

In the case of Loizidou v. Turkey (1),

The European Court of Human Rights, sitting, pursuant to Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,  
Mr R. Bernhardt,  
Mr F. Gölcüklü,  
Mr L.-E. Pettiti,  
Mr B. Walsh,  
Mr A. Spielmann,  
Mr S.K. Martens,  
Mrs E. Palm,  
Mr R. Pekkanen,  
Mr A.N. Loizou,  
Mr J.M. Morenilla,  
Mr A.B. Baka,  
Mr M.A. Lopes Rocha,  
Mr L. Wildhaber,  
Mr G. Mifsud Bonnici,  
Mr P. Jambrek,  
Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 24 October 1995, 24 January and 28 November 1996,

Delivers the following judgment on the merits, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 40/1993/435/514. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the Government of the Republic of Cyprus ("the Cypriot Government") on 9 November 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 15318/89) against the Republic of Turkey ("the Turkish Government") lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) on 22 July 1989 by a Cypriot national, Mrs Titina Loizidou.

2. In a judgment of 23 March 1995 on various preliminary objections raised by the Turkish Government (Series A no. 310), the Court dismissed an objection concerning alleged abuse of process; held

that the facts alleged by the applicant were capable of falling under Turkish "jurisdiction" within the meaning of Article 1 of the Convention (art. 1) and that the territorial restrictions attached to Turkey's Articles 25 and 46 (art. 25, art. 46) declarations were invalid but that the declarations contained valid acceptances of the competence of the Commission and Court. It also joined to the merits the preliminary objection *ratione temporis*.

3. As President of the Chamber (Rule 21 para. 6), Mr R. Ryssdal, acting through the Registrar, consulted the Agents of the Governments, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38) in relation to the merits. Pursuant to the order made in consequence, the Registrar received the memorials of the applicant, the Cypriot Government and the Turkish Government on 29 June, 17 July and 18 July 1995 respectively. In a letter of 2 August the Deputy to the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearing.

4. On 13 September 1995 the Commission, the applicant and the Cypriot and Turkish Governments submitted their observations on the question of reference in the proceedings before the Court to a confidential report of the European Commission of Human Rights in the case of *Chrysostomos and Papachrysostomou v. Turkey* which was then pending before the Committee of Ministers of the Council of Europe, as requested by the President in a letter of 8 September.

5. In accordance with the President's decision, the hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 25 September 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Turkish Government

Mr B. Çağlar,	Agent,
Mr T. Özkarol,	
Mr E. Apakan,	
Mr H. Golsong,	
Mrs D. Akçay,	
Mr Ö. Koray,	
Mr Z. Necatigil,	Counsel;

(b) for the Cypriot Government

Mr A. Markides, Attorney-General,	Agent,
Mr M. Triantafyllides, Barrister-at-Law,	
Mr M. Shaw, Barrister-at-Law,	
Mrs T. Polychronidou, Counsel of the Republic A',	
Mrs S.M. Joannides, Counsel of the Republic A',	Counsel,
Mr P. Polyviou, Barrister-at-Law,	
Mrs C. Palley, Consultant to the Ministry of Foreign Affairs,	
Mr N. Emiliou, Consultant to the Ministry of Foreign Affairs,	Advisers;

(c) for the Commission

Mr S. Trechsel,	Delegate;
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(d) for the applicant

Mr A. Demetriades, Barrister-at-Law,
Mr I. Brownlie QC,

Ms J. Loizidou, Barrister-at-Law,

Counsel.

The Court heard addresses by Mr Trechsel, Mr Demetriades, Mr Brownlie, Mr Markides, Mr Shaw, Mr Çağlar, Mrs Akçay, Mr Necatigil and Mr Golsong, and also replies to its questions.

6. On 26 September 1995, Mr Macdonald decided, pursuant to Rule 24 para. 3 of Rules of Court A, to withdraw from the Grand Chamber. In accordance with this Rule he informed the President who exempted him from sitting.

7. On 27 September 1995, the President received a request from the Turkish Government that Judge Macdonald withdraw from the Chamber. The Court decided that no response was called for in the light of Judge Macdonald's above-mentioned decision to withdraw.

8. On 6 October 1995, the Cypriot Government submitted various court decisions to which reference had been made at the public hearing.

9. Following the publication by the Committee of Ministers of the Commission's report in *Chrysostomos and Papachrysostomou v. Turkey*, the President requested, by letter of 19 October 1995, the applicant and the Government of Cyprus to submit any comments they wished to make. On 6 November, they filed supplementary observations. On 23 November the Turkish Government submitted a reply.

10. On 3 November 1995 the Turkish Government submitted an article to which reference had been made at the public hearing.

#### AS TO THE FACTS

##### Particular circumstances of the case

11. The applicant, a Cypriot national, grew up in Kyrenia in northern Cyprus. In 1972 she married and moved with her husband to Nicosia.

12. She claims to be the owner of plots of land nos. 4609, 4610, 4618, 4619, 4748, 4884, 5002, 5004, 5386 and 5390 in Kyrenia in northern Cyprus and she alleges that prior to the Turkish occupation of northern Cyprus on 20 July 1974, work had commenced on plot no. 5390 for the construction of flats, one of which was intended as a home for her family. Her ownership of the properties is attested by certificates of registration issued by the Cypriot Lands and Surveys Department at the moment of acquisition.

She states that she has been prevented in the past, and is still prevented, by Turkish forces from returning to Kyrenia and "peacefully enjoying" her property.

13. On 19 March 1989 the applicant participated in a march organised by a women's group ("Women Walk Home" movement) in the village of Lymbia near the Turkish village of Akincilar in the occupied area of northern Cyprus. The aim of the march was to assert the right of Greek Cypriot refugees to return to their homes.

Leading a group of fifty marchers she advanced up a hill towards the Church of the Holy Cross in the Turkish-occupied part of Cyprus passing the United Nations' guard post on the way. When they reached the churchyard they were surrounded by Turkish soldiers and prevented from moving any further.

14. She was eventually detained by members of the Turkish Cypriot police force and brought by ambulance to Nicosia. She was released around midnight, having been detained for more than

ten hours.

15. In his report of 31 May 1989 (Security Council document S/20663) on the United Nations Operation in Cyprus (for the period 1 December 1988 - 31 May 1989) the Secretary-General of the United Nations described the demonstration of 19 March 1989 as follows (at paragraph 11):

"In March 1989, considerable tension occurred over the well-publicized plans of a Greek Cypriot women's group to organize a large demonstration with the announced intention of crossing the Turkish forces cease-fire line. In this connection it is relevant to recall that, following violent demonstrations in the United Nations buffer-zone in November 1988, the Government of Cyprus had given assurances that it would in future do whatever was necessary to ensure respect for the buffer-zone ... Accordingly, UNFICYP asked the Government to take effective action to prevent any demonstrators from entering the buffer-zone, bearing in mind that such entry would lead to a situation that might be difficult to control. The demonstration took place on 19 March 1989. An estimated 2,000 women crossed the buffer-zone at Lymbia and some managed to cross the Turkish forces' line. A smaller group crossed that line at Akhna. At Lymbia, a large number of Turkish Cypriot women arrived shortly after the Greek Cypriots and mounted a counter demonstration, remaining however on their side of the line. Unarmed Turkish soldiers opposed the demonstrators and, thanks largely to the manner in which they and the Turkish Cypriot police dealt with the situation, the demonstration passed without serious incident. Altogether, 54 demonstrators were arrested by Turkish Cypriot police in the two locations; they were released to UNFICYP later the same day."

A. Turkish military presence in Northern Cyprus

16. Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication. The army's headquarters are in Kyrenia. The 28th Infantry Division is based in Asha (Assia) with its sector covering Famagusta to the Mia Milia suburb of Nicosia and with about 14,500 personnel. The 39th Infantry Division, with about 15,500 personnel, is based at Myrtou village, and its sector ranges from Yerolakkos village to Lefka. TOURDYK (Turkish Forces in Cyprus under the Treaty of Guarantee) is stationed at Orta Keuy village near Nicosia, with a sector running from Nicosia International Airport to the Pedhieos River. A Turkish naval command and outpost are based at Famagusta and Kyrenia respectively. Turkish airforce personnel are based at Lefkoniko, Krini and other airfields. The Turkish airforce is stationed on the Turkish mainland at Adana.

17. The Turkish forces and all civilians entering military areas are subject to Turkish military courts, as stipulated so far as concerns "TRNC citizens" by the Prohibited Military Areas Decree of 1979 (section 9) and Article 156 of the Constitution of the "TRNC".

B. Article 159 (1) (b) of the "TRNC" Constitution

18. Article 159 (1) (b) of the 7 May 1985 Constitution of the "Turkish Republic of Northern Cyprus" (the "TRNC") provides, where relevant, as follows:

"All immovable properties, buildings and installations which

were found abandoned on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or ownerless after the above-mentioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined ... and ... situated within the boundaries of the TRNC on 15 November 1983, shall be the property of the TRNC notwithstanding the fact that they are not so registered in the books of the Land Registry Office; and the Land Registry Office shall be amended accordingly."

C. The international response to the establishment of the "TRNC"

19. On 18 November 1983, in response to the proclamation of the establishment of the "TRNC", the United Nations Security Council adopted Resolution 541 (1983) which provides, where relevant, as follows:

"The Security Council ...

1. Deplores the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus;

2. Considers the declaration ... as legally invalid and calls for its withdrawal ...

6. Calls upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus;

7. Calls upon all States not to recognise any Cypriot State other than the Republic of Cyprus ..."

20. Resolution 550 (1984), adopted on 11 May 1984 in response to the exchange of "ambassadors" between Turkey and the "TRNC" stated, inter alia:

"The Security Council ...

1. Reaffirms its Resolution 541 (1983) and calls for its urgent and effective implementation;

2. Condemns all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership, declares them illegal and invalid and calls for their immediate withdrawal;

3. Reiterates the call upon all States not to recognise the purported State of the "Turkish Republic of Northern Cyprus" set up by secessionist acts and calls upon them not to facilitate or in any way assist the aforesaid secessionist entity;

4. Calls upon all States to respect the sovereignty, independence, territorial integrity, unity and non-alignment of the Republic of Cyprus ..."

21. In November 1983, the Committee of Ministers of the Council of Europe decided that it continued to regard the Government of the Republic of Cyprus as the sole legitimate Government of Cyprus and called for the respect of the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus.

22. On 16 November 1983 the European Communities issued the following statement:

"The ten Member States of the European Community are deeply concerned by the declaration purporting to establish a 'Turkish Republic of Northern Cyprus' as an independent State. They reject this declaration, which is in disregard of successive resolutions of the United Nations. The Ten reiterate their unconditional support for the independence, sovereignty, territorial integrity and unity of the Republic of Cyprus. They continue to regard the Government of President Kyprianou as the sole legitimate Government of the Republic of Cyprus. They call upon all interested parties not to recognize this act, which creates a very serious situation in the area."

23. The Commonwealth Heads of Government, meeting in New Delhi from 23 to 29 November 1983, issued a press communiqué stating, inter alia, as follows:

"[The] Heads of Government condemned the declaration by the Turkish Cypriot authorities issued on 15 November 1983 to create a secessionist state in northern Cyprus, in the area under foreign occupation. Fully endorsing Security Council Resolution 541, they denounced the declaration as legally invalid and reiterated the call for its non-recognition and immediate withdrawal. They further called upon all States not to facilitate or in any way assist the illegal secessionist entity. They regarded this illegal act as a challenge to the international community and demanded the implementation of the relevant UN Resolutions on Cyprus."

D. The Turkish declaration of 22 January 1990 under Article 46 of the Convention (art. 46)

24. On 22 January 1990, the Turkish Minister for Foreign Affairs deposited the following declaration with the Secretary General of the Council of Europe pursuant to Article 46 of the Convention (art. 46):

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 (art. 46) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory ipso facto and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention (art. 1), performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

25. The above declaration was renewed for a period of three years as from 22 January 1993 in substantially the same terms.

#### PROCEEDINGS BEFORE THE COMMISSION

26. Mrs Loizidou lodged her application (no. 15318/89) on 22 July 1989. She complained that her arrest and detention involved violations of Articles 3, 5 and 8 of the Convention (art. 3, art. 5, art. 8). She further complained that the refusal of access to her property constituted a continuing violation of Article 8 of the Convention (art. 8) and Article 1 of Protocol No. 1 (P1-1).

27. On 4 March 1991 the Commission declared the applicant's complaints admissible in so far as they raised issues under Articles 3, 5 and 8 (art. 3, art. 5, art. 8) in respect of her arrest and detention and Article 8 and Article 1 of Protocol No. 1 (art. 8, P1-1) concerning continuing violations of her right of access to property alleged to have occurred subsequent to 29 January 1987. Her complaint under the latter two provisions (art. 8, P1-1) of a continuing violation of her property rights before 29 January 1987 was declared inadmissible.

In its report of 8 July 1993 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 3 (art. 3) (unanimously); Article 8 (art. 8) as regards the applicant's private life (eleven votes to two); Article 5 para. 1 (art. 5-1) (nine votes to four); Article 8 (art. 8) as regards the applicant's home (nine votes to four) and Article 1 of Protocol No. 1 (P1-1) (eight votes to five). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to the Loizidou v. Turkey judgment of 23 March 1995 (preliminary objections), Series A no. 310.

#### FINAL SUBMISSIONS TO THE COURT

28. In her memorial, the applicant requested the Court to decide and declare:

1. that the respondent State is responsible for the continuing violations of Article 1 of Protocol No. 1 (P1-1);
2. that the respondent State is responsible for the continuing violations of Article 8 (art. 8);
3. that the respondent State is under a duty to provide just satisfaction in accordance with the provisions of Article 50 of the Convention (art. 50); and
4. that the respondent State is under a duty to permit the applicant to exercise her rights, in accordance with the findings of violations of the Protocol and Convention, freely in the future.

29. The Cypriot Government submitted that:

1. the Court has jurisdiction *ratione temporis* to deal with the applicant's case because Turkey's declaration under Article 46 of the Convention (art. 46) did not clearly exclude competence in respect of violations examined by the Commission after the Turkish declaration of 22 January 1990. Turkey is thus liable for the continuing violations complained of by the applicant in the period since 28 January 1987;
2. in any event Turkey is liable for those violations continuing in the period since 22 January 1990 and which have been examined by the Commission;

3. there is a permanent state of affairs, still continuing, in the Turkish-occupied area, which is in violation of the applicant's rights under Article 8 of the Convention (art. 8) and Article 1 of Protocol No. 1 (P1-1).

30. In their memorial, the Turkish Government made the following submissions:

1. the applicant was irreversibly deprived of her property situated in northern Cyprus by an act of the "Government of the Turkish Republic of Northern Cyprus", on 7 May 1985, at the latest;

2. the act referred to under (1) above does not constitute an act of "jurisdiction" by Turkey within the meaning of Article 1 of the Convention (art. 1);

3. Turkey has not violated the rights of the applicant under Article 8 of the Convention (art. 8).

AS TO THE LAW

31. The applicant and the Cypriot Government maintained that ever since the Turkish occupation of northern Cyprus the applicant had been denied access to her property and had, consequently, lost all control over it. In their submission this constituted a continued and unjustified interference with her right to the peaceful enjoyment of property in breach of Article 1 of Protocol No. 1 (P1-1) as well as a continuing violation of the right to respect for her home under Article 8 of the Convention (art. 8).

The Turkish Government contested this allegation and maintained primarily that the Court lacked jurisdiction *ratione temporis* to examine it.

#### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

32. The Court recalls its findings in the preliminary objections judgment in the present case that it is open to Contracting Parties under Article 46 of the Convention (art. 46) to limit, as Turkey has done in its declaration of 22 January 1990, the acceptance of the jurisdiction of the Court to facts which occur subsequent to the time of deposit and that, consequently, the Court's jurisdiction only extends to the applicant's allegation of a continuing violation of her property rights subsequent to 22 January 1990. It must now examine that allegation since in the above-mentioned judgment it decided to join the questions raised by the objection *ratione temporis* to the merits (see the *Loizidou v. Turkey* judgment of 23 March 1995 (preliminary objections), Series A no. 310, pp. 33-34, paras. 102-05).

##### A. The wording of the Article 46 declaration (art. 46)

33. In their memorial on the merits, the Cypriot Government submitted that Turkey's Article 46 (art. 46) declaration was ambiguously worded. The absence of a comma in the final sentence after the word "facts", where it occurs for the second time, made it unclear whether the words "which have occurred subsequent to the date of deposit" qualified "facts" (when first used) or "judgments" (see paragraph 24 above). The same observation was made as regards the Government's Article 25 (art. 25) declarations. In their submission, all Convention enforcement organs, which have jurisdiction conferred upon them, enjoy jurisdiction retroactively to the time of ratification of the Convention unless there has been an express and unambiguously worded restriction *ratione temporis*. However, the latter requirement,

they claimed, was not satisfied in the present case.

34. The Court sees no merit in this argument. In its view the reading of the present text in the manner contended by the Cypriot Government would render the last sentence of the declaration almost unintelligible. It considers that the intention of the Turkish Government to exclude from the Court's jurisdiction all matters raised in respect of facts which occurred prior to the date of deposit of the Article 46 (art. 46) declaration is sufficiently evident from the words used in the last sentence and can be reasonably inferred from them. Moreover, it notes that the Commission has construed in a similar fashion identical language and punctuation in Turkey's Article 25 (art. 25) declarations (see the decision of admissibility in applications nos. 15299/89, 15300/89 and 15318/89 (joined), Chrysostomos, Papachrysostomou and Loizidou v. Turkey, 4 March 1991, Decisions and Reports (DR) 68, pp. 250-51, paras. 50-60).

B. Further arguments of those appearing before the Court

35. The Turkish Government, for their part, contended that the process of the "taking" of property in northern Cyprus started in 1974 and ripened into an irreversible expropriation by virtue of Article 159 (1) (b) of the "TRNC" Constitution of 7 May 1985 (see paragraph 18 above) justified under the international-law doctrine of necessity. In this context they contended that the "TRNC" is a democratic and constitutional state whose Constitution was accepted by a referendum. Following a process of political and administrative evolution, the "TRNC" was established by the Turkish Cypriot people in pursuance of their right to self-determination and thus was able to make valid law. Moreover, the effectual and autonomous nature of the administration in the northern part of Cyprus had been recognised in various court decisions in the United Kingdom (Hesperides Hotels Ltd and Another v. Aegean Turkish Holidays Ltd and Another [1977] 3 Weekly Law Reports 656 (Court of Appeal) and Polly Peck International PLC v. Asil Nadir and Others [1992] 2 All England Reports 238 (Court of Appeal)).

Furthermore, in finding that the arrest and detention of the applicants in the case of Chrysostomos and Papachrysostomou v. Turkey were lawful, the Commission and subsequently the Committee of Ministers of the Council of Europe had recognised as valid the relevant laws of the "TRNC" (see report of the Commission of 8 July 1993, paras. 143-70 and Resolution DH (95) 245 of 19 October 1995).

In the Turkish Government's submission, the applicant had thus definitively lost ownership of the land well before the crucial date of 22 January 1990, i.e. on 7 May 1985 at the latest. The judgment of the Court in the Papamichalopoulos and Others v. Greece case (of 24 June 1993, Series A no. 260-B), where the Court had found that there had been a continuing interference with the applicant's property rights, was moreover distinguishable on the ground that the Greek Government had not raised any objection *ratione temporis* in that case.

It followed, in their submission, that the Court was concerned in the present case with an instantaneous act which predated the Government's acceptance of the Court's jurisdiction under Article 46 (art. 46). It was thus incompetent *ratione temporis* to examine the applicant's complaints.

36. The applicant, whose submissions were endorsed by the Government of Cyprus, maintained that the fact that she had been denied access to her property ever since 1974 and, consequently, had lost all control over it constituted a continuing violation of her rights and that the jurisprudence of the Convention institutions and other

international tribunals recognised this concept. She stressed that the rules of international law must be taken into account when interpreting the Convention and contended that the 1985 Constitution of the "TRNC" was - as was recognised by the international community - invalid under international law, because its origin lay in the illegal use of force by Turkey. A second reason was that the policy of the Turkish authorities was based upon racial discrimination in breach of Article 14 of the Convention (art. 14) and of customary international law. Accordingly, no effect should be given to the confiscatory provisions of the 1985 Constitution.

37. In the submission of the Government of Cyprus, the denial of peaceful enjoyment of the possessions of Greek Cypriots in the occupied area has been effected by a systematic and continuing process. They denied, however, that this process had amounted to loss of ownership. Evidence for this contention was provided by the Settlement and Distribution of Land and Property of Equivalent Value Law of 28 August 1995 which, according to the Government, purports to extend what were hitherto limited permits to occupy Greek property and by the fact that Turkey alleged that there had been no confiscation of Greek property in northern Cyprus in a memorial circulated within the Committee of Ministers in 1987.

38. As explained by the Commission's Delegate at the hearing on the preliminary objections, the Commission also considered that the applicant's complaints under Article 1 of Protocol No. 1 (P1-1) and Article 8 of the Convention (art. 8) concerned violations which were essentially of a continuing nature. In his written observations on the preliminary objections, the Delegate had therefore taken the view that the Court has competence to deal with these complaints as far as they involved the period after 22 January 1990. Moreover, at the hearing on the merits the Delegate, with the endorsement of the applicant, asked the Court to consider whether Turkey should be estopped from introducing new facts relating to the provisions of the 1985 Constitution which had not been referred to during the proceedings before the Commission.

#### C. The Court's assessment

39. The Court first observes, as regards the estoppel submission, that in principle it is not prevented in its examination of the merits of a complaint from having regard to new facts, supplementing and clarifying those established by the Commission, if it considers them to be of relevance (see the *McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 51, para. 73, and the *Gustafsson v. Sweden* judgment of 25 April 1996, Reports of Judgments and Decisions 1996-II, p. 655, para. 51).

40. Although in the present case the objection *ratione temporis* was raised by the Turkish Government in the proceedings before the Commission, there was no discussion or analysis in its admissibility decision of 4 March 1991 as to whether the matters complained of involved a continuing situation or an instantaneous act. This point, although touched on to some extent before the Court at the preliminary objections phase, was the subject of detailed submissions only in the proceedings on the merits, the new information being mentioned for the first time in the Turkish Government's written memorial but also in the appendices to the Cypriot Government's memorial. Against this background, the plea of estoppel must fail.

41. The Court recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs (see, *inter alia*, the *Papamichalopoulos and Others v. Greece* judgment of 24 June 1993, Series A no. 260-B, pp. 69-70, paras. 40 and 46, and the

Agrotexim and Others v. Greece judgment of 24 October 1995, Series A no. 330-A, p. 22, para. 58).

Accordingly, the present case concerns alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol No. 1 (P1-1) and Article 8 of the Convention (art. 8), can still be regarded - as remains to be examined by the Court - as the legal owner of the land.

42. The Court has had regard to the Turkish Government's allegation that "the process of 'the taking' of property in northern Cyprus started in 1974 and ripened into an irreversible expropriation by virtue of Article 159 of the 'TRNC' Constitution of 7 May 1985" (see paragraph 35 above). The formulation of this assertion suggests that in the Turkish Government's view the applicant had not lost ownership of the land before 7 May 1985; if it should be understood differently, the Turkish Government have failed to clarify in what manner the loss of ownership occurred before that date. The Court will therefore concentrate on the Government's submission that ownership was lost in 1985 as a result of the operation of Article 159 of the "TRNC" Constitution (see paragraph 18 above).

In this context the Court takes note of United Nations Security Council Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" as legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus. A similar call was reiterated by the Security Council in Resolution 550 (adopted on 11 May 1984). In November 1983 the Committee of Ministers of the Council of Europe also condemned the proclamation of statehood and called upon all States to deny recognition to the "TRNC" (see paragraphs 19-21 above). A position to similar effect was taken by the European Community and the Commonwealth Heads of Government (see paragraphs 22-23 above). Moreover it is only the Cypriot Government which is recognised internationally as the Government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations (see the Commission's decisions on the admissibility of applications nos. 6780/74 and 6950/75, Cyprus v. Turkey, 26 May 1975, DR 2, pp. 135-36; no. 8007/77, Cyprus v. Turkey, 10 July 1978, DR 13, p. 146).

43. It is recalled that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" (see, inter alia, the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 14, para. 29, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 24, para. 51, and the above-mentioned Loizidou judgment (preliminary objections), p. 27, para. 73).

In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention (art. 49).

44. In this respect it is evident from international practice and the various, strongly worded resolutions referred to above (see paragraph 42) that the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus - itself, bound to respect international standards in the field

of the protection of human and minority rights. Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely.

45. The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC". It notes, however, that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, "the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory" (see, in this context, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16, p. 56, para. 125).

46. Accordingly, the applicant cannot be deemed to have lost title to her property as a result of Article 159 of the 1985 Constitution of the "TRNC". No other facts entailing loss of title to the applicant's properties have been advanced by the Turkish Government nor found by the Court. In this context the Court notes that the legitimate Government of Cyprus have consistently asserted their position that Greek Cypriot owners of immovable property in the northern part of Cyprus such as the applicant have retained their title and should be allowed to resume free use of their possessions, whilst the applicant obviously has taken a similar stance.

47. It follows that the applicant, for the purposes of Article 1 of Protocol No. 1 (P1-1) and Article 8 of the Convention (art. 8), must still be regarded to be the legal owner of the land. The objection *ratione temporis* therefore fails.

## II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

48. The applicant contended that the continuous denial of access to her property in northern Cyprus and the ensuing loss of all control over it are imputable to the Turkish Government and constitute a violation of Article 1 of Protocol No. 1 (P1-1), which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions (P1-1) shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

### A. The imputability issue

49. The applicant insisted, in line with her submissions concerning the preliminary objection *ratione materiae* (Loizidou judgment (preliminary objections) cited above at paragraph 32, pp. 22-23, paras. 57-58), that the present case was exceptional in that the authorities alleged to have interfered with the right to the peaceful enjoyment of possessions are not those of the sole legitimate Government of the territory in which the property is situated. That particularity entailed that, in order to determine whether Turkey is

responsible for the alleged violation of her rights under Article 1 of Protocol No. 1 (P1-1) with respect to her possessions in northern Cyprus, the Court should take into account the principles of State responsibility under international law. In this context Mrs Loizidou repeated her criticism that the Commission had focused too much on the direct involvement of Turkish officials in the impugned continuous denial of access. Whilst evidence of direct involvement of Turkish officials in violations of the Convention is relevant, it is not a legal condition of responsibility under public international law.

She went on to contend that the concept of State responsibility rested on a realistic notion of accountability. A State was responsible in respect of events in the area for which it is internationally responsible, even if the conduct or events were outside its actual control. Thus, even acts of officials which are *ultra vires* may generate State responsibility.

According to international law, in the applicant's submission, the State which is recognised as accountable in respect of a particular territory remained accountable even if the territory is administered by a local administration. This was the legal position whether the local administration is illegal, in that it is the consequence of an illegal use of force, or whether it is lawful, as in the case of a protected State or other dependency. A State cannot by delegation avoid responsibility for breaches of its duties under international law, especially not for breaches of its duties under the Convention which, as illustrated by the wording of Article 1 of the Convention (art. 1), involve a guarantee to secure Convention rights.

Mrs Loizidou maintained that the creation of the "TRNC" was legally invalid and no State, except Turkey, or international organisation has recognised it. Since the Republic of Cyprus obviously cannot be held accountable for the part of the island occupied by Turkey, it must be Turkey which is so accountable. Otherwise the northern part of Cyprus would constitute a vacuum as regards responsibility for violations of human rights, the acceptance of which would be contrary to the principle of effectiveness which underlies the Convention. In any case there is overwhelming evidence that Turkey has effective overall control over events in the occupied area. She added that the fact that the Court, at the preliminary objections phase of the present case, had found Turkey to have jurisdiction created a strong presumption of Turkish responsibility for violations occurring in the occupied area.

50. According to the Cypriot Government, Turkey is in effective military and political control of northern Cyprus. It cannot escape from its duties under international law by pretending to hand over the administration of northern Cyprus to an unlawful "puppet" regime.

51. The Turkish Government denied that they had jurisdiction in northern Cyprus within the meaning of Article 1 of the Convention (art. 1). In the first place they recalled the earlier case-law of the Commission which limited the jurisdiction of Turkey "to the border area and not to the whole of northern Cyprus under the control of the Turkish Cypriot authorities" (see the Commission's decisions on the admissibility of applications nos. 6780/74, 6950/75 and 8007/77, cited in paragraph 42 above). In the second place, the presumption of control and responsibility argued for by the applicants was rebuttable. In this respect it was highly significant that the Commission in the *Chrysostomos and Papachrysostomou v. Turkey* report of 8 July 1993 found that the applicants' arrest, detention and trial in northern Cyprus were not "acts" imputable to Turkey. Moreover, the Commission found no indication of control exercised by the Turkish authorities over the prison administration or the administration of justice by Turkish Cypriot authorities in the applicant's case (cited above at

paragraph 32).

In addition, the Turkish Government contended that the question of jurisdiction in Article 1 of the Convention (art. 1) is not identical with the question of State responsibility under international law. Article 1 (art. 1) was not couched in terms of State responsibility. In their submission this provision (art. 1) required proof that the act complained of was actually committed by an authority of the defendant State or occurred under its direct control and that this authority at the time of the alleged violation exercised effective jurisdiction over the applicant.

Furthermore they argued that seen from this angle, Turkey had not in this case exercised effective control and jurisdiction over the applicant since at the critical date of 22 January 1990 the authorities of the Turkish Cypriot community, constitutionally organised within the "TRNC" and in no way exercising jurisdiction on behalf of Turkey, were in control of the property rights of the applicant.

In this context they again emphasised that the "TRNC" is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey. The administration in northern Cyprus has been set up by the Turkish Cypriot people in the exercise of its right to self-determination and not by Turkey. Moreover, the Turkish forces in northern Cyprus are there for the protection of the Turkish Cypriots and with the consent of the ruling authority of the "TRNC". Neither the Turkish forces nor the Turkish Government in any way exercise governmental authority in northern Cyprus. Furthermore, in assessing the independence of the "TRNC" it must also be borne in mind that there are political parties as well as democratic elections in northern Cyprus and that the Constitution was drafted by a constituent assembly and adopted by way of referendum.

52. As regards the question of imputability, the Court recalls in the first place that in its above-mentioned Loizidou judgment (preliminary objections) (pp. 23-24, para. 62) it stressed that under its established case-law the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (see the above-mentioned Loizidou judgment (preliminary objections), *ibid.*).

53. In the second place, the Court emphasises that it will concentrate on the issues raised in the present case, without, however, losing sight of the general context.

54. It is important for the Court's assessment of the imputability issue that the Turkish Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the "TRNC" (see the above-mentioned preliminary objections judgment, p. 24, para. 63). Furthermore, it has not been disputed that the applicant has on several occasions been prevented by Turkish troops

from gaining access to her property (see paragraphs 12-13 above).

However, throughout the proceedings the Turkish Government have denied State responsibility for the matters complained of, maintaining that its armed forces are acting exclusively in conjunction with and on behalf of the allegedly independent and autonomous "TRNC" authorities.

55. The Court recalls that under the scheme of the Convention the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). It is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, *inter alia*, the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 29, para. 74, the *Klaas v. Germany* judgment of 22 September 1993, Series A no. 269, p. 17, para. 29, and the *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, p. 50, para. 168).

56. The Commission found that the applicant has been and continues to be denied access to the northern part of Cyprus as a result of the presence of Turkish forces in Cyprus which exercise an overall control in the border area (see the report of the Commission of 8 July 1993, p. 16, paras. 93-95). The limited ambit of this finding of "control" must be seen in the light of the Commission's characterisation of the applicant's complaint as essentially concerning freedom of movement across the buffer-zone (see paragraphs 59 and 61 below). The Court, however, must assess the evidence with a view to determining the issue whether the continuous denial of access to her property and the ensuing loss of all control over it is imputable to Turkey.

It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus (see paragraph 16 above) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" (see paragraph 52 above). Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.

In view of this conclusion the Court need not pronounce itself on the arguments which have been adduced by those appearing before it concerning the alleged lawfulness or unlawfulness under international law of Turkey's military intervention in the island in 1974 since, as noted above, the establishment of State responsibility under the Convention does not require such an enquiry (see paragraph 52 above). It suffices to recall in this context its finding that the international community considers that the Republic of Cyprus is the sole legitimate Government of the island and has consistently refused to accept the legitimacy of the "TRNC" as a State within the meaning of international law (see paragraph 44 above).

57. It follows from the above considerations that the continuous denial of the applicant's access to her property in northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) and is thus imputable to Turkey.

#### B. Interference with property rights

58. The applicant and the Cypriot Government emphasised that, contrary to the Commission's interpretation, the complaint is not limited to access to property but is much wider and concerns a factual situation: because of the continuous denial of access the applicant had effectively lost all control over, as well as all possibilities to use, to sell, to bequeath, to mortgage, to develop and to enjoy her land. This situation, they contended, could be assimilated to a de facto expropriation within the meaning of the Court's case-law. They denied that there had been a formal expropriation, but added that if and in so far as there had been attempts at formal expropriation the relevant enactments should be disregarded as being incompatible with international law.

59. For the Turkish Government and the Commission the case only concerns access to property, and the right to the peaceful enjoyment of possessions does not include as a corollary a right to freedom of movement.

The Turkish Government further submitted that if the applicant was held to have absolute freedom of access to her property, irrespective of the de facto political situation on the island, this would undermine the intercommunal talks, which were the only appropriate way of resolving this problem.

60. The Court first observes from the Commission's decision on admissibility that the applicant's complaint under Article 1 of Protocol No. 1 (P1-1) was not limited to the question of physical access to her property. Her complaint, as set out in the application form to the Commission, was that Turkey, by refusing her access to property "has gradually, over the last sixteen years, affected the right of the applicant as a property owner and in particular her right to a peaceful enjoyment of her possessions, thus constituting a continuing violation of Article 1 (P1-1)" (see the report of the Commission of 8 July 1993, p. 21, and the decision of admissibility in *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, DR 68, p. 228). Moreover it is this complaint as formulated above that is addressed by the applicants and the Turkish Government in both their written and oral submissions.

61. Seen in the above light, the Court cannot accept the characterisation of the applicant's complaint as being limited to the right to freedom of movement. Article 1 of Protocol No. 1 (P1-1) is thus applicable.

62. With respect to the question whether Article 1 (P1-1) is violated, the Court first recalls its finding that the applicant, for purposes of this Article (P1-1), must be regarded to have remained the legal owner of the land (see paragraphs 39-47 above).

63. However, as a consequence of the fact that the applicant has been refused access to the land since 1974, she has effectively lost all control over, as well as all possibilities to use and enjoy, her property. The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1 (P1-1). Such an interference cannot, in the exceptional circumstances of the present case to which the applicant and the Cypriot Government have referred (see paragraphs 49-50 above), be regarded as either a deprivation of property or a control of use within the meaning of the first and second paragraphs of Article 1 of Protocol No. 1 (P1-1-1, P1-1-2). However, it clearly falls within the meaning of the first sentence of that provision (P1-1) as an interference with the peaceful enjoyment of possessions. In this respect the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment (see, *mutatis mutandis*, the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 14, para. 25).

64. Apart from a passing reference to the doctrine of necessity as a justification for the acts of the "TRNC" and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant's property rights which is imputable to Turkey.

It has not, however, been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation.

Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention.

In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1 (P1-1).

### III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

65. The applicant also alleged an unjustified interference with the right to respect for her home in violation of Article 8 of the Convention (art. 8), paragraph 1 of which (art. 8-1) provides, inter alia, that:

"Everyone has the right to respect for ... his home ..."

In this respect she underlined that she had grown up in Kyrenia where her family had lived for generations and where her father and grandfather had been respected medical practitioners. She conceded that after her marriage in 1972 she had moved to Nicosia and had made her home there ever since. However, she had planned to live in one of the flats whose construction had begun at the time of the Turkish occupation of northern Cyprus in 1974 (see paragraph 12 above). As a result, it had been impossible to complete the work and subsequent events had prevented her from returning to live in what she considered as her home town.

66. The Court observes that the applicant did not have her home on the land in question. In its opinion it would strain the meaning of the notion "home" in Article 8 (art. 8) to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives.

Accordingly, there has been no interference with the applicant's rights under Article 8 (art. 8).

### IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

67. Article 50 of the Convention (art. 50) provides as follows:

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

68. In her memorial the applicant outlined the following claims under this head: (a) compensation for pecuniary damage - loss of income from the land since January 1987: 531,900 Cyprus pounds; (b) compensation for non-pecuniary damage - punitive damages to the same amount as claimed for pecuniary damage; (c) to be allowed to exercise her rights under Article 1 of Protocol No. 1 (P1-1) freely in the future; and (d) a non-specified amount in respect of costs and expenses.

In their memorial the Turkish Government have not commented on the issues thus raised. Neither have these issues been discussed by those appearing before the Court at its hearing on the merits.

69. Under these circumstances the Court, taking into account the exceptional nature of the case, considers that the question of the application of Article 50 (art. 50) is not ready for decision. The question must accordingly be reserved and the further procedure fixed with due regard to the possibility of agreement being reached between the Turkish Government and the applicant.

FOR THESE REASONS, THE COURT

1. Dismisses by eleven votes to six the preliminary objection *ratione temporis*;
2. Holds by eleven votes to six that the denial of access to the applicant's property and consequent loss of control thereof is imputable to Turkey;
3. Holds by eleven votes to six that there has been a breach of Article 1 of Protocol No. 1 (P1-1);
4. Holds unanimously that there has been no violation of Article 8 of the Convention (art. 8);
5. Holds unanimously that the question of the application of Article 50 of the Convention (art. 50) is not ready for decision; and consequently,
  - (a) reserves the said question;
  - (b) invites the Turkish Government and the applicant to submit, within the forthcoming six months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
  - (c) reserves the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 December 1996.

Signed: Rolv RYSSDAL  
President

Signed: Herbert PETZOLD  
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Wildhaber, joined by Mr Ryssdal;

- (b) dissenting opinion of Mr Bernhardt, joined by Mr Lopes Rocha;
- (c) dissenting opinion of Mr Baka;
- (d) dissenting opinion of Mr Jambrek;
- (e) dissenting opinion of Mr Pettiti;
- (f) dissenting opinion of Mr Gölcüklü.

Initialled: R.R.

Initialled: H.P.

CONCURRING OPINION OF JUDGE WILDHABER, JOINED BY JUDGE RYSSDAL

There was no need for the Court to give an express answer to Turkey's claim that the "TRNC" was established by the Turkish Cypriot people in pursuance of their right to self-determination (see paragraph 35 of the judgment). That claim must indeed fail.

Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.

In the instant case, the Court is faced with an applicant who alleges violations of certain Convention guarantees; with the respondent Turkish Government which alleges a right to self-determination of the "TRNC" in order to disclaim responsibility for a violation of certain Convention guarantees; and with an international community which refuses to recognise the entity which claims a right to self-determination (the "TRNC").

When the international community in 1983 refused to recognise the "TRNC" as a new State under international law (see paragraph 42 of the judgment), it by the same token implicitly rejected the claim of the "TRNC" to self-determination in the form of secession. At that time the close connection between the right to self-determination and the observance of international standards with respect to human rights and democracy was not established to the same extent as today. The "TRNC" is constituted by what was originally a minority group in the whole of Cyprus (i.e. the "Turkish Cypriots") but what is now the majority in the northern part of Cyprus. This group invokes a right to self-determination which under the 1985 Constitution is denied by them to the "Greek Cypriots" living in the territory of the "TRNC". This leads me to the conclusion that where the modern right to self-determination does not strengthen or re-establish the human rights and democracy of all persons and groups involved, as it does not in the instant case, it cannot be invoked to overcome the international community's policy of non-recognition of the "TRNC".

DISSENTING OPINION OF JUDGE BERNHARDT JOINED BY JUDGE LOPES ROCHA

I have voted for accepting the preliminary objection *ratione temporis* and against the finding of a violation of Article 1 of Protocol No. 1 (P1-1). Before I discuss the two main aspects of the case, some general remarks are, in my view, indispensable.

1. A unique feature of the present case is that it is impossible to separate the situation of the individual victim from a complex

historical development and a no less complex current situation. The Court's judgment concerns in reality not only Mrs Loizidou, but thousands or hundreds of thousands of Greek Cypriots who have (or had) property in northern Cyprus. It might also affect Turkish Cypriots who are prevented from visiting and occupying their property in southern Cyprus. It might even concern citizens of third countries who are prevented from travelling to places where they have property and houses. The factual border between the two parts of Cyprus has the deplorable and inhuman consequence that a great number of individuals are separated from their property and their former homes.

I have, with the majority of the judges in the Grand Chamber, no doubt that Turkey bears a considerable responsibility for the present situation. But there are also other actors and factors involved in the drama. The coup d'état of 1974 was the starting-point. It was followed by the Turkish invasion, the population transfer from north to south and south to north on the island, and other events. The proclamation of the so-called "Turkish Republic of Northern Cyprus", not recognised as a State by the international community, is one of those events. The result of the different influences and events is the "iron wall" which has existed now for more than two decades and which is supervised by United Nations forces. All negotiations or proposals for negotiations aimed at the unification of Cyprus have failed up to now. Who is responsible for this failure? Only one side? Is it possible to give a clear answer to this and several other questions and to draw a clear legal conclusion?

The case of Mrs Loizidou is not the consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 and its closure up to the present day.

2. Turkey has accepted the jurisdiction of the Court only in respect of the facts which occurred subsequent to 22 January 1990. Such a limitation excludes an inquiry into and final legal qualification of previous events, even if these were incompatible with a State's obligation under the Convention.

The Convention organs have accepted the notion of "continuing violations", violations which started prior to the critical date and which still continue. I entirely agree with this concept, but its field of application and its limits must be appreciated. If a person is kept in prison before and after the critical date, if concrete property is illegally occupied before and after that date (as in the case of *Papamichalopoulos and Others v. Greece*, judgment of 24 June 1993, Series A no. 260-B), there can be no doubt that it falls within the Court's jurisdiction to examine facts and circumstances which have occurred after the date in question. The essential fact in such cases is the actual behaviour of State organs which is incompatible with the commitments under the European Convention on Human Rights.

The factual and legal situation is in my view different when certain historical events have given rise to a situation such as the closing of a border with automatic consequences in a great number of cases. In the present case, the decisive events date back to the year 1974. Since that time, Mrs Loizidou has not been able to visit her property in northern Cyprus. This situation continued to exist before and after the adoption of the Constitution of the so-called "Turkish Republic of Northern Cyprus" of 1985 and the expropriation proclaimed therein. I share the doubts of the Court (see paragraphs 45-47 of the judgment) concerning the validity of the expropriation; however this is not decisive. Turkey has recognised the jurisdiction of the Court only "in respect of facts ... which have occurred subsequent to the date of deposit of the present declaration";

the closing of the borderline in 1974 is in my view the material fact and the ensuing situation up to the present time should not be brought under the notion of "continuing violation".

Therefore, the preliminary objection *ratione temporis* raised by Turkey is in my view legally well-founded.

3. Even if I had been able to follow the majority of the Court in this respect, I would still be unable to find a violation of Article 1 of Protocol No. 1 (P1-1). As explained above, the presence of Turkish troops in northern Cyprus is one element in an extremely complex development and situation. As has been explained and decided in the *Loizidou* judgment on the preliminary objections (23 March 1995, Series A no. 310), Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials. But in the present case, we are confronted with a special situation: it is the existence of the factual border, protected by forces under United Nations command, which makes it impossible for Greek Cypriots to visit and to stay in their homes and on their property in the northern part of the island. The presence of Turkish troops and Turkey's support of the "TRNC" are important factors in the existing situation; but I feel unable to base a judgment of the European Court of Human Rights exclusively on the assumption that the Turkish presence is illegal and that Turkey is therefore responsible for more or less everything that happens in northern Cyprus.

#### DISSENTING OPINION OF JUDGE BAKA

In the present case it is extremely difficult to determine whether, on the one hand, the violation complained of by the applicant has been a continuous one or whether, on the other hand, there has been an instantaneous expropriation of the applicant's property with continuing effects. I agree with the majority that the answer to this question has direct consequences for deciding the Government's preliminary objection *ratione temporis*.

On the basis of the facts of the case, I have come to the conclusion that Mrs *Loizidou* lost overall control of her property as a direct consequence of the Turkish military action in 1974. Since that time she has not been able to possess, to use and enjoy her property in any way nor even have access to it. It can thus be said that there has been a form of *de facto* expropriation.

However, in the period between 1974 and 1985 the applicant still held legal title to her land. She purportedly lost ownership by the formal act of expropriation pursuant to Article 159 (1) of the "TRNC" Constitution of 7 May 1985 which sought to regularise the existing *de facto* situation.

Although I share the view of the Court concerning the non-recognition of the "TRNC" by the international legal community and the legal consequences flowing from this, I am also of the opinion that its legal provisions "have been invoked by the Turkish Government". In the instant case the legal situation in respect of property issues is very close to those of the former communist States in central and eastern Europe. In those countries - which, it must be borne in mind, were internationally recognised States - there had been a long process of expropriation of property by nationalisation legislation and other legal means. These actions, which led to enormous property rearrangements in the countries concerned, cannot always be justified by simply referring to the fact that those States had been recognised by the international community at the relevant time.

On the other hand, Article 159 of the "TRNC" Constitution and certain other legal provisions cannot be completely set to one side as

devoid of all effect merely on the basis of the international non-recognition of the entity in northern Cyprus. It is rightly said in paragraph 45 of the judgment that international law recognises the legitimacy of certain arrangements and transactions in such a situation the "effects of which can be ignored only to the detriment of the inhabitants of the territory". The full implications of this view, however, - as the recent and very different legal arrangements in the former communist States as regards property matters clearly show - are still very much open to interpretation. Nevertheless the principle has some application in the field of real property in a situation such as that pertaining in the "TRNC" where it can be said that the interests of the community required, if not necessitated, some form of regularisation. In my view it is open to the Court to have regard to this principle in the context of the dispute as to whether there is a continuing situation without endorsing or recognising the legitimacy of the totality of the property rearrangements effected by the "TRNC" in 1985.

Bearing in mind the de facto nature of the expropriation of the applicant's property up to 1985 as well as the relevant provisions of the 1985 Constitution affecting that property, I am unable to share the Court's opinion that the applicant's complaint concerns a continuing situation. Since the Court's jurisdiction only concerns matters occurring subsequent to 22 January 1990, the Government's objection *ratione temporis* must be considered to be well-founded.

#### DISSENTING OPINION OF JUDGE JAMBREK

##### I.

1. In its decision on the preliminary objections in the present case the Court joined to the merits the objection *ratione temporis*. It was of the opinion that the correct interpretation and application of the relevant restrictions raised difficult legal and factual questions which were closely connected to the merits of the case (paragraphs 103 and 104 of the judgment of 23 March 1995).

It follows that the Court had first to examine the applicant's allegations of a continuing violation of her property rights subsequent to 22 January 1990. That examination entailed an assessment as to whether the applicant could still be regarded as the legal owner of the land, which in turn depended upon a prior clarification of the manner in which the loss of her ownership occurred - or did not occur - before that date. In particular, did it occur by way of an instantaneous act, and if so, by which act, or did she lose her property as a result of a longer process, ending in an irreversible expropriation, possibly by virtue of Article 159 of the "TRNC" Constitution of 7 May 1985?

2. I was unable to subscribe to the finding of the majority of my colleagues that Mrs Loizidou cannot be deemed to have lost title to her property, and that she must therefore still be regarded as the legal owner of the land. On the other hand, after considering facts advanced by the applicant and by the respondent Government, and those found by the Court, I also remained unconvinced of the opposite view, namely, that she in fact lost title to her property. Consequently, and in doubt, I was unable to dismiss the preliminary objection *ratione temporis*.

3. For similar reasons I also remained in doubt as to whether the denial of access to the applicant's property resulted in her loss of control, amounting to a breach of Article 1 of Protocol No. 1 (P1-1), which occurred due to the interference with the peaceful enjoyment of her possessions. Consequently I also dissented on the issue of the imputability of the interference to Turkey, and on whether there has been a violation of Article 1 of Protocol No. 1 (P1-1) (points 2 and

3 of this judgment's operative provisions).

4. In the present case an interesting interplay took place between casting a vote on the preliminary objection, and then on the merits. It is worth mentioning it as an obiter dictum to my opinion.

In the memorials and at the hearing we were witness to the exchanges about the "proper" calculation of the votes of the members of the Commission at the admissibility and at the final stages. It appeared as obvious that an individual member of the Commission might indeed opt for any one of the following three choices: (a) to hold that there was no breach of the Convention because of the prior acceptance of the validity of the preliminary objection without going into the merits; (b) to hold that there was no breach after firstly accepting the preliminary objection, and then going into the merits, or (c) to hold that there was a breach after firstly accepting the preliminary objection, and then going into the merits.

In retrospect, the majority of eight members of the Commission who voted for "non-violation" of Article 1 of Protocol No.1 (P1-1) was reinterpreted as being composed of three members who found no violation after going into the merits, and five members who voted for non-admissibility of the case, and had either (a) not expressed a valid opinion on the issue of violation at the merits stage (the Cyprus Government's position), or (b) had expressed a valid opinion on this (this seems to be President Trechsel's view, although not stated in exactly such terms).

All in all, two kinds of principled reasoning about the issue seem possible at first sight:

(a) The two votes, at the admissibility/preliminary objections stage and at the merits stage, are independent of each other. The decision about the jurisdiction appears autonomous from a procedural point of view. But it may not be autonomous in relation to the merits considering the facts, the law, or the philosophical views of a judge. For example, a judge may adhere to the doctrine of judicial restraint, and therefore vote conservatively in favour of the preliminary objection, while the merits of the case may on the other side be of quite another concern for him or for her.

Moreover, the "Scandinavian doctrine" of minority respect for majority decision in the follow-up cases as applied to the present issue would recommend that a judge who was overruled on the preliminary objection should recognise its authority immediately. Because he feels, or actually is bound by the decision on Court's jurisdiction, he should go into the merits all the way - by expressing views and by casting his vote.

(b) The second kind of reasoning would advocate interdependence of the two votes, at the preliminary objections and at the merits stages. If the judge takes the view that a preliminary objection is well-founded, he has to vote for non-violation, given that in his view the Court is not competent to deal with the issue and should therefore never decide on the merits. If the dissenting judge's view were to prevail, the Court would not be seized, the applicant's claim would not be considered on its merits, and the violation would consequently not be found.

The present case departs from the two options discussed in the sense that the decision on the preliminary objection *ratione temporis* depended upon a prior examination of certain aspects of the merits. Therefore, the choice between the two options is not exhaustive of all possibilities. As for myself, I came to the conclusion that the merits of the case fall outside the jurisdiction of the Court *ratione temporis*

only after a preliminary examination of those facts found by the Court which related to the issue of the title and control of the property.

My subsequent dissent from the second and the third points of the operative provisions of the judgment was effected cumulatively by the reasoning under (b) above, by my preliminary and partial understanding of the merits of the case, and by some further considerations which I set out below.

## II.

5. The alleged original ("instantaneous") breach is in my view veiled in the factual and legal uncertainties of events which occurred as long ago as 1974 and even before. It also seems beyond this Court's abilities and competence to assess with the required certainty whether Turkey's interference was (in)consistent with international agreements, and whether or not it was (in)consistent with general principles of international law.

I am indebted to my colleague Judge Wildhaber for having reminded me also of the following ideas. The United Nations and other international policies of non-recognition of the "TRNC" are valid on an inter-State level. As a result, the "TRNC" Government cannot create legislation or bring about changes with legal effect in international law. However, it would be going too far to say that no purportedly legal acts of the "TRNC" administration are valid. For example, a marriage conducted by a "TRNC" official, and registered in the "TRNC", would have legal effect outside that "jurisdiction". Similarly, a transfer of property between private individuals in northern Cyprus, registered by an official of the "TRNC", would have legal effect elsewhere in the world.

Similar situations have occurred in other countries in the past. For example, in the settlement between Czechoslovakia and Germany following the Second World War, it was decided that the Munich Agreement was null and void, but that land transactions between private individuals were valid.

Furthermore, the events in northern Cyprus in 1974 would not be sufficient on their own to establish that Mrs Loizidou had lost her property. For example, if the prior status quo had been re-established in 1975 or 1976, she would not have lost her property. But the prior status quo has not yet been restored. Although it may be seen that Mrs Loizidou did not lose her property by an instantaneous act in 1974, it may nonetheless be disputed that no transfer of ownership was effected.

The Court's earlier case-law has always dealt in this respect with concrete situations. For example, in the *Papamichalopoulos and Others v. Greece* judgment (of 24 June 1993) the case concerned a refusal by the authorities to execute a national court decision. That is not the case here, where the ownership of Mrs Loizidou was allegedly altered by the events of 1974, or even as a result of the follow-up "process of the 'taking of the property'".

I must therefore suppose that after a certain time events in the "TRNC" may have led to a transfer of ownership - in which case there is no violation continuing to the present day: the relevant acts in northern Cyprus were possibly completed by the time of the Turkish declaration recognising this Court's jurisdiction.

The doctrine of "continuing violation" implies a beginning, i.e., a critical event constituting the original breach, and its continuation. In the case of Mrs Loizidou the Court in my view failed

to ascertain both ingredients to this concept in an unequivocal manner. This line of reasoning thus led me, *inter alia*, to the conclusion that the objection *ratione temporis* applies.

6. Moreover, the factual situation established in 1974 has persisted ever since and it is still uncertain which side in the conflict, or even more likely, what kind of negotiated compromise solution will become "ultimately successful". While it is true that simple longevity of control must not be equated with "ultimate success", it is also far from established whether the "TRNC" *de facto* Government will survive or not, and if it will, in what form - as a federal or confederal unit, an independent state, or in some other form. In any case, the validity of its acts concerning the applicant must be considered to depend upon its ultimate success. The final outcome of the conflict - in the form of a *post facto* international or bilateral settlement - will have to resolve in one way or another the issue of recognition of the acts of the "TRNC" from the commencement of its existence, and/or of reversion to the original status prior to such acts.

7. A national and an international judge alike, before making a decision to act in an activist or a restrained way, will as a rule examine whether the case is focused in a monocentric way and ripe for decision, and whether it is not overly moot and political.

Given that efforts are under way to arrive at a peaceful settlement of the Cyprus problem within UN, CE and other international bodies, a judgment of the European Court may appear as prejudicial. The respective "political nature" of the issue at hand does not refer, however, to the possible political consequences of the final judgment; all judgments, domestic and international, have at least some general social and political effects.

The "political nature" of the present case is in my view rather related to the place of the courts in general, and of the Strasbourg mechanism in particular, in the scheme of the division and separation of powers. There, the courts have a different role to play, than, e.g., the legislative and executive bodies. Courts are adjudicating in individual and in concrete cases according to prescribed legal standards. They are ill-equipped to deal with large-scale and complex issues which as a rule call for normative action and legal reform.

The same kinds of dilemmas face an international tribunal, which should, in my view, proceed in a rather restrained, that is, conservative way in matters which clearly transcend adjudication of an individual case, especially when they are part and parcel of a given structure of inter-community relationships. As to the present case, a "violation decision" on Article 1 of Protocol No.1 (P1-1) might invite another one hundred thousand or so similar cases in which applications could be filed with legitimate expectations that Commission's reports or the Court's judgments will follow the present precedent. In that case, the Court has in fact taken a broad decision about a large-scale issue in the realm of public international law.

8. This case may furthermore affect the role of the Court in another perspective, on which I also had the privilege to exchange and share ideas with my colleague Judge Wildhaber. It may affect the way in which the Court might handle future cases involving new member States such as Croatia, Bosnia and Hercegovina or Russia. The Court might have to look at what happened in the Croat region of Krajina, in the Republika Srpska, in other parts of Bosnia and Hercegovina, or in Chechnya. There, alleged violations of Convention-protected human rights and fundamental freedoms would be counted in millions, not "only" in hundreds and thousands of possible cases.

I have great respect for the principled view that the Court's only task is to see to it that fundamental rights of individuals are respected, irrespective of their numbers. On the other hand, I see much reason to consider seriously an equally legitimate issue of this Court's effectiveness in resolving human rights problems. This problem is even more difficult in respect of individual cases, such as the present one, which are inextricably linked to, and also depend upon the solution of a large-scale inter-communal ethnic and/or political conflict.

9. In the final analysis, the totality of the above considerations led me to take a restrained judicial approach in the present case, and to accept validity of the *exceptio ratione temporis*.

#### DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority against finding a violation of Article 1 of Protocol No. 1 (P1-1) for a number of reasons. In the judgment on the preliminary objections I had already expressed my views as follows:

"At the examination of preliminary objections stage, after the discussion at the public hearing, which was limited to analysis of these objections by the Parties, the European Court was not able to take cognisance of all the problems, and this circumstance militated even more forcefully in favour of joining all these objections to the merits. To date legal writers have not considered analysis of the Turkish declaration a simple matter (see Claudio Zanghi, Christian Tomuschat, Walter Kalin, Pierre-Henri Imbert, Christopher Lush, etc.).

An overall assessment of the situation, beginning with the concepts of sovereignty and jurisdiction, would make it possible to review the criteria ('occupation', 'annexation', territorial application of the Geneva Conventions in northern Cyprus, 'conduct of international relations') on the basis of which the UN has analysed both the problem whether or not to recognise northern Cyprus as a State and the problem of the application of the UN Charter (see Security Council Resolution 930). The responsibilities of the European Convention institutions, when faced with such difficulties, reflect the mutual commitment of the member States to ensuring the best and widest protection of individuals and fundamental rights in the countries concerned by applying the Convention provisions in a manner consistent with their object and purpose." (individual dissenting opinion, Series A no. 310, pp. 43-44)

"Admittedly the concept of jurisdiction is not restricted to the territory of the High Contracting Parties, but it is still necessary to explain exactly why jurisdiction should be ascribed to a Contracting Party and in what form and manner it is exercised. We note that in the *Drozd and Janousek v. France and Spain* judgment cited in paragraph 62 the Court eventually found that there had been no violation.

While the responsibility of a Contracting Party may be engaged as a consequence of military action outside its territory, this does not imply exercise of its jurisdiction. The finding in paragraph 64 does not refer to any criterion for deciding the question of jurisdiction. In our opinion, therefore, there is a contradiction between what the Court says in paragraph 62 and

its conclusion in paragraph 64, and this contradiction reappears in the vote on point 2 of the operative provisions. The Court should have looked into the merits of the question who did or did not have jurisdiction before ruling on the objection." (joint dissenting opinion of Judge Gölcüklü and myself, loc. cit., p. 35)

That is why I was in favour of upholding the objection *ratione temporis* and of distinguishing between *ratione loci* and *ratione personae*.

Neither the second deliberations nor the memorials produced supplied the detailed information needed for a thorough assessment of the facts. Nor did the parties' arguments concerning Protocol No. 1 (P1) shed any light on the problem of attributing responsibility for any interference with the use of property there may have been, although free access to the property depended on liberty of movement from one zone to the other.

The majority held that there had been a violation of Article 1 of Protocol No. 1 (P1-1) mainly because of the refusal of access since 1974, which led to the complete loss of control over the property, a matter covered by the first sentence of that provision (P1-1). They considered that the interference was not justified and criticised the Turkish Government for not explaining how the need to rehouse the Turkish Cypriot refugees displaced after 1974 could justify the measure taken against Mrs Loizidou. Indeed, the Court went on to say that it could not accept such a justification. In any case, I consider that consideration to be of secondary importance.

The need concerned seems obvious, and if events had made the rehousing operation inevitable, that could justify the interference. The facts of the matter had to be looked into. The Loizidou case as a whole could not be analysed as if it concerned a *de facto* expropriation under ordinary law, without compensation. The movement of displaced persons from one zone to another, an exodus which affected both communities, was the consequence of international events for which responsibility cannot be ascribed on the basis of the facts of the Loizidou case but has to be sought in the sphere of international relations.

Since 1974, the United Nations not having designated the intervention of Turkish forces in northern Cyprus as aggression in the international law sense, various negotiations have been conducted with a view to mediation by the United Nations, the Council of Europe and the European Union. Moreover, the Court did not examine the question whether that intervention was lawful (see paragraph 56 of the judgment). The decision to station international forces on the line separating the two communities made the free movement of persons between the two zones impossible, and responsibility for that does not lie with the Turkish Government alone.

The Court's reference to the international community's views about the Republic of Cyprus and the "TRNC" (see paragraph 42 of the judgment) is not explained. But is it possible in 1996 to represent the views of this "international community" on the question as uncontested, given that the most recent resolutions of the United Nations General Assembly and Security Council go back several years and the Court had no knowledge of the missions of the international mediators? For the Court it would appear that only Turkey is "accountable" for the consequences of the 1974 conflict! In my opinion, a diplomatic situation of such complexity required a lengthy and thorough investigation on the spot, conducted by a delegation of the Commission, of the role of the international forces and the administration of justice, before the Court determined how

responsibility, in the form of the jurisdiction referred to in Article 1 of the Convention (art. 1), should be attributed.

The problem of the status and responsibilities of the "TRNC" should have been examined more fully. It is true that the United Nations General Assembly has not admitted the "TRNC" as a member, but the lack of such recognition is no obstacle to the attribution of national and international powers (see paragraph 51 of the judgment). The case of Taiwan is comparable.

Moreover, the Court accepted the validity of measures adopted by the "TRNC" authorities in the fields of civil law, private law and the registration of births, deaths and marriages, without specifying what reasons for distinguishing between these branches of law and the law governing the use of property justified its decision. On the merits of Mrs Loizidou's claim, there are a number of uncertainties which have not been elucidated by the files. Since 1974 she does not seem to have taken any steps to give tangible expression to her intention of going to live in northern Cyprus or brought proceedings to preserve her title between 1974 and 1985 at least in the courts of the Republic of Cyprus, although she maintained that the latter had sole legitimate jurisdiction and sovereignty over the whole island. She did not apply to the Commission until 1989 and she has not produced any evidence that she applied to the UN forces for authorisation to cross the line and travel in the area beyond the border zone. The very basis of her civil action remains to be specified, her application being mainly concerned with access to her property. Loss of the use of the property is essentially due to the creation of the border, not to any one act on the part of a local authority.

The Court takes the view that it acquired jurisdiction on 22 January 1990 (see paragraph 32 of the judgment). Quite apart from the problem of admissibility raised by the wording of Turkey's declaration under Article 46 of the Convention (art. 46), it is not obvious that there was a continuing violation of Mrs Loizidou's property rights. On the contrary, it could be considered that there was an instantaneous violation in 1974, at the time of the coup d'état, even before a de facto expropriation in 1985 by the local authorities and during a period of disorder on which the Commission has not been able to throw any light, making it impossible to dissociate Mrs Loizidou's personal situation from the historical situation which also affected the Turkish Cypriot community. The term "continuing violation" is not appropriate, as the Commission observed in paragraphs 97 and 98 of its report.

It should also be noted that the Commission limited its finding on the question whether Turkey exercised jurisdiction to the border zone, not the whole of northern Cyprus (see applications nos. 6780/74, 6950/75 and 8007/77) and that it concluded that the applicants' arrest, detention and trial in the above-mentioned cases were not acts imputable to Turkey (see paragraph 51 of the judgment and paragraph 114 of the Turkish Government's memorial). In its report of 8 July 1993 the Commission refrained from ruling on the status of the "TRNC".

That takes us a long way from the type of situation which the Court termed a continuing violation in cases such as the Holy Monasteries case. The scope and limits of the concept of a continuing violation should have been defined.

Whatever the responsibilities assumed in 1974 at the time of the coup d'état, or those which arose with the arrival of the Turkish troops in the same year, however hesitant the international community has been in attempting to solve the international problems over Cyprus since 1974, at the time when the "TRNC" was set up or at the time of Turkey's declaration to the Council of Europe, those

responsibilities being of various origins and types, the whole problem of the two communities (which are not national minorities as that term is understood in international law) has more to do with politics and diplomacy than with European judicial scrutiny based on the isolated case of Mrs Loizidou and her rights under Protocol No. 1 (P1). It is noteworthy that since 1990 there has been no multiple inter-State application bringing the whole situation in Cyprus before the Court. That is eloquent evidence that the member States of the Council of Europe have sought to exercise diplomatic caution in the face of chaotic historical events which the wisdom of nations may steer in a positive direction.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

I disagree with the majority on all points and in the first place on rejection of the Turkish Government's preliminary objection concerning the Court's jurisdiction *ratione temporis*. The present dissenting opinion is prompted mainly by the fact that this case raises legal and political difficulties which go well beyond the conceptual framework established by the Convention and the whole of the Court's case-law hitherto.

1. Firstly, the present judgment contains serious methodological flaws. As I pointed out in my dissenting opinion on the preliminary objections in the same case (judgment of 23 March 1995, Series A no. 310), the central legal problem in the case of *Loizidou v. Turkey* is the question of jurisdiction and responsibility for the purposes of the Convention. Not only does the judgment not resolve this problem, it boldly ventures into a highly political area, namely the Court's definition of the capacity in which Turkey is present in northern Cyprus and its "assessment" of the legal existence of the Turkish Republic of Northern Cyprus, both of which are matters that lie entirely outside its jurisdiction and are dealt with differently by other bodies. In other words, the Court has built its own database in order to be able to "rule" on a case that is likely to become the prototype for a whole series of similar cases which will in all probability be resolved by political bodies. Hitherto, each time the Strasbourg supervision institutions had to deal with a case involving application of other international treaties or agreements, they proceeded with great caution, and such applications never got past the admissibility stage. It is interesting, for example, that even in the present case the Commission, in its report of 8 July 1993, prudently stated with regard to the applicant's allegation that she had been unlawfully deprived of her possessions: "The Commission finds that it is not in this connection required to examine the status of the 'Turkish Republic of Northern Cyprus'. It notes that the demonstration on 19 March 1989, in the course of which the applicant was arrested in northern Cyprus, constituted a violation of the arrangements concerning the respect of the buffer-zone in Cyprus ... The provisions under which the applicant was arrested and detained ... served to protect this very area. This cannot be considered as arbitrary" (see paragraph 82 of the report). Likewise, in its report in the case of *Chrysostomos and Papachrysostomou v. Turkey*, the Commission stated: "... the Commission does not feel called upon to resolve the dispute between the parties as to the status of the area in which the applicants' arrest took place. It refers in this respect to paragraph 11 sub-paragraph (b) of the report of the Secretary-General of the United Nations ... and to paragraph 6 of the Unmanning Agreement of 1989 ..." (see paragraph 153 of the report).

2. As regards jurisdiction too, the Court's present judgment goes beyond the limits of its previous case-law on the question.

Wherever jurisdiction is not derived from the territorial ambit of a Contracting State's legal system, the fact of its existence must be expressly established, since in such cases it is not legally correct to speak of application of the Convention *ratione loci*. On that point I refer to my dissenting opinion in the above-mentioned Loizidou judgment and the Commission's decision of 12 March 1990 on the admissibility of application no. 16137/90, which concerned application of the Convention to Hong Kong (Decisions and Reports (DR) 65, p. 330 et seq.).

In its decision of 26 May 1975 concerning the case of *Cyprus v. Turkey* (nos. 6780/74 and 6950/75, DR 2, p. 136) the Commission had already taken the same view. That decision clearly shows that it is not a question of the Convention's application *ratione loci*, but of its application *ratione personae*.

That approach is clarified still further in other decisions in which the Commission has expressed the opinion that the acts of a State's officials, including diplomatic or consular agents, "bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property" (application no. 17392/90, DR 73, p. 193, and application no. 7547/76, DR 12, p. 73).

In its *Drozd and Janousek v. France and Spain* judgment the Court too, after noting that the Principality of Andorra was not "an area ... common to the French Republic and the Kingdom of Spain, nor ... a Franco-Spanish condominium", concluded that there was no jurisdiction *ratione loci*. It was only after excluding that category of jurisdiction that the Court turned to the question whether there was jurisdiction *ratione personae*, and what is more on the basis of the case-law cited above (judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

In its report in the cases of *Chrysostomos and Papachrysostomou* the Commission observed: "The Commission, having regard to the developments described above and finding no indication of direct involvement of Turkish authorities in the applicants' detention, and the proceedings against them, after their arrest on 19 July 1989, sees no basis under the Convention for imputing these acts to Turkey" (see paragraph 170 of the report).

The present judgment breaks with the previous case-law since in dealing with the question whether there was jurisdiction *ratione personae* it applies the criteria for determining whether there was jurisdiction *ratione loci*, although the conditions for doing so have not been met. Thus, for the first time, the Court is passing judgment on an international law situation which lies outside the ambit of the powers conferred on it under the Convention's supervision machinery. In this judgment the Court projects Turkey's legal system on to northern Cyprus without concerning itself with the political and legal consequences of such an approach.

3. I would also emphasise that not only does northern Cyprus not come under Turkey's jurisdiction, but there is a (politically and socially) sovereign authority there which is independent and democratic. It is of little consequence whether that authority is legally recognised by the international community. When applying the Convention the actual factual circumstances are the decisive element. The Commission and the Court have stated more than once that the concept of "jurisdiction" within the meaning of Article 1 of the Convention (art. 1) covers both *de facto* and *de jure* jurisdiction. In northern Cyprus there is no "vacuum", whether *de jure* or *de facto*, but a politically organised society, whatever name and classification one chooses to give it, with its own legal system and its own State

authority. Who today would deny the existence of Taiwan? That is why the Commission in its report in the Chrysostomos and Papachrysostomou cases examined the law in force in northern Cyprus as such, and not Turkish law in order to determine whether the applicants' detention had been lawful (see paragraphs 148, 149 and 174 of the report).

4. I now come to the heart of the problem. I voted in favour of upholding the Turkish Government's preliminary objection *ratione temporis* and against finding a violation of Article 1 of Protocol No. 1 (P1-1). As Judge Bernhardt, the Vice-President of the Court, rightly pointed out in his dissenting opinion, some general remarks are indispensable before any discussion of the two main aspects of the case can begin.

I agree entirely with that part of Judge Bernhardt's opinion where he states: "A unique feature of the present case is that it is impossible to separate the situation of the individual victim from a complex historical development and a no less complex current situation. The Court's judgment concerns in reality not only Mrs Loizidou, but thousands or hundreds of thousands of Greek Cypriots who have (or had) property in northern Cyprus. It might also affect Turkish Cypriots who are prevented from visiting and occupying their property in southern Cyprus. It might even concern citizens of third countries who are prevented from travelling to places where they have property and houses. The factual border between the two parts of Cyprus has the ... consequence that a great number of individuals are separated from their property and their former homes."

The Cypriot conflict between the Turkish and Greek communities is mainly attributable to the 1974 coup d'état, carried out by Greek Cypriots with the manifest intention of achieving union with Greece (*enosis*), which the Cypriot head of state at the time vigorously criticised before the international bodies. After this coup d'état Turkey intervened to ensure the protection of the Republic of Cyprus under the terms of a Treaty of Guarantee previously concluded between three interested States (Turkey, the United Kingdom and Greece) which gave these States the right to intervene separately or jointly when the situation so required, and the situation did so require ultimately in July 1974, on account of the coup d'état. In all of the above, incidentally, I make no mention of the bloody events and incidents which had been going on continually since 1963.

This implementation of a clause in the Treaty of Guarantee changed the previously existing political situation and durably established the separation of the two communities which had been in evidence as early as 1963.

I fully agree with Judge Bernhardt that after the 1974 coup d'état there were a number of actors and factors involved in the Cypriot "drama", including "the population transfer from north to south and south to north". He continued: "The result of the different influences and events is the 'iron wall' which has existed now for more than two decades and which is supervised by United Nations forces. All negotiations or proposals for negotiations aimed at the unification of Cyprus have failed up to now. Who is responsible for this failure? Only one side? Is it possible to give a clear answer to this and several other questions and to draw a clear legal conclusion? ... The case of Mrs Loizidou is not the consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 and its closure up to the present day."

After the establishment of the buffer-zone under the control of United Nations forces, movement from north to south and vice versa

was prohibited and there was a population exchange with the common consent of the Turkish and Cypriot authorities under which eighty thousand Turkish Cypriots moved from southern to northern Cyprus.

I must emphasise once again that, as already mentioned at the very beginning of this dissenting opinion, in the present case we are dealing with a political situation and it is impossible to separate the political aspects of the case from the legal aspects.

The case has another political dimension for our Court. Its judgment will certainly have consequences for future cases - whose origins go back to the Second World War - against new members of the Council of Europe, such as the countries in central or eastern Europe previously governed by communist regimes.

Turkey has recognised the Court's jurisdiction only in respect of events subsequent to 22 January 1990. That restriction excludes all judicial consideration of events prior to that date, even if they were incompatible with the respondent State's obligations under the Convention.

The Convention institutions have accepted the notion of "continuing violations", that is violations which began before the critical date and continued afterwards. However, where this concept is invoked it is vital to define its scope and its limits. In the case of imprisonment or the illegal occupation of land before and after the date concerned there is no doubt that a continuing violation exists and that the period subsequent to the critical date falls within the Court's jurisdiction. Like Judge Bernhardt, however, I consider that the position is different in the present case, where a certain historical event has led to "a situation such as the closing of a border with automatic consequences in a great number of cases". If it were otherwise, the Strasbourg institutions could be confronted with the difficult task of reconsidering historical events many years after their occurrence and applying Convention standards retrospectively.

In the *Loizidou v. Turkey* case it is the existence of a buffer-zone, a kind of border guarded by UN forces in collaboration with the security forces of both communities, in accordance with the agreements they have concluded, which is preventing the Greek Cypriots of southern Cyprus from obtaining access to their properties in the north and from living there. Its establishment, which took place before 1990, that is before Turkey recognised the Court's jurisdiction, was an instantaneous act which froze a de facto situation of a political nature. That being the case, we are not confronted with a "continuing situation" as the majority of the Court considered. In this case, therefore, there is no question of a continuing violation nor of any infringement of the applicant's right of property. That is also the view taken by the Commission, which noted: "the applicant, who was arrested after having crossed the buffer-zone in Cyprus in the course of a demonstration, claims the right freely to move on the island of Cyprus, irrespective of the buffer-zone and its control, and bases this claim on the statement that she owns property in the north of Cyprus". The report continues: "The Commission acknowledges that limitations of the freedom of movement - whether resulting from a person's deprivation of liberty or from the status of a particular area - may indirectly affect other matters, such as access to property. But this does not mean that a deprivation of liberty, or restriction of access to a certain area, interferes directly with the right protected by Article 1 of Protocol No. 1 (P1-1). In other words, the right to the peaceful enjoyment of one's possessions does not include, as a corollary, the right to freedom of movement." The Commission accordingly concluded that there had been no violation of Article 1 of Protocol No. 1 to the Convention (P1-1) (see the Commission's report

on the application of *Loizidou v. Turkey*, paras. 97, 98 and 101).