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

W. Paul Gormley

Recommended Citation

Available at: http://ir.lawnet.fordham.edu/flr/vol39/iss1/2
THE MODIFICATION OF MULTILATERAL CONVENTIONS BY MEANS OF "NEGOTIATED RESERVATIONS" AND OTHER "ALTERNATIVES": A COMPARATIVE STUDY OF THE ILO AND COUNCIL OF EUROPE—PART ONE†

W. PAUL GORMLEY*

I. THE CONTINUING NEED FOR RESERVATIONS

The most perplexing problem of treaty law facing both regional and international organizations is that of securing universal acceptance to their multilateral conventions by all members, for ratification can entail agreement between the seventeen Members of the Council of Europe or over one hundred states in the United Nations. In a similar fashion, such institutions as the Organization of American States and the International Labour Organization face corresponding difficulties arising from the basic requirements of maintaining the integrity of the treaty, but at the same time allowing some degree of flexibility in regard to the legal commitment assumed by a ratifying state. These two main interests must be safeguarded, oftentimes by compromise. Still, the required number of ratifications must be obtained in order that treaty texts may enter into force. Unfortunately, no completely satisfactory solution has been found, capable of protecting all of the above-mentioned factors, and it appears that no future scheme of understandings, reservations, or alternative flexibility devices will satisfy all conflicting interests.

The United Nations, through its International Law Commission, is con-† The writer wishes to take this opportunity to sincerely thank those persons at the International Labour Organization in Geneva, and at the Council of Europe in Strasbourg, who so graciously gave valuable time and information, during the past three summers. As requested, no personal acknowledgments are made; however, it is hoped that the conclusions reached do not deviate too far from actual practice. Accordingly, the writer assumes full responsibility for all statements. Part Two of this article will appear in a subsequent issue of this volume.

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

1. Anderson, Reservations To Multilateral Conventions: A Re-examination, 13 Intl'l & Comp. L.Q. 450 (1964). "The question of reservations to multilateral conventions—their formulation and acceptance or rejection—has become since the Second World War one of the most controversial issues in the law of treaties, and, of all the many problems in international law today, it is one of those most urgently in need of clarification and codification." Id. Accord, Comment, The Problem of Reservations in Multilateral Conventions, 30 Albany L. Rev. 100 (1966).
continuing to devote considerable effort in its attempts to finally determine the international law standard governing reservations to treaties, including the very interesting related problems of understandings and declarations, in light of the 1951 judgment in the Genocide Case. This verdict in fact changed the traditional standard of international law as promulgated by the League of Nations under which absolutely no reservation could be attached at signature, at ratification, or at a subsequent date without the consent of all other parties. While it is not the primary aim of this paper to examine the international law criterion of unanimity as it is presently being modified by the International Law Commission and the American Law Institute, the writer believes it is essential to recognize that the doctrine in this area is far from settled. Moreover, the law of reservations will remain in a condition of uncertainty for some time,


3. Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15; Bishop, Judicial Decisions, 45 Am. J. Int'l L. 579 (1951). "The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result.... It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation." [1951] I.C.J. at 24; Bishop, supra at 584-85.

4. Professor William W. Bishop, Jr., in his 1965 Hague Academy of International Law lectures, took the position that the International Court of Justice in the 1951 Genocide Case moved closer to the Pan American practice for the reason that the key phrase in the decision is "compatible with the object and purpose of the Convention." Bishop, The General Course of Public International Law, 115 Recueil des Cours 147, 350 (1965 II). In his second series of lectures before The Hague Academy more emphasis was placed on the OAS criteria. Earlier, some writers had recognized the value in the Pan American norm. E.g., Meek, International Law: Reservations to Multilateral Agreements, 5 De Paul L. Rev. 40, 73-74 (1955). Cf. note 5 infra.

5. Bishop, Reservations To Treaties, 103 Recueil des Cours 245 (1961 II); Fitzmaurice, Reservations To Multilateral Conventions, 2 Int'l & Comp. L.Q. 1 (1953).

largely because this phase of treaty law is growing not only within the United Nations but, correspondingly, within major regional groupings, especially the Organization of American States.

Previously, the writer has taken the position that the Pan American practice of permitting an unlimited right to attach reservations even in the face of objection from other ratifying states has become the correct international norm in actual practice as a result of the Genocide Case. Though recognizing this position represents a viewpoint considerably beyond the essential object and purpose test enunciated by the International Court of Justice, there is some support for such conclusions because of an increasing use of reservations at both the regional and international levels. Despite severe criticism of the OAS standard, the writer submits that the International Court of Justice and the International Law Commission have rejected the traditional norm prohibiting the attachment of reservations to multilateral conventions unless all other states specifically agreed in advance to accept the reservation. Under this older view, the reserving state could not ratify in the face of objection by any other party. Thus, every state could exercise a veto if it so desired.


9. Gormley, The Influence of the United States and the Organization of American States On the International Law of Reservations, 7 Inter-Am. L. Rev. 127 (1965); accord, A. McNair, The Law of Treaties 167 (rev. ed. 1961) where he states: "[H]aving regard to the origins and special characteristics of the Convention, the court found that the States responsible for the negotiation of this Convention were deemed to have authorized the making of 'compatible' reservations and to have accepted in advance their validity without the necessity of their being submitted to all the parties for their assent." (Footnote omitted.)

10. The ICJ enumerated the basic requirement in the Genocide Case as follows: "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation." [1951] I.C.J. at 24; Bishop, supra note 3, at 584-85.

11. Bishop, supra note 4, at 348-52.

12. The system proposed by the Commission is very close to the Pan American system which has not proved very successful. Fitzmaurice has demonstrated fairly convincingly that the Pan American system does not even work very satisfactorily in its own field, and it is less likely therefore that it would have any more success in a global field. Fitzmaurice, supra note 5, at 20-22.
Regardless of the position taken toward the use of reservations to multilateral conventions at the international level, islands of specialized practice have developed in both the international and regional spheres which reject both the unanimity principle and the unlimited right of reservation. Interestingly, the same problems must be resolved, namely, the preservation of the essential integrity (object and purpose) of the multilateral convention as opposed to the need to obtain the maximum number of ratifications or at the very least the minimum number required to bring the instrument into force. As brought out very forcefully in the Genocide Case, some conventions cannot enter into force if too high a standard of compliance is imposed. As will be shown in this study, similar difficulties have been resolved by the International Labour Organization at the global level and the seventeen-member Council of Europe in the regional area, but different legal criteria have evolved.

Although the special techniques developed within the ILO and Council of Europe will not be adopted by the world community, it is possible that some help, or at least insight, may be gained from an examination of the unique procedures used by these two organizations for the reason that the negotiated reservation represents a standard that is very close to the criteria set forth by the International Court of Justice in the Genocide Case. In effect, the fundamental dilemma of maintaining the integrity of the negotiated text, while at the same time enabling as many states to ratify the convention as possible, has been squarely faced by these two institutions, and new workable solutions have been found. Moreover, the practice originally begun by ILO (and limited to use by that organization) has already served as a starting point for the Council of Europe, which in turn will have an impact on other newly developing organizations. Hence, this new phase of treaty law may have some influence on other regions. At least, it should be considered to constitute a significant part of modern law being created by the growing regional movement. The most significant single factor is that the signatories determine in advance those reservations and alternatives to reservations that will be permitted and are, therefore, deemed to be in conformity with the object and purpose of the convention.

Originally, the Council of Europe intended to adhere to the traditional norm by completely prohibiting all reservations on the theory that a limited number of homogeneous states could resolve all major difficulties.

during the process of negotiation, for it was felt that like-minded European governments would not encounter the diverse conflicts arising in the larger United Nations and Pan American Union. As a result of difficulties subsequently encountered in the various attempts to unify Europe at the political level, a series of compromises became necessary. In fact, the very existence of the Council is based on the notion of compromise. Thus, it became apparent that a "European law of reservations" suitable to the special problems facing the Council was required, rather than the mere adoption of the International, or Pan American, or even ILO procedures. Nevertheless, it should not be implied that the Council has not benefited from the experience of other institutions. Instead, the seventeen-member political group has profited greatly from the utilization of flexibility devices originally formulated by the ILO, a world-wide legal unit which, in theory, firmly prohibits the use of any and all reservations. Realistically, the negotiated reservation represents an evolution from ILO's more limited flexibility device, deemed to constitute an alternative to reservations rather than a true reservation.

II. THE PURPOSE OF THE STUDY

Against the general hypothesis set forth above, the specific purpose of this study is first, to examine the use of the flexibility device as an alternative (to the typical reservation) originally developed by ILO but later adopted by the Council; and secondly, to trace the evolution of the negotiated reservation subsequently emerging in the Council of Europe, which grew out of earlier concepts. This "specialized reservation" adheres closely to the criteria set forth by the International Court of Justice in the Genocide Case, since the essential integrity of the treaty is preserved. These islands of specialized practice, rejecting the traditional norms, the criteria of the International Law Commission, and the liberal Pan American stand, will continue to govern not only treaty relationships between Member States but also additional international institutions, such as the Organization for Economic Cooperation and Development (OECD). Admittedly, it is a bit premature to formulate conclusions as to the future growth of regional treaty law. Nonetheless, a significant beginning has been made, worthy of serious examination.

III. PROBLEM OF DEFINING "RESERVATION"

Considerable difficulty is experienced in defining precisely what type of statement will constitute a full reservation as contrasted with an under-

15. Bishop, supra note 5, at 326. See also note 20 infra.
standing or declaration short of a reservation. Further, some of the treaty texts examined below could be held to constitute either an integral part of the text or in other cases an amendment. Admittedly, considerable dispute can arise over such points of interpretation. Numerous attempts have been made to arrive at a very precise definition.16 Article 13 of The Harvard Research in International Law defines a reservation as "a formal declaration by which a State . . . specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty insofar as it may apply in the relations of that State with the other State or States which may be parties to the treaty."17 The essential element in a reservation is that a change in the legal effects of the treaty results. Likewise, the Restatement of the Foreign Relations Law of the United States uses the terms "changing or stating more precisely the legal effect of the agreement."18

For the purpose of this study it will be necessary to adopt a relatively broad concept of reservation so as to include treaty articles, short of amendments, permitting states to vary the legal effects of their ratifications. Admittedly, a narrower definition19 of "reservation" would limit the scope of the study, perhaps on the theory that escape clauses and flexibility devices are an integral part of the treaty and, therefore, differ from unilateral statements. Conversely, the writer wishes, for the purpose of analysis, to include all devices the application of which permit a state to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text. To the degree that a state can deviate from the legal effects of a treaty, a reservation has in fact been permitted. The significant factor, insofar as the ILO and Coun-


18. See Restatement §§ 127 & 130.

19. E.g., Anderson presents a very restricted definition to fit his proposed collegiate system, permitting some reservations to which a majority of states do not object. He would exclude a "unilateral statement" from the definition of reservation. Anderson feels that "[t]he unilateral statement is a proposed reservation; the eventual provision to which the other parties, or at any rate a majority of them, agree is the actual reservation." Anderson, supra note 1, at 452.

Likewise, an examination of understandings and interpretative declarations cannot be undertaken here; it merely needs to be noted that such statements do not modify the terms of the treaty as do reservations. See Bishop, supra note 5, at 303-22; Restatement § 127, comment c at 465-67.
cil of Europe are concerned, is that the negotiating states have determined beforehand those articles subject to modification and, correspondingly, those absolutely essential to the object and purpose of the treaty and, therefore, incapable of modification.

The writer will concede that others might properly desire a different classification of such internal portions of treaty texts, previously agreed to by all concerned. However, he believes the legal effect of flexibility devices and negotiated reservations rather than mere classification is the vital consideration. In this study emphasis will be placed on the modification and variation of treaty obligations within these two islands of specialized law, one at the international level and the other within the regional sphere. As will be indicated below, the ILO and Council of Europe have formulated alternatives to the reserving practice found in traditional international law. Nevertheless, similar-type problems are resolved, especially the need to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of states to become parties, though they are unable to assume full obligations. In short, compromise before signature results in some accommodation to both essential interests. Since the traditional reservation could not be employed to achieve this objective, it was absolutely essential that some other scheme be chosen.

IV. THE INTERNATIONAL LABOUR ORGANIZATION

The oldest world-wide specialized agency, originally affiliated with the League of Nations, has in theory been the staunchest advocate of the absolute integrity of the Convention as negotiated and finally adopted. Repeatedly, its Director-General has taken the position that absolutely no reservations of any type will be permitted. The result is that a state is forced to make a choice; either the entire package of obligations must be accepted or the state will not be permitted to ratify. This basic proposition of refusing to recognize any reservations is as old as ILO itself.20

20. Jenks, supra note 8, at 542-47; McNair, supra note 9, at 173; Bishop, supra note 5, at 305-06. The primary sources consist of two memoranda. The first is: Admissibility of Reservations to General Conventions, Memorandum By the Director of the International Labour Office, 8 League of Nations Off. J. 882 (1927). This Memorandum was submitted to the Council of the League on June 15, 1927 [hereinafter cited as Memo to League]. The second, and by far the more important is: Written Statement of the International Labour Organization, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Pleadings, Oral Arguments, and Documents at 216 (1951) [hereinafter cited as Memo]. See also Memo, app. I at 237; Memo, app. III at 237; Memo, app. IV at 257. "The principle that reservations to ratifications of international labour conventions are not admissible was first formulated by the International Labour Office in 1920, has been repeatedly reaffirmed since that time, and has been generally accepted by the Members of the International Labour Organization." Memo, para. 19, at 228.
The main reason for the firm stand of ILO lies in the fact that its Conventions do not affect Member Governments exclusively but also private labour and management groups. Unilateral variations from the minimum obligations contained in its Conventions would defeat the organization's objective, which is to establish definite *minimum standards* of labour and human rights protection, at a level below which a state cannot deviate and still remain a party to the Convention even though the concurrence of all other signatories is obtained. Not only does ILO deal with non-governmental entities, it is actually composed of private delegates from labour and management along with governmental representatives. Thus, the unique character of ILO results from its tripartite structure. Because of its special function, the protection of labour and management at the global level, the traditional type of reservation has repeatedly been rejected in a long line of decisions from the Director-General. That is to say, the basic function of ILO Conventions is to serve as instruments facilitating the establishment of a world-wide network of minimum labour standards, incorporating far more than governmental interests. Therefore, states cannot be permitted to hamper the total system by unilateral deviations, since the obligations assumed must be based on reciprocity. As was maintained by the Director of the International Labour Office in 1927:

> If reservations made on the occasion of ratification were accepted, a legal deadlock would inevitably be reached; every State would thus be contracting engagements of varying scope according to the significance of its reservations. This argument may be applied in a general way to all collective treaties; but, in the case of international labour conventions, it has a special importance, on which stress must be laid. The object of the International Labour Organisation is to safeguard conditions of labour against the detrimental influence of international competition; and this is the reason why international labour conventions must establish a network of mutual obligations among the various States. It is essential that exact reciprocity should be preserved in these obligations, and to that end the Peace Treaties establish an extremely detailed procedure for the enforcement of the conventions. It is perfectly obvious that the admission of reservations on the occasion of ratification would soon destroy the practical value of the international engagements in question and upset the balance which it is the object of the conventions to establish as regards industrial competition. The procedure of enforcement would become inoperative, and the entire system of the International Labour Organisation would collapse.

In short, the unique nature and purpose of its Conventions is the basic

---

24. Memo to League 883-84.
reason for prohibiting reservations. The texts are not drafted and signed by governments but are drawn up by the International Labour Conference. Because of the tripartite character of the drafting body, these Conventions are not typical treaties. Instead, they relate to, and draw authority from, the ILO Constitution. As such, these texts are brought into being by a two-thirds vote of the Conference, composed of delegates representing "interests" rather than states.\[2\] In effect, "[t]he adoption of a draft convention by a two-thirds majority of the Conference may thus be said to take the place of the traditional formality of signature."\[2\] Accordingly, ILO Conventions represent much more than contractual obligations among Members.

In addition to statements of policy sent to the Council of the League of Nations and the International Court of Justice, the International Labour Office has had repeated occasion to refuse recognition of proposed reservations such as those suggested by Poland in 1920, India in 1921, Cuba in 1928, and Peru in 1936.\[7\] In each instance the reservation was either withdrawn or the state was unable to ratify the Convention.

A. Alternatives To Reservations

In view of the fact that reservations would not be recognized, it became necessary for alternatives to be developed in order that some nations, unable at first to adopt higher-type European labour standards, could become parties and temporarily accept certain minimum obligations. The advantage of allowing the adoption of such lower legal duties is that at least a bare minimum of labour and human rights protection is obtained at the outset, with the hope that as the nation's resources develop the higher criteria will subsequently be adopted. Such flexibility

25. "Perhaps, however, they [ILO Conventions] might be more accurately defined as 'treaties of accession.' They appear to be legal instruments partaking of the nature both of a law and of a contract. They have a contractual character in the sense that they are mutually binding only upon those states which have of their own free will ratified them; and they have a legislative character in the sense that they are produced by a special authority which fixes a sole and universal text. While free to adhere or refrain from adhering, the contracting parties cannot impair the force of these general instruments by means of special conventions or declarations." Id. at 883.

26. Id. at 882. "These agreements are not drawn up by the Contracting States in accordance with their own ideas; they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-Government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-Governmental interests in regard to the adoption of international labour conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the conventions." Id. at 883.

27. Memo 228-30.
devices, permitting the ratification of only minimum portions of certain conventions, plus escalation clauses allowing a later raising of minimums, is assured under the ILO Constitution. "In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries." Likewise, other paragraphs, namely 7(a), (b)(i)-(iii), and 8, deal with degrees of flexibility permitted in the adoption process.

Despite these provisions designed to deal with certain special cases, as augmented by other regional arrangements, ILO will not retreat from its basic position, namely that these flexibility devices are not reservations. The writer, nevertheless, submits that the practical result of such alternatives has an effect similar to reservations. Therefore, the more profitable approach would seem to be a recognition of alternatives to reservations, which do in fact effect a change in the obligations set forth in a Convention, though a certain basic minimum is assured. Indeed, the major difference between alternatives to typical reservations and the newer negotiated reservation of the Council of Europe may be one of philosophy or intent (or even semantics) rather than the result achieved. Admittedly, this premise may be incapable of easy solution at the theoretical level.

B. Flexibility In Practice

Though the term "flexibility" is not employed in the ILO Memoranda to the International Court of Justice, the concept is very clear in application. Nevertheless, in practice considerable variations exist as to the

28. ILO Const. art. 19(3).
29. See 1 International Labour Code (1951). In the Preface, at LXXV-VI, the point is made that the ratification of a Convention or Recommendation will not repeal a higher national standard. The fact that the ILO Conventions constitute only minimum standards was clearly established in 1946 by the Conference Delegation on Constitutional Questions. The Council of Europe has adopted a similar position.
30. E.g., 2 id. at 725-46, appendix V, pt. I, Asian Regional Supplement, The "Modification" of the Provisions of Conventions In Respect of Asian Countries In Virtue of Article 19(3) of the Constitution of the International Labour Organisation. Article 19(3) has been used primarily by the Asian countries.
31. Memo, para. 14, at 224 contains numerous examples of Conventions with optional provisions, enabling the state in question to adopt the lower standards. Regretfully, these numerous examples of treaty articles in the Memo cannot be recounted here; consequently, only appropriate references to paragraphs, along with selected examples, will be provided. The Memo should be consulted for additional documentation.
32. Id.
types of special provisions chosen in order to give effect to constitutional powers, especially Article 19. For the purpose of exposition, it is possible (even though open to some question) to group the one hundred-thirty ILO Conventions under five general headings. Admittedly, considerable overlapping, plus over simplification, necessarily results from such a survey. It should be noted that the following general classifications will subsequently be used as a starting point for an analysis of the Conventions promulgated by the Council of Europe.

1. Exceptions

The simplest alternative to formal reservations consists of articles or paragraphs inserted into the main body of the treaty, signifying that ratifying states may exclude certain provisions if they so desire. Under this device, which the writer believes has the same practical effect as a negotiated reservation, the designated portions of the Convention can be rendered inapplicable. For example, Article 3 of the Convention Concerning Benefits in the Case of Employment Injury\(^3\) incorporates a long list of classifications capable of exclusion at the time of ratification.\(^3^4\)

2. National Legislation

An alternative very similar to the exception often consists of a nationality test. In this situation, general aims are set forth in the Convention, but the precise standards are determined by national legislation. Realistically, in many technical areas exact criteria cannot be promulgated by international regulations. To illustrate, Article 2 of the Convention Concerning Employment Policy holds:

Each Member shall, by such methods and to such extent as may be appropriate under national conditions—

(a) decide on and keep under review, within the framework of a co-ordinated economic and social policy, the measures to be adopted for attaining the objectives specified in Article 1.\(^3^3\)

34. "1. Any Member which ratifies this Convention may, by a declaration accompanying its ratification, exclude from the application of the Convention—

(a) seafarers, including seafishermen,

(b) public servants, where these categories are protected by special schemes which provide in the aggregate benefits at least equivalent to those required by this Convention.

2. Where a declaration under paragraph 1 of this Article is in force, the Member may exclude the persons belonging to the category or categories excluded from the application of the Convention from the number of employees when calculating the percentage of employees in compliance with paragraph 2, clause (d), of Article 4, and with Article 5.\(^3^5\) Id. art. 3, para. 3 contains a typical escalation clause permitting the subsequent adoption of higher standards. The Council of Europe follows this practice. See art. 5 of the Recommendation Concerning Medical Care and Sickness Benefits, No. 134 (1969).

Similarly, Article 3 of the Convention Concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines provides: "National laws or regulations shall define the persons responsible for compliance with the provisions of this Convention." The result is that a lower—or differing—standard may be applied depending on the condition of local law. Hence, such provisions (oftentimes accompanied by understandings, as pointed out below) do not produce the same standard in every country. Consequently, it is highly possible that the degree of variation may even preclude the establishment of a global minimum. However, the value of clearly stated ideals should not be underrated since world attention is directed toward any internal deficiencies. Accordingly, these criteria are implemented by reporting devices.

3. Territorial Application

A specialized type of exception is authorized pursuant to Article 35 of the Constitution in that governing powers may exclude non-metropolitan territories, including trust territories, in those instances in which "the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions." Very frequently both the ILO and Council of Europe have inserted similar articles enabling governments to limit their acceptance strictly to the Mother Country. Sadly, the frequency of such modifications must be conceded.

4. Optional or Alternative Provisions

The ILO Memorandum submitted to the International Court of Justice contains numerous examples by which states may adopt certain optional or even alternative parts, rather than assuming all of the higher standards to be set by national legislation.


37. ILO Const. art. 35. It contains more specific provisions relative to excluded territories. Accord, id. art. 19(3) relating to local conditions. "The obligation to apply ratified conventions to non-metropolitan territories is a qualified one under the terms of the Constitution itself which provides (Article 35 (1) and (2)) for the communication to the Director-General of declarations stating the extent to which the Member undertakes that the provisions of the convention will be applied to non-metropolitan territories and giving such particulars as may be prescribed by the convention. The particulars prescribed by the individual conventions include particulars of the modifications subject to which the convention will be applied to the various non-metropolitan territories." Memo, para. 23, at 232-33.

38. E.g., Convention Concerning Statistics of Wages and Hours of Work in the Principal Mining and Manufacturing Industries, Including Building and Construction, and in Agriculture, No. 63 (1938), 40 U.N.T.S. 255.

39. See discussion in Memo, para. 23, at 232-34 and the numerous examples included therein.
standards. In a sense these options represent an early stage, and at the present time a middle ground, between the simple exception and the fully-developed escalation clause, which oftentimes encompasses an elaborate set of escalation clauses. In any event, these optional and alternative articles represent an advancement over the single exception, in that a higher level of labour protection may be assumed at a later date. In addition, the state has much more choice as to the type of obligation to be assumed. On the other hand, the Council of Europe is using the option concept to give greater variation to its reservations.

5. Flexibility Devices

Recent Conventions have tended to make more extensive use of the escalation concept, which the writer believes is the most significant contribution made by ILO to the science of treaty law. Actually, the major advancement in this field has taken place since World War II, though early traces can be found in the inter-war period. In a manner similar to the later Council of Europe, the ILO pioneered the practice of first obtaining acceptance of essential articles and at subsequent dates working toward the adoption of an enumerated series of higher obligations by utilizing available reporting devices supported by the sanction of publicity. Under such practice, excluded sections, alternative provisions, and especially "colonial clauses" are subsequently removed. Similarly, national legislation is raised to meet international norms. This procedure, resulting in the adoption of higher standards, can be traced through a series of recent Conventions. On the other hand, participating states are accorded a great deal of choice as to the various provisions they may exclude. The result is that a maximum degree of participation is assured, and conflict, similar to that present in the Genocide Case, is avoided, since the desired escape valve has already been agreed upon by the International Labour Conference.

In the previously cited Convention Concerning Benefits in the Case of

40. See id. for examples of escalation clauses, especially as they apply to non-metropolitan territories.


Saba speaks of the "world sense of shame" as the means by which compliance is obtained as to Conventions and Recommendations of ILO. Saba, Quasi-Legislative Activities of the Specialized Agencies of the United Nations, 111 Recueil des Cours 603 (1964 I). Realistically, the reporting devices are the main reason causing the Member States to adopt higher standards. Gormley, supra note 21, at 46-49.
Employment Injury, Article 3(3) was noted. By way of further example, the Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security includes an escalation clause pursuant to which additional classes of benefits can be adopted. Such optional application permits a state to guarantee additional benefits. However, once accepted, they generally cannot be removed or a lower criterion applied. A few exceptions permitting rescission will be noted below. Moreover, through bilateral agreements Member States may promulgate higher standards of variations to more adequately meet local conditions. The Council of Europe has also found this technique to be extremely valuable.

In the Convention Concerning Minimum Standards of Social Security the escalation clause becomes very clear in that the essential portions, which must be ratified along with some optional provisions, are clearly set forth in Articles 2-4 as follows:

Article 2

Each Member for which this Convention is in force—

(a) shall comply with—

(i) Part I;

(ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, including at least one of Parts IV, V, VI, IX and X;

(iii) the relevant provisions of Parts XI, XII and XIII; and

42. See note 34 supra.

43. No. 118 (1962), 494 U.N.T.S. 271 [hereinafter cited as Convention Concerning Equality of Treatment of Nationals]. Article 2(1) of this Convention provides:

"1. Each Member may accept the obligations of this Convention in respect of any one or more of the following branches of social security for which it has in effective operation legislation covering its own nationals within its own territory:

(a) medical care;

(b) sickness benefit;

(c) maternity benefit;

(d) invalidity benefit;

(e) old-age benefit;

(f) survivors' benefit;

(g) employment injury benefit;

(h) unemployment benefit; and

(i) family benefit."

44. Id. art. 2(4) which states:

"Each Member which has ratified this Convention may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more branches of social security not already specified in its ratification."

45. Id. art. 9 states: "The provisions of this Convention may be derogated from by agreements between Members which do not affect the rights and duties of other Members and which make provisions for the maintenance of rights in course of acquisition and of acquired rights under conditions at least as favourable on the whole as those provided for in this Convention." See also id. art. 12(1).

(iv) Part XIV; and
(b) shall specify in its ratification in respect of which of Parts II to X it accepts the obligations of the Convention.

Article 3

1. A Member whose economy and medical facilities are insufficiently developed may, if and for so long as the competent authority considers necessary, avail itself, by a declaration appended to its ratification, of the temporary exceptions provided for in the following Articles: 9(d); 12(2); 15(d); 18(2); 21(c); 27(d); 33(b); 34(3); 41(d); 48(c); 55(d) and 61(d).

2. Each Member which has made a declaration under paragraph 1 of this Article shall include in the annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation a statement, in respect of each exception of which it avails itself—
(a) that its reason for doing so subsists; or
(b) that it renounces its right to avail itself of the exception in question as from a stated date.

Article 4

1. Each Member which has ratified this Convention may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more of Parts II to X not already specified in its ratification.

2. The undertakings referred to in paragraph 1 of this Article shall be deemed to be an integral part of the ratification and to have the force of ratification as from the date of notification.

The writer submits that the Minimum Standards Convention represents the best example of true flexibility devices, because even a lower standard may subsequently be adopted. Nevertheless, other recent
Conventions have incorporated similar features. To illustrate, the 1965 Convention Concerning the Minimum Age for Admission to Employment Underground in Mines contains an escalation clause enabling a higher minimum age to be specified. Likewise, the Convention Concerning Maternity Protection sets forth numerous categories of exceptions in Article 7(1). But Article 7(2) maintains: "The categories of occupations or undertakings in respect of which the Member proposes to have recourse to the provisions of paragraph 1 shall be specified in the declaration accompanying its ratification." As previously noted, certain articles permit removal of such exceptions. Article 7(3) holds: "Any Member which has made such a declaration may at any time cancel that declaration, in whole or in part, by a subsequent declaration," whereas Article 10 deals with subsequent modifications as to non-metropolitan territories. The later Convention Concerning Wages, Hours of Work on Board Ship and Manning, accomplishes a similar objective under the provisions in Article 5. Interestingly, an even more flexible technique,

(d) the territories in respect of which it reserves its decision pending further consideration of the position."

49. No. 123 (1965) [hereinafter cited as Convention Concerning Minimum Age in Mines].
50. The international minimum age of sixteen is contained in id. art. 2. Article 3 specifies the higher option as follows: "Each Member which has ratified this Convention may subsequently notify the Director-General by a further declaration, that it specifies a minimum age higher than that specified at the time of ratification."
52. Id. art. 7(2) (emphasis added).
53. See notes 34 & 48 supra. The Council of Europe has adopted a similar practice.
54. Article 10(1)(b)-(d) of the Convention Concerning Maternity Protection provides that declarations communicated to the Director-General must indicate:

"(b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
(c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
(d) the territories in respect of which it reserves its decision pending further consideration of the position."

A higher standard may be adopted pursuant to paragraph 3 of art. 10 which provides:
"Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article." Accord, id. art. 7(3). Article 10 must be read in connection with art. 11(1) and (2) of the same convention.
55. No. 109 (Revised 1958) [hereinafter cited as Convention Concerning Wages on Board Ship].
56. Id. art. 5 states:

1. Each Member ratifying this Convention may, by a declaration appended to its ratification, exclude from its ratification Part II of the Convention.
2. Subject to the terms of any such declaration, the provisions of Part II of the Con-
permitting a very low standard of compliance, is set forth in Article 5(5) in that the optional items may be accepted as a recommendation. "While a declaration made under paragraph 1 of this Article remains in force in respect of Part II, the Member may declare its willingness to accept Part II as having the force of a Recommendation."\(^{57}\)

C. Continued Use of Alternatives

Additional recent Conventions could be cited to illustrate the various flexibility devices, especially the vital escalation clauses, presently in use.\(^{58}\) Obviously, the over one hundred and twenty-five Conventions cannot be discussed in minute detail within the scope of a comparative study of this type. However, from the selected Conventions analyzed above, in connection with the earlier data set forth in the two memoranda prepared for the League of Nations and the International Court of Justice,\(^{59}\) certain observations, or more correctly, unresolved problems emerge, primarily because: 1) some of the above cited Articles appear to have the same effect as reservations;\(^{60}\) 2) provision is made for unilateral declarations at the time of ratification, excluding certain provisions and territories to which the texts shall be in force;\(^{61}\) and 3) the newer escalation practice does in fact result in varying degrees of treaty obligation, even though an international minimum is guaranteed.\(^{62}\) Furthermore, the theoretical stand that absolutely no reservations may be attached to ILO Conventions can be further questioned on the ground that understandings and unilateral declarations may often be attached. Consequently, it is here submitted that some of these provisions, though placed in a different category and referred to as alternatives, have for all practical purposes the same operational effect as reservations, with one very important qualification. The three negotiating groups—representatives of labour, management, and sovereign states—have indicated in the main text those...
portions subject to exclusion and subsequent modification. Furthermore, the same approach has been taken by the Council of Europe.

Despite prior agreement, the texts of final Articles contain language indistinguishable from reservations. To illustrate, Article 17(1) and (2) (a) of the Convention concerning the Guarding of Machinery\(^6\) reads like a reservation:

1. The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification.

2. In cases where a declaration specifying a more limited application is made—
(a) the provisions of the Convention shall be applicable as a minimum to undertakings or branches of economic activity in respect of which the competent authority, after consultation with the labour inspection services and with the most representative organisations of employers and workers concerned, determines that machinery is extensively used; the initiative for such consultation can be taken by any such organisation . . . .\(^{64}\)

Indeed, the discretion given the ratifying government is very broad; moreover, the writer cannot distinguish the above Article from a typical reservation. Realistically, the Convention on Guarding Machinery represents the most extreme level of flexibility in that minimum international standards are not assured, as is the case with Conventions (e.g., Minimum Standards Convention) setting forth mandatory standards of social security. Here, the "Member ratifying the Convention [itself] specifies a more limited application by a declaration . . . ."\(^{65}\) Earlier in the study certain selected treaty articles were cited as examples containing narrower specifications, and the observation was made in several footnotes that they could be deemed to constitute reservations.\(^{66}\) The question may be asked: Is the term "declaration" to be at least partially equated with a reservation and not exclusively with a unilateral declaration? At least a tentative answer can be gleaned from one obvious fact; a declaration authorized by the Convention itself has the authority to modify the text because it has been agreed to by all negotiating delegates beforehand. As such, a position very similar to that followed by the Council of Europe has been reached. By taking a different philosophical approach, the Council has evolved a negotiated reservation rather than an alternative to reservations. Consequently, the writer suspects that two differing philosophies have resulted in the development of somewhat similar solutions,

\(^{63}\) No. 119 (1963), 532 U.N.T.S. 159.

\(^{64}\) Id. art. 17(1) & (2)(a) (emphasis added). Article 17(2)(b) & (3) provide for the withdrawal of such declarations; accord, Convention Concerning Wages on Board Shlp, art. 5(5), note 55 supra.

\(^{65}\) Convention Concerning the Guarding of Machinery, art. 17(1).

\(^{66}\) See notes 47, 57, 60 & 64 supra. Cf. note 70 infra and the examples cited therein.
as will be discussed more fully in the conclusions to this article. For the present, however, the important factor is to note that the above mentioned treaty texts are capable of "changing or stating more precisely the legal effect of the agreement," which language is a reservation in the opinion of the American Law Institute.

D. Understandings Short of Reservations

Although typical international type reservations are prohibited, the practice of attaching understandings and "interpretative" declarations does not draw objection, provided that the convention's text is not qualified. The ILO accepts this definition because these statements are distinguishable from reservations. The problem is further complicated by the fact that the term "declaration" can be used in several different contexts. In some instances understandings—attached by legislative bodies at ratification—are stated in terms equivalent to reservations.

67. Restatement § 127. See also id. comment (b) and the definition by Harvard Research found in note 17 supra.

68. Memo to League 884. See Restatement §§ 138 & 140.

69. "In a few cases Members have, when ratifying, placed on record their understanding of the meaning to be attached to a particular provision of a convention, generally specifying that in so stating their understanding of the position they are not to be regarded as making a reservation; no question has arisen hitherto in regard to the effect of such understandings. In certain cases of this kind there is clearly no problem. Thus a requirement by a legislative body that the executive shall satisfy itself of certain things, by enquiry from other States or from an international organization or otherwise, before communicating an instrument of ratification, or shall exercise in a certain manner a discretion left to national competent authorities by a convention, are not reservations and will not make it impossible to register the ratification . . . . They do not qualify the fact that in no case has a ratification been registered subject to a substantive reservation." Memo 234.

70. Appendix VII to Memo, item III, Examples of ratifications subject to understandings which have not been regarded as constituting reservations. Id. at 272-82.

In the ratification by Great Britain to the Convention Concerning Seamen's Articles of Agreement, No. 22 (1926), 38 U.N.T.S. 295, an understanding was attached to the effect that British law satisfied the requirements of the Treaty. Similarly, India took the position that its internal law satisfied this Convention. Memo 272-75.

Australia attached an understanding to the effect that its arbitration court, rather than legislation, would give effect to the Convention Concerning Hours of Work on Board Ship and Manning, No. 57 (1936). See the discussion of Australian law in Memo 276. Such observations were accepted by the Undersecretary-General on the ground that it was an understanding and not a reservation. "His Majesty's Government take the view that the law and/or practice in Australia outlined above provides all the protection to seamen that the Convention contemplates . . . . on the understanding that such law and/or practice is regarded as specifying . . . . the requirements of the said articles." Memo 276.

The above understanding was accepted by the Undersecretary-General on the ground that it was an understanding and not a reservation. "The terms of your letter have been communicated to the Director of the International Labour Office who has drawn my attention to the fact that if the understanding stated in your letter were to be regarded as constituting
The most striking example of an alleged understanding—recognized as such by ILO—was attached by the United States Senate and "made part of [such] ratification" of five maritime conventions. To quote the language of the Senate, that legislative body "did advise and consent to the ratification of the said draft Convention . . . subject to the following understandings to be made part of such ratification." Furthermore, the Senate attached a reservation as to the Philippine Islands and the Panama Canal Zone in the following terms: "The provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction, except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision."

Clearly, the above language limits the scope of the treaty, with the result that it seems unrealistic to classify this statement as an understanding for the reason that even the term "reserves" is used by the Senate. Subsequently President Roosevelt ratified the convention. "[I]n pursuance of the aforesaid advice and consent of the Senate [I] ratify and confirm the same and every article and clause thereof, subject to the understandings hereinabove recited and made part of this ratification." The reservation, the doctrine approved by the Committee of Experts on the Progressive Codification of International Law, in a report accepted by the Council on 17 June, 1927, to the effect that the reservations to international labour conventions are inadmissible, would be applicable to the present case. It is presumed, however, that the Government of the Commonwealth of Australia, which has communicated to the Secretariat an instrument of ratification in unqualified terms, has no intention of purporting to ratify subject to a reservation, but is merely drawing attention to the law and/or practice in Australia, which it understands to be in conformity with the requirements of the Convention." Memo 278.


Memo 278-82.

Id. at 280 (emphasis added). The Convention to which understandings were attached was the Convention Concerning Masters and Officers. The understandings attached by the United States read as follows:

"(1) The United States Government understands and construes the words 'vessels registered in a territory' appearing in this Convention to include all the vessels of the United States as defined under the laws of the United States.

(2) The United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.

(3) Nothing in this Convention shall be so construed as to prevent the authorities of the United States from making such inspection of any vessel referred to in Article V, paragraph 3, within the jurisdiction of the United States, as may be necessary to determine that there has been a compliance with the terms of this Convention, or to prevent such authorities from withholding clearance to any vessel which they find has not complied with the provisions of this Convention until such time as any such deficiency shall be corrected." Id. at 281.

Id. at 281-82 (emphasis added).

Id. at 281 (emphasis added).
intent of the Senate’s consent has been given greater clarification by the President’s ratification, and the writer concludes that the United States has attached a reservation and not an understanding to the five maritime Conventions. We can only speculate concerning the reason for the inaction of the Director-General of the ILO. Perhaps it was felt expedient to permit the United States to ratify at least five ILO Conventions so as not to completely exclude United States’ participation at a time when our country was not even a member of the League. Further, our Government had not previously ratified any significant ILO conventions and in fact, the United States did not even join the ILO until 1934. Hence, it is conceivable that the same standards used as a basis for rejecting the proposed reservations of Poland, India, and Cuba were not applied. It would appear that the designation “understanding” was not questioned by the Depositary on the theory that a dispute would not subsequently arise.

The writer believes that the United States attached a reservation because the text had been qualified by a unilateral declaration at the time of ratification. The language contained in the Senate’s acceptance and the President’s ratification is clearly that of a reservation and not an understanding, for the understanding is “made part of this ratification.”

E. Recommendation As to ILO Practice

It would be well for ILO, especially the Director-General and his Office, to reexamine the “devices” being used as “alternatives” to reservations, primarily because a significant number of the more recent Conventions employ provisions that appear to constitute reservations. At the very least they have the same operational effect as the traditional reservation. The problem is further complicated by the fact that understandings and interpretative declarations are permitted, without a clear boundary having first been established between the “reservations,” as contrasted with declarations short of reservations (as opposed to declarations previously specified as acceptable within the text). Therefore, it may be

---

76. “The various ratifications were registered by the Secretary-General of the League of Nations on 29 October, 1938.” Id. at 282.
77. To date, only seven ILO Conventions have been ratified by the United States. On October 6, 1970, the House of Representatives voted to cut off the United States contribution to ILO for the first half of 1971. Although the United States will provide no funds for the first part of 1971, it will retain its vote for two years. N.Y. Times, Oct. 7, 1970, at 15, col. 1-2.
79. Memo 281.
suggested that the ILO has reached such a very advanced stage of legal maturity (constituting in fact a distinct global legal system) that greater emphasis needs to be placed on codification rather than ILO Common Law. The most recent statement of basic philosophy prohibiting reservations was set forth at the time of the Genocide Case. However, considerable development in the unique ILO legal system has taken place since the last major pronouncement in the early 1950's. The writer understandably wonders if the conventions promulgated during the last twenty years have departed from the strict rule.

Other institutions, especially the United Nations, are reexamining the whole area. In a similar fashion, states are reconsidering their national standards as to the adoption of both bilateral and multilateral treaties, with considerable help from their academic communities. Consequently, greater clarification of ILO practice is highly desirable. More specifically, it may also be suggested that a further official pronouncement would be helpful in view of the practice of "negotiated reservations" being perfected by the seventeen-member Council of Europe.