Die »auslegende Erklärung« der Schweiz zu Art.6 Abs.1 EMRK und die Unzulässigkeit von Vorbehalten nach Art.64 EMRK

Anmerkung zum Urteil des Europäischen Gerichtshofes für Menschenrechte im Fall *Belilos* vom 29. April 1988

Mit dem Urteil im Fall *Belilos*[1] hat der Europäische Gerichtshof für Menschenrechte eine wichtige Wegmarke seiner Rechtsprechung gesetzt. Dieser Entscheidung kommt Bedeutung nicht nur für die Debatte um die Auslegung des Art.64 der Europäischen Menschenrechtskonvention (EMRK)[2] zu, sondern auch in einem weiteren Umfang für die Diskussion um Fragen der Wirkung von Vorbehalten im Rahmen von Menschenrechtsverträgen, wenn nicht sogar für die Entwicklung der allgemeinen Völkerrechtsregeln zur Wirkung von Vorbehalten[3]. Wirkt die Entscheidung auf den ersten Anschein wie eine Bestätigung und behutsame Weiterentwicklung der von der Kommission schon im Bericht zum Verfahren

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[1] Council of Europe, European Court of Human Rights, Judgment of the Court (adopted 29 April 1988), Case No.20/1986/118/167, *Marlène Belilos* against *Switzerland*, abgedruckt unten S.522.

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

[3] Vgl. zu diesen Problemfeldern 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.58 ff.; vgl. auch J. A. Frowein, Reservations to the European Convention on Human Rights, in: Protecting Human Rights: The European Dimension/Studies in honour of Gérard J. Wiarda (1988), S.193 ff.

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Temeltasch / Schweiz[4] entwickelten Grundsätze, so zeigt eine etwas genauere Untersuchung, daß der Gerichtshof in entscheidenden Punkten über die bisher als geklärt geltenden Fragen hinausgegangen ist und Grundlinien für die weitere Entwicklung der Konventionspraxis angedeutet hat.

Der Ausgangspunkt ist zunächst völlig vergleichbar der im Verfahren *Temeltasch / Schweiz*[5], anläßlich dessen sich die Kommission 1982 erstmals mit den grundsätzlichen Fragen der Auslegung des Art.64 EMRK zu befassen hatte. Die Beschwerdeführerin hatte geltend gemacht, die schweizerische »auslegende Erklärung«[6] sei kein gültiger Vorbehalt im Sinne des Art.64 EMRK. Die angegriffene kantonale Verfahrenspraxis im Bagatellstrafverfahren des Kantons Waadt[7] war – zumindest bei näherer Prüfung – als unvereinbar mit Art.6 Abs.1 EMRK einzustufen[8], jedenfalls soweit man die Auslegung zugrunde legt, die Kommission und Gerichtshof dieser

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[4] Bericht der Europäischen Menschenrechtskommission vom 5.5.1982, Decisions and Reports 31, S.120ff.; auszugsweise abgedruckt in ZaöRV 43 (1983), S.834ff. sowie in Europäische Grundrechte-Zeitschrift, Bd.10 (1983), S.150; vgl. dazu die Anmerkungen von R. Kühner, Die »auslegende Erklärung« der Schweiz zu Art.6 Abs.3 *lit.*e der Europäischen Menschenrechtskonvention, ZaöRV 43 (1983), S.828ff. sowie von B. Wagner/L. Wildhaber, Der Fall Temeltasch und die auslegenden Erklärungen der Schweiz, Europäische Grundrechte-Zeitschrift, Bd.10 (1983), S.145ff.

[5] Für kurze Sachverhaltsdarstellungen zum Fall *Temeltasch* vgl. Kühner (Anm.4), S.829 Anm.8 sowie B. Wagner in Europäische Grundrechte-Zeitschrift, Bd.10 (1983), S.150.

[6] Bei ihrem Beitritt zur EMRK am 28.11.1974 hat die Schweiz u.a. erklärt: »Für den Schweizerischen Bundesrat bezweckt die in Absatz 1 von Artikel 6 der Konvention enthaltene Garantie eines gerechten Prozesses, sei es in bezug auf Streitigkeiten über zivilrechtliche Rechte und Pflichten, sei es in bezug auf die Stichhaltigkeit der gegen eine Person erhobenen strafrechtlichen Anklage, nur daß eine letztinstanzliche richterliche Prüfung der Akte und Entscheidungen der öffentlichen Gewalt über solche Rechte und Pflichten oder über die Stichhaltigkeit einer solchen Anklage stattfindet«.

[7] M. Belilos war 1981 von der städtischen Polizeikommission in Lausanne wegen der Teilnahme an einer unangemeldeten Demonstration zu einer Geldstrafe von 200,–SFr. verurteilt worden. Die Beschwerdeführerin bestritt den Tatvorwurf. Auf ihren Einspruch trat die Polizeikommission erneut in das Verfahren ein und führte in mündlicher Verhandlung eine Beweisaufnahme durch, ohne allerdings die Verurteilung im Schuldspruch aufzuheben. Das bei der Kassationsabteilung des Kantonsgerichts eingelegte Rechtsmittel blieb ohne Erfolg; nach dem kantonalen Recht ist das Kantonsgericht nur zur Kontrolle der Rechtsanwendung, nicht aber zur Überprüfung der Tatsachenfeststellungen berufen. Die von der Beschwerdeführerin erhobene Rüge, das kantonale Verfahrensrecht verstoße gegen Art.6 Abs.1 EMRK, wurde vom Kantonsgericht wie von dem im Wege der staatsrechtlichen Beschwerde angerufenen Bundesgericht als unbegründet zurückgewiesen.

[8] Vgl. die Ausführungen des Gerichtshofes unter Ziff.61–73 der Entscheidung.

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Bestimmung seit der Entscheidung im Fall *Ringeisen* gegeben haben[9]. Betrachtete der Gerichtshof diese Rechtsfrage nicht als wirksam durch einen Vorbehalt aus dem Geltungsbereich der Konvention ausgeklammert, so mußte insoweit die Feststellung einer Konventionsverletzung erfolgen.

Mit der Frage, inwieweit den Konventionsorganen überhaupt die Befugnis zur Überprüfung der Vereinbarkeit von Vorbehalten mit Art.64 EMRK zustehe, die in der Entscheidung der Kommission im Fall *Temeltasch* noch breiten Raum eingenommen hatte[10], hält der Gerichtshof sich nicht mehr allzu lang auf. Zwar hatte die Schweiz – zumindest implizit – eine derartige Kompetenz jedenfalls gegenüber der Kommission noch bestritten, aber der Gerichtshof hält seine diesbezügliche Überprüfungsbefugnis für nahezu selbstverständlich[11]. Ob die Frage der Gültigkeit des Vorbehalts nun ein Problem der Zulässigkeit darstellt – so die Position der schweizerischen Regierung – oder ein Problem der Begründetheit, wird aus der eigenwilligen – und im Ergebnis ambivalenten – Konstruktion, die der Gerichtshof der Begründung zugrunde gelegt hat, allerdings nicht deutlich[12].

In den – recht langen – Ausführungen zur Rechtsnatur der schweizerischen »auslegenden Erklärung«[13] nimmt der Gerichtshof weitgehend die von der Kommission im *Temeltasch*-Bericht vorgeprägten Ansätze[14] auf, die er sich dadurch zu eigen macht. Daß er die schweizerische Erklärung in die Nähe eines echten Vorbehaltes rückt[15], vermag nach der *Temeltasch*-Entscheidung der Kommission kaum noch zu überraschen. Die Entstehungsgeschichte der »auslegenden Erklärung« zu Art.6 Abs.1 EMRK, mit der der Gerichtshof sich ausführlich beschäftigte, sprechen in erheblichem Maße für eine beabsichtigte Vorbehaltswirkung – war die Erklärung doch (wie die zu Art.6 Abs.3 *lit.*e) ursprünglich als Vorbehalt konzipiert, und erst im letzten Stadium des innerstaatlichen Zustimmungsverfahrens wurde ihr die nunmehr offizielle Bezeichnung als «déclaration interprétative» gegeben[16]. Da für diesen Formenwechsel nicht zuletzt Erwägungen der schweizerischen Innenpolitik eine erhebliche Rolle gespielt zu haben schei-

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[9] Zur einschlägigen Rechtsprechung von Kommission und Gerichtshof vgl. W. Peukert in J.A. Frowein/W. Peukert, EMRK-Kommentar (1985), Rdnrn.88ff. zu Art.6.

[10] Vgl. Ziff.59–67 des Kommissionsberichts im Fall *Temeltasch* (Anm.4); vgl. auch Frowein (Anm.3), S.196f.

[11] Vgl. Ziff.50 der Entscheidung.

[12] Vgl. Ziff.38 der Entscheidung.

[13] Vgl. Ziff.40–49 der Entscheidung.

[14] Vgl. Ziff.68–82 des Kommissionsberichts zum Fall *Temeltasch* (Anm.4).

[15] Vgl. Ziff.49 der Entscheidung.

[16] Vgl. Ziff.30–33 der Entscheidung.

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nen, dürfte es eher naheliegen, der offiziellen Bezeichnung keine übertriebene Bedeutung beizumessen. Die gleichartige Entstehungsgeschichte, die die Erklärung zu Art.6 Abs.1 mit der – von der Kommission im *Temeltasch*-Fall als echten Vorbehalt eingestuften – Erklärung zu Art.6 Abs.3 *lit.*e EMRK verbindet, ließ bei vordergründiger Betrachtung ein gleiches Ergebnis – Qualifizierung als echter Vorbehalt – wie im *Temeltasch*-Verfahren erwarten. Nun hatte die Kommission im *Belilos*-Verfahren aber ihren Ansatz im Blick auf die Erfordernisse des Art.64 EMRK weiter differenziert. Eine »auslegende Erklärung« könne nur in Ausnahmefällen als echter Vorbehalt angesehen werden; sei die Erklärung so unbestimmt und auslegungsbedürftig wie im Falle der schweizerischen Erklärung zu Art.6 Abs.1, komme eine Vorbehaltswirkung nach dem System des Art.64 EMRK nicht in Betracht, weshalb die fragliche Erklärung nur als reine Interpretationserklärung klassifiziert werden könne[17]. Diese Auffassung hat sich der Gerichtshof nicht explizit zu eigen gemacht. Umgekehrt wird man allerdings vergeblich nach einer Passage der Begründung suchen, in der ausdrücklich festgestellt wird, die Erklärung sei als echter Vorbehalt einzustufen. Zwar lassen die gebrauchten Wendungen eine gewisse Präferenz für diesen Ansatz erkennen, aber letztendlich hat der Gerichtshof sich auf eine recht sibyllinische Formulierung beschränkt, die die Frage offen läßt[18].

Diese Frage bedurfte im Ergebnis keiner verbindlichen Antwort, da der Gerichtshof darauf verweisen konnte, daß selbst wenn die Erklärung grundsätzlich als echter Vorbehalt einzustufen sei, sie gegen die Erfordernisse des Art.64 EMRK verstoße und deshalb keine Vorbehaltswirkungen entfalten könne[19]. Mit diesen Erwägungen zur Zulässigkeit des Vorbehalts nach Art.64 EMRK greift der Gerichtshof ebenfalls wieder auf die von der Kommission im *Temeltasch*-Verfahren entwickelten Grundsätze zurück. Seine Umschreibung der von Art.64 Abs.1 Satz 2 EMRK verbotenen »Vorbehalte allgemeiner Art« gleicht weitgehend der von der Kommission entwickelten Definition[20] und präzisiert diese nur etwas:

"By 'reservation of a general character' in Art.64 is meant in particular a

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[17] Vgl. den Bericht der Europäischen Menschenrechtskommission vom 7.5.1986, *Belilos* against *Switzerland,* Application no.10328/83, Ziff.102; vgl. auch Ziff.41 der Entscheidung des Gerichtshofes.

[18] Vgl. Ziff.49 der Entscheidung.

[19] Vgl. Ziff.51 und Ziff.60 der Entscheidung.

[20] Vgl. Ziff.84 des Kommissionsberichts zum Fall *Temeltasch* (Anm.4).

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reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope"[21].

Genau diese Schwierigkeit hafte aber der schweizerischen Erklärung an, sobald man sie als Vorbehalt behandele. Der objektive Gehalt der gewählten Formulierung sei so unklar, die Erklärung so auslegungsbedürftig, daß die Erklärung den an sie zu stellenden Erfordernissen der inhaltlichen Präzision und Klarheit nicht genüge[22].

Verstärkt wird diese Wertung noch durch die Ausführungen zu Art.64 Abs.2. Hier konnte der Gerichtshof ebenfalls an die von der Kommission im Fall *Temeltasch* entwickelten Grundsätze[23] anknüpfen, die im Verfahren *Belilos* von der Kommission noch weiter präzisiert worden waren. Besondere Bedeutung kommt dabei der inhaltlichen Verschränkung mit dem Verbot »allgemeiner Vorbehalte« in Art.64 Abs.1 Satz 2 zu. Je größer die Reichweite der betroffenen Regelung und damit die Unbestimmtheit (und potentielle Tragweite) des Vorbehalts, desto größer ist das Bedürfnis nach einer präzisierenden Inhaltsangabe der vom Vorbehalt erfaßten nationalen Rechtsvorschriften. Die Vorschrift des Art.64 Abs.2 sei – so auch die Auffassung des Gerichtshofes – insoweit kein rein formales Erfordernis, sondern eine inhaltliche Anforderung an die Bestimmtheit im Interesse der Rechtsklarheit[24].

Als Vorbehalt war die schweizerische Erklärung somit für den Gerichtshof unwirksam. Dieses Verdikt der Unwirksamkeit schafft allerdings ein äußerst delikates Folgeproblem. Die Rechtsfolgen unzulässiger Vorbehalte sind selbst im Kontext des Art.64 EMRK alles andere als geklärt[25]. Führt die Unzulässigkeit des Vorbehalts zum Wegfall jeglicher Bindung an den Vertrag, führt sie im Gegenteil zur uneingeschränkten Bindung an den Vertrag oder zur eingeschränkten Bindung mit Ausnahme des von dem Vorbehalt betroffenen Vertragsteils? – so lautet die Palette der denkbaren (und vertretenen) Lösungsmöglichkeiten[26]. Das Schwergewicht in der Argumentation, das die Vertreter der schweizerischen Regierung in der Verhandlung vor dem Gerichtshof auf diesen Problemkomplex legten, hätte eigentlich eine relativ eingehende Auseinandersetzung mit diesen Fragen erwarten lassen. Die Erwartung wird jedoch von der Entscheidung ent-

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21 Vgl. Ziff.55 der Entscheidung.

22 *Ibid.*

23 Vgl. Ziff.85–91 des Kommissionsberichts im Fall *Temeltasch* (Anm.4).

24 Vgl. Ziff.59 der Entscheidung.

25 Vgl. Kühner (Anm.3), S.82 ff. mit weiteren Nachweisen.

26 Vgl. auch R. Kühner, Vorbehalte zu multilateralen völkerrechtlichen Verträgen (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.91) (1986), S.220 ff.

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täuscht, was der schweizerischen Seite Anlaß zu einiger Kritik geben dürfte. Auf die Feststellung, die Erklärung sei als Vorbehalt für unwirksam zu halten ("must be held to be invalid"), folgt nämlich nichts als der kryptische Satz: "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration"[27].

Nun könnte eingewandt werden, der Gerichtshof habe die Erklärung ja gar nicht ausdrücklich als Vorbehalt qualifiziert. Die gesamten Ausführungen zur Unzulässigkeit eines derartigen Vorbehalts nach Art.64 EMRK seien nur eine hypothetische Argumentation, die zeigen solle, daß die Erklärung keinen echten Vorbehalt darstellen könne (was dem Ansatz der Kommission sehr nahe käme). Im Rahmen des von der Kommission beschrittenen Begründungsweges war die Rechtsfrage der Folgen unzulässiger Vorbehalte auch wirklich nicht entscheidungserheblich. Diesen Weg dürfte der Gerichtshof sich mit der Formulierung seiner Schlußfolgerungen jedoch verbaut haben, als er ausdrücklich feststellte, die Erklärung sei »unwirksam«[28] – was nur heißen kann »als Vorbehalt unwirksam«; als gewöhnliche Interpretationserklärung stellte sich nicht die Frage der Wirksamkeit, sondern allenfalls die der sachlichen Richtigkeit, die die Erklärung als unbeachtlich erweisen könnte. Damit hätte dann aber auch das Problem der Rechtsfolgen dieser Unwirksamkeit einiger Erörterung bedurft.

Inwieweit der Wahl einzelner Worte eine derartige Bedeutung beigemessen werden kann, mag als zweifelhaft erscheinen. Sollte die extrem knappe Formulierung zu dieser Frage jedoch bedeuten – und eine andere denkbare Auslegung des Urteils ist nicht ersichtlich –, daß der Gerichtshof die Position einnimmt, im Falle der EMRK führe die Unzulässigkeit eines Vorbehalts zur uneingeschränkten Bindung der den Vorbehalt anbringenden Partei an die Konvention, soweit nicht erkennbar sei, daß die Vertragspartei die gesamte vertragliche Bindung von der Wirksamkeit des Vorbehalts abhängig mache, so hätte der Gerichtshof im Falle *Belilos* eine äußerst mutige Position bezogen, die diese Entscheidung als geradezu bahnbrechend für die Frage der Vorbehaltswirkungen erscheinen ließe.

Aus diesen schlaglichtartig gehaltenen Bemerkungen zu den grundlegenden Problemen und Folgerungen der *Belilos*-Entscheidung des Straßburger Gerichtshofes sollte deutlich geworden sein, daß dem Urteil in mehrfacher Hinsicht entscheidende Bedeutung zukommt. Zum einen für das Konventionssystem selbst: mit der Bestätigung und Fortschreibung der von der

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[27] Vgl. Ziff.60 der Entscheidung.
[28] "... the declaration ... must be held to be invalid" – Ziff.60 der Entscheidung.

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Kommission zu Art.64 entwickelten Grundsätze hat die Auslegung der Konvention in maßgeblichen Punkten eine endgültige Klärung und Präzisierung erfahren. Dem Urteil ist zum anderen aber auch für die zukünftige Praxis anderer Organe des Menschenrechtsschutzes erhebliche Bedeutung beizumessen. Mit der Betonung seiner Kompetenz zur Überprüfung von Vorbehalten und der einschränkenden Auslegung der Zulässigkeit »allgemeiner Vorbehalte« hat der Gerichtshof einen wichtigen Präzedenzfall geschaffen, der bei Bedarf von anderen Organen des internationalen Menschenrechtsschutzes – zu denken ist hier insbesondere an das Komitee nach dem Internationalen Pakt über Bürgerliche und Politische Rechte – aufgegriffen werden könnte.

Schließlich besitzt die Entscheidung auch für die Entwicklung der allgemeinen Vorbehaltsregeln eine in ihrer Bedeutung nicht zu unterschätzende Impulsfunktion. Mit dem vom Gerichtshof implizit zum Problem der Vorbehaltswirkungen bezogenen Standpunkt hat eine Tendenz Verstärkung erfahren, die insbesondere für den Bereich der Vorbehalte zu Menschenrechtsverträgen nur begrüßt werden kann. Nur über den – bisher selbst in der Literatur nur zaghaft vertretenen[29] – Ansatz der uneingeschränkten Bindung bei Unzulässigkeit des Vorbehalts kann den ausufernden Folgen unbestimmter Vorbehalte entgegengetreten werden ohne die Effektivität des Menschenrechtsschutzes zu beeinträchtigen[30]. Ob diese Tendenz allgemeine Zustimmung über den Sonderbereich der Menschenrechtskonventionen hinaus wird finden können – selbst für diesen Bereich fehlt bisher ein Konsens – wird sich erst in der Folgezeit erweisen können.

Bei der Bewertung des Urteils sollte aber nicht vergessen werden, daß der Gerichtshof in entscheidenden Punkten der Begründung sehr unbestimmte Formulierungen gewählt hat, die wichtige Weichenstellungen für die zukünftige Konventionspraxis weiterhin offen halten. Der Gerichtshof hat sich damit größtmögliche Freiheit bei der weiteren Entwicklung seiner Rechtsprechung gesichert, gleichzeitig aber Grundlinien der weiteren Entwicklung angedeutet, an die er bei Bedarf wieder anknüpfen kann. Wichtigste Neuheit der in der *Belilos*-Entscheidung angelegten Grundsätze stellt zweifellos die Behandlung der Vorbehaltswirkungen dar. Mit den – in einigen Punkten wohl als unzulässig einzustufenden – einschränkenden Erklärungen zur Anerkennung des Individualbeschwerderechts gemäß

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[29] Vgl. Kühner (Anm.3), S.83ff., 87 mit weiteren Nachweisen.

[30] Vgl. in diesem Sinne Frowein (Anm.3), S.197f.

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Art.25 EMRK durch die Türkei[31] steht ein auch politisch äußerst heikler Fragenkomplex im Hintergrund, der dem Gerichtshof durchaus gewärtig gewesen sein dürfte. Welche Linie die Kommission in ihrer Rechtsprechungspraxis hierzu beziehen wird, bleibt abzuwarten. Der Gerichtshof jedenfalls hat mit der Entscheidung im Fall *Belilos* wichtige Ansatzpunkte für die weitere Entwicklung zur Verfügung gestellt.

Eine weitere Folge des Urteils verdient es, zum Abschluß hier erwähnt zu werden, und zwar sind dies die Bemühungen der Schweiz, die Auswirkungen der *Belilos*-Entscheidung auf die Schweizer Rechtsordnung möglichst weitgehend zu begrenzen.

Für den Bereich der Strafrechtspflege sind Veränderungen der kantonalen Rechtslage unvermeidbar. So hat der Bundesrat die Kantone aufgefordert, ihr Verwaltungsstrafrecht auf die Vereinbarkeit mit der Rechtsprechung des Gerichtshofs hin zu überprüfen. Der direkt betroffene Kanton Waadt hat bereits Vorschläge für eine umfassende Rechtsänderung in die »Vernehmlassung« geschickt, nach der das überprüfende Gericht umfassende Kognition auch über die Tatsachen erhalten soll[32].

Für den »zivilrechtlichen Bereich« möchte die Schweiz dagegen an ihrer auslegenden Erklärung festhalten. Mit Schreiben vom 19. Mai 1988 hat der Schweizer Bundesrat folgende »präzisierende Mitteilung« abgegeben:

> "As of 29 April 1988 the [above-mentioned] declaration shall read as follows:
> The Swiss Federal Council considers that the guarantee of fair trial in Article 6 paragraph 1 of the Convention in the determination of civil rights and obligations is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations. For the purpose of the present declaration, 'ultimate control by the judiciary' shall mean a control by the judiciary limited to the application of the law, such as a cassation control"[33].

Gleichzeitig wurden die Kantone aufgefordert, ihr Zivil- und Verwaltungsrecht auf diese »Erklärung« hin durchzugehen und alle einschlägigen

[31] Vgl. zu diesem Problem C. Rumpf, Die Anerkennung des Individualbeschwerderechts gemäß Art.25 EMRK durch die Türkei, ZaöRV 47 (1987), S.778ff. (799ff.), sowie W. Kälin, Die Vorbehalte der Türkei zu ihrer Erklärung gemäß Art.25 EMRK, Europäische Grundrechte-Zeitschrift, Bd.14 (1987), S.421–429.

[32] Vgl. Neue Zürcher Zeitung vom 15.8.1988, S.21.

[33] Abgedruckt als Appendix VIII der "minutes" der 195. Kommissionssitzung – Council of Europe, European Commission of Human Rights, Document DH (88) 7 of 19 July 1988, S.24.

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Bestimmungen mit kurzer Inhaltsangabe aufzulisten und den Konventionsorganen zu übermitteln[34].

Das eigenwillige Vorgehen des Schweizer Bundes wäre einer gesonderten Anmerkung würdig. Im Ergebnis werden damit mehr Fragen aufgeworfen als gelöst. Ob eine nachträgliche »Heilung« einer unwirksamen »Erklärung« auf diesem Wege überhaupt möglich ist, mag schon angezweifelt werden. Ob die »Erklärung« in ihrer »präzisierten« Fassung überhaupt den Anforderungen des Art.64 EMRK entspricht, mag gleichfalls fraglich sein. Der Gerichtshof wird also – vielleicht sogar dank des Schweizerischen Vorgehens – bald Gelegenheit erhalten, weitere Zweifelsfragen in der Anwendung des Art.64 EMRK zu klären. Das als zu »technisch« wenig beliebte Thema der Vorbehalte scheint sich zur geradezu spannenden Materie im Rahmen der EMRK zu entwickeln. Stefan Oeter

Anhang

EUROPEAN COURT OF HUMAN RIGHTS

Belilos Case

Judgment of 29 April 1988

As to the Law

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

38. By way of a preliminary objection, the Government argued that Mrs. Belilos's application was incompatible with the international undertakings entered into by Switzerland under Article 6 § 1 of the Convention. They relied on the interpretative declaration made when the instrument of ratification was deposited, which is worded as follows:

"The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public

[34] Vgl. Neue Zürcher Zeitung vom 15.8.1988, S.21.

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authorities relating to such rights or obligations or the determination of such a charge".

In their submission, the Commission should have declined to exercise jurisdiction as the application related to a right that was not recognised by the Confederation.

39. The Court will examine the nature of the declaration in issue and then, if appropriate, its validity for the purposes of Article 64 of the Convention, which reads as follows:

"1. Any State may, when signing the 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".

A. The nature of the declaration

40. The applicant contended that the declaration could not be equated with a reservation. When ratifying the Convention, Switzerland had made two "reservations" and two "interpretative declarations"; in so doing, it had adopted a terminology that had been chosen quite deliberately. A reservation resulted in the Convention's being inapplicable in respect of a particular point, whereas a declaration on the other hand was only provisional in nature, pending a decision of the Strasbourg organs. Mrs. Belilos further argued that when in 1982 the Federal Department of Foreign Affairs had announced the withdrawal of the reservation in respect of Article 5 it had stated that only one reservation remained, the one in respect of the rule that hearings are to be held in public and judgments pronounced publicly. Having made the distinction in full knowledge of the circumstances, Switzerland could not now depart from it.

41. The Commission likewise reached the conclusion that the declaration was a mere interpretative declaration which did not have the effect of a reservation (see its report, § 102); it based its view both on the wording of the declaration and on the preparatory work. The latter showed that Switzerland's intention had been to deal with the situation arising as a result of the Court's judgment of 16 July 1971 in the *Ringeisen* case (Series A no. 13), i.e. in respect of administrative proceedings relating to civil rights; it did not, on the other hand, provide any indication of how the declaration might be applied as a reservation in the case of criminal proceedings. More generally, the Commission considered that if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former.

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42. In the Government's submission, on the other hand, the declaration was a "qualified" interpretative declaration. It consequently was in the nature of a reservation within the meaning of Article 2 § 1 (d) of the Vienna Convention on the Law of Treaties of 23 May 1969, which provides:

"'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".

43. The first of the considerations relied on by the Government was the purpose of the declaration. They claimed that it was to preserve proceedings which, while coming within the "civil" or "criminal" ambit of Article 6 § 1, initially took place before administrative authorities, in such a way that the court or courts to which appeal lay did not – or did not fully – review the facts. The declaration thus reflected the wish to respect the cantons' distinctive features, recognised in the Federal Constitution, with regard to procedure and the administration of justice. At the same time, the declaration was a "reaction" to the *Ringeisen* judgment previously cited.

This argument is closely related to the one based on the preparatory work, which the Court will consider below (see paragraph 48).

44. Another factor, in the Government's submission, was the wording used in the declaration which clearly had a restrictive character.

The Court acknowledges that the wording of the original French text of the declaration, though not altogether clear, can be understood as constituting a reservation.

45. In order to demonstrate that the declaration amounted to a reservation, the Government further relied on the fact that Switzerland's reservations and interpretative declarations went through identical processes with regard to establishing the grounds for their adoption, to their formulation and to their inclusion in the federal decree approving the Convention, which was adopted on 3 October 1974 by the Federal Assembly (...)[35]. The same procedure had been followed when the instrument of ratification was deposited (...).

The Court does not find this argument convincing. The fact that the making of interpretative declarations coincides with the making of reservations, that is to say takes place when the Convention is signed or when the instrument of ratification is deposited (Article 64), reflects normal practice. It is therefore not surprising that the two sets of texts, even if they differed in their legal character, should have been incorporated in a single parliamentary instrument and subsequently in a single instrument of ratification.

46. The Government also prayed in aid the Swiss practice in respect of reserva-

[35] Reference to the Facts.

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tions and interpretative declarations under which the criteria for distinguishing between the two concepts were not absolute. In the event of doubt as to the real meaning of a clause in a convention (for example where there was no established case-law on a point), the Federal Council would recommend making an interpretative declaration in order, where appropriate, to change the legal effect of the clause concerned. In the instant case Switzerland's two declarations had the same effect as reservations; they amounted to qualified declarations and not mere declarations.

Varying terminology was, the Government continued, a characteristic of the practice followed in the Convention system too. Nor, they said, was there anything surprising about that situation: international treaties had not – at least until recently – made any specific provision for the making of declarations; even today, the generic concept of a "reservation" in international law still embraced any unilateral declaration designed to preclude or modify the legal effect of certain treaty provisions in respect of the State making the reservation.

The Court cannot see how a lack of uniformity of this kind – even though it illustrates the relativity of the distinction – could in itself justify describing the declaration in issue as a reservation.

47. The Government derived an additional argument from the fact that there had been no reaction from the Secretary General of the Council of Europe or from the States Parties to the Convention.

The Secretary General had made no comment when he notified the Council of Europe member States of the reservations and interpretative declarations contained in Switzerland's instrument of ratification. Yet, so the Government maintained, it was open to him as the depositary, who had important prerogatives, to ask for clarifications and to make observations on the instruments he received, as he had shown in the case of the declaration made under Article 25 by the Turkish Government on 28 January 1987. As far as the reservations and interpretative declarations of Switzerland were concerned, it had, when they were in the process of formulation, made extensive enquiries of the Council of Europe's Legal Affairs Directorate so as to ensure that there was no objection from the Secretary General.

As to the States Parties, they did not deem it necessary to ask Switzerland for explanations regarding the declaration in question and had therefore considered it acceptable as a reservation under Article 64 or under general international law. The Swiss Government inferred that it could in good faith take the declaration as having been tacitly accepted for the purposes of Article 64.

The Court does not agree with that analysis. The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.

48. Lastly, the Government laid great emphasis on the preparatory work done on the declaration. They saw it as being of decisive importance, just as, they

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claimed, the Commission and the Committee of Ministers had done in connection with the *Temeltasch* application against Switzerland (no.9116/80, report of 5 May 1982 and Resolution DH (83) 6, Decisions and Reports no.31, pp.138–153). They referred in particular to two documents which the Federal Council had sent to the Federal Assembly and which related to the Convention: the supplementary report of 23 February 1972 and the communication of 4 March 1974 (...).

Like the Commission and the Government, the Court recognises that it is necessary to ascertain the original intention of those who drafted the declaration. In its view, the documents show that Switzerland originally contemplated making a formal reservation but subsequently opted for the term "declaration". Although the documents do not make the reasons for the change of nomenclature entirely clear, they do show that the Federal Council has always been concerned to avoid the consequences which a broad view of the right of access to the curts – a view taken in the *Ringeisen* judgment – would have for the system of public administration and of justice in the cantons and consequently to put forward the declaration as qualifying Switzerland's consent to be bound by the Convention.

49. The question whether a declaration described as "interpretative" must be regarded as a "reservation" is a difficult one, particularly – in the instant case – because the Swiss Government have made both "reservations" and "interpretative declarations" in the same instrument of ratification. More generally, the Court recognises the great importance, rightly emphasised by the Government, of the legal rules applicable to reservations and interpretative declarations made by States Parties to the Convention. Only reservations are mentioned in the Convention, but several States have also (or only) made interpretative declarations, without always making a clear distinction between the two.

In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 § 1 and to secure itself against an interpretation of that Article which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of Article 64 as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision.

B. The validity of the declaration

1. The Court's jurisdiction

50. The Court's competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration

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has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Articles 45 and 49 of the Convention, which were cited by the Government, and from Article 19 and the Court's case-law (see, as the most recent authority, the *Ettl and Others* judgment of 23 April 1987, Series A no.117, p.19, § 42).

2. Compliance with Article 64 of the Convention

51. The Court must accordingly ascertain whether the relevant declaration by Switzerland satisfied the requirements of Article 64 of the Convention.

(a) Article 64 § 1

52. Before the Commission the applicant conceded that the interpretative declaration was not a reservation of a general character, but before the Court she submitted the opposite. She now maintained that the declaration sought to remove all civil and criminal cases from the judiciary and transfer them to the executive, in disregard of a principle that was vital to any democratic society, namely the separation of powers. As "ultimate control by the judiciary" was a pretence if it did not cover the facts, such a system, she claimed, had the effect of excluding the guarantee of a fair trial, which was a cardinal rule of the Convention. Switzerland's declaration accordingly did not satisfy the basic requirements of Article 64, which expressly prohibited reservations of a general character and prohibited by implication those which were incompatible with the Convention.

53. The Government relied on the two criteria set forth by the Commission in its report of 5 May 1982 in the *Temeltasch* case and asserted that Switzerland's declaration was not of a general character.

They argued, in the first place, that it referred expressly to a specific provision of the Convention, paragraph 1 of Article 6, even if it inevitably had consequences for paragraphs 2 and 3, which contained guarantees that were "constituent elements, among others, of the general notion of a fair trial" (see the *Colozza* judgment of 12 February 1985, Series A no.89, p.14, § 26).

In the second place, they argued that it was worded in a way that made it possible to determine its scope clearly and that was sufficiently precise for other States Parties and for the Convention institutions. The Federal Council's intention had been to limit the extent of the guarantee of a fair trial, in particular in cases in which an administrative authority determined a criminal charge. It had in good faith chosen the expression "ultimate control by the judiciary" to denote a review of the cassation type, initiated by means of an application for a declaration of nullity *(pourvoi en nullité)* and confined to questions of law, i.e. examination of the propriety of the public authority's decision from the point of view of its

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conformity with the law. It had thus faithfully paraphrased – and extended to the criminal aspect of Article 6 – the argument put forward by Mr. Fawcett on behalf of the Commission minority in the *Ringeisen* case. It was, moreover, the Government continued, wrong to criticise the declaration – some fifteen years after it had been made – for being general and vague, on the basis primarily of the case-law subsequently developed by the Convention institutions, especially by the Court in its judgment of 10 February 1983 in the *Albert and Le Compte* case (Series A no.58). Lastly, the concept of "ultimate control by the judiciary" was not unknown to international human-rights law, as was shown by France's reservation to Article 2 of Protocol No.7 to the Convention.

At the hearing before the Court the Government mentioned a third point: compatibility with the object and purpose of the Convention. They considered such compatibility to be beyond doubt in the instant case, as the declaration related only to a particular aspect – not the substance – of the right to a fair trial.

54. The Commission recognised that it was necessary to take account of two circumstances: firstly, the preparatory work which preceded ratification, from which it emerged that Switzerland wanted to restrict the concept of a fair trial to a judicial review which did not entail a full determination on the merits; secondly, the stage of development of the case-law of the Convention institutions in 1974 – the Court had not yet stated that Article 6 § 1 guaranteed the "'right to a court' ... and [to] a determination by a tribunal of the matters in dispute ..., both for questions of fact and for questions of law" (see the *Albert and Le Compte* judgment previously cited, Series A no.58, p.16, § 29).

However, the Commission continued, the words "ultimate control by the judiciary" were ambiguous and imprecise. They created great uncertainty as to the effects of the declaration concerned on the application of paragraphs 2 and 3 of Article 6, particularly as regards decisions in criminal matters by administrative authorities. In the Commission's view, the declaration appeared to have the consequence that anyone "charged with a criminal offence" was almost entirely deprived of the protection of the Convention, although there was nothing to show that this had been Switzerland's intention. At least in respect of criminal proceedings, therefore, the declaration had general, unlimited scope.

55. The Court has reached the same conclusion. By "reservation of a general character" in Article 64 is meant in particular a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope. While the preparatory work and the Government's explanations clearly show what the respondent State's concern was at the time of ratification, they cannot obscure the objective reality of the actual wording of the declaration. The words "ultimate control by the judiciary over the acts or decisions of the public authorities relating to [civil] rights or obligations or the determination of [a criminal] charge" do not make it possible for the scope of the undertaking by Switzer-

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land to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the "ultimate control by the judiciary" takes in the facts of the case. They can therefore be interpreted in different ways, whereas Article 64 § 1 requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character.

(b) Article 64 § 2

56. In the applicant's submission, the interpretative declaration did not comply with Article 64 § 2 either, as it did not contain "a brief statement of the law concerned". No doubt the Government would have encountered practical difficulties in drawing up a list of the cantonal and federal laws which were not compatible with Article 6 § 1 at the time, but that did not justify disregarding an express condition of the Convention.

57. The Government conceded that the interpretative declaration was not accompanied by a "brief statement of the law concerned", but they maintained that the failure to comply with that formality could not be of any consequence. They pointed to the very flexible practice in the matter which they claimed had evolved with the tacit consent of the depositary and of the other Contracting States, and they referred to the cases of Ireland (reservation in respect of Article 6 § 3 (c)) and Malta (declaration of interpretation of Article 6 § 2). Above all, they argued that Article 64 § 2 did not take account of the specific problems which faced federal States and which could prove virtually insuperable. In order to fulfil the obligation, Switzerland would have had to mention most of the provisions in the twenty-six cantonal codes of criminal procedure and in the twenty-six cantonal codes of civil procedure, and even hundreds of municipal laws and regulations. This laborious exercise would have confused the situation instead of clarifying it. In sum, compliance with the letter of Article 64 § 2 would have entailed more drawbacks than advantages and might even have given rise to serious misunderstandings about the scope of Switzerland's international undertaking. In any case, the references to the Swiss Criminal Code in the Federal Council's supplementary report of 23 February 1972 to the Federal Assembly satisfied the requirement of Article 64 § 2 at least indirectly.

58. In the Commission's view, the undeniable practical difficulties put forward by the Government could not justify the failure to comply with paragraph 2 of Article 64. The latter applied to all the States Parties without any distinction, whether they were unitary or federal and whether or not they had a unified body of procedural law. Referring to its report of 5 May 1982 in the *Temeltasch* case, the Commission emphasised two points. Firstly, paragraph 2 of Article 64 had, in its opinion, to be read in the light of paragraph 1, which applied only to a "law then in force" and prohibited reservations of a general character; the details that the States

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concerned were asked to provide helped to prevent acceptance of such reservations. Secondly, the obligation to append to the reservation a brief statement of the laws that a State wished to retain enabled the other Contracting Parties, the Convention institutions and any other interested party to acquaint themselves with such legislation. That feature was of not inconsiderable value. The scope of the rule whose application the State wished to prevent by means of a reservation or interpretative declaration was a relevant factor here, because the wider the rule's scope, the greater was the need to include a statement of the law.

59. The Court concurs on the whole with the Commission's view on this point. It would add that the "brief statement of the law concerned" both constitutes an evidential factor and contributes to legal certainty. The purpose of Article 64 § 2 is to provide a guarantee – in particular for the other Contracting Parties and the Convention institutions – that a reservation does not go beyond the provisions expressly excluded by the State concerned. This is not a purely formal requirement but a condition of substance. The omission in the instant case therefore cannot be justified even by important practical difficulties.

C. Conclusion

60. In short, the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1

61. The applicant claimed to be the victim of a violation of Article 6 § 1 of the Convention, which reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

In her view, the Lausanne Police Board was not an "independent and impartial

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tribunal"; furthermore, neither the Criminal Cassation Division of the Vaud Cantonal Court nor the Federal Court had provided sufficiently extensive "ultimate control by the judiciary", as they were unable to reconsider the findings of fact which had been made by a purely administrative body, the Police Board.

62. The Court notes that those appearing before it did not dispute the applicability of Article 6 §1 in the instant case, apart from the effect of Switzerland's interpretative declaration. On the basis of the criteria which have been established in its case-law, it likewise considers that the offence of which the applicant was accused was a "criminal" one (see, *mutatis mutandis*, the *Öztürk* judgment of 21 February 1984, Series A no.73, pp.18–21, §§50–54).

1. The Lausanne Police Board

63. Mrs. Belilos complained that the Police Board was subordinate to the police authorities: consisting as it did of a single police official, it could not but take the police authorities' side.

The Commission noted in its opinion merely that the applicant had been fined by an administrative authority which made the final findings of fact.

The Government did not challenge that but argued that the applicant nonetheless received a fair trial. In the first place, the municipal official had in practice a large measure of independence in the execution of his duties, and Mrs. Belilos had never claimed, even by implication, that he was not impartial. Furthermore, the proceedings before him satisfied the essential requirements of Article 6 §1: a defendant could ask for inquiries to be made into the facts, and Mrs. Belilos had successfully availed herself of that possibility; the Board always considered the evidence and had only limited powers of punishment. Lastly, its decisions were not entered in the criminal records.

64. According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see, as the most recent authority, the judgment of 30 November 1987 in the case of *H* v. *Belgium*, Series A no.127, p.34, §50). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – serveral of which appear in the text of Article 6 §1 itself (see, *inter alia*, the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no.43, p.24, §55).

65. The 1969 Act describes the Police Board as a "municipal authority". As to the Federal Court, its judgment of 2 November 1982 mentions "administrative authorities" (...), an expression the Government adopted before the European Commission of Human Rights. Even if such terms do not appear to be decisive, they provide an important indication as to the nature of the body in question.

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66. However, the Police Board is given a judicial function in Vaud law and the proceedings before it are such as to enable the accused to present his defence. Its single member is appointed by the municipality, but that is not sufficient to cast doubt on the independence and impartiality of the person concerned, especially as in many Contracting States it is the executive which appoints judges.

The appointed member, who is a lawyer from police headquarters, is a municipal civil servant but sits in a personal capacity and is not subject to orders in the exercise of his powers; he takes a different oath from the one taken by policemen, although the requirement of independence does not appear in the text of it; in principle he cannot be dismissed during his term of office, which lasts four years. Moreover, his personal impartiality has not been called into question in the instant case.

67. Nonetheless, a number of considerations relating to the functions exercised and to internal organisation are relevant too; even appearances may be important (see, *mutatis mutandis*, the *De Cubber* judgment of 26 October 1984, Series A no.86, p.14 §26). In Lausanne the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society.

In short, the applicant could legitimately have doubts as to the independence and organisational impartiality of the Police Board, which accordingly did not satisfy the requirements of Article 6 §1 in this respect.

2. Available forms of appeal

68. In its judgment of 21 February 1984 in the *Öztürk* case, the Court held:

"Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6" (Series A no.73, pp.21–22, §58; see also the *Lutz* judgment of 25 August 1987, Series A no.123, p.24, §57).

These considerations apply in the instant case too. That being so, the Court must satisfy itself that the available forms of appeal made it possible to remedy the deficiencies noted in the proceedings at first instance.

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(a) The Criminal Cassation Division of the Vaud Cantonal Court

69. Mrs. Belilos applied to the Criminal Cassation Division of the Vaud Cantonal Court for a declaration of nullity under section 43 of the 1969 Act (...) but she claimed that she had not been able to bring her case before a court with unlimited jurisdiction and, in particular, with power to review the facts and hear witnesses. The Commission took the same view.

In the Government's submission, however, the judicial safeguards at cantonal level, looked at as a whole, went appreciably beyond mere review of the cassation type, notwithstanding that there was no straightforward transfer of jurisdiction over questions of fact; they were tantamount in practice to those afforded by a full-scale appeal. Firstly, the applicant had not availed herself of the appeal on points of law *(recours en réforme)* that she could have lodged "on grounds of incorrect application of the law or of misuse of discretionary powers in the application of the law" (section 44 of the 1969 Act ...). From this the Government inferred that she had not had any ground for complaint against the Police Board. Further, the Criminal Cassation Division was empowered – and even obliged, if there were "serious doubts" as to the facts (such as the applicant's participation in the unauthorised demonstration) – to refer the case back to the Police Board with a request that it should make further investigations (sections 43 and 52 of the 1969 Act ...).

70. The remedy of an appeal on points of law is not relevant, since, as the Government noted, it was not available for complaints such as the applicant's.

As to the Criminal Cassation Division, regard must be had to its judgment of 25 November 1981 (...). In it the court cited the Federal Council's communication of 4 March 1974 to the Federal Assembly, which referred to the case where "the decision taken by an administrative authority can be referred to a court not for a ruling on the merits but solely for review of its lawfulness *(pourvoi en nullité)*". It also acknowledged that the proceedings before it included neither oral argument nor the taking of evidence by, for example, hearing witnesses. As was moreover indicated by the Federal Court in its judgment of 2 November 1982, "It does not ... have full competence to re-examine the facts" (...). These various factors lead to the conclusion that the jurisdiction of the Criminal Cassation Division of the Vaud Cantonal Court was not in the instant case sufficient for the purposes of Article 6 § 1 (see, *inter alia*, the *Albert and Le Compte* judgment previously cited, Series A no.58, p.16, § 29).

(b) The Federal Court

71. In the applicant's view, the Federal Court could not remedy the deficiency at the municipal and cantonal levels, because when hearing a public-law appeal (the only one available in the instant case), it did not re-examine the questions of fact or of law, as its power was limited to ensuring that there had been no arbitrariness.

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The Government recognised that Mrs. Belilos had not had full judicial review of the issues of fact at this stage either. The Commission shared that view.

72. The Court has reached the same conclusion. In this connection, it takes account of the judgment given in the instant case on 2 November 1982 by the Federal Court (...). That court noted, after recapitulating the powers which the Cassation Division of the Vaud Cantonal Court has under sections 43 (e) and 44 of the 1969 Act (...): "The Cantonal Court ... enjoys a much more extensive power of review than the Federal Court in a public-law appeal, where jurisdiction is restricted to ensuring that a decision is not arbitrary". The Court has already noted, however, that the review provided at the level of the Cantonal Court was inadequate; so it was not possible subsequently to remedy the shortcomings found at the level of the Police Board.

73. In conclusion, there was a violation of Article 6 § 1.

III. APPLICATION OF ARTICLE 50

74. By Article 50 of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

In her claims under this provision the applicant sought cancellation and refund of the fine, amendment of the Vaud Municipal Decisions Act and reimbursement of costs and expenses.

A. Cancellation and refund of the fine

75. Mrs. Belilos sought in the first place an order that Switzerland should take "all the necessary measures to cancel the fine imposed ... on 4 September 1981 by the Police Board of the Municipality of Lausanne" and to reimburse her the relevant amount, that is to say 120 CHF.

The Delegate of the Commission considered that restitution should be ordered. As for the Government, they noted that the Court's judgments did not have the effect of quashing the decisions of domestic courts, and added that the correctness of the facts and the reasonableness of the fine were not in issue before the Convention institutions.

76. The Court notes that the Convention does not give it jurisdiction to direct the Swiss State – even supposing that the latter could itself comply with such a direction – to cancel the applicant's conviction and sentence (see, *mutatis mutan-*

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dis, the *Le Compte, Van Leuven and De Meyere* judgment of 18 October 1982, Series A no.54, p.7, § 13).

Furthermore, it cannot speculate as to what the outcome of the proceedings in question would have been had the violation of the Convention not occurred.

B. Legislative amendment

77. The applicant also requested the Court to ask Switzerland to „take all the necessary measures to ensure that the police boards no longer have the competence to make a final determination of the facts in proceedings resulting in the imposition of a fine, the Vaud Municipal Decisions Act of 17 November 1969 being altered to that effect".

Neither the Agent of the Government nor the Delegate of the Commission made any observations on this matter.

78. The Court notes that the Convention does not empower it to order Switzerland to alter its legislation; the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to its obligation under Article 53 (see, *mutatis mutandis*, the *Marckx* judgment of 13 June 1979, Series A no.31, p.25, §58, and the *F* v. *Switzerland* judgment of 18 December 1987, Series A no.128, p.19, §43).

C. Costs and expenses

79. Lastly, Mrs. Belilos claimed reimbursement of costs and expenses incurred in the proceedings before the Swiss courts and lawyer's fees and expenses in respect of the proceedings before the Convention institutions.

An award may be made under Article 50 in respect of costs and expenses that (a) were actually and necessarily incurred by the injured party in order to seek, through the domestic legal system, prevention or rectification of a violation, to have the same established by the Commission and later by the Court and to obtain redress therefor; and (b) are reasonable as to quantum (see, among other authorities, the *Olsson* judgment of 24 March 1988, Series A no.130, p. (...), § 104).

1. Costs incurred in the national proceedings

80. The applicant's claim related to court fees which the domestic courts required her to pay and to lawyer's fees, a total of 3,250 CHF.

As the Government made no objection and the Delegate of the Commission did not make any comment, Switzerland should reimburse the applicant 3,250 CHF.

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2. Costs incurred in the European proceedings

81. Mrs. Belilos claimed 25,000 CHF in expenses for her lawyer in respect of the European proceedings. She said that this claim was warranted by the importance of the case and the research he had had to undertake.

The Government objected that she had not provided any concrete evidence that such an amount had actually been incurred; they also considered the sum to be too large, in view of the circumstances in which the proceedings took place. They agreed, however, to an award of a "lump sum" of 8,000 CHF, from which the sums received in legal aid would fall to be deducted.

The Court notes, like the Delegate of the Commission, that the applicant did not produce details, with supporting documents, of the expenses not covered by legal aid. For this reason and having regard to the Government's observations, the Court awards Mrs. Belilos the uncontested sum of 8,000 CHF, less the 8,822 FF paid by the Council of Europe.

82. The applicant put the amount of her own expenses not covered by legal aid (travel within Switzerland, telephone and photocopies) at 3,000 CHF.

The Government challenged the accuracy of this figure, as it was unsupported by any further particulars. They said, however, that in a spirit of conciliation they were willing to pay 300 CHF.

The Delegate of the Commission did not express any opinion.

The Court considers it to be equitable that Switzerland should pay the applicant 500 CHF for her own out-of-pocket expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's preliminary objection;
2. *Holds* that there has been a breach of Article 6 § 1 of the Convention;
3. *Holds* that the respondent State is to pay the applicant in respect of costs and expenses the sum of 11,750 (eleven thousand seven hundred and fifty) Swiss francs, less 8,822 (eight thousand eight hundred and twenty-two) French francs to be converted into Swiss francs at the rate applicable on the day on which this judgment is delivered;
4. *Rejects* the remainder of the claim for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 April 1988.

Marc-André EISSEN — Rolv RYSSDAL
Registrar — President

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In accordance with Article 51 §2 of the Convention and Rule 52 §2 of the Rules of Court, the separate concurring opinions of Mr. Pinheiro Farinha and Mr. De Meyer are annexed to this judgment.

M.-A. E. R.R.

CONCURRING OPINION OF JUDGE PINHEIRO FARINHA
(Provisional translation)

1. I concur in the result.
2. I cannot endorse the view that Switzerland's declaration of interpretation of Article 6 of the Convention "can be understood as constituting a reservation".

Switzerland deposited reservations and declarations on the same day, in a single instrument of ratification. I do not think that it wished to give the same weight and intent to both categories. It did two different things.

CONCURRING OPINION OF JUDGE DE MEYER
(Provisional translation)

I should like briefly to explain my vote as regards the preliminary objection, which I, like all my colleagues, reject.

The object and purpose of the European Convention on Human Rights is not to create, but to recognise, rights which must be respected and protected even in the absence of any instrument of positive law.

It is difficult to see how reservations can be accepted in respect of provisions recognising rights of this kind. It may even be thought that such reservations, and the provisions permitting them, are incompatible with the *ius cogens* and therefore null and void, unless they relate only to arrangements for implementation, without impairing the actual substance of the rights in question.

This is the only spirit in which Article 64 of the Convention should be interpreted and applied; at most, that Article may allow a State to give itself, as a purely temporary measure, "at the time of" the signature or ratification of the Convention, a brief space in which to bring into line any laws "then in force in its territory" which do not yet sufficiently respect and protect the fundamental rights recognised in the Convention.

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