

Seminar “Managing the International Order – The Functions of Treaty Depositaries”

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Council of Europe Depositary Practice

Jörg Polakiewicz*

Director of Legal Advice and Public International Law (Legal Adviser)

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1. Introduction

When I arrived at the Council of Europe in November 1993, 25 years ago, I was immediately assigned to work for the treaty office. This was probably due to my background as a former research fellow at the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg.

The early 1990’s were a particularly propitious period to put my theoretical knowledge of international law into practice. At that time, the Council of Europe was in full expansion eastwards. Within a few years, many new member states joined the Organisation and became parties to its core treaties. All this provided a heavy workload for a relatively small entity such as the treaty office. While the main depositary tasks are essentially clerical, some involve thorough legal analysis. Indeed, many of the highly political issues which have marked this continent over the years have found their expression in one way or another in the treaty practice of states.

In my intervention, I will address some of these issues, in particular our depositary practice relating to reservations and declarations as well as the broader management of our treaties which exceptionally includes the convening of conferences of the parties. But I will start with some general considerations about our depositary functions.

2. Depositary functions in the Council of Europe

The Secretary General of the Council of Europe is the depositary of Council of Europe treaties with the exception of the Statute of the Council of Europe (ETS 1, 1949, for which the United Kingdom is the depositary). In practice, depositary functions are performed by the treaty office within the Directorate of Legal Advice and Public International Law (DLAPIL).¹

I would like to underline that we not only perform the core depositary functions, but we also advise member states on questions of treaty law and participation in the elaboration of new treaties. The core depositary functions such as publishing and archiving treaty texts, organising ceremonies of signature or ratification, receiving and registering all acts relating to treaties and notifying them to member states and other parties, rarely give rise to particular legal issues.

In that context, I would like to mention our practice as regards the “the former Yugoslav Republic of Macedonia”. Due to the dispute about this country’s name, this member state has not put its signature on any of the original Council of Europe treaties. Instead, it deposits a signature letter that is registered by the treaty office and a unilateral procès-verbal is signed.

While we have developed a certain practice of the Organisation,² we are in principle guided by articles 76 to 80 of the 1969 Vienna Convention on the Law of Treaties (VCLT). All Council of Europe treaties are registered with the Secretariat of the UN within one month of entry into force.

The treaty office maintains custody of all original documents including full powers and instruments of ratification and accession presented to it. These documents are kept in a closely controlled area with very limited access but readily available since Council of Europe treaties remain open for signature at any time by a member state wishing to join the treaty. All these documents are also digitalised.

* All views expressed in this intervention are personal and do not necessarily reflect the official position of the Council of Europe.

¹ These tasks of DLAPIL are stated in Rule No. 1390 of 11 May 2017 defining the role of the Directorate of Legal Advice and Public International Law within the Secretariat General of the Council of Europe (in particular, article 1, paragraph f, of this Rule).

² *Practical Guide - Treaty Office of the Council of Europe, Provisional Edition 2013.*

In fact, nowadays all treaty information is also available on the Council of Europe's website. This website was created, in English and in French, in January 2000. There is no separate restricted internal database for treaty information as all the information is automatically displayed in a publicly accessible website. The website contains the text of each Council of Europe treaty, its explanatory report, a table with dates of signature and ratification by individual states and organisations as well as any reservations or declarations made by them.

The website's database enables many forms of statistics to be generated and searches to be carried out on the legal acts, sorted either by state, by treaty or partial agreement, or by time period.

During 2003, German, Italian and Russian versions of the website were added with the contribution of the Ministries for Foreign Affairs of Germany, Italy, Switzerland and the Russian Federation, which transmitted official and non-official translations of the treaties. Moreover, since 2009, official as well as non-official translations of treaties and explanatory reports into non-official languages - from Albanian to Yiddish - are being transmitted to the treaty office by various official entities to be published online for information purposes.

Notifications of all legal acts (signatures, ratifications, declarations, etc.) are sent electronically to all member states and other parties at a set time each week. All notifications issued since January 2000 are published online in the two official languages, English and French.

The treaty office's website is kept fully up to date and is revised immediately following each treaty act. The website receives in excess of 1 million visits annually.

3. Reservations and declarations

Under the regime of the Vienna Convention on the Law of Treaties, two competing requirements must be reconciled. On the one hand, it must be ensured that the relevant treaty provisions on reservations and declarations 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.

In 1976, the Committee of Ministers discussed the nature and scope of depositary functions exercised by the Secretary General. This discussion was prompted by a statement made by Turkey in relation to the ratification of seven European treaties. In December 1975, Turkey presented each of its instruments of ratification 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 in question even prohibited the making of any reservations. In substance, the statement undoubtedly has an effect on the application of the treaty, which is entirely excluded, but only in relations between the declaring state and one other party. In this sense, it resembles a declaration of non-recognition.

The Secretary General initially refused the registration of the Turkish instruments of ratification and asked the Committee of Ministers for guidance. Following prolonged 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.”

It should be underlined that the use of the term “*reservations*” was requested by the Turkish Government. The Committee of Ministers as such reserved its position as to the nature and scope of the Turkish statement.³ The International Law Commission’s *Guide to Practice* does not categorise such statements.⁴ It is interesting to note that this issue is still on the agenda of CAHDI. In 2016,⁵ 2017⁶ and 2018,⁷ Turkey again formulated statements, this time expressly categorised as “*declarations*”, regarding the application of a number of conventions regarding

³ Similar reservations having been made by Turkey in 1976, 1978 and 1980, the depositary has also annexed the decision of the Committee of Ministers to these notifications.

⁴ Guideline 1.5.1 Statements of non-recognition: “A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.”

⁵ See Notifications [JJ8129C Tr./108-100](#) and [JJ8132C Tr./197-72](#) of 6 May 2016; Notifications [JJ8178C Tr./086-56](#), [JJ8179C Tr./181-66](#), [JJ8180C Tr./182-67](#), [JJ8181C Tr./209-33](#) and [JJ8182C Tr./212-13](#) of 13 July 2016.

⁶ See Notification [JJ8498C Tr./211-28](#) of 22 September 2017.

⁷ See Notifications [JJ8633C Tr./127-300](#) of 29 March 2018 and [JJ8667C Tr./087-34](#) of 18 May 2018.

Cyprus. Some states have objected to these “*declarations*” considering that they would in reality amount to reservations contrary to the object and purpose of the conventions in question.⁸

In this respect also, I would like to refer to the recent terminological practice of one member state, namely Austria, for which the treaty office has now included a ‘Note by the Secretariat’ stating that “*Austria refers to its expressions of disagreement with interpretative declarations as ‘oppositions’, not as ‘objections’.*”

In general, Council of Europe practice in relation to reservations can be summarised as follows: in his capacity as depositary, the Secretary General has the task of ensuring that reservations conform to the final clauses of the respective treaty. In order to do this, the treaty office must evaluate the legal nature of a statement to determine whether it constitutes a proper reservation or only an interpretative declaration. If the treaty does not permit any reservations the treaty office can refuse to register the ratification. 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 latter 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.

Late reservations

In the Council of Europe, we follow strictly the Vienna Convention regime on reservations. Reservations may only be made at the time of signature or when depositing an instrument of ratification, acceptance, approval or accession (article 19 of the VCLT). Reservations made upon signature subject to ratification must be formally confirmed by the reserving state when expressing its consent to be bound by the treaty (article 23 (2) of the VCLT). Accepting the belated formulation of reservations creates 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 a 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.

I am quite proud to say that we have so far successfully resisted all attempts to circumvent this rule. Exceptions may only 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 due to administrative oversight it had been forgotten to communicate the text

⁸ Namely Austria, Cyprus, Greece and Portugal.

when depositing the instrument of ratification or accession. Examples are the reservation made by Greece in 1988 to the European Convention on the Suppression of Terrorism (ETS 90, 1977)⁹ or declarations made in 1997 by Portugal with regard to the European Convention on Mutual Assistance in Criminal Matters (ETS 30, 1959).¹⁰

Declarations regarding territories of disputed jurisdiction

At present there are a number of unresolved conflicts in Europe involving in particular Abkhazia, Crimea, Donetsk and Luhansk, Nagorno-Karabakh, Northern Cyprus, South Ossetia (Tskhinvali) and Transnistria. Although these conflicts are hardly similar to each other in a number of respects, as a result five of our member states - Azerbaijan, Cyprus, Georgia, Moldova, and Ukraine - have within their territorial borders regions over which they have no effective control because of annexation, military occupation and/or the control of separatist de facto entities.

The treaty office has recorded a number of declarations by states ratifying Council of Europe conventions whereby such states have declared their inability to ensure compliance with the conventions in question in those parts of their territory falling out of the sphere of their effective control. Usually they are made without reference to any particular provision of the conventions in question. Examples are declarations by Azerbaijan in respect of Nagorno-Karabakh,¹¹ Georgia in respect of the territories of Abkhazia and Tskhinvali regions,¹² Moldova in respect of Transnistria¹³ and Ukraine in respect of Crimea and the Donetsk and Luhansk regions¹⁴ under separatist control. Such declarations have however not always been made consistently in respect of all Council of Europe treaties.

The legal nature of such declarations remains contested. The International Law Commission's Guide to Practice on Reservations to Treaties, states in Guideline 1.1.3 that "*a unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.*"¹⁵ The subsequent commentary qualifies this statement however and concludes that "*these are not reservations in the sense of the Vienna Convention.*" In the Case of *Ilaşcu and Others v. Moldova*

⁹ Notification JJ2126C Tr./90-3 of 12 September 1988.

¹⁰ Notification JJ3793C Tr./30-33 of 25 April 1997.

¹¹ See Notification [JJ8470C Tr./198-76](#) of 11 August 2017.

¹² See Notification [JJ4680C Tr./126-127, 151-52, 152-52](#) of 21 July 2000.

¹³ See Notification [JJ7021C Tr./180-8](#) of 26 March 2010.

¹⁴ See Notification [JJ8025C Tr./024-115, 030-124, 051-20, 062-65, 070-33, 073-45, 077-9, 086-54, 090-68, 097-47, 098-58, 099-61, 105-88, 112-105, 141-122, 156-38, 160-44, 167-67, 173-152, 182-65, 185-90, 189-51, 190-47, 191-59, 192-22, 196-64, 197-68, 198-61, 201-70](#) of 23 October 2015.

¹⁵ *Guide to Practice on Reservations to Treaties*, Guideline 1.1.3 "Reservations relating to the territorial application of the treaty" (document A/66/10).

and the Russian Federation,¹⁶ a Grand Chamber of the ECtHR found that such a declaration made by Moldova in respect of Transnistria “cannot be equated with a reservation within the meaning of the Convention, so that it must be deemed invalid.”¹⁷ A careful reading of the decision in the *Ilaşcu* case suggests that the declaration was only found to be invalid as a reservation within the meaning of article 57 alone or even taken together with article 56 of the ECHR. In that sense, the GC decision is wholly consistent with the Court’s earlier case law, which seeks to avoid any loopholes or gaps, whether in space or time, which would deprive persons of the effective protection of the Convention.

Despite some differences, the statements by Azerbaijan, Georgia, Moldova and Ukraine should in my view not be seen as reservations in the sense of the Vienna Convention, but rather as declarations relating to a factual situation in the territories in question. Their main purpose is to inform the other states parties of a situation which makes it impossible for the countries in question to guarantee compliance with their treaty commitments in territories over which they exercise no effective control. Indeed none of the statements has prompted objections by other parties. Had we considered them as reservations, some of these declarations would have been prohibited because certain of the conventions to which they have been made exclude explicitly the formulation of any reservations.

It must be stressed that the statements of this kind cannot absolve the countries of all responsibility regarding events occurring on these territories. They remain responsible in so far as they exercise “*jurisdiction*”, for example as a consequence of military action against separatist movements. Under the ECHR, states parties remain moreover under an obligation to use all the legal and diplomatic means available to them in the attempt to continue to secure to the people living there the enjoyment of ECHR rights and freedoms.¹⁸

ECHR as a special case

Also as regards depositary practice, the European Convention on Human Rights constitutes a special case.¹⁹ Already in 1975, the then Director of Legal Affairs observed in respect of a reservation entered by France in respect of article 15 of the ECHR:

“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

¹⁶ Grand Chamber Decision as to the admissibility of application no. [48787/99](#) by *Ilie Ilaşcu and Others against Moldova and the Russian Federation* (4 July 2001).

¹⁷ *Ibid.*, p. 21.

¹⁸ *Ilaşcu and Others v. Republic of Moldova and Russia*, cited below, § 333 and *Catan and Others v. the Republic of Moldova and Russia*, cited below, §§ 109-110.

¹⁹ Article 59 of the ECHR; see Polakiewicz, *op. cit. supra note 6*, pp. 90 et seq., in particular pp. 104-105.

scope and admissibility of a reservation relating to one of its provisions may, if appropriate, be raised and settled by the same organs.”²⁰

While refraining from any act or declaration that could interfere with the exercise of the functions of the ECtHR, the Secretary General as depositary has to ensure that reservations conform to the applicable clauses, in particular articles 56 and 57 of the ECHR. In order to do this, the treaty office evaluates the legal nature of a statement independently, if necessary after having consulted the state concerned and determines whether it constitutes a proper reservation or only an interpretative declaration.

In that context, it is worth mentioning that various member states, before expressing their consent to be bound, have informally consulted the treaty office with respect to the compatibility of legally complex reservations or declarations, in particular but not only relating to the ECHR. Though not legally binding for the states concerned, the opinions given by the treaty office have provided useful guidance and have usually been followed in practice.

4. Additional depositary functions

Depositaries are occasionally required to perform additional functions such as convening conferences or meetings of the parties or maintaining a register of experts. In our practice we have had two interesting cases relating to the provisional application of certain provisions of Protocol 14 to the ECHR and the so-called Riga Protocol on foreign fighters (CETS No. 217, 2015).

Provisional application of Protocol 14 and Protocol 14bis to the ECHR

The urgent need to reform certain aspects of the control mechanism of the European Convention on Human Rights was the principal reason for the adoption of Protocol No. 14 to the Convention in 2004. The ratification process took however much longer than expected. Faced with an ever accelerating influx of new applications and a constantly growing backlog of cases, the President of the Court drew in October 2008 attention to the extremely serious situation and proposed the urgent implementation of certain procedural provisions of Protocol No. 14, in particular the single-judge procedure and the competence of the three-judge committee for repetitive cases.²¹

²⁰ Translation by P.-H. Imbert, ‘Reservations and Human Rights Conventions’, (1981) 6 Human Rights Review 28 (60, note 99).

²¹ Requested by the CM, both the Steering Committee on Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI) concluded that, whilst the best solution remained entry into force of Protocol No. 14, implementation of the two procedures by means of a Protocol No. 14 bis, pending entry into force of Protocol No. 14, would be fully compatible with the principles of public international law.

The rather complex legal issues raised by the proposed provisional application were examined by the Steering Committee on Human Rights (CDDH)²² and the CAHDI.²³ Since Protocol No. 14 did not contain any provision allowing provisional application, it was necessary to create a legal basis for that purpose. Taking into account the different constitutional traditions among the member states, it was eventually decided to use two parallel procedures. On the one hand, Protocol No. 14bis was adopted by the Committee of Ministers which simply reproduced the relevant provisions of Protocol No. 14 combined with a provision allowing for their provisional application. This option had however the drawback that it required the signature and ratification of a new legal instrument. Following CAHDI's advice, 10 member states were able to pursue a more rapid option, namely the adoption of an agreement on provisional application by a conference of the parties.²⁴ In his capacity as depositary of the ECHR, the Secretary General convened a conference of high contracting parties in the margins of the 119th Ministerial Session of the Committee of Ministers held in Madrid on 12 May 2009. The Secretary General opened the conference and presided over it until a chairperson was elected. The conference agreed by consensus that *“the provisions regarding the new single-judge formation and the new competence of the Committees of three judges contained in Protocol No. 14 to the European Convention on Human Rights are to be applied on a provisional basis with respect to those states that express their consent.”*²⁵

Activation of the 24/7 network under the Riga Protocol

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217, 2015) effectively implements UNSC Resolution 2178 (2014) on ‘Threats to international peace and security caused by terrorist acts’. It provides inter alia for the setting up of a network of contact points for the exchange of police information between the parties concerning persons alleged to have committed the crime of travelling abroad for the purposes of terrorism. With a view to facilitating the timely exchange of information prior to the entry into force of the Protocol, the member states of the Council of Europe called at the 126th Committee of Ministers’ Ministerial Session on 18 May 2016 *“for the expeditious designation of the 24/7 contact points ... as provided for by the Additional Protocol to the Council of Europe*

²² See documents CDDH(2008)014 Addendum I for the CDDH Preliminary Opinion, CM(2009)56 add for the CAHDI Opinion and CM(2009)51 add for the CDDH Final Opinion. The CDDH’s Reflection Group (DH-S-GDR) also contributed to the analysis in the period between December 2008 and March 2009.

²³ [“Opinion of the CAHDI on the Public International Aspects of the Advisability and Modalities of inviting the European Court of Human Rights to put into practice certain procedures already envisaged to increase the Court’s case-processing capacity, in particular the new single-judge and committee procedures”](#) adopted in March 2009.

²⁴ See article 25 (1) (b) of the VCLT: *“A treaty or part of a treaty is applied provisionally pending its entry into force if ... the negotiating states have in some other manner so agreed.”*

²⁵ 112th Session of the Committee of Ministers - Madrid, 12 May 2009, Volume of Decisions Addendum 1 to the Minutes, CM(2009)PV-Add 1.

*Convention on the Prevention of Terrorism (CETS 217), pending its entry into force.*²⁶ It can be argued that in this particular case the ministers acted simultaneously as a forum of negotiating states and the Secretary General subsequently invited member states to appoint such contacts.

4. Concluding remarks

The Max Planck Encyclopedia of Public International Law describes the role of the depositary as “*an understated yet highly significant role in the administration of the treaty.*” I could not agree more. The functions that the Secretary General exercises as depositary are not very visible or spectacular, but essential for the proper management of our treaties which “*constitute a unique integrated system of legal standards collectively defined within the Organisation and agreed upon by the member States.*”²⁷

Our conventions and agreements are essential for the Council of Europe. Most of our activities are to some extent treaty-based. To date, 223 international conventions and agreements have been concluded within our Organisation with a view to fostering international cooperation, establishing common European standards and approximating the legislation of European states. Treaties constitute the most effective means of achieving the aim of the Council of Europe that is to achieve a greater unity between its members.

In the time allocated to me I could only deal with some aspects of this largely unknown work but I am more than happy to reply to your questions.

Thank you for your attention.

²⁶ 126th Session of the Committee of Ministers - Sofia, 18 May 2016, Volume of Decisions Addendum 1 to the Minutes, CM/PV(2016)126 Addendum 1, Item 2b.

²⁷ Committee of Ministers reply to Parliamentary Assembly Recommendation 1920(2010) on ‘Reinforcing the effectiveness of Council of Europe treaty law’.