RESERVATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY

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1. INTRODUCTION

There is one and perhaps only one matter on which the Applicant, the Swiss Government, the European Commission of Human Rights, and the European Court of Human Rights were all expressly agreed in the *Belilos* case (1). That one matter was the importance of the Court's decision for the future of the legal system established by and functioning in accordance with the European Convention on Human Rights. The issue that was deemed so important concerned not a matter of substantive law but arose on a preliminary objection by the Swiss Government to the Court's jurisdiction. The substantive law and facts were relatively straight forward : they involved the application of the right, originally set out in the *Le Compte, Van Leuven and De Meyer* case (2) and subsequently elaborated in the *Albert and Le Compte* (3), and *Ozturk* (4) cases, of an individual charged with a criminal offence to a judicial hearing on facts and law either at first instance or on appeal.

The preliminary objection of the Swiss Government was not so straight forward. The specific issue it raised before the Court, for the first time, was the classification, interpretation, and effect under the Convention of « interpretative declarations ». But more widely, the Court was required to consider the role and application of not only interpretative declarations but also of reservations under the Convention particularly in light of Article 64. In reaching its decision, the Court has assisted the determination of the scope of the Convention and the mechanisms by which states can limit their obligations thereunder. The purpose of this paper is to analyse the

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(1) Judgement of 29 April 1988.
(2) Series A, No. 43.
(3) Series A, No. 58.
(4) Series A, No. 73, Judgement of 21 February 1984.

Court's judgement in the *Belilos* case from the perspective of its contribution to the law governing reservations under the Convention and to consider in light of it how in future cases the Court will approach unilateral declarations which purport to exclude or modify the Convention. For purposes of this task we will first outline the essential facts of the case. Second, we will consider a number of general issues relating to reservations under the Convention. Third, we will analyse the Court's judgement in detail in so far as it relates to reservations. Fourth, we will conclude with a consideration of the implications of the decision for reservations under the Convention.

2. THE FACTS

The facts giving rise to the *Belilos* case were these. The applicant, Mrs. Belilos, was a Swiss citizen who had been fined 200 Swiss Francs for allegedly taking part in an illegal demonstration in Lausanne on 4th April 1981. Sentence was imposed by the municipal Police Board and appeal to that body was permissible if, as was the case here, the accused was tried without being summoned. The applicant appealed.

On appeal, the conviction was upheld but the sentence was reduced to 120 Swiss Francs. Mrs. Belilos then appealed to the immediately superior court, the Criminal Cassation of the Vaud Cantonal Court. The appeal was put on two grounds. First, that the municipal Police Board was not an « impartial and independent » tribunal as stipulated by Article 6 of the Convention and that therefore the decision of the Board was null and void. Second, that the Court should listen to the evidence of her former husband and redetermine the facts. The Swiss government in reply relied on its interpretative declaration to Article 6 to limit its obligations under the Convention. The interpretative declaration provided 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 authorities relating to such rights or obligations or the determination of such a charge. »

The appeal was dismissed.

A further appeal to the Federal Court was then made solely on public law grounds. The failure of the Swiss legal system to provide for an appeal from an administrative authority on the facts was again said to be contrary to the Convention and Article 6. The Federal Court rejected this argument, emphasizing, as the Vaud Cantonal Court had done, that the Swiss interpretative declaration to Article 6(1) limited the obligations of Switzerland under that Article to ensuring a review of the lawfulness of the decision of the tribunal of original jurisdiction.

Mrs. Belilos then applied to the Commission on the grounds that the Swiss Court structure was contrary to Article 6(1). The Commission in a unanimous decision held that with respect to the substantive question of compliance with Article 6(1) the Swiss Court structure was contrary to the Convention and that, on the preliminary objection, the interpretative declaration relied upon by the Swiss Government was not intended to limit its obligations under the Convention and that, if it was, the declaration was incompatible with the requirements of Article 64, in that it was both of a « general character » contrary to Article 64(1) and did not provide « a brief statement of the law concerned ». For good measure, the Commission also observed that the failure to comply with the requirements of Article 64 suggested that the Swiss Government could not have intended the declaration to have the effect of a reservation, for if the Government had so intended it would surely have ensured the declaration's compliance with Article 64 (5).

Before the European Court of Human Rights, the Government relied chiefly on two arguments in respect of the alleged violation of Article 6(1). First, that as a matter of fact the municipal Police Board was impartial and independent and, second, that as the Vaud Cantonal Court had the right to refer cases back to the municipal Police Board, if it had « serious doubts » as to the facts, the obligation to provide for full judicial review of facts and law in cases determined by administrative tribunals was fulfilled. The Court rejected both contentions. In respect of the former it stated that justice must not only be done but also must be seen to be done and that, as « the member of the Police Board is a senior civil servant who is liable to return to other departmental duties... the applicant could legitimately have doubts as to the independence and organizational impartiality of the Police Board » (6). In respect of the latter, the Court refused to permit any incursions into the *Osturk* decision and rejected the half way house proffered it by the Swiss Government.

However, the more important question before the Court was whether the interpretative declaration precluded Switzerland's obligations under Article 6(1). The Court's answer was a clear no. In brief, the Court held that an interpretative declaration could be a reservation within the terms of Article 64 but that the failure to comply with the requirements of Article 64, in that the interpretative declaration was of a general character and did not contain a brief statement of the law concerned, rendered it invalid and that, not withstanding the invalidity of the reservation, the obligations contained in Article 6(1) remained binding on Switzerland.

(5) *Report of the Commission*. Adopted on 7 May, 1986. Application No. 10328/83, Paras. 90-128.

(6) Series A, No. 132, Para. 67.

3. RESERVATIONS TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. *Reservations : The Policy Issues*

The question of reservations to any major instrument on human rights is always one of some delicacy. Put simply, it is difficult for a government to ratify an instrument which affirms the « profound belief » of its members in those « Fundamental Freedoms which are the foundation of justice and peace in the world » and at the same time make reservations to those fundamental freedoms as if they were no more important than any one of the routine provisions in the myriad of agreements that most governments enter into every year without the appearance of some if not a considerable degree of insincerity.

Nevertheless, the success of the Convention is leading States Parties to question this view. It is argued that the teleological and purposive construction of the Convention by the Court is imposing obligations that states never intended to accept at the time of ratification, and that reservations made at the time of ratification are ineffective to preserve national law when it conflicts with the Convention in that such reservations were drafted to apply to those matters which at the time of drafting were considered to fall within the province of the Convention and ignore the Court's recent elaborations. Further, those states which ratified the Convention in its early days without making extensive reservations feel aggrieved and prejudiced in that more recent members have been able to make their ratifications subject to numerous, extensive, and well researched reservations which the former states have not been able to emulate (7). Indeed it is understood that some states have considered withdrawing from the Convention so that they may reratify subject to more accommodating reservations (8).

Some distinguished observers are seriously concerned by this development. Professor Frowein, for instance, has drawn attention to this practice which, in his opinion, « may run counter to the very essence of what the Convention is about », and it has led him to doubt whether « reservations are really compatible with the aim of the Convention at all » and to the view that « the possibility of unilateral derogation through reservations is

(7) See generally the *Memorial of the Swiss Government*, COUR (87) 28, pp. 13-14, 27 February 1987.

(8) FROWEIN, « Reservations to the European Convention on Human Rights », *in* MATSCHER and PETZOLD (eds.), *Protecting European Rights : The European Dimension : Studies in Honour of Gerard J. Wiarda*, 1988, p. 199.

one of the great weaknesses of the European Convention of Human Rights » (9).

B. *Article 64 : Its Structure*

The question of reservations to the European Convention is complicated by virtue of the express sanction given to reservations by Article 64. However, the permission is subject to controls. Article 64 provides 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.

Accordingly, states may make reservations to the Convention but any such reservation must a) be in respect of a particular provision of the Convention, b) not be of a general nature, c) contain a brief statement of the law which is not compatible with the Convention.

However, it is possible to argue that Article 64 is not intended to limit the general right to make reservations to the Convention but is clarificatory of those circumstances in which reservations can be made without necessarily imposing limits on those situations falling outside the Article's parameters. For example, it might be argued, if a reservation is narrowly defined as one so named on its face, that any unilateral act whereby a state purports to restrict or exclude its liability under a treaty and which is not so expressly labeled on its face falls outside the reach of Article 64 and is to be regulated by general international law (10).

C. *Theoretical Approaches to Article 64*

The different perspectives on the utility of reservations to the Convention has given rise to two very different approaches to the construction of Article 64 and the limits on reservations to the Convention generally. The first approach requires reservations to be construed solely in accordance with the relevant rules of international law. The second approach gives emphasis to the special nature of the European Convention on Human Rights, recognized by the Court in *Ireland* v. *United Kingdom* (11), and requires the application of rules of construction which might depart from the more usual canons of international law because they are better suited

(9) *Ibid.*
(10) *Supra*, footnote 7, pp. 22-24.
(11) Series A, No. 25.

in the Court's view to the « objective obligations » created by the Convention.

As is well known, the question of the definition and effect to be given to reservations in international law is a question of considerable difficulty and was indeed one of the major and most thoroughly explored topics of the comparatively recent Vienna Conference on the Law of Treaties. Accordingly it might be thought that the relevant provisions of the Convention would provide helpful guidance on a difficult subject. On investigation, however, it becomes clear that for at least three reasons the utility of applying the rules of international law relating to reservations to the European Convention is limited. The first reason is that the special nature of the Convention, in contrast to what the Court has called the « classic » treaties of international law, renders a simple application of the rules of international law inappropriate to reservations under the Convention. The second reason is that the purpose of reservations to the so-called classic treaties is different to the part played by reservations to the Convention. The third reason is the well known complexity and uncertainty surrounding the rules concerning the application of reservations in international law, which the Vienna Convention has not entirely eliminated. We will now examine each of these reasons in turn.

The European Convention on Human Rights is distinct from the kind of treaty that the drafters of the Vienna Convention had in mind when drafting Articles 19-23 of that treaty. The purpose underlying most treaties is the establishment of reciprocal obligations between states for a specific purpose. Although this is true of the European Convention on Human Rights, the Convention transcends this in a number of ways. First, the Convention is a striking example of a derogation from the maxim that states and not individuals are the subjects of international law. The Convention imposes obligations on states to individuals and grants the latter directly or indirectly through the instrumentality of the Convention organs and the Contracting Parties, rights of enforcement. Second, as a matter of structure, the Convention provides its own machinery to interpret and apply its provisions. Third, by the mechanism of Article 64 the Convention itself provides for the regulation and control of reservations to its own text. By reason of this difference, rules of international law that place great emphasis on whether or not a state has objected to a reservation to determine its validity and that ignore the Convention organs and the rights of individuals, do not necessarily seem appropriate.

Further, the function of reservations to treaties of the classic kind is very different to the function of permissible reservations to the European Convention by reason of the latter's subject matter. Articles 19-23 of the Vienna Convention seek to strike a balance between maximising the number of states to a treaty and the achievement of its given purpose.

However, the fundamental nature of the subject matter of the European Convention makes it difficult for any reservation to be made without imperilling the « further realization of Human Rights and Fundamental Freedoms ». Accordingly, Article 64 limits permissible reservations under the European Convention to those in accordance with its terms, excluding reservations of a general character or not containing a brief statement of the law concerned. In fact, the purpose of reservations under the Convention is not so much to clarify which obligations a state accepts but, first, to be accommodating in respect of minor differences between municipal law and the provisions of the Convention, differences which otherwise might preclude a state from ratifying the Convention, and, second, to grant to states a certain period after ratification during which they can continue to apply existing laws while amending and revising them to bring them into line with the provisions of the Convention.

Even if the Convention and the function of reservations under it were of a nature similar to other treaties and reservations under international law, the applicable rules of international law are not necessarily helpful. Although a paper on reservations to the European Convention on Human Rights is not the place to discuss in detail the defects and difficulties pertaining to reservations under international law, it is important to note that international law itself, in respect of many of the issues before the Court in the *Belilos* case, is unclear (12). As Sir Ian Sinclair concludes, in his analysis of reservations, the Vienna Convention on the Law of Treaties « leaves unanswered a whole series of questions... particularly questions concerning the distinction between reservations and interpretative declarations and between permissible and impermissible reservations » (13).

D. *The Approach of Convention Organs to Article 64*

The question of the relevance of the provisions of the Vienna Convention to reservations was first considered in some detail by the Commission in its decision in the *Temeltasch* case (14). That case was concerned with whether the Swiss Government could rely on its interpretative declaration to Article 6(3)(e) to exclude the obligation to provide without cost an interpreter to those charged with a criminal offence and unable to understand or speak the language of the Court.

The first question for the Commission to consider was, who should determine the validity of the declaration (15) ? In international law, there are surprisingly few cases in which an international tribunal or court has con-

(12) See generally, SINCLAIR, *The Vienna Convention on the Law of Treaties* (1984), pp. 50-81.
(13) *Ibid.*, p. 77.
(14) *Report of the Commission*, adopted on 5 May 1982, Application No. 9116/80.
(15) *Ibid.*, Paras. 58-67.

sidered the validity of a reservation and in those circumstances it might have been argued that accordingly it was for the Swiss government to determine whether its declaration effectively excluded its liability under the Convention. However, the respondent Government did not expressly challenge the right of the Commission to determine whether the interpretative declaration complied with the Convention. But the argument by the Government that the Commission, in reaching its decision on whether the interpretative declaration was effective in excluding Switzerland's obligations under Article 6(3)(e), should take into account the reactions of other states to its declaration, an argument derived from the familiar rules of international law, led the Commission to fully consider the nature of reservations and interpretative declarations and the right of the Convention organs to determine their validity.

The Commission's decision firmly rejected any purported right of states to construe their own reservation or to base their construction on the practice of member states. The Commission based this view on the intention of the drafters of the Convention « to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedoms and the rule of law », and not on any principle of international law. The Commission then cited the well known words of the Court in *Ireland* v. *United Kingdom* in which the Court had 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 » (16).

Nevertheless, where the Convention did not provide an answer or its special nature dictate one, the Commission was willing to make reference to international law, although such rules, where necessary, were applied in such a way as to maintain and ensure the integrity of the objectivity of the Convention system. The Commission's decision in the *Temeltasch* case provides two such examples and we will now consider them.

The first example occurs in the context of the meaning to be given to the word reservation in Article 64 of the Convention for the purpose of determining whether an « interpretative declaration » was a reservation capable of excluding a state's liability. In considering this question, the Commission referred in detail to the collected jurisprudence of international law. Indeed, the Commission expressly stated that, « 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 under-

(16) *Ireland v. the United Kingdom*, Judgement of 18 January 1978, Series A, No. 25, Para. 239.

stood in international law' » (17). Adopting the definition of Article 2(1)(d) of the Vienna Convention, which provides that « 'a reservation' means a unilateral statement, however phrased or named, made by a State... whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State », the Commission went on to note that according to the International Law Commission the reference to the effect of the reservation, rather than its appellation, is intended to distinguish between those declarations which are a mere clarification of a state's position and those which are intended to vary or exclude the terms of the treaty as adopted. The Commission then proceeded to consider the writings of scholars and the decisions of the court of arbitration in the delimitation of the continental shelf between France and Great Britain.

Nevertheless, the application of the above principles was not permitted to challenge the Commission's supervision of reservations to the Convention. Recognizing the possibility that it might be argued that it was for the reserving state to say whether it intended to enter a reservation or not, the Commission stated that « the specific nature of the European Convention... must be interpreted objectively... and not on the basis of how one of the Contracting Parties understands its provisions at the time of ratification » (18). In deciding whether the Swiss Government had intended to enter a reservation, the Commission set out two criteria by which to objectively determine whether this was so. First, what were the actual words of the purported reservation ? Second, what intention was revealed by the travaux preparatoires preceding the reservation ? This approach, as we will see, is the one adopted by, and underlying the Court's decision in, the *Belilos* case.

The second example of the Commission making use of a doctrine of international law in the *Temeltasch* case, but subjecting that doctrine to the requirements of the Convention, occurs in the Commission's construction of the requirement in Article 64 that no reservation shall be « of a general character ». In examining these words, the Commission stated that « it will try to interpret these terms by relying on international law doctrine, and... the relevant provisions of the Vienna Convention » (19).

In its judgement in the *Belilos* case, the European Court of Human Rights appears, as we will see, at first blush to have rejected even the Commission's limited reliance upon principles of international law to assist in the construction or application of the interpretative declaration before it. Although the Commission had referred to the Vienna Convention in its decision, and the Applicant, the Respondent Government, and the Commis-

(17) *Report of the Commission*, Para. 68.
(18) *Ibid.*, Para. 68.
(19) *Ibid.*, Para. 84.

sion all emphasized the importance of the Court's decision for the future of international law, the Court's judgement makes no reference to customary international law or to the Vienna Convention whatsoever, and in light of such argument it can only be concluded that this was a deliberate decision. Further, the Court's judgement in many areas adopts an approach to reservations contrary to the canons of international law. For example, in determining the enforceability of a reservation against other states, the Court excludes consideration of the weight to be attached to the protestations or affirmations of other states and refuses to apply in any form the rule of international law that a state whose reservation is not accepted may in part or in full not be a party to the treaty against which its reservation is entered.

Nevertheless, although the reference is not explicit, the Court does adopt in substance Article 2(1)(d) of the Vienna Convention as the basis for its definition of a reservation in the context of Article 64. Further, it appears that the Court may be willing to apply the « object and purpose » test for purposes of determining the validity of reservations, and this test, as we know, has its roots in international law as much as in the Convention. In sum, the approach of the organs of the Convention to international law for purposes of elaborating the law relating to reservations under the Convention has been to use international law as a starting point in an area where there is little other assistance. The application of international law has been constantly refined and reconsidered in light of the special role played by reservations under the Convention until it has all but been replaced. Where its norms may be suspected of undergirding the relevant norms of the Convention, reference is not made, lest it be argued that other norms of international law are also applicable. Any future contributions of international law to the law of reservations under the Convention will be limited to instances where the Convention is silent.

4. THE APPLICATION AND INTERPRETATION OF ARTICLE 64

A. *Interpretative Declarations : Can they be Equated with Reservations ?*

The first question that the Court dealt with was the question of what was the true nature of the Swiss interpretative declaration. At the time of ratifying the Convention, Switzerland had made two reservations and two interpretative declarations, one of which was the declaration before the Court. Accordingly it was argued by the Appellant, on the basis of the *ipse dixit* rule, that the fact that Switzerland had expressly made reservations while not attaching that label to the declaration in question made it

manifest that the interpretative declaration was not intended at the time of its making to limit the Government's obligations and therefore was not a reservation. This argument weighed heavily with the Commission in the *Belilos* case and in its opinion the Commission stated that, « If a state makes reservations and interpretative declarations at the same time, an interpretative declaration will only exceptionally be able to be equated with a reservation » (20).

This argument is perhaps not fully convincing. First, states have political reasons, whether good or bad, for not always referring to declarations intended to limit their obligations under treaties as reservations. Second, ratifications of the Convention by many other states are accompanied by documents of varying purposes and labels. To permit only those expressly designated as reservations to take effect would create a degree of concern among member states that might imperil the future of the Convention. It is noticeable that the Commission had not applied the *ipse dixit* argument in the earlier *Temeltasch* case.

The *ipse dixit* argument does not seem to have weighed heavily with the Court, which expressly rejected the argument that the effect of a declaration was determined by its title and instead affirmed that what was important was its « substantive content ». The Court would look behind the title given to the instrument and consider whether it was intended to have the effect of a reservation. In the Court's view, the intention of the reservation was to be determined by reference to its express wording and by an analysis of the documentation leading up to its making.

In *Belilos,* the Court found the wording not altogether clear and gave emphasis to the travaux preparatoires, but this should not lead to the conclusion that the travaux preparatoires are only applicable to the interpretation of a reservation when the text is unclear, as would be the case if the meaning to be attributed to the text of a treaty was in doubt. In fact, the Court expressly recognized « that it is necessary to ascertain the original intention of those who drafted the declaration » (21), and in its acknowledgement of the Government's argument on this point the Court seems to have accepted the Government's view that what is important is the subjective intention of the reserving government. However, this does not mean that whatever the government asserts was its intention at the time will be accepted by the Court. The government must still provide objective proof of its intention and this may be expressed in the text of the Convention or the travaux preparatoires leading up to the state's ratification of the Convention.

(20) *Report of the Commission*. Para 102. See also concurring opinion of Judge Pinheiro Farinha, *Judgement*. p. 29.

(21) *Judgement*. Para. 48.

On the facts, the argument that at the time of ratification the Swiss Government had intended to make a declaration equivalent to a reservation was strong. The declaration was a direct response to the Court's decision in the *Ringeisen* case, which was pronounced while the Swiss government was reviewing the terms upon which it could ratify the Convention and which was considered as having extended Article 6(1) so far as to render it incompatible with the Swiss Constitution (22). Second, the Swiss Government had originally intended to make a reservation to Article 6(1) but on political grounds preferred instead to make an interpretative declaration because, for many people, reservations could appear to raise questions about the Swiss Government's commitment « to the further realization of human rights ». Third, as one of its Counsel, the Government was able to call Dr. Kraft who, as a drafter and negotiator of the declaration with the Secretary General of the Council, was able to testify to the intention of the Swiss Government at the time of ratification. This point does raise interesting questions of the extent to which the Court can hear witnesses of fact and the form in which their evidence can be heard, but the point was not taken in the case and the Court's judgement passes over it in silence.

The Court however refused to accept the argument of the Government that because the declarations went through identical processes with regard to their adoption as reservations they should be considered to be reservations. It is normal practice for reservations and interpretative declarations to be joined in a common document and to share a common history in their formulation. The « common history » argument is accordingly not to be used as a separate argument for establishing that an interpretative declaration is to be given effect to as a reservation or, as a variant or consolidation of the argument based on the travaux preparatoires, though of course it is formulated separately it may negative an argument based on the travaux preparatoires (23).

The Court rejected any argument based on extrapolating the intention of a state to make a reservation by analogy with the practice of other states. The Swiss Government pointed to the varying terminology that characterised the concept of a reservation in international law. It also pointed to its own practice in other contexts. It asserted that in the event of the meaning of an Article of the Convention being unclear it would make an interpretative declaration, while in the case of the clause being clear it would make a reservation, even though in both instances its intention was to render its international obligation compatible with its municipal laws. Although the Court recognized that the use of interpretative declarations in such a fashion was in accordance with their being reservations in any

(22) Series A, No. 13.
(23) *Judgement*, Paras. 45-46.

particular case, the relativity of the dictinction could not « in itself justify describing the declaration in issue as a reservation » (24).

A second dispute involving nomenclature that the Court avoided was that arising out of the parties extensive reference to the learning of international law and in particular to Professor D. M. McRae's well known classification of interpretative declarations. Professor McRae classifies interpretative declarations into two types, which he calls the « mere interpretative declaration » and the « qualified interpretative declaration » (25). He describes the former as a declaration in which a state attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty or part of it. The second situation he defines as where a state makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. Adopting these classifications, the Applicant and the Commission argued that the declaration was no more than an interpretation of Article 6(1) and that the failure to accept such an interpretation by the Convention organs was in no circumstances intended to limit the obligations of the Swiss Government arising thereunder. The Swiss Government argued the contrary, affirming that the declaration was a qualified interpretative declaration which limited its obligations under Article 6(1).

Although the Court in its judgement cites these arguments in its summary of the contentions of the respective Parties, the Court's judgement is striking for its failure to use such terms in its own analysis. The Court preferred, as we have seen, to look at the « substantive content » of the declaration before it in order to determine its effect rather than to become entangled in the sophistries of whether the declaration fell within one of the two above mentioned categories.

The Swiss Government also argued, and again this argument derived from international law, that the failure of, first, the Secretary General of the Council of Europe, and, second, of any member state, to object to the reservation were further considerations showing that the interpretative declaration was a reservation. The importance to be attached to the activity of the Secretary General arose, it was suggested, by reason of the special powers granted to him under the Convention and his willingness to use them in the case of reservations made by other states, such as that made by Turkey under Article 25. The importance to be attached to the silence of other states was, it was argued, that such silence constituted tacit consent by other states to the reservations, as in international law, where silence by a state for a period of twelve months after it has been notified of a reservation or twelve months after it ratified the treaty is deemed to

(24) *Ibid.*, Para. 46.

(25) McRae, « The Legal Effect of Interpretative Declarations » (1978), 49 *British Y.B.I.L.* 155.

constitute tacit consent by it to the reservation. The Court robustly, and without further argument, affirmed that it did not agree with such analyses. In its opinion, « The silence of the depository and the Contracting States does not deprive the Convention institutions of the power to make their own assessment » (26).

B. *The Basis of the Jurisdiction of the Court*

As we have seen, the right of a tribunal to determine the validity of a reservation is not completely clear in international law because of the possibility of infringement on a state's sovereignty. Nevertheless, as the Swiss Government recognized, by refraining from taking the point, it is an argument unlikely to find favour before the Court in light of the special properties of the European Convention of Human Rights.

However, in order to avoid uncertainty, and by reason of the continuing debate in the academic journals, the Court set out what it perceived to be the basis of its jurisdiction over the validity of reservations. The Court rested its judgement on Articles 45, 49 and 19 of the Convention. Unfortunately, the Judgement is somewhat terse in relating the application of these articles to the Court's jurisdiction. Article 49 provides that it is for the Court to decide whether it has jurisdiction or not but it does not indicate the grounds on which the Court is to exercice its decision. The more relevant Articles are Articles 45 and 19.

Article 45 provides that the Court's jurisdiction shall extend to all cases concerning the interpretation and application of the Convention. Although it may be argued that the consideration of the validity of a reservation is different to the consideration of the interpretation or application of the Convention itself, the question before the Court was not the validity of a reservation but the validity under Article 64 of a reservation. The Court's recognition of this point is made clear by its treatment of the jurisdictional issue after its consideration of the meaning of a reservation, while the Commission in the *Temeltasch* case had inverted this order. The question of the validity of the reservation was thus not be determined by any rules arising outside of the Convention but by the interpretation and application of Article 64 of the Convention.

The other more probable basis of the Court's jurisdiction is Article 19. This provision provides, inter alia, that a European Court shall be set up in order « to ensure the observance of the engagements undertaken by the High Contracting Parties ». This purpose can only be fulfilled if the Court and not the party concerned is able to determine what are the obligations of the party and to what extent it has limited them by reservations. Indeed

(26) *Judgement*, Para. 47.

the basic test employed by the Court to determine the validity of a reservation, namely, what did the reserving state objectively intend to do at the time of the reservation ?, suggests that the task which the Court considered that it was undertaking was to ensure that states observed the obligations they had accepted.

C *Article 64(1) : Its Conditions on Reservations*

In order for a reservation to be permitted under the Convention it must fulfill, as will be recalled, the obligations set out in Article 64(1). That is, the reservation must first apply to a particular provision and, second, must not be of a general character. In *Belilos,* the Swiss Government argued that the latter is really a subcategory of the first condition and that, accordingly, any reservation which refers to a particular provision must necessarily not possess a general character. However, the Court rejected this argument. Although the reservation even referred to a particular subclause of Article 64, the Court still found the declaration to « fall foul of the rule that reservations must not be of a general character » and thereby confirmed the existence of the general character test as an independent condition, following the Commission in the *Temeltasch* case.

In the context of Article 64(1), the real question for the Court was whether the prohibition on declarations of a general character was violated by the Swiss declaration that the purpose of guaranteeing a fair trial in Article 6(1) was « to ensure ultimate control by the judiciary over the acts or decisions of the public authorities ». There were a number of special factors that the Swiss Government could point to as indicating that the declaration was not of a general character. First, the reservation was a clear reaction to the Court's decision in the *Ringeisen* case and was intended to deal with the parameters of that decision. Second, the expression used, namely, « the ultimate control of the judiciary », was an expression that had received the sanction of an organ of the Convention, namely, the Commission, albeit a view of the minority in the *Ringeisen* case itself. Third, the same expression had been used by other states in connection with reservations.

The Court was not influenced by these special factors in making its decision. A reservation is of a general character, the Court stated, if it is « couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope » (27). The important words in these helpful guidelines are the concluding ones, that in order for a reservation to be permitted it must be possible to determine its exact scope and meaning. Although a reservation may be broad, it will not be of a general

(27) *Judgement*, Para. 55.

character unless it is impossible to determine its exact scope and meaning. Of course, a broad reservation may offend against the first limb of Article 64(1).

The exact scope and meaning of a reservation is to be determined objectively and solely by reference to the text of the reservation. Although the Swiss Government urged the Court to take into consideration the travaux preparatoires and the Government's explanations as to its intentions at the time of ratification in order to give precision to the interpretative declaration, the Court refused to permit these matters to « obscure the objective reality of the actual wording of the declaration ». In the Court's view, the objective reality of the actual wording was that the wording was imprecise. It was impossible to decide on its face whether the declaration applied only to civil matters or only to criminal matters or to both and it was also impossible to decide whether the declaration applied to a review of the law only or to a review of the facts only or to both. The Commission's endorsement or that of other states was not considered by the Court to be sufficient to clarify its content. It could be interpreted in different ways, whereas Article 64(1) required precision and clarity.

The refusal of the Court to take into consideration the travaux preparatoires in the context of the determination of whether a reservation possesses a general character, while relying upon the travaux preparatoires in the context of the determination whether a declaration constitutes a reservation, although at first blush contradictory, is based upon sound principle. Article 64 in essence reflects the balance that is found throughout the Convention between the demands of the sovereign state for freedom of action and the need to protect the interests of the individual. To further the former, Article 64 preserves the right of a state under international law to make reservations to a treaty by expressly sanctioning reservations to the Convention, and by giving precedence to the intention of the state. To further the latter, the right to make reservations is subject to strict conditions so as to ensure that the obligations under the treaty are not nullified by the extensive use of reservations. Thus, states may not deliberately obfuscate their obligations by wide ranging but imprecise reservations : since legal certainty is a fundamental right in itself it would be unfortunate if the Convention itself provided for such uncertainty. States, far more than individuals, have adequate and often substantial legal resources and these must exercice their talents to define the province of reservations as precisely as possible.

We noted above that the Court stated that a reservation of a general character was one couched in terms too vague or broad for it to be possible to determine the reservation's exact scope and meaning. Accordingly it may be possible to argue that the prohibition on « broad » reservations is qualified, so that only reservations that are imprecise and whose scope is

unclear are prohibited. If such a construction is possible it is unfortunate and can only arise by treating the words of the judgement as enshrined as if in statute. Fortunately, there are many indications in the Court's judgement that it will not follow such a path.

In its analysis of the arguments raised by the parties, the Court went out of its way to emphasize those arguments relating to the question whether the reservations were contrary to the object and purpose of the Convention. For example, the Commission in its oral argument asked, in a kind of obiter rhetorical question, whether it was not necessary to find « that a reservation which renders the rights guaranteed under Article 6 meaningless with respect to criminal proceedings should be regarded as a reservation which entirely contradicts the aim and purpose of this Convention ? » It concluded however that « the Commission does not think that it is necessary to settle this question since... the declaration is not tantamount to a reservation » (28).

Nevertheless, despite such a tentative approach, the Court almost treats this view, that the declaration was contrary to the object and purpose of the Convention, as one of the Commission's main reasons for holding the declaration invalid, and the Court proceeds to state its agreement with that reasoning in what appears to be an almost passing reference. Although it may be a little difficult to say categorically whether the Court has or will in future apply the rule of international law that reservations contrary to the object and purpose of a treaty are void as an independent condition or whether it will use that rule as a guideline in the determination of whether a reservation possesses a general character, it seems clear that unduly wide reservations will be rigorously analysed (29).

Finally, in the context of paragraph 1 of Article 64, one might note the argument that the last clause of the first sentence qualifies the general right to make reservations by permitting them only « to the extent that any law then in force in its territory is not in conformity with the provision ». If this clause was given its literal effect, interpretative declarations would not be possible, since at the time such a declaration was made it would not be possible to say that a provision of national law was incompatible with the Convention. Neither the Commission nor the Applicant felt able to pursue this argument, though the point was raised by the Government in the Oral Proceedings. In light of the Court's acknowledgement of the Swiss interpretative declaration, the Commission and Applicant's decision is probably correct (30).

(28) Note of the Public Hearings held on 26 October 1987, COUR/MISC (87) 238, p. 7.

(29) See also Concurring Opinion of Judge DE MEYER, *Judgement*, p. 30, stating that certain reservations may even be contrary to *jus cogens*.

(30) Note of the Public Hearings held on 26 October 1987, COUR/MISC (87) 237, p. 39.

D. *Article 64(2) : The Limit it Sets on Reservations*

Article 64(2) provides that « any reservation... shall contain a brief statement of the law concerned ». Before we consider the Court's view as to how this provision is to be applied it is helpful to first consider the Commission's decisions in the *Temeltasch* and *Belilos* cases, since the Court in substance affirmed the jurisprudence developed in those decisions.

The *Temeltasch* and *Belilos* cases share a number of common features. The Government's arguments in both cases, and the Commission's response in principle,were the same, though by reason of the facts the Commission's decisions varied.

The Government argued in both cases as follows. First, it was clear that the Government had not complied with Article 64(2) by affixing to the reservation in question a list of the laws and regulations which were deemed to be placed outside the scope of the Convention by reason of the particular reservation, and this was admitted. Second, it was argued by the Government that the practical difficulties that arose in a federal state, and which in Switzerland's case would have meant mentioning most of the provisions of the 26 cantonal codes of civil procedure or even hundreds of legal provisions or local by-laws, justified an exemption to the requirements of Article 64(2) (31). Third, in the event that there was not a « practical difficulties » exemption to Article 64(2), it was argued by the Government that the provision was of a procedural nature, on the basis that a flexible practice had evolved in which a number of other states, such as Ireland and Malta, had made reservations which did comply with the express terms of the Article.

The Commission's response to these arguments was as follows. First, in both cases the Commission rejected the alleged practical difficulties exemption and made no comment in respect of the flexible practice argument. Second, it accepted that non-compliance with Article 64(2) did not necessarily render ineffective a reservation under the Convention. In the Commission's view, in the *Temeltasch* case, the formal requirement in paragraph 2 of Article 64 of the Convention is essentially a supplementary condition, which must be interpreted toghether with paragraph 1 of that provision. This view was based on two factors which the Commission endorsed in the *Belilos* case. First, paragraph 2 acts as a touch stone by which a reservation can be judged to determine whether it offends against the prohibition on reservations of a general character set out in paragraph 1. The assumption seems to be that a state making a reservation which does not provide a brief statement of the law concerned has probably failed to do so because it has made a general reservation in respect of which

(31) *Ibid.*, pp. 21 et seq.

it has not been able to ascertain the law concerned. Second, the purpose of paragraph 2 is to ensure that other contracting parties, the organs of the Convention, and other interested parties, have access to the means of knowing the exact scope of the Convention in relation to any particular state.

As will be seen from the above, in the Commission's view, the rational for Article 64(2) is that it seeks to further legal certainty, which in a Convention concerned with human rights is fundamental. However, if the reservation is clear on its face a reference to the laws with which it is concerned may be otiose. This explains why in the *Temeltasch* case the Commission considered the reservation valid despite its incompatibility with Article 64(2), while in the *Belilos* case it held the reservation invalid under Article 64(2). It will be recalled that the *Temeltasch* case concerned the very narrow issue of a reservation to the right of those subject to criminal charges to have the assistance of a free interpreter if unable to speak the language of the Court. Accordingly the Commission upheld the reservation but noted that « 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) » (32). In the *Belilos* case, the Commission was thus justified in determining the reservation to be invalid as it effectively undermined the application of the whole of Article 6.

The Court in its judgement affirmed this jurisprudence of the Commission but in somewhat ambiguous terms. It stated that « the Court concurs on the whole with the Commission's view on this point » but unfortunately the Court did not expressly list which points of detail it might not concur on (33). However, it did add, and this provides a clue to the Court's thinking, that paragraph 2 is « not a purely formal requirement but a condition of substance. The omission in the instant case therefore cannot be justified even by important major practical difficulties » (34). The Court thus seems to reject the Commission's view that paragraph 2 is merely supplementary to paragraph 1.

The implications of this finding, namely, that paragraph 2 is one of substance, the Court did not draw out in detail. The Court did not say that failure to comply with paragraph 2 automatically renders ineffective a reservation but only that, in the « instant case », failure to comply with the reservation concerned led to its ineffectiveness. It may be that this reference to the instant case means that there are still circumstances in which non-compliance with paragraph 2 will not render a reservation ineffective. Nevertheless, the failure to refer in this portion of its judgement to

(32) *Temeltasch*. Report of the Commission, Para. 90.
(33) *Judgement*. Para. 59.
(34) *Ibid.*, Para. 59.

the wide ranging nature of the reservation and the apparent emphasis on the substantive nature of paragraph 2 as the reason why departure from it could not be justified makes this somewhat doubtful. It may well be that in a subsequent case, the Court, having established its starting point, will develop its reasoning to hold invalid any reservation which does not comply with paragraph 2.

E. *The Effect of a Reservation not Permitted under Article 64*

Under international law, the effect of a reservation which is objected to or which is deemed to be invalid often involves complicated questions of law and other questions to which there is no authoritative answer. The Court's judgement in respect of the effects of a reservation that does not comply with Article 64 is nothing if not both terse and simple. First, a reservation which does not comply with Article 64 is invalid. Second, an invalid reservation is without effect; there is no ground for saying that if it falls outside Article 64 but would be valid under international law it still may have effect. Third, if a state makes an invalid reservation both the obligation in respect of which the reservation was made and the treaty or convention of which the obligation forms part remains binding on the reserving state (35).

A number of alternative solutions are possible and were discussed, together with their roots in international law, in oral argument (36). First, adopting the classical consensual theory of reservations, it might be argued that the failure of a state to limit its obligations to those which it desired to undertake means that it is not a party to any obligation under a particular treaty. Second, the obligation in respect of which the invalid reservation is made ceases to be applicable between the reserving state and the other contracting parties. The decision of the Court of Arbitration in the *U.K./French* arbitration was cited in support of this argument by the Swiss government (37). Third, and a variant on the second, the obligation remains not binding on the state but the Court may insist on the defect in the reservation being remedied a posteriori and the declaration reworded accordingly.

The Court did not elaborate on the reasons for its decision that the obligation in respect of which the reservation was made binds the state as if no reservation had been made, nor did it discuss the learning of international lawyers in this context, however inconclusive. Nevertheless, some good reasons may be suggested for its decision and they appear to rest on solid pragmatic grounds. To hold a state not party to the Convention by

(35) *Judgement*, Para. 60.
(36) See notes 28 and 30, above.
(37) Cmnd. 7438 (1979).

reason of the invalidity of a reservation is to give a disproportionate weight to the reservation in question. The Convention is of fundamental importance for the protection of human rights and few states would wish another to be excluded from the Convention by reason of the invalidity of its reservation(s).

Further, it is not the intention of the contracting states making reservations that their consent to be bound by the Convention is conditional upon the validity of their reservation. Even the Swiss government felt that it could not maintain this line of argument. To hold a state not a party to the particular obligation which it has sought to make a reservation against may be correct under a treaty imposing reciprocal obligations on the contracting parties, but it is not appropriate under a treaty of the nature of the Convention. The Convention imposes primarily obligations on the contracting parties and does not given them rights of immediate benefit. To exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation. Further, the *U.K./French* arbitration concerned objections to a reservation and not an invalid reservation per se.

It is difficult to see why a state making an invalid reservation should be able to avoid its obligations in respect of which the invalid reservation is made until the reservation is correctly worded ; the onus must be on the state, with its substantial resources, to ensure that its reservation is correct. In sum, as the delegate of the Commission declared in oral argument, « should the Court and the Commission accept that the principle of the Vienna Convention applies as such to the system of reservations of the European Convention on Human Rights, then... the objective significance of this Convention and its whole system could no longer survive » (38).

Finally, in the context of Article 64, one should note that the Court makes no reference to the argument of the Commission that non-compliance with the provisions of paragraphs 1 and 2 of Article 64 is suggestive of the fact that a state did not intend in the case of an interpretative declaration to limit or exclude its liability under the Convention. This argument is specious, for a state may intend to limit its obligations under the Convention but deliberately or accidentally, if perilously, not comply with the requirements of the two paragraphs on pragmatic grounds. The failure of the Court to comment on this argument is indicative perhaps of its legal merit.

CONCLUSION

In *Belilos,* the European Court of Human Rights has continued the work commenced by the Commission of establishing a body of law to regulate

(38) COUR/MISC (87) 238, p. 10.

reservations to the Convention. In its decision the Court has clarified the existing law and added its authoritative imprimatur to the jurisprudence of the Commission. It has set out clear tests for the determination of what is a reservation under Article 64, what factors should be looked at in determining whether a reservation possesses a general character under Article 64(1), and moved towards making the brief statement of the law requirement of Article 64(2) mandatory. What is more, the Court has maintained if not emphasized the unique nature of the norms of the Convention and ensured their continuing efficacy.

The Court has avoided the danger of undue reliance on doctrines of international law, which might have undermined the objectivity of the obligations undertaken by states under the Convention and introduced all the complexities and uncertainties that characterize contemporary international law relating to reservations. Nevertheless, the Court has successfully struck a balance between the preservation and application in the context of Article 64 of its established rules of construction while giving effect to the norms of international law where they are thought to be helpful by, for example, giving special emphasis to the intention of the reserving state at the time of making the reservation.

The Court's unwillingness to uphold the reservation in *Belilos,* even when special circumstances, such as the appearance of the drafter of the reservation before the Court, and its adoption of language used by the Commission might, one would have thought, led otherwise, suggests that reservations to be valid under the Convention must be drafted with great care and that only those of limited and precise scope will be valid. In particular, the decision raises questions about many existing reservations. For example, the reservation of France to Article 2 of Protocol 7, in connection with the right of those convicted of criminal offences to appeal against sentence, states that such rights are subject to the « ultimate control of the judiciary » though in this context the concept may be less ambiguous. Similar uncertainty must exist with regard to the Irish reservation to Article 6(3)(c) and the Maltese interpretative declaration to Article 6(2), neither of which have a brief reference of the law concerned attached. At the time the *Belilos* case was being heard by the Court, the Swiss Government had already begun the arduous task of ensuring full judicial control in law and on fact over the numerous administrative tribunals which historically in Switzerland have been the place where criminal justice in minor matters is dispensed. In the light of *Belilos,* it is suggested that states should consider bringing those of its laws not in conformity with the Convention into conformity before they become subject to the Court's rigorous scrutiny.