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## Parliamentary Participation in Treaty-Making, Report on Swiss Law - Europe

Luzius Wildhaber

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# PARLIAMENTARY PARTICIPATION IN TREATY-MAKING, REPORT ON SWISS LAW

LUZIUS WILDHABER\*

## I. INTRODUCTION

The Swiss Federal Constitution of 1874 is, like most other constitutions, "introverted." It deals very briefly with declarations of war and treaties of peace, the preservation of independence and neutrality, emigration and expulsion of foreigners, foreign commerce and the conclusion of other international treaties in general.<sup>1</sup> But it shows no awareness of the fundamental sociological fact of present-day international interdependence and transnationalism. Ever since the Second World War, government and parliament have consistently proclaimed that the conduct of foreign relations must be guided by the principles of neutrality, solidarity, availability and universality.<sup>2</sup> These principles, however, cannot be found explicitly in the written text of the Constitution. The express wording of the Federal Constitution mainly acknowledges international coexistence, cooperation and interdependence by way of regulating the making of treaties. To the extent it is claimed that the Swiss legal order is open to international developments and the supremacy of international law, one must rely on changed circumstances, the buildup of customary constitutional law or a contemporaneous interpretation of the Constitution in the light of a very different context.<sup>3</sup>

\* Dr. iur., LL.M., J.S.D.; Professor of public international law and constitutional law and Rector of the University of Basel; Associate Member of the International Law Institute; Judge at the European Court of Human Rights. I owe sincere thanks to my two former assistants Dr. Roland Strauss and Dr. Valentin Zellweger for their able help in the preparation of this article.

1. Dietrich Schindler, *Art. 8 RZ 1-3, 30-45*, in *KOMMENTAR ZUR BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT VOM 29. MAI 1874* [hereinafter *BV-KOMMENTAR*] (Jean-François Aubert et al. eds., 1987-1992); Luzius Wildhaber, *Legalitätsprinzip und Aussenpolitik - eine Problemerkizze*, *FESTSCHRIFT RAYMOND PROBST* 443 (1984); Luzius Wildhaber, *Aussenpolitische Kompetenzordnung im Schweizerischen Bundesstaat*, *HANDBUCH DER SCHWEIZERISCHEN AUSSENPOLITIK* (2d ed. 1992).

2. Luzius Wildhaber, *Neutralität, Aussenpolitik und internationale Organisationen aus Schweizer Sicht*, in *SCHWEIZ-ÖSTERREICH* 209, 217-19 (Koja and Stourzh eds., 1986); ALOIS RIKLIN, *GRUNDLEGUNG DER SCHWEIZERISCHEN AUSSENPOLITIK* (1975); Walter Kälin, *Verfassungsgrundsätze der Schweizerischen Aussenpolitik*, 105 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 251, 289-342 (1986); Jean Monnier, *Les Principes et les Règles Constitutionnels de la politique étrangère suisse*, 105 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 107, 126-34 (1986).

3. Ernst-Ulrich Petersmann, *Die Verfassungsentscheidung für eine völkerrechtskonforme Rechtsordnung als Strukturprinzip der Schweizer Bundesverfassung*, 115 *ARCHIV DES ÖFFENTLICHEN RECHTS* 537 (1990); Luzius Wildhaber, *Menschenrechte - Föderalismus - Demokratie und*

The following paper will deal, in a first part, with the distribution of powers between executive, legislature, courts and populace with respect to treaty-making. In a second part, it will describe the relationship between international and municipal law in the Swiss legal order. A final, third part will contain a specific discussion of the *Temeltasch*, *Belilos* and *Weber* cases before the European Commission and the European Court of Human Rights and the Swiss reactions to these cases, which are of special interest, because the Strasbourg organs have for the first time held invalid a reservation and an interpretative declaration and have therefore made a precedent-setting contribution to the international law of reservations.

The distribution of treaty-making powers between the Federal Government and the 26 cantons will not be taken up in this paper. It is taken for granted that the treaty-making power is fully entrusted to the Federal Government, in contrast to the basic presumption of competence in favor of the cantons. Indeed, under article 8 of the Swiss Federal Constitution of 1874 (Cst.), "the Confederation has the sole right to declare war and make peace, to conclude alliances and treaties, particularly customs and commercial treaties with foreign states," whereas under article 9 Cst. the cantons retain only "exceptionally" the right to conclude international agreements, "provided such agreements contain nothing repugnant to the Confederation or the rights of other cantons." The prevailing centralist interpretation sees in article 8 Cst. an independent and substantive source of federal power, so that the Federal Government has the right to conclude treaties even in the areas otherwise reserved to the legislative and administrative powers of the cantons. As a result, the cantonal agreement-making power is only concurrent and secondary to the plenary federal treaty-making power.<sup>4</sup> In the following, I shall concentrate only on the federal treaty-making power.

*die verfassungsrechtliche Verankerung der Aussenpolitik*, Festschrift Werner Kägi 423, 423-25 (1979) (plead in favor of such an openness).

4. Yves Lejeune, *Le statut international des collectivités fédérées à la lumière de l'expérience suisse* (1984); Luigi Di Marzo, *Component Units of Federal States and International Agreements* (1980); Schindler, *Art. 8-10 in BV-Kommentar*, *supra* note 1; Luzius Wildhaber, *Switzerland, in Federalism and International Relations* 245 (Michelmann and Soldatos eds., 1987); Luzius Wildhaber, *Conclusion and Implementation of Treaties in Switzerland, in Swiss Reports Presented at the XIIIth International Congress of Comparative Law* 173, 173-81 (1990).

## II. DISTRIBUTION OF TREATY-MAKING POWERS BETWEEN EXECUTIVE AND LEGISLATURE

### A. *Constitutional framework*

According to article 85 (5) and (6) Cst., the Federal Assembly (the legislature) has power to deal with "alliances and treaties with foreign states," and with "measures for the external security, for the preservation of the independence and neutrality of Switzerland, declarations of war and conclusions of peace." Under article 102 (8) and (9) Cst., the Federal Council (the executive) "watches over the external security, the assertion of the independence and neutrality of Switzerland," as well as over "the foreign interests of the confederation;" furthermore, it "is generally in charge of external affairs."

The purpose of the Federal Constitution is obviously to assign interdependent and overlapping powers to the legislature and the executive in the field of foreign policy and treaty-making. A long standing practice, rather than explicit clauses of the Constitution or court decisions, has settled most conflicts of competence. Yet owing to the openness and flexibility of the Constitution in the field of external affairs, new developments can readily be absorbed and the focus may be shifted elsewhere without formal constitutional revision.

### B. *The treaty-making process as a series of successive functional steps*

Especially for the purposes of comparing different legal systems, it will be most helpful to break down the treaty-making process into a series of successive functional steps. These steps take place partly on the international and partly on the municipal plane. It is particularly important and difficult to reconcile the differing exigencies of the various planes. The following steps may be distinguished:

1. international and/or municipal decision to initiate and negotiate a treaty;
2. municipal nomination of the negotiators and discussion of the principles which shall guide them;
3. formulation of the treaty during the international negotiations;
4. municipally relevant decision (by the executive, the legislature or the people in a vote on a treaty referendum);
5. internationally binding declaration of the municipally relevant decision;
6. municipal performance (implementing legislation or rule-

making in the case of non-self-executing treaties, followed by municipal application by courts or administration);  
 7. international and/or municipal interpretation or modification, denunciation or termination of a treaty (which in turn may be followed by the making of a new treaty).

The following considerations will focus above all on power to make the municipally relevant decision. There, we must distinguish as many as four possible procedural variants in Swiss law:

1. Agreements in simplified form (or executive agreements) may be concluded by the executive alone;
2. The more important treaties must be approved by the Federal Assembly;
3. Three categories of treaties are subject to an optional referendum, and in addition, the Federal Assembly may decide to expose other treaties to an optional referendum;
4. Two categories of treaties must be approved, in a compulsory referendum vote, by a majority of the people voting and a majority of the cantons.

### *C. Agreements in simplified form*

According to a decade-old practice, the Swiss Federal Council used to conclude five categories of international agreements without submitting them to parliamentary approval or to the treaty referendum. These categories were the following:

1. agreements the conclusion of which the Federal Assembly had authorized in advance;
2. agreements executing prior treaties;
3. agreements which conferred only rights and imposed no new obligations upon Switzerland;
4. provisional and urgent agreements;
5. agreements concerning objects which, in municipal law, the Federal Council had power to regulate alone.<sup>5</sup>

Some of these categories gave rise to internal conflicts and so the International Law Division of the Federal External Affairs Department and the Federal Office of Justice of the Federal Department of Justice and Police, in a version agreed by the Federal Council, reframed the said categories in 1987. They now read as follows:

5. BRUNO SPINNER, *DIE KOMPETENZDELEGATION BEIM ABSCHLUSS VÖLKERRECHTLICHER VERTRÄGE IN DER SCHWEIZ* 42-48, 136-59 (1977); LUZIUS WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* 119-24 (1971).

1. agreements the conclusion of which the Federal Assembly has authorized in advance;
2. agreements which necessitate a provisional entry into force without delay;
3. agreements which settle matters of a purely administrative or technical nature of minor importance and thus are aimed primarily at the authorities and not at individuals.<sup>6</sup>

#### *D. Treaty referendum*

Those treaties which cannot be concluded in simplified form are subject to the approval of the Federal Assembly. Roughly speaking, one may say that a treaty has to be submitted for legislative approval, if and when it contains new obligations of a certain importance, which the Federal Council may not incur municipally. After legislative approval, certain treaties are subject to an optional, others to an obligatory referendum.<sup>7</sup> In the case of an optional referendum, the approval decree of the Federal Assembly can be challenged within 90 days by the signature of at least 50,000 citizens and put to a vote. In the case of an obligatory referendum, the approval decree is automatically subject to a vote, which requires the double majority of all people voting and of the cantons.

An amendment of 1977 to the Federal Constitution extended the treaty referendum considerably. The former regime depended on the criterion of a treaty duration of more than 15 years. The present regime tries to take account of the intrinsic importance of each treaty by spelling out certain categories of treaties considered as particularly significant. Thus article 89 (3) Cst. subjects to optional referendum:

1. treaties concluded for an indefinite period and without possibility of denunciation;
2. the adherence to international organizations;
3. treaties implying multilateral unification of law;
4. treaties can also be subjected ad hoc to an optional referendum by a discretionary decision of the Federal Assembly, under

6. See the agreed version in 51 VERWALTUNGSPRAXIS DER BUNDESBEHÖRDEN no. 58, 369-401 (1987); see also Schindler, *Art. 85 RZ 40-50 (1989)*, in BV-KOMMENTAR, *supra* note 1 (indicating that under the new system, only slightly more than 50% of all agreements concluded by Switzerland are in simplified form, whereas under the earlier system, 65% were agreements in simplified form).

7. See for the new situation after 1977 Schindler, *Art. 89 ss. 3-5 (1989)* in BV-KOMMENTAR, *supra* note 1; Mark E. Villiger, *Die Unterstellung eines Staatvertrages unter das Referendum*, FESTSCHRIFT DIETRICH SCHINDLER 799 (1989); Luzius Wildhaber, *Das neue Staatsvertragsreferendum*, FESTSCHRIFT RUDOLF BINDSCHIEDLER 201 (1980).

article 89 (4) Cst. This "doubly-optional" referendum would offer the possibility to put politically and legally sensitive treaties which do not fall within article 89 (3) Cst. to a popular vote, but it is obvious that the Federal Assembly refrains from such an extension of the referendum.

According to article 89 (5) Cst., the adherence to supranational organizations and to organizations for collective security is subject to obligatory referendum. In 1986, the Swiss people and cantons rejected the government's proposal to join the United Nations Organization.<sup>8</sup> Full membership in the European Communities would similarly require a positive vote by the people and the cantons. In all likelihood, membership in the new European Economic Area between the European Economic Community (EEC) and EFTA states would also be considered as a case of quasi-adherence to the supranational EEC and would therefore be exposed to an obligatory referendum.

### *E. The distribution of treaty-making powers between executive and legislature*

#### 1. In general

As we have seen above, it is the purpose of the Constitution to assign interdependent and overlapping powers to both the legislature and the executive in the field of foreign policy and treaty-making. Both are in other words urged to co-operate with one another. There is no "presumption of competence" either in favor of the Federal Council or in favor of the Federal Assembly, because treaty-making is neither an exclusively executive nor a purely legislative function in the sense of the doctrine of separation of powers.

#### 2. Negotiations

The Federal Council negotiates and signs treaties. It decides on the beginning of negotiations, nominates and instructs the negotiating delegation and therefore formally conducts the negotiations. It can decide to drop an unsatisfactory project without submitting it to the Federal Assembly. There is basically no possibility for parliament to influence the content of a draft treaty or to modify it. Only seldom has the Federal

8. *Botschaft des Bundesrates über den Beitritt der Schweiz zu den Vereinten Nationen*, BUNDEBLATT DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT 497 (1981 I) [hereinafter BB1]; Dieter Pfirter, *Verhältnis Schweiz-UNO: Wie weiter nach dem 16. März 1986*, 28 SCHWEIZERISCHES JAHRBUCH FÜR POLITISCHE WISSENSCHAFT 73 (1988); Luzius Wildhaber, *Das Schweizer Nein zu einer Vollmitgliedschaft in den Vereinten Nationen*, 41 EUROPA-ARCHIV 461 (1986).

Assembly attempted to oblige the Federal Council to negotiate certain treaties. The government, to be sure, can only be obliged to establish diplomatic contacts and to suggest negotiations, whereas, of course, the other contracting parties remain fully free as to their reactions. In the case of politically or economically important treaties, the government usually informs the parliamentary commissions with respect to procedure and content.

### 3. Legislative approval

The Federal Constitution states only that, and not when, the Federal Assembly must approve treaties. Theoretically, five possibilities are conceivable:

1. authorization in advance of negotiations;
2. advance authorization, subsequent specific approval after ratification, subject to treaty denunciation in case of refusal of approval;
3. tacit approval in case the legislature does not expressly object between signature and ratification;
4. specific approval between signature and ratification;
5. subsequent approval after ratification.

In Swiss practice, all these variants have occurred, with the exception of the third one. The normal procedure is the fourth one, i.e., specific approval between signature and ratification. It is not advisable to ratify a treaty before the legislature has approved it, since this would create the risk that the treaty becomes internationally binding while lacking validity in municipal law.

The predominant and in my view correct thesis explains the approval of a treaty by the Federal Assembly as an authorization to the Federal Council to ratify it.<sup>9</sup> In other words, legislative approval is considered as a municipal condition of ratification, or simply as one more step in the entire treaty-making process. Approval is not a transformation, since the Swiss system is not dualist in that respect. Nor is it tantamount to law-making, because some treaties are not law-making in nature, because the Federal Assembly must accept treaties as a whole and is not free to amend them, and because the treaty referendum is far

9. See generally JAQUELINE B. MOERI, DIE KOMPETENZEN DER SCHWEIZERISCHEN BUNDESVERSAMMLUNG IN DEN AUSWÄRTIGEN ANGELEGENHEITEN (1990); BERNHARD EHRENZELLER, LEGISLATIVE GEWALT UND AUSSENPOLITIK (forthcoming 1992); Walter Kälin, *Der Geltungsgrund des Grundsatzes "Völkerrecht bricht Landesrecht,"* 124 bis ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS 45 (1988); Monnier, *supra* note 2, at 199-200, 217; Schindler, *Art. 85 Ziff. 5, RZ 51-54 in BV-KOMMENTAR, supra* note 1; WILDHABER, *supra* note 5, at 52-58, 68-85.



less extensive than the referendum against statutes.<sup>10</sup> Nor is approval the same as ratification, the latter term being reserved for the final and—under international law—binding consent given by the parties to a treaty and expressed by the executive.

The two Federal Chambers accept or reject a treaty as a whole, *en bloc*. This is so because, technically speaking, the Chambers act upon the federal decree ("*arrêté fédéral*") approving the treaty, rather than the treaty as such.

The legislature must of course be free to approve or reject treaties. Nonetheless, the refusal to approve a given treaty project is bound to have major repercussions, either on the international or the municipal plane, and is therefore hardly a check upon the executive which can be used regularly and efficiently. Like other legislatures, the Federal Assembly therefore insists upon a constant and timely information by its preparatory commissions, and it will be inclined to subject important treaties to a searching scrutiny. This has been the case for instance of the Free Trade Agreement with the European Economic Community of 1972,<sup>11</sup> of the European Convention on Human Rights and its Additional Protocols,<sup>12</sup> the United Nations Human Rights Pacts,<sup>13</sup> as well as a few selected bilateral agreements concerning, e.g., the status of migratory workers or double taxation.<sup>14</sup> In 1987, the Federal Assembly refused to give its approval to the European Social Charter.<sup>15</sup>

In the years since 1989, negotiations concerning an European Economic Area or even a full adherence to the EEC have taken place. These negotiations have led to a wide-ranging discussion with regard to the future European role of Switzerland. Since approval of a treaty on an European Economic Area or membership in the European Communities will be subject to an obligatory referendum and the requirement of a double

10. All federal statutes are subject to an optional referendum, art. 89 Swiss Federal Constitution of 1984 [hereinafter Cst.], while only about 20% of all treaties are subject to the categories of optional referendum spelled out in art. 89 (3-4) Cst. (as to which see *supra* II D).

11. Sammlung der Eidgenössischen Gesetze 1972 3115 [hereinafter AS], Systematische Sammlung des Bundesrechts [hereinafter SR] 0.632.401.

12. Amtliches Bulletin der Bundesversammlung Nationalrat/Ständerat [hereinafter Amtl. Bull. NRat] 1969 320-69, StRat 1969 201-22; NRat 1972 1697-1709, StRat 1972 774-80; NRat 1974 1461-73, 1484-99, 1502-04, StRat 1974 378-90. As to the refusal to ratify the First Additional Protocol, 37 see SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT [hereinafter SJIR] (1981) 282-83, 38 SJIR 158 (1982); 39 SJIR 272 (1983); 40 SJIR 200 (1984); 41 SJIR 249 (1985); 44 SJIR 268 (1988). As to the ratification of the 6th, 7th and 8th Additional Protocols, see 43 SJIR 192-94 (1987); 44 SJIR 267 (1988); 46 SJIR 259 (1989).

13. BBl 1991 I 1189-1247.

14. See the 1964 Treaty concerning the Emigration of Italian Workers to Switzerland, AS 1965 399, SR 0.142.114.548, and the 1971 Double Taxation Treaty with the Federal Republic of Germany, AS 1972 3075, SR 0.672.913.62.

15. BBl 1983 II 1241, 1988 II 311; Amtl. Bull. StRat 1984 28-44, NRat 1987 1560-94.

majority of the people and the cantons, it is not surprising that such discussions should take place. In the future, it seems necessary to elaborate a concept under which the government attempts to inform systematically not only the parliamentary commissions, but the public at large. Even after ratification of either an European Economic Area or the EEC treaties, the Federal Assembly should be permanently involved in the shaping of European policy and the elaboration and application of secondary EEC norms.<sup>16</sup>

Most recently, a preparatory commission of the National Council formulated proposals for an increased parliamentary participation in treaty-making.<sup>17</sup> It proposed increased and regular information concerning international developments; a consultation of the External Affairs Commissions of the Federal Assembly before mandates are given to delegations in international organizations; a similar consultation with respect to treaty negotiations; and finally an authorization of the External Affairs Commissions to send observers to pending negotiations with respect to treaties or international conferences. No proposals were made concerning a parliamentary participation in treaty interpretation, denunciation or termination. The Federal Council replied that it would endeavor to improve parliamentary information.<sup>18</sup> It objected to obligatory consultations of parliamentary commissions before treaty negotiations and also to the inclusion of observers in the Swiss delegations to international conferences. The Federal Assembly accepted a tuning down of the earlier proposals, and it now seems that a compromise version will become law, which will enhance parliamentary participation at an early stage and will stress regular information and consultation.<sup>19</sup>

#### 4. Parliamentary qualifications of treaty approvals

Swiss practice knows of no parliamentary understandings or qualifications apart from those expressed in the approval decree itself. If the Federal Assembly wishes to insist upon a specific interpretation of a treaty provision, it ought to express such wish in its decision to approve a

16. Olivier Jacot-Guillarmod, *Conséquences, sur la démocratie suisse, d'une adhésion de la Suisse à la Communauté européenne*, EG-RECHT UND SCHWEIZERISCHES STAATSRECHT, BEIHEFTE ZUR ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 10, 39, 61, 72, 74-75 (1990); HANSJÖRG SEILER, EG, EWR UND SCHWEIZERISCHES STAATSRECHT 42-58 (1990); Daniel Thüser, *Die Schweizerische Bundesversammlung und die EG - Zu den Chancen einer verstärkten parlamentarischen Legitimierung des europäischen Gemeinschaftsrechts im nationalen Rahmen*, in DAS PARLAMENT — "OBERSTE GEWALT DES BUNDES?" 443-73 (1991).

17. BBI 1991 III 625, 648-58, 708-09, 728-29, 757, 784-87; 1991 IV 367-68.

18. BBI 1991 III 816-20, 826.

19. BBI 1991 III 1376-77.

treaty, making the approval subject either to renegotiation or to a reservation which must be expressed upon ratification.

As for formal reservations or interpretative declarations, the rule is that the Federal Council suggests these itself. It also formulates itself, without the specific approval of the Federal Assembly, objections to reservations or declarations introduced by other parties to a treaty.<sup>20</sup> If the Federal Council makes a reservation upon ratification, the intended effect is to exclude or to modify the legal effect of certain treaty provisions in their application to the other contracting parties.<sup>21</sup>

Nevertheless, the Federal Assembly may qualify its approval of a treaty by the condition that the Federal Council make specific reservations or declarations while ratifying a given treaty or acceding to one. The Federal Assembly may therefore change the formulation of reservations or declarations advocated by the Federal Council, it may introduce new ones or ask the Federal Council to examine whether a reservation cannot be dropped in a specific case.<sup>22</sup> In all such cases, it is understood that the Federal Assembly cannot amend a treaty itself, on the international plane, but that it only participates in the internal treaty-making process.<sup>23</sup> Any parliamentary qualification in respect of a treaty, be it a reservation or a declaration or an understanding or any other qualification, is considered as (municipally and internationally) legally binding only if it forms part of the legislative approval decree. If the Federal Assembly or specific members of parliament spell out a special under-

20. 46 SJIR 208 (1989) (for the Federal Council's objection to a declaration by the former German Democratic Republic to the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment).

21. See for example the Swiss reservations to the 1984 7th Additional Protocol to the European Convention on Human Rights [hereinafter ECHR], SR 0.101.07; to the 1950 Agreement on the Import of Educational, Scientific and Cultural Objects, SR 0.631.145.141; to the 1956 Statute of the International Atomic Energy Agency, AS 1958 503; to the 1965 Convention on the Registration of Inland Navigational Vessels, AS 1972 881; to the 1948 Convention on the Intergovernmental Maritime Consultative Organization, AS 1958 981; to the 1967 European Agreement on the Instruction and Education of Nurses, AS 1970 1209; to the 1974 European Convention on the Social Protection of Farmers, AS 1975 2240.

22. See e.g., the reservations to article 5 of the 1984 7th Additional Protocol to the ECHR, BBl 1986 II 622, Amtl. Bull. NRat 1986 1242, AS 1988 1596, SR 0.101.07; to the 1951 Convention on the Status of Refugees, BBl 1954 II 84, AS 1955 441, SR 0.142.30; to Art. 2 of the 1930 Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, BBl 1931 II 359, *Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848-1947* 11 1928 [hereinafter BS], SR 0.221.545.1; to Art. 2 of the 1931 Convention on the Settlement of Conflicts of Laws concerning Checks, BBl 1931 II 359, BS 11 928, SR 0.221.555.1; to the 1978 Additional Protocol No. 99 to the European Convention on Mutual Assistance in Criminal Matters, BBl 1983 IV 153, Amtl. Bull. NRat 1984 591, 603-04, StRat 1985 500, 505; to the 1962/1983 General Credit Agreements of the International Monetary Fund, BBl 1983 II 1384, AS 1984 845, SR 0.941.15.

23. MOERI, *supra* note 9, at 133i, Monnier, *supra* note 2, at 216; Schindler, *Art. 85 Ziff. 5, RZ 54 in BV-KOMMENTAR*, *supra* note 1; Wildhaber, *Conclusion and Implementation of Treaties*, *supra* note 4, at 184.

standing of a treaty, without making it part of their approval decision, such understanding will obviously influence the future municipal interpretation of the treaty, but only as one element of the entire interpretation process, not as an absolutely binding rule.

There have never been any claims that a lack of parliamentary participation would amount to a manifest violation of the Constitution or concerned a rule of fundamental concern, in terms of article 46 of the 1969 Vienna Convention on the Law of Treaties.<sup>24</sup>

I know of no bilateral treaty concluded by Switzerland which contains Swiss reservations. Swiss practice in this respect seems to follow the view of the International Law Commission, according to which "a reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty."<sup>25</sup>

The intended effect of an interpretative declaration to a treaty depends on the context.<sup>26</sup> The intended effect may be equivalent to that of a reservation.<sup>27</sup> Or else, the effect may be to communicate to the other contracting parties the Swiss understanding of some matter or its interpretation of a particular provision. Such a communication as a rule amounts to an attempt to influence the future interpretation on the international plane. Depending on the future interpretation, the Federal Council may wish to leave open the question whether the interpretative declaration can "harden" into a reservation at a given future moment. Other declarations may recognize certain procedures which require a specific declaration in order to become applicable,<sup>28</sup> or may specify the

24. Cf. WILDHABER, *supra* note 5, at 146-82; see also *Inländische Mission der Schweizer Katholiken v. Kanton Nidwalden und Verwaltungsgesicht des Kantons Nidwalden*, 112 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS (AMTLICHE SAMMLUNG) 75 (1986). An inhabitant of the canton of Nidwalden bequeathed to the *inländische Mission der Schweizer Katholiken* in the canton of Zug a legate which was taxed by Nidwalden in the amount of 20%. The beneficiary claimed that in 1954 the Cantonal Tax Administration of Nidwalden had decreed, in a reciprocity declaration to the canton of Zug, a tax exemption of such legates. The canton of Nidwalden claimed that under its cantonal constitution only the cantonal parliament would have been empowered to issue such reciprocity declarations. The Federal Tribunal applied international law by analogy and found that under Art. 46 of the 1964 Vienna Convention on the Law of Treaties, the canton of Nidwalden was estopped from pleading the invalidity of a reciprocity declaration issued by one of the members of its cantonal government.

25. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 203 (1966 II). In the same sense ROLF KÜHNER, *VORBEHALTE ZU MULTILATERALEN VÖLKERRECHTLICHEN VERTRÄGEN* 27-30 (1986).

26. See generally Donald M. McRae, *The Legal Effect of Interpretative Declarations*, BRITISH YEARBOOK OF INTERNATIONAL LAW 155 (1978); see also the discussion of the *Belilos* Case *infra* IV C.

27. See the treatment of the Swiss reservations and declarations in the *Temeltasch* and *Belilos* cases *infra* IV B. and C.

28. E.g., the declarations under Art. 25 ECHR recognizing the right of individual petitions, or

territorial range of application of a treaty.<sup>29</sup> Finally, certain declarations are purely declaratory.

### 5. Municipal interpretation and modification of treaties

All state organs which have to apply a treaty contribute, within their range of authority, to the process of municipal interpretation. This applies to federal and cantonal courts, parliaments and executives. As a result, the municipal courts are in principle free to interpret and apply international treaties. One may consider this as a consequence of the doctrine of separation of powers, or more specifically of the independence of courts. Nevertheless, municipal courts will, as a rule, interpret treaties—and particularly bilateral treaties—in conformity with the opinion expressed by the Federal Council in its written approval message to the Federal Assembly or in conformity with an expressed view of the majority of the Federal Assembly.<sup>30</sup> The courts are aware that the executive is free to amend and modify treaties anyway, so as to make them fit either subsequent practice or felt necessities of change. Municipal courts are therefore unlikely to interpret and apply treaties in a manner which would diverge from opinions expressed by the executive or a legislator.

In the case of law-making multilateral treaties, the evaluation may be somewhat different. The Federal Tribunal has shown a marked awareness of the needs of a dynamic interpretation, for instance, basing its case-law largely on the precedents of the European Commission and the European Court of Human Rights.<sup>31</sup>

Under article 102 (8) Cst., the general competence in the field of external relations lies with the Federal Council, which therefore seems to have authority to interpret a treaty in its international application. When the executive pleads cases before the European Commission or the European Court of Human Rights, nonetheless, the Federal Council cannot

the declarations recognizing the power of the Committee against Torture to consider complaints introduced by other parties or by individuals under Art. 21 and 22 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, SR 0.105.

29. *E.g.*, SR 0.631.122; 0.631.250.112.; 0.631.250.12; 0.631.250.21; 0.631.251.7; 0.631.252.511; 0.631.252.52; 0.632.21.

30. MARIO KRONAUER, *DIE AUSLEGUNG VON STAATSVERTRÄGEN DURCH DAS SCHWEIZERISCHE BUNDESGERICHT* 71-76 (1972); WILDHABER, *supra* note 5, at 234-39.

31. LUZIUS WILDHABER, *DIE SCHWEIZ UND DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION IM RAHMEN NEUERER ENTWICKLUNGEN* (1989); Rainer J. Schweizer, *Auf dem Weg zu einem Schweizerischen Verwaltungsverfahren- und Verwaltungsprozessrecht*, 91 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS-UND VERWALTUNGSRECHT 193 (1990); Daniel Thürer, *Neuere Entwicklungen im Bereich der Europäischen Menschenrechtskonvention*, 89 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS-UND VERWALTUNGSRECHT 377 (1988); Stefan Trechsel, *Der Einfluss der Europäischen Menschenrechtskonvention auf das Strafrecht und das Strafverfahrensrecht der Schweiz*, 100 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 667 (1988).

easily claim that a certain view expressed by the Federal Tribunal is wrong. Indeed, no such claim has been made in Strasbourg, to the best of my knowledge. While the Federal Council has the authority to interpret a treaty in its international application, therefore, it will consider itself bound by the municipal interpretation advocated by the Federal Tribunal.

As far as a treaty is subject to Swiss reservations, the municipal courts may not apply the reserved treaty parts. The same is true of those interpretative declarations which are considered as equivalent to a reservation.

Article 113 (3) Cst. states that all treaties approved by the Federal Assembly are binding upon the Federal Tribunal. This exclusion of judicial review of the constitutionality of federal statutes and treaties may be interpreted so as to mean that the Federal Tribunal may not review whether a reservation or declaration is internationally lawful, either under the regime of particular treaty or under general public international law. In a few recent cases which concerned the Swiss reservations or declarations to article 6 of the European Convention on Human Rights, however, the Federal Tribunal examined whether the reservations or declarations were compatible with article 64 of the European Convention on Human Rights (ECHR).<sup>32</sup> In each case, it reached the conclusion that the reservation or declaration was valid under article 64 ECHR, so that it cannot be taken for granted that the Federal Tribunal would consider itself empowered to strike down a reservation as invalid.

## 6. Denunciation and termination of treaties

Since the general competence in the field of external relations lies with the Federal Council, it is basically the federal government which has the authority to determine whether a treaty remains in force or has expired. The denunciation of treaties is also considered to lie within the competence of the Federal Council.<sup>33</sup> It is controversial whether the Federal Assembly would be empowered to oblige the Federal Council to denounce or terminate a treaty. Parliamentarians have repeatedly made use of the so-called motion (a binding mandate) in order to request the Federal Council to denounce a treaty.<sup>34</sup> But it is doubtful whether such motion is really binding upon the executive. The Federal Council, at any

32. 38 SJIR 159-60 (1982); 40 SJIR 205-06 (1984); 46 SJIR 263-65 (1989); 47 SJIR 193-94 (1990).

33. Monnier, *supra* note 2, at 200; WILDHABER, *supra* note 5, at 121.

34. Amtl. Bull. StRat 1972 242; NRat 1978 885-86, 1979 1123-25.

rate, has usually said that it will not consider such motion as binding.<sup>35</sup> The Council of States has recently amended its standing orders and has there said that the Federal Assembly can only recommend (but not order) the denunciation of a treaty by the Federal Council.<sup>36</sup>

### III. MUNICIPAL APPLICATION OF TREATIES

Treaties upon ratification become an integral part of the Swiss legal order without formal transformation.<sup>37</sup> In this respect, Switzerland has a monistic tradition. Once a treaty is officially published, it can be invoked by any individual before the administration or in court, provided the treaty is self-executing.

According to the Federal Tribunal, the main criterion for the self-executing character of a treaty is its justiciability, or in other words, the question whether it is sufficiently precise and clear in order to constitute the foundation of a court decision in a concrete case or controversy.<sup>38</sup> Apart from justiciability, the interpretation of the specific provision, its systematic context and the general aim of the treaty determine whether or not it is directly applicable.

### IV. SWISS RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE TEMELTASCH, BELILOS AND WEBER CASES

#### A. Introduction and background

The following cases will be discussed separately, because *Belilos* is the first case in which an international tribunal has held a reservation

35. Amtl. Bull. NRat 1975 960-64.

36. SR 171.14, *Geschäftsreglement des Ständerates* of 1986, Art. 25-33, particularly Art. 25 (2).

37. See Federal Office of Justice and Public International Law Division, *Rapports entre le droit international et le droit interne au sein de l'ordre juridique suisse*, 53 VERWALTUNGS-PRACTIS DER BUNDESBEHÖRDEN no. 54, 393-436 (1989 IV) (joint statement); see also Schindler, *Art. 85 Ziff. 5 RZ 56-65 in BV-KOMMENTAR*, *supra* note 1; for the general relationship between international and Swiss municipal law, see Olivier Jacot-Guillarmod, *La primauté du droit international face à quelques principes directeurs de l'Etat fédéral suisse*, 104 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 383 (1985 I); Kälin, *supra* note 9, at 45-65; Giorgio Malinverni, *L'article 113 al. 3 de la Constitution fédérale et le contrôle de conformité des lois fédérales à la Convention Européenne des droits de l'homme*, Festschrift OTTO K. KAUFMANN 381 (1989); Wildhaber, *Conclusion and Implementation of Treaties*, *supra* note 4, at 190-93.

38. ARNOLD KOLLER, *DIE UNMITTELBARE ANWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE UND DES EWG-VERTRAGES IM INNERSTAATLICHEN BEREICH* (1971); Oliver Jacot-Guillarmod, *L'applicabilité directe des traités internationaux en Suisse: histoire d'un détour inutile*, 45 SJIR 129 (1989); Blaise Knapp, *Les Particuliers et les Traités Internationaux Devant les Tribunaux Internes*, 88 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 229, (1969 I); Luzius Wildhaber, *Erfahrungen mit der Europäischen Menschenrechtskonvention*, 98 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 229, 334-41 (1979 II); BGE 112 I b 184, 106 I b 187, 100 I b 230, 98 I b 385.

invalid, and because a sketch of the background, the cases and the Swiss reactions to these judgments provide a very illustrative example of the complexities of our topic.

When the Federal Council proposed to the Federal Assembly, in 1968, to ratify the ECHR, various obstacles had to be overcome. The Federal Council urged that five reservations be attached, some with intertemporal effect and for a limited duration only, others as permanent derogations. The five reservations would have concerned:

1. The 19th century prohibitions upon the teaching of Jesuits and the foundation of new monasteries;
2. The lack of political rights of women to vote and to stand for election, as well as the lacking secrecy of the ballot in the case of the *Landsgemeinden* (which arose under the First Protocol);
3. Derogations to the principle of public hearings and the public pronouncement of judgments;
4. Inequalities between boys and girls in schools (which arose under the First Protocol);
5. and finally, lack of access to courts in the case of administrative confinement to psychiatric institutions.<sup>39</sup>

It is obvious that these reservations concerned important principles and fundamental freedoms. While a narrow majority of the National Council gave its consent to the proposed ratification, the Council of States, with an equally narrow majority, felt that ratification was inappropriate as long as such a significant number of reservations would have been necessary.<sup>40</sup>

In 1974, Switzerland ratified the ECHR, but not the First Protocol.<sup>41</sup> In the meantime, the right of women to vote in federal affairs had been introduced, and the full freedom of religion had been re-established. Switzerland then attached two reservations, one (which has since been withdrawn) with respect to administrative confinement to psychiatric institutions,<sup>42</sup> and the other one concerning the public nature of court hearings and of the pronouncement of judgments. In addition, Switzerland attached two interpretative declarations, which it considered as equivalent to reservations, but which it apparently called declarations in order to avoid the impression of attaching as many as four reservations. Another distinction invoked by the Federal Council is based on the rea-

39. BBl 1968 II 1057-1181.

40. Amtl. Bull. 1969 320-69; StRat 1969 201-22, 1974 1461-73, 1484-99, 1502-04; StRat 1974 378-90.

41. BBl 1974 I 1035-98, 1972 I 989-1000.

42. BBl 1977 III 1-63 = 34 SJIR 188-201 (1978); AS 1982 292 = 38 SJIR 160 (1982).



soning that reservations constitute exemptions from well-known effects of a treaty, whereas interpretative declarations express a state's view as to the resolution of future conflicts concerning interpretation.<sup>43</sup> The declarations, at any rate, concerned the costs for legal counsel and interpreters (article 6 paragraph 3 (c) and (e)) and the right of access to a court under the guarantee of a fair trial of article 6 paragraph 1. The remaining reservation and the two declarations have since come under fire in the *Temeltasch*, *Belilos* and *Weber* cases, which will be described in the following.

### B. *The Temeltasch case*

In the *Temeltasch* case,<sup>44</sup> a Dutch national of Turkish origin was arrested and tried for possession of drugs found in his car by the police in the canton of Neuchâtel. The Criminal Court acquitted Temeltasch, but required him to pay the costs of an interpreter. The Federal Tribunal upheld this judgment.<sup>45</sup> While article 6, paragraph 3 (c) and (e) guaranteed the free assistance of an attorney or an interpreter, Switzerland had limited these guarantees by its interpretative declaration, with the result that the said guarantees did not permanently absolve the beneficiary from payment of the resulting costs.<sup>46</sup> The interpretative declaration of Switzerland is easily explained in a multilingual society. It would contradict the Swiss principle of linguistic territoriality and the federal distribution of powers, if citizens from different cantons did not have to accept the language of the local courts.

The European Commission of Human Rights held that under the system of the ECHR it was competent to determine the validity of the Swiss declaration. It then held that the interpretative declaration amounted to a reservation. Article 64 ECHR provides with respect to reservations:

- (1) Any State may, when signing this Convention or when depositing

43. See *infra* note 53, *Belilos* Judgment of April 29, 1988 § 46.

44. Pierre-Henri Imbert, *Reservations to the ECHR before the Strasbourg Commission: The Temeltasch Case*, 33 INT. & COMP. L.Q. 558 (1984); Rolf Kühner, *Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention*, 42 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT AND VÖLKERRECHT 58 (1982) [hereinafter *ZaöRV*]; Kühner, *Die "auslegende Erklärung" der Schweiz zu Art. 6 Abs. 3 lit. e der Europäischen Menschenrechtskonvention*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT AND VÖLKERRECHT 43 (1983), 828-42; Beatrice Wagner & Luzius Wildhaber, *Der Fall Temeltasch und die auslegenden Erklärungen der Schweiz*, EUROPÄISCHE GRUNDRICHTE-ZEITSCHRIFT 145 (1983).

45. BGE 106 Ia 214 = 37 SJIR 287 (1981) = EuGRZ 1981 220.

46. The declaration reads as follows: "The Swiss Federal Council declares that it interprets the guarantee of free legal assistance and the free assistance of an interpreter, in Art. 6, § 3 (c) and (e) of the Convention, as not permanently absolving the beneficiary from payment of the resulting costs," 17 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 (1974).

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.

The Commission held that the Swiss declaration was attached to a specific provision of the Convention and therefore was basically narrow enough so as not to be of a general character. While Switzerland had failed to comply with the requirement that reservations contain a brief statement of the law concerned, the Commission treated this requirement as a formality that did not automatically invalidate the Swiss declaration.<sup>47</sup> The Commission's report was endorsed by the Committee of Ministers and provoked no reaction in the Swiss internal legal order.

### C. *The Belilos case*

In 1981, the Police Board for the City of Lausanne fined Mrs. Marlene Belilos 200 Swiss francs for participating in an unauthorized street demonstration.<sup>48</sup> The applicant denied having participated and sought to have the decision of the Police Board overruled, first by appeal to the same board, then before the Court of Criminal Cassation of the canton of Vaud and finally before the Federal Tribunal. She argued that the right to a fair trial and more specifically the right to access to an independent court was violated, since the Police Board was allowed to make factual determinations which were unreviewable in an independent and impartial tribunal. Indeed the appeal courts could only rule on the procedural regularity of the Police Board's decision.

The Federal Tribunal<sup>49</sup> and later the Federal Council in Strasbourg

47. Report of the Commission of May 5, 1982, No. 9116/80, Decisions and Reports of the European Commission of Human Rights 31, 120 = EuGRZ 1983 150; Resolution DH (83) 6 of the Committee of Ministers of March 24, 1983, *ibid.* at p. 137.

48. Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347 (1989); Ian Cameron & Frank Horn, *Reservations to the ECHR: The Belilos Case*, 33 GERMAN YEARBOOK OF INTERNATIONAL LAW 69 (1990); Gérard Cohen-Jonathan, *Les réserves à la Convention européenne des droits de l'homme. A propos de l'arrêt Belilos du 29 avril 1988*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 271 (1989); Jochen Abr. Frowein, *Reservations to the ECHR*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 193-200 (1988); Ronald St. J. MacDonald, *Reservations under the ECHR*, 21 REVUE BELGE DE DROIT INTERNATIONAL 429 (1988-2); Susan Marks, *Reservations Unhinged: The Belilos Case before the European Court of Human Rights*, 39 INT. & COMP. L.Q. 300 (1990); Stefan Oeter, *Die "auslegende Erklärung" der Schweiz zu Art. 6 Abs. 1 EMRK und die Unzulässigkeit von Vorbehalten nach Art. 64 EMRK*, 48 ZaöRV 514 (1988); Mark E. Villiger, *Das Urteil des Europäischen Gerichtshofs für Menschenrechte im Fall Belilos gegen die Schweiz*, 2 RECHT 59 (1989).

49. BGE 108 Ia 313 = 40 SJIR 220 (1984).

argued that article 6 ECHR was limited by Switzerland's interpretative declaration:

The Swiss Federal Council considers that the guarantee of fair trial in Art. 6 § 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.<sup>50</sup>

The European Commission of Human Rights reasoned that where states submitted both reservations and interpretative declarations to the same treaty, as Switzerland had done, "an interpretative declaration will only exceptionally be able to be equated with a reservation."<sup>51</sup> Assuming that the declaration could be considered as a reservation, the Commission concluded that even then the declaration was invalid, since it did not comply with the requirements of article 64 ECHR. First of all, the declaration was of a general character, particularly because the words "ultimate control by the judiciary" employed in the Swiss declaration were ambiguous. Secondly, the declaration did not contain a brief statement of the law concerned, and whereas the Commission had treated such an omission as harmless in the *Temeltasch* case, here it insisted upon compliance with this requirement.<sup>52</sup>

The European Court of Human Rights also held against Switzerland. It agreed that the interpretative declaration could be treated as a reservation, since Switzerland "meant to remove certain categories of proceedings from the ambit of article 6, paragraph 1 and to secure itself against an interpretation of that Article which it considered to be too broad."<sup>53</sup> Like the Commission, however, the Court found the Swiss declaration to be invalid when measured against the strict terms of article 64 ECHR. The declaration at issue failed to meet the requirement of "precision and clarity" and did "not make it possible for the scope of the undertaking by Switzerland to be ascertained exactly, in particular as to which categories of dispute are included and as to whether or not the 'ultimate control by the judiciary' takes in the facts of the case."<sup>54</sup>

As to the requirement of article 64, paragraph 2 ECHR, that a reservation must "contain a brief statement of the law concerned," the

50. 17 YEARBOOK OF THE EUROPEAN COMMISSION ON HUMAN RIGHTS 8 (1974).

51. Report of the Commission of May 7, 1986, No. 10328/83, § 102, in PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS A/132.

52. *Id.* at § § 108-118.

53. Judgment of April 29, 1988, *Belilos* Case, PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS A/132, § 49 = EUROPÄISCHE GRUNDECHTE-ZEITSCHRIFT 28 (1989).

54. *Id.* at § 55.

Swiss declaration obviously lacked such a statement. The Federal Council explained this with the practical difficulties in compiling a list of 26 differing cantonal laws. The Court considered this to be an argument of administrative inconvenience, which "did not justify disregarding an express condition of the Convention."<sup>55</sup> Indeed the specific problems of federal states with regard to human rights treaties are well known and have led to lengthy and laborious disputes concerning the so-called federal state clauses.<sup>56</sup> No such clause is included in article 64 ECHR, however, and the Court held that the brief statement of the reserved law required by article 64, paragraph 2 was a "condition of substance," which "constitutes an evidential factor and contributes to legal certainty."<sup>57</sup>

The Swiss representatives, in their argument before the Court, had argued that there was disagreement as to the effect of a judicial declaration of nullity of a reservation.<sup>58</sup> Under the contract theory of treaties, a state which formulated an invalid reservation simply was not a party to the treaty. In a closed or integrated system, a state which had submitted an invalid reservation remained bound by the treaty, so that the reservation had no effect. As an intermediate solution, a state which had made an invalid reservation would continue to be a party to a treaty, but the reserved provision would be inoperative, either permanently or at least until the state had reformulated the reservation.

The Court hardly discussed this argument and flatly held the Swiss declaration invalid. In a regrettably short passage, it stated that it was "beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."<sup>59</sup>

Susan Marks in an interesting comment writes that the Court's decision in the *Belilos* case can be explained by four factors.<sup>60</sup> The first was the "age" factor. States which had ratified the ECHR at an earlier stage had attached far less reservations, so that there was a danger of inequality between the contracting parties. The Court apparently felt it could privilege the integrity of the guarantees of the Convention as against the need to secure a strictly contractual participation. Second was the "isolation" factor: whereas reservations normally operate reciprocally, with the

55. *Id.* at § 56.

56. See, Valentin Zellweger, *Die Bundesklausel in multilateralen Staatsverträgen*, unpublished thesis, University of Basel.

57. *Belilos* Judgment of April 29, 1988, *supra* note 53, at § 59.

58. *Belilos* Case, *Compte rendu des audiences publiques tenues le 26 octobre 1987*, Council of Europe Document Cour/Misc. (87) 237, pp. 43-47 [hereinafter C.E. Doc.].

59. *Belilos* Judgment of April 29, 1988, *supra* note 53, at § 60.

60. Marks, *supra* note 48, at 64.

effect that the decision invalidating a reservation would lead to conflicts and denunciations, the ECHR as a typical human rights treaty claims an objective rather than a reciprocal effect, with the result that the impact of the *Belilos* decision remained isolated. A third factor related to the role of the supervisory organs: under the framework of the ECHR, the Court must have the final word as to the validity of reservations, which in turn lessens the sovereignty of the states parties and the value of the contract theory. Finally, and perhaps most importantly, the Court in the *Belilos* case considers the European Convention on Human Rights as an "integration mechanism," which aims at establishing a common European public order in the field of human rights, which must transcend and replace the particular legal orders of the individual states parties.<sup>61</sup>

Both the aftermath of the *Belilos* judgment and the relationship to other Convention articles show that not all possible difficulties have been eliminated. The canton of Vaud has modified its legislation on March 10, 1989, so as to bring all cases such as the one of Mrs. *Belilos* before ordinary courts.<sup>62</sup> Yet the *Belilos* decision rapidly came under fire, not only in the canton of Vaud, but in the Second Parliamentary Chamber, the Council of States. Councillor Danioth asked that parliament invite the Federal Council to reestablish the sovereignty of Switzerland and the cantons with respect to the European institutions. In particular, it should provisionally denounce the Convention and reformulate the invalid declaration as a valid reservation.<sup>63</sup> The Federal Council opposed this so-called postulate, but the Council of States only very narrowly (with 16 to 15 votes) voted against Councillor Danioth.<sup>64</sup>

Given this political pressure, the Federal Council decided that it would draw different legal consequences from the *Belilos* judgment. It would accept that the Swiss declaration was invalid in respect of the criminal law aspect of article 6, paragraph 1 ECHR. It would reformulate, however, the civil law aspect of the said provision.<sup>65</sup> It thereupon invited the cantons to submit a precise list of those cantonal statutes con-

61. In the same sense, Bourguignon, *supra* note 48, at 371, 385-386; Cameron & Horn, *supra* note 48, at 92-96; Frowein, *supra* note 48 at 194, 200. For an earlier theoretical discussion, see Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71 (1986).

62. Cf. Villiger, *supra* note 48, at 64.

63. Amtl. Bull. StRat 1988 554-61.

64. *Id.* at 561.

65. The newly worded declaration (compare the original wording in the text, *supra*, at note 50) now reads:

The Swiss Federal Council considers that the guarantee of fair trial in Art. 6, § 1 of the Convention in the determination of civil rights and obligations is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations. For the purpose of the present declaration, 'ultimate control

cerning civil law aspects which should remain reserved and exempted from article 6, paragraph 1.<sup>66</sup> The reformulated list, which is supposed to constitute a "brief statement of the law concerned," now enumerates not only seven federal statutory provisions, but in addition the amazing number of 523 cantonal provisions.<sup>67</sup> As a newly elected Judge of the European Court of Human Rights, I do not wish to express an opinion as to the validity of the re-formulated declaration.<sup>68</sup>

The Court's judgment in the *Belilos* case indeed seems to proceed from a view of the Convention which is not sovereignty or contract-oriented, but objectivist, autonomous and integrationist. The assumption is apparently that political considerations will make it impossible for the States parties to the Convention to denounce it (under article 65 ECHR) or to reject the renewal of the declarations concerning the individual petition and the jurisdiction of the Court (under article 25 or 46 ECHR). The facts of the *Belilos* case may have appeared sufficiently placid to the Court for it to reach its conclusion, but the true test for the accuracy of the assumption may still be in the wings.

#### D. *The Weber case*

Franz Weber, a well-known journalist and ecologist, had brought defamation proceedings in the canton of Vaud. He was sentenced to a fine of 300 Swiss francs for having breached, at a press conference, the confidentiality of an investigation in connection with the defamation proceedings, in summary judicial proceedings conducted without a public hearing.

Both the European Commission and the European Court of Human Rights held that the freedom of expression, protected under article 10 ECHR, had been violated. Contrary to the Commission, however, the Court also found that article 6, paragraph 1 ECHR was applicable. In its view, the summary proceedings instituted against the applicant were criminal rather than disciplinary in nature. Switzerland had invoked its reservation in respect of article 6, paragraph 1:

The rule contained in Art. 6 § 1 of the Convention that hearings

by the judiciary' shall mean a control by the judiciary limited to the application of the law, such as a cassation control.

C.E. Doc. ETS/STE No 5, JJ2099C-24/05/88.

66. 44 SJIR 272 (1988).

67. Only the newly worded declaration, not the 523 cantonal provisions, have been officially published in AS 1264 (1988).

68. *But see* the doubting opinions of Bourguignon, *supra* note 48, at 383-384; Cameron & Horn, *supra* note 48, at 114, 117-119, 127; Frowein, *supra* note 48, at 199; Oeter, *supra* note 48, at 521-22; Villiger, *supra* note 48, at 64, 66.

shall be in public shall not apply to proceedings relating to the determination of civil rights and obligations or of any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority.

The rule that judgment must be pronounced publicly shall not affect the operation of cantonal legislation on civil or criminal procedure providing that judgment shall not be delivered in public but notified to the parties in writing.<sup>69</sup>

The Court followed the *Belilos* judgment and found that no "brief statement of the law concerned," as required by article 64, paragraph 2 ECHR, had been appended. As a result, the Swiss reservation was regarded as invalid. The Court left open whether the reservation was also of a "general character."<sup>70</sup> In this case, the Swiss Government did not attempt to re-formulate the reservation. However, a few months later it proposed to the Federal Assembly the U.N. Human Rights Pacts, subject to certain reservations. Included among these reservations was the one concerning public hearings and public pronouncement of judgments which had just been held invalid in the *Weber* case.<sup>71</sup> It is not at all easy to say what factors may have motivated the Swiss Government to choose such an extraordinary and contradictory course. Under the U.N. system, Switzerland apparently pretends to continue to consider as valid a reservation which has been declared invalid by the Strasbourg organs under the ECHR, and which the Federal Council has neither sought to reformulate nor attempted to "heal" by submitting a list of reserved cantonal statutes, like in *Belilos*. One fails to see much sense in this attitude.

69. 17 YEARBOOK OF THE EUROPEAN COMMISSION ON HUMAN RIGHTS 6-8 (1974).

70. Judgment of May 22, 1990, *Weber* case, in PUBLICATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS A/177, § 38.

71. BBI 1991 I 1199-1200, 1213-14.