STELLUNGNAHMEN

Die »auslegende Erklärung« der Schweiz zu Art.6 Abs.3 *lit.*e der Europäischen Menschenrechtskonvention

Anmerkung zum Bericht der Europäischen Menschenrechtskommission im Fall *Temeltasch* vom 5. Mai 1982

Der nach der zustimmenden Entscheidung des Ministerausschusses vom 24. März 1983[1] nunmehr veröffentlichte Bericht der Kommission im Fall *Temeltasch*[2] leistet einen wichtigen Beitrag zur Klärung von Inhalt und Anwendungsbereich des Art.64 der Europäischen Menschenrechtskonvention (EMRK)[3]. Diese Bestimmung, deren umstrittener materieller Regelungsgehalt[4] durch die Entscheidung der Kommission in wesentlichen Punkten geklärt worden sein dürfte, regelt die Zulässigkeit von Vorbehalten zur EMRK[5]. Der *Temeltasch*-Fall warf zunächst die Frage auf, ob auch

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[1] Resolution DH (83) 6.

[2] Council of Europe, European Commission of Human Rights, Report of the Commission (adopted 5 May 1982). Application No.9116/80, *Alparslan Temeltasch* against *Switzerland*, auszugsweise wiedergegeben unten S.834ff.

[3] Zum *Temeltasch*-Fall vgl. auch B. Wagner/L. Wildhaber, Der Fall Temeltasch und die auslegenden Erklärungen der Schweiz, Europäische Grundrechte Zeitschrift (EuGRZ) 10 (1983), S.145ff.

[4] Vgl. hierzu R. Kühner, Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art.64 MRK am Beispiel der schweizerischen »auslegenden Erklärung« zu Art.6 Abs.3 *lit.*e MRK, ZaöRV 42 (1982), S.58ff. (69–82).

[5] Art.64 lautet: »1. Jeder Staat kann bei Unterzeichnung dieser Konvention oder bei Hinterlegung seiner Ratifikationsurkunde bezüglich bestimmter Vorschriften der Konven-

sogenannte interpretative Erklärungen, wie die schweizerische Erklärung zu Art.6 Abs.3 *lit.*e der Konvention[6], als Vorbehalte im Sinne des Art.64 EMRK angesehen werden können[7]. Der Beschwerdeführer, ein holländischer Staatsbürger türkischen Ursprungs, hatte geltend gemacht, die schweizerische auslegende Erklärung sei kein gültiger Vorbehalt im Sinne von Art.64 EMRK[8].

Bevor die Kommission sich der Beantwortung dieser Frage zuwendet, untersucht sie zunächst ihre Kompetenz zur Überprüfung der Vereinbarkeit von Vorbehalten mit Art.64 EMRK[9]. Dieses Vorgehen erscheint angesichts der an der Kompetenz der Kommission in der Literatur geäußerten Zweifel[10] gerechtfertigt, obwohl die ältere Rechtsprechung der Kommission zur Vorbehaltsproblematik die Kompetenz der Konventionsorgane zur Überprüfung von Vorbehalten niemals in Zweifel gezogen hat[11]. Ihre Kompetenz zur Überprüfung von Vorbehalten begründet die Kommission

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tion einen Vorbehalt machen, soweit ein zu dieser Zeit in seinem Gebiet geltendes Gesetz nicht mit der betreffenden Vorschrift übereinstimmt. Vorbehalte allgemeiner Art sind nach diesem Artikel nicht zulässig.

2. Jeder nach diesem Artikel gemachte Vorbehalt muß mit einer kurzen Inhaltsangabe des betreffenden Gesetzes verbunden sein«.

[6] Bei ihrem Beitritt zur EMRK am 28.11.1974 hat die Schweiz u. a. erklärt: «Le Conseil fédéral suisse déclare interpréter la garantie de la gratuité de l'assistance d'un avocat d'office et d'un interprète figurant à l'article 6, para.3, lettres c et e, de la convention comme ne libérant pas définitivement le bénéficiaire du paiement des frais qui en résultent».

[7] Vgl. hierzu Kühner (Anm.4), S.65ff., und Wagner/Wildhaber (Anm.3), S.146ff.

[8] A. Temeltasch wurde 1978 in der Schweiz festgenommen, weil man in seinem Wagen Drogen gefunden hatte. Ein gegen ihn durchgeführtes Strafverfahren endete mit einem Freispruch und seiner Verurteilung zur Zahlung von 500.– Schweizer Franken Gerichtskosten. Seine hiergegen gerichteten Rechtsmittel blieben erfolglos. Das schweizerische Bundesgericht wies in letzter Instanz eine die Verletzung von Art.6 Abs.3 *lit.*e EMRK rügende staatsrechtliche Beschwerde Temeltaschs unter Hinweis auf die auslegende Erklärung der Schweiz zu dieser Bestimmung zurück (vgl. 8 EuGRZ 1981, S.220ff.), weil es danach zulässig sei, Dolmetscherkosten zu den Prozeßkosten zu zählen, die dem Verurteilten nach Abschluß des Verfahrens auferlegt werden könnten. Hierauf rief der Beschwerdeführer die Kommission an und rügte eine Verletzung von Art.6 Abs.3 *lit.*e EMRK, da nach der *Luedicke*-Entscheidung des Europäischen Gerichtshofs für Menschenrechte (6 EuGRZ 1979, S.34ff.) Art.6 Abs.3 *lit.*e keine vorläufige, sondern eine endgültige Befreiung von Dolmetscherkosten garantiere. Die Entscheidung der Kommission über die Zulässigkeit der Beschwerde Temeltaschs ist wiedergegeben in ZaöRV 42 (1982), S.150ff.

[9] Ziff.58–67 des Kommissionsberichts, vgl. unten S.835f.

[10] Vgl. etwa P.H. Imbert, Die Frage der Vorbehalte und die Menschenrechtskonvention, in I. Maier (Hrsg.), Europäischer Menschenrechtsschutz – Schranken und Wirkungen – Verhandlungen des Fünften Internationalen Kolloquiums über die Europäische Menschenrechtskonvention in Frankfurt (Main) (1982), S.95ff. (107ff.).

[11] Zur älteren Rechtsprechung der Kommission vgl. Kühner (Anm.4), S.73ff.

mit dem spezifischen Charakter der EMRK[12]. Sie verweist insbesondere auf den Umstand, daß Abschnitt III der Konvention besondere Organe vorsehe, welche für die Überwachung der Einhaltung der einzelnen Konventionsbestimmungen verantwortlich seien. Angesichts dieser klaren Aussage dürfte der Streit um die Kompetenz der Kommission zur Überprüfung von Vorbehalten nunmehr endgültig obsolet geworden sein.

Daß die Kommission die schweizerische Erklärung als echten Vorbehalt im Sinne des Art.64 ansehen würde, war angesichts der zuvor im Schrifttum zu dieser Frage vertretenen Auffassungen[13] und der Entstehungsgeschichte der schweizerischen Erklärung[14] zu erwarten und dürfte niemanden sonderlich überrascht haben. Da Art.64 weder eine Definition des Begriffs »Vorbehalt« noch des Begriffs »interpretative Erklärung« enthält, mußte die Kommission insoweit auf die im Rahmen des allgemeinen Völkerrechts entwickelten Begriffsbestimmungen abstellen. Unter Berücksichtigung des einschlägigen Schrifttums und der Vorbehaltsdefinition des Art.2 Abs.1 *lit.*d der Wiener Vertragsrechtskonvention, den sie als Kodifizierung geltenden Gewohnheitsrechts versteht[15], kommt die Kommission zu dem Ergebnis,

> "... that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending to exclude or alter the legal effect of some of its provisions, such a declaration, whatever it is called, must be assimilated to a reservation within the meaning of Article 64 of the Convention"[16].

Sodann untersucht die Kommission ausführlich den von der Schweiz mit ihrer Erklärung verfolgten Zweck[17]. Nach Ansicht der Kommission zeigt bereits die Formulierung der Erklärung, daß die Schweiz das in Art.6 Abs.3 *lit.*e garantierte Recht auf kostenlosen Beistand eines Dolmetschers nur eingeschränkt anerkennen wollte[18]. Die Berichte des Bundesrats und die Beratungen des Ständerats und des Nationalrats bestätigten, daß die Schweiz die Absicht gehabt habe, ihrer auslegenden Erklärung die gleichen Rechtswirkungen beizumessen wie einem förmlichen Vorbehalt[19]. Der Schweiz kam insoweit wohl auch zustatten, daß zum Zeitpunkt

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[12] Ziff.62–64 des Kommissionsberichts, vgl. unten S.835f.
[13] Vgl. Kühner (Anm.4), S.66 dort Anm.35.
[14] Vgl. hierzu Kühner, S.65ff., und Wagner/Wildhaber (Anm.3), S.146ff.
[15] Ziff.68 des Kommissionsberichts, vgl. unten S.837.
[16] Ziff.73 des Kommissionsberichts, vgl. unten S.838.
[17] Ziff.73–82 des Kommissionsberichts, vgl. unten S.838f.
[18] Ziff.75 des Kommissionsberichts, vgl. unten S.838.
[19] Ziff.83 des Kommissionsberichts, vgl. unten S.839.

der Abgabe der Erklärung (1974) noch keine Rechtsprechung zur Auslegung des Art.6 Abs.3 *lit.*e existierte[20]. Die Schweiz konnte daher zu diesem Zeitpunkt nicht eindeutig erkennen, ob ihre Praxis hinsichtlich der Dolmetscherkosten konventionswidrig oder konventionskonform war. Im letzteren Fall wäre die Anbringung eines förmlichen Vorbehalts überflüssig gewesen; man wich daher angesichts der bestehenden Unsicherheit über die Rechtslage auf die Abgabe einer interpretativen Erklärung aus. Betrachtet man die Erklärung vor diesem Hintergrund, so wird verständlich, warum die Kommission der Behauptung der Schweiz Glauben geschenkt hat, sie habe mit ihrer Erklärung die gleiche Absicht verfolgt wie mit einem Vorbehalt.

Allerdings sind auch Fallkonstellationen denkbar, in denen eine andere Beurteilung notwendig erscheint. Da die Ausarbeitung und Formulierung von Vorbehalten und auslegenden Erklärungen allein dem Urheber der entsprechenden Erklärung obliegt[21], müssen Unklarheiten insoweit zu seinen Lasten gehen. Bei einer Divergenz des Erklärten mit dem Gewollten ist der Erforschung des wirklichen Willens des Urhebers der Erklärung durch das Vertrauen der anderen Staaten auf den im Text der Erklärung zum Ausdruck gekommenen Willen eine Schranke gezogen[22]. Bei einseitigen Willenserklärungen kommt der grundsätzlichen Vorrangstellung des erklärten vor dem wirklichen Willen eine erhöhte Bedeutung für die Rechtssicherheit zu[23]. Würde man lediglich auf die hinter der Erklärung stehende subjektive Absicht abstellen, stünde es letztendlich im Belieben des erklärenden Staates, den Inhalt seiner Verpflichtung zu präzisieren[24], weil niemand außer ihm selbst über seine eigentliche Intention zuverlässig Bescheid weiß. Indes ergaben sich für die Kommission auch aus dem Text der schweizerischen Erklärung Anhaltspunkte dafür, daß die Schweiz an Art.6 Abs.3 *lit.*e nicht gebunden sein wollte. Ob bei der Erforschung des Willens des Erklärenden auch auf Willensäußerungen zurückgegriffen werden kann, die der Urheber der Erklärung etwa im Rahmen der innerstaatlichen parlamentarischen Behandlung der entsprechenden Erklärung abge-

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[20] Die *Luedicke*-Entscheidung des Europäischen Gerichtshofs für Menschenrechte (Anm.8) erging erst im Jahre 1978.

[21] Vgl. C. Kopetzki, Zur Anwendbarkeit des Art.6 MRK im (österreichischen) Verwaltungsstrafverfahren, ZaöRV 42 (1982), S.1 ff. (40–41).

[22] Vgl. J.H.W. Verzijl, International Law in Historical Perspective, Bd.6 (1973), S.106.

[23] Vgl. Kopetzki (Anm.21), S.40–41.

[24] Vgl. Kopetzki, S.41.

geben hat, erscheint zweifelhaft[25]. Die Kenntnis derartiger Vorgänge dürfte nämlich dem Erklärungsempfänger nicht ohne weiteres zuzumuten sein, wenn er nicht vom Urheber der Erklärung ausdrücklich auf sie hingewiesen worden ist.

Ausführlich prüft die Kommission die Vereinbarkeit der schweizerischen Erklärung mit Art.64 EMRK. Sie erläutert erstmals, was sie unter einem Vorbehalt »allgemeiner Art« im Sinne des Art.64 Abs.1 Satz 2 versteht, obwohl hierzu eigentlich kein konkreter Anlaß gegeben war, weil an der Vereinbarkeit der schweizerischen Erklärung mit Art.64 Abs.1 Satz 2 von Anfang an keine ernsthaften Zweifel bestanden[26]. Für die Kommission ist ein Vorbehalt allgemeiner Art, "... if it does not refer to a specific provision of the Convention or if it is worded in such a way that its scope cannot be defined"[27]. Mit dieser klaren Aussage dürfte der Streit um die Bedeutung des Art.64 Abs.1 Satz 2 beendet sein.

Besondere Beachtung verdienen die Ausführungen der Kommission zur Vereinbarkeit der schweizerischen Erklärung mit Art.64 Abs.2 EMRK[28]. Die Kommission tritt den in der Literatur unternommenen Versuchen, Art.64 Abs.2 als reine Formvorschrift zu interpretieren[29], deutlich entgegen. Sie vertritt die Auffassung, Art.64 Abs.2 sei in engem Zusammenhang mit Art.64 Abs.1 zu interpretieren. Die von den Staaten geforderte kurze Inhaltsangabe des betreffenden innerstaatlichen Gesetzes solle verhindern helfen, daß Vorbehalte allgemeiner Natur angebracht werden[30]. Daneben ermögliche es die von Art.64 Abs.2 geforderte Inhaltsangabe den anderen Vertragsparteien, den Konventionsorganen und betroffenen Einzelpersonen, sich Klarheit über den Inhalt der von dem Vorbehalt erfaßten innerstaatlichen Rechtsnormen zu verschaffen[31]. Die Kommission sieht hierin eine wichtige Funktion des Art.64 Abs.2. Im konkreten Fall vertritt sie jedoch die Auffassung, daß der offensichtliche Verstoß der schweizerischen Erklärung gegen Art.64 Abs.2 nicht die Unwirksamkeit der schweizerischen Erklärung zur Konsequenz habe. Es sei "... essential to take account of the scope of the Convention provisions whose application a State intends to prevent by means of a reservation or an interpretative

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25 Vgl. Kopetzki, S.41 dort Anm.224.

26 Vgl. Kühner (Anm.4), S.69 mit weiteren Nachweisen.

27 Ziff.84 des Kommissionsberichts, vgl. unten S.840.

28 Ziff.85–91 des Kommissionsberichts, vgl. unten S.841; vgl. hierzu auch Kühner (Anm.4), S.80f.

29 Vgl. die Literaturnachweise bei Kühner, S.80 dort Anm.109.

30 Ziff.89 des Kommissionsberichts, vgl. unten S.841.

31 Ziff.90 des Kommissionsberichts, vgl. unten S.841.

declaration"[32]. Die Notwendigkeit einer Inhaltsangabe der von dem Vorbehalt betroffenen innerstaatlichen Normen sei bei Konventionsbestimmungen mit einem weiten Anwendungsbereich, wie z.B. Art.10 der Konvention, größer als bei einer Vorschrift mit einem klar begrenzten Anwendungsbereich, wie Art.6 Abs.3 *lit.*e. Nur weil Art.6 Abs.3 *lit.*e EMRK den exakt spezifizierten und in seinen Konturen scharfen Grundsatz des freien Beistandes eines Dolmetschers normiert, führt der Verstoß gegen Art.64 Abs.2 nach Meinung der Kommission hier nicht zur Unwirksamkeit der auslegenden Erklärung der Schweiz. Danach bleibt die Frage nach den Folgen eines Verstoßes gegen Art.64 Abs.2 in anderen Fällen, d.h. unter Konstellationen, wo der Vorbehalt zu Konventionsbestimmungen mit einem weniger scharf begrenzten Anwendungsbereich erklärt wurde, weiterhin offen. Die Kommission weist insoweit ausdrücklich darauf hin, daß "... it is possible that a reservation made in breach of the requirements of Article 64 (2) could be regarded as contrary to the Convention and as not having the effects intended by the State making it"[33]. Man darf gespannt sein, wie die Kommission diese, im Vergleich zu früheren Entscheidungen, Geist und Buchstaben des Art.64 Abs.2 sehr ernst nehmende Rechtsprechung[34] fortführen wird. Jedenfalls scheint es nach der *Temeltasch*-Entscheidung nicht mehr ausgeschlossen, daß die Kommission einen Vorbehalt wegen eines Verstoßes gegen Art.64 für unwirksam erklärt. Der schweizerischen Erklärung zu Art.6 Abs.3 *lit.*e blieb dieses Schicksal erspart. Ihr kommen die Rechtswirkungen eines rechtsgültig erklärten Vorbehaltes zu[35]. Die Verurteilung A. Temeltaschs zur Zahlung der in dem schweizerischen Strafverfahren entstandenen Dolmetscherkosten stellt daher keine Verletzung des Art.6 Abs.3 *lit.*e EMRK dar[36]. Auf Grund ihres Vorbehalts kann die Schweiz auch weiterhin Art.6 Abs.3 *lit.*e EMRK im Sinne einer lediglich vorläufigen Befreiung von Dolmetscherkosten interpretieren.

Rolf Kühner

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[32] *Ibid.*

[33] *Ibid.*

[34] Bereits in dem Verfahren Nr.1452/68, Yearbook of the European Convention on Human Rights, 6 (1963), S.268ff., hatte der Beschwerdeführer ausdrücklich einen Verstoß gegen Art.64 Abs.2 gerügt, auf den die Kommission damals aber nicht näher einging; vgl. Kühner (Anm.4), S.74.

[35] Ziff.92 des Kommissionsberichts, vgl. unten S.842.

[36] Die Entscheidung der Kommission erging mit neun zu zwei Stimmen.

Anhang

COUNCIL OF EUROPE
EUROPEAN COMMISSION OF HUMAN RIGHTS

Report of the Commission

(adopted 5 May 1982)

Application No.9116/80
Alparslan Temeltasch
against
Switzerland

IV. Opinion of the Commission

...

A. Can Switzerland's interpretative declaration on Article 6 (3) (e) of the Convention be regarded as a reservation and does it comply with the requirements of Article 64 of the Convention?

Article 64 reads 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.

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

55. The applicant alleges a violation by the Swiss judicial authorities of Article 6 (3) (e) of the Convention insofar as he was ordered to pay part of the interpretation costs on account of not understanding the language used in court.

This provision of the Convention states that "everyone charged with a criminal offence has the following minimum rights ... to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

56. As the European Court of Human Rights has held, the right protected by that provision "entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter without

subsequently having claimed back from him payment of the costs thereby incurred" (Eur. Court HR, Case of *Luedicke, Belkacem and Koç*, judgment of 28 November 1978, para. 46).

57. When Switzerland ratified the Convention on 28 November 1974, it formulated an interpretative declaration on Article 6 (3) (e), which stated that "the Swiss Federal Council declares that it interprets the guarantee of ... the free assistance of an interpreter in Article 6, paragraph 3 ... (e) of the Convention as not permanently absolving the beneficiary from payment of the resulting costs".

58. The questions arises whether Switzerland, having made this declaration, is or is not bound by the principle of free assistance of an interpreter, as defined by the Court in the above-mentioned case. In order to decide this question, the Commission must consider whether this declaration produces the legal effects peculiar to a reservation made in accordance with Article 64 of the Convention. It must, however, initially ascertain its competence in this matter.

1. The competence of the Commission to determine the compliance with the Convention of reservations or interpretative declarations made by party States

59. The respondent Government, although not expressly challenging the Commission's competence on this point, notes that the lack of objections by States parties to the Convention to Switzerland's interpretative declaration shows their implied consent to this declaration. It further maintains that the practice of implied consent is recognised in the Convention system.

60. The Commission is of the opinion that it is not indispensable, for the purposes of examining this case, to decide whether a reservation or an interpretative declaration made by a State Party to the Convention may or may not be the subject of express acceptance or objections by other Party States, given that this has not materialised in the case of Switzerland's interpretative declaration.

61. However, it emphasises that, even assuming that some legal effect were to be attributed to an acceptance or an objection made in respect of a reservation to the Convention, this could not rule out the Commission's competence to decide the compliance of a given reservation or an interpretative declaration with the Convention.

62. In this respect, the specific nature of the Convention should be recalled, and particularly the fact that in Section III it establishes organs responsible for supervising the enforcement of its provisions by the Contracting Parties.

63. The latter, in drawing up the Convention, did not intend – as the Commission has already noted, to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but ... to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law

(see Application No.788/50, *Austria* v. *Italy*, Rec.7, pp.23,41). The obligations undertaken by States are of an essentially objective character, which is particularly clear from the supervisory machinery established by the Convention. The latter "is founded upon the concept of a collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention" (*loc.cit.*, p.42).

64. The Court has carefully pointed out that "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement". (Eur. Court HR, *Case of Ireland* v. *United Kingdom*, Judgment of 18 January 1978, para.239).

65. In view of the above considerations, the Commission considers that the very system of the Convention confers on it the competence to consider whether, in a specific case, a reservation or an interpretative declaration has or has not been made in accordance with the Convention. Although it has never been required to decide the validity of a reservation, it has on the other hand given an interpretation thereof on several occasions (cf. *inter alia*, Applications No.462/59, Yearbook 2, p.382; No.473/59, Yearbook 2, p. 400; No.1047/61, Yearbook 4, p.357, and No.1452/62, Yearbook 6, p.269).

66. With particular reference to the reservation made by Austria to Article 1 of the Protocol in which it declared that it intended to continue to apply Parts IV and V of its State Treaty of 15 May 1955 in full, the Commission held that this reservation should be interpreted as intended to cover all legislative and administrative measures directly relating to the questions governed by these parts of the State Treaty. Parts IV and V of the Treaty, which lay down general principles could have no practical effect unless completed by other administrative and legislative measures (see above-mentioned Application No.473/59, p.405; see also Application No.8180/78, DR 20, pp.23,25).

67. The Court on the other hand, has never determined the validity of a reservation or an interpretative declaration but appears to recognise at least impliedly, its competence in this matter.

Thus, on two occasions, it interpreted reservations made by States parties to the Convention. In the *Ringeisen* case, it held that the Austrian reservation to Article 6 – which moreover it considered of its own motion – covered the proceedings challenged by the applicant, even though in the text of the reservation they were not expressly referred to (Eur. Court HR, Judgment of 16 July 1971, para.18). In another case, it rejected the interpretation put forward by the Irish Government of its reservations relating to Article 6 (3) (c) of the Convention, holding that that reservation "cannot be interpreted as affecting the obligations under Article 6 (1)" of that State (cf. Eur. Court HR, case of *Airey* v. *Ireland*, Judgment of 9 October 1979, para.26).

2. Can Switzerland's interpretative declaration on Article 6 (3) (e) be regarded as a reservation, within the meaning of Article 64 (1) of the Convention?

68. As Article 64 contains no definition of the term "reservation" the Commission must analyse this notion, and the notion of "interpretative declaration" as they are understood in international law. In this regard it will attach particular importance to the Vienna Convention on the Law of Treaties of 23 May 1969, which states above all the existing rules of customary law and is essentially in the nature of a codification.

In proceeding in this way, the Commission will nonetheless take account of the specific nature of the European Convention on Human Rights, which must be interpreted objectively, as has been stated above, and not on the basis of how one of the Contracting Parties understands its provisions at the time of ratification (cf. Application No. 4451/70 *Golder* v. *the United Kingdom*, report of the Commission, para. 44; see also judgments of the Court in the same case of 21 February 1975 and in the case of *Luedicke, Belkacem and Koç*, of 28 November 1978, para. 39).

69. Article 2 (1) (d) of the Vienna Convention reads as follows:

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

70. According to the International Law Commission, "the need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position, or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted" (cf. United Nations Conference on the Law of Treaties, Official Records, New York, 1971, p. 10).

71. This is the position adopted by the vast majority of legal writers who accept that an interpretative declaration can constitute a formal reservation, as defined in the above-mentioned provision. This interpretation attaches decisive importance only to the material part of the definition, i.e. the exclusion or alteration of the legal effect of one or more specific provisions of the treaty in their application to the State making the reservation.

72. The respondent Government relies in this respect on Professor McRae's submission, whereby a distinction should be drawn between a "mere interpretative declaration" and a "qualified interpretative declaration". In the latter case, a State makes a specific interpretation of the treaty or part of the treaty a condition of its ratification or accession ("the legal effect of interpretative declarations", BYIL 49, 1978, p. 160). The Government concludes that Switzerland's interpretative declaration belongs to this category and is therefore in the nature of a reservation.

73. The Commission agrees on this point with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending to exclude or alter the legal effect of some of its provisions, such a declaration, whatever it is called, must be assimilated to a reservation within the meaning of Article 64 of the Convention. It is thus indispensable to interpret the intention of the author of the declaration. Moreover, it is significant to note that when the Commission had to interpret Austria's reservations, it used the expression the "clear intention" of the Government in this context (cf. Applications 1452/62, Yearbook 6, p.277, and 3500/68, Yearbook 14, p.187).

This was moreover, the reasoning applied by the Court of Arbitration established by France and the United Kingdom when it decided that the French declaration relating to Article 6 of the Convention on the Continental Shelf should be regarded as a reservation "and not as an 'interpretative declaration'" (cf. French Documentation, Court of Arbitration, *French Republic* v. *United Kingdom of Great Britain and Northern Ireland*, Delimitation of the Continental Shelf, Decision of 30 June 1977, Paris, 1977).

74. In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of the actual terms of the above-mentioned interpretative declaration and the *travaux préparatoires* which preceded Switzerland's ratification of the Convention.

75. The Commission considers that the terms used (cf. para.57), taken by themselves, already show an intention by the Government to prevent the principle of absolutely free assistance of an interpreter, as laid down by Article 6 (3) (e) of the Convention from being invoked against it.

76. As regards the *travaux préparatoires*, the Commission refers to the Federal Council's reports to the Federal Assembly on the Convention of 9 November 1968 (Feuille fédérale, 1968 II, pp.1121, 1122) of 23 February 1972 (Rapport complémentaire, Feuille fédérale, 1972 I, p.995) and of 4 March 1974 (Feuille fédérale, 1974 I, pp.1034–1035). It also considers that it must take account in this context of the debates held in the Federal Chambers when the Convention was being approved and ratified.

77. As regards the above-mentioned Federal Council's reports, the Commission notes that the Swiss Government had, since 1968, been aware of the divergence between domestic legislation and the Convention on the principle of the free assistance of an interpreter as laid down by Article 6 (3) (e). The Government referred in this respect to the rule in many cantonal codes and in federal criminal procedure whereby the convicted person could be ordered to pay all litigation costs and suggested accordingly to the Federal Chambers that an interpretative declaration be made on this point when lodging the instrument of ratification of the Convention.

78. In its report of 1974, it again made the same proposal to the Federal Chambers, "in order to avoid any possible dispute and in view of the lack of case-law in the Commission on this point" (*loc.cit.*, p.1132).

79. With regard to the Federal Chambers' debates on ratification of the Convention, it is important to refer in particular to the statements that were made.

80. Mr. Graber, a Federal Councillor, stated before the National Council that "where the Convention and domestic law are incompatible, we shall make reservations and on a question of interpretation we shall make interpretative declarations" (BO of the Federal Assembly, CN 1974, p.1489). On the other hand, the Rapporteur of the Foreign Affairs Committee of the Upper Chamber and a States Councillor, Mr. Hefti, stated before the Council of States on 27 June 1972 that "interpretative declarations must be assimilated to reservations made in accordance with Article 64 of the Convention" (BO of the Federal Assembly, CN 1974, p.379).

Relying on the *travaux préparatoires*, the Government argues that they clearly show "beyond any possible doubt, that the Federal Council's interpretative declaration can be assimilated to a formal reservation". It further contends that continuing uncertainty in 1974 about the scope of Article 6 (3) (e) of the Convention led the Federal Council and the Federal Chambers to opt for an interpretative declaration rather than a formal reservation; it would have chosen the latter had Switzerland ratified the Convention after the judgment delivered by the Court on 28 November 1978 in the case of *Luedicke, Belkacem and Koç*.

81. The applicant does not seem to contest that this declaration may have the scope of a reservation, but does challenge its validity – as will be seen later – on the grounds of non-compliance with Article 64 (2) of the Convention.

82. In the light of the terms used in Switzerland's interpretative declaration on Article 6 (3) (e) of the Convention and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation.

3. The compliance of the Swiss interpretative declaration with Article 64 of the Convention

83. This provision lays down, *inter alia*, that reservations of a general character are not permitted (para.1) and that any reservation must include a brief statement of the law concerned (para.2).

The Commission will consider in turn whether Switzerland's interpretative declaration complied with these two conditions.

a. Is Switzerland's interpretative declaration a reservation "of a general character"?

84. Article 64 of the Convention contains no definition of the terms reservation "of a general character". The Commission will try to interpret these terms by relying on international law doctrine and, for the reasons mentioned above, the relevant provisions of the Vienna Convention (cf. *mutatis mutandis* para.68). A reservation is of a general character if it does not refer to a specific provision of the Convention or if it is worded in such a way that its scope cannot be defined. However, the Swiss interpretative declaration is clearly worded (cf. paras.57 and 75) and expressly refers to a provision of the Convention, i.e. Article 6 (3) (e). It cannot therefore, in the opinion of the Commission, be regarded as a reservation "of a general character".

b. Did Switzerland's interpretative declaration comply with the condition laid down in Article 64 (2) of the Convention and, if not, what are the legal effects thereof?

85. The applicant argues that Switzerland's interpretative declaration cannot be regarded as a properly executed reservation, insofar as the respondent Government has not complied with the formal requirement laid down in the above-mentioned provision of the Convention. The Government argues that this provision is only a procedural requirement and cannot be interpreted literally, given the fairly flexible practice adopted on this point by the States Parties to the Convention. It refers in this respect to the cases of Ireland and Malta, who have made a reservation and a declaration of interpretation in general terms on Article 6 (3) (e) and (2). Furthermore, a Federal State without a standard law of procedure such as Switzerland, cannot be required to provide a detailed list of all its sources of cantonal and even municipal law, and in any case, the Federal Council's report of 1968 and its messages of 1972 and 1974 refer by way of example to certain cantonal procedural provisions that do not recognise the principle of the free assistance of an interpreter.

86. The Commission finds that Switzerland has not accompanied its interpretative declaration by a brief statement of the law or laws concerned. Its submission seeking recognition of the practical difficulties involved in drawing up a list of these laws – which it intended to retain in force – does not seem very convincing. It is true on the one hand, that in the 1968 Federal Council Report, reference is made to Article 207 (1) (a) of the Code of Criminal Procedure of the Canton of Valais, and to Articles 98 and 245 of the Federal Code of Criminal Procedure, which provide that interpreters' costs may be ordered against the convicted person. However, the Commission considers that these references do not fulfill Switzerland's obligation under the above-mentioned provision.

87. It considers accordingly that Switzerland has violated paragraph 2 of Article 64. Nevertheless, the question which arises is whether non-compliance with this formal requirement does not leave the validity of Switzerland's interpretative declaration intact.

88. In order to determine the legal effects of such an omission, the Commission must specify the scope of obligations arising under this provision. This question cannot of course be considered *in abstracto*, i.e. the approach cannot be whether non-compliance with this formal requirement automatically invalidates any reservation or declaration made in this way. In the instant case, the Commission is only required to rule on Switzerland's interpretative declaration and the effects it produces.

89. The formal requirement in paragraph 2 of Article 64 of the Convention is essentially a supplementary condition, which must be interpreted together with paragraph 1 of that provision. It is recalled that the latter requires a reservation to refer to "any law then in force" and prohibits reservations of a general character. This concern probably underlies the existence of paragraph 2. In other words, the information requested of States making a reservation should help to avoid the possibility of reservations of a general character being made. In this respect, as the Commission has already found, Switzerland's interpretative declaration is beyond reproach.

90. However, is this to be regarded as the only *raison d'être* of Article 64, paragraph 2?

The Commission finds one other in any event: it is beyond question that the obligation on a State to append to its reservation a brief statement of the law or laws it intends to keep in force – which in principle are not consistent with the Convention – also enables other Contracting Parties, and the organs of the Convention and any person concerned, to be informed of this legislation. This is an important factor and as regards the problem before the Commission, it is essential to take account of the scope of the Convention provision whose application a State intends to prevent by means of a reservation or an interpretative declaration. The necessity of including a statement of the law is much greater where a very wide provision of the Convention is concerned, e.g. Article 10, than in the case of a provision of a more limited application, e.g. Article 6 (3) (e). In the former case, it is possible that a reservation made in breach of the requirements of Article 64 (2) could be regarded as contrary to the Convention and as not having the effects intended by the State making it.

91. In the instant case, however, Switzerland's interpretative declaration refers to a provision – Article 6 (3) (e) – which lays down a very specific principle: the free assistance of an interpreter. Consequently, the failure by Switzerland – an omission which it would have been desirable to avoid – to include a brief statement of the national laws that were contrary to this principle did not prove to be decisive in the circumstances of the present case. Indeed, the very terms of the

interpretative declaration were sufficient to make the applicant or his lawyer aware that the principle of the free assistance of an interpreter could not as such be invoked against Switzerland.

Conclusion

92. In view of the above considerations, the Commission concludes by nine votes to two, with one abstention, that Switzerland's interpretative declaration relating to Article 6 (3) (e) of the Convention, although it does not comply with the formal requirements of paragraph 2 of Article 64 of the Convention, produces the legal effects of a validly made reservation.

B. Does the obligation on the applicant to pay part of the interpreter's costs amount to a violation of Article 6 (3) (e) of the Convention, as it applies to Switzerland?

93. The applicant's principal allegation is the violation of the above-mentioned provision. However, the Commission has just held that Switzerland's interpretative declaration does produce the legal effects of a validly made reservation. It consequently excludes the application to Switzerland of the principle of the free assistance of an interpreter, which that provision prescribes.

Conclusion

94. For these reasons, the Commission concludes by nine votes to two, with one abstention, that there was no breach of Article 6 (3) (e) of the Convention in the present case.

The Secretary
of the Commission
(H. C. Kruger)

The President
of the Commission
(C. A. Norgaard)