APPLICATION NO. 9116/80

Alparslan TEMELTASCH

against

SWITZERLAND

81.471
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I. REPORT OF THE COMMISSION.

TABLE OF CONTENTS

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights, and an account of the proceedings.

a. Brief outline of the facts and applicant's complaints

2. The applicant, born in 1941, is a Dutch national of Turkish origin and is domiciled in Rotterdam. In proceedings before the Commission he was represented by Mr Pierre Bauer, a barrister practising at the La-Chaux-de-Fonds (Canton of Neuchâtel) bar.

On 6 December 1978 he was arrested by the Swiss authorities because a quantity of drugs had been found in his car.

3. On 5 June 1979 the Criminal Court of Val-de-Travers (Canton of Neuchâtel) acquitted the applicant but ordered him to pay 500 Swiss francs as part of the court costs. This sum included interpretation costs as the applicant did not understand the language used in court, ie French.

On 10 October 1979 the Criminal Court of Cassation of the Republic and Canton of Neuchâtel disallowed the appeal brought by the applicant.

On 14 November 1979 the applicant brought a public law appeal to the Federal Court, maintaining essentially that the obligation to pay part of the court costs violated Article 6 (3) (e) of the Convention.

4. On 30 April 1980 the Federal Court rejected the appeal, holding that the Swiss Federal Council, when it ratified the Convention, had made an interpretative declaration whereby the guarantee of the free services of an interpreter contained in Article 6 (3) (e) of the Convention did not permanently exempt the beneficiary from the resulting costs. It held that this interpretative declaration had the same effects as a formal reservation and complied with the formal requirements laid down by Article 64 of the Convention.

The applicant maintained before the Commission that Article 6 (3) (e) of the Convention had been violated, insofar as he was obliged to pay part of the interpretation costs, whereas the judgment of the European Court of Human Rights in the case of Luedicke, Belkaçem and Koç, delivered on 28 November 1978 established that this provision of the Convention guaranteed a «once and for all ... exoneration» from payment of interpretation costs.

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b. Proceedings before the Commission

6. The application was introduced on 16 September 1980 and registered on 18 September 1980.

On 20 March 1981 the Commission decided to invite the respondent Government to submit written observations on the admissibility and merits of the application in accordance with Rule 42 (2) (b) of its Rules of Procedure. In particular, the Government was invited to answer the following two questions:

«1. Does the Federal Council's interpretative declaration relating to Article 6 (3) (e) of the Convention amount to a reservation within the meaning of Article 64 of the Convention, and in particular does it comply with the requirements laid down in that provision?

2. If not, and in the light of the judgment of the European Court of Human Rights of 28 November 1978 in the case of Luedicke, Belkacem and Koç, can the obligation on the applicant to pay part of the interpretation costs be regarded as complying with Article 6 (3) (e) of the Convention?».

These observations, dated 3 June 1981, were forwarded to the applicant's lawyer, who replied on 8 July 1981.

7. On 12 October 1981, the Commission declared the application admissible and as regards the presentation of observations on the merits of the case, left it to the parties to choose either a memorial or a hearing. On 23 October 1981 the applicant stated he would not be presenting supplementary observations and on 20 November 1981 the respondent Government presented supplementary written observations on the merits.

8. After declaring the application admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the matter. In the light of the parties' reaction, the Commission finds that there is no basis on which such a settlement can be effected.

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c. The present report

9. The present report was prepared by the Commission in pursuance of Article 31 of the Convention, after deliberations and votes in plenary session, the following members being present:

MM C A NORGAARD, President
G SPERDUTI, first Vice-President
J A FROWEIN, second Vice-President
G JÖRUNDSSON
G TENEKIDES
S TRECHSEL
B KIERNAN
M MELCHIOR
J SAMPAIO
A S GÖZÜBÜYÜK
A WEITZEL
H G SCHERMERS

10. The text of the report was adopted by the Commission on 5 May 1982 and will be transmitted to the Committee of Ministers in accordance with Article 31 (2) of the Convention.

11. As a friendly settlement of the case has not been reached, the purpose of the present report, pursuant to Article 31 of the Convention is accordingly:

1. to establish the facts; and

2. to state an opinion as to whether the facts found disclose a breach by the respondent Government of their obligations under the Convention.

12. A schedule setting out the history of proceedings before the Commission and the text of the Commission's decision on admissibility in the case are attached hereto as Appendices I and II.

13. The full text of the submissions of the parties and the documents submitted to the Commission are held in the archives of the Commission and are available to the Committee of Ministers if required.

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II. ESTABLISHMENT OF THE FACTS

14. The facts of the case, as established by the Commission, may be summarised as follows:

The applicant Alparslan Temeltasch, born in Turkey in 1941, is a Dutch national domiciled in Rotterdam.

15. On 5 December 1978, the applicant and a Turkish national B, left the Netherlands for Switzerland in separate cars. Having driven across Belgium and France, they left B's car at Pontarlier and proceeded in the applicant's car.

They were arrested on 6 December 1978 by Swiss customs officials who discovered 9 grammes of hashish and 63 grammes of heroine in the applicant's car.

16. On 5 June 1979 the Criminal Court of Val-de-Travers (Canton of Neuchâtel) sentenced B to 32 months imprisonment, 15 years expulsion from Swiss territory and ordered him to pay 5,912 Swiss francs as part of the court costs. The applicant himself was acquitted, the court having found that he was genuinely unaware that there were drugs in his car. However, he was ordered, pursuant to Article 90 of the Neuchâtel Code of Criminal Procedure (1), to pay 500 Swiss francs as part of the court costs. This sum included interpretation costs as neither the applicant nor his co-defendant understood the language used in court.

17. On 4 July 1979 the applicant brought an appeal on a point of law to the Criminal Court of Cassation of the Republic and Canton of Neuchâtel. He submitted that the decision ordering him to pay part of the court costs, which included the interpretation costs, was in breach of Article 6 (3) (e) of the Convention. He referred in this respect to the judgment of the European Court of Human Rights of 28 November 1978 in the case of Luedicke, Belkacem and Koç in which it held that «the right protected by Article 6 (3) (e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free

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(1) This provision states that «In the event of discontinuance or acquittal, the court may, as an exceptional measure and where the interests of fairness so require, order all or part of the costs to be borne by the person who gave rise to the prosecution or made the investigation difficult».

assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred». Finally, he submitted that although the Federal Council did make an interpretative declaration of that provision when the Convention was being ratified by Switzerland, whereby «the guarantee of ... the free assistance of an interpreter» did not absolve «the beneficiary from payment of the resulting costs», this declaration was not a valid reservation in accordance with Article 64 of the Convention insofar as it did not refer to a law then in force.

18. On 10 October 1979 the Criminal Court of Cassation of the Republic and Canton of Neuchâtel disallowed the appeal. As to the alleged violation of Article 6 (3) (e) of the Convention, it held that in the event of conflict between those provisions and Swiss law, the intention of the Legislature, ie the Federal Assembly, had above all to be ascertained. However, in the instant case, that intention was clear: the Federal Assembly had rightly or wrongly intended the procedural provisions to prevent accused persons from being permanently absolved from payment of interpretation costs. If the solution adopted by the Legislature were to be considered injudicious, it was for the Legislature to reform it: either the Federal Assembly could withdraw its interpretative declaration or the Neuchâtel legislature could amend its Code of Criminal Procedure.

19. On 14 November 1978 the applicant brought a public law appeal to the Federal Court, applying to have the two above-mentioned decisions set aside. He relied essentially on the same grounds as those set out in his appeal to the Cantonal Court of Cassation, contending in particular that the Swiss interpretative declaration had no effect and in no respect lessened Switzerland's obligations under Article 6 (3) (e) of the Convention.

20. On 30 April 1980 the Federal Court disallowed the appeal. Having held that Switzerland had not made a formal reservation to Article 6 (3) (e) of the Convention, which the applicant had invoked, the Court considered whether the Federal Council's interpretative declaration might in the instant case have the same effect as a reservation. It held that interpretative declarations had in principle to be assimilated to reservations, insofar as this approach corresponded to the intention of the signatory State and such declarations had been made in accordance with that intention. It was possible to state, on the basis of the reasons which had led the Federal Council to make the declaration - essentially the fact that domestic federal and cantonal law did not comply with the potential requirements of Article 6 (3) (e) of the Convention - that as far as the Swiss authorities were concerned, the interpretative declaration had the force of a reservation.

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Moreover, it held that when the ratification of the Convention was being debated before the National Council, and although no case-law from Strasbourg had yet been produced on Article 6 (3) (e) of the Convention, a Federal Councillor Mr Graber had stated that «where the Convention and domestic law are incompatible, we shall make reservations and on a question of interpretation, we shall make an interpretative declaration». The Rapporteur of the Committee of the Council of States, Mr Hefti, had stated that «interpretative declarations must be assimilated to reservations made in accordance with Article 64 of the Convention» («die auslegenden Erklärungen sind Vorbehalten gemäss Artikel 64 der Konvention gleichzusetzen»). The Federal Court concluded that Switzerland clearly intended to limit the scope of this provision and that had it acceded to the Convention after the Luedicke judgment, it would have made a formal reservation.

21. The Federal Court then examined the question whether or not the interpretative declaration fulfilled the requirements laid down by Article 64 of the Convention, particularly as regards the obligation to provide a brief statement of the domestic law concerned by the reservation. It held that this obligation was merely a formal requirement because a Federal State could not be asked to provide a detailed account of all its sources of cantonal and, where appropriate, municipal law. Moreover, it noted that the Swiss authorities would encounter certain problems in providing a systematic account of the various cantonal Codes of Criminal Procedure or cantonal regulations fixing costs in criminal proceedings. In any case, the report of the Federal Chambers listed some cantonal laws and gave at least a summary of their contents. A longer account was unnecessary as it was simply a matter of stating that under the laws in question, the State could not permanently bear interpretation costs.

22. The Federal Court therefore concluded that the Federal Council's interpretative declaration complied with the formal requirements of Article 64 of the Convention and that it had the same effects as formal reservation.

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III. SUBMISSIONS OF THE PARTIES

23. As regards the questions arising in the instant case under Article 64 and 6 (3) (e) of the Convention, the substance of the submissions presented by the parties during the proceedings before the Commission is as follows.

A. The applicant

24. The applicant notes firstly that both the decision of the Criminal Court of Val-de-Travers of 5 June 1979 and the judgment of the Criminal Court of Cassation of the Republic and Canton of Neuchâtel violated Article 6 (3) (e) of the Convention. Indeed the European Court of Human Rights in its judgment of 23 November 1978 in the case of Luedicke, Belkacem and Koç held very specifically that this provision of the Convention guaranteed to everybody appearing before a court a «once and for all ... exoneration» from payment of interpretation costs.

He naturally concedes that when the Federal Council ratified the Convention, it declared that it was interpreting Article 6 (3) (e) of the Convention as not permanently absolving the beneficiary from payment of interpretation costs. However he maintains that this interpretative declaration cannot be regarded as a valid reservation within the quite specific meaning of Article 64 of the Convention, to the extent that it does not expressly refer to a law in force as required by paragraph 2 of that provision. Consequently it produces no effect and in no respect lessens Switzerland's obligations under Article 6 (3) (e) of the Convention. The applicant, invoking part of Swiss legal theory in this respect, contends that since the case of Luedicke, Belkacem and Koç, the Federal Council has been in opposition to the Strasbourg organs on this point and that in practice it is no longer possible for a court to order a convicted person to bear the translation or interpretation costs made necessary by his lack of knowledge of the language used in the proceedings.

26. As the Federal Council has itself admitted in a legal opinion of 8 June 1979, «it is certain that the privileged place of the European Court of Human Rights in the system of collective supervision established by the Convention confers on its judgments an authority going well beyond the particular case in question» (case-law of the administrative authorities of the Confederation, 1980, Fasc. 44/II, p 292 et seq). The applicant is simply contending that in the absence of a formal reservation within the meaning of Article 64 of the Convention and where a mere interpretative declaration has been made, a person involved in proceedings in Switzerland is entitled to rely on the Luedicke decision after 28 November 1978.

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27. He notes further that the Federal Council has also conceded that «the adaptation of our law to the Convention in accordance with the interpretation thereof by the Strasbourg organs is unavoidable» (Message in 1977 in support of an emergency draft federal decree amending the Military Criminal Code, Feuille fédérale, 1977, Vol 1, p 113).

28. The Government cannot, he maintains, rely on the Federal Court's case-law in support of its submissions. The judgment delivered by the latter in the applicant's case is itself inconsistent with the general principles established by its recent case-law. Indeed, in a judgment of 4 April 1979, the Federal Court recalled that in interpreting constitutional guarantees, it was obliged to take the corresponding provisions of the Convention into account, «including the developments brought about by the decisions of the judicial organs established by that Convention» (judgments of the Federal Court (105/Ia/186), translated into French in l'Annuaire suisse de droit international, Vol 36, 1980, pp 244-245).

29. Finally, the applicant challenges the liberal interpretation of Article 64 of the Convention put forward by the Government. There is surely something devious in isolating this provision from the rest of the Convention. The latter is a very technical instrument as the case-law of the Commission and the Court amply bears out. It would not be reasonable, despite the intrinsic differences of the Convention provisions, to rely on the one hand on the very technical nature of Articles 5 and 6, while maintaining on the other hand that Article 64 is a purely procedural provision.

B. The Government

30. The Government recalls firstly that since the judgment of the Court of 28 November 1978 in the case of Luedicke, Belkacem and Koç, the Swiss authorities have on three occasions been required to state the scope which, taking account of that decision, should be attributed to Switzerland's interpretative declaration on Article 6 (3) (e) of the Convention. The first official position was a legal opinion drawn up by the Federal Justice Office on 8 June 1979, which argued that the interpretative declaration could be assimilated to a reservation and that it remained fully effective even after the Court's judgment. The other two occasions were the judgments delivered by the Criminal Court of Cassation of Neuchâtel and by the Federal Court on 10 October 1979 and 30 April 1980 respectively, both of which concerned the applicant and found that the Swiss interpretative declaration had the same effect as a formal reservation and complied with the formal requirements laid down in Article 64 of the Convention.

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31. The Government attaches fundamental importance to the position adopted by the Swiss Government on these three occasions. It further considers that it must reply to the following questions: the scope of reservations and interpretative declarations in general international law, reservations and interpretative declarations in the Convention system, the scope of Switzerland's interpretative declaration on Article 6 (3) (e) of the Convention and finally, the compliance of that declaration with the formal requirements of Article 64 of the Convention.

1. Scope of reservations and interpretative declarations in general international law

32. The Government recalls that the European Court of Human Rights acknowledged that the Vienna Convention on the Law of Treaties of 23 May 1969 was a source of guidance in the interpretation of the Convention, insofar as it stated generally accepted principles of international law (Eur Court HR, Golder case, judgment of 21 February 1975, para 29).

33. However, with regard to the interpretation of the concept of reservation, which appears in Art 64 of the Convention, Article 2 (1) (d) of the Vienna Convention provides that:

> «'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».

34. Concerning this Article, the Government refers to the commentary on the draft articles of the International Law Commission on the law of treaties which states as follows: (United Nation Conference on the law of treaties, official records, New York, 1971, p 10):

> «The need for this definition (of reservations) arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted».

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35. The Government considers it beyond question that when Switzerland drew up an interpretative declaration of Article 6 (3) (c) and (e) of the Convention, it intended to exclude itself from an interpretation of that provision that was inconsistent with that declaration. The travaux préparatoires amply bear out this point. Furthermore, the federal decree adopted on 3 October 1974 by the Federal Chambers placed reservations on an equal footing with interpretative declarations, both of which were conditions of the Federal Chambers' approval of the Convention.

36. Finally, the Government agrees with a theory put forward by Professor McRae, whereby a distinction must be drawn between «mere interpretative declarations» and «qualified interpretative declarations» («The legal effect of interpretative declarations», BYIL, 49, 1978, p 155-173). The object of the former is simply that the State sets out its interpretation of the treaty or part thereof, whereas in the latter case a State makes a specific interpretation of the treaty or part thereof a condition of its ratification or accession. The effects that should be attributed to the two types of interpretative declarations are not the same: whereas the scope of a mere interpretative declaration differs according to the attitude adopted by the other Contracting Parties, a qualified interpretative declaration must on the other hand be assimilated to a reservation.

2. Reservations and interpretative declarations in the Convention system

a. State practice

37. The Government notes that almost half of the States parties to the Convention have made reservations which have not produced any reaction from other Contracting Parties. This liberal attitude to reservations and interpretative declarations is due to the fact that the principal concern of States parties to the Convention has been that reservations and interpretative declarations made by some of them should not be incompatible with the object and purpose of the Convention - this would be contrary to general international law, Article 19 of the Vienna Convention - or be «of a general character» in accordance with Article 64 (1) of the Convention.

38. The Government remarks in this respect that the absence of objections by States party to the Convention to Switzerland's interpretative declaration undoubtedly amounts to implied consent by the Contracting Parties to that declaration. This practice of implied consent is recognised in the Convention system and in the instant case is due to the fact that before formulating this interpretative declaration, the Swiss authorities had extensively sounded out opinion through diplomatic channels.

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39. Moreover, there seems in fact to be no strict boundary separating reservations from interpretative declarations. The Government considers that the fact that in the collected texts relating to the Convention, the Secretariat has placed declarations after «reservations made to the Convention, First and Fourth Protocols, under Article 64» cannot justify the conclusion that an interpretative declaration is technically narrower in scope and is not covered by Article 64 of the Convention.

40. In order to illustrate firstly, the vague boundary between reservations and interpretative declarations and secondly, the tolerance of States parties to the Convention as regards compliance with the technical requirements of Article 64 (2), the Government cites two examples: firstly, the position of the Irish Government, which ratified the Convention in 1953 «subject to the reservation that they do not interpret Article 6 (3) (c) of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland»; secondly, the position of the Maltese Government, which in a declaration of interpretation made in 1967, stated that «it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts». The respondent Government notes that in neither of these cases was the domestic law concerned mentioned by name and considers it difficult a priori to state in what respect the scope of the Irish Government's reservation is wider than the qualified interpretative declaration of the Government of Malta.

b. The practice of the organs of the Convention relating to Article 64

41. The Government considers it significant that the Commission has to date been liberal in its interpretation of reservations made by States. The Court does not appear to have yet had an opportunity to decide the validity and scope of reservations or interpretative declarations made pursuant to Article 64 of the Convention. Admittedly, in its judgment of 9 April 1979 in the Airey case (Series A, Vol 32, p 16, para 26 in fine), it clearly ruled out the possibility of the Irish reservation to Article 6 (3) (c) affecting that State's obligations under Article 6 (1) of the Convention. However, the fact remains that the Court in no respect seems to have challenged the formal validity of the Irish reservation, even though the latter did not strictly comply with the formal requirements of Article 64 (2) of the Convention.

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c. Trends in legal opinion

42. The Government notes that at the recent international colloquy in Frankfurt on the Convention in April 1980, there was considerable support for stronger supervision by the organs of the Convention of reservations and interpretative declarations made by States. However it is significant that Sir Vincent Evans, representative of opinion in one of these States, warned the participants at the colloquy against this tendency, emphasising that if States could not protect themselves by reservations with sufficient certainty, they might be reluctant to ratify new instruments in the future.

3. Scope of Switzerland's interpretative declaration on Article 6 (3) (e) of the Convention

43. The Government argues that in order to decide the question of whether the Federal Council's interpretative declaration has the same scope as a reservation, the intention of the Legislature and the positions adopted by the Government before the parliamentary debates must be of decisive importance. The clarity of the statements made in 1974 in the Swiss Parliament (in particular, Mr Graber, a Federal Councillor stated: «where the Convention and domestic law are incompatible, we shall make reservations, and on a question of interpretation, we shall make interpretative declarations»; and Mr Hefti, Rapporteur of the Committee of the Council of States, «interpretative declarations must be assimilated to reservations made in accordance with Article 64 of the Convention») can be explained by the consistent position adopted by the Government, which since 1968 had drawn the Legislature's attention to the advisability and need to make an interpretative declaration on Article 6 (3) (e) (see in particular Article 207, 1 (a) of the Code of Criminal Procedure of the Canton of Valais, of 22 February 1962).

44. In its report of 9 December 1968, the Federal Council noted that in several cantons, the payment of an interpreter was regarded as part of the costs of the case, which were borne by the convicted person. The relevant passages of this report are as follows:

> «In order to avoid any possible dispute and in view of the lack of case-law in the Commission on this point, we consider however that Switzerland could, in acceding to the Convention, make an interpretative declaration of Article 6 (3) (e), taking account of the practice of ordering the costs resulting from the assistance (...) of an interpreter to be borne by the convicted person».
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«As to the question of the free assistance (...) of an interpreter, it seems preferable as long as the European Commission and Court of Human Rights has not had an opportunity to rule on this question, to specify in the instrument of ratification the interpretation that Switzerland intends to give the provisions in question» (Feuille fédérale, 1968, II, p 2211).

45. It further noted that free interpretation raised complex problems for Switzerland «particularly on account of the existence of four national languages recognised by Article 166 of the Federal Constitution and the presence of a large number of aliens on our territory» (loc. cit).

46. Moreover, the Federal Council, in its message of 4 March 1974, noted that «the free assistance of an interpreter is not expressly recognised in Swiss law. The payment of the interpreter is usually part of the costs of the case and may be ordered against the person convicted» (Feuille fédérale, 1974, I, p 1035).

Another passage states that:

«We do not think that we can recommend the withdrawal of this declaration (...). In particular, we consider that the rights of the accused are protected from the moment that he is not obliged to advance the costs involved in obtaining the services of a lawyer appointed by the court or an interpreter» (loc. cit, p 1105).

47. The respondent Government concludes that «it is clear beyond any possible doubt from the travaux préparatoires that the Federal Council's interpretative declaration is a qualified interpretative declaration that can be assimilated to a formal reservation». It emphasised that only the uncertainty which still existed in 1974 on the question of the interpretation of Article 6 (3) (e) of the Convention led the Federal Council and the Federal Chambers to opt for an interpretative declaration rather than a formal reservation.

48. They would have chosen the latter had Switzerland ratified the Convention after the Court had delivered its judgment of 28 November 1978. However, as the Federal Justice Office noted in its legal opinion, when the Convention was ratified by Switzerland, the formulation of a formal reservation within the meaning of Article 64 of the Convention «might have been inadvisable insofar as it might have appeared to prejudge a question of interpretation on which the European Court of Human Rights is the ultimate authority under the international system of the collective supervision of human rights set up by the Convention».

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4. Compliance of Switzerland's interpretative declaration with the formal requirements of Article 64

49. The Government maintains that the formal requirement in Article 64 (2) («any reservation ... shall contain a brief statement of the law concerned») cannot be taken literally, in view of the fairly flexible practice adopted in this matter by the Contracting Parties to the Convention.

50. Admittedly several States (the Federal Republic of Germany, France, Norway, Austria, Portugal, Spain) including a Federal State, have been careful to expressly refer to the provisions of domestic law that were taken into consideration when formulating reservations. It is however significant that reservations containing «a brief statement of the law concerned» are rare. When ratifying the European Convention on Human Rights in 1974, Switzerland could in good faith rely on this flexible practice, particularly since, as has already been mentioned, Ireland and Malta had drawn up a reservation and a declaration of interpretation on Article 6 (3) (c) and 6 (2) in general terms. A fortiori, Switzerland, being a Federal State without a standard law of procedure - not comparable to the situation in the Federal Republic of Germany - could rely on this flexible practice to excuse itself from drawing up and maintaining an up-to-date list of the relevant cantonal procedural provisions under Article 64 (2) of the Convention.

51. The Government refers here to the judgment of the Federal Court in the public law appeal brought by the applicant, in which it agreed with the opinion of Professor Wildhaber that «a Federal State cannot be required to provide a detailed list of all its sources of cantonal and, where appropriate, municipal law».

52. Finally, and taking account of the fact that the Federal Council's report of 1968 and the messages of 1972 and 1974 refer by way of example to certain cantonal procedural provisions (in the former report, Article 207 (1) (a) of the Code of Criminal Procedure of the Canton of Valais of 22 February 1962 and Articles 98 and 245 of the Federal Code of Criminal Procedure are referred to), the Swiss Government considers that the object and purpose, if not the letter, of Article 64 (2) of the Convention have been complied with and that Switzerland's interpretative declaration is in this respect in accordance with the Convention.

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IV. OPINION OF THE COMMISSION

53. The Commission is required to decide the following questions:

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

In this respect the Commission will consider whether:

1. it is competent to determine the compliance with the Convention of reservations or interpretative declarations made by party States;

2. the above-mentioned interpretative declaration made by Switzerland has or has not the effect of a reservation within the meaning of Article 64 (1) of the Convention;

3. the said declaration was or was not made in accordance with Article 64 of the Convention;

On this point it will decide whether

a. Switzerland's interpretative declaration is a reservation "of a general character";

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

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

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

Article 64 reads as follows:

"1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

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

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

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

56. As the European Court of Human Rights has held, the right protected by that provision "entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter without subsequently having claimed back from him payment of the costs thereby incurred" (Eur, Court HR Case of Luedicke, Belkacem and Koç, judgment of 28 November 1978, para 46).

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

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

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

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

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

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

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

63. The latter, in drawing up the Convention, did not intend - as the Commission has already noted, to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but ... to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.(see Application No. 788/50, Austria v Italy, Rec. 7, pp. 23,41). The obligations undertaken by States are of an essentially objective character, which is particularly clear from the supervisory machinery established by the Convention. The latter "is founded upon the concept of a collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention".(loc cit p. 42).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Relying on the travaux préparatoires, the Government argues that they clearly show "beyond any possible doubt, that the Federal Council's interpretative declaration can be assimilated to a formal reservation". It

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further contends that continuing uncertainty in 1974 about the scope of Article 6 (3) (e) of the Convention led the Federal Council and the Federal Chambers to opt for an interpretative declaration rather than a formal reservation; it would have chosen the latter had Switzerland ratified the Convention after the judgment delivered by the Court on 28 November 1978 in the case of Luedicke, Belkacem and Koç.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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91. In the instant case, however, Swtizerland's interpretative declaration refers to a provision - Article 6 (3) (e) - which lays down a very specific principle: the free assistance of an interpreter. Consequently, the failure by Switzerland - an ommision which it would have been desirable to avoid - to include a brief statement of the national laws that were contrary to this principle did not prove to be decisive in the circumstances of the present case. Indeed, the very terms of the interpretative declaration were sufficient to make the applicant or his lawyer aware that the principle of the free assistance of an interpreter could not as such be invoked against Switzerland.

Conclusion

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

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

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

Conclusion

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

The Secretary of the Commission	The President of the Commission
(H C KRUGER)	(C A NORGAARD)

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DISSENTING OPINION OF Mr B J KIERNAN

Joined by Mr Gözübüyük

1. I agree with the majority view that the Commission has jurisdiction to determine the effect of a reservation and of an interpretative declaration made by a State signing or ratifying the Convention. I cannot agree that the declaration of Switzerland of the interpretation of Artic. 6 (3) (e) of the Convention is, or can be regarded as, a reservation duly made under Article 64.

2. The right of a State to make a reservation is expressly written into the Convention in Article 64. Because it is an express or special provision authorising the making of reservations in specified cases and in a specified manner, a reservation which does not comply with Article 64 is not permitted. The Swiss declaration does not comply with Article 64 because it is not described as a reservation; it does not state the extent to which the laws then in force are not in conformity with Article 6 (3) (e) and it does not contain a brief statement of the laws concerned. It is not, in my opinion, a reservation which is permitted under Article 64 and is for that reason a nullity.

3. None of the requirements of Article 64 can, in my opinion, be disregarded as being merely formal. The purpose of Article 64 is to enable a State whose domestic law is, in some respects, not in conformity with the Convention, to become a party to the Convention in spite of that. Because the Convention provides for a collective guarantee of human rights, it is envisaged that States bring their legislation eventually into line with the Convention. The requirement in Article 64 (2) to give a brief statement of the law concerned is not just idle curiosity. That paragraph must be read in particular with Article 57 of the Convention which gives powers of a supervisory nature to the Secretary General of the Council of Europe. Full compliance with Article 64 is necessary to enable these powers to be effectively exercised by periodic verification of the compatibility of domestic laws with the Convention.

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4. The law on reservations in 1950, when the Convention was adopted, was then far from settled as may be seen by the different approaches to reservations by the League of Nations in 1927 (1) and by the Pan-American Union in 1932 (2), and disagreement some years later of the International Law Commission (3) with the advisory opinion of the International Court on Reservations to the Genocide Convention (4). Article 64 should be seen against this background as an attempt to provide for a special and more certain regime governing the making of reservations under the Convention.

5. This provision also reflects the concern of those drafting the Convention to ensure that the obligations undertaken by the High Contracting Parties be as clearly defined and as certain as possible - a matter of paramount importance in a Convention which provides for the right of individual petition against States.

To regard interpretative declarations as reservations would introduce uncertainty into Article 64 and detract from the clear terms of the provision.

6. Moreover, the use of interpretative declarations would appear, at least as far as the Convention is concerned, as a post-1950 development. To give them the same status as a reservation is to introduce an inequality of treatment between the States signing or ratifying the Convention earliest and those doing so later.

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(1) Report of the League of Nations Committee for the Progressive Codification of International Law (1927) 8 LNOJ 880-881.

(2) Reservations to Multilateral Conventions, UN Doc. A/1372, p. 11.

(3) YB ILC II, pp. 125-31.

(4) ICJ Rep. (1951), p. 15.