally” by setting minimum standards to which domestic legislation must conform.¹⁹⁹ The flexible system of the convention is intended to balance conflicting state interests in treaties which establish a set of reciprocal rights and obligations. As in a private law contract, the reservation is treated as a sort of offer, which may be accepted in whole or in part by the other parties.²⁰⁰

In the case of treaties of a “normative” nature whose goal it is to guarantee certain minimum standards or even to harmonise domestic law and procedures, the Vienna Convention’s objections mechanism may prove to be inadequate. If the opposability of a reservation depends entirely on acceptance, it could be argued that a reserving state undertakes different obligations with regard to objecting states and with regard to non-objecting ones. On the basis of reciprocity, parties would be allowed to invoke reservations made by other parties in order to limit the scope of their own obligations. Such a fragmentation into bilateral treaty relationships was surely not intended by the objecting states and would run counter to the treaties’ object and purpose of creating common rules for all parties. “Normative”

196. See ICJ, *Reservations to the Convention on the Prevention on Genocide (Advisory Opinion of 28 May 1951)*, ICJ Reports, 1951, 15 (29-30); Bowett, op. cit. *supra* Note 187, 81; Redgwell, op. cit. *supra* Note 176, 405.

197. As Sir Ian Sinclair concludes, the Vienna Convention “leaves unanswered a whole series of questions ... particularly questions concerning the distinction ... between permissible and impermissible reservations”, op. cit. *supra* Note 176, 77.

198. One notable exception being the European Convention on Human Rights, see pp. 104 *et seq.*

199. Simma, op. cit. *supra* Note 192, 663; Horn, op. cit. *supra* Note 189, 190.

200. This interesting parallel was drawn by Schabas, op. cit. *supra* Note 192, 64.

treaties do not operate within bilateral relationships which can be modified on the basis of reciprocity. Their obligations are essentially “objective” and “unilateral” rather than “subjective” and “mutual” in nature. In such cases, there should be no room for the application of the principle of reciprocity on which the provisions of Article 21 of the Vienna Convention are based.

In this context, it is worth recalling one passage of the advisory opinion given in 1951 by the International Court of Justice with respect to reservations concerning the *Convention on the Prevention and Punishment of the Crime of Genocide*. With regard to multilateral treaties intended to be “universal in scope” and whose objects are “purely humanitarian and civilising”, the Court emphasised that parties generally have no interest of their own:

“[T]hey merely have a common interest, namely the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contracting balance between rights and duties”.²⁰¹

While it cannot be disputed that the regime of the Vienna Convention applies in principle also to normative treaties, including human rights treaties,²⁰² it is less clear whether it fully regulates the consequences of inadmissible reservations. A growing number of European in particular states regularly object to inadmissible reservations, linking such non-acceptance with express declarations as to the legal consequences of their objections.²⁰³ The consequences specified in the declarations vary, ranging from the view that the reserving state will not be regarded as a party to the treaty in question to a kind of “severance” or “severability” approach. According to this practice, the inadmissible reservation is considered null and void, while leaving the reserving state’s consent to be bound unaffected.²⁰⁴ In 1999, the Committee of Ministers adopted *Recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties*,²⁰⁵ which contains model response clauses based on this approach.

Against this background, the drafting practice within the Council of Europe is characterised by the constant search for an equilibrium between the goal of ensuring wide-ranging participation by member states in the treaties and the danger of jeopardising their uniform application by allowing too many

201. *Genocide Convention Advisory Opinion*, ICJ Reports, 1951, 15.

202. *Preliminary conclusions of the ILC on reservations to normative multilateral treaties including human rights treaties*, UN Doc. A/CN.4/L.544/Add. 2 (1997).

203. Simma, op. cit. *supra* Note 192, 664-69.

204. The “severance” or “severability” doctrine is also used by the European Court of Human Rights, see *infra* pp. 109-117.

205. Adopted by the Committee of Ministers on 18 May 1999 at the 670th meeting of the Ministers’ Deputies.

reservations. How such an equilibrium is to be achieved cannot be determined in the abstract, but only in regard to each particular treaty.

Drafting practice within the Council of Europe

Drafters should be mindful of the words of Lord McNair who spoke of an “imperative necessity” to formulate regimes on reservations specific to each treaty, especially in the case of multilateral treaties aiming at the harmonisation of national laws and practices.²⁰⁶ The same concern was expressed by the Parliamentary Assembly in Recommendation 1223 (1993), which suggested the inclusion in each convention of “a clause specifying the conditions under which states may make reservations”.

The drafting practice within the Council of Europe clearly favours a system of “negotiated reservations” which is also provided for in the *Model Final Clauses* (Article e).²⁰⁷ The reservations which are to be permitted are discussed the expert committees during the drafting of the treaty. The permitted reservations may be specified in various ways. Usually the provisions which may be derogated from explicitly mention the possibility of making reservations. Sometimes their precise wording is already contained in the actual text of the treaty or in an appendix thereto.²⁰⁸ Such specifically authorised reservations are usually formulated by way of declarations contained in the instrument of ratification in or a *note verbale*. The Secretary General of the Council of Europe notifies all member states and other parties to the treaty in question of them. In accordance with Article 20.1 of the VCLT, no subsequent acceptance by the other parties is required.

Many Council of Europe treaties exhaustively enumerate the provisions which may be derogated from, usually adding that no other reservations are allowed. One example of such a clause is Article 40.1 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141, 1990):

“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 of the reservations provided for in Article 2, paragraph 2, Article 6, paragraph 4, Article 14, paragraph 3, Article

206. A. McNair, *The Law of Treaties* (1961), 170.

207. This was already stressed in the written statement submitted in 1968 by the Council of Europe to the United Nations Conference on the Law of Treaties, UN Doc. A/CONF.39/7 of 27 March 1968, 27. See also F. Albanese, “Le processus législatif du Conseil de l’Europe”, *Revue trimestrielle de droit européen*, 1986, 391 (404).

208. For example, Annex II to the European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles (ETS No. 29, 1959); European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51, 1964 – Article 38); Appendix I to the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73, 1972); Appendix I to the European Convention on the International Validity of Criminal Judgments (ETS No. 70, 1970).

21, paragraph 2, Article 25, paragraph 3 and Article 32, paragraph 2. No other reservation may be made".²⁰⁹

Sometimes even the maximum number of possible reservations is specified.²¹⁰ Finally, there are a few Council of Europe treaties which stipulate that no reservations are permitted.²¹¹

The *Criminal Law Convention on Corruption* (ETS No. 173, 1999) contains particularly sophisticated provisions concerning reservations and declarations (Articles 36, 37 and 38):

"Article 36 – Declarations

Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it will establish as criminal offences the active and passive bribery of foreign public officials under Article 5, of officials of international organisations under Article 9 or of judges and officials of international courts under Article 11, only to the extent that the public official or judge acts or refrains from acting in breach of his duties.

Article 37 – Reservations

1. Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, reserve its right not to establish as a criminal offence under its domestic law, in part or in whole, the conduct referred to in Articles 4, 6 to 8, 10 and 12 or the passive bribery offences defined in Article 5.

2. 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 the reservation provided for in Article 17, paragraph 2.

3. Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession declare that it may refuse mutual legal assistance under Article 26, paragraph 1, if the request concerns an offence which the requested Party considers a political offence.

209. See also Article 31.1 of the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156, 1995); Article 17.1 of the Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998).

210. For example, Article 25.1 of the European Convention on the Adoption of Children (ETS No. 58, 1967) [two reservations]; Article 14.1 of the European Convention on the Legal Status of Children Born out of Wedlock (ETS No. 85, 1975) [three reservations].

211. For example, Article 7 of the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories (ETS No. 53, 1965); Article 15 of the Convention on the Establishment of a Scheme of Registration of Wills (ETS No. 77, 1972); Article 4 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114, 1983); Article 87 of the Revised European Code of Social Security (ETS No. 139, 1990).

4. No state may, by application of paragraphs 1, 2 and 3 of this Article, enter reservations to more than five of the provisions mentioned thereon. No other reservation may be made. Reservations of the same nature with respect to Articles 4, 6 and 10 shall be considered as one reservation.

Article 38 – Validity and review of declarations and reservations

1. Declarations referred to in Article 36 and reservations referred to in Article 37 shall be valid for a period of three years from the day of the entry into force of this Convention in respect of the state concerned. However, such declarations and reservations may be renewed for periods of the same duration.

2. Twelve months before the date of expiry of the declaration or reservation, the Secretariat General of the Council of Europe shall give notice of that expiry to the state concerned. No later than three months before the expiry, the state shall notify the Secretary General that it is upholding, amending or withdrawing its declaration or reservation. In the absence of notification by the state concerned, the Secretariat General shall inform that state that its declaration or reservation is considered to have been extended automatically for a period of six months. Failure by the state to notify its intention to uphold or modify its declaration or reservation before the expiry of that period shall cause the declaration or reservation to lapse.

3. If a Party makes a declaration or a reservation in conformity with Articles 36 and 37, it shall provide, before its renewal or upon request, an explanation to Greco, on the grounds justifying its continuance".

The convention develops common standards concerning a large number of corruption offences, some of which were relatively new for some member states. It also establishes rules of jurisdiction and seeks to improve international co-operation. When drafting the convention, the Multidisciplinary Group on Corruption (GMC) took the view that allowing a certain number of clearly circumscribed reservations would facilitate the ratification and entry into force of the convention. Seeking to strike a balance between flexibility and coherence, the GMC agreed that the convention's monitoring body, the Group of States against Corruption (Greco), should play a key role in examining reservations. Article 38 of the convention accordingly provides for a procedure whereby states are required to assess the need for each reservation at regular intervals and to justify before Greco the need to maintain it. The period of validity of reservations was fixed to three years. Unless explicitly renewed, the reservations will lapse automatically.

The GMC also decided to limit the maximum number of reservations that any state may formulate. However, being unable to reach a compromise on the exact number and bearing in mind the political implications of the question, the GMC preferred to leave it to the Committee of Ministers to decide

the maximum number of reservations which each state would be entitled to formulate when ratifying the convention. The Committee of Ministers finally adopted a compromise.²¹² In accordance with Article 37.5 of the convention, each state will be entitled to make reservations to not more than five provisions. Due to the fact that the bribery of parliamentarians is dealt with in Articles 4 (bribery of members of domestic public assemblies), Article 6 (bribery of members of foreign public assemblies) and Article 10 (bribery of members of international parliamentary assemblies), it was agreed that a reservation of the same nature to all three of these provisions (for example, excluding the passive side of the bribery) should be counted as only one reservation. In addition, Article 36 of the convention gives parties the opportunity to limit the scope of certain provisions (Articles 5, 9 and 11) by a simple declaration with the consequence that such declarations will not be counted as “reservations” under Article 37.5. States may thus reserve the right to establish as criminal offences the bribery of foreign public officials, of officials of international organisations or of judges and officials of international courts only to the extent that the undue advantage offered, promised or given to the bribee induces him or her or is intended to induce him or her to act or refrain from acting in breach of his or her duties as an official or judge. The notion of “breach of duties” is to be understood in a broad sense and therefore also implies that the public official had a duty to exercise judgement or discretion impartially. It does not require a proof of the law allegedly violated by the official.²¹³ When adopting the convention on 4 November 1998, the Committee of Ministers appealed to all states to restrict, as far as possible, the number of reservations.

Since 1993, specific provisions limiting the freedom of states to formulate reservations have been included in the following treaties:

- Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No. 150, 1993) – Article 35;
- European Convention relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (ETS No. 153, 1994) – Article 14;
- Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156, 1995) – Article 31;
- European Convention on the Exercise of Children’s Rights (ETS No. 160, 1996) – Article 24;
- Convention on Human Rights and Biomedicine (ETS No. 164, 1997) – Article 36;

212. At the 646th meeting of Ministers’ Deputies on 22 October 1998 (Item 10.2).

213. See § 142 of the explanatory report.

- Convention on the Recognition of Qualifications concerning Higher Education in the European Region (ETS No. 165, 1997) – Article XI.7;
- European Convention on Nationality (ETS No. 166, 1997) – Article 29;²¹⁴
- Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998) – Article 17;
- Criminal Law Convention on Corruption (ETS No. 173, 1999) – Articles 36 and 37.

In addition, there are certain treaties which provide for a system of optional commitments. Contracting states must accept a certain number of provisions by which they consider themselves bound. This technique is used notably by the *European Social Charter* (ETS No. 35, 1961, Article 20), its *Additional Protocol* (ETS No. 128, 1988, Article 5), the *Revised European Social Charter* (ETS No. 163, 1996, Part III, Article A) and the *European Charter of Local Self-Government* (ETS No. 122, 1985, Article 12). This technique leaves a considerable choice to the parties. It can be complemented by the identification of a certain number of compulsory provisions which, in view of their importance for the object and purpose of the convention, have to be accepted by every contracting state. This “compulsory core” system has been used by the *European Convention on the Legal Status of Migrant Workers* (ETS No. 93, 1977, Article 36.1). Under such systems of optional commitments, reservations may only be made in respect of provisions exceeding the minimum number of provisions the acceptance of which is required under the treaty.

Finally, there are treaties which due to their object and purpose exclude the making of reservations. This is in particular the case of certain amending protocols to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) which regulate only the internal procedure of the European Court and Commission of Human Rights. The explanatory report to Protocol No. 11, which restructured the whole control machinery established by the Convention, states that the protocol “by its very nature excludes the making of reservations”.²¹⁵

The number of conventions and agreements which are silent on the question of reservations has diminished considerably. Since 1983, only the following treaties fall into this category:

214. Using the language of the Vienna Convention, this provision stipulates that reservations may only be made “so long as they are compatible with the object and purpose of this Convention”.

215. *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and explanatory report* (1994), 49 (§ 115).

- Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983);
- European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985);
- Arrangement for the Application of the European Agreement of 17 October 1980 concerning the Provision of Medical Care to Persons during Temporary Residence (ETS No. 129, 1988);
- Anti-doping Convention (ETS No. 135, 1989);
- European Convention on the General Equivalence of Periods of University Study (ETS No. 138, 1990);
- European Convention on the Protection of the Archaeological Heritage (revised) (ETS No. 143, 1992);
- Framework Convention for the Protection of National Minorities (ETS No. 157, 1995).

The absence of any provision on reservations means that member states are free to formulate reservations, provided of course that they are compatible with the object and purpose of the treaty (Article 19.c of the VCLT).

Depositary and state practice within the Council of Europe

*The scope of depositary functions with regard to the admissibility of reservations*²¹⁶

Without prejudice to the relevant provisions of the respective treaty, the Secretary General's depositary practice is guided by Articles 76 to 80 of the 1969 *Vienna Convention on the Law of Treaties*. The depositary functions for all Council of Europe treaties are carried out by the Department of the Legal Adviser and Treaty Office which is part of the Directorate of Legal Affairs.

Under the regime of the Vienna Convention, the depositary must reconcile two competing requirements. On the one hand, it must be ensured that the relevant treaty provisions on reservations are respected. On the other hand, the depositary is in principle not entitled to decide on the admissibility or the legal effects of reservations and declarations.

216. See in particular Horn, *op. cit. supra* Note 175, 367-69; H. Golsong, "Le développement du droit international régional", *Société française de droit international*, Colloquy in Bordeaux, 1976 (1977), 221 (228-9).

217. On 19 December 1975, Turkey deposited instruments of ratification for the following treaties:

- European Agreement on the Protection of Television Broadcasts (ETS No. 34, 1960), its Protocol (ETS No. 54, 1965) and its Additional Protocol (ETS No. 81, 1974);
- European Convention for the Protection of Animals during International Transport (ETS No. 65, 1968);
- European Convention on Information on Foreign Law (ETS No. 62, 1968);
- Convention on the Establishment of a Scheme of Registration of Wills (ETS No. 77, 1972);
- Agreement on the Transfer of Corpses (ETS No. 80, 1973).

In 1976, the Committee of Ministers had a rather inconclusive albeit revealing discussion on the scope of the Secretary General's depositary functions. The discussion was provoked by Turkey, which on 19 December 1975 had presented instruments of ratification to seven European treaties²¹⁷ with an accompanying letter from the Permanent Representative of Turkey, stating that:

“The Government of Turkey, while ratifying the Agreement/Arrangement/Convention/Protocol ..., declares that it does not consider itself bound to carry out the provisions of the said Agreement in relation to the Greek Cypriot Administration, which is not constitutionally entitled to represent alone the Republic of Cyprus”.

This statement could not be assimilated with any of the authorised reservations. One of the treaties even prohibited the making of any reservations.²¹⁸ Instead of modifying in substance any of the treaties' provisions, the statement only concerned the effective implementation of the treaties with regard to one party. In this sense, it resembled a declaration of non-recognition.²¹⁹

The Secretary General initially refused the registration of the Turkish instruments of ratification and asked the Committee of Ministers for guidance. Following long deliberations, the Ministers' Deputies finally adopted the following decision during their 254th meeting, in February 1976:

“The Deputies,
in the light of the foregoing discussion, and referring solely to the procedural aspects of the deposit of the seven instruments of ratification, considered that the Secretary General should proceed, with effect from 19 December 1975, to the registration of these instruments of ratification as presented by the Permanent Representative of Turkey by letter dated 19 December 1975 and notify the Governments of member states thereof, it being understood that the registration of reservations by the Secretary General has no effect on their validity.

The above decision will in no way affect the position of the Government of the Republic of Cyprus in the Committee of Ministers of the Council of Europe”.²²⁰

It should be emphasised that the use of the term “reservations” was due to the explicit wish of the Turkish Government. The Committee of Ministers

218. Convention on the Establishment of a Scheme of Registration of Wills (ETS No. 77, 1972) – Article 15.

219. Horn, *op. cit. supra* Note 175, 368. According to Pellet, statements of non-recognition constitute reservations, *Third report on reservations to treaties*, UN Doc. A/CN.4/491/Add.3 (1998), §§ 168 *et seq.*

220. Decision adopted during the 254th meeting of Ministers' Deputies held from 9 to 18 February 1976 (Item XIX).

221. Imbert, *op. cit. supra* Note 175, 18 (Note 37).

as such reserved its position as to the exact nature and scope of the Turkish statement.²²¹

Concerning the representation of Cyprus in the Council of Europe, it should be added that, at its 73rd Session on 24 November 1983, the Committee of Ministers decided that it continued “to regard the Government of the Republic of Cyprus as the sole legitimate Government of Cyprus”. It called for the respect of the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus.

In his capacity as depositary, the Secretary General has the task of ensuring that reservations conform with the final clauses of the respective treaty which often contain explicit provisions on reservations. In order to do this, the Treaty Office must evaluate the legal nature of a statement independently, if necessary after having consulted the state concerned, usually via the Permanent Representation in Strasbourg, and determine whether it constitutes a proper reservation or only an interpretative declaration. For this purpose, the formal denomination of the statement is not decisive. In order to establish the legal nature of a statement, “one must look behind the title given to it and seek to determine the substantive content”.²²² The evaluation will be based on the definition contained in Article 2.1.d of the 1969 Vienna Convention which restates established customary international law. The phrasing or title given by the state formulating the declaration provides an indication of the desired objective. This is particularly applicable when several unilateral declarations are formulated in respect of a single treaty, some of which are designated as reservations and others as interpretative declarations.²²³

If the terms of a reservation are unclear or ambiguous or if the legal nature of a statement is doubtful, the Treaty Office will informally consult the state concerned, usually via the Permanent Representation. It should also be noted that a certain number of states, before expressing their consent to be bound, will have informally consulted the Treaty Office concerning the compatibility of envisaged reservations with the respective treaties. The opinions given have usually been followed.

If the treaty expressly prohibits the formulation of reservations or allows only specified reservations, which do not include the envisaged one (Article 19.a and b of the VCLT), the Secretary General will refuse to accept the deposit of an instrument of ratification, acceptance or approval. If there are doubts as to whether a reservation is compatible with the object and purpose of the treaty (Article 19.c of the VCLT), it is common practice within the Council of Europe to informally consult the state concerned. If the state

222. Eur. Court of HR, *Belilos* judgment of 29 April 1988, *Series A*, Vol. 132, § 49.

223. Compare A. Pellet, *Third report on reservations to treaties*, UN Doc. A/CN.4/491/Add.4 (1998), § 298.

insists on making the reservation in question, the Treaty Office will register and notify it. In such cases it is for the other parties to raise objections to statements which they consider to constitute inadmissible reservations. Where there is a difference between the depositary and the state concerned, the matter will be brought to the attention of the Committee of Ministers, as in the case of the aforementioned Turkish declarations.

Formal requirements

Reservations and declarations are often contained in the instrument of ratification, acceptance or approval. They may also be contained in a *note verbale* or a letter from the Minister for Foreign Affairs which is handed over when the relevant treaty is signed or ratified. Acting upon instructions from their governments, the Permanent Representatives in Strasbourg are also empowered to formulate reservations or declarations, even without producing full powers to this effect.²²⁴

Appropriate time for the formulation of reservations and declarations

In accordance with the applicable clauses of each treaty and the *Vienna Convention on the Law of Treaties*, reservations and declarations may only be made at the time of signing or of depositing the instrument of ratification, acceptance or approval. Strict observance of the applicable treaty provisions is vital in order to ensure their proper functioning and application. In the practice of the Council of Europe, the provisions concerning the making of reservations and declarations have generally been respected.

One exception to this rule is foreseen in the *Interim Agreements on Social Security* (ETS Nos. 12 and 13, 1953).²²⁵ The Interim Agreements are intended to guarantee equality of treatment for the nationals of all parties with respect to a series of social security benefits. States are required to communicate the basic legislation pertaining to each social security scheme which is set out in Annex I to each of the Agreements. It was not considered necessary to oblige states to indicate in detail all the various laws relating to social security. In principle it is sufficient to give broad references to entire schemes. If a new law or regulation relates to a scheme already listed in Annex I and does not change the character of the scheme, it is not neces-

224. In this respect, the practice of the United Nations seems to be stricter, see *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc. ST/LEG/8 (1994), § 105.

225. European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors (ETS No. 12, 1953); European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors (ETS No. 13, 1953). In relations between the parties, the Interim Agreements have been replaced by the European Convention on Social Security (ETS No. 78, 1972).

226. *Explanatory Memorandum on the European Interim Agreements relating to Social Security*, Parliamentary Assembly Document 10 (1952), § 44.

sary to notify such a law or regulation.²²⁶ However, states must notify any new legislation which introduces a social security scheme of a type not included in Annex I (Article 7.2). If such legislation is notified, the state is entitled to make a reservation with respect to the provisions of the new legislation. Article 9 of the Interim Agreements provides as follows:

“Any Contracting Party may, at the time of making a notification in accordance with Article 7 or Article 8, make a reservation in respect of the application of the present 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”.

In the absence of such provisions, it is consistent Council of Europe practice that reservations which had been communicated at a later date than that specified by the treaty are only accepted in exceptional cases.²²⁷ Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other states in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardise legal certainty and impair the uniform implementation of European treaties. It would also run counter to the efforts by the Parliamentary Assembly and the Committee of Ministers to reduce the number of reservations.²²⁸

Exceptions may, however, be justified by the fact that a certain reservation or declaration had been formulated by the competent national authority (parliament or government) before ratification, but that due to administrative oversight they had forgotten to communicate the text when depositing the instrument of ratification or accession. Examples of such cases are the

227. One example is the reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts (ETS No. 34, 1961). Belgium ratified the Agreement on 7 February 1968 (entry into force 8 March 1968) and formulated reservations contained in a letter from the Ministry of Foreign Affairs of Belgium, dated 17 April 1968, registered at the Secretariat General on 19 April 1968. Denmark ratified the same Agreement on 26 October 1961 and made reservations in a letter from the Permanent Representative of Denmark, dated 3 November 1961, registered at the Secretariat General on 6 November 1961, before the entry into force of the Agreement for this state on 27 November 1961.

228. See Parliamentary Assembly's Recommendation 1223 (1993) and the reply adopted by the Committee of Ministers on 17 February 1994 at the 508th meeting of the Ministers' Deputies, reproduced in Appendix V.

229. Reservation contained in a letter from the Permanent Representative of Greece, dated 5 September 1988, registered at the Secretariat General on 6 September 1988. The letter explained that parliamentary approval had been subject to a reservation which had not been mentioned in the instrument of ratification deposited on 4 August 1988. The reservation read as follows:

“In pursuance of Article 13 of the European Convention on the Suppression of Terrorism, Greece declares that it reserves the right, in accordance with paragraph 1 of the same article, to refuse extradition for any of the offences listed in Article 1 of the Convention if the person suspected of having committed the offence is being prosecuted for his or her action in favour of freedom”.

reservation made by Greece in 1988 to the *European Convention on the Suppression of Terrorism* (ETS No. 90, 1977),²²⁹ a declaration relating to the Annex on Privileges and Immunities to the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ETS No. 126, 1987) made by Italy in 1989,²³⁰ the declarations made in 1997 by Portugal with regard to the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30, 1959)²³¹ and the declarations made in 1997 by Romania with regard to the *Convention on the Transfer of Sentenced Persons* (ETS No. 112, 1983).²³²

However, there are certain declarations which do not affect the scope of obligations under the treaty and which may be subject to regular modifications, for example, declarations indicating the relevant domestic legislation or designating central authorities. It is obvious that such declarations may be modified even if the treaty in question requires them to be made when it is signed or when depositing the instrument of ratification, acceptance, approval or accession. There are many instances where parties have amended such declarations without provoking any objections by other parties.²³³

Confirmation of reservations made upon signature

According to Article 23.2 of the 1969 Vienna Convention, reservations made upon signature subject to ratification, acceptance or approval or accession must be formally confirmed by the reserving state when expressing its consent to be bound by the treaty.

Within the Council of Europe, a different rule had originally been developed. In its observations on the draft articles on the law of treaties which had been prepared by the International Law Commission, the Secretary

230. Declaration contained in a letter from the Permanent Representative of Italy, dated 27 January 1989, registered at the Secretariat General on 30 January 1989 – Or. Fr.

231. Declarations contained in a letter from the Permanent Representative of Portugal, dated 3 April 1997, registered at the Secretariat General on 4 April 1997, following the letter of the Permanent Representative of Portugal, dated 19 December 1996, registered at the Secretariat General on 2 January 1997. The letter explained that the declarations contained in the decree of the President of the Republic and the Assembly resolution had not been mentioned in the instrument of ratification that had been deposited on 27 September 1994.

232. Declarations contained in a letter from the Permanent Representative of Romania, dated 23 October 1997, registered at the Secretariat General on 24 October 1997. The letter explained that the declarations contained in the Law on Ratification No. 76 of 12 July 1996 had not been mentioned in the instrument of ratification that had been deposited on 23 August 1996.

233. For example, the declarations contained in a *note verbale* from the Permanent Representation of the Netherlands, dated 14 October 1987, registered at the Secretariat General on 15 October 1987, concerning Articles 6 and 21 of the European Convention on Extradition (ETS No. 24, 1957); declarations contained in a *note verbale* from the Ministry of Foreign Affairs of Israel, dated 27 January 1999, registered at the Secretariat General on 8 February 1999, concerning Articles 15.6 and 24 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959).

General observed in 1968 that “[i]n the practice of the Council of Europe and in contradiction to paragraph 2 of Article 18, a reservation made when signing a treaty need not be confirmed when ratifying, accepting or approving the treaty”.²³⁴ However, in the wake of the adoption of the 1969 Vienna Convention, it has become common practice in the Council of Europe to confirm reservations made upon signature.

Modification of reservations

Reservations made at the time of ratification, acceptance, approval or accession may only be withdrawn, partially or wholly. Modifications which amount to an extension of their scope of application will not be accepted.

There have been instances where states have approached the Secretariat requesting information as to whether and how existing reservations could be modified.²³⁵ In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations (see above under *c*). Allowing such modifications would create a dangerous precedent which would jeopardise legal certainty and impair the uniform implementation of European treaties.

Theoretically, the modification of existing reservations may be achieved by denouncing the treaty in question and ratifying it again, this time with the modified reservations. Although such a procedure has been considered by some states in the past, it has never been carried out. The denunciation of a multilateral treaty constitutes a measure of last resort which is likely to raise negative publicity for the state in question. Denunciation followed by immediate re-ratification may even constitute an abuse of rights. This was the conclusion of the Swiss Federal Court when it had to consider the possibility of a denunciation of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950).²³⁶ The European Convention on Human Rights belongs to a limited number of treaties to which adherence is now seen as a prerequisite for membership of the Council of Europe.

Interpretative declarations

234. UN Doc. A/CONF. 39/7 of 27 March 1968, 28.

235. Judge Valticos proposed that states should be given an opportunity to rectify reservations which have been invalidated by the European Court of Human Rights, Dissenting Opinion to the case of *Chorherr v. Austria*, judgment of 25 August 1993, *Series A*, No. 226-B, 42.

236. Swiss Federal Court, judgment of 17 December 1992, ATF 118 I a. See J.-F. Flauss, “Le contentieux de la validité des réserves à la C.E.D.H. devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l’article 6 § 1”, *RUDH*, 1993, 297 *et seq.*

In the practice of the Council of Europe, interpretative declarations which do not exclude or modify the legal effect of any provisions of a treaty are registered and communicated to all member states.

Sometimes interpretative declarations are made which do not refer to any particular provision of the treaty. An interesting example in this respect is provided by the *Framework Convention for the Protection of National Minorities* (ETS No. 157, 1995). Due to opposition by some states, it was not possible to include a provision on reservations in the text of the convention. Most of the convention's substantive provisions contain rather broadly-framed principles which require implementation by domestic legis-

237. *Framework Convention for the Protection of National Minorities and explanatory report* (1995), 40 (§ 98).

238. "The Government of Malta reserves the right not to be bound by the provisions of Article 15 in so far as these entail the right to vote or to stand for election either for the House of Representatives or for Local Councils", reservation contained in the instrument of ratification, deposited on 10 February 1998 – Or. Engl.

239. "The Republic of Austria declares that, for itself, the term 'national minorities' within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups (*Volksgruppengesetz*, Federal Law Gazette No. 396/1976) and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures", declaration contained in the instrument of ratification deposited on 31 March 1998 – Or. Engl.

240. "In connection with the deposit of the instrument of ratification by Denmark of the Framework Convention for the Protection of National Minorities, it is hereby declared that the Framework Convention shall apply to the German minority in South Jutland of the Kingdom of Denmark", declaration contained in a Note Verbale dated 22 September 1997, handed to the Secretary General at the time of deposit of the instrument of ratification, on 22 September 1997 – Or. Engl.

241. "The Republic of Estonia understands the term 'national minorities', which is not defined in the Framework Convention for the Protection of National Minorities, as follows: the following citizens of Estonia are considered as 'national minorities':

- those who reside on the territory of Estonia;
- those who maintain longstanding, firm and lasting ties with Estonia;
- those who are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics;
- those who are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity", declaration contained in the instrument of ratification, deposited on 6 January 1997 – Or. Est./Engl.

242. "The Framework Convention contains no definition of the notion of national minorities. It is therefore up to the individual Contracting Parties to determine the groups to which it shall apply after ratification. National minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship", declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995 – Or. Ger./Engl. – and renewed in the instrument of ratification, deposited on 10 September 1997 – Or. Ger./Engl.

lation. The explanatory report nevertheless states that “reservations are allowed in as far as they are permitted by international law”.²³⁷

So far, only Malta has made a formal reservation with regard to Article 15 of the Framework Convention.²³⁸ Austria,²³⁹ Denmark,²⁴⁰ Estonia,²⁴¹ Germany,²⁴² Liechtenstein,²⁴³ Luxembourg,²⁴⁴ Malta,²⁴⁵ Slovenia,²⁴⁶ Switzerland,²⁴⁷ and “the former Yugoslav Republic of Macedonia”²⁴⁸ have made “declarations” intended to determine the minorities to which the Framework Convention

243. “The Principality of Liechtenstein declares that Articles 24 and 25, in particular, of the Framework Convention for the Protection of National Minorities of 1 February 1995 are to be understood with regard to the fact that no national minorities in the sense of the Framework Convention exist in the territory of the Principality of Liechtenstein. The Principality of Liechtenstein considers its ratification of the Framework Convention as an act of solidarity in view of the objectives of the Convention”, declaration contained in the instrument of ratification deposited on 18 November 1997 – Or. Fr.

244. “The Grand Duchy of Luxembourg understands by ‘national minority’ in the meaning of the Framework Convention, a group of people settled for numerous generations on its territory, holding the Luxembourg nationality and having kept distinctive ethnic and linguistic characteristics. On the basis of this definition, the Grand Duchy of Luxembourg is induced to establish that there is no ‘national minority’ on its territory”, declaration contained in a letter from the Permanent Representative of Luxembourg, dated 18 July 1995, handed to the Secretary General at the time of signature, on 20 July 1995 – Or. Fr.

245. “The Government of Malta declares that Articles 24 and 25, in particular, of the Framework Convention for the Protection of National Minorities of 1 February 1995 are to be understood with regard to the fact that no national minorities in the sense of the Framework Convention exist in the territory of the Government of Malta. The Government of Malta considers its ratification of the Framework Convention as an act of solidarity in the view of the objectives of the Convention”, declaration contained in the instrument of ratification, deposited on 10 February 1998 – Or. Engl.

246. “Considering that the Framework Convention for the Protection of National Minorities does not contain a definition of the notion of national minorities and it is therefore up to the individual Contracting Party to determine the groups which it shall consider as national minorities, the Government of the Republic of Slovenia, in accordance with the Constitution and internal legislation of the Republic of Slovenia, declares that these are the autochthonous Italian and Hungarian national minorities. In accordance with the Constitution and internal legislation of the Republic of Slovenia, the provisions of the framework convention shall apply also to the members of the Roma community who live in the Republic of Slovenia”, declaration contained in a *note verbale* from the Permanent Representation of Slovenia, dated 23 March 1998, handed to the Secretary General at the time of deposit of the instrument of ratification, on 25 March 1998 – Or. Engl.

247. “Switzerland declares that in Switzerland national minorities in the sense of the framework convention are groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, firm and lasting ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language”, declaration contained in the instrument of ratification deposited on 21 October 1998 – Or. Fr.

248. “The Republic of Macedonia declares that: 1. The term ‘national minorities’ used in the Framework Convention for the Protection of National Minorities is considered to be identical to the term ‘nationalities’ which is used in the Constitution and the laws of the Republic of Macedonia. 2. The provisions of the Framework Convention for the Protection of National Minorities will be applied to the Albanian, Turkish, Vlach, Roma and Serbian national minorities living on the territory of the Republic of Macedonia”, declarations contained in the instrument of ratification deposited on 10 April 1997 – Or. Engl.

shall apply. When depositing its instrument of ratification on 21 August 1998, the Russian Federation made the following declaration:

“The Russian Federation considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term ‘national minority’, which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of states parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities.”²⁴⁹

In the absence of any definition of the term “national minority” in the text of the convention, declarations seeking to define this term for each party concerned do not “alter”, “modify” or “derogate from” any of the convention’s provisions. This does not mean, however, that states enjoy unfettered discretion with regard to the determination of national minorities. Any restriction in the scope of application of the Framework Convention would have to be justified by the existence of objectively established distinctions between the different minority groups, the nature and scope of which warrant the differential treatment. When exercising its monitoring role, the Committee of Ministers should not be prevented from examining the admissibility of declarations and reservations made by the parties. A consistent monitoring practice by the Committee of Ministers may eventually lead to the emergence of a generally accepted concept of the term “national minorities”.

Objections to reservations or declarations

Within the Council of Europe, objections to reservations are fairly rare. In the rare cases where member states formulate objections, they usually do not oppose the entry into force of a treaty with regard to a reserving state. One exception was the reaction by Belgium, Luxembourg and the Netherlands to an Italian reservation with regard to the *European Agreement for the Abolition of Visas for Refugees* (ETS No. 31, 1959). When ratifying the agreement on 1 June 1965, Italy had declared that “the application of this agreement within the territory of the Italian Republic will not apply to refugees who had left this territory with the intention of emigrating”. The objecting states were not prepared to accept the entry into force of the treaty between them and Italy.²⁵⁰ Luxembourg considered the

249. Declaration contained in the instrument of ratification deposited on 21 August 1998 – Or. Rus./Engl./Fr.

250. Notifications J3735 of 29 June 1965 (Netherlands); J3930 of 9 July 1965 (Belgium); J4140 of 22 July 1965 (Luxembourg).

reservation to be contrary to the object and purpose of the treaty. Italy finally withdrew the reservation on 10 December 1965.

Objections are registered and notified to all member states in the same way as reservations or declarations. It is not surprising that the most objections were raised against reservations to conventions concerning international co-operation in criminal matters. These conventions are classical examples of treaties establishing reciprocal rights and obligations for which the Vienna Convention's reservations regime is particularly suitable. The following examples may be considered:

– In December 1981, Portugal ratified the *European Convention for the Suppression of Terrorism* (ETS No. 90, 1977), reserving the right not to grant extradition "for offences punishable in the requesting state with either the death penalty, life imprisonment or a detention order involving deprivation of liberty for life".²⁵¹ Reacting within the twelve month period specified by Article 20.5 of the VCLT, Germany objected, arguing that the reservation was incompatible with the meaning and purpose of the convention. According to Germany, the reservation had no basis in the convention, which is not an extradition treaty, but merely restricts the possibility of raising the political offence objection with regard to extradition requests. Germany added that its declaration should not be interpreted as preventing the entry into force of the convention between Germany and Portugal.²⁵²

– In 1990, Portugal formulated a reservation with regard to Article 1 of the *European Convention on Extradition* (ETS No. 24, 1957) according to which it will not grant the extradition of persons who are wanted in connection with an offence punishable by a life sentence or detention order.²⁵³ This reservation prompted objections from Germany,²⁵⁴ Austria,²⁵⁵ Switzerland,²⁵⁶ Russia²⁵⁷ and Belgium.²⁵⁸ The Government of the Federal Republic of Germany, whose position was supported by the other states, considered Portugal's reservation to be compatible with the

251. Reservation contained in the instrument of ratification deposited on 14 December 1981 – Or. Fr.

252. Notification JJ1349C of 4 February 1983.

253. Reservation contained in a letter from the Permanent Representative of Portugal, dated 12 February 1990, registered with the Secretariat General on 13 February 1990 – Or. Fr.

254. Declaration contained in a letter from the Permanent Representation dated 4 February 1991, registered with the Secretary General on 5 February 1991 – Or. Fr.

255. Declaration contained in a letter from the Permanent Representative dated 4 June 1991, registered with the Secretariat General on 7 June 1991 - Or. Engl.

256. Declaration contained in a letter from the Permanent Representative dated 21 August 1991, registered at the Secretariat General on 22 August 1991 – Or. Fr.

257. Declaration contained in a letter from the First Deputy Minister for Foreign Affairs of the Russian Federation, handed to the Secretary General at the time of signature, on 7 November 1996 – Or. Rus./Engl.

258. Declaration contained in a letter from the Minister for Foreign Affairs of Belgium, dated 3 June 1997, handed to the Secretary General at the time of deposit of the instrument of ratification, on 29 August 1997 - Or. Fr.

object and purpose of the convention “only if refusal to grant extradition for offences punishable by a life sentence or detention order is not absolute”. The German Government added that it interpreted “the reservation to mean that the only circumstance in which extradition will not be granted is where there is no possibility under the law of the requesting state for the person sentenced to life imprisonment, having completed a certain proportion of the sentence or period of detention, obtaining a judicial review of his or her case with a view to having the remainder of the sentence commuted to probation”.

– In 1993, Germany,²⁵⁹ Austria²⁶⁰ and Turkey²⁶¹ objected to a Polish declaration with regard to Article 6.1 of the European Convention on Extradition (ETS No. 24, 1957). When ratifying the convention on 15 June 1993, Poland declared in accordance with Article 6.1.b that persons who had been granted asylum in Poland would be treated as Polish nationals and would therefore not be extradited.²⁶² A similar declaration made by Romania in 1997²⁶³ was objected to on the same grounds by Austria.²⁶⁴ The objecting states considered that a refusal to extradite persons who had been granted asylum would be compatible with the object and purpose of the convention only on condition that it did not exclude extradition of such persons to a state other than that in respect of which asylum has been granted. It follows that persons who were granted asylum could be placed on an equal footing with nationals only in the event of a request for extradition by the persecuting state.

Temporal limitation of the validity of reservations

As far as the treaties concluded within the Council of Europe are concerned, only the *European Convention on the Adoption of Children* (ETS No. 58, 1967) and the *European Convention on the Legal Status of Children born out of Wedlock* (ETS No. 85, 1975) contain provisions limiting the temporal validity of reservations (Article 25.1 and Article 14.2 respectively):

“A reservation shall be valid for five years from entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration

259. Declaration contained in a *note verbale* from the Permanent Representation dated 11 October 1993 registered at the Secretariat General on 13 October 1993 – Or. Engl.

260. Declaration contained in a letter from the Permanent Representation of Austria to the Council of Europe, dated 7 January 1994, registered at the Secretariat General on 11 January 1994 – Or. Fr.

261. Declaration contained in a letter from the Permanent Representative of Turkey, dated 15 June 1994, registered at the Secretariat General, on 21 June 1994 – Or. Fr.

262. Declaration contained in the instrument of ratification, deposited on 15 June 1993 – Or. Fr.

263. Declaration contained in the instrument of ratification, deposited on 10 September 1997 – Or. Rom./Fr.

264. Declaration contained in a letter from the Permanent Representative of Austria, dated 3 December 1997, registered at the Secretariat on 5 December 1997 – Or. Fr./Engl.

addressed to the Secretary General of the Council of Europe before the expiration of each period".

This provision was intended to reduce the number of reservations in force with respect to the two conventions. However, far from facilitating their application, the provisions gave rise to considerable problems when certain parties insisted on maintaining reservations which were not renewed in time. The *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI) discussed the practical consequences of this provision. However, no agreement could be reached on the decisive question of whether reservations which had not been renewed in time would automatically be obsolete. Similar difficulties were avoided in the *Criminal Law Convention on Corruption* (ETS No. 173, 1999), which lays down a procedure to be followed for each renewal. The convention explicitly states that "[f]ailure by the state to notify its intention to uphold or modify its declaration or reservation ... shall cause the declaration or reservation to lapse" (Article 38.2).

Finally, the Treaty Office adopted a pragmatic approach which was welcomed by the parties. The belated reservations by several states were notified to all parties, accompanied by a letter from the Director of Legal Affairs which specified that, in the absence of any objection by parties within ninety days from the date of the notification, the reservations would be considered to be tacitly accepted and to apply retroactively as from the date of expiration of the previous reservations.²⁶⁵ The same procedure was followed when one country presented belated objections to the amendments of Appendix I to the *Convention on the Conservation of European Wildlife* (ETS No. 104 1979).²⁶⁶

The solution can be seen as further confirmation of the general principle that parties to an international treaty may, by unanimous decision, take such measures as they deem appropriate with respect to the application or interpretation of that treaty. It should be emphasised that, contrary to a certain practice of the Secretary General of the United Nations,²⁶⁷ this procedure has never been applied with regard to the belated formulation or subsequent modification of reservations.

In some cases, states themselves have limited the temporal validity of their reservations. Such a practice has developed in particular with regard to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) and its protocols.

265. See the notifications concerning reservations by Luxembourg and the United Kingdom to ETS No. 85 (JJ3230C of 16 September 1994) and by Italy to ETS No. 58 (JJ3560C of 9 April 1996).

266. Notification JJ3964 of 10 December 1997 concerning Norway's objections to the amendments which were adopted by the Standing Committee on 6 December 1996.

267. *UN Juridical Yearbook*, 1978, 199-200.

When Lithuania ratified the Convention on 20 June 1995, it made a reservation with regard to Article 5.3 in order to safeguard the application of Article 104 of the Code of Criminal Procedure of the Republic of Lithuania (amended version No. I-551, July 19, 1994) which provides that a decision to detain in custody any persons suspected of having committed a crime may also be taken by a prosecutor. It was expressly stated that “[t]his reservation shall be effective for one year after the convention comes into force in respect of the Republic of Lithuania”.²⁶⁸

Albania made reservations to the right to free elections (Article 3 of the Protocol to the ECHR) for a period of five years from the date of deposit of the instrument of ratification on 2 October 1996.²⁶⁹

On 11 September 1997, Ukraine ratified the Convention and formulated reservations to Article 5.1 of the ECHR concerning the detention of a person and the arrest warrant issued by the public prosecutor, as well as to Article 8 of the ECHR concerning warrants for arrest and search warrants issued by the public prosecutor. Each time it was expressly stated that “[s]uch reservations will be in force until the appropriate amendments to the Criminal Procedure Code of Ukraine have been made or until the adoption of the new Criminal Procedure Code of Ukraine, but not later than 28 July 2001”.²⁷⁰

On 12 September 1997, Moldova ratified the Convention and made a reservation to Article 4 of the ECHR “with a view to retaining the possibility of enforcing criminal sentences in the form of non-custodial forced labour, as provided for in Article 27 of the Criminal Code, and also administrative sentences in the form of forced labour, as provided for in Article 30 of the Code of Administrative Offences”. Moldova also formulated a reservation to Article 5.3 of the ECHR, “with a view to extending the validity of an arrest warrant issued by the public prosecutor as set out in Article 25 of the Constitution of the Republic of Moldova, Article 78 of the Code of Criminal Procedure and Article 25 of Law No. 902-XII on the Prokuratura of the Republic of Moldova of 29 January 1992”. The validity of the reservations was limited to one year and six months respectively.

The instrument of ratification deposited by the Russian Federation on 5 May 1998 contained reservations with regard to Articles 5.3 and 5.4 of the ECHR which were designed to safeguard the application of procedures of arrest and detention under the Disciplinary Code of the Armed Forces and the 1960 RFSR Code of Criminal Procedure (Articles 89, 90, 92, 96, 96⁽¹⁾, 96⁽²⁾, 97, 101 and 122). The aforementioned provisions of the Code of Criminal Procedure

268. Reservation contained in the instrument of ratification deposited on 20 June 1995 – Or. Engl. The reservation expired on 21 June 1996 (cf. letter from the Permanent Representative of Lithuania, dated 19 July 1996, registered at the Secretariat General on 22 July 1996 – Or. Engl. – Notification JJ3634C of 30 July 1996).

269. Reservation contained in the instrument of ratification, deposited on 2 October 1996 – Or. Engl.

270. Reservations contained in the instrument of ratification, deposited on 11 September 1997 – Or. Ukr./Engl.

regulate the reasons for preventive detention and detention pending trial and the arrested person's right to be informed as well as the delays for and modalities of review by the prosecutor and the courts. Arrests for administrative offences are not covered by the reservation. Without indicating a precise time-limit, Russia declared that "the period of validity of these reservations shall be the period required to introduce amendments to the Russian federal legislation which will completely eliminate the incompatibilities between the said provisions and the provisions of the convention".²⁷¹

This practice can be explained by the fact that the countries in question were carrying out wide-ranging reforms of their administrative and judicial system. When ratifying the convention, these countries had not yet fully accomplished the reform process and some of the old legislation was still on the statute books. It was therefore necessary to safeguard its application until the necessary reforms had been fully implemented. Under these circumstances, the temporal limitation of the reservations' validity was welcomed since it underlined the willingness of the countries concerned to bring their legislation into line with the requirements of the convention.

Reservations to the European Convention on Human Rights²⁷²

Depositary and state practice

The European Convention on Human Rights and its protocols have given rise to a considerable number of reservations and interpretative declarations. The provisions which have attracted most reservations are the right to liberty and security (Article 5 of the ECHR), the right to a fair trial (Article 6 of the ECHR), the protection of property (Article 1 of the Protocol to the ECHR) and the right to education (Article 2 of the Protocol to the ECHR).

271. Reservations contained in the instrument of ratification deposited on 5 May 1998 – Or. Rus./Eng./Fr.

272. See in particular *The European Convention on Human Rights and Reservations* (with contributions by F. Horn and F. Schurmann), Council of Europe Doc. H (96) 18 (December 1996); G. Cohen-Jonathan, "Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux", *RGDIP*, 1996, 915-48; W.A. Schabas in L.-E. Pettiti/E. Decaux/P.-H. Imbert, *La Convention européenne des Droits de l'Homme* (1995), 923-42; I. Cameron/F. Horn, "Reservations to the European Convention on Human Rights: The *Belilos* Case", *German Yearbook of International Law*, 33 (1990), 69-129; R.St.J. MacDonald, "Reservations under the European Convention on Human Rights", *RBDI*, 21 (1988), 429 *et seq.*; J.A. Frowein, "Reservations to the European Convention on Human Rights", in F. Matscher/H. Petzold (eds.), *Protecting Human Rights. The European Dimension* (1988), 193-200; P.-H. Imbert, "Reservations and Human Rights Conventions", *Human Rights Review*, 6 (1981), 28 *et seq.*

273. In its memorial in the case of *Kjeldsen and Others*, the Commission referred to reservations to the provisions there in question as "useful guides to interpretation", Publications of the European Court of Human Rights, *Series B*, No. 21, 44-45 (§ 154).

274. See generally on Article 15 of the ECHR F. Jacobs, "Emergency Situations: The Practice of the Organs of the European Convention on Human Rights", in European Commission for Democracy through Law, *Human Rights and the Functioning of the Democratic Institutions in Emergency Situations* (1997), 129-41.

The nature and scope of such reservations may influence the interpretation of the Convention's provisions.²⁷³

The *Vienna Convention on the Law of Treaties* and the aforementioned rules governing the depositary functions of the Secretary General (above under 7 [a]) are also applied with regard to the European Convention on Human Rights and its Protocols. In addition to reservations and declarations, notices of derogation under Article 15 of the ECHR are notified.²⁷⁴ The latter notification was the subject of some controversy in 1956, when the United Kingdom communicated notices of derogation in respect of Cyprus and the Seychelles.²⁷⁵ Finally, the Committee of Ministers adopted *Resolution (56) 16 on the interpretation and application of Article 15.3 of the ECHR* which requires the Secretary General to notify any information transmitted by a party in pursuance of Article 15.3 of the Convention to the other parties as soon as possible, and to the European Commission of Human Rights. Notices of derogation are now notified to the President of the European Court of Human Rights which started to function only in 1959, and which became permanent in 1998, as well as to the President of the Parliamentary Assembly.

The exercise of depositary functions with regard to the European Convention on Human Rights must take into account the special features of the Convention. "The European Convention on Human Rights having instituted specific procedures and organs for the quasi-judicial and judicial supervision of its application, any questions concerning the scope and admissibility of a reservation relating to one of its provisions may, if appropriate, be raised and settled by the same organs".²⁷⁶ In its capacity as depositary, the Secretariat General must therefore refrain from any act or declaration that could interfere with the exercise of the functions of the Convention's supervisory bodies.

The rapid enlargement of the Council of Europe's membership since 1989 has prompted a more active role of the Council of Europe's Secretariat in the preparation of ratifications of human rights treaties. Possible reservations to the ECHR and its protocols are regularly discussed prior to ratification during so-called "compatibility exercises", when experts study the law and practices of candidate countries in order to identify possible contradictions between the domestic law and the requirements of the Convention.²⁷⁷ Before expressing their consent to be bound, a certain number of countries

275. See A.-C. Kiss, "Les fonctions du Secrétaire Général du Conseil de l'Europe comme dépositaire des conventions européennes", *AFDI*, 2 (1956), 680-710.

276. Translation of a letter dated 23 June 1975 from the Director of Legal Affairs of the Council of Europe, answering a state's request for clarification about a reservation entered by France in respect of Article 15 of the ECHR, quoted by Imbert, *op. cit. supra* Note 272, *Human Rights Review*, 6 (1981), 60.

277. See A. Drzemczewski, "Ensuring Compatibility of Domestic Law with the European Convention on Human Rights prior to Ratification: The Hungarian Model", *HRLJ*, 16 (1995), p. 241 *et seq.*

have informally consulted the Secretariat on the compatibility of envisaged reservations with the European Convention on Human Rights. The opinions given by the Secretariat have usually been followed. Considering the particularly difficult situation of many of the countries of central and eastern Europe, which were implementing wide-ranging reforms at the same time as preparing the ratification of the Convention, it is encouraging to see that the countries formulated only a relatively small number of reservations, generally of rather limited scope.

Member states have rarely objected against reservations to the European Convention on Human Rights or its protocols. Although the competence of the Convention's supervisory organs to invalidate inadmissible reservations is now well-established, such objections are not entirely futile. They may serve the purpose of upholding the force of a principle which might otherwise be undermined by numerous reservations.²⁷⁸

In 1979, the United Kingdom,²⁷⁹ Germany²⁸⁰ and France²⁸¹ reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to the ECHR.²⁸² By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.²⁸³

278. Imbert, *op. cit. supra* Note 272, *Human Rights Review*, 6 (1981), 37.

279. Notification JJ698C of 8 March 1979.

280. Notification JJ771C of 31 July 1979.

281. Notification JJ831C of 12 December 1979.

282. A letter from the Permanent Representative of Portugal, dated 8 November 1978 and handed to the Secretary General at the time of deposit of the instrument of ratification, on 9 November 1978, contained notably the following reservation:

"Article 1 of the Protocol will be applied subject to Article 82 of the Constitution of the Portuguese Republic, which provides that expropriations of large landowners, big property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by the law".

"Article 82 of the Constitution reads as follows:

1. The law shall determine the methods and forms of intervention, nationalisation and socialisation of the means of production and criteria for fixing compensation.

2. The law may stipulate that expropriations of large landowners, big property owners and entrepreneurs or shareholders shall not be subject to any compensation whatsoever."

283. Reservations withdrawn by letter from the Permanent Representative of Portugal, registered at the Secretariat General on 11 May 1987 – Or. Fr.

284. See I. Cameron, "Turkey and Article 25 of the European Convention on Human Rights", *ICLQ*, 37 (1988), 887 *et seq.*; C. Zanghì, "La déclaration de la Turquie relative à l'article 25 de la Convention européenne des droits de l'homme", *RGDIP*, 93 (1989), 69 *et seq.*

In recent years, practically no objections to reservations or declarations relating to the European Convention on Human Rights have been received by the Secretary General, one notable exception being the Turkish declarations under former Articles 25 and 46 of the ECHR (the relevant provisions were abrogated by Protocol No. 11 to the ECHR which entered into force on 1st November 1998).²⁸⁴ In 1987, Turkey recognised for the first time the competence of the European Commission of Human Rights to receive individual petitions. However, contrary to the usual practice of member states, the declaration under Article 25 of the ECHR was accompanied by a number of restrictive conditions.²⁸⁵

In a letter to which the declaration was attached, the Director of Legal Affairs, acting on behalf of the Secretary General, emphasised that “[a]t the time this declaration was deposited, I drew the Turkish authorities’ attention to the fact that this notification made pursuant to Article 25 (3) of the Convention in no way prejudices the legal questions which might arise concerning the validity of the said declaration”.²⁸⁶ This disclaimer was clearly intended to alert the other parties to the possibility that the restrictions might be invalid. Turkey protested against these comments and invoked the depositary practice of the United Nations, where no comments on the substance of statements are made.²⁸⁷ Following the notification, Greece

285. “The Government of Turkey, acting pursuant to Article 25 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms hereby declares to accept the competence of the European Commission of Human Rights to receive petitions according to Article 25 of the Convention subject to the following:

- i. 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;
- ii. the circumstances and conditions under which Turkey, by virtue of Article 15 of the Convention, derogates from her obligations under the Convention in special circumstances must be interpreted, for the purpose of the competence attributed to the Commission under this declaration, in the light of Articles 119 to 122 of the Turkish Constitution;
- iii. the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed forces ;
- iv. for the purpose of the competence attributed to the Commission under this declaration, the notion of “a democratic society” in paragraphs 2 of Articles 8, 9, 10 and 11 of the Convention must be understood in conformity with the principles laid down in the Turkish Constitution and in particular its Preamble and its Article 13 ;
- v. for the purpose of the competence attributed to the Commission under the present declaration, Articles 33, 52 and 135 of the Constitution must be understood as being in conformity with Article 10 and 11 of the Convention.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present declaration. This declaration is valid for three years from the date of deposit with the Secretary General of the Council of Europe”. Annex to notification JJ1939C, dated 29 January 1987.

286. Notification JJ147, dated 29 January 1987.

287. Letter dated 13 March 1987 by the Permanent Representative of Turkey to the Council of Europe, notification JJ1950C of 17 March 1987.

288. The facts are summarised in Case of *Loizidou v. Turkey* (Preliminary Objections), judgment of 23 March 1995, *Series A*, No. 310, §§ 15-29.

289. Notification JJ2339C of 24 January 1990.

objected to the Turkish declaration, and Sweden, Luxembourg, Denmark, Norway and Belgium reserved their position as to its legal validity.²⁸⁸

In 1990, Turkey recognised the jurisdiction of the European Court of Human Rights, specifying that its declaration “relates to the exercise of jurisdiction within the meaning of Article 1 of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey”.²⁸⁹ When notifying this declaration, it was again pointed out that the notification was without preju-

290. See Case of *Loizidou v. Turkey* (Preliminary Objections), judgment of 23 March 1995, Series A, No. 310, §§ 27-9.

291. *Ibid.* §§ 65-89. See also pp. 115-117.

292. “The Government of the Republic of Turkey, acting pursuant to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereby declares acceptance of the competence of the European Commission of Human Rights, to receive petitions which raise allegations concerning acts taken under the jurisdiction of the Republic of Turkey.

This Declaration shall be extended to petitions in relation to anything done or omitted by a Turkish authority outside the national territory of Turkey, having due regard to local, factual and legal circumstances and provided that the Turkish authority concerned had exercised Turkish jurisdiction only and not jurisdiction shared with or exercised by an international or any other state authority. In the event that the Commission, when interpreting any of the rights or obligations of the Convention, takes into consideration other international treaties or conventions as a supplementary means of interpretation, the Government of Turkey assumes that due regard will be given to the intrinsic conditions contained in each of these treaties or conventions with respect to the delimitation of the relevant substantive and territorial scope of the application.

This Declaration extends to petitions made in respect of facts, including judgments based on such facts which have occurred subsequent to January 28, 1987. Any petition previously registered by the Commission in reliance on the previous Declaration made by Turkey pursuant to Article 25 shall be deemed to have been made on the basis of the present Declaration.

This Declaration, replacing that of January 28, 1987, is valid until January 31, 1998 and may be renewed”, Annex I to notification JJ3504C, dated 15 January 1996. The declaration was renewed in 1998 (notification JJ4001C of 18 February 1998).

293. “The Government of the Republic of Turkey, acting pursuant to Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention.

This Declaration shall be extended to acts of jurisdiction exercised by a Turkish authority outside the national territory of Turkey, having due regard to local, factual and legal circumstances and provided that the Turkish authority concerned had exercised Turkish jurisdiction only and not jurisdiction shared with, or exercised by an international or any other state authority.

In the event that the Court, when interpreting any of the rights or obligations of the Convention, takes into consideration other international treaties or conventions as a supplementary means of interpretation, the Government of Turkey assumes that due regard will be given to the intrinsic conditions contained in each of these treaties or conventions with respect to the delimitation of the relevant substantive and territorial scope of the application.

This Declaration is made on condition of reciprocity including reciprocity of obligations assumed under the Convention. It extends to all matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to 22 January 1990.

Any case pending before the Commission at the time of effectiveness of this Declaration and filed pursuant to the former Declaration made by Turkey pursuant to Article 25 shall be deemed to have been made on the basis of the present Declaration.

This Declaration, replacing that of January 22, 1990, is valid until January 31, 1998 and may be renewed”, Annex II to notification JJ3504C, dated 15 January 1996. The declaration was renewed in 1998 (notification JJ4001C of 18 February 1998).

dice to the legal questions that might arise concerning the validity of the declaration. In a letter of 31 May 1990, Greece objected to the declaration.²⁹⁰

In its judgment of 23 March 1995, the European Court of Human Rights held that all restrictions attached to Turkey's Article 25 and 46 declarations except those *ratione temporis* were invalid.²⁹¹

In 1996, Turkey renewed its declarations under former Articles 25²⁹² and 46²⁹³ of the ECHR with more limited conditions which did not provoke any reactions from either the depositary or other parties. The absence of any reaction should not be interpreted as tacit approval of the new Turkish declarations. It could rather be seen as an implicit recognition of the European Court of Human Rights' competence to deal with the legality of the declarations. Finally, following the entry into force of Protocol No. 11 to the ECHR on 1 November 1998,²⁹⁴ Court and Commission have been replaced by a single permanent Court in Strasbourg whose jurisdiction extends automatically to all parties, at least as far as the "main" national territory is concerned.²⁹⁵

The approach of the European Court and Commission of Human Rights

The European Commission and Court of Human Rights have successfully affirmed their competence to judge the validity of reservations made to the European Convention on Human Rights since the 1980s.²⁹⁶ In the *Belilos* judgment of 29 April 1988, the Strasbourg Court held for the first time that a reservation (formulated by Switzerland as an "interpretative declaration") was invalid and had no effect.²⁹⁷

Article 57 (former Article 64) of the ECHR²⁹⁸ regulates the right to make reservations as follows:

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

294. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (ETS No. 155, 1994).

295. See Articles 34 and 56.4 of the ECHR as amended by Protocol No. 11.

296. In *Temeltasch v. Switzerland*, decision of 5 May 1982, DR 31, 120, the European Commission of Human Rights questioned for the first time the validity of an "interpretative declaration" which was held to constitute a "reservation".

297. *Belilos* judgment of 29 April 1988, *Series A*, No. 132. See the excellent commentary by S. Marks, Reservations Unhinged: The *Belilos* Case before the European Court of Human Rights, *ICLQ* 39 (1990), 300-27.

298. Protocol No. 11 to the ECHR (ETS No. 155, 1994) which entered into force on 1 November 1998 did not amend this provision, but modified the numbering of articles.

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

The *European Convention on Establishment* (ETS No. 19, 1955, Article 26) and the *Convention on Human Rights and Biomedicine* (ETS No. 164, 1997, Article 36) contain identically worded provisions concerning reservations.

Article 57 of the ECHR applies not only with regard to the Convention itself, but also with regard to certain protocols thereto which contain additional rights (Protocols Nos. 1, 4 and 7 to the ECHR). *Protocol No. 6 concerning the abolition of the death penalty* (ETS No. 114, 1983) explicitly prohibits the making of reservations (Article 4).

Article 57 of the ECHR lays down criteria of validity which are self-contained and suitable for judicial examination. The application of Article 57 of the ECHR leaves little room for the “general rules of international law” as embodied in the *Vienna Convention on the Law of Treaties*. In the *Belilos* case, the Swiss Government invoked the twelve months tacit acceptance rule of Article 20.5 of the VCLT. It argued that the contested declaration had been tacitly accepted since neither the Secretary General as depositary nor the other parties to the Convention had raised any objections to it. The Strasbourg Court rejected this argument, stating simply that “[t]he silence of the depositary and the contracting states does not relieve the Convention institutions of the power to make their own assessment”.²⁹⁹

The Strasbourg Court has also departed from the traditional rules of the *Vienna Convention on the Law of Treaties* as far as the consequences of impermissible reservations are concerned. The Court declared reservations which were incompatible with Article 64 (now Article 57) of the ECHR null and void, but left the state’s consent to be bound unaffected.³⁰⁰ This “severance approach” has the practical advantage that the state remains bound by the Convention in its entirety even subsequent to the determination that the reservations which were initially formulated by it are invalid.

The innovative practice of the Strasbourg organs, which was unparalleled in international law,³⁰¹ has been facilitated by certain special features of the Convention which, in the words of the Court, constitutes “a constitutional instrument of European public order (*ordre public*) for the protection of

299. *Belilos* judgment of 29 April 1988, *Series A*, No. 132, § 47.

300. *Belilos* case, *ibid.*, § 60; *Case of Loizidou v. Turkey* (Preliminary Objections), judgment of 23 March 1995, *Series A*, No. 310, §§ 90-98.

301. A similar position has subsequently been adopted by the Human Rights Committee which was established under the *UN Covenant on Civil and Political Rights*, see General Comment No. 24 (52), *supra* Note 193. The committee’s position was, however, opposed by several parties to the Covenant, including Council of Europe member states such as France and the United Kingdom.

302. *Loizidou v. Turkey* (Preliminary Objections), judgment of 23.3.1995, *Series A*, No. 310, § 75. See also the admissibility decision of the Commission, applications 15299, 15300 and 15318/89 – *Chrysostomos and Others v. Turkey* (4.3.1991), *HRLJ*. 12 (1990), 113 (121).

individual beings".³⁰² The parties undertake to ensure the enjoyment of the individual rights and freedoms set forth in the Convention to everyone within their jurisdiction. The essentially non-reciprocal nature of the obligations under the Convention does not leave much room for unilateral action by the parties. In addition, the Convention rights and freedoms benefit from a collective enforcement guarantee through an independent judicial organ to which the individuals have direct access. The Convention's aim is "to achieve greater unity in the maintenance and further realisation of human rights".³⁰³ In such an integrated legal order, where the Strasbourg Court is gradually assuming the role of a European constitutional court, the traditional freedom of states to unilaterally modify their obligations through the formulation of reservations must appear as somewhat anachronistic.³⁰⁴

It is therefore not surprising that reservations to the Convention have come under strict scrutiny by the Commission and the Court which were set up not only to facilitate the application of the Convention, but also to "ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19 of the ECHR). Their approach has been facilitated by the fact that by the end of the 1980s, virtually all parties accepted the competence of the Commission and the jurisdiction of the Court. It is beyond any doubt that the new permanent Court, which started to function on 1 November 1998, following the entry into force of Protocol No. 11 to the ECHR, will confirm and further develop the "Strasbourg approach" with regard to reservations.

Criteria of admissibility in the case-law of the European Court and Commission of Human Rights

Scope of admissible reservations (Article 57.1 of the ECHR)

Article 57.1 (former Article 64.1) of the ECHR requires precision and clarity.³⁰⁵ Reservations must be made "in respect of a particular provision of the Convention". "Reservations of a general character shall not be permitted" (Article 57.1 of the ECHR). In the *Belilos* case, the Court held that "by 'reservation of a general character' ... is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope".³⁰⁶ When examining the compliance of a reservation, the Court considers its objective wording, not the subjective intention of the reserving state in making it.

Any reservation must refer to a domestic law which is not in conformity with the Convention's provision to which the reservation is made. The

303. *Loizidou* case, *ibid.*, § 77.

304. Frowein, *op. cit. supra* Note 272, 199; see also B. Simma, "From Bilateralism to Community Interests in International Law", *Recueil des Cours*, 250 (1994-VI), 373 *et seq.*

305. *Belilos* judgment of 29 April 1988, *Series A*, No. 132, § 55.

306. *Ibid.*, § 56.

domestic legislation should be identified by referring to particular provisions of a law. Sweeping references to the constitution or entire codes would make it impossible to determine whether the statement amounts to a general reservation which is not permitted under the Convention.

The law in force at time of the ratification of the Convention may of course be modified. Any subsequent amendments would be covered by the initial reservation, provided that the new legislation is not incompatible to a larger extent with the Convention than the one which was initially protected by the reservation. For the sake of legal certainty, subsequent amendments of the domestic legislation in question should be notified. Such amendments may also permit a partial withdrawal of the initial reservation.³⁰⁷

Mere amendments must be distinguished from new legislation, which would not be covered by the initial reservation even if it concerned the same subject. In the case of *Fischer v. Austria* the Strasbourg Court had to examine whether the refusal of the Administrative Court to hold a public hearing was in conformity with Article 6 of the ECHR.³⁰⁸ The legislation at stake was an amendment to the Administrative Court Act which had been adopted in 1982. The Austrian Government argued that this legislation was covered by Austria's reservation to Article 6 of the ECHR, which had been formulated in 1958,³⁰⁹ because the 1982 amendment was – from a teleological point of view – identical to the corresponding provisions then in

307. A good example is the following declaration contained in a letter of 28 May 1986 from the Permanent Representative of Spain: "At the time of deposit of the instrument of ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, on 29 September 1979, Spain formulated a reservation to Articles 5 and 6 to the extent to which those Articles might be incompatible with the provisions of the Code of Military Justice – Chapter XV of Part II and Chapter XXIV of Part III – concerning the disciplinary regime of the Armed Forces.

I have the honour to inform you, for communication to the parties to the Convention, that these provisions [that is, Chapter XV of Part II and Chapter XXIV of Part III of the Spanish Code of Military Justice] have been replaced by Basic Law 12/1985 of 27 November – Chapter II of Part III and Chapters II, III and IV of Part IV – concerning the disciplinary regime of the Armed Forces, which will enter into force on 1 June 1986.

The new legislation amends the former provisions by reducing the duration of the sanctions imposing deprivation of liberty which can be applied without judicial intervention by increasing the guarantees of persons during the preliminary investigation.

Spain nevertheless confirms its reservation to Articles 5 and 6 to the extent to which those articles might be incompatible with the provisions of Basic Law 12/1985 of 27 November – Chapter II of Part III and Chapters II, III and IV of Part IV – concerning the disciplinary regime of the Armed Forces, which will enter into force on 1 June 1986".

308. *Fischer v. Austria*, judgment of 26 April 1994, *Series A*, No. 312.

309. "The provisions of Article 6 of the Convention shall be so applied that there shall be no prejudice to the principles governing public court hearings laid down in Article 90 of the 1929 version of the Federal Constitution Law", reservation contained in the instrument of ratification, deposited on 3 September 1958.

310. *Fischer v. Austria*, judgment of 26 April 1995, *Series A*, No. 312, § 41. The Court adopted similar reasoning in the cases of *Stallinger and Kuso v. Austria*, judgment of 23 April 1997, Reports of Judgments and Decisions 1997 II, 679 (§ 48); *Pauger v. Austria*, judgment of 28 May 1997, Reports of Judgments and Decisions 1997-III, 895 (§ 53).

force. The Court rejected this argument, arguing that the 1982 amendment had in fact broadened the Administrative Court's power to refuse to hold a public hearing. In 1958, the grounds for such a refusal related to cases in which formal or procedural matters were at stake as well as those where a ruling favourable to the appellant to quash an administrative decision was to be made. The addition of 1982 made it possible for the first time to refuse an oral hearing on grounds pertaining to the merits of the cases, in instances where the appeal fell to be dismissed.³¹⁰

The Strasbourg Court has not yet had any opportunity to decide whether a reservation, even if clearly circumscribed as to its scope, could also be inadmissible due to the fundamental character of the Convention provision from which derogation is sought. Reservations to human rights norms which form part of *jus cogens* would certainly be invalid.³¹¹ According to Article 53 of the 1969 Vienna Convention, a *jus cogens* norm is "accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted". The United Nations Human Rights Committee provides as examples the prohibition of torture and of arbitrary deprivation of liberty.³¹²

In addition, certain reservations, though not affecting peremptory norms of international law, might not pass the "object and purpose" test of Article 19 of the Vienna Convention, even if they are formulated in conformity with the formal requirements of Article 57 of the ECHR. In this respect, it is probably not appropriate to establish an automatic correlation between non-derogable rights and incompatibility,³¹³ an approach which was also rejected by the Human Rights Committee with regard to the UN Covenant. The committee concluded: "While there is not automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a state has a heavy onus to justify such reservations".³¹⁴

The "object and purpose" test must be applied taking into account the exact scope of the reservation and its impact on the application of the Convention as a whole. As regards the European Convention on Human Rights, not only the non-derogable rights under Article 15.2, but also certain other rights,

311. See concurring opinion of Judge De Meyer to the *Belilos* judgment of 29 April 1988, *Series A*, No. 132; Schabas, *supra* Note 272, 937-38.

312. General Comment No. 24 (52), *supra* Note 272, § 10.

313. Imbert, *op. cit. supra* Note 96, *Human Rights Review*, 6 (1981), 31-2; Schabas, *op. cit. supra* Note 192, 49-53.

314. General Comment No. 24 (52), *supra*, Note 193, § 10.

315. Case of the *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions*, 1998-I, 21 (§ 45). See also case of the *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions*, 1998-III, 1252 (§ 29).

316. See *mutatis mutandis* the advisory opinion of the Inter-American Court of Human Rights No. OC 3/83 of 8 September 1983, *ILM* 23 (1984), 320 (§ 61).

such as the non-retroactivity of penal law (Article 7) or the right to free elections (Article 3 of the Protocol to the ECHR) are of paramount importance. "Democracy is without doubt a fundamental feature of the European public order",³¹⁵ which is apparent both from the preface to the Convention and the systematic reference to a "democratic society" in the clauses allowing for restrictions of the rights guaranteed in Articles 8, 9, 10 and 11 of the ECHR. In each case, it will be decisive whether only limited aspects of a certain right or the right as such are covered by the reservation.³¹⁶

Brief statement of the law (Article 57.2 of the ECHR)

The requirement of a brief statement of the law has a twofold purpose:³¹⁷ on the one hand, it helps to avoid "reservations of a general character". It guarantees that reservations relate to a "law then in force" and do not go beyond the provisions expressly excluded by the reserving state. On the other hand, it enables the other parties, the Convention institutions and any other interested party to acquaint themselves with the relevant domestic law. Departing from the less demanding approach of the Commission,³¹⁸ the Court stressed in the *Belilos* case that the "brief statement" was not "a purely formal requirement but a condition of substance" whose omission "cannot be justified even by important practical difficulties".³¹⁹

In subsequent cases, the Court invalidated a number of reservations simply because they were not accompanied by a "brief statement" of the law (or laws) concerned.³²⁰

However, in the *Chorherr* case, the Court adopted a more lenient approach with regard to an Austrian reservation to Article 5 of the ECHR.³²¹ The Court considered it sufficient that reference had been made to the relevant number of the Austrian Official Gazette. The "reference to the Federal Gazette – preceded moreover by an indication of the subject-matter of the

317. *Belilos* judgment of 29 April 1988, *Series A*, No. 132, § 59.

318. In *Temeltasch v. Switzerland*, Decision of 5 May 1982, DR 31, 120, the Commission had considered that the failure to attach a statement of the relevant legislation was "not decisive", because the rule in Article 6.3.e of the ECHR was a clear rule with a well-determined scope (§ 91).

319. *Belilos* judgment of 29 April 1988, *Series A*, No. 132, § 59.

320. *Weber* judgment of 22 May 1990, *Series A*, No. 177, § 38; *Gradinger v. Austria*, judgment of 23 October 1995, *Series A*, No. 328-C, § 51.

321. The Austrian reservation contained in the instrument of ratification which was deposited on 3 September 1958 reads as follows: "The provisions of Article 5 of the Convention shall be so applied that there shall be no interference with the measures for the deprivation of liberty prescribed in the laws on administrative procedure, BGBl No. 172/1950, subject to review by the Administrative Court or the Constitutional Court as provided for in the Austrian Federal Constitution".

322. *Chorherr v. Austria*, judgment of 25 August 1993, *Series A*, No. 226-B, § 21.

323. Dissenting opinion by Judge Valticos, *ibid.*; Horn, *op. cit. supra* Note 189, "Making Reservations" 11-12.

relevant provisions – makes it possible for everyone to identify the precise laws concerned and to obtain any information regarding them”.³²²

The Court’s approach in this case has been criticised.³²³ The said reference in the Official Gazette refers in fact to four somewhat voluminous pieces of legislation (the Code of Administrative Procedure, the Code of Administrative Offences, the Act on the Implementation of Administrative Measures and the Introductory Provisions to the Administrative Procedures Act). The reservation does not specify exactly which provisions might be incompatible with Article 5 of the ECHR. The Court’s reluctance to invalidate the Austrian reservation in this case might have been prompted by the fact that Commission had previously applied it in a number of cases without questioning its legality.³²⁴

Conditions with respect to declarations recognising the competence of the Commission and the jurisdiction of the Court

Under the original system of the European Convention on Human Rights, the ratification of the Convention in itself did not entail automatic acceptance of the competence of the two supervisory organs established under the Convention. Parties to the Convention had to make separate declarations recognising the competence of the European Commission of Human Rights to receive individual petitions (former Article 25 of the ECHR) and the jurisdiction of the European Court of Human Rights to deal with all matters concerning the interpretation and application of the Convention (former Article 46 of the ECHR). Following the entry into force of Protocol No. 11 to the ECHR on 1 November 1998, Court and Commission have been replaced by a single permanent Court in Strasbourg.³²⁵ Acceptance of the new Court’s jurisdiction is automatic, at least as far as the “main” national territory is concerned (Article 34 of the ECHR as amended by

324. See, for example, decisions on admissibility of 29 August 1959 (Application 473/59); 15 December 1961 (Application 1047/61); 7 April 1967 (Application 2431/65), 14 December 1970 (Application 3923/69) and 29 March 1971 (Application 4002/69).

325. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (ETS No. 155, 1994). See A. Drzemczewski/J. Meyer-Ladewig, “Principal characteristics of the new ECHR control mechanism, as established by Protocol No. 11, signed on 11 May 1994”, *HRLJ*, 14 (1994), 81-115; A. Drzemczewski, “A major overhaul of the European Human Rights Convention control mechanism: Protocol No. 11”, in *Collected Courses of the Academy of European Law*, 1995, Vol. IV (1997), 121-244.

326. Such territories may also be situated in Europe, see Eur. Court H.R., *Gillow* judgment of 24 November 1986, *Series A*, No. 109, § 62.

327. Eur. Commission HR, admissibility decision of 4 March 1991, applications 15299, 15300 and 15318/89 – *Chrysostomos and Others v. Turkey*, *HRLJ* 12 (1990), 113; *Loizidou v. Turkey* (Preliminary Objections), judgment of 23 March 1995, *Series A*, No. 310. The Turkish restrictions are reproduced in footnotes 292 and 293 above.

328. W. Kälin, “Die Vorbehalte der Türkei zu ihrer Erklärung gemäß Art. 25 EMRK”, *EuGRZ*, 1987, 421 (424); C. Rumpf, “Die Anerkennung des Individualbeschwerderechts gemäß Art. 25 EMRK durch die Türkei”, *ZaöRV*, 47 (1987), 778 (790-91).

Protocol No. 11). As far as territories for whose international relations a state is responsible are concerned,³²⁶ states will still have an option to accept the new Court's jurisdiction or not (Article 56.4 of the ECHR as amended by Protocol No. 11).

The European Commission and Court of Human Rights had to examine the validity of certain "conditions" attached to Turkey's declarations under former Articles 25 and 46 of the ECHR.³²⁷ Neither the Commission nor the Court determined the precise legal nature of the "conditions". In legal doctrine, they have sometimes been assimilated to "reservations" in the sense of Article 2.d of the VCLT.³²⁸ In a letter dated 26 June 1987, the Permanent Representative of Turkey to the Council of Europe emphasised, however, that the restrictions contained in the Turkish declaration under Article 25 of the ECHR "cannot be considered as 'reservations' in the sense of international treaty law". They "do not purport to modify or to exclude any of the legal provisions of the Convention", but only "to define and limit the granting of additional power and authority which Turkey as contracting state has on its own volition bestowed upon the Commission".³²⁹

The "conditions" differ from reservations in the sense that they do not purport to qualify the scope of existing treaty obligations, but the acceptance of additional undertakings. Since they refer to the functioning of the Convention's control mechanism, they do not have a purely conventional character. For similar reasons, the substantive, territorial and temporal restrictions which some states attached to their acceptance of the jurisdiction of the International Court of Justice under the optional clause in Article 36 of the Statute of the ICJ are not considered to constitute "reservations" in the sense of Article 2.d of the VCLT.³³⁰ The validity of the "conditions" had therefore to be tested primarily with respect to Articles 25 and 46, and only secondarily with respect to former Article 64 (now Article 57) of the ECHR.

In the case of *Loizidou v. Turkey (Preliminary Objections)*, the European Court of Human Rights came to the conclusion that all restrictions except those *ratione temporis* were invalid and severable,³³¹ thereby confirming earlier findings of the Commission.³³² The Court adopted a similar approach as in the *Belilos* case. Rather than rendering the state's consent null and void in its entirety, it nullified only the inadmissible restrictions and left Turkey's acceptance unaffected.

329. Notification JJ1989C of 1 July 1987.

330. J. Crawford, "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", *BYIL*, 50 (1979), 63 (77); Bowett, *op. cit. supra* Note 187, 76; Kühner, *op. cit. supra* Note 175, 51-52.

331. *Loizidou v. Turkey (Preliminary Objections)*, judgment of 23 March 1995, *Series A*, No. 310, §§ 65-98.

332. Admissibility decision of 4 March 1991, Applications 15299, 15300 and 15318/89 – *Chrysostomos and Others v. Turkey*, *HRLJ*. 12 (1990), 113.

In order to reach this conclusion, the Commission and the Court could rely on the wording of the relevant provisions which do not provide for any restrictions of the kind made by Turkey and the previous practice of parties which had been in conformity with them. The Court rejected the argument that states were able to attach restrictions to their acceptance of the jurisdiction of the International Court of Justice under the optional clause in Article 36 of the Statute of the ICJ. It reaffirmed the special character of the Convention as “a constitutional instrument of European public order for the protection of individual beings” and its mission “to ensure the observance of the engagements undertaken by the High Contracting Parties” (Article 19 of the ECHR).³³³ This special character “mitigates in favour of severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey’s ‘jurisdiction’ within the meaning of Article 1 of the Convention”.³³⁴

Conclusions

The practice within the Council of Europe has revealed some of the inadequacies of the reservations regime under the Vienna Convention as regards treaties of a normative character, and in particular human rights treaties. The innovative “Strasbourg approach” of the European Court and Commission of Human Rights may also influence international treaty law in general.

On the whole, reservations have so far not excessively impaired the application and functioning of Council of Europe treaties. The Organisation’s practice confirms that it is of paramount importance to consider the question of reservations carefully each time new treaties are drafted. The inclusion of “negotiated reservations” into the treaty itself, accompanied by an explicit prohibition of any other reservations, remains the ideal solution. However, as with any other ideal, it will not always be possible to put it into practice.

In the meantime, the inherent right of states to make reservations has to be accommodated so as not to pose a threat to the integrity of international treaties. States must show the utmost diligence when drafting reservations. Once they are made, reservations cannot be easily undone. The already existing informal practice within the Council of Europe to consult the depositary on the admissibility of draft reservations should be encouraged.

333. *Loizidou case (Preliminary Objections)*, §§ 75 and 93.

334. *Loizidou case (Preliminary Objections)*, § 96.

335. Redgwell, *op. cit. supra* Note 176, 410.

336. Dissenting Opinion to the case of *Chorherr v. Austria*, judgment of 25 August 1993, *Series A*, No. 226-B, 42.

CHAPTER 8: FOLLOW-UP, MONITORING AND SETTLEMENT OF DISPUTES

Introduction

The Statute of the Council of Europe contains no provision of a general nature conferring upon the Committee of Ministers or any other organs a task of monitoring the implementation of treaties elaborated within the Organisation. This matter is governed by general principles of international law and by specific provisions contained in the treaties themselves. Most treaties contain no explicit provisions concerning monitoring. In principle, the parties are responsible *vis-à-vis* one another for the reciprocal implementation of treaty obligations. Difficulties arising between them can often be resolved without any intervention from the Council of Europe.

In the past, the Parliamentary Assembly has made several attempts to establish a judicial organ which would generally be competent for the interpretation of Council of Europe treaties.³³⁷ None of the variants proposed (creation of a new judicial body or competence of the European Court of Human Rights to give advisory opinions) has been taken up by the Committee of Ministers. The only tangible result achieved was the adoption of *Resolution (69) 27 on measures likely to promote uniform interpretation of Council of Europe treaties* and *Resolution (69) 28 on collection and distribution of information on the application and interpretation of Council of Europe conventions and agreements*.³³⁸ Compared with the more ambitious proposals by the Parliamentary Assembly, the resolutions contain only very modest measures relating to the publication of translations into official national languages as well as to the collection and dissemination of information on the application and interpretation of European treaties.

The failure of the various attempts made by the Parliamentary Assembly can be explained by a number of factors. As will be shown in detail below, the application of many European treaties is already monitored by intergovernmental committees. This flexible procedure appears to be suitable for many of the treaties which contain rather broadly phrased principles and require implementation by domestic legislation. Where the object and purpose of a particular treaty was considered likely to create differences

337. *Motion for a recommendation on the establishment of a European Supreme Court* (Parliamentary Assembly Doc. 737 of 22 October 1957); Recommendations 231 (1960), 372 (1963) and 454 (1966) on the uniform interpretation of European treaties.

338. Adopted at the 182nd meeting of Ministers' Deputies on 26 September 1969.

between the parties as to the treaty's correct interpretation and application, judicial or quasi-judicial procedures for the friendly settlement of disputes have often been provided for. Experience has shown that even these procedures have very rarely been resorted to.

In the past, the practical need for a new judicial body was therefore denied. It can be argued that this situation has changed due to the rapid increase in the number of treaties and in the membership of the Organisation, which has to a certain extent become more heterogeneous. This is why the Czech Republic made a new attempt in March 1998 to establish a general judicial authority with a view to facilitating the settlement of disputes and strengthening the monitoring of Council of Europe treaties.³³⁹

The proposal was examined by the Committee of Wise Persons which had been set up following the 2nd Summit of Heads of State and Government of the Council of Europe in October 1997. The committee did not approve the proposal – notably because it would amount to the creation of a new and relatively elaborate structure.³⁴⁰ At the same time, the Committee of Wise Persons considered that it would be useful if future Council of Europe conventions included specific provisions concerning their interpretation. It referred to the possibility of asking the European Commission for Democracy through Law (the so-called Venice Commission), a consultative body within the Council of Europe, to give non-binding opinions on the interpretation of existing treaties for which interpretation mechanisms are not available.

Finally it should be noted that in the wake of the 1st Summit of Heads of State and Government of the Council of Europe held in Vienna in October 1993, both the Committee of Ministers and the Parliamentary Assembly have established procedures to monitor member states' compliance with commitments. These procedures for a more political control are designed to complement, not to duplicate or replace, the existing treaty-based mechanisms. They will not be discussed here.³⁴¹

339. See Decision No. 4 concerning the Committee of Wise Persons which was adopted by the Committee of Ministers at the 613th meeting of Ministers' Deputies on 18, 19 and 23 December 1997 (Item 1.4). See also *General judicial authority of the Council of Europe, Motion for a recommendation*, Parliamentary Assembly Doc. 8234 (9 October 1998).

340. *Building greater Europe without dividing lines. Report of the Committee of Wise Persons to the Committee of Ministers* (1998), 8 and 21 (§ 59). The report was presented at the 103rd Session of the Committee of Ministers, Strasbourg, 3-4 November 1998.

341. For more details see Council of Europe, *Methodology for implementing mechanisms for monitoring commitments by member states of the Council of Europe and the OSCE (1997); Monitoring of compliance with commitments entered into by Council of Europe member states. An overview*, Document prepared by the Secretary General's Monitoring Unit, Monitor/Inf(99)2 of 26 February 1999; *Compliance with Commitments entered into by Member states. Vade-mecum on the Committee of Ministers' Monitoring Procedure*, Document prepared by the Secretary General's Monitoring Unit, Monitor/Inf (99) 3 of 1 March 1999.

Settlement of disputes by judicial organs

In principle, all disputes relating to interpretation and application of Council of Europe treaties may be brought before the International Court of Justice on condition that the parties to the dispute have recognised its jurisdiction under the optional clause of Article 36 of the Court's Statute. Specific mention of the International Court of Justice's jurisdiction has been made in the *European Convention on Establishment* (ETS No. 19, 1955, Article 31), the *European Convention on Establishment of Companies* (ETS No. 57, 1966, Article 19), the *European Convention on Consular Functions* (ETS No. 61, 1967, Article 56.3) and the *European Convention for the Peaceful Settlement of Disputes* (ETS No. 23, 1957).

The *European Convention for the Peaceful Settlement of Disputes* (ETS No. 23, 1957) obliges parties to submit to the International Court of Justice all international legal disputes which may arise between them, including those concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach of an international obligation (Article 1).³⁴²

In addition to the judicial settlement procedure, the convention also provides for conciliation and arbitration mechanisms for non-legal disputes (Chapters II and III). It is left to the parties' discretion whether to accept conciliation and arbitration, to accept conciliation only or not to submit non-legal disputes to any procedure.³⁴³

Only a limited number of Council of Europe member states are parties to the convention,³⁴⁴ some of which have made use of the possibility to make reservations excluding the application of conciliation and arbitration procedures. The convention has therefore only rarely been applied in practice.³⁴⁵ It was applied in the dispute between the Federal Republic of Germany, on the one hand, and the Netherlands and Denmark, on the other hand, over the delimitation of the continental shelf in the North Sea. The latter case

342. See H. Miehsler, "The European Convention for the Peaceful Settlement of Disputes", in *Liber Amicorum pour Friedrich August Freiherr von der Heydte* (1977), 335-61; M.-O. Wiederkehr, "Les clauses de règlement des différends dans les conventions et accords du Conseil de l'Europe", *AFDI*, 24 (1978), 942 (944-51).

343. The last variant effectively restricts the convention's application to legal disputes only, as, for example, Italy decided to do; see Italy's declaration made at the time of deposit of the instrument of ratification, on 29 January 1960 – Or. Fr.

344. As of 1 March 1999, Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, Norway, Sweden, Switzerland, and the United Kingdom.

345. Miehsler, op. cit. *supra* Note 342, 340-42.

was eventually submitted to the International Court of Justice under the terms of special agreements, which were based on the European convention.³⁴⁶ Reference to the European convention was also made in the dispute between Austria and Italy over the rights of the German-speaking minority in South Tyrol³⁴⁷ and in the Austro-Italian Agreement of 29 March 1974, concerning the frontier-crossing of railways.³⁴⁸ There is no evidence that any non-legal disputes have been submitted to the procedures of conciliation and arbitration.

In more recent treaties a tendency to confer judicial functions on the European Court of Human Rights, which has been established under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950), rather than on the International Court of Justice with its universal jurisdiction, is clearly discernible. The *Protocol to the European Convention on State Immunity* (ETS No. 74, 1972) established the European Tribunal on Matters of State Immunity which actually consists of the members of the European Court of Human Rights and, if necessary, of representatives of parties to the convention which are not member states of the Council of Europe.³⁴⁹ The jurisdiction of the tribunal encompasses any disputes which may arise between two or more states party to the protocol concerning the interpretation and application of the convention.

The European Court of Human Rights has also been entrusted with the task of giving advisory opinions on legal questions concerning the interpretation of the *Convention on Human Rights and Biomedicine* (ETS No. 164, 1997). Such advisory opinions can be requested by the government of a party or by the Steering Committee on Bioethics (CDBI). In addition, the convention envisages the possibility of a reporting system, modelled on Article 52 (former Article 57) of the ECHR. The Secretary General will be able to request any party to explain how its internal law ensures the effective implementation of the convention's provisions (Article 30).

Finally, there are a number of treaties which provide for arbitration procedures in cases of alleged treaty violations and disputes concerning the interpretation or application of the treaty in question:³⁵⁰

346. *North Sea Continental Shelf case*, judgment of 20 February 1969, *ICJ Reports*, 1969, 3 (6-8); *ICJ Pleadings, North Sea Continental Shelf*, Vol. I, 13 and 151.

347. Miehsler, *op. cit. supra* Note 342, 340-41; P. Pazartzis, *Les engagements internationaux en matière de règlement pacifique des différends entre Etats* (1992), 218-19.

348. "Abkommen zwischen der Republik Österreich und der Italienischen Republik über die Regelung des Grenzüberganges der Eisenbahnen", *Official Gazette* [BGBl.] 1976/473.

349. See M.-O. Wiederkehr, "La Convention européenne sur l'immunité des Etats du 16 mai 1972", *AFDI*, 20 (1974), 924-43. So far, no non-member state has become a party to the convention.

350. See Wiederkehr, *op. cit. supra* Note 342, 951-56.

- European Interim Agreements on Social Security (ETS Nos. 12 and 13, 1953, Article 11);
- European Convention on Social and Medical Assistance (ETS No. 14, 1953, Article 20);
- European Convention on Consular Functions (ETS No. 61, 1967, Article 56.1);
- European Convention for the Protection of Animals during International Transport (ETS No. 65, 1968, Article 47);³⁵¹
- European Convention on the Suppression of Terrorism (ETS No. 90, 1977, Article 10);
- Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979, Article 18);
- European Agreement on Transfer of Responsibility for Refugees (ETS No. 107, 1980, Article 15.2);
- European Convention on Transfrontier Television (ETS No. 132, 1989, Article 26);
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990, Article 42);³⁵²
- Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156, 1995, Article 34);
- Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998, Article 19.2);
- Criminal Law Convention on Corruption (ETS No. 173, 1999, Article 40.2).

The fact that these procedures have so far never been used in practice bears witness to the reluctance of member states to submit their disputes to a judicial settlement.

Follow-up and monitoring by intergovernmental and other committees

Steering committees and other committees set up under Article 17 of the Statute of the Council of Europe may be entrusted with the task of examining the functioning and implementation of European treaties.

The application of most treaties is regularly monitored by existing steering committees, in particular the European Committee on Legal Co-operation

351. This provision has been amended by the additional protocol to the convention (ETS No. 103, 1979) which entered into force on 7 November 1989.

352. See also Recommendation No. R (91) 12 of the Committee of Ministers concerning the setting-up and functioning of arbitral tribunals under Article 42, paragraph 2, of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990.

(CDCJ), the European Committee on Crime Problems (CDPC) and the European Committee for Social Cohesion (CDCS). The Steering Committee on Local and Regional Democracy (CDLR)³⁵³ is competent as far as the implementation of the *European Charter of Local Self-Government* (ETS No. 122, 1985) and the *European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities* (ETS No. 106, 1980). In some cases, the follow-up has been entrusted to a committee of experts set up by the Committee of Ministers pursuant to Article 17 of the Statute of the Council of Europe.³⁵⁴

Various committees have been set up directly under a treaty. They are not governed by Article 17 of the Statute of the Council of Europe.³⁵⁵ Their powers vary, but usually comprise the monitoring of the treaty's implementation, making recommendations to the parties and proposing treaty amendments to the Committee of Ministers:

- the Standing Committee of the European Convention on Establishment (ETS No. 19, 1955, Article 24.1);
- the Standing Committee of the European Convention on the Protection of Animals kept for Farming Purposes (ETS No. 87, 1976, Article 9.1);
- the Multilateral Committee on the European Agreement on the Transmission of Applications for Legal Aid (ETS No. 92, 1977),³⁵⁶
- the Consultative Committee of the European Convention on the Legal Status of Migrant Workers (ETS No. 93, 1977, Article 33.3);
- the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979, Article 14.1);

353. Previously the Steering Committee on Local and Regional Authorities. The Ministers' Deputies agreed to change the name during the 623rd meeting on 17 March 1998 (Item 9.1).

354. See Article 20 of the Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121, 1985); Article 23.2 of the European Convention on Nationality (ETS No. 166, 1997).

355. Article 17 reads as follows: "The Committee of Ministers may set up advisory and technical committees or commissions for such specific purposes as it may deem desirable".

356. This committee, which is not explicitly foreseen in the treaty was set up at the request of the parties. It prepared two recommendations aiming at improving the practical application of the agreement, Recommendation No. R (97) 6 and Recommendation No. R (99) 6 which was adopted at the 660th meeting of Ministers' Deputies on 23 February 1999 (Item 10.2). It also drew up a "Guide to legal aid procedures" designed to facilitate the task of the national authorities on a practical level.

357. This committee is not explicitly foreseen in the treaty. It prepared, notably, Recommendation No. R (99) 7 on the application of the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody which was adopted at the 660th meeting of Ministers' Deputies on 23 February 1999 (Item 10.3), a model form on "Request for arrangements for organising or securing the effective exercise of right of access" and a document containing information on the procedures of contracting states to the Custody Convention (DIR/JUR (98) 3).

- the Convention Committee on the Custody Convention (ETS No. 105, 1980, Article 28);³⁵⁷
- the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, 1981, Article 19.a);
- the Standing Committee of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985, Article 9.1);
- the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which was set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126, 1987);
- the Standing Committee of the European Convention on Transfrontier Television (ETS No. 132, 1989; Article 21.a);
- the Monitoring Group of the Anti-doping Convention (ETS No. 135, 1989; Article 11.1.g);
- the Committee of Experts of the European Convention on the Protection of the Archaeological Heritage (ETS No. 143, 1992, Article 13);
- the Committee of Experts of the European Charter for Regional or Minority Languages (ETS No. 148, Article 17);
- the Advisory Committee of the Framework Convention for the Protection of National Minorities (ETS No. 157, Article 26).

Finally, there are a number of treaties which provide for multilateral consultations between the parties to be convened by the Secretary General at regular intervals. Such consultations usually have the purpose to examine the application of the treaty and the advisability of revising or extending its provisions.³⁵⁸

The following description can only give an overview of the treaty-related activities of some of the committees.

Treaties falling within the competence of the European Committee on Legal Co-operation (CDCJ)

The European Committee on Legal Co-operation (CDCJ) regularly considers the operation of conventions and agreements within its powers.³⁵⁹ One

358. Examples are the European Convention on the Service Abroad of Documents relating to Administrative Matters (ETS No. 94, 1977, Article 18), the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (ETS No. 100, 1978, Article 24) and various treaties concerning the protection of animals, see pp. 139-141.

359. Practically all treaties concerning civil, commercial and public law, for example, European Convention on Information on Foreign Law (ETS No. 62, 1968); Convention on the Establishment of a Scheme of Registration of Wills (ETS No. 77, 1972).

or more of such instruments are selected for discussion at each of the meetings of the CDCJ, and members are asked to provide information on their application and interpretation.

Treaties falling within the competence of the European Committee on Crime Problems (CDPC)

The European Committee on Crime Problems (CDPC) is responsible for conventions in the field of criminal law.³⁶⁰ Most of the treaties contain a clause that provides that the CDPC shall be kept informed regarding the interpretation and application of the particular treaty.

In 1981, the CDPC established the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC). This committee, which usually meets twice each year, has a double task, namely to examine difficulties that arise out of the application of the Council of Europe treaties in the penal field, and to develop new instruments if and when necessary. The PC-OC exchanges views and information and reports to the CDPC, suggesting action if appropriate. It should be noted that the practice of the CDPC and of the PC-OC is to consider the operation of a given treaty in general terms without examining the compliance by a particular state with its provisions.

The last years have witnessed an increasing need to follow closely the application of the different conventions in the penal field and to solve practical difficulties that arise. This is due to a variety of factors, which include the accession to the treaties by many countries of central and eastern Europe, technical and other developments that are not covered by the

360. European Convention on Extradition (ETS No. 24, 1957); European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959); European Convention on the Punishment of Road Traffic Offences (ETS No. 52, 1964); European Convention on the International Validity of Criminal Judgments (ETS No. 70, 1970); European Convention on the Repatriation of Minors (ETS No. 71, 1970); European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73, 1972); Additional Protocol to the European Convention on Extradition (ETS No. 86, 1975); European Convention on the Suppression of Terrorism (ETS No. 90, 1977); Second Additional Protocol to the European Convention on Extradition (ETS No. 98, 1978); Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 99, 1978); European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101, 1978); Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983); European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116, 1983); European Convention on Offences Relating to Cultural Property (ETS No. 119, 1985); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990); Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156, 1995); Convention on the Protection of the Environment through Criminal Law (ETS No. 172, 1998); Criminal Law Convention on Corruption (ETS No. 173, 1999).

361. The Treaty of Amsterdam of 1997 provides for the incorporation of the Schengen *acquis* in the framework of the European Union; see the Protocol integrating the Schengen *acquis* in the framework of the European Union which is annexed to the Treaty on European Union and to the Treaty establishing the European Community.

existing texts, some of which date back to the 1950s and 1960s, and the urgent need to follow developments in other fora such as the European Union and the Schengen Group.³⁶¹

The European Committee on Crime Problems has prepared a number of important resolutions and recommendations designed to facilitate the practical application of the conventions and to respond to the new challenges of international crime, for example:

- Resolution (75) 12 on the practical application of the European Convention on Extradition; Recommendations Nos. R (80) 7, R (86) 13 and R (96) 9 on the practical application of the European Convention on Extradition;
- Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights;
- Recommendation No. R (82) 1 concerning international co-operation in the prosecution and punishment of acts of terrorism;
- Resolutions (71) 43 and (77) 36 on the practical application of the European Convention on Mutual Assistance in Criminal Matters; Recommendations Nos. R (80) 8, R (83) 12 and R (85) 10 concerning the practical application of the European Convention on Mutual Assistance in Criminal Matters;
- Recommendations Nos. R (88) 13 and R (92) 18 concerning the practical application of the Convention on the Transfer of Sentenced Persons.

It should be emphasised, however, that any recommendations which are eventually adopted by the Committee of Ministers cannot be used for authoritatively interpreting the provisions of a treaty or, where the practical application reveals lacunae in the text, for amending them. The text of a treaty itself can only be amended or supplemented by an amending or additional protocol the drafting, adoption and implementation of which constitutes a rather cumbersome and time-consuming procedure (see Chapter 10).

In the event of a dispute between two or several parties, the CDPC “shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application”. This provision on the friendly settlement of disputes has become a standard feature of European conven-

362. With the exception of the early treaties, such as the European Convention on Extradition (ETS No. 24, 1957) and the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959). With regard to the Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983), France made the following reservation at the time of signature, on 27 April 1983, and renewed it at the time of deposit of the instrument of approval, on 11 February 1985: “The French Government has made a reservation with regard to Article 23 in respect of the competence of a Committee of experts, the CDPC, to deal with the friendly settlement of any difficulties which may arise out of the application of the Convention”.

tions in the penal field.³⁶² In practice, the CDPC has only once been formally requested to perform such a task. This happened in 1998, at the request of Italy, in a case involving the application of the *Convention on the Transfer of Sentenced Persons* (ETS No. 112, 1983).

The case concerned the refusal by the United States of America to transfer an Italian citizen, Ms Silvia Baraldini, to Italy.³⁶³ Ms Baraldini had been found guilty of active participation in the activities of a terrorist group known as "the Family" (Movement for the Independence of Puerto Rico) and convicted in 1983 of two RICO (Racketeering Influenced and Corrupt Organisation Act) charges. The overall sentence amounted to forty-three years imprisonment and a fine of US\$ 50000. Various requests by the Italian Government to transfer Ms Baraldini had been rejected by the United States on the grounds that the acts committed by her were extremely serious and that her possible release would be unacceptable.

In March 1998, the Italian Government made a formal request for a friendly settlement in accordance with Article 23 of the convention, invoking the humanitarian objectives of the Strasbourg convention which did not make any distinction regarding the type or seriousness of the offences. It argued that Ms Baraldini's transfer to Italy would ensure her full social rehabilitation and the enforcement of her sentence in compliance with humanitarian principles.

The CDPC discussed the case during its 47th plenary session in June 1998 and formulated observations with a view to facilitating a friendly settlement. It clarified in particular the sequence of events and legal consequences thereof: Italy would apply the procedure provided in Article 9.1.a of the convention (continued enforcement of the sentence). Given that the duration of the American sentence (forty-three years) was at variance with the maximum penalty available in Italy for the types of crimes for which Ms Baraldini was sentenced (thirty years), Italy would have to adapt the duration of the sentence, as permitted by Article 10.2 of the convention, to fix it at thirty years. The conditions under which Ms Baraldini would serve her sentence would be determined and supervised by the relevant *Tribunale di Sorveglianza*. Under Italian law, she would not be eligible for conditional release until five years before the date at which the term of imprisonment expired. At Ms Baraldini's request, the *Tribunale di Sorveglianza*, after having received information from the USA concerning her conduct in prison, could authorise her to serve her sentence in prison, but allow her to leave prison, on her own, during working hours, for the purpose of going to work.

Following the CDPC's observations the Italian and United States governments finally reached an agreement that allowed Ms Baraldini's

363. See resolutions of the European Parliament on the detention of Silvia Baraldini in the United States of 17 November 1994 (OJEC C 341, 5 December 1994, 173), 15 February 1996 (OJEC C 65, 4 March 1996, 165) and 20 November 1997.

return to Italy on 25 August 1999. On 9 July 1999, the Rome Court of Appeal had recognised that the sentence will be enforced in Italy until 2008.

The incident concerning the detention of Abdullah Öcalan, leader of the Kurdistan Workers' Party (PKK), in Italy, gave another opportunity to reconsider the functioning of Council of Europe conventions in the penal field. On 12 November 1998, Mr Öcalan was detained at Fiumicino airport (Rome) on the basis of an international arrest warrant issued by the Federal Court in Karlsruhe. However, while Germany eventually did not request extradition, Turkey did. Italy could not extradite Mr Öcalan to Turkey because Turkish legislation still applies the death penalty for some of the offences of which Mr Öcalan is accused.³⁶⁴ In 1996 the Italian Constitutional Court had in effect ruled that the unconditional nature of the right to life and the prohibition of the death penalty prevented Italian authorities from extraditing a person to a country where he or she would face capital punishment (even if the requesting state gave assurances not to apply or execute this sentence).³⁶⁵ On 16 December 1998, the Court of Appeal in Rome ruled that Mr Öcalan must be released because Germany had withdrawn its international arrest warrant. Mr Öcalan left Italy for an unknown destination. He was finally captured in Kenya and brought to Turkey on 16 February 1999 to stand trial.³⁶⁶

At the request of Italy, the Committee of Ministers considered, during its 653rd meeting in December 1998, general penal co-operation among member states in the struggle against terrorism. It charged the European Committee on Crime Problems (CDPC) to develop a fast and effective mechanism designed to facilitate the friendly settlement of any difficulty, including conflicts of jurisdiction, which may arise out of the application of Council of Europe conventions in criminal matters (in particular the *European Convention on Extradition*, ETS No. 24, 1957; the *European Convention on the Suppression of Terrorism*, ETS No. 90, 1977; and the *European Convention on the Transfer of Proceedings in Criminal Matters*, ETS No. 73, 1972) and to examine the efficiency of existing mechanisms.³⁶⁷

*European Social Charter (ETS No. 35, 1961)*³⁶⁸

364. Turkey has not signed Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (ETS No. 114, 1983), but it has not carried out this penalty since 1984.

365. Judgment No. 223/1996 of 27 June 1996 – *Venezia*, *Gazzetta Ufficiale*, *Prima Serie Speciale*, No. 27 of 3 July 1996 [ITA 1996-2-005 in the Codices database, CD-Rom or <http://www.venice.coe.int/codices>].

366. See *Le Monde*, 17 February 1999, 3.

367. See the *ad hoc* terms of reference for the CDPC adopted at the 653rd meeting of Ministers' Deputies, 16 to 17 December 1998 (Item 10.2).

368. See generally D. Harris, *The European Social Charter* (8th edition 1984); A.P.C.M. Jaspers/L. Betten, *European Social Charter* (1988); Council of Europe, *The Social Charter of the 21st Century*. Colloquy organised by the Secretariat of the Council of Europe, 14-16 May 1997 (1997).

The *European Social Charter* and its Protocol (ETS No. 128, 1988) guarantee a number of basic social and economic rights. The charter's provisions may be accepted *à la carte* subject to the acceptance of certain "hard core" provisions and a minimum of ten articles (Article 20). Both treaties will eventually be replaced by the *Revised European Social Charter* (ETS No. 163, 1996), which was opened for signature on 3 May 1996.

The implementation of the accepted provisions is monitored on the basis of reports submitted at regular intervals by the parties. The control procedure consists of three stages. To a certain extent, it is already based on the *Turin Protocol amending the Social Charter* (ETS No. 142, 1991), which has not yet formally entered into force, but some provisions of which have been implemented following decisions by the Committee of Ministers adopted in December 1991, April 1993 and March 1994.³⁶⁹

In a first stage, the Committee of Independent Experts, composed of nine experts elected by the Committee of Ministers and assisted by an observer from the International Labour Organisation, examines the reports and evaluates the state's compliance with the accepted provisions. In a second stage, the Governmental Committee, in collaboration with social partners, carries out a political evaluation based on social, economic and other policy considerations. Its report selects situations where non-compliance should give rise to recommendations to the parties concerned.

On the basis of the Governmental Committee's report, the Committee of Ministers adopts a resolution containing detailed recommendations addressed to individual parties. In 1993, the Committee of Ministers effectively started to issue recommendations addressed to individual states. The Parliamentary Assembly is also associated with the control system and uses the conclusions of the Committee of Independent Experts in its periodical debates on social policy in Europe. Numerous amendments of national legislation and adjustments of administrative practices are tangible results of the control procedure.

In December 1998, the Committee of Ministers adopted rules of procedure for adopting recommendations concerning the application of the European Social Charter which had been drafted taking account of the already exist-

369. In December 1991, during the 467th meeting of the Committee of Ministers, states parties were requested to apply the Protocol "in so far as the text of the Charter will allow". In April 1993, during their 492nd meeting, the Ministers' Deputies "agreed unanimously to the introduction of the rule whereby only the representatives of those states which have ratified the charter vote in the Committee of Ministers when the latter acts as a control organ of the application of the charter" (Item 15). This rule corresponds to the amendments contained in Article 5 of the Turin Protocol. In March 1994, during the Committee of Ministers' 509th meeting, it was agreed to increase the number of members of the Committee of Independent Experts from seven to nine.

370. At the 653rd meeting of Ministers' Deputies, on 17 December 1998 (Item 4.6.b).

371. See *supra* Note 369.

ing practice.³⁷⁰ In accordance with a decision taken already in 1993, it is provided that only the representatives of those states which have ratified the charter shall vote when the Committee of Ministers acts as a control organ of the application of the charter.³⁷¹ A recommendation must be adopted by a two-thirds majority of the representatives voting and a majority of the parties to the charter (Article 9. 4 combined with Article 10.3 of the Rules of Procedure for the Meetings of the Ministers' Deputies). A proposal for a recommendation may only be put to the vote at the express request of the party concerned. Where no vote has been requested, the recommendation will be regarded as adopted. A party may always request a debate within the Committee of Ministers on the subject of a proposed recommendation by the Governmental Committee. Prior to the debate, the party is invited to submit its written observations.

The control procedure has received a new impetus following the entry into force of the *Additional Protocol to the European Social Charter, Providing for a System of Collective Complaints* (ETS No. 158, 1995) on 1 July 1998. It enables international organisations of employers and trade unions, as well as certain other international non-governmental organisations with consultative status with the Council of Europe, to lodge collective complaints alleging violations of the charter's provisions. In addition, each state may, in a declaration to the Secretary General, authorise national non-governmental organisations to make complaints. Collective complaints are examined by the Committee of Independent Experts. After having collected information from the applicant, the state concerned, other parties to the charter and social partners, the committee draws up a report to the Committee of Ministers containing an opinion on whether or not the state in question has complied with the charter.

Treaties in the field of social security

Until 1998, the European Social Security Committee (CDSS) monitored the application of conventions in the field of social security. Assisted by the Committee of Experts for the Application of the European Convention on Social Security (SS-AC), it collected information on legislative provisions to which the *European Convention on Social Security* (ETS No. 78, 1972) and its Protocol (ETS No. 154, 1994) applied.

Parties to the *European Code of Social Security* (ETS No. 48, 1964) and its Protocol (ETS No. 48A-1964) are required to submit regularly reports on

372. Initially the Committee of Experts on Social Security was responsible; following the adoption of Committee of Ministers' Resolution (76) 3 on 18 February 1976, the Steering Committee for Social Security (CDSS) took over the responsibility; following a decision taken at the 486th meeting of Ministers' Deputies, 18-20 January 1993, the European Social Security Committee (CDSS) and since 1998 the Committee of Experts on Standard-Setting Instruments in the Social Security Field (SS-CO) has been responsible.

their application. The reports are examined on behalf of the Council of Europe by the International Labour Organisation (ILO). The ILO assessments are communicated to the competent committee (Article 1.1.b of the code), which submits them with comments to the Committee of Ministers. The title of the intergovernmental committee responsible for the code has changed several times.³⁷² The Committee of Ministers adopts resolutions on each report which may contain recommendations to the party concerned. Such resolutions have in a number of cases prompted modifications of national legislation to bring it into line with the code and its Protocol.

Under the *Revised European Code of Social Security* (ETS No. 139, 1990), which has not yet entered into force, parties forward copies of the reports to their most representative organisations of employers and workers for comments (Article 79.1). The (revised) code also makes it compulsory to consult the Parliamentary Assembly (Article 80). The Committee of Ministers will have to decide whether a party has complied with the obligations it has accepted under the (revised) code and, if not, it will invite the party to take remedial measures (Article 81).

Following the Second Council of Europe Summit held in October 1997, the Committee of Ministers restructured the work in the social field. In 1998, the European Committee for Social Cohesion (CDCS) was created.³⁷³ The CDCS, which replaced three existing steering committees, is mandated to co-ordinate, guide and stimulate co-operation between the member states with a view to promoting social cohesion in Europe, together with the social standards embodied in Council of Europe treaties.³⁷⁴ It is to conduct its activities according to an interdisciplinary approach centred on the chief factors of social cohesion, such as employment, social protection, housing, health and education. For this purpose, a large number of observers will be involved in its discussions and activities, in particular the Parliamentary Assembly, the CLRAE, labour and management, and NGOs.

The CDCS was charged with executing the terms of reference derived from the following treaties:

- European Code of Social Security and its Protocol (ETS Nos. 48 and 48A, 1964);
- European Agreement on “au pair” Placement (ETS No. 68, 1969);
- European Convention on Social Security (ETS No. 78, 1972) via its Supplementary Agreement (ETS No. 78A, 1972);

373. See the decisions adopted by the Committee of Ministers on 19 June 1998 at the 636th meeting of Ministers' Deputies (Item 6.1).

374. At their 636th meeting on 19 June 1998, the Ministers' Deputies agreed, however, to maintain the European Social Security Committee (CDSS), the Steering Committee on Social Policy (CDPS) and the Steering Committee for Employment and Labour (CDEM) for a period ending 31 December 1998 upon which date these three steering committees would cease to exist.

- Revised European Code of Social Security (ETS No. 139, 1990).

The committee is also responsible for examining the functioning and implementation of the following treaties, which do not provide for a supervisory mechanism, with a view to adapting them and improving their practical application:

- European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors, and Protocol thereto (ETS Nos. 12 and 12A, 1953);
- European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors, and Protocol thereto (ETS Nos. 13 and 13A, 1953);
- European Convention on Social and Medical Assistance, and Protocol thereto (ETS Nos. 14 and 14A, 1953).

*Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979)*³⁷⁵

The aims of the *Bern Convention* are to ensure conservation and protection of wild plants and animal species, to increase co-operation between states in these areas, and to provide special protection to the most vulnerable species (including migratory species). It currently protects more than 500 wild plant species and more than 1 000 wild animal species, half of which enjoy total protection (for example, the bear, the wolf, the otter, the monk seal and the marine turtle).

The convention's application is monitored by a Standing Committee on the basis of regular reports on the implementation of the convention prepared by the parties. The Standing Committee can examine alleged violations on the basis of complaints which can be lodged, notably by non-governmental organisations. This procedure can involve "on-the-spot appraisals", where independent experts visit the problem areas, evaluate the situation and issue recommendations to the Standing Committee on action to be taken. In addition, groups of experts regularly monitor the status of particularly threatened populations of species protected by the convention.

The Standing Committee regularly adopts recommendations to the parties (Article 14.1 of the convention), many of which are specifically addressed to one or several parties. The recommendations are subject to regular follow-up and discussion in the Standing Committee.

Convention for the Protection of Individuals with regard to Automatic

375. See generally P.-H. Imbert, "La convention relative à la conservation de la vie sauvage et du milieu naturel de l'Europe: exception ou étape?", *AFDI*, 25 (1979), 726-47 and the information on <http://www.nature.coe.int>.

Processing of Personal Data (ETS No. 108, 1981)

Under the convention, a consultative committee has been set up to make proposals or give advice with a view to facilitating or improving the application of the convention (Article 19.a). It may also make proposals for amendments to the convention (Article 19.b). However, it has no monitoring role in the strict sense of the term.

In addition to this conventional committee, an intergovernmental committee, the Project Group on Data Protection (CJ-PD), acting under the authority of the European Committee on Legal Co-operation (CDCJ), has a general mandate to examine and monitor data-protection problems in Europe. Over the years it has prepared a number of important recommendations dealing with different sectors where such problems arise (in particular insurance, the media, police, statistics, credit reference, direct marketing, and so on). Its recommendations, which often develop the principles contained in the convention, are eventually adopted by the Committee of Ministers. Examples are as follows:

- Recommendation No. R (99) 5 on the protection of privacy on the Internet;
- Recommendation No. R (97) 18 on the protection of personal data collected and processed for statistical purposes;
- Recommendation No. R (97) 5 on the protection of medical data;
- Recommendation No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services;
- Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies;
- Recommendation No. R (90) 19 on the protection of personal data used for payment and other operations;
- Recommendation No. R (89) 2 on the protection of personal data used for employment purposes;
- Recommendation No. R (87) 15 regulating the use of personal data in the police sector;³⁷⁶
- Recommendation No. R (86) 1 on the protection of personal data for social security purposes;

376. Recommendation (87) 15 has been referred to in two international treaties. Article 115.1 of the Convention applying the Schengen Agreement of 14 June 1985 states that control by the supervisory authority should take account of the recommendation. Likewise, Article 14.1 of the Convention of 26 July 1995 on the Establishment of a European Police Office (Europol) provides that processing of police data should take account of the 1987 recommendation of the Council of Europe.

- Recommendation No. R (85) 20 on the protection of personal data

used for the purposes of direct marketing.

377. See F. Albanese, "Which international guarantees of local self-government? Council of Europe work", in the European Democracy through Law publication *Local Self-government, territorial integrity and protection of minorities* (1996), 304-12.

378. *Explanatory report on the European Charter of Local Self-Government* (1986), 9.

379. On the following see A. Delcamp, *The supervision of the application of the charter by the Congress of Local and Regional Authorities of Europe*, report submitted to the Conference on the European Charter of Local Self-Government: the application of the charter by the courts, Barcelona, 24-26 April 1997, Doc. CONF/BCN (3) 4, Strasbourg 25 June 1997.

380. See in particular Resolutions 2 (1994), 34 (1996); Recommendations 3 (1994), 20 (1996). The texts of recommendations and resolutions are available on the web site of the CLRAE: <http://www.coe.fr/cplre/>. (Due to the new domain name (@coe.int replaces @coe.fr), Council of Europe Internet addresses are subject to modifications).

*European Charter of Local Self-Government (ETS No. 122, 1985)*³⁷⁷

The charter, which sets common European standards for measuring and safeguarding the rights of local authorities, is a good example of the gradual and dynamic development of a supervisory mechanism. The charter itself did not set up an institutionalised system of control of its application, beyond a requirement for the parties to supply “all relevant information concerning legislative and other measures taken for the purpose of complying with the charter” (Article 14 of the charter). The explanatory report states that “[c]onsideration was indeed given to setting up an international system of supervision analogous to that of the European Social Charter. However, it was felt possible to dispense with complex supervisory machinery, given that the presence within the Council of Europe of CLRAE with direct access to the Committee of Ministers would ensure adequate political control of compliance by the parties with the requirements of the charter”.³⁷⁸

The existing supervisory mechanism was set up thanks to the constant support of, initially, the *Standing Conference of Local and Regional Authorities of Europe* and subsequently its successor, the *Congress of Local and Regional Authorities of Europe* (CLRAE). The actual system of supervision, which will certainly be developed further in the light of the experience gained so far, comprises two bodies:³⁷⁹

- a “Working Group responsible for monitoring the implementation of the European Charter of Local Self-Government”, with ten members elected by the Chamber of Local Authorities together with a member of the Chamber of Regions as observer;
- a “European committee of independent experts”, attached to the working group and “acting under its aegis”, the members of which are appointed by the Secretariat with the consent of the Bureau of the Congress.

The working group has received a direct mandate from the Congress, which has been extended regularly.³⁸⁰ On the one hand, the working group draws up general and periodic reports on a given article or paragraph of the

381. This expression was preferred to “claims”, a notion which was deemed too “judicial”.

382. See Article 2 of Statutory Resolution 94(3) relating to the setting-up of the Congress of Local and Regional Authorities of Europe, adopted by the Committee of Ministers on 14 January 1994 at the 506th meeting of Ministers’ Deputies.

383. Recommendation 35 (1997) on the implementation of the European Charter of Local Self-Government in Italy.

384. Recommendation 30 (1997) on the state of local self-government and federalism in Russia.

385. Recommendation 29 (1997) on the state of local and regional democracy in Turkey.

charter. This *ex officio* examination of the application of all the charter's articles should be completed by the Council's fiftieth anniversary in 1999.

On the other hand, the local and regional authorities of a Council of Europe member state may, via their representative bodies, and subject to certain conditions, ask the Congress to verify in specific cases whether the charter's provisions are complied with. The working group was authorised by Resolution 3 (1994) of 2 June 1994:

“to receive complaints³⁸¹ through the intermediary of the representative national association, ... and where necessary investigate them, in order to add knowledge of the way in which legislation is applied to general knowledge of the legislation itself. A brief summary of these investigations might be appended to the general report”.

Each complaint must describe the problem and indicate the provisions of the charter which are allegedly violated. If the complaint is lodged by a local or regional authority, it is required to demonstrate a real interest as well as evidence that all internal remedies have been exhausted. Finally, monitoring procedures concerning one or several countries may also be initiated at the request of the CLRAE Bureau (see Resolution 34 [1996] and Resolution 31 [1996]).

On the basis of reports drawn up under the above-mentioned procedures, the Congress of Local and Regional Authorities of Europe may propose to

386. Recommendation 45 (1998) on the situation of local and regional self-government in the Republic of Bulgaria.

387. Recommendation 46 (1998) on the situation of local and regional democracy in Croatia.

388. Recommendation 47 (1998) on the situation of local and regional democracy in Latvia.

389. Recommendation 38 (1998) on the situation of local and regional self-government in the Republic of Moldova.

390. Recommendation 48 (1998) on the situation of local and regional democracy in Ukraine.

391. Recommendation 49 (1998) on the situation of local and regional democracy in the United Kingdom.

392. See also the Reply to CLRAE Recommendations 29 (1997), 31 (1997) and 35 (1997) adopted by the Committee of Ministers during the 615th meeting of Ministers' Deputies on 20 January 1998 and the decisions adopted during the 641st meeting of Ministers' Deputies, 15 and 18 September 1998 (Item 9.3).

393. See the decisions adopted during the 650th meeting of Ministers' Deputies, held from 24 to 25 November 1998 (Item 2.4). For a description of the Committee of Ministers' monitoring procedure see *Compliance with Commitments entered into by Member States. Vademecum on the Committee of Ministers' Monitoring Procedure*, Document prepared by the Secretary General's Monitoring Unit, Monitor/Inf (98) 1 of 13 July 1998.

394. C. Mottet (ed.), *The implementation of the European Convention for the Prevention of Torture* (1995); J. Murdoch, "The European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment", *European Law Review*, 21 (1996), 130 *et seq.*; M. Evans/R. Morgan, "The European Convention for the Prevention of Torture: 1992-1997", *ICLQ*, 46 (1997), 663 *et seq.*; A. Cassese, *Inhuman States – imprisonment, detention and torture in Europe today* (1996). See also CPT's website: <http://www.cpt.coe.fr>. (Due to the new domain name (@coe.int replaces @coe.fr), Council of Europe Internet addresses are subject to modifications).

the Committee of Ministers that recommendations may be addressed directly to the governments of the member states concerned.

These monitoring procedures are complemented by the statutory powers of the Congress which regularly addresses recommendations dealing with the situation of local and regional democracy in the member states to the Committee of Ministers and/or the Parliamentary Assembly.³⁸² At its 4th Session, held in Strasbourg from 3 to 5 June 1997, the Congress adopted Resolution 58 (1997) on the situation of local democracy in member countries. It also adopted specific recommendations concerning Italy,³⁸³ the Russian Federation³⁸⁴ and Turkey.³⁸⁵ During the 5th Session of CLRAE, held from 26 to 28 May 1998, recommendations concerning the situation in Bulgaria,³⁸⁶ Croatia,³⁸⁷ Latvia,³⁸⁸ Moldova,³⁸⁹ Ukraine³⁹⁰ and the United Kingdom³⁹¹ were adopted.³⁹² The recommendations are drawn up on the basis of detailed reports which are drafted after country visits and discussions with central government authorities and with local and regional authorities and their associations. They contain a number of precise conclusions concerning the situation in each country.

Compliance of member states with the principles of the *European Charter of Local Self-Government* (ETS No. 122, 1985) was also considered by the Committee of Ministers within the framework of its monitoring procedure which was set up as a result of the 1st Summit of Heads of State and Government of the Council of Europe held in Vienna in 1993.³⁹³

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126, 1987)³⁹⁴

The convention is based on a preventive approach to human rights violations. Instead of setting new standards, it established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) with strong monitoring powers. The committee is entitled to conduct visits to any place within the jurisdiction of the state parties where persons are deprived of their liberty by a public authority, with a view to protecting such persons from torture and inhuman or degrading treatment or punishment (Article 2 of the convention). Both regular and *ad hoc* visits are carried out (Article 7.1 of the convention).

Members of the CPT are elected for a four-year term by the Committee of Ministers.³⁹⁵ The committee seeks to ensure that the membership represents an appropriate blending of professionals with practical experience in

395. M. Evans/R. Morgan, "The European Torture Committee: membership issues", *EJIL*, 5 (1994), 249 *et seq.*

396. *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Explanatory report* (1992), §§ 25 and 27.

397. *Ibid.*, § 27.

398. See Cassese, *op. cit. supra* Note 394, 44-5.

the areas which are of relevance for the work of the CPT (including law, medicine, prison affairs, psychiatry and politics). Members are not representatives of their governments. They are to serve in their individual capacity as independent and impartial experts (Article 4.4. of the convention).

The convention's mechanism is non-judicial. Any effort was made to avoid possible overlap with the judicial functions of the European Court of Human Rights. The convention explicitly provides that it is not to be construed as limiting or derogating from the competence of the Court (Article 17.2). The explanatory report adds that the CPT shall not intervene in proceedings pending before the Court or formulate interpretations of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950).³⁹⁶ Article 3 of the ECHR, the prohibition of torture, is of course the standard underlying the committee's activities and the case-law of the Court provides "a source of guidance".³⁹⁷ Given the essentially preventive nature of its functions, the CPT has adopted a pragmatic and factual approach, taking into account circumstances which may not pass the threshold of Article 3 but which, if allowed to continue or develop, might do so.³⁹⁸

The CPT's work rests on two pillars: co-operation with the parties and confidentiality. The visits are carried out by delegations, usually composed of two or more CPT members, who visit the country for one or two weeks, accompanied by other experts, members of the committee's secretariat and interpreters. During their visits, CPT delegations have unlimited access to places of detention (*inter alia* prisons, police stations, military barracks and psychiatric hospitals) and complete freedom of movement within them. They have the right to interview in private and without restriction persons deprived of their liberty. After each visit, the CPT prepares a confidential report which contains its recommendations to the authorities of the country visited. The main objective of the CPT is not to judge past violations, but to prevent the recurrence of torture and other forms of ill-treatment in the future. Preventive measures recommended regularly by the CPT therefore include the improvement of conditions of detention (overcrowding constitutes a serious problem in many prisons all over Europe), better training for

399. See CPT, *Second General Report on the CPT's activities* (1991), §§ 36-43 (police custody) and §§ 44-60 (imprisonment); *Third General Report on the CPT's activities* (1992), §§ 30-77 (health care); *Seventh General Report on the CPT's activities* (1996) §§ 24-36 (detention under aliens legislation); *Eighth General Report on the CPT's activities* (1997), §§ 25-58 (placement in psychiatric establishments).

400. Public declarations concerning Turkey of 15 December 1992 and 6 December 1996, available on the CPT's website: <http://www.cpt.coe.fr>. (Due to the new domain name (@coe.int replaces @coe.fr), Council of Europe Internet addresses are subject to modifications).

401. A. Cassese, "A New Approach to Human Rights: The European Convention for the Prevention of Torture", *AJIL*, 83 (1989), 128 (150).

402. Its recommendations are binding for the parties, see Article 9 and the judgment of the German Federal Constitutional Court of 6 July 1999 (2 BvF 3/90).

police and prison personnel, or the improvement of health care services for detained persons. Over the years, the CPT has adopted a series of standards for different areas of its activities, the observance of which has proven to be conducive to the prevention of torture and other forms of ill-treatment during detention.³⁹⁹

Any party may decide to lift the confidentiality and to make CPT's report public (Article 11.2 of the convention). So far practically all states have done so, a clear indication that the CPT has gained the trust and confidence of the governments which take its recommendations seriously. When a party fails to co-operate or refuses to take steps to improve the situation in the light of the recommendations made, the CPT may decide to make a public statement, but only after having given the party in question an opportunity to explain its behaviour (Article 10.2 of the convention). The decision to make a public statement requires a two-thirds majority of the members. This exceptional procedure, which could be perceived as kind of sanction, constitutes a measure of last resort and has so far been adopted only twice.⁴⁰⁰ The whole point of the convention is "that more can be achieved by discreet contacts than by public exposure and denunciations, which tend to produce denials rather than improvements".⁴⁰¹

Two amending *Protocols to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ETS Nos. 151 and 152, 1993) have been adopted. The first protocol "opens" the convention to non-member states which the Committee of Ministers may invite to accede to it. The second protocol introduces technical changes, including provisions to renew half the CPT's membership every two years. It also allows members to be re-elected twice, instead of once, as at present. The protocols will enter into force after having been ratified by all parties to the convention.

Treaties concerning the protection of animals

Several conventions concerning the protection of animals have been concluded within the Council of Europe. Only the *European Convention for the Protection of Animals kept for Farming Purposes* (ETS No. 87, 1976) provides for the setting up of a standing committee.⁴⁰² Two other treaties provide for multilateral consultations of the parties whose mandates include in each case the monitoring of the treaty's implementation, its adaptation to changing circumstances and new scientific evidence and the development of common and co-ordinated programmes.⁴⁰³ Finally the

403. Article 30 of the European Convention on the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS No. 123, 1986); Article 15 of the European Convention for the Protection of Pet Animals (ETS No. 125, 1987).

404. Decision adopted during the 409th meeting of Ministers' Deputies in June 1987.

405. Adopted by the Multilateral Consultation on 27 November 1992.

European Convention for the Protection of Animals during International Transport (ETS No. 65, 1968) and *European Convention for the Protection of Animals for Slaughter* (ETS No. 102, 1979) do not provide for any follow-up mechanism.

In order to ensure the follow-up of all conventions, the Committee of Ministers decided in 1987 to convene one multilateral consultation of parties per year which would be dedicated to monitoring the implementation of one of the conventions.⁴⁰⁴ Since 1988, multilateral consultations on the different treaties have been held regularly.

During the multilateral consultations, the parties adopt certain conclusions in the form of "resolutions". The applicable provisions of the conventions in question do not confer any authority to adopt binding instruments on the multilateral consultations. This does not mean, however, that resolutions adopted during multilateral consultations are devoid of any legal effect. In accordance with their respective object and purpose, the resolutions may deploy legal effects as "subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions" (Article 31.3.a of the VCLT) or as recommendations to the parties.

It is generally recognised that the parties to a treaty may make an agreement regarding its interpretation without requiring the approval of their respective parliaments. In order to qualify as an "agreement on interpretation", certain conditions must be fulfilled. The provisions of the treaty which are interpreted must be clearly identified. The resolution must use a clear and unambiguous wording which shows the intention to go beyond a mere recommendation (the present tense or terms such as "shall" should be used instead of vague formulations such as "should" or "as far as possible"). The resolution must contain an "interpretation" of the original provisions of the convention. The process of interpretation through subsequent agreement is legally distinct from a modification of the treaty, although the distinction is often rather fine. The resolution on the interpretation of certain provisions and terms of the convention,⁴⁰⁵ which was adopted with regard to the *European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes* (ETS No. 123, 1986) can be seen as an example of such an "agreement on interpretation".

Agreements regarding the interpretation of a treaty which have been adopted after the treaty's entry into force constitute an "authoritative inter-

406. R.G. Wetzel/D. Rauschning, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978), 253.

407. Adopted by the Multilateral Consultation on 10 March 1995.

408. See *Explanatory report on the European Convention for the Protection of Pet Animals* (1988), § 16.

pretation" by the parties and are as such part of the context of the treaty for the purposes of its interpretation.⁴⁰⁶ It follows that states which become parties to this treaty subsequent to such an agreement will also be bound by its terms.

In most cases, however, resolutions adopted during multilateral consultations do not use wording that implies the intention of adopting an agreement regarding the interpretation of the relevant convention. Though referring to certain provisions of the conventions, the resolutions simply commit the parties to follow a commonly agreed approach or programme with regard to a particular subject. The need to adopt such resolutions may arise because the subject-matter is either not sufficiently or, in view of changing circumstances, new technologies or new scientific evidence, no longer adequately covered by the applicable provisions of the conventions. These resolutions contain, rather additional commitments which are typically phrased in non-mandatory language (using the terms "guidelines", "should", "encourage" and so on). Without formally having the binding effect of conventions, the adoption of such resolutions by duly authorised representatives may be seen as a joint expression of opinion by the parties on a given subject which lends them considerable weight. The parties commit themselves in good faith to implementing the terms of a resolution. If, with regard to compelling reasons of public policy, a party decides to disregard the recommendations, it is bound to explain the reasons for its decision.

Resolutions of this type may be seen as evidence of a "subsequent practice in the application of the treaty" which may establish an agreement of the parties regarding its interpretation (Article 31.3.b of the VCLT), in particular if they are effectively implemented. Due regard must be had to the wording used in the resolution and the subsequent practice of the parties. The resolution on the keeping of wild animals as pet animals,⁴⁰⁷ for example, may be seen as a confirmation by the parties that certain provisions of the *European Convention for the Protection of Pet Animals* (ETS No. 125, 1987) should be applied to wild animals, and how.⁴⁰⁸

409. Resolution (67) 12 on the doping of athletes.

410. Recommendation No. R (84) 19 on the European Anti-Doping Charter for Sport; see also Recommendation No. R (88) 12 on the institution of doping controls without warning outside competitions.

411. Adopted by the IOC in November 1988.

412. *Explanatory report of the Anti-doping Convention* (1990), § 34.

Anti-doping Convention (ETS No. 135, 1989)

The problem of doping has been on the agenda of the Council of Europe since 1967 when the Committee of Ministers adopted a first resolution on the subject.⁴⁰⁹ In September 1984 a recommendation containing a *European Anti-Doping Charter for Sport*⁴¹⁰ was adopted which became the model for the *International Olympic Anti-Doping Charter*.⁴¹¹ The Anti-doping Convention, which was opened for signature on 16 November 1989, marks a counterpoint to the initiatives of the international sports movement, emphasising the responsibility of public authorities to actively participate in the campaign against doping.

The convention lays down binding rules with a view to harmonising national anti-doping regulations. Parties commit themselves to adopt an agreed set of legislative, financial, technical, educational and policy measures such as:

- restricting the availability and use of doping agents;
- assisting the funding of anti-doping tests;
- establishing a link between the strict application of anti-doping rules and awarding subsidies to sports organisations or individual sportsmen and sportswomen;
- organising regular doping control procedures during and outside competitions.

Rather than enumerating the measures exhaustively, the convention contains principles which governments have to implement in close co-operation with the sports movement, taking into account the existing national legislative and constitutional framework. Provided that all sports and all sports people are treated on an equal basis, the parties enjoy a certain margin of appreciation to judge which sports and which levels require particular attention and action at a given time.⁴¹² An appendix to the convention contains a reference list of banned substances and doping methods which is regularly updated in close co-operation with the International Olympic Committee.

Under Article 11 of the Anti-doping Convention, the Monitoring Group (T-DO) has a mandate to monitor the application of the convention, to propose amendments and to approve and update the list of banned substances. Over the years, it has prepared several recommendations on the implementation of provisions of the convention. Various groups of experts have been set up to assist the Monitoring Group's work, including advisory groups and working parties in the scientific, legal, technical and educational fields. Overall co-ordination is the responsibility of a co-ordination group

413. Canada and the United States of America participated in the elaboration of the convention, see *Explanatory report of the Anti-doping Convention* (1990), § 88.

414. See the decisions adopted on 9 April 1999, at the 667th meeting of Ministers' Deputies.

composed of the Chair and Vice-Chair of the Monitoring Group and the chairs of the advisory groups and working parties.

The convention came into force on 1 March 1990, after having been ratified by five member states. To date thirty-five states are parties to it, including non-European countries like Australia and Canada.⁴¹³ Other non-European states (the United States, China, South Africa, New Zealand, Japan, Brazil and Peru) as well as international sports federations take part in the work of the Monitoring Group as Observers. The convention has thus the potential to become virtually universal in scope, as will be evidenced by a ministerial meeting on doping to be held in Australia in autumn 1999.

Events in 1998, in particular during the Tour de France, again highlighted the need to step up both national and international action against doping. The Monitoring Group participated in the IOC Conference on Doping in Sport, held in Lausanne from 2 to 4 February 1999, and the preparatory work for an independent international anti-doping agency. The group is currently reviewing possibilities to strengthen the Anti-doping Convention and to further improve existing mechanisms.⁴¹⁴

European Charter for Regional or Minority Languages (ETS No. 148, 1992)

The charter, which entered into force on 1 March 1998, aims to protect and promote the historical regional or minority languages of Europe. Its objectives are to maintain and develop Europe's cultural traditions and heritage and to guarantee respect for the right to use a regional or minority language in private and public life.

Article 7 of the charter enunciates objectives and principles that parties undertake to apply to all the regional or minority languages spoken within their territory (for example, respect for the geographical area of each language, the need for promotion, the facilitation and/or encouragement of the use of regional or minority languages in speech and writing, in public and private life). Further, the charter sets out a number of specific measures to promote the use of regional or minority languages in public life covering the following fields: education, justice, administrative authorities and public services, the media, cultural activities and facilities, economic and social activities and transfrontier exchanges (Part III of the charter, Articles 8 to 14). Each party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among these measures, including a number of compulsory measures chosen from a "hard core". Moreover, each party has to specify in its instrument of ratification, acceptance or approval each

415. European Charter for Regional or Minority Languages and explanatory report (1993), § 129.

416. Item 9.1.

regional or minority language or official language which is less widely used in the whole or part of its territory, to which the chosen paragraphs shall apply.

In 1998, the Committee of Ministers established the charter's supervisory body, the Committee of Experts for the European Charter for Regional or Minority Languages, and elected its members who serve in their individual capacity as independent and impartial experts (Article 17 of the charter). According to Article 15 of the charter, the parties are required to submit periodical reports on the charter's implementation:

"1. The Parties shall present periodically to the Secretary General of the Council of Europe, in a form to be prescribed by the Committee of Ministers, a report on their policy pursued in accordance with Part II of this charter and on the measures taken in application of those provisions of Part III which they have accepted. The first report shall be presented within the year following the entry into force of the charter with respect to the Party concerned, the other reports at three-yearly intervals after the first report.

2. The Parties shall make their reports public".

The reports will assist the committee of experts in the preparation of its report to the Committee of Ministers in accordance with paragraphs 3 and 4 of Article 16 of the charter. The object of the reports is to give the committee of experts all necessary information on the implementation of the charter by the parties. The committee of experts may also receive communications from legally established bodies and associations working on minority issues (Article 16.2). However, it was not intended to create a quasi-judicial complaints procedure with the committee of experts acting as an appeal body.⁴¹⁵

During their 648th meeting, held from 9 to 10 November 1998, the Ministers' Deputies approved an indicative outline for periodical reports to be submitted by the parties.⁴¹⁶ The parties should indicate *inter alia* the legal act that implements the charter and the scope of application of the charter with regard to territorial and non-territorial languages. The number of speakers and the definition of "speakers" should be indicated for each language, since this definition may vary. Since Article 16.2 of the charter gives legally established bodies and associations the possibility of addressing the committee of experts, it was considered necessary to indicate in the periodical report those legally established bodies and associations which have the aim of developing and promoting regional or minority languages.

417. H. Klebes, "The Council of Europe's Framework Convention for the Protection of National Minorities", *HRLJ*, 16 (1995), 92-98.

418. M. Weckerling, "Der Durchführungsmechanismus des Rahmenübereinkommens des Europarats zum Schutz nationaler Minderheiten", *EuGRZ*, 1997, 605-8.

Part II of the periodical report should refer to Part II of the charter specifying all measures taken in accordance with Article 7 of the charter, as well as indicating any relevant measures which will be taken in the future. In Part III of the periodical report, the parties are invited to indicate in a scheme, for each language, which paragraphs or sub-paragraphs have been chosen and in which way they have been implemented. The relevant legal provisions and the territory where they are applied should be specified.

*Framework Convention for the Protection of National Minorities (ETS No. 157, 1995)*⁴¹⁷

The Framework Convention is the first legally binding multilateral instrument devoted to the protection of national minorities in general. It entered into force on 1 February 1998. The convention sets out legal principles which states undertake to implement in their national legislation. The main principles are the right to equality, principles relating to the sphere of public life, such as freedom of peaceful assembly, freedom of association, freedom of expression, freedom of thought, conscience and religion, and access to the media, as well as principles relating to the use of minority languages in education, transfrontier co-operation, and so on.

The Framework Convention provides for a monitoring system.⁴¹⁸ On the basis of regular reports submitted by the parties, the Committee of Ministers, assisted by an advisory committee, evaluates the adequacy of the convention's implementation in domestic law. The rather rudimentary regulation contained in Articles 24 to 26 of the Framework Convention had to be complemented, in particular as regards voting arrangements within the Committee of Ministers, the participation of non-member states and the composition of the advisory committee.

According to Article 24.1 of the Framework Convention, it is the "Committee of Ministers of the Council of Europe" which shall monitor its implementation. In principle, all representatives on the Committee would therefore be entitled to vote. During the discussions in the Committee of Ministers it became clear however that there was a strong political will in favour of arrangements whereby the representatives of those states which are parties to the convention would have a decisive vote. If the Committee of Ministers' usual voting rules had been applied, there would have been a serious risk of blocking the decision-making process. The experience with the *European Social Charter* (ETS No. 35, 1961) had shown that Deputies representing states that are not parties to a treaty usually abstain from voting for any decisions concerning the monitoring of its application by the

419. Article 20.d of the Statute of the Council of Europe; Articles 9.4 taken together with 10.3 of the Rules of Procedure for the Meetings of the Ministers' Deputies.

parties. Such abstentions would prevent the adoption of decisions which, according to Article 20.d of the Statute of the Council of Europe, must be approved by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the committee.⁴¹⁹

In order to avoid the rather cumbersome procedure of a treaty amendment, it was decided to introduce special voting arrangements by a simple decision of the Committee of Ministers. At the 601st meeting of Ministers' Deputies, on 17 September 1997, the following voting rule was adopted:

“Decisions pursuant to Articles 24.1 and 25.2 of the Framework Convention shall be considered to be adopted if two-thirds of the representatives of Contracting Parties casting a vote, including a majority of the representatives of the Contracting Parties entitled to sit on the Committee of Ministers, vote in favour”.

The Deputies noted that this rule may be reviewed whenever the Committee of Ministers deems it appropriate.

At the same meeting, the Committee of Ministers adopted Resolution (97) 10 (“Rules adopted by the Committee of Ministers on the Monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities”). The resolution regulates the composition, election and appointment of members of the advisory committee which will assist the Committee of Ministers when it evaluates the adequacy of the measures taken by the parties to give effect to the principles set out in the Framework Convention. The advisory committee is composed of up to eighteen ordinary members appointed by the Committee of Ministers who serve in their individual capacity as independent and impartial experts.

The advisory committee which started its work in June 1998 will not be limited by the facts given in the state reports. It may request additional information from the parties and consider information from sources other than state reports (including NGOs and individuals). Unless the Committee of Ministers decides otherwise, the opinions of the advisory committee will be made public. The final conclusions and recommendations of the Committee of Ministers will be made public upon adoption.

When adopting Resolution (97) 10, it was agreed that parties which are not member states of the Council of Europe are entitled to have an expert on the advisory committee under the same conditions as member states which are parties. During the 642nd meeting of Ministers' Deputies on 30 September 1998, an indicative outline for state reports to be submitted

420. Item 4.1.

421. During the 516th meeting of Ministers' Deputies held from 20 to 21 September 1994 (Item 10.3).

422. During the 578th meeting of Ministers' Deputies held from 18 to 20 November 1996 (Item 10.2).

pursuant to Article 25 of the Framework Convention was adopted.⁴²⁰ The outline has no compulsory character. It is merely intended to facilitate the work of the national authorities and the advisory committee.

Treaties adopted in pursuance of the programme of action against corruption

In recent years the fight against corruption has constituted one of the main objectives of the Council of Europe's work in the legal field. At their 19th conference, held in Valletta in 1994, the European Ministers of Justice acknowledged that corruption was a serious threat to democracy, the rule of law and human rights. In September 1994, the Committee of Ministers set up the Multidisciplinary Group on Corruption (GMC), instructing it to examine what measures might be suitable to be included in an international programme of action against corruption.⁴²¹ The GMC started work in March 1995 and prepared a draft programme of action which was finally adopted in November 1996.⁴²² The programme of action provides for the drafting of international conventions and a European Code of Conduct for Public Officials as well as for the realisation of research projects, training and exchange programmes.

At its 101st Session on 6 November 1997, the Committee of Ministers adopted *Resolution (97) 24 on the 20 Guiding Principles for the Fight against Corruption*. At its 102nd Session on 5 May 1998, the Committee of Ministers adopted *Resolution 98 (7) authorising the partial and enlarged agreement establishing the Group of States against Corruption (Greco)*. Through a process of mutual evaluation and peer pressure, Greco will be charged with monitoring the observance of the guiding principles and the implementation of any international legal instrument to be concluded within the Council of Europe. According to Greco's statute, the evaluation will be divided into rounds (Article 10). It will be carried out by evaluation teams (Article 12) who may visit the country concerned (Article 13). Evaluation reports, which will in principle be confidential, may contain recommendations inviting the members undergoing the evaluation to improve their domestic laws and practices to combat corruption (Article 15). The members concerned will be invited to report on the measures taken to follow these recommendations. Greco will also be entitled to issue public statements when it believes that members remain passive or take insufficient action in respect of recommendations addressed to them as regards the application of the guiding principles or the treaties ratified by them (Article 16).

It is the first time that a partial agreement has been entrusted with the task of monitoring Council of Europe conventions. This novelty in Council of Europe treaty practice was motivated by the desire to give countries which are not member states of the Organisation the opportunity to participate fully in this activity on an equal footing. Decisions relating to the publica-

tion of statements of non-compliance and budgetary questions will be taken by a statutory committee which will be composed of the representatives on the Committee of Ministers of the member states of the Council of Europe which are also members of Greco and of representatives specifically designated to that effect by the other members of Greco (Article 18 of the Statute). States such as Canada, Japan, Mexico and the United States of America, which have actively participated in its setting-up, are thus entitled to become members of Greco with the same membership rights as Council of Europe member states. The agreement establishing Greco will formally enter into force as soon as fourteen member states of the Council of Europe have joined it.

The first multilateral treaty elaborated in accordance with the programme of action was the *Criminal Law Convention on Corruption* (ETS No. 173, 1999), which was opened for signature on 27 January 1999. The convention develops common standards concerning a large number of corruption offences, though it does not provide a uniform definition of corruption. It deals with substantive and procedural matters which are closely related to corruption offences, such as rules of jurisdiction, and seeks to improve international co-operation. The implementation of the convention will be monitored by Greco (Article 24). If a state is already a member of Greco at the time the Criminal Law Convention enters into force with respect to it, the scope of the monitoring carried out by Greco will be automatically extended to cover this convention. If a state or the European Community becomes a party to the convention without being a member of Greco, Articles 32.2, 32.3 and 33.2 impose a compulsory and automatic membership of Greco. Membership of Greco entails the obligation to accept monitoring in accordance with the procedures described above. Greco will also have a special responsibility to examine the reservations made by contracting states with a view to progressively limiting them in their scope and number. Under Article 38 of the convention, the parties are required to assess the need for each reservation at regular intervals and to justify before Greco the need to retain it.

Another convention dealing with civil law aspects of corruption will probably be opened for signature in November 1999.

Monitoring practice of intergovernmental committees with respect to reservations

423. Recommendation No. 4 (1986), adopted by the Standing Committee on 4 December 1986.

424. *Official Journal of the EC*, L 333 of 9.12.1998.

425. See also the decision taken during the 650th meeting of Ministers' Deputies held from 24 to 25 November 1998, by which the Committee of Ministers invited member states which have ratified the European Charter of Local Self-Government (ETS No. 122, 1985) "to reconsider any reservations/declarations they had made ... and to withdraw them wherever possible" (Item 2.4).

Many of the steering and conventional committees which are entrusted with the task of examining the functioning and implementation of certain Council of Europe treaties have in the past examined the reservations made by Council of Europe member states.

The problem of reservations to the appendices to the *Convention on the Conservation of European Wildlife and Natural Habitats* (ETS No. 104, 1979) was discussed by the Standing Committee set up under the convention. In 1986, the Standing Committee, recognising that the high number of reservations might prevent the convention from achieving its goal, recommended that parties should reconsider reservations made.⁴²³

The European Committee on Legal Co-operation (CDCJ) and the European Committee on Crime Problems (CDPC) regularly examine the problem of reservations to treaties falling within their respective competences. In its current work, the CDCJ examines reservations which have posed problems for the application of the treaties falling within its competence.

In recent years, the discussions have focused in particular on reservations made to the *European Convention on the Legal Status of Children Born Out of Wedlock* (ETS No. 85, 1975), the *European Convention on the Adoption of Children* (ETS No. 58, 1967) and the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141, 1990). As far as the latter convention is concerned, mention should be made of the Joint Action of 3 December 1998 concerning the identification, tracing, freezing or seizing and confiscation of instrumentalities and the proceeds from crime which was adopted within the framework of the European Union.⁴²⁴ The Joint Action calls for concrete measures to implement the convention and instructs EU member states to limit their reservations formulated with respect to Articles 2 and 6 of the convention.

On the basis of texts prepared by the competent steering committees, the Committee of Ministers has invited parties to withdraw reservations made to Council of Europe treaties, in particular as far as treaties in the field of criminal and family law are concerned.⁴²⁵ With regard to the *European Convention on Extradition* (ETS No. 24, 1957), Resolutions (78) 30 of 11 May 1978 and Resolution (78) 43 of 25 October 1978 should be mentioned. Both resolutions recommended to the governments of member states parties to the convention "that they limit the scope of the reservations or withdraw them, bearing in mind the contribution of the Additional Protocols". Since 1978, Austria, Switzerland and the United Kingdom have either restricted or withdrawn some of their reservations to this convention.

426. Parliamentary Assembly Doc. 6856 (1993), § 43.

427. *UN Juridical Yearbook*, 1976, 221.

In 1991, a similar recommendation was adopted with regard to the conventions in the field of family law. Principle 4.4 of Recommendation No. R (91) 9 of 9 September 1991 reads as follows:

“With a view to facilitating international co-operation in family matters states should become parties to, and apply effectively, international instruments providing such co-operation, and should consider withdrawing their reservations to such instruments where possible”.

Following this recommendation, Austria, France and Spain withdrew their reservations to the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ETS No. 105, 1980), wholly or in part.

In his opinion on reservations made by member states to Council of Europe conventions, the Parliamentary Assembly's rapporteur referred to the practice of the organs set up under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) in examining and even invalidating inadmissible reservations. He expressed the view that “there is nothing to prevent other supervisory bodies set up by conventions adopted at the Council of Europe from availing themselves of comparable powers”.⁴²⁶ However, the practice of the European Court of Human Rights is rather unique and cannot easily be compared to the role of conventional committees set up by other treaties.

None of the steering or conventional committees is endowed with powers similar to those of the Commission and Court of Human Rights. Under their terms of reference, these committees can only adopt recommendations, appealing to parties to reconsider their reservations or inviting future contracting states to ratify without making any reservations. In this context, a legal opinion given in 1976 by the Director of the Human Rights Division of the United Nations is worthy of note. He examined the effect of a unanimous decision of the Committee on the Elimination of Racial Discrimination (CERD) that a reservation was incompatible with the object and purpose of the convention, when this reservation had already been accepted by the other parties. It concluded that “a decision – even a unanimous decision – by the committee that a reservation is unacceptable could not have any legal effect”.⁴²⁷ It should be noted that the said convention expressly lays down a procedure for determining the validity of reservations, which depends on the acceptance or objection of a certain propor-

428. The ILC adopted a similar point of view in its Preliminary conclusions on reservations, A/CN.4/L.544/Add. 2 (1997). The Commission stressed that the competence of monitoring bodies did not exclude or otherwise affect the traditional methods of control by the parties themselves as well as dispute-settlement mechanisms provided in an instrument (§ 6).

429. Adopted by the Committee of Ministers on 17 February 1994 at the 508th meeting of the Ministers' Deputies. The reply is reproduced in Appendix V.

CHAPTER 9: THE APPLICATION OF EUROPEAN TREATIES IN DOMESTIC LAW

The reception of Council of Europe treaties in domestic law

Few of the treaties concluded within the Council of Europe contain explicit provisions on the application of their provisions in domestic law. As treaties concluded under the rules of international law, they are, at least from the point of view of international law, superior to any national enactment. It is a generally recognised principle of international law that no state can refer to its domestic law in order to escape obligations derived from an international treaty.⁴³⁰

From a conceptual point of view, there are distinct approaches to the manner in which European states give domestic legal effect to international treaties.⁴³¹ There is a first group of countries where a treaty acquires the status of domestic law upon its ratification and promulgation in the state concerned. In countries of a monist tradition (for example, Belgium, France, Luxembourg, Portugal), it is sufficient that the treaty has been duly ratified, entered into force and published in the official gazette. In countries favouring a dualist approach (for example, Germany, Italy and most of the countries of central and eastern Europe⁴³²), it is the internal act of ratification, normally the law approving the treaty and authorising the deposit of an instrument of ratification, which “transforms” the substantive norms of the treaty or “adopts” them into the domestic legal order. In both cases, parliament gives legislative consent to the ratification unless the national constitution provides that, due to the subject of the treaty in question, legislative approval is not necessary. In such cases, the necessary domestic enactments to give effect to the treaty’s provisions may be taken in the form of governmental decrees or administrative regulations.

In a second group of countries, a duly ratified treaty does not *ipso facto* enjoy the status of domestic law (for example, the United Kingdom, Ireland). Although the treaty binds the state internationally upon its ratifi-

430. See Article 27 of the 1969 Vienna Convention on the Law of Treaties as well as numerous judgments of the Permanent Court of International Justice and the International Court of Justice; for example, the *Wimbledon* case (1923), *PCIJ, Series A, No. 1, 19*; the *Fisheries* case, *ICJ Reports, 1951, 116 (132)*; *Nottebohm* case, *ICJ Reports, 1955, 4 (20-21)*.

431. See Directorate of Legal Affairs, *Expression of consent by states to be bound by a treaty* (1987); A. Cassese, “Modern Constitutions and International Law”, *Recueil des cours, 192 (1985-III), 331 et seq.*; P.M. Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order* (1996).

432. E. Stein, “International Law in Internal Law: Toward Internationalization of central and eastern European Constitutions?”, *AJIL, 88 (1994), 427-50*.

ation, that act alone does not have the legal force of transforming the treaty's provisions into domestic law. A separate legislative act is necessary to achieve this result. This situation can be explained by the fact that in these countries, the executive branch is authorised to bind the country internationally without necessarily requiring approval by the legislature. Finally, the situation in the nordic countries can be described as a mixed system. Legislative approval is required before the executive branch can bind the country internationally, but this legislative approval does not have the effect of transforming the treaty into domestic law. This result can only be achieved by an additional legislative enactment. These countries (with the exception of Finland) ratified, for example, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) in the 1950s (Denmark on 13 April 1953, Iceland on 29 June 1953, Norway on 15 January 1952 and Sweden on 4 February 1952), but incorporated it only many years later.⁴³³ In Denmark, the Convention and its Protocols Nos. 1 to 8 were made part of municipal law as from 1 July 1992.⁴³⁴ Iceland and Sweden decided to incorporate the provisions of the Convention in 1994 and 1995.⁴³⁵ In Norway legislation incorporating the Convention and its Protocols Nos. 1, 4, 6 and 7 (the Human Rights Law) entered into force on 21 May 1999.

Most of the Council of Europe treaties are of a normative character. They formulate more or less broadly-framed principles and objectives on a certain subject, which require implementation by the parties before they can have effect at national level. It is generally accepted that parties are in principle free to choose the means which suit them best for ensuring the effective application of the principles set out in a treaty, be it incorporation or not. Like other rules of international law, the conventions require that the parties guarantee a certain result – the conformity of their domestic law and practice with the conventional duties – but they leave the manner in which this result is achieved to the discretion of each party.

The necessary domestic measures to implement a treaty have to be taken before it is formally ratified, accepted or approved. In the United Kingdom the policy in this respect was clearly set out by the minister responsible for the passage of the legislation incorporating the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30, 1959) during a parliamentary debate in 1989:

“The United Kingdom takes the view that there is no point in ratifying a convention until there is in place all the legislation and procedures

433. See M. Scheinin (ed.), *International Human Rights Norms in the Nordic and Baltic Countries* (1996).

434. Law No. A 285 of 29 April 1992.

435. Law No. 62/1994 of 19 May 1994 [Iceland] and Law (1994:1219) of 5 May 1994 which entered into force on 1 January 1995 [Sweden].

which are necessary to implement it fully ... The procedure is that we in the United Kingdom first put our legal house in order. We then ratify the convention ... Ratification is done by an Order in Council. Then the instrument of ratification is deposited [with the appropriate depositary]" .⁴³⁶

In recent years the necessity of adopting implementing legislation has increasingly been made the object of particular provisions in the treaties. Article 4 of the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108, 1981) requires that:

"1. [e]ach Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in this chapter.

2. These measures shall be taken at the latest at the time of entry into force of the Convention in respect of that Party".

The conditions for ratification of the convention were discussed by the Consultative Committee established under the convention during its 8th meeting (27 to 29 January 1993).⁴³⁷ After thorough examination of various aspects, the Consultative Committee agreed that the expression "necessary measures to give effect to the basic principles" should be understood as a condition for a state wishing to deposit its instrument of ratification, that at least those provisions in its domestic law which are required for the general data protection principles in the convention to be respected, have entered into force. There was general agreement that the convention should not be implemented simply by attributing self-executing force to some of its provisions.

Article 1.2 of the *Convention on Human Rights and Biomedicine* (ETS No. 164, 1997) stipulates as follows:

"Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention".

The explanatory report recalls that conformity between the convention and domestic law may be achieved either by directly applying the convention's provisions in domestic law or by enacting the necessary legislation to give effect to them. With regard to each provision, the means have to be

436. Earl Ferries, *Hansard House of Lords Debates*, Vol. 513, col. 1232, 12 December 1989, reproduced in H. Fox/P. Gardner/C. Wickremasinghe, United Kingdom, in P.M. Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order* (1996), 495 (503).

437. Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 8th meeting, Strasbourg, 27-29 January 1993, Doc. T-PD (93) 5 of 3 February 1993, 9 (§ 41).

determined by each party in accordance with its constitutional law and taking into account the nature of the provision in question.⁴³⁸

On the other hand, the *European Convention on Nationality* (ETS No. 166, 1997) “establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality, to which the internal law of the states parties shall conform” (Article 1). This provision is meant to indicate that the principles and rules contained therein are not self-executing and that states shall take into account their own particular circumstances when transposing the rules and principles into their internal law.⁴³⁹

In 1998, the Congress of Local and Regional Authorities of Europe (CLRAE) adopted *Recommendation 39 (1998) on the incorporation of the charter into the legal systems of ratifying countries and on the legal protection of local self-government*.⁴⁴⁰ In this recommendation, the Congress emphasises that it is “essential to incorporate the European Charter of Local Self-Government into the domestic legal system by means of a formal act of incorporation in accordance with the rules governing the implementation of international treaties. The prior existence of domestic rules which seem to be in keeping with the principles of local self-government established by the charter does not exempt the national authorities from this measure”.

The self-executing character of treaty provisions

The question of incorporation must be distinguished from the related issue of self-executing provisions.⁴⁴¹ The term self-executing is sometimes used to state the principle of a particular system of national law that certain rules of international law do not need a separate, formal act of incorporation in order to have internal effect. However, the term is more often used to describe the character of the rules themselves. In order to actually apply the provisions of an international treaty in judicial proceedings, national courts have to determine whether such provisions can be applied directly, without any implementing legislation. This determination is also necessary in states where treaties enjoy the status of domestic law.

Whether a treaty is or is not self-executing has to be determined by the national courts. The test applied usually centres on two interrelated ques-

438. *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine and explanatory report* (1998), § 20.

439. *Convention on Nationality and explanatory report* (1997), § 20.

440. Discussed and adopted by the Standing Committee of the Congress on 6 March 1998. The text of the recommendation is available on the website of the CLRAE, <http://www.coe.fr/cplre/> (Due to the new domain name (@coe.int replaces @coe.fr), Council of Europe Internet addresses are subject to modifications).

441. T. Buergenthal, “Self-Executing and Non-Self-Executing Treaties in National and International Law”, *Recueil des cours*, 235 (1992-IV), 303-400.

tions:⁴⁴² firstly, are the treaty provisions, given their wording, purpose and context, capable of being applied directly and, secondly, did the parties intend to confer directly enforceable rights and obligations on individuals?

In a 1983 judgment, the Belgian Court of Cassation articulated the test as follows:

“[T]he notion of direct applicability of a treaty invoked by a national of the state that has concluded it presupposes that the obligation assumed by that state shall have been expressed in a complete and precise manner and that the Contracting Parties intended for the treaty to confer subjective rights or to impose obligations on individuals”.⁴⁴³

It is fairly unusual for that Council of Europe treaties to contain provisions that possess a sufficient degree of determination to be applied by the courts even in the absence of any specific domestic legislation which gives effect to them. Treaty provisions often require implementing legislation, not because they expressly call for them, but because they formulate general principles or objectives without providing any specific legal standards for the courts to apply.

The question of whether a treaty is or is not self-executing is a question of domestic law which may receive a different answer in different countries, depending on the national constitution, legal traditions and court practices. In many member states of the Council of Europe, the provisions of the *European Convention on Extradition* (ETS No. 24, 1957) are considered to be self-executing. The Italian Constitutional Court held, however, that Article 8 of the convention, which gives the requested party the right to refuse extradition if proceedings for the same offence are pending in the requested state, was “a provision of international treaty law, addressed to the state parties and not directly applicable in their domestic legal systems”.⁴⁴⁴

Another example is the *European Social Charter* (ETS No. 35, 1961), some provisions of which have been directly applied in a limited number of municipal court cases. In a judgment of 30 May 1986, the Supreme Court of the Netherlands recognised the self-executing character of Article 6.4 of the charter (the right to strike).⁴⁴⁵ In most cases, however, national courts

442. Buergenthal, *ibid.*, 383-4. The Permanent Court of International Justice addressed this issue in its advisory opinion of 3 March 1928 on pecuniary claims of the Danzig Railway Officials who have passed into the Polish service, against the Polish Railways Administration, *PCIJ, Series B*, No. 15, at 17-18.

443. Cour de cassation, *Thonon v. Etat Belge*, *Revue critique de jurisprudence belge*, 1985, 22 with note by M. Waelbroeck.

444. Judgment No. 58 of 3 March 1997 – *Priebke*, *RDI*, 80 (1997), 521 (527).

445. Hoge Raad, *Jurisprudentie* 1986, 688. See W. Heringa, *Sociale Grondrechten* (1989), on the charters's impact on Dutch labour law.

refused to apply the charter's provisions directly, invoking in particular the following statement which is contained in the appendix to the charter and indicates that it was not intended that any of its provisions should be considered self-executing.⁴⁴⁶

"It is understood that the charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof".⁴⁴⁷

The *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) and its Protocols Nos. 1, 4, 6, and 7 are probably the most prominent examples of self-executing treaties. On 1 July 1999, all member states of the Council of Europe had ratified the Convention.⁴⁴⁸ Its rights and freedoms were directly applicable in thirty-nine of the forty-one states parties. Following the entry into force of United Kingdom's Human Rights Act 1998, Ireland will soon remain the only state which has not incorporated the Convention. In all these countries, the courts have, after some hesitation in a few cases, taken the view that the rights and freedoms guaranteed by the Convention (Articles 2 to 18) are self-executing.⁴⁴⁹

The Convention has certain features which transcend the traditional barrier between the individual and the international order and thus distinguish it from other international treaties. It is designed to protect individuals against improper actions by their own national authorities. In this sense, the Convention has the same function as constitutional human rights guarantees. It has granted subjective rights and freedoms which, in the words of the Convention's preamble, benefit from a collective enforcement through the international supervision exercised by the European Court of Human Rights, which may directly be addressed by anyone who is under the jurisdiction of one of the parties.

With reference to its special features, the Strasbourg Court held that the Convention "creates over and above a network of mutual, bilateral under-

446. See, for example, the French Conseil d'Etat, judgment of 20 April 1984, *Min. chargé du Budget c. Dlle Valton et autres*, *Recueil Conseil d'Etat*, 148 (Article 4.4 of the Social Charter); judgment of 15 May 1995, *Raut*, *Rec. tab.*, 610 (Articles 11 and 12 of the Social Charter).

447. See D. Harris, *The European Social Charter* (1984), 290.

448. Georgia was the last state to ratify the convention on 20 May 1999, see Council of Europe, *Chart showing signatures and ratifications of Council of Europe conventions and agreements* (loose-leaf publication which is updated every two months).

449. J. Polakiewicz, "The Implementation of the European Convention on Human Rights in Western Europe: A Survey of National Law and Practice", in *All-European Human Rights Yearbook*, Vol. 2 (1992), 11-52; *id.*, "The Implementation of the European Convention on Human Rights in Western Europe: An Evaluation", *ibid.*, 147-71; J. Polakiewicz/V. Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case Law in States where Direct Effect is given to the Convention", *HRLJ*, 12 (1991), 65-85 (Part I) and 125-42 (Part II); A. Drzemczewski, *European Human Rights Convention in Domestic Law* (1983).

takings, objective obligations".⁴⁵⁰ Both the Court and the Commission have characterised it as "a constitutional instrument of European public order (*ordre public*)" in the field of human rights.⁴⁵¹ In this sense, the practice of the European Court of Human Rights contributes substantially to the development of a truly European constitutional jurisprudence.⁴⁵² Judgments of the Strasbourg Court often highlight incompatibilities between domestic law and practice on the one hand and the Convention guarantees on the other, requiring immediate changes in domestic law or practice.

It is, however, more common that the provisions of Council of Europe treaties call for rather detailed implementing legislation which goes beyond a mere incorporation of their provisions into domestic law. For instance, the *Convention on Human Rights and Biomedicine* (ETS No. 164, 1997) contains a number of provisions which may, under the domestic law of many states, qualify as self-executing. Others formulate rather broadly-worded principles which leave the parties with considerable discretion concerning the manner of bringing about the formulated objectives (in particular Articles 2, 3 and 4).

In its opinion on the convention, the Parliamentary Assembly had proposed that all parties should be under an obligation to "introduce the substantial provisions of this convention into their national legislation".⁴⁵³ The main advantage of this proposed amendment would have been that different standards in the application of the convention, which might follow from the rather heterogeneous constitutional principles and practices with regard to the application of international treaty law, could have been avoided. However, this advantage had to be weighed against the risk that such an amendment might deter certain states, which would otherwise have been willing to commit themselves to European standards in this field, from ratifying the convention. The fact that practically no Council of Europe treaty contains a similar clause⁴⁵⁴ can be explained by the need to respect the differing constitutional practices of member states with regard to the incorporation of international treaty law. The Committee of Ministers did not accept the proposed amendment. According to the final text of the convention, a party is only required "to take in its internal law the necessary measures to give effect to the provisions of this convention" (Article 1.2),

450. *Case of Ireland v. United Kingdom*, judgment of 18.1.1978, *Series A*, No. 25, § 239.

451. *Loizidou v. Turkey* (Preliminary Objections), judgment of 23.3.1995, *Series A*, No. 310, § 75; Admissibility decision of the Commission, Applications Nos. 15299, 15300 and 15318/89 – *Chrysostomos and Others v. Turkey* (4.3.1991), *HRLJ*, 12 (1990), 113 (121).

452. See Simma, *op. cit. supra* Note 304. J.A. Frowein, "Die Herausbildung europäischer Verfassungsprinzipien", in *Rechtsstaat und Menschenwürde, Festschrift für W. Maihofer zum 70. Geburtstag* (1988), 149-58.

453. Parliamentary Assembly, Opinion No. 184 (1995) on the draft bioethics convention, adopted by the Assembly on 2 February 1995 (6th Sitting).

454. One exception is Article 1 of the European Convention providing a Uniform Law of Arbitration (ETS No. 56, 1966). The convention has never entered into force.

leaving the manner in which this result is to be achieved to the discretion of each party.

The fact that an international treaty creates in principle only rights and obligations between the parties should not prevent the administrative and judicial authorities from using its provisions when examining the legality of individual acts which are taken in application of a treaty. The exercise of discretionary powers by national authorities must respect the international obligations undertaken by the state.

A good example is the decision of the Federal Constitutional Court of Germany of 18 June 1998.⁴⁵⁵ The court was confronted with a situation where the legality of a refusal to grant a transfer of a convicted person on the basis of the *Convention on the Transfer of Sentenced Persons* (ETS No. 112, 1983) was not reviewed by the ordinary courts. The courts declined to examine the exercise of discretionary powers by the competent judicial authorities, arguing that the convicted persons had no subjective right to a transfer under the convention. When ratifying the convention, Germany had declared that it interpreted the convention “as creating rights and obligations between the parties only, without any claims or subjective rights accruing to sentenced persons, or that any such claims or rights being created”.⁴⁵⁶

The Constitutional Court did not accept this reasoning and held that the objectives of social rehabilitation and reintegration which are embodied in the convention must be taken into account when decisions on applications by prisoners to be transferred to their native country are taken. According to the Constitutional Court, Germany's declaration was merely intended to exclude the possibility of an individual claiming rights directly under the convention. It did not exclude the possibility that a person asking for a transfer to his or her country of origin had a right under German law to ask that the national authorities take the objectives of the convention into account when deciding upon individual requests for a transfer. Even if this decision is discretionary, it is nevertheless subject to judicial control. The sentenced person therefore has a right to legal protection by the courts for review as to whether the public authorities exercised their discretion correctly, taking into account the objectives of the convention.

455. Decision of 18 June 1997, 2 BvR 2501/95, 2 BvR 2990/95, 2 BvR 483/95, EuGRZ, 1997, 421 [GER-1997-2-009 in the Codices database, CD-Rom or <http://www.venice.coe.int/codices>].

456. Declaration contained in a letter from the Permanent Representative handed over at the time of deposit of the instrument of ratification on 31 October 1991 – Or. Ger./Eng.

CHAPTER 10: AMENDING EUROPEAN TREATIES

General considerations

Treaty revision is an area where politics, diplomacy and law are interwoven.⁴⁵⁷ Once a treaty has entered into force, the legal framework set by it is not usually open to dynamic development unless provision has been made in the treaty itself for its continual adaptation. Many Council of Europe treaties do not contain any express regulations regarding amendments.⁴⁵⁸ The question therefore regularly arises as to whether and how a certain treaty should be amended, for example, to meet changed circumstances or to facilitate its implementation by the parties.

If the treaty in question does not contain any provisions relating to amendments, this question is governed by general international treaty law, which is to a large extent embodied in the 1969 *Vienna Convention on the Law of Treaties*. According to this convention, the amendment of treaties depends on the consent of the parties. Article 39 of the VCLT provides that "a treaty may be amended by agreement between the parties", without requiring any formality for the expression of this agreement. The modification of a treaty does not require the adoption of another treaty in written form. In its commentary to Article 39 of the VCLT, the International Law Commission stressed that amendments may also be adopted by verbal or even tacit agreement.⁴⁵⁹

Within the context of the Council of Europe, it is difficult to imagine the introduction of amendments by verbal or tacit agreement. It is the usual practice to amend conventions through the adoption of amending protocols. Such protocols usually enter into force after acceptance or ratification by all the parties to the convention.⁴⁶⁰ To require the ratification by all par-

457. Lord McNair, *Law of Treaties* (1961), 534 argued that "treaty revision is a matter for politics and diplomacy and has little, if any, place in this book".

458. Such provisions are contained in, for example, Article 36 of the European Social Charter (ETS No. 35, 1961); Articles 16 and 17 of the Convention for the Conservation of European Wildlife and Natural Habitats (ETS No. 104, 1979); Article 23 of the European Convention on Transfrontier Television (ETS No. 132, 1989); Article 29 of the Convention on Civil Liability for damage resulting from activities dangerous to the environment (ETS No. 150, 1993).

459. R.G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978), 297. See also W. Grewe, "Treaties, Revision", in *Encyclopedia of Public International Law*, Instalment 7 (1984), 499-505.

460. For example, Protocol amending the European Social Charter (ETS No. 142, 1991); Protocols No. 1 and 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS Nos. 151 and 152, 1993); Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155, 1994).

ties has the advantage that only one version of the treaty is in force at any given time, the initial text prior to the entry into force of the amending protocol and the amended text thereafter. All parties are bound by the same international obligations. A plurality of treaty regimes can thus be avoided.

However, modifications of an existing treaty may also enter into force after acceptance or ratification by a limited number of parties. After its entry into force, the protocol would only be binding for the parties which have ratified it. The remaining parties would still be bound by the original version of the treaty. This procedure is suitable for additional protocols, which add provisions to the original treaty without necessarily affecting the scope of existing obligations.⁴⁶¹

A more radical solution is to replace the original treaty in its entirety by a new one. This procedure has been used where a fundamental change has occurred in the conditions under which the original treaty was concluded. The *Revised European Convention on the Protection of the Archaeological Heritage* (ETS No. 143, 1992) replaces the original convention of 1969 (ETS No. 66). Major changes in the scientific and economic context of archaeology made it necessary to revise the original convention in order to make the text more coherent and comprehensive.⁴⁶² The developments in labour law and social policies since the original *European Social Charter* (ETS No. 35) was drawn up in 1961 prompted the adoption of a *Revised European Social Charter* (ETS No. 163) which was opened for signature on 3 May 1996.⁴⁶³ The instrument has been drafted in such a way as to be autonomous from the original charter, but with the same supervisory mechanism (Part IV, Article C). It is designed progressively to replace the original charter. The *Revised European Code of Social Security* (ETS No. 139, 1990) is eventually intended to replace the original code of 1964 (ETS No. 48) which no longer corresponded to the new trends in legislation and social security practices in the member states. The most recent example is the *Convention on the Recognition of Qualifications concerning Higher Education in the European Region* (ETS No. 165, 1997), which was jointly drafted by the Council of Europe and Unesco. It is designed to streamline the legal framework at European level and to replace in the long run six

461. For example, Protocols Nos. 1, 4, 6 and 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS Nos. 9, 1952; 46, 1963; 114, 1983 and 117, 1984); Additional Protocol to the European Convention on Extradition (ETS No. 86, 1975); Second Additional Protocol to the European Convention on Extradition (ETS No. 98, 1978); Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters Extradition (ETS No. 99, 1978); Additional Protocol to the European Social Charter (ETS No. 128, 1988); Additional Protocol to the European Social Charter, providing for a System of Collective Complaints (ETS No. 158, 1995).

462. *Protection of archaeological heritage. Explanatory report on the revised convention opened for signature on 16 January 1992* (1993), 4.

463. *Revised European Social Charter and explanatory report* (1996), §§ 8-10.

conventions adopted on this matter by the Council of Europe and Unesco.⁴⁶⁴

Simplified procedures (tacit consent and opting-out)

Amendments to the treaty itself

Simplified procedures which do not require the formal expression of consent through the traditional procedures of signature and ratification have also been used in treaties concluded within the Council of Europe.

A standard clause which has been introduced in a number of treaties provides that amendments prepared by a conventional committee are formally approved by the Committee of Ministers. Their entry into force requires that all parties to the convention inform the Secretary General of their acceptance (see, for example, Article 16 of the *Convention on the Conservation of European Wildlife and Natural Habitats*, ETS No. 104, 1979; Article 21 of the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, ETS No. 108, 1981; Article 23 of the *European Convention on Transfrontier Television*, ETS No. 132, 1989; Article 83 of the *Revised European Code of Social Security*, ETS No. 139, 1990; Article 18 of the *Convention on the Protection of the Environment through Criminal Law*, ETS No. 172, 1998). Treaty provisions of this kind avoid the two-tier procedure for the conclusion of treaties (signature followed by ratification, acceptance or approval) which is normally required for the entry into force of an amending protocol.

The *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (ETS No. 150, 1993) makes a distinction between amendments to the basic provisions (Articles 1 to 25) which are of a technical nature and can be adopted by the Standing Committee alone, and amendments to the articles concerning the relations between the convention and other provisions, the Standing Committee, the amendment procedures and the final clauses, which, by virtue of their political and budgetary implications, require the approval of the Committee of Ministers.⁴⁶⁵ The former will already enter into force after having been

⁴⁶⁴. The following treaties are concerned:

- European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS No. 15, 1953) and its Protocol (ETS No. 49, 1964);
- European Convention on the Equivalence of Periods of University Study (ETS No. 21, 1956);
- European Convention on the Academic Recognition of University Qualifications (ETS No. 32, 1959);
- International Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States bordering on the Mediterranean (1976);
- Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region (1979);
- European Convention on the General Equivalence of Periods of University Study (ETS No. 138, 1990).

accepted by three parties, including at least two member states of the Council of Europe (Article 29.3). The latter require acceptance by all parties (Article 29.4).

Such procedures have to be distinguished from the use of “opting-out” or “tacit consent” clauses, which do not require any formal expression of consent for the entry into force of amendments which have been agreed in procedures of majoritarian decision making. Such procedures are used within the framework of some international organisations (in particular the World Health Organisation, the ICAO, the International Maritime Organisation, the Convention on International Trade in Endangered Species [CITES]⁴⁶⁶ and the International Whaling Convention).⁴⁶⁷ They are particularly suitable for amendments to provisions of a purely technical character.⁴⁶⁸ Even more distinct from traditional procedures of treaty-making are regimes such as the Montreal Ozone Protocol, where super-majorities can change standards of ozone-depleting substances, without any opting-out rights for objecting states.⁴⁶⁹

Within the political context of the Council of Europe, it has been rather difficult to introduce such procedures of “binding nonconsensus decisionmaking”. In 1988 the addition of “opting-out clauses” to the *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe* was considered by the Committee of Experts on Public International Law (CJ-DI). The Secretariat drafted a number of model clauses and proposed that their inclusion into certain types of treaties (in particular protocols or agreements on technical matters) should be considered on a case-by-case basis.⁴⁷⁰ The proposed tacit acceptance clause sets a fixed period after which the treaty would automatically enter into force unless a state had notified an objection. The clause would not prevent states which wish to do so, or are obliged to do so by their domestic law, from depositing an instrument of acceptance.

During the discussion in the Committee of Ministers about the inclusion of such opting-out clauses into the *Model Final Clauses*, the extraordinary

465. The convention has not yet entered into force.

466. Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, *UNTS*, Vol. 993, 243.

467. International Convention for the Regulation of Whaling of 2 December 1946, *UNTS* Vol. 161, 72.

468. C. Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations* (1973), 40 *et seq.*; J. Sommer, “Environmental Law-Making by International Organisations”, *ZaöRV*, 56 (1996), 628 (644-48).

469. Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, *ILM*, 26 (1987), 1550, amended and adjusted in 1991, *ILM*, 30 (1991), 541. See also Article 121 of the Rome Statute of the International Criminal Court, adopted on 17 July 1998, *ILM*, 37 (1998), 999 (adoption of amendments by seven-eighths of the parties coupled with a right of withdrawal for states which do not accept the amendments).

470. Committee of Experts on Public International Law, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe – Opting Out Clauses*, CJ-DI (89)

character of such procedures was stressed by several delegations. Due to opposition by some member states, the proposed opting-out clauses were eventually not included in the *Model Final Clauses*. There are, however, a certain number of examples where such clauses have been inserted in particular treaties concluded within the Council of Europe.

The proposal by the Committee of Experts on Public International Law was inspired by the successful use of such clauses for amending the following three agreements in the public health field:⁴⁷¹

- European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS No. 26, 1958);
- Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis or Treatment (ETS No. 33, 1960);
- European Agreement on the Exchanges of Blood-Grouping Reagents (ETS No. 39, 1962).

The respective protocols (ETS Nos. 109, 110 and 111, 1983) opened the original agreements to an accession by the European Economic Community (now the European Community). In addition to providing for an entry into force following the deposit of instruments of acceptance by all parties to the agreements, they contained a tacit acceptance clause. Article 2.2 of the Additional Protocols were all drafted identically and read as follows:

“However, this Additional Protocol shall enter into force on the expiration of a period of two years from the date on which it has been opened for acceptance, unless one of the Contracting Parties has notified an objection to the entry into force. If such an objection has been notified, paragraph 1 of this Article shall apply”.

Since no party formulated an objection, the three Additional Protocols entered into force on 1 January 1985. The tacit acceptance clause did not prevent a certain number of states from depositing an instrument of acceptance (Belgium, Cyprus, France, Italy and the Netherlands).

Attempts to insert similar opting-out clauses into a protocol to the *European Agreement on the Protection of Television Broadcasts* (ETS No. 34, 1960) and Protocol No. 8 to the *European Convention on Human Rights* (ETS No. 118, 1985) were finally abandoned due to the reluctance of some member states to accept such clauses.⁴⁷²

10 of 12 July 1989.

471. P.-H. Imbert, “Le consentement des Etats en droit international. Réflexions à partir d’un cas pratique concernant la participation de la CEE aux traités du Conseil de l’Europe”, *RGDIP*, 89 (1985), 353-81; R. Brillat, “Participation de la Communauté européenne aux conventions du Conseil de l’Europe”, *AFDI*, 37 (1991), 819 (822).

Article 16 of the *European Convention for the Protection of Pet Animals* (ETS No. 125, 1987) provides for an “opting-out” procedure as far as amendments to Articles 1 to 14 of the convention are concerned. These provisions fix binding standards for the protection of pet animals.

“1. Any amendment to Articles 1 to 14 proposed by a Party or the Committee of Ministers shall be communicated to the Secretary General of the Council of Europe and forwarded by him to the member states of the Council of Europe, to any Party, to any state invited to accede to the Convention in accordance with the provisions of Article 19.

2. Any amendment proposed in accordance with the provisions of the preceding paragraph shall be examined at a multilateral consultation not less than two months after the date of forwarding by the Secretary General where it may be adopted by a two-thirds majority of the Parties. The text adopted shall be forwarded to the Parties.

3. Twelve months after its adoption at a multilateral consultation any amendment shall enter into force unless one of the Parties has notified objections”.

The use of opting-out clauses was again discussed during the preparation of the *Protocol amending the European Convention on Transfrontier Television* (ETS No. 171, 1998). Most of the provisions of the original convention correspond to the almost identical provisions of EC Council Directive 89/552/EEC of 3 October 1989, which was drafted in parallel. In 1997, Directive 89/552/EEC was in several aspects amended by Directive 97/36/EC of the European Parliament and the Council of 19 June 1997. The ultimate deadline for the transposition of the directive into the domestic law of the member states of the European Union was fixed at 30 December 1998. In order to avoid the problems which would arise for states and broadcasters from the application of two different legal standards on the European continent, there was an urgent need to bring the convention into line with the new provisions of the directive.

It should be noted that Article 23 of the convention already provides for a fairly flexible procedure which does not require the formal signature and ratification of possible amendments. According to Article 23.4 of the convention, amendments which are prepared by the Standing Committee and approved by the Committee of Ministers “shall enter into force on the thirtieth day after all the parties have informed the Secretary General of their acceptance thereof”.

When the Standing Committee discussed how to bring the convention into line with the new standards of the EU Directive, it became clear that many states wanted to use an opting-out clause to speed up the entry into force of the amendments. The question was therefore raised as to whether the

procedure provided for in the convention was mandatory in the sense that no other procedure could be used. Such a conclusion might at first sight be inferred from Article 40.1 of the VCLT, which stipulates that the rules of the Vienna Convention apply “except in so far as the treaty may otherwise provide”.⁴⁷³

Such a restrictive conclusion does not stand up to closer scrutiny. Article 40.1 of the VCLT merely emphasises that the rules stated in this article are residual in the sense that specific provisions in the relevant treaty will take precedence over the general rules contained in the Vienna Convention.⁴⁷⁴ It does not follow that any specific rules in a treaty would prevent the parties from agreeing unanimously on a different procedure for the adoption of amendments and their entry into force. Such a conclusion would be contrary to the general principle of international treaty law that the parties are masters of the treaty. An amending agreement may take whatever form the parties to the original treaty choose. If they are unanimous, they may decide not to use the procedures foreseen in the original treaty.

The conclusion that the parties are in principle free to depart from the amending procedure foreseen in a treaty is confirmed by the precedent of the *European Social Charter* (ETS No. 35, 1961). The fact that the charter contains in Article 36 a provision similar to Article 23 of the European Convention on Transfrontier Television did not prevent the parties from adopting additional and amending protocols⁴⁷⁵ and finally a totally revised charter (ETS No. 163, 1996) which is eventually destined to replace the original charter, in each case with special conditions for their entry into force.

Similarly, in the context of the United Nations, the *Convention on the Law of the Sea* of 10 December 1982⁴⁷⁶ has been substantially modified by the agreement relating to the Implementation of Part XI of the convention⁴⁷⁷ without using the procedures for amendments laid down in Articles 312-314 of the convention. The annex to the agreement contains a variety of provisions interpreting, implementing or adjusting the provisions of the convention, some of which are even deleted as no longer applicable. This radical solution was warranted by the necessity of achieving universal participation in the convention, whose regime for the “Area” (the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction)

472. Imbert, *ibid.*, 377-80.

473. See Grewe, *op. cit. supra* Note 458, 503.

474. Wetzel/Rauschnig, *op. cit. supra* Note 458, 297.

475. Additional Protocol to the European Social Charter (ETS No. 128, 1988); Protocol amending the European Social Charter (ETS No. 142, 1991); Additional Protocol to the European Social Charter, Providing for a System of Collective Complaints (ETS No. 158, 1995).

476. UN Doc. A/CONF.62/122 and Corr. 1 to 11 (1982).

477. Adopted by the General Assembly on 28 July 1994, UN Doc. A/RES/48/263 (17 August

and its resources was no longer acceptable, in particular for the industrialised countries.⁴⁷⁸

During the 639th meeting of Ministers' Deputies (7-9 September 1998), the Committee of Ministers adopted the Protocol amending the *European Convention on Transfrontier Television* (ETS No. 171, 1998). Article 35 contains the following conditions for its entry into force:

- “1. This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
2. However, this Protocol shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party to the convention has notified the Secretary General of the Council of Europe of an objection to its entry into force. The right to make an objection shall be reserved to those states of the European Community which expressed their consent to be bound by the convention prior to the expiry of a period of three months after the opening for acceptance of this Protocol.
3. Should such an objection be notified, the Protocol shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
4. A Party to the Convention may, at any time, declare that it will apply the Protocol on a provisional basis”.

The protocol follows to a certain extent the aforementioned example of the protocols in the public health field (ETS Nos. 109, 110 and 111, 1983). However, instead of providing that an objection entails the application of the usual procedure for all parties, that is, the deposit of an instrument of acceptance, this consequence is only foreseen for the party which has notified the objection. For the other parties the tacit acceptance procedure remains applicable.

In addition, it was deemed necessary to provide safeguards against the risk that a new state would become a party to the original convention without accepting the amending protocol. Such a state would be in a position to block the entry into force of the amending protocol for an indefinite period of time. The possibility of reserving the right to make an objection to the automatic entry into force of the amendments to those states or the European Community which had already expressed their consent to be

1994). It entered into force on 28 July 1996.

478. See Louis B. Sohn, “International Law Implications of the 1994 Agreement”, *AJIL*, 88

bound by the convention before the opening for acceptance of the amending protocol was therefore provided. Since at the time of the adoption of the amending protocol a number of states had already initiated the ratification procedure at national level, an exception was made by providing that they would also have the right to make an objection if and when they expressed their consent to be bound by the convention prior to the expiry of a period of three months after the opening for acceptance of the protocol (Article 35.2 *in fine*).

The provisional application foreseen in Article 35.4 of the protocol can only operate on the basis of reciprocity. As long as the original convention remains in force, a party which makes use of this clause declares its willingness to apply immediately the convention in its amended version, but it may not impose the new obligations on other parties which do not accept the provisional application.

Council of Europe treaty practice confirms that the rules of international treaty law concerning amendments are flexible and that states have the freedom to adapt these rules to new circumstances, as long as some basic principles of *jus cogens* are not violated.⁴⁷⁹

Amendments to the appendices or technical protocols of a treaty

Simplified procedures are particularly suitable for the amendment of protocols and appendices of a purely technical nature. When such procedures are used, it is necessary to provide safeguards which avoid states becoming bound too easily against their interests. For instance, a certain number of opting-out notifications can prevent the regulation from coming into force. Such a "prohibitive quorum" is like the veto right of a certain minority group. It can also be provided that a "positive" quorum of consenting parties is necessary for the entry into force of a given regulation. Finally, the right of parties to explicitly object and thereby avoid the binding effect of amendments is generally respected. It is very unusual for states to agree in advance to be bound by regulations which will be adopted on the basis of majority voting without retaining the right to opt out, at least in exceptional cases.

The *Convention on the Conservation of Wildlife and Natural Habitats (Bern Convention)* (ETS No. 104, 1979) contains two distinct amending procedures, one for amendments to the articles of the convention (Article 16), which requires the express consent of all parties to the convention, and another for amendments to its appendices (Article 17). The latter is drafted as an "opting-out" procedure:

"1. Any amendment to the appendices of this Convention proposed by a Contracting Party or the Committee of Ministers shall be communicated

(1994), 696-705.

to the Secretary General of the Council of Europe and forwarded by him at least two months before the meeting of the Standing Committee to the member states of the Council of Europe, to any signatory, to any Contracting Party, to any state invited to sign this Convention in accordance with the provisions of Article 19, and to any state invited to accede to it in accordance with the provisions of Article 20.

2. Any amendment proposed in accordance with the provisions of the preceding paragraph shall be examined by the Standing Committee, which may adopt it by a two-thirds majority of the Contracting Parties. The text adopted shall be forwarded to the Contracting Parties.

3. Three months after its adoption by the Standing Committee and unless one-third of the Parties have notified objections, any amendment shall enter into force for those Contracting Parties which have not notified objections".

The *Convention on Civil Liability for damage resulting from activities dangerous to the environment* (ETS No. 150, 1993), which has not yet entered into force, contains similar provisions (Articles 29 to 31). It is provided that amendments to the annexes may enter into force following a tacit acceptance procedure, which can only be blocked if more than one-third of the parties object (Article 30.3 of the convention). An even more simplified procedure is foreseen to ensure that the convention remains in harmony with Community law. Annex I concerning dangerous substances refers to various EC directives.⁴⁸⁰ Amendments to the relevant EC legislation will become automatically applicable for the convention, without any intervention by the Standing Committee, unless one party requests the application of the procedure laid down in Article 30 of the convention (Article 31). Only in this case, the amendment is forwarded to the Standing Committee for approval. In each case, it is provided that parties which notify objections will not be bound by the amendments.

The *European Agreement on the Exchange of Therapeutic Substances of Human Origin* (ETS No. 26, 1958) and the *European Agreement on the Exchanges of Blood-Grouping Reagents* (ETS No. 39, 1962) foresee the introduction of amendments of a technical nature through so-called "tech-

479. Sohn, *ibid.*, 700.

480. Council Directive of the European Communities 67/548/EEC of 27 June 1967 (*Official Journal of the EC*, L 196/1) on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances as amended, for the seventh time, in the Council Directive of the European Communities 92/32/EEC of 30 April 1992 (*Official Journal of the EC*, L 154/1), and as adapted to technical progress, for the sixteenth time, by Commission Directive of the European Communities 92/37/EEC of 30 April 1992 (*Official Journal of the EC*, L154/30); the Council Directive of the European Communities 88/379/EEC of 7 June 1988 (*Official Journal of the EC*, L 187/14) on the approximation of the laws, regulations and administrative provisions of the member states relating to the classification, packaging and labelling of dangerous preparations as adapted to technical progress by the Directive of the Commission of the European

nical protocols". Article 4 of each of the instruments provides that therapeutic substances or consignments of blood-grouping reagents be accompanied by a certificate to the effect that they were prepared in accordance with certain specifications contained in protocols to the respective agreements. These certificates are based on models to be found in the appendices to the respective protocols. Article 4.4 of both agreements declare that the protocol and its appendices "may be amended or supplemented by the governments of the parties to this Agreement".

According to this procedure, revised texts of the protocol are submitted to the Committee of Ministers for approval. Parties which are not represented on the Committee of Ministers are invited to make known their agreement to the proposed modifications by a specific date. Once all parties have expressed their consent, the revised text of the protocol is published in a certificate of the Secretary General. The procedure under Article 4.4 of the *European Agreement on the Exchange of Therapeutic Substances of Human Origin* has frequently been used without any problems.⁴⁸¹

Another type of opting-out procedure is contained in the *European Convention for the Protection of Animals kept for Farming Purposes* (ETS No. 87, 1976). The Standing Committee set up under the convention may adopt recommendations containing detailed provisions for the implementation of the principles contained in Chapter I of the convention. These recommendations become effective according to an opting-out mechanism. Parties which do not object to a recommendation within the specified time are considered by virtue of the convention to be under an obligation to implement it, either through legislation, regulations or administrative practice. Article 9 of the convention is worded as follows:

"1. The Standing Committee shall be responsible for the elaboration and adoption of recommendations to the Contracting Parties containing detailed provisions for the implementation of the principles set out in Chapter I of this Convention, to be based on scientific knowledge concerning the various species of animals.

2. For the purpose of carrying out its responsibilities under paragraph 1 of this Article, the Standing Committee shall follow developments in scientific research and new methods in animal husbandry.

3. Unless a longer period is decided upon by the Standing Committee, a recommendation shall become effective as such six months after the date of its adoption by the Committee. As from the date when a recommendation becomes effective each Contracting Party shall either implement it or inform the Standing Committee by notification to the Secretary General of the Council of Europe of the reasons why it has

Communities 90/492/EEC of 5 October 1990 (*Official Journal of the EC*, L 275/35).

481. See the certificates by the Secretary General, dated September 1970, July 1973, April

decided that it cannot implement the recommendation or can no longer implement it.

4. If two or more Contracting Parties or the European Economic Community, being itself a Contracting Party, have given notice in accordance with paragraph 3 of this Article of their decision not to implement or no longer to implement a recommendation, that recommendation shall cease to have effect".

The protocol of amendment to the *European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes* (ETS No. 171, 1998) will introduce an opting-out procedure for the amendments to the Appendices A and B of the convention.⁴⁸² According to the new Article 31, the amendments will be examined and adopted during multilateral consultations by a two-thirds majority of the parties. Any amendment will enter into force twelve months after its adoption at a multilateral consultation, unless one third of the parties have notified objections. Contrary to the usual practice, a right to opting-out for objecting states is not provided for. The introduction of this procedure can be explained by the scope and nature of the appendices. Appendix A is not mandatory. It merely contains guidelines for the accommodation and care of animals which are to be implemented with discretion (Article 5 of the convention). Appendix B regulates only the presentation of statistical information (Articles 27 and 28 of the convention).

1978 and April 1982, each containing revised texts of the protocol and its appendices.

482. The protocol was opened for signature on 22 June 1998. It has not yet entered into

CHAPTER 11: STATE SUCCESSION

Introduction

Since 1989 the European continent has witnessed political changes on a hitherto unknown scale. The dissolution of Czechoslovakia, the Soviet Union and Yugoslavia, as well as the reunification of Germany have all confronted the Council of Europe with a number of practical problems, because some of the states concerned had been member states of the Organisation or at least parties to a limited number of treaties concluded under its auspices.⁴⁸³ None of the treaties concluded within the Council of Europe contains any explicit provisions on state succession.

The *Vienna Convention on Succession of States in respect of Treaties* of 23 August 1978⁴⁸⁴ defines "state succession" as follows (Article 2.1.b):⁴⁸⁵

"the replacement of one state by another state in the responsibility for the international relations of territory".

Within the Council of Europe, state practice was regularly analysed and discussed by the *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI).⁴⁸⁶ The Organisation's practice in this field can be summarised as follows.⁴⁸⁷

force.

483. On the recent European practice of state succession see in particular H. Tichy, "Two Recent Cases of State Succession – an Austrian Perspective", *Austrian Journal of Public International Law*, 44 (1992), 117-36; W. Czaplinski, "La continuité, l'identité et la succession d'Etats – évaluation de cas récents", *RBDI*, 26 (1993), 374-93; G. Burdeau/B. Stern (eds.), *Dissolution, continuation et succession en Europe de l'Est. Succession d'Etats et relations économiques internationales* (1994); Comité 21 ADI, "Sur la succession d'Etats en matière de traités", *Rivista di studi politici internazionali*, 63 (1996), 505-44; Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, 1996, *State Succession: Codification Tested against the Facts* (1997); M.C.R. Craven, "The Problem of State Succession and the Identity of States under International Law", *EJIL*, 9 (1998), 142-62.

484. ILM 17 (1978), 1488. The convention entered into force on 6 November 1996.

485. The same definition is included in Article 2.1.a of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 7 April 1983, *ILM*, 20 (1983), 306. The convention has not yet entered into force.

486. See *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI), *Succession of States: Information Document*, CAHDI (92) 1 BIL (1992); J. Klabbers/M. Koskenniemi/O. Ribbelink/A. Zimmermann (eds.), *State Practice Regarding State Succession and Issues of Recognition* (1999).

487. See J. Malenovsky, "La succession au Conseil de l'Europe", in *Dissolution, continuation*

Summary of practice

Germany⁴⁸⁸

The reunification of Germany on 3 October 1990 did not create particular problems. It was carried out on the basis of Article 23 of the Federal Republic of Germany's Basic Law of 1949, which envisaged the application of the Basic Law to other German territory following an act of voluntary accession. On 23 August 1990, the East German Parliament, the Volkskammer, decided by a two-thirds majority in favour of accession based on this provision. Reunification was followed by an automatic extension of the scope of application of almost all international treaties and agreements, including treaties establishing membership of international organisations, to which the Federal Republic of Germany was already a party.

As far as Council of Europe treaties were concerned, this was confirmed by a *note verbale* from the Permanent Representation of the Federal Republic of Germany, dated 2 October 1990,⁴⁸⁹ which referred to Article 11 of the treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty) of 31 August 1990.⁴⁹⁰ The treaty is based on the assumption that the Federal Republic of Germany continues its existence and identity under international law, whereas the German Democratic Republic comes to an end as an independent subject of international law upon accession. All territorial declarations concerning the status of Berlin which the Federal Republic of Germany had previously made with regard to certain Council of Europe treaties became automatically obsolete.

Article 12 of the Unification Treaty provided for consultations with treaty partners with a view to deciding upon the fate of treaties to which the former German Democratic Republic had been a party. Most international treaties of the former GDR had to be considered obsolete or in need of adjustment due to the fundamental change of circumstances resulting from the GDR's demise, the establishment of a new legal and economic order for the whole of Germany, and the extension of the Federal Republic of Germany's treaties to the acceding territories. The expiry of the treaties was usually confirmed by exchanges of notes with the parties to these treaties.⁴⁹¹ The GDR had not, however, been a party to any of the Council of Europe treaties.

et succession, op. cit. *supra* Note 482, 134-45.

488. See generally J.A. Frowein, "The reunification of Germany", *AJIL*, 86 (1992), 152-63; A. Randelzhofer, "German Unification: Constitutional and International Implications", *Michigan Journal of International Law*, 13 (1991), 122 *et seq.*; S. Oeter, "German Unification and State Succession", *ZaöRV*, 51 (1991), 349 *et seq.*

489. Notification JJ2446C of 3 October 1990.

490. The Unification Treaty was published in the Federal Gazette (*Bundesgesetzblatt*) 1990, Part II, 889, translated in *ILM*, 30 (1991), 457.

491. D. Papenfuß, "The Fate of International Treaties of the GDR within the Framework of

*Union of Soviet Socialist Republics (USSR)*⁴⁹²

Even before the formal dissolution of the Soviet Union, the Baltic states Estonia, Latvia and Lithuania restored their independence at the end of August 1991, following the failed *coup d'état* in Moscow. Estonia declared itself an independent state on 20 August 1991, followed a day later by Latvia, while Lithuania had already declared its independence on 11 March 1990. The independence of the Baltic states was effectively recognised by both the Soviet Union and the Russian Federation.⁴⁹³ The three states represented a special case since their claim to be identical with the three Baltic states which had been incorporated into the Soviet Union in 1940 was accepted by many states.

During an extraordinary meeting of the Council of Europe's *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI), which was devoted to the issues of state succession, the following point was made:

"... the Baltic states should be dealt with in a pragmatic manner in order to avoid a different approach by those states which had not recognised the incorporation of the Baltic states into the Soviet Union (and therefore did not consider the Baltic states to be successor states to the Soviet Union) and other states which had recognised this incorporation (and therefore did consider the Baltic states to be successor states to the Soviet Union). Consequently for practical reasons it would be preferable for states to accept that suitable treaties made by the Soviet Union should continue to apply to the Baltic states if these treaties were still suitable under the changed circumstances".⁴⁹⁴

It should be noted that, in keeping with their claim to continue their pre-1940 statehood, the Baltic states never invoked the status of successor states to the Soviet Union in their relations with the Council of Europe. As far as Council of Europe treaties are concerned, they expressed their consent to be bound according to the normal procedures.

In December 1991, the rest of the Soviet Union fell apart. On 8 December 1991, the Presidents of the Russian Federation, Belarus and Ukraine signed the treaty establishing the Commonwealth of Independent States (CIS).⁴⁹⁵ The preamble to this treaty read that the Soviet Union had "ceased to exist

German Unification", *AJIL*, 92 (1998), 469 (484-7).

492. M. Bothe/C. Schmidt, "Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie", *RGDIP*, 96 (1992), 811-42; T. Schweisfurth, "Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR", *Archiv des Völkerrechts*, 32 (1994), 99-129.

493. Recognition by Russia in *Vedomosti RSFSR*, 1991 No. 35, 115 and 1158; recognition by the USSR in *Vedomosti RSFSR*, 1991 No. 37, 1091, 1092 and 1093.

494. CAHDI, Extraordinary meeting, Strasbourg, 16 January 1992, CAHDI (92) 2 rev., § 30.e.

as a subject of international law and as a geopolitical entity". On the same day, the Russian Federation revoked the treaty of 30 December 1922 which had founded the Soviet Union.⁴⁹⁶ The process of dissolution was achieved by the Declaration of Alma-Ata of 21 December 1991, in which the CIS states guaranteed the respect for international engagements signed by the former Soviet Union.⁴⁹⁷ The Baltic states and Georgia did not sign this declaration.

Between 1989 and 1991 the former Soviet Union had acceded to seven Council of Europe conventions:

- European Cultural Convention (ETS No. 18, 1954);
- European Convention on Information on Foreign Law (ETS No. 62, 1968);
- European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985);
- Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121, 1985);
- Anti-doping Convention (ETS No. 135, 1989);
- European Convention on the Protection of Animals during International Transport (ETS No. 65, 1968) and its Additional Protocol (ETS No. 103, 1979).

Following the dissolution of the former Soviet Union, the Committee of Ministers "noted that the Russian Federation was a party to the Council of Europe conventions to which the Soviet Union had acceded".⁴⁹⁸ As a consequence, in the Chart of signatures and ratifications, which is prepared by the Directorate of Legal Affairs, the name "USSR" was simply replaced by "Russia" with the relevant entries (dates of accessions, entry into force, declarations and reservations) unchanged.

Subsequently, Ukraine was invited, without prejudice to the general questions of state succession, to become a party to the *European Cultural Convention* (ETS No. 18, 1954), the *European Convention on Information on Foreign Law* (ETS No. 62, 1968) and its Additional Protocol (ETS No. 97, 1978).⁴⁹⁹ Ukraine notified its accession to these treaties on 13 June 1994.⁵⁰⁰

It is interesting to note that no other state which emerged from the Soviet Union relied on the status of a "successor state" in order to accede to the Council of Europe treaties to which the Soviet Union had been a party.

495. *ILM*, 31 (1992), 143.

496. See the resolution of the Supreme Soviet of the RSFSR of 12 December 1991, *Vedomosti RSFSR*, 1991 No. 51, 1799.

497. *ILM* 31 (1992), 148; Russian text in *Diplomaticeskij Vestnik*, 1992, No. 1, 7.

498. At the 472nd meeting of Ministers' Deputies on 27 March 1992.

499. Decisions taken at the 476th and 508th meetings of Ministers' Deputies (21 May 1992 and 17 February 1994).

Since 1992 Armenia, Azerbaijan, Belarus, Georgia and Moldova have expressed their consent to be bound by various Council of Europe treaties, according to the normal procedures in each case.

Moldova and Ukraine joined the Council of Europe on 13 July and 9 November 1995 respectively. On 28 February 1996, Russia also became a member state of the Organisation and Georgia followed on 27 April 1999.

*Czech and Slovak Federal Republic (CSFR)*⁵⁰¹

The Czech and Slovak Federal Republic was dissolved with effect from 1 January 1993. This state had been a member state of the Council of Europe since 21 February 1991. Czechoslovakia had also been a party to the following conventions:

- Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950) and Protocols Nos. 1, 4, 6, 7, 9 and 10;
- European Cultural Convention (ETS No. 18, 1954);
- European Agreement on the Suppression of Terrorism (ETS No. 90, 1977);
- several conventions in the academic field (European Convention on the Equivalence of Diplomas leading to Admission to Universities [ETS No. 15, 1953] and its Additional Protocol [ETS No. 49, 1964]; European Convention on the Equivalence of Periods of University Study [ETS No. 21, 1956]; European Convention on the Academic Recognition of University Qualifications [ETS No. 32, 1959]);
- several conventions in the penal field (European Convention on Extradition [ETS No. 24, 1957]; European Convention on Mutual Assistance in Criminal Matters [ETS No. 30, 1959]; European Convention on the Transfer of Proceedings in Criminal Matters [ETS No. 73, 1972]; Convention on the Transfer of Sentenced Persons [ETS No. 112, 1983]).

At the 484th *ter* meeting on 8 January 1993 the Committee of Ministers noted that the Czech and Slovak Federal Republic was no longer a member of the Council of Europe. It also decided that, regarding the Statute of the Organisation, the status of member could only be granted once the Committee of Ministers, in the light of the opinion of the Parliamentary Assembly, had established that the conditions for membership were respected. As far as membership rights were concerned, no special status was recognised to the two successor states. The same procedure for membership was followed as for other requests (opinion by the Parliamentary Assembly and invitation by the Committee of Ministers). In the meantime, the two

500. Notifications JJ3190C of 28 June 1994 and JJ3191C of 28 June 1994.

501. See generally J. Malenovsky, "Problèmes juridiques liés à la partition de la

countries were provisionally allowed to participate as observers in all inter-governmental expert committees in which they expressed an interest.

Following the adoption by the Committee of Ministers of Resolutions (93) 32 and 33 inviting the two states to join the Organisation, the Czech Republic and Slovakia acceded anew to the Council of Europe on 30 June 1993. The resolutions did not deploy any retroactive effects. The contributions of the two states to the Council of Europe's budget were fixed only for a six-month period. Between 1 January and 30 June 1993, the two states were not members of the Organisation.

Regarding the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) and its Protocols, the Czech Republic and Slovakia expressed their intention to succeed the Czech and Slovak Federal Republic and to consider themselves bound, with effect from 1 January 1993, by these instruments and also by the declarations provided for in former Articles 25 and 46 of the convention.⁵⁰² At the 496th *bis* meeting on 30 June 1993, the Committee of Ministers decided that the Czech Republic and Slovakia should be considered as parties to the European Convention on Human Rights and its Protocols with effect from 1 January 1993 and that these states were bound, as of that date, by the declarations formulated by the Czech and Slovak Federal Republic under the terms of Articles 25 and 46 of the Convention.⁵⁰³ This resulted in the rather anomalous situation in which for six months (1 January to 30 June 1993), both successor states were regarded as parties to the Convention without being member states of the Council of Europe, which under normal circumstances is a precondition for participation in the Convention (Article 59 [former Article 66] of the ECHR).

As far as other multilateral treaties were concerned, the Czech Foreign Minister declared in a letter dated 1 January 1993:

“[i]n conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor state to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, that is, the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral treaties to which the Czech

Tchécoslovaquie”, *AFDI*, 39 (1993), 305 *et seq.*

502. Letters from the Ministers for Foreign Affairs of the Czech Republic and Slovakia dated 1 January 1993, registered at the Secretariat General on 2 January 1993. The provisions have been abrogated by Protocol No. 11 to the ECHR which entered into force on 1 November 1998.

503. See Notification JJ2989C of 13 July 1993 in which the head of the Division of the Legal Adviser and Treaty Office informed the member states of the decisions taken by the Committee of Ministers. He added that “during the ceremony of accession to the Council of Europe, the Minister for Foreign Affairs of the Czech Republic and the Minister for Foreign Affairs of Slovakia declared that the reservations made by the Czech and Slovak Federal Republic to Articles 5 and 6 of the European Convention on Human Rights will remain

and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic".⁵⁰⁴

Slovakia made a similar declaration in letters dated 1 January⁵⁰⁵ and 6 April 1993.⁵⁰⁶

When examining the question of the status of these two countries with regard to Council of Europe treaties, the Committee of Ministers decided to make a distinction between the so-called "open" and "closed" conventions. Regarding the "open" conventions (to which non-member states of the Council of Europe can accede), at the 484th meeting on 8 January 1993, the Ministers' Deputies took note of the declarations of succession of the Czech Republic and Slovakia. They decided that in view of these declarations the Czech Republic and Slovakia were, with retroactive effect from 1 January 1993, parties to the following conventions:⁵⁰⁷

- European Cultural Convention (ETS No. 18, 1954);
- Conventions in the academic field:
 - European Convention on the Equivalence of Diplomas leading to Admission to Universities and Additional Protocol (ETS No. 15, 1953 and ETS No. 49, 1964);
 - European Convention on the Equivalence of Periods of University Study (ETS No. 21, 1956);
 - European Convention on the Academic Recognition of University Qualifications (ETS No. 32, 1959);
- Conventions in the penal field:
 - European Convention on Extradition (ETS No. 24, 1957);
 - European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959);
 - European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73, 1972);
 - Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983).

Where the so-called "closed" conventions were concerned (those to which only Council of Europe member states can become parties), a definitive decision could only be taken once the two states had again become mem- applicable".

504. Letter from the Minister for Foreign Affairs of the Czech Republic dated 1 January 1993, registered at the Secretariat General on 2 January 1993.

505. Letter from the Minister for Foreign Affairs of Slovakia dated 1 January 1993, registered at the Secretariat General on 2 January 1993.

506. Letter from the Minister for Foreign Affairs of Slovakia dated 6 April 1994, registered at the Secretariat General on 28 April 1994 and notified on 11 May 1993 (JJ3151C).

bers of the Organisation. At the 496th *bis* meeting of the Committee of Ministers on 30 June 1993, the Deputies decided, in identical terms for both states, that they were to be considered as parties to the *European Convention on the Suppression of Terrorism* (ETS No. 90, 1977) with effect from 1 January 1993 and as being signatory states to the *European Social Charter* (ETS No. 35, 1961) and its two protocols, as well as to the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ETS No. 126, 1987).

Both states maintained the reservations and declarations formulated by the Czech and Slovak Federal Republic in respect of the various treaties.⁵⁰⁸ The declarations concerning competent authorities had, of course, to be modified.

In the *Chart of signatures and ratifications*, the relevant entries (dates of signatures, ratifications, accessions, declarations and reservations) effected by the former Czechoslovakia prior to its dissolution were used for the "Czech Republic" and "Slovakia". A footnote indicates that the date corresponds to that of the signature or the deposit of an instrument by the Czech and Slovak Federal Republic.

*Socialist Federal Republic of Yugoslavia (SFRY)*⁵⁰⁹

The Socialist Federal Republic of Yugoslavia (SFRY) gradually disintegrated over a certain period of time. In the summer of 1991, hostilities broke out following the proclamations of independence by some of the constituent republics of the SFRY. On 25 June 1991, Slovenia and Croatia declared their independence. "The former Yugoslav Republic of Macedonia" and Bosnia and Herzegovina followed on 20 December 1991 and 6 March 1992 respectively.

The Federal Republic of Yugoslavia (Serbia and Montenegro) considered itself to continue the state and international legal personality of the former Socialist Federal Republic of Yugoslavia. This claim was not generally accepted by the international community. In Resolution 777 (1992), the Security Council expressed the view that "the state formerly known as the Socialist Federal Republic of Yugoslavia ha[d] ceased to exist" and that there was no identity of the Federal Republic of Yugoslavia consisting of Serbia and Montenegro with the former SFRY. The Arbitration Commission set up by the member states of the European Community and chaired by

507. Notification JJ2891C of 19 January 1993.

508. Letter from the Minister for Foreign Affairs of the Czech Republic dated 1 January 1993, registered at the Secretariat General on 2 January 1993. Letter from the Minister for Foreign Affairs of Slovakia dated 6 April 1994, registered at the Secretariat General on 28 April 1994 and notified on 11 May 1993 (JJ3151C).

509. M. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties", *Max Planck Yearbook of United Nations Law*, 1 (1997), 231-57; S. Oeter, "State Succession and the Struggle over Equity", *German Yearbook of International*

Mr Badinter came to a similar conclusion in its Opinions Nos. 1, 8 and 10.⁵¹⁰ It held that the SFRY had been dissolved and that the Federal Republic of Yugoslavia (Serbia and Montenegro) could be considered as one of the successor states, but not as the sole legal successor. It seems therefore appropriate to qualify the disintegration process as a case of "dismembratio".⁵¹¹ According to this view, the SFRY has ceased to exist as a subject of international law and its territory has been divided among five successor states.

As far as the treaties concluded within the United Nations are concerned, Slovenia, Croatia, Bosnia and Herzegovina, and "the former Yugoslav Republic of Macedonia" deposited instruments of succession to the multilateral treaties to which Yugoslavia had been a party. The Federal Republic of Yugoslavia (Serbia and Montenegro) deposited no such instruments of succession. Nevertheless, in the United Nations publication *Multilateral Treaties deposited with the Secretary-General of the United Nations*, "Yugoslavia" remained listed under the entry "participants" with the relevant dates of signature, ratification or accession by the former Yugoslavia.⁵¹² The introduction to *Multilateral Treaties* states that the number of participants "does not include those states which have ceased to exist". Indeed, states like the former German Democratic Republic are not included in the list of participants, while "Yugoslavia" is.

In a decision of 11 July 1996 on the preliminary objections in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*,⁵¹³ the International Court of Justice held that

"At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that 'the Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that

Law, 38 (1995), 73 *et seq.*

510. The opinions are reproduced in ILM 31 (1992), 1488 *et seq.* The work of the Commission was analysed by M.C.R. Craven, "The European Community Arbitration Commission on Yugoslavia", *British Yearbook of International Law*, 66 (1995), 333-413; A. Pellet, "L'activité de la Commission d'arbitrage de la Conférence internationale pour l'ex-Yugoslavie", *AFDI*, 39 (1993), 286-303.

511. See the decision of the Austrian Supreme Court in *Republic of Croatia et. al. v. Girocredit Bank A.G. der Sparkasse*, judgment of 17 December 1996, ILM, 36 (1997), 1520 (1528). The original German text was published in *Recht der internationalen Wirtschaft* 1997, 1044.

512. See *Multilateral Treaties Deposited with the Secretary-General* (United Nations Publication, also available on the Internet: <http://www.un.org/Depts/Treaty/>). The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, ST/LEG/8 (1994), §§ 297-8, described the FRY as the "predecessor state" whose treaty obligations remained unaffected by the secession of the various Yugoslav republics. After a series of written protests, *inter alia*, by the USA, Germany and Guinea (UN Docs. S/1996/251, S/1996/263, S/1996/260), an erratum was issued on 9 April 1996 which omitted any reference to Yugoslavia.

the Socialist Federal Republic of Yugoslavia assumed internationally'. The intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General".⁵¹⁴

The solution adopted by the Court leaves open crucial questions, regarding in particular the status and scope of the declaration of 27 April 1992, which had not been notified by the Secretary-General in his capacity as depositary. Pending clarification, the current situation is characterised by the fact that neither the UN Secretariat nor state parties have officially contested the claim by the Federal Republic of Yugoslavia to be a party to multilateral treaties to which the former SFRY had been a party.⁵¹⁵ It would be an error, however, to interpret this approach as an acceptance of the contested proposition of legal continuity. The fact that representatives of the Federal Republic of Yugoslavia have been prevented, often by vote, from participating in meetings of parties to certain conventions shows that the issue is not yet settled.⁵¹⁶

Within the Council of Europe, the claim by the Federal Republic of Yugoslavia to be identical with and to continue the legal personality of the former Socialist Federal Republic of Yugoslavia was not accepted. The former Yugoslavia had been a party to the following Council of Europe treaties:

- European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS No. 15, 1953);
- European Cultural Convention (ETS No. 18, 1954);
- European Convention on the Equivalence of Periods of University Study (ETS No. 21, 1956);
- European Convention on the Academic Recognition of University Qualifications (ETS No. 32, 1959);
- Convention on the Liability of Hotel-keepers concerning the Property of their Guests (ETS No. 41, 1962);
- Additional Protocol to the European Convention on the Equivalence of Diplomas leading to Admission to Universities (ETS No. 49, 1964);
- Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50, 1964);
- European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51, 1964);
 - European Convention on the Protection of the Archaeological Heritage (ETS No. 66, 1969);

513. Judgment of 11 July 1996, *ICJ Reports*, 1996, 595.

514. *Ibid.* p. 610 (§ 17).

515. See *Summary of Practice*, op. cit. *supra* Note 512, § 89; Wood, op. cit. *supra* Note 509, 254.

- European Agreement on Continued Payment of Scholarships to Students Studying Abroad (ETS No. 69, 1969);
- European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 87, 1976);
- European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle (ETS No. 88, 1976);
- European Convention for the Protection of Animals for Slaughter (ETS No. 102, 1979);
- European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120, 1985);
- Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121, 1985);
- Anti-doping Convention (ETS No. 135, 1989).

On 24 September 1992 the Committee of Ministers noted that, “for the purposes of the Council of Europe Conventions and Agreements to which it was a party, the ‘Socialist Federal Republic of Yugoslavia’ had ceased to exist”.⁵¹⁷ This decision was in line with decisions taken by the Security Council and the General Assembly of the United Nations⁵¹⁸ and the opinions of the Badinter Arbitration Commission.⁵¹⁹

This solution allowed the entry into force of the *Protocol to the Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 134, 1989). For its entry into force, this protocol required ratification by all parties to the convention. In September 1992, all parties had deposited their instruments of ratification with the exception of Portugal and Yugoslavia. Portugal ratified on 18 September 1992 and only the absence of a ratification by Yugoslavia could prevent its entry into force. Following advice given by the Director of Legal Affairs, the Committee of Ministers concluded that the former Yugoslavia had ceased to exist for the purposes of the protocol, thereby allowing its entry into force on 1 November 1992.

The Committee of Ministers subsequently decided to invite Slovenia,⁵²⁰ Croatia⁵²¹ and Bosnia and Herzegovina⁵²² to become parties to the treaties to which the former Yugoslavia had been a party. The European Cultural Convention (ETS No. 18, 1954) was not included in the decision on the

516. Wood, *op. cit. supra* Note 509, 256.

517. Decision adopted during the 480th meeting of Ministers’ Deputies on 24 September 1992.

518. See in particular Security Council Resolutions 757 (1992) and 777 (1992), as well as General Assembly Resolution 47/1 of 22 September 1992, by which the General Assembly considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations.

519. *Supra* Note 510.

520. Decisions taken at the 478th and 480th meetings of Ministers’ Deputies (25 June 1992 and 24 September 1992).

521. Decisions taken at the 484th *bis* and 515th meetings of Ministers’ Deputies (10 December 1992 and 21 June 1994).

request of “the former Yugoslav Republic of Macedonia”,⁵²³ because the Committee of Ministers did not achieve the requisite unanimity. These decisions were taken on a case-by-case basis, without prejudice to the general questions of state succession. The states in question became parties by simple notification, without retroactive effect.

Slovenia and “the former Yugoslav Republic of Macedonia” became members of the Council of Europe on 14 May 1993 and 9 November 1995 respectively. Croatia joined the Organisation on 6 November 1996. Bosnia and Herzegovina⁵²⁴ and the Federal Republic of Yugoslavia⁵²⁵ have also made applications for membership.

Hong Kong

Prior to the incorporation of Hong Kong into China, the United Kingdom had extended the application of two Council of Europe treaties to this territory (*Convention on the Transfer of Sentenced Persons*, ETS No. 112, 1983;⁵²⁶ *European Convention on State Immunity*, ETS No. 74, 1972⁵²⁷). Although it is rather difficult to categorise the Hong Kong case, there is little doubt that the “transition” taking effect on 1 July 1997 falls within the definition of state succession given in Article 2.1.b of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978.⁵²⁸

Since China was not prepared to accept the continued application of the two treaties in this territory, the United Kingdom made the following declarations:

“I am instructed by Her Britannic Majesty's Principal Secretary of state for Foreign and Commonwealth Affairs to refer to the European

522. Decision taken at the 518th meeting of Ministers' Deputies on 13 October 1994.

523. Decision taken at the 503rd meeting of Ministers' Deputies on 10 December 1993.

524. The application for membership was contained in a letter addressed to the Secretary General by the Minister for Foreign Affairs, dated 10 April 1995; see Resolution (95) 21 on Bosnia and Herzegovina, adopted by the Committee of Ministers on 12 September 1995 at the 544th meeting of Ministers' Deputies. In January 1999, the application was transmitted to the Parliamentary Assembly; see decisions adopted during the 655th meeting of Ministers' Deputies held from 12 to 13 January 1999 (Item 2.4).

525. The application for membership was contained in a letter addressed to the Secretary General by the Minister for Foreign Affairs, dated 18 March 1998; see the communiqué adopted by the Committee of Ministers during the 624th meeting of Ministers' Deputies on 25 March 1998 (Item 2.5) and the decisions adopted during the 639th meeting of Ministers' Deputies held from 7 to 9 September 1998 (Item 2.4). The reply to Parliamentary Assembly Recommendations 1368 and 1376 (1998) adopted during this meeting states, *inter alia*, that “[i]t has been made clear that the lack of seriousness and credibility of the Government of the Federal Republic of Yugoslavia's application for membership of the Organisation has led to suspension of discussion of this issue. A radical change of policy by Belgrade would be needed before the application could be considered”.

526. Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 22 October 1987, registered at the Secretariat General on 23 October 1987.

527. Declaration contained in the instrument of ratification, deposited on 3 July 1979.

Convention on State Immunity signed at Basle on 16 May 1972 [Convention on Transfer of Sentenced Persons signed at Strasbourg on 21 March 1983] which applies to Hong Kong at present.

I am also instructed to state that, in accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong signed on 19 December 1984, the Government of the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997. The Government of the United Kingdom will continue to have international responsibility for Hong Kong until that date. Therefore, from that date the Government of the United Kingdom will cease to be responsible for the international rights and obligations arising from the application of the Convention to Hong Kong".⁵²⁹

Evaluation

As far as international treaty law is concerned, the *Vienna Convention on Succession of States in respect of Treaties* of 23 August 1978⁵³⁰ contains a number of rules which might have been applicable to the cases summarised in this chapter. The convention has, however, attracted only a very limited number of ratifications among European states and entered into force only on 6 November 1996. This lack of acceptance is mainly due to the distinction drawn in the convention between states established within the process of decolonisation, which are entitled to invoke the "clean-slate" rule, and other kinds of successor states. This distinction does not reflect current state practice, especially in Europe. It is therefore generally agreed that the Vienna Convention of 1978 cannot be considered, at least not in its totality, as constituting a codification of existing customary law in this field.⁵³¹ It falls short of accurately reflecting the rather divergent state practice in this field and gives insufficient consideration to the different nuances of state succession (separation, dissolution, continuation, and so on).⁵³²

Council of Europe practice, in particular the example of the Czech Republic and Slovakia, has confirmed that the relevant rules of the Organisation take precedence as far as the acquisition of membership is concerned (see Article 4 of the 1978 Vienna Convention). The political character of the Organisation which is committed to certain basic values (democracy,

528. R. Mushkat, "Hong Kong and Succession of Treaties", *JCLQ*, 46 (1997), 181 (191-92).

529. Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 19 June 1997, registered at the Secretariat General on 19 June 1997.

530. *ILM*, 17 (1978), 1488.

531. CAHDI, Extraordinary meeting, Strasbourg, 16 January 1992, CAHDI (92) 2 rev., § 17; Malenovsky, in *Dissolution, continuation et succession*, op. cit. *supra* Note 483, 141; see also Koskenniemi, in *State Succession: Codification Tested against the Facts*, op. cit. *supra* Note 483, 94-95.

human rights, rule of law) leaves no room for an automatic succession to membership.

As far as multilateral treaties are concerned, the Council of Europe did not follow the practice of the United Nations where the Secretary-General simply accepted instruments of succession by “new states”, provided, firstly, that the treaty was effectively applied to – or treaty action taken on behalf of – the territory of the new state by the predecessor state prior to the succession and, secondly, that the territory had been recognised as a state.⁵³³

Given the degree of co-operation required under the European treaties, the Committee of Ministers decided to examine individually requests by successor states to become parties to Council of Europe treaties. Accession to many of the treaties entitles states to participation in various intergovernmental committees set up within the Council of Europe and sometimes entails financial consequences (for example, being a party to the *European Cultural Convention*, ETS No. 18, 1954, entails an obligation to contribute to the Cultural Fund). An “automatic succession” by states which were in the process of undergoing a profound transformation of their political and judicial system was perceived as a potential threat for the proper application and functioning of the European treaties. Requests for succession were therefore decided upon on a case-by-case basis, without prejudice to the general questions of state succession. In each case the requirements of the convention and the situation in the successor state had to be evaluated. Within the Committee of Ministers, there was general agreement that, because of the limited number of negotiating states and the object and purpose of the European treaties, the participation of any other state required explicit consent by the organ which is empowered under the treaties to decide upon requests for accession, that is, the Committee of Ministers.⁵³⁴ According to J. Malenovsky, the Permanent Representative of the Czech Republic in Strasbourg during these years, the practice confirms the primacy of political will and pragmatism in this field.⁵³⁵

As far as the conventions in the penal field were concerned, invitations to accede were only adopted following meetings between Council of Europe experts and officials of the country concerned. These meetings, which allowed an evaluation of the domestic law of the successor state, were

532. Mushkat, *op. cit. supra* Note 528, 182.

533. *Summary of Practice*, *op. cit. supra* Note 512, § 299; see also *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, judgment of 11 July 1996, *ICJ Reports*, 1996, 595 (612, at § 23); L. Sbolci, “La partecipazione degli stati ai trattati multilaterali mediante notificazione de successione”, *Rivista di diritto internazionale*, 74 (1996), 620-55.

534. Compare the formulation contained in Articles 17.3 and 18.4 of the 1978 Vienna Convention on Succession of States in Respect of Treaties and see Malenovsky in *Dissolution, continuation et succession*, *op. cit. supra* Note 483, 141-42.

535. Malenovsky, in *Dissolution, continuation et succession*, *op. cit. supra* Note 483, 145 (“c’est la liberté politique et le pragmatisme qui prévalent dans une large mesure dans les solu-

often carried out within the framework of the various Council of Europe co-operation and assistance programmes.

The Committee of Ministers adopted its decisions to invite “successor states” to accede by applying the respective treaty provisions concerning the invitation of non-member states. This meant that usually a two-thirds majority of the Deputies was sufficient to adopt the decision. Only in exceptional cases is unanimity required. The requirement of unanimity for the *European Cultural Convention* (ETS No. 18, 1954, Article 9.4), accession to which is seen as a first step to full membership in the Organisation, prevented the Committee of Ministers from inviting “the former Yugoslav Republic of Macedonia” to become a party. This country only acceded to the European Cultural Convention on 24 November 1994, after having become a member state of the Council of Europe. Given the continuing difference with Greece over the country's name,⁵³⁶ the country was allowed to deposit an instrument of accession instead of signing and ratifying the convention, which is the usual procedure for member states.⁵³⁷

Apart from the special cases of the Russian Federation (with regard to the treaties of the former Soviet Union) and the Czech Republic and Slovakia (with regard to the European Convention on Human Rights and the other conventions to which Czechoslovakia had been a party), the successor states became parties by simple notification, without retroactive effect. The Committee of Ministers' treatment of the Russian Federation was clearly influenced by the precedent in the United Nations where this country had been considered as a continuing state of the Soviet Union with regard not only to the permanent seat in the Security Council, but also to its position as a party to various multilateral treaties.⁵³⁸

The decision to give retroactive effect to the Czech Republic's and Slovakia's participation in the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 5, 1950) and the other conventions was described as a “curiosity” from the point of view of international treaty law.⁵³⁹ The decision was dictated by the legitimate desire to avoid any temporal gap in the application of the treaties in question which would have been potentially detrimental. It must be recalled that persons living on the territory of the former Czech and Slovak Federal Republic continued to file individual applications with the European Commission of Human Rights. In order to ensure that these applications would receive due consideration by the Commission, it was necessary to regard the Czech tions adoptées jusqu'ici”).

536. See also pp. 32-33.

537. Notification JJ3490C of 30 November 1995.

538. See *Multilateral Treaties*, op. cit. *supra* Note 512; *Summary of Practice*, op. cit. *supra* Note 512, § 297.

539. J.-F. Flauss, “Convention européenne des droits de l'homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du Conseil de l'Europe en date du

Republic and Slovakia as parties to the convention, bound by the declarations under former Articles 25 and 46 thereof. With regard to the clear statements by the two countries concerned and to the national legislation concerning the transfer of powers arising out of the dissolution of Czechoslovakia, the European Commission of Human Rights concluded that the successor states could be held responsible for facts relating to the period between 18 March 1992 (the date on which the convention had entered into force for the Czech and Slovak Federal Republic) and 31 December 1992.⁵⁴⁰ In order to determine whether there had been a violation of Article 6, paragraph 1, of the ECHR on account of an excessive length of judicial proceedings, the Commission held in a case concerning Slovakia that “the relevant period which it had jurisdiction to consider had not begun as from the institution of the proceedings in question in November 1991, but only as from 18 March 1992 when the former Czech and Slovak Federal Republic had ratified the Convention and had recognised the right of individual application”.⁵⁴¹

30 juin 1993 concernant la République tchèque et la Slovaquie”, *RUDH* 1994, 1-5.

540. See, for example, Application No. 23131/93 – *Brezny v. Slovakia*, decision of 4.3.1996, DR 85-B, 65.

ABBREVIATIONS

AFDI:	Annuaire français de droit international
AJIL:	American Journal of International Law
EC:	European Community(-ies)
ECHR:	European Convention on Human Rights
EJIL:	European Journal of International Law
ETS No.:	European Treaty Series
EuGRZ:	Europäische Grundrechte-Zeitschrift
Eur. Court H.R.:	European Court of Human Rights
HRLJ:	Human Rights Law Journal
ICJ:	International Court of Justice
ICLQ:	International and Comparative Law Quarterly
ILC:	International Law Commission
ILM:	International Legal Materials
Or. Eng.:	Original text in English
Or. Fr.:	Original text in French
PCIJ:	Permanent Court of International Justice
RBDI:	Revue belge de droit international
RDI:	Rivista di diritto internazionale
RGDIP:	Revue générale de droit international public
RUDH:	Revue universelle des droits de l'homme
VCLT:	Vienna Convention on the Law of Treaties of 23 May 1969
ZaöRV:	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

APPENDIX I – BIBLIOGRAPHY

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APPENDIX II – LIST OF CONVENTIONS AND AGREEMENTS OF THE COUNCIL OF EUROPE

ETS No.

- 1 Statute of the Council of Europe (1949)
- 2 General Agreement on Privileges and Immunities of the Council of Europe (1949)
- 5 Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- 9 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1954)
- 10 Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1956)
- 12 European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors, and Protocol thereto (1953)
- 13 European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors, and Protocol thereto (1953)
- 14 European Convention on Social and Medical Assistance, and Protocol thereto (1953)
- 15 European Convention on the Equivalence of Diplomas leading to Admission to Universities (1953)
- 16 European Convention relating to the Formalities required for Patent Applications (1953)
- 17 European Convention on the International Classification of Patents for Invention (1954)
- 18 European Cultural Convention (1954)
- 19 European Convention on Establishment (1955)
- 20 Agreement on the Exchange of War Cripples between Member Countries of the Council of Europe with a view to Medical Treatment (1955)
- 21 European Convention on the Equivalence of Periods of University Study (1956)
- 22 Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1956)
- 23 European Convention for the Peaceful Settlement of Disputes (1957)
- 24 European Convention on Extradition (1957)

- 25 European Agreement on Regulations governing the Movement of Persons between Member states of the Council of Europe (1957)
- 26 European Agreement on the Exchange of Therapeutic Substances of Human Origin (1958)
- 27 European Agreement concerning Programme Exchanges by means of Television Films (1958)
- 28 Third Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1959)
- 29 European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles (1959)
- 30 European Convention on Mutual Assistance in Criminal Matters (1959)
- 31 European Agreement on the Abolition of Visas for Refugees (1959)
- 32 European Convention on the Academic Recognition of University Qualifications (1959)
- 33 Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for purposes of Diagnosis or Treatment (1960)
- 34 European Agreement on the Protection of Television Broadcasts (1961)
- 35 European Social Charter (1961)
- 36 Fourth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1961)
- 37 European Agreement on Travel by Young Persons on Collective Passports between the Member Countries of the Council of Europe (1961)
- 38 European Agreement on Mutual Assistance in the matter of Special Medical Treatments and Climatic Facilities (1962)
- 39 European Agreement on the Exchanges of Blood-Grouping Reagents (1962)
- 40 Agreement between the Member States of the Council of Europe on the issue to Military and Civilian War-Disabled of an International Book of Vouchers for the repair of Prosthetic and Orthopaedic Appliances (1962)
- 41 Convention on the Liability of Hotel-keepers concerning the Property of their Guests (1962)
- 42 Agreement relating to Application of the European Convention on International Commercial Arbitration (1962)
- 43 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963)

- 44 Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions (1963)
- 45 Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention (1963)
- 46 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (1963)
- 47 Convention on the Unification of Certain Points of Substantive Law on Patents for Invention (1963)
- 48 European Code of Social Security, and Protocol to the European Code of Social Security (1964)
- 49 Protocol to the European Convention on the Equivalence of Diplomas leading to Admission to Universities (1964)
- 50 Convention on the Elaboration of a European Pharmacopoeia (1964)
- 51 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964)
- 52 European Convention on the Punishment of Road Traffic Offences (1964)
- 53 European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories (1965)
- 54 Protocol to the European Agreement on the Protection of Television Broadcasts (1965)
- 55 Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention (1966)
- 56 European Convention providing a Uniform Law on Arbitration (1966)
- 57 European Convention on Establishment of Companies (1966)
- 58 European Convention on the Adoption of Children (1967)
- 59 European Agreement on the Instruction and Education of Nurses (1967)
- 60 European Convention on Foreign Money Liabilities (1967)
- 61 European Convention on Consular Functions (1967)
 - 61.i. Protocol to the European Convention on Consular Functions concerning the Protection of Refugees
 - 61.ii. Protocol to the European Convention on Consular Functions in respect of Civil Aircraft
- 62 European Convention on Information on Foreign Law (1968)

- 63 European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (1968)
- 64 European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (1968)
- 65 European Convention for the Protection of Animals during International Transport (1968)
- 66 European Convention on the Protection of the Archaeological Heritage (1969)
- 67 European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights (1969)
- 68 European Agreement on "au pair" Placement (1969)
- 69 European Agreement on Continued Payment of Scholarships to Students Studying Abroad (1969)
- 70 European Convention on the International Validity of Criminal Judgments (1970)
- 71 European Convention on the Repatriation of Minors (1970)
- 72 Convention relating to Stops on Bearer Securities in International Circulation (1970)
- 73 European Convention on the Transfer of Proceedings in Criminal Matters (1972)
- 74 European Convention on State Immunity and Additional Protocol (1972)
- 75 European Convention on the Place of Payment of Money Liabilities (1972)
- 76 European Convention on the Calculation of Time-Limits (1972)
- 77 Convention on the Establishment of a Scheme of Registration of Wills (1972)
- 78 European Convention on Social Security and Supplementary Agreement for the Application of the European Convention on Social Security (1972)
- 79 European Convention on Civil Liability for Damage caused by Motor Vehicles (1973)
- 80 Agreement on the Transfer of Corpses (1973)
- 81 Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts (1974)
- 82 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974)
- 83 European Convention on the Social Protection of Farmers (1974)
- 84 European Agreement on the Exchange of Tissue-Typing Reagents (1974)

- 85 European Convention on the Legal Status of Children born out of Wedlock (1975)
- 86 Additional Protocol to the European Convention on Extradition (1975)
- 87 European Convention for the Protection of Animals kept for Farming Purposes (1976)
- 88 European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle (1976)
- 89 Additional Protocol to the European Agreement on the Exchange of Tissue-Typing Reagents (1976)
- 90 European Convention on the Suppression of Terrorism (1977)
- 91 European Convention on Products Liability in regard to Personal Injury and Death (1977)
- 92 European Agreement on the Transmission of Applications for Legal Aid (1977)
- 93 European Convention on the Legal Status of Migrant Workers (1977)
- 94 European Convention on the Service Abroad of Documents relating to Administrative Matters (1977)
- 95 Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1977)
- 96 Additional Protocol to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1977)
- 97 Additional Protocol to the European Convention on Information on Foreign Law (1978)
- 98 Second Additional Protocol to the European Convention on Extradition (1978)
- 99 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1978)
- 100 European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (1978)
- 101 European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (1978)
- 102 European Convention for the Protection of Animals for Slaughter (1979)
- 103 Additional Protocol to the European Convention for the Protection of Animals during International Transport (1979)
- 104 Convention on the Conservation of European Wildlife and Natural Habitats (1979)

105 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1980)

106 European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (1980)

107 European Agreement on Transfer of Responsibility for Refugees (1980)

108 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981)

109 Additional Protocol to the European Agreement on the Exchange of Therapeutic Substances of Human Origin (1983)

110 Additional Protocol to the Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis or Treatment (1983)

111 Additional Protocol to the European Agreement on the Exchanges of Blood-Grouping Reagents (1983)

112 Convention on the Transfer of Sentenced Persons (1983)

113 Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts (1983)

114 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (1983)

115 Protocol amending the European Agreement on the Restriction of the Use of certain Detergents in Washing and Cleaning Products (1983)

116 European Convention on the Compensation of Victims of Violent Crimes (1983)

117 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984)

118 Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1985)

119 European Convention on Offences relating to Cultural Property (1985)

120 European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (1985)

121 Convention for the Protection of the Architectural Heritage of Europe (1985)

122 European Charter of Local Self-Government (1985)

123 European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (1986)

124 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (1986)

- 125 European Convention for the Protection of Pet Animals (1987)
- 126 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)
- 127 Convention on Mutual Administrative Assistance in Tax Matters (1988)
- 128 Additional Protocol to the European Social Charter (1988)
- 129 Arrangement for the Application of the European Agreement of 17 October 1980 concerning the Provision of Medical Care to Persons during Temporary Residence (1988)
- 130 Convention on Insider Trading (1989)
- 131 Third Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts (1989)
- 132 European Convention on Transfrontier Television (1989)
- 133 Protocol to the Convention on Insider Trading (1989)
- 134 Protocol to the Convention on the Elaboration of a European Pharmacopoeia (1989)
- 135 Anti-doping Convention (1989)
- 136 European Convention on Certain International Aspects of Bankruptcy (1990)
- 137 Fifth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1990)
- 138 European Convention on the General Equivalence of Periods of University Study (1990)
- 139 European Code of Social Security (Revised) (1990)
- 140 Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1990)
- 141 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)
- 142 Protocol amending the European Social Charter (1991)
- 143 European Convention on the Protection of the Archaeological Heritage (revised) (1992)
- 144 Convention on the Participation of Foreigners in Public Life at Local Level (1992)
- 145 Protocol of Amendment to the European Convention for the Protection of Animals kept for Farming Purposes (1992)
- 146 Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1992)
- 147 European Convention on Cinematographic Co-production (1992)
- 148 European Charter for Regional or Minority Languages (1992)

- 149 Second Protocol amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1993)
- 150 Convention on Civil Liability for damage resulting from activities dangerous to the environment (1993)
- 151 Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1993)
- 152 Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1993)
- 153 European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (1994)
- 154 Protocol to the European Convention on Social Security (1994)
- 155 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (1994)
- 156 Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995)
- 157 Framework Convention for the Protection of National Minorities (1995)
- 158 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995)
- 159 Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (1995)
- 160 European Convention on the Exercise of Children's Rights (1996)
- 161 European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (1996)
- 162 Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1996)
- 163 European Social Charter (revised) (1996)
- 164 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997)
- 165 Convention on the Recognition of Qualifications concerning Higher Education in the European Region (1997)
- 166 European Convention on Nationality (1997)
- 167 Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997)

168 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine on the Prohibition of Cloning Human Beings (1998)

169 Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Interterritorial Co-operation (1998)

170 Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (1998)

171 Protocol amending the European Convention on Transfrontier Television (1998)

172 Convention on the Protection of the Environment through Criminal Law (1998)

173 Criminal Law Convention on Corruption (1999)

Treaties which do not appear in this list

ETS No.

3 Special Agreement relating to the seat of the Council of Europe (1949)¹

4 Supplementary Agreement to the General Agreement on Privileges and Immunities of the Council of Europe (1950)¹

6 Amendments to the Statute (May 1951)²

7 Amendment to the Statute (December 1951)²

8 Texts of a Statutory Character adopted in May and August 1951

11 Amendment to the Statute of the Council of Europe (1953)²

1. Treaty concluded between the Council of Europe and the French Government.

2. Amendments having been integrated into the Statute of the Council of Europe.

**APPENDIX III – TEXTS OF A STATUTORY CHARACTER ADOPTED
BY THE COMMITTEE OF MINISTERS IN THE
COURSE OF ITS 8TH AND 9TH SESSIONS
(1951) WITH A VIEW TO THEIR ULTIMATE
INCLUSION IN A REVISED STATUTE**

**Resolution adopted by the Committee of Ministers at its 8th Session
(May 1951)**

The Committee of Ministers,

Having regard to certain proposals made by the Consultative Assembly for the revision of the Statute of the Council of Europe;

Considering that the provisions hereinafter set out are not inconsistent with the present Statute,

Declares its intention of putting into effect the following provisions:

Admission of new members

The Committee of Ministers, before inviting a state to become a member or associate member of the Council of Europe, in accordance with Articles 4 and 5 of the Statute, or inviting a member of the Council of Europe to withdraw, in accordance with Article 8, shall first consult the Consultative Assembly in accordance with existing practice.

Powers of the Committee of Ministers (Article 15 of the Statute)

The conclusions of the Committee may, where appropriate, take the form of a convention or agreement. In that event the following provisions shall be applied:

- i. The convention or agreement shall be submitted by the Secretary General to all members for ratification;
- ii. Each member undertakes that, within one year of such submission or, where this is impossible owing to exceptional circumstances, within eighteen months, the question of ratification of the convention or agreement shall be brought before the competent authority or authorities in its country;
- iii. The instruments of ratification shall be deposited with the Secretary General;
- iv. The convention or agreement shall be binding only on such members as have ratified it.

Joint Committee

i. The Joint Committee is the organ of co-ordination of the Council of Europe. Without prejudice to the respective rights of the Committee of Ministers and the Consultative Assembly, the functions of the Joint Committee shall be, in particular:

- a. to examine the problems which are common to those two organs;
- b. to draw the attention of those two organs to questions which appear to be of particular interest to the Council of Europe;
- c. to make proposals for the draft agenda of the sessions of the Committee of Ministers and of the Consultative Assembly;
- d. to examine and promote means of giving practical effect to the recommendations adopted by one or other of these two organs.

ii. a. The Joint Committee shall be composed in principle of twelve members, five representing the Committee of Ministers and seven representing the Consultative Assembly, the latter number to include the President of the Consultative Assembly, who shall be a member *ex officio*.

The number of members may be increased by agreement between the Committee of Ministers and the Assembly. Nevertheless, the Committee of Ministers shall, at its discretion, be entitled to increase the number of its representatives by one or two.

- b. The Committee of Ministers and the Consultative Assembly shall each be free to choose its own method of selecting its representatives on the Joint Committee.
- c. The Secretary General shall be entitled to attend the meetings of the Joint Committee in an advisory capacity.

iii. a. The President of the Consultative Assembly shall be the Chairman of the Joint Committee.

b. No proceedings of the Committee shall be regarded as valid unless there is a quorum consisting of three of the representatives of the Committee of Ministers and five of the representatives of the Consultative Assembly.

c. The conclusions of the Joint Committee shall be reached without voting.

d. The meetings of the Joint Committee shall be convened by the Chairman and shall take place as often as is necessary and, in particular, before and after the sessions of the Committee of Ministers and of the Consultative Assembly.

e. Subject to the foregoing provisions, the Joint Committee may adopt its own Rules of Procedure.

Specialised authorities

- i.
 - a. The Council of Europe may take the initiative of instituting negotiations between members with a view to the creation of European specialised authorities, each with its own competence in the economic, social, cultural, legal, administrative or other related fields.
 - b. Each member shall remain free to adhere or not to adhere to any such European specialised authority.
- ii. If member states set up European specialised authorities among themselves on their own initiative, the desirability of bringing these authorities into relationship with the Council of Europe shall be considered, due account being taken of the interests of the European community as a whole.
- iii.
 - a. The Committee of Ministers may invite each authority to submit to it a periodical report on its activities.
 - b. In so far as any agreement setting up a specialised authority provides for a parliamentary body, this body may be invited to submit a periodical report to the Consultative Assembly of the Council of Europe.
- iv.
 - a. The conditions under which a specialised authority shall be brought into relationship with the Council may be determined by special agreements concluded between the Council and the specialised authority concerned. Such agreements may cover, in particular:
 1. reciprocal representation and, if the question arises, appropriate forms of integration between the organs of the Council of Europe and those of the specialised authority;
 2. the exchange of information, documents and statistical data;
 3. the presentation of reports by the specialised authority to the Council of Europe and of recommendations of the Council of Europe to the specialised authority;
 4. arrangements concerning staff and administrative, technical, budgetary and financial services.
 - b. Such agreements shall be negotiated and concluded on behalf of the Council of Europe by the Committee of Ministers after an opinion has been given by the Consultative Assembly.
- v. The Council of Europe may co-ordinate the work of the specialised authorities brought into relationship with the Council of Europe in accordance with the foregoing provisions by holding joint discussions and by submitting recommendations to them, as well as by submitting recommendations to member governments.

Relations with intergovernmental and non-governmental international organisations

- i. The Committee of Ministers may, on behalf of the Council of Europe, conclude with any intergovernmental organisation agreements on matters which are within the competence of the Council. These agreements shall, in particular, define the terms on which such an organisation shall be brought into relationship with the Council of Europe.
- ii. The Council of Europe, or any of its organs, shall be authorised to exercise any functions coming within the scope of the Council of Europe which may be entrusted to it by other European intergovernmental organisations. The Committee of Ministers shall conclude any agreements necessary for this purpose.
- iii. The agreement referred to in paragraph i may provide, in particular:
 - a. that the Council shall take appropriate steps to obtain from, and furnish to, the organisations in question regular reports and information, either in writing or orally;
 - b. that the Council shall give opinions and render such services as may be requested by these organisations.
- iv. The Committee of Ministers may, on behalf of the Council of Europe, make suitable arrangements for consultation with international non-governmental organisations which deal with matters that are within the competence of the Council of Europe.

Resolution concerning partial agreements, adopted by the Committee of Ministers at its 9th Session (August 1951)

The Committee of Ministers,

Having regard to Article 20.a of the Statute, which provides that recommendations by the Committee of Ministers to member governments require the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee;

Having regard to Recommendation 3 adopted by the Consultative Assembly in August 1950;

Desirous, whenever possible, of reaching agreement by unanimous decision, but recognising, nevertheless, that in certain circumstances individual members may wish to abstain from participating in a course of action advocated by other members;

Considering that it is desirable for this purpose that the procedure of abstention already recognised under Article 20.a of the Statute should be so defined that the individual representatives on the Committee of

Ministers should be able, by abstaining from voting for a proposal, to avoid committing their governments to the decision taken by their colleagues,

Resolves:

1. If the Committee, by the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee, decides that abstention from participation in any proposal before it shall be permitted, that proposal shall be put to the Committee; it shall be considered as adopted only by the representatives who then vote in favour of it, and its application shall be limited accordingly.
2. Any additional expenditure incurred by the Council in connection with a proposal adopted under the above procedure shall be borne exclusively by the members whose representatives have voted in favour of it.

APPENDIX IV – STATUTORY RESOLUTION (93) 27 ON MAJORITIES REQUIRED FOR DECISIONS OF THE COMMITTEE OF MINISTERS

Adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session

The Committee of Ministers, under the terms of Articles 15.a and 16 of the Statute of the Council of Europe,

Having regard to the Parliamentary Assembly's proposals for institutional reforms within the Council of Europe;

Bearing in mind the increased membership of the Council of Europe and the need to strengthen the Organisation's capacity for action;

Considering it therefore desirable to reduce the number of cases where unanimity is required for decisions of the Committee of Ministers;

Considering that the provisions hereinafter set out are not inconsistent with the Statute of the Council of Europe,

Resolves as follows:

I. Opening of conventions and agreements for signature

Decisions on the opening for signature of conventions and agreements concluded within the Council of Europe shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee, as set out in Article 20.d of the Statute.

II. Partial Agreements

In accordance with the Statutory Resolution on Partial and Enlarged Agreements decisions authorising certain member states to pursue an activity as a Partial Agreement shall be taken by a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee, as set out in Article 20.d of the Statute.

**APPENDIX V – RECOMMENDATION 1223 (1993) ON
RESERVATIONS MADE BY MEMBER STATES
TO COUNCIL OF EUROPE CONVENTIONS
AND THE REPLY ADOPTED BY THE COMMITTEE
OF MINISTERS ON 17 FEBRUARY 1994
AT THE 508TH MEETING OF THE MINISTERS'
DEPUTIES**

**Recommendation 1223 (1993) on reservations made by member states
to Council of Europe conventions**

(Adopted by the Parliamentary Assembly on 1 October 1993 [51st Sitting])⁵⁴²

1. The conclusion of conventions and agreements or other legal instruments by which the member states are bound constitutes one of the chief methods available to the Council of Europe for attaining the goals set by its Statute.
2. According to the Vienna Convention and the rules of international law, on acceding to an international convention states are entitled to make certain reservations.
3. Many conventions furthermore specify in their actual texts certain reservations of which the contracting states may avail themselves, particularly at the time of signing and ratifying the convention.
4. The use of a reservation enables a state to circumvent the obstacle which it may encounter in a given convention provision. Thus the possibility of making reservations simplifies the accession of states to certain Council of Europe conventions.
5. With a view to ensuring maximum participation by contracting states, most conventions therefore provide facilities whereby states need not be bound by certain provisions.
6. None the less, the use of reservations also has major drawbacks. Firstly, the unity and coherence of the convention may be impaired. The legal machinery which it institutes may be weakened and fall short of the goal of harmonising and unifying the relevant law. As the states are no longer bound by the same international undertakings, reservations interfere with

⁵⁴². Assembly debate on 1 October 1993 (51st Sitting); see Parliamentary Assembly Doc. 6856, Report of the Committee on Legal Affairs and Human Rights (rapporteur: Mr Gundersen).

the equality which should prevail between contracting parties and seriously complicate their relations. In addition, it is often difficult to determine the obligations of each state.

7. In conclusion, the Assembly considers it advisable and even necessary that the number of reservations made in respect of Council of Europe conventions be considerably reduced. It accordingly recommends that the Committee of Ministers,

A. with regard to Council of Europe conventions which have already been concluded:

i. invite member states to make a careful review of their reservations, withdraw them as far as possible and make a reasoned report to the Secretary General if certain reservations are maintained;

ii. instruct the Council of Europe steering committees to examine, in the light of the national reports suggested above, the reservations made in respect of each convention within their sphere of competence;

B. as regards Council of Europe conventions to be concluded in the future:

i. include in each convention a clause specifying whether reservations are admitted and, if this is the case, the conditions under which states may make reservations;

ii. limit the validity of reservations to a maximum period of ten years. At the end of that period the Secretary General of the Council of Europe shall invite the state which made the reservation to review it, withdraw it as far as possible or make a reasoned report to the Secretary General if the reservation is maintained. If the reservation is not expressly renewed by the contracting state, it shall automatically lapse one year after the invitation of the Secretary General to react;

iii. vest the bodies set up by conventions with the authority to issue reasoned opinions on such reservations as the contracting states may wish to make.

Reservations made by member states to Council of Europe conventions

Parliamentary Assembly Recommendation 1223 (1993)

Decisions adopted on 17 February 1994 at the 508th meeting of Ministers' Deputies

The Deputies

1. decided to transmit Parliamentary Assembly Recommendation 1223 (1993) to the governments of member states;
2. decided to invite all steering and conventional committees entrusted to monitor and promote implementation of conventions to examine in due course the question of reservations made in respect of each convention in their sphere of competence;
3. adopted the following reply to Parliamentary Assembly Recommendation 1223 (1993):
 - “A. The Committee of Ministers informs the Parliamentary Assembly that it has transmitted Recommendation 1223 (1993) to the governments of member states.
 - B. The Committee of Ministers carefully considered Parliamentary Assembly Recommendation 1223 (1993). It shares in principle the Assembly's view that it is advisable and even necessary that the number of reservations made in respect of Council of Europe conventions be reduced. However, it observes that the Assembly had not dealt with some other questions relating to reservations, for instance the role of depositaries, interpretation of reservations, territorial clauses, clauses of suspension, negotiated reservations, etc. The Committee of Ministers notes that the law and practice relating to reservations constitute one of the most complex parts of public international law and are subject to constant development. Furthermore, the matter of reservations is currently under consideration by the United Nations International Law Commission.
 - C. With regard to paragraph A.i. of the recommendation, the Committee of Ministers recalls that in the field of family and criminal law, it has formulated similar invitations in the past which gave results only in a very limited number of cases. In respect of the European Convention on Extradition (ETS No. 24), Committee of Ministers Resolutions (78) 30 of 11 May 1978 and (78) 43 of 25 October 1978 recommended 'to the governments of member states contracting Parties to the European Convention on Extradition that they limit the scope of the reservations or withdraw them, bearing in mind the contribution of the Additional Protocols'. Since 1978, only three contracting parties have

either restricted or withdrawn some of their reservations to the European Convention on Extradition.

More recently, following a recommendation of the Committee of Ministers with regard to the existing conventions in the field of family law (Recommendation No. R (91) 9 of 9 September 1991), three contracting parties wholly or partly withdrew their reservations to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children (ETS No. 105).

The Committee of Ministers recalls that according to rules of general public international law and relevant treaty provisions, states have the right to limit their respective international obligations by formulating reservations to certain treaty provisions. Therefore it does not believe that it is appropriate that Council of Europe member states make reasoned reports to the Secretary General if certain reservations are maintained, as recommended by the Parliamentary Assembly.

- D. With regard to paragraph A.ii. of the recommendation, the Committee of Ministers would like to point out that a number of steering or conventional committees are already entrusted to monitor and promote implementation of conventions, i.e. reviewing regularly reservations made by contracting parties. It admits that discussion of the matter in the steering or conventional committees might induce contracting parties to reconsider their position with regard to certain of their reservations and to restrict their scope of application or even withdraw them, especially those which are outdated or have never been applied in practice.

The Committee of Ministers has invited therefore all steering and conventional committees referred to above to examine in due course the question of reservations made in respect of each convention in their sphere of competence.

- E. With regard to paragraph B.i. of the recommendation, the Committee of Ministers shares the Assembly's view about the advisability to include in each convention a clause specifying whether reservations are admitted and, if this is the case, the conditions under which states may make them. However, it notices that the number of conventions containing no provisions on reservations has already considerably diminished in recent practice. Since 1983 only six Council of Europe conventions and agreements fall into this category, as well as Protocols Nos. 8, 9 and 10 to the European Convention on Human Rights (ETS Nos. 118, 140 and 146). However, since these Protocols only contain provisions modifying the procedure of the convention organs, the formulation of reservations appears to be inadmissible in this case.

Two other conventions, the European Charter of Local Self-Government (ETS No. 122) and the Additional Protocol to the European Social Charter (ETS No. 128), are also silent on the question of reservations, but contain clauses allowing contracting Parties to select certain provisions of the substantive part by which they consider themselves bound.

- F. With regard to paragraph B.ii. of the recommendation, the Committee of Ministers cannot support either the Assembly's suggestion on limiting the validity of reservations to a maximum period of ten years, or the one on their automatic invalidity in case of non-renewal. The past experience has shown that provisions of this type did not facilitate the application of conventions since they were not followed in practice. The Committee of Ministers recalls that under the present international law, the right of a state to maintain its reservations has remained unfettered and therefore finds it preferable to limit the number of reservations to the necessary minimum in order to ensure a wide-ranging participation of member states.
- G. With regard to paragraph B.iii. of the recommendation, the Committee of Ministers believes that conventional committees cannot be endowed with supervisory powers as proposed by the Parliamentary Assembly. Due to their composition and status they are not competent to exercise quasi-judicial functions since they are usually composed of public officials who are subject to instructions by their respective governments. Their purely consultative opinions on reservations would probably not be endorsed by contracting parties. The existing practice shows that these committees do not usually go any further than inviting future contracting states to ratify without making any reservations."

ABOUT THE AUTHOR

Doctor of Law from the University of Heidelberg, Jörg Polakiewicz has worked for the last six years in the Department of the Legal Adviser and Treaty Office of the Council of Europe. Before joining the Organisation, he was a research fellow at the Max Planck Institute for Comparative Public and Public International Law in Heidelberg. He is the author of a book on the obligations of states resulting from the judgments of the European Court of Human Rights and of numerous articles on public international, European and constitutional law.

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About the author: Jörg Polakiewicz is with the Department of the Legal Adviser and Treaty Office of the Council of Europe. He is the author of The obligations of states arising from the judgments of the European Court of Human Rights (1993) and of numerous articles on public international, European and constitutional law.

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