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JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE LOIZIDOU CASE: A CRITICAL EXAMINATION*

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THE CIRCUMSTANCES OF THE CASE

The applicant, Mrs Titina Loizidou, is a Greek Cypriot, presently living in South Cyprus. She owned certain plots of land in Kyrenia (Girne).

On 19 March 1989, a Greek Cypriot women's group, Women Walk Home, organised a march with the announced intention of crossing the cease-fire line of the Turkish forces. From Nicosia, the demonstrators drove to the village of Lymbia, where a group managed to cross the buffer zone and the Turkish forces' line. Turkish Cypriot police officers arrested some of the women, including Mrs Loizidou. Later the same day, they were released to United Nations Forces in Cyprus (UNFICYP) officials in Nicosia and taken over to the Greek Cypriot area.

The UN Secretary General referred to the demonstration in his report of 31 May 1989. He said, "Considerable tension occurred over the well-publicised plans of a Greek Cypriot women's group to organise a large demonstration with the announced intention of crossing the Turkish Forces cease-fire lines". He also said that the incident happened despite the fact that the Greek Cypriot government "had given assurances" that it would do whatever was necessary to ensure respect for the buffer-zone.¹

In July 1989, the applicant applied to the European Commission of Human Rights concerning her deprivation of liberty on 19 March 1989, and refusal of access to her property in North Cyprus. She alleged violations of Articles 3 and 5, and a continuing violation of Article 8 of the European Convention for Human Rights and Article 1 of Protocol No. 1. She claimed that Turkish military forces stationed in the northern part of Cyprus or forces acting under their authority carried out all the acts she complained of.

On 4 March 1991, the Commission declared inadmissible the applicant's complaints of continuing violations of Article 8 of the Convention and Article 1 of Protocol No.1 because the alleged incidents occurred before 29 January 1987, the date of Turkey's acceptance of the right of individual application. The remainder of the application was declared admissible.

The Commission held a hearing on the merits on 4 December 1992. The Commission adopted its report on 8 July 1993, under Article 31 of the Convention. In its report, the Commission concluded that there had been no violation of Article 3 (ill treatment) of the Convention. As regards to the allegation relating to the applicant's arrest and detention, the Commission found that the "demonstration constituted a serious threat to peace and public order on the demarcation line in Cyprus".² Having noted that Turkish Cypriot policemen had arrested

the applicant after she crossed the UN controlled buffer-zone, the Commission concluded that the arrest took place “in accordance with a procedure prescribed by law” as required by Article 5(1) of the Convention.³ The Commission also found that the provisions under which the applicant was arrested and detained, that is, provisions of laws applicable in the Turkish Republic of Northern Cyprus (TRNC), served to protect this very area and could not be “considered as arbitrary”.⁴

As for the right to respect for home, the Commission found that the applicant had left Kyrenia and moved to Nicosia in 1972. In view of this the prevention of the applicant from returning to her home in Kyrenia, could not affect her right to respect for her home and therefore her allegation of violation of Article 8 of the Convention could not be sustained.⁵

As for the right to possessions under Article 1 of Protocol No. 1, the Commission found that the prevention of the applicant from having access to her property in North Cyprus was imputable to Turkey due to the presence of Turkish forces in Cyprus, who exercise an overall control in the border area.⁶ The Commission considered, however, “that a distinction must be made between claims concerning the peaceful enjoyment of one’s possessions and claims of freedom of movement.”⁷ The Commission then acknowledged:

“that limitations of the freedom of movement—whether resulting from a person’s deprivation of liberty 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. In other words, the right to the peaceful enjoyment of one’s possession does not include, as a corollary, the right to freedom of movement”.⁸

The Commission therefore found that the applicant’s claim of free access to the north of Cyprus, cannot be based on her alleged ownership of property in North Cyprus, and, in view of this, there could be no question of violation of Article 1 of Protocol No. 1.⁹

The Greek Cypriot Administration on 9 November 1993 referred the case to the European Court of Human Rights under Articles 32(1) and 47 of the European Convention. The object of the application to the Court was said to be to obtain a decision as to whether the facts of the case concerning the applicant’s property disclosed a breach by Turkey of its obligations under Article 1 of Protocol No. 1 and Article 8 of the Convention.¹⁰

The main objections of the Turkish government to the claims of the applicant were:

(a) that the Court lacked competence to consider the merits of the case on the grounds that the matters complained of did not fall within the Turkish jurisdiction, but within that of the TRNC, in view of the restriction (reservation) in Turkey’s declaration of acceptance of the compulsory jurisdiction of the Court, dated 22 January 1990, to the effect that such acceptance was in respect of matters “performed within the boundaries of the Republic of Turkey” (*ratione loci* objection);

and

(b) that the case fell outside the jurisdiction of the Court because it related to events that occurred before Turkey’s declaration of acceptance of the compulsory jurisdiction of the Court, dated 22 January 1990 (*ratione temporis* objection).¹¹

In its judgement of 23 March 1995, on the above preliminary objections, the Court found that Turkey’s restriction *ratione loci* was invalid, but ruled that the invalid clause could be severed from the rest of the declaration so that the declaration itself was valid.¹² As for the *ratione temporis* objection, the Court decided that temporal restrictions limiting acceptance of jurisdiction of the Court to matters that occur subsequent to the time of deposit of the instrument of acceptance can be validly made.¹³ However, the correct interpretation and application of the restrictions *ratione temporis* in the Turkish declarations under Article 25 and 46 of the

Convention, and the notion of continuing violations of the Convention, would, in the opinion of the Court, rise difficult legal and factual questions. The Court therefore decided to join these issues to the merits of the case.¹⁴

During the hearing on the merits, which was held on 25 September 1995, the above points were developed and argued before the Court. Turkey contended that the application fell outside the jurisdiction of the Court as the complaints occurred before Turkey's acceptance of jurisdiction of the Court. Turkey argued that the expropriation of the property of the applicant had been effected and completed in virtue of the provisions of Article 159 of the TRNC Constitution and legislation in force in North Cyprus at the relevant time, relating to property abandoned in North Cyprus since 13 February 1975. The expropriation, therefore, was a fact that had occurred prior to Turkey's acceptance and was beyond the jurisdiction of the Court.¹⁵ The Court held, by a majority of eleven votes to six, that, as the international community did not regard the TRNC as a state under international law, it could not attribute legal validity for the purposes of the Convention to the TRNC Constitution. In consequence, the expropriation could not be considered as having been completed in that year, the applicant was still to be regarded as the legal owner of the property in question and the situation had, therefore, to be viewed as a continuing act of interference with the applicant's property subsisting subsequent to Turkey's declaration.¹⁶

On the question of imputability, the Court said that it was not necessary to determine whether Turkey exercised detailed control over the policies and actions of the TRNC authorities, but it was "obvious from the large number of troops engaged in active duties in Northern Cyprus", that the Turkish army exercised effective overall control there.¹⁷

The Court observed that although Mrs Loizidou had remained the legal owner of the land since 1974 she had effectively lost all control over it and all possibility to enjoy the use of it. The continuous denial of access amounted, therefore, to an interference with her rights under Article 1 of Protocol No. 1.¹⁸

This article intends to examine below the various aspects of the above views and conclusions of the Court and their impact on the political situation subsisting in the island.

THE POLITICAL DIMENSION

The political dimension of the Loizidou case is illustrated by the fact that it was one of the many cases instituted against Turkey since 1975 arising from developments on the island of Cyprus, the aim being to accuse Turkey before the organs of the Council of Europe, in spite of the fact that, as stated by the Committee of Ministers of the Council of Europe in its Resolution DH (79) 1, full respect for human rights in Cyprus could

"only be brought about through the re-establishment of peace and confidence between the two communities; and that inter-communal talks constitute the appropriate framework for reaching a solution of the dispute".

Another political aspect of the case lies in the endeavour of the moving party, the applicant Greek Cypriot Administration, to disregard the Turkish Cypriot authorities exercise of substantial jurisdiction in North Cyprus with the purpose of imputing responsibility to Turkey. However, as stated by the judges R. Bernhardt and M. A. Lopes Rocha in their common dissenting opinion, the position of the applicant and of the government that supports it cannot be separated from a "complex historical development and a no less complex current situation".

One may also recall the important observation of the judge L. E. Pettiti in his dissenting opinion:

"... the whole problem of the two communities ... 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. It is

noteworthy that since 1980 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.”

Another political dimension of the case is shown by the attitude of the Court in dealing with TRNC statehood, thus side-stepping the issue of the authorities of North Cyprus’s exercise of substantial jurisdiction, in relation to matters under the Court’s examination. On the question of imputability and/or responsibility the true test would have been as to whether there is a de facto administration in North Cyprus exercising effective and exclusive executive, legislative and judicial authority, and not whether the TRNC is regarded as a state or not. Moreover, the question of recognition could not have been of crucial significance in determining responsibility and/or imputability. An unrecognised state can have duties and responsibilities in international law. Just as the Court ruled that it was not necessary to decide on the “lawfulness or unlawfulness under international law of Turkey’s military intervention in the island in 1974” (para. 56 of the judgement) it was not necessary for the Court to adjudicate on the status of the TRNC, as the exercise of de facto authority in North Cyprus could be examined independently of the legal status of the TRNC. The Court, however, unlike the Commission (para. 82 of the Report of the Commission of 8 July 1993), preferred to rule on the status of the TRNC (para. 44 of the judgement), thus giving an unnecessary and undesirable political advantage to the moving party, the Greek Cypriot Administration. The Court should be wary of meddling unnecessarily in political matters, though instigated by the moving party to do so.

FAILURE OF THE COURT TO EXAMINE THE ACTUAL EXERCISE OF AUTHORITY IN NORTH CYPRUS

In the *Loizidou* case, the Court failed to examine the true governmental position in North Cyprus as it actually existed at the time of the judgement. If this had been properly done, the Court would have been bound to find, as the Commission found in the *Chrysostomos and Papachrysostomou* case,¹⁹ that the Greek Cypriot government in South Cyprus had not exercised authority over the Turkish Cypriots since December 1963. Further, it would have found that the people of North Cyprus have been governing themselves in an orderly manner in accordance with democratic standards, in particular, as laid down in Article 3 of the First Protocol to the Convention, and that there existed in fact an administration and a judiciary, as well as, a legislature capable of making laws—that is to say, the very ingredients of statehood.²⁰

It may be recalled that the fact that there was an effectual and established autonomous administration in the North was recognised by Lord Denning MR in the English Court of Appeal in *Hesperides Hotels and Another v. Aegean Holidays and Another*.²¹ In *Polly Peck International plc v. Asil Nadir and Others*,²² the English Court of Appeal recognised the TRNC’s Central Bank as equal to any central bank in any other state. In the *Hesperides* case, Lord Denning MR held that the action, being one in tort, was not maintainable because the acts complained of were lawful under the *lex loci actus*; notice would be taken of the laws of the Turkish Federated State of Cyprus which authorised the acts. This was stated in the following terms:

“There is an effective administration in Northern Cyprus which has made laws governing the day to day lives of the people. According to these laws, the people who have occupied these hotels in Kyrenia are not trespassers. They are not occupying them unlawfully. They are occupying them by virtue of a lease granted to them under the laws or by virtue of requisitions made by the existing administration. If an action were brought in the courts of this northern part, alleging trespass to land or to goods, it would be bound to fail. It follows inexorably that their conduct cannot be made the subject of a suit in England”.²³

The ability of the actual administration of a territory, whether presenting itself as a state or as a government de facto, to enact laws entitled to be taken cognisance of in the international plane, is generally accepted. The fact that an authority exercising legislative power had not been recognised as a state or government does not mean that its legislation is not accepted externally as effective to alter the law within the area under its control.

Without entering into a detailed consideration of the authorities on this point, it may suffice to refer to the position within the legal systems of a number of member state of the Council of Europe:

Austria

“In Austria courts are not bound to obtain a certificate of the Ministry of Foreign Affairs concerning the existence or non-existence of a state. Austrian Courts did not hesitate to apply the law of the German Democratic Republic even at a time when the latter was not recognised by Austria”.²⁴

France

“The noted Clerget affair has given the courts a chance to decide the question definitively. A private creditor seized the effects of the commercial attaché of North Vietnam ... The Court of Cassation decided ... that the Court of Paris had correctly looked at the actual situation of the North Vietnamese government and had decided

‘that the Democratic Republic of North Vietnam, although not recognised, is represented in France, is an independent sovereign state whose assets ... cannot be seized, having regard to the sovereignty and independence which international courtesy forbids us to breach even to obtain payment of debts incurred in a private capacity’.

This case shows in a particularly striking manner the sovereign powers recognised by the courts in these cases”.²⁵

Germany

“The German courts have recognised the status of Poland and of Czechoslovakia as states, deducing their status from their existence and from the fact that they possessed a territory, a population, and a stable government, even at a time when the German Reich had not yet recognised these two States”.²⁶

Switzerland

In 1965, the then Swiss Federal Tribunal, dealing with the effect of the laws of the German Democratic Republic, observed that “the legal order of the GDR is to be treated on an equal basis with the order of the Federal Republic of Germany even though the GDR is not recognised as a State by Switzerland”. It also said that “there is no reason why a foreign expropriation, even if it was not followed by the payment of compensation, should not be taken into account as a fact in deciding this question ...”.²⁷

Even more to the point, however, is the fact that the European Commission of Human Rights itself attributed legal validity and effect to the legislation of the TRNC when, in the Chrysostomos case,²⁸ it found that the arrest of the applicants in Cyprus, by police acting under Chapter 155, Section 14 of the Criminal Procedure Law took place “in accordance with a procedure prescribed by law as required by Article 5 para. 1 of the Convention”. It is impossible to understand how at one and the same time, the legislation of the TRNC can be valid and effective in law for the purposes to judging the legality of an arrest under “a procedure prescribed by law”, yet the Constitution of that same authority does not constitute valid and effective law. Moreover, by its Resolution DH (95) 245, the Committee of Ministers of the Council of Europe has endorsed the above finding of the European Commission in Chrysostomos by formally agreeing with the Commission’s opinion that in the said case “there had been no violation of Article 5 para. 1 of the Convention” and, further, “that the applicants’ detention after their arrest [by the TRNC authorities] and the proceedings against them [before a TRNC judge] were not in violation of the Convention and that there had been no violation of Article 13 of the Convention”. It is hard to believe that the Loizidou judgement can be interpreted in such a way as to throw overboard the

findings of the Commission in Chrysostomos and the legal position taken in Res. DH (95) 245.

INCORRECT ATTRIBUTION OF RESPONSIBILITY TO TURKEY

In paragraph 54 of the Judgement (Merits) of 18 December 1996 the Court says as follows:

“It is important for the Court’s assessment of the imputability issues 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 of the ‘TRNC’ (see the above mentioned preliminary objections Judgement, 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)”.

As can be seen in the above quotation, the Court referred to the preliminary objection judgement of 23 March 1995, para. 63, in support of the proposition that the Turkish government “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 of the ‘TRNC’.” However, there is no reference either in the preliminary objection judgement, or in the judgement on the merits, to any record, minutes, proceedings or documents to show in what way, and at what stage, such an acknowledgement is allegedly made. On the contrary, the position of the Turkish government all along had been that the Turkish intervention of 1974 was carried out under the Treaty of Guarantee, in the wake of a Greek-sponsored coup d’état, which aimed at uniting the island with Greece (enosis), and that the Turkish intervention could not be described as an ‘invasion’ or ‘occupation’. Moreover, the Turkish government, had argued, inter alia, that it was due to the legislation and the constitutional provisions of the TFSC and its successor the TRNC, that the property of the applicant was expropriated, which could not be related to the Turkish intervention of 1974, the intervening acts constituted novus actus interveniens and, therefore, the acts in question were not imputable to Turkey but to the authorities of the TRNC. Turkey developed the *ratione temporis* objection to show that the chain of causation since the Turkish intervention was broken and that the Turkish responsibility could not be invoked as regards acts and events prior to the recognition of the competence of the Court to hear and determine individual applications.

Furthermore, the Court’s finding in para. 54 that “it has not been disputed that the applicant has on several occasions been prevented by Turkish troops from gaining access to her property”, is also not supported by evidence. In support of this proposition, the Court refers to paras. 12 and 13 of the judgement on the merits. These paragraphs refer, however, to the “allegations” of the applicant as deduced by the Court. In her application, the applicant herself did not allege that on “several occasions” she had been prevented from gaining access to her property. Her complaint was that “by the continued occupation and/or control of the said part of Cyprus and by prohibiting ... access to the said part of Cyprus and consequently to her property in question, has gradually and with the passing of time over the last 15 years, affected the rights of the Applicant as property owner”.

Had the Court recalled the position of the Turkish government, as expressed in para. 30 of the Commission’s report of 8 July 1993, it would have found that the Turkish government had in fact denied that the applicant had ever intended to have access to her property but was prevented from doing so. The Turkish government’s view was that there was no genuine attempt to have access to property. The position was explained in para. 30 of the Commission’s report as follows:

“The respondent Government states that, after 15 July 1974, there was an agreement for exchange of Turkish and Greek Cypriots. Turks living in the South were allowed to come to the north of the island and the Greeks living in the north were allowed to go to the south. The properties of the communities concerned were taken over by the administrative authorities on both sides. The question of Greek Cypriot properties in the north and Turkish Cypriot properties in the south is a matter discussed within the framework of the inter-communal talks. The applicant has not been residing in the ‘Turkish Republic of Northern Cyprus’. Her allegation that she went

there to claim her property is false”.

The Court also failed to address itself directly to the issue of responsibility. In paragraph 52 of the judgement, the Court held that “the responsibility of a Contracting Party could also arise where as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory”. The Court further said in paragraph 56 that “it is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her [Turkey’s] army exercises effective control over that part of the island”. But this does no more than state a conclusion; it does not provide a reason for it. Moreover, the conclusion is wrong. It could legitimately only have been reached after a close consideration in the given individual case of the extent to which the effective authority of the civil authorities in Northern Cyprus might have been displaced by the presence and activity of the Turkish troops. Had the Court done so, it would have found that the Turkish forces do not exercise governmental authority or control over the administration of the TRNC any more than do, say, the presence of forces of the United States and the United Kingdom in Germany. The best way to demonstrate the absence of Turkish authority in North Cyprus is to look at the omnipresence of Turkish Cypriot authority. The Commission as the fact-finding body did not find that Turkey was responsible for the alleged Convention violation.

FAILURE OF THE COURT TO CONDUCT A JUDICIAL EXAMINATION OF THE EXISTENCE OF THE TRNC

It was not necessary, or even desirable, to decide on the status of the TRNC. Having decided to do so, however, the Court proceeded to apply wrong criteria to the question under its consideration, as will be explained in the following paragraphs.

The Court, failed to conduct a judicial examination of the existence of the TRNC, but wrongly regarded international practice, particularly relating to recognition, as constituting international law.²⁹ However, international practice as such is not automatically part of international law, and where it becomes so it always involves the acquiescence, or at least, the non-objection of the state against which the practice is sought to be applied.

Having, however, chosen to make a ruling on the legal status of the TRNC as central to the case, the Court should have independently and objectively examined this issue on the basis of the relevant law and facts. The criteria of statehood in international law are well-known (such as, territory, population and government), and the satisfaction of those criteria could easily have been assessed if an attempt had been made to consider the pertinent facts.³⁰ Instead, the Court limited its consideration of facts to the “Turkish military presence in North Cyprus”³¹ and to “The international response to the establishment of the ‘TRNC’”.³²

The Court failed to examine the facts relating to the creation, structure and operation of the TRNC and to its administrative, legislative and judicial system. Although acknowledging that “it [the Court] must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction”, the Court immediately went on to say:

“In this respect it is evident from international practice and the various strongly worded resolutions referred to above (of the UN Security Council, the Council of Europe, the European Community’s Council of Ministers and the Commonwealth Heads of Government) that the international community does not regard the ‘TRNC’ as a State under international law and that the Republic of Cyprus had remained the sole legitimate Government of Cyprus...”³³

The Court thus acted in a manner comparable to some national courts when they accept the views of the executive as determinative of certain questions of foreign affairs. But the European Court of Human Rights is not a national court. It is an international tribunal, even though one of limited jurisdiction. The Court is not meant to be subservient to the views of governments, but rather to examine the validity of those views. The

fact that many governments may adhere to a particular position as a matter of policy, even though that position is couched in legal terms, does not turn that position into law.

The Court should instead have approached the question of the status of the TRNC in the manner in which the Badinter Commission,³⁴ at the request of the Council of Ministers of the European Community, approached the question of the status of the successor states in the former Yugoslavia.

The Badinter's Commission did not deal with the question by assessing the degree to which the new states had been recognised as such by other states. Instead, the Commission deemed its task to be one of finding the facts and applying the law to them. The Commission considered.

“(a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a State, that in this respect, the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory;

(b) that the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority; that such a State is characterised by sovereignty;

(c) that, for the purpose of applying these criteria, the form of political organisation and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's sway over the population and the territory”.³⁵

It is clear that, for the Badinter Commission, recognition was not “constitutive” of statehood, but merely “declaratory” of it. ‘Statehood’ had an objective existence quite distinct from recognition.

No member of the European Community has expressed any dissent from the views of the Badinter Commission. It would be quite inconsistent for those same states, to accept the approach used by the European Court of Human Rights.

The legality of the existence of the TRNC as a state is not affected by the fact that Turkish forces are present in North Cyprus, for this is the direct consequence of the coup by Greek Cypriots in 1974. The international reaction to Turkey having fulfilled its duties as a guarantor of that arrangement has never been the subject of international judicial scrutiny or indeed of any proper objective legal examination at all. Even the Court of Justice of the European Community allowed no more than the most cursory and superficial examination of the matter in the reference from an English Court in the case of *The Queen v. Minister of Agriculture, ex-parte Anastasiou (Cypfruvex intervening)*.³⁶

Moreover, the resolutions referred to in paragraph 42 of the judgement are not legally mandatory and should not have been accorded controlling influence. The Security Council resolutions were not stated to have been adopted in the exercise by the Council of its powers under Chapter VII of the UN Charter, nor were they expressed in the language usually associated with an intent to create a mandatory effect under Article 25 of the UN Charter. A number of members of the Council of Europe, namely, Britain, Belgium, France and Italy, have openly taken this position regarding Security Council resolutions.³⁷

THE MINORITY ISSUE

Para. 44 of the Loizidou judgement reads as follows:

“In this respect it is evident from international practice and the various, strongly worded resolutions referred to above (see paragraph 42 above) 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 relies.”

The statement in the above paragraph 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” has two misleading aspects. First, it wrongly presumes that the recognised ‘Government of Cyprus’ (composed of Greek Cypriots only, irrespective of the provisions of the international Treaties that gave birth to the Republic of Cyprus and of the now defunct 1960 Constitution which provided for a bi-communal Republic of Cyprus) is the legitimate Republic of Cyprus. The Court wrongly equates ‘recognition’ with ‘legitimacy’ without examining the status of the Republic of Cyprus under the above mentioned Treaties and the Constitution. Second, by stating that the present ‘Government of Cyprus’ is itself “bound to respect international standards in the field of human and minority rights”, wrongly suggests that the Turkish Cypriots have the status of a minority, as meant by international standards. If that was the meaning of para.44, the Court’s judgement would have far-reaching repercussions, for it disregards completely the equal political status of the Turkish Cypriot community. Even more surprising is the opinion of the two honourable judges—Wildhaber and Ryssdal—to the effect that the TRNC is “constituted by what was originally a minority group in the whole of Cyprus”. Both of these passages completely ignore those legal and factual features that characterise the life of society in Cyprus. The international Treaties and the now defunct 1960 Constitution of Cyprus clearly recognised two politically equal communities, the Greek Cypriot community and the Turkish Cypriot community.³⁸ The minorities on the island were religious groups, such as the Maronites, Armenians and Latins, who were given the right to opt to join either one of the two communities.

The Turkish Cypriot community has never been qualified by anyone, other than Greek Cypriot quarters, as a minority in Cyprus, neither at the time of the establishment of the Republic by agreement between Great Britain, Greece, Turkey and the respective heads of the Turkish Cypriot and the Greek Cypriot communities, nor thereafter. It is precisely because of the attempt of the Greek Cypriot community, through a coup against the Constitution, to demote the Turkish Cypriot community to a minority status that the Cyprus problem emerged as of 1963. As from December 1963, no government representing the whole population of Cyprus has existed. From then on, two exclusive administrations replaced the government of Cyprus. This corresponded to the right of self-determination of each community recognised at the time by the British government, the predominant player in bringing about the Republic of Cyprus. At the time of the emergence of Cyprus as an independent state, the then British Colonial Secretary stated:

“It will be the purpose of Her Majesty’s Government to ensure that any exercise of self-determination should be effected in such a manner that the Turkish Cypriot community, no less than the Greek Cypriot community, shall, in the special circumstances of Cyprus, be given freedom to decide for themselves their future status. In other words, Her Majesty’s Government recognises that the exercise of self-determination in such a mixed population must include partition among the eventual options”.³⁹

The existence of separate rights of self-determination for the two communities, or peoples, of Cyprus is implicit in the ongoing negotiation process under the auspices of the United Nations. Even more so, at the end of their meeting held in Geneva in July 1974, the foreign ministers of the three Guarantor Powers, the United Kingdom, Greece and Turkey, issued a statement calling for negotiations to be carried on to secure the restoration of peace and “the re-establishment of constitutional government in Cyprus” and noting at the same time “the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot Community and that of the Turkish Cypriot Community”.⁴⁰

The United Nations deals with the Cyprus problem on the basis of two separate communities. For instance, the UN Security Council, in its resolutions 367 of 1975 and 649 of 1990, describes those to whom the Secretary General is to render his good offices, as ‘communities’ and sometimes as ‘parties’. In his report to the Security

Council dated 8 March 1990, the UN Secretary General states,

“Cyprus is the common home of the Greek Cypriot community and of the Turkish Cypriot community. Their relationship is not one of majority and minority but one of two communities in the state of Cyprus. The mandate given to me by the Security Council makes it clear that my mission of good offices is with the two communities. My mandate is also explicit that the participation of the two communities in this process is on an equal footing. The solution that is being sought is thus one that must be decided upon by and must be acceptable to both communities. It must also respect the cultural, religious, social and linguistic identity of each community”.

The UN Security Council Resolution 649 of 12 March 1990 also describes the negotiation process as “... negotiations between the representatives of the two communities on an equal footing, the objectives of which must continue to be to freely reach a solution providing for a political settlement and the establishment of a mutually acceptable constitutional arrangement ...”

Security Council Resolution 716 of 11 October 1991 and 993 of 29 July 1994 again emphasised this parity of negotiating status in the search for a bi-communal and bi-zonal federation. The Secretary General has also stated that:

“The federation will be established through a new constitutional arrangement which will be prepared in line with the overall framework agreement being negotiated in which the two communities participate on an equal footing and which will be approved through separate referenda in each community”.⁴¹

Nothing has changed in the meantime to make such assessments irrelevant or invalid. By ignoring such fundamental facts, the Court has not only acted in derogation of legal criteria, but has also aggravated the overall situation by unfortunately introducing misguided considerations into the ongoing search for a peaceful settlement. And what about the right of the Greek Cypriot Community to self-determination as measured against the human rights standards allegedly relevant to the exercise of self-determination? Has the apparent exercise of self-determination by the Greek Cypriot community by way of coup d'état in 1963-64 effectively served the human rights of Turkish Cypriot citizens of the Republic? It is sufficient to refer to the UN Security Council resolution 186 of 4 March 1964, under the terms of which a United Nations Peace Force in Cyprus was established in order to stop the Greek Cypriots' massacre of Turkish Cypriots on the Island beginning in December 1963. Members of the Court may have lost sight of these fundamental facts.

EROSION OF THE PRINCIPLE OF BI-ZONALITY

The Loizidou judgement also fails to take into account the bi-zonal, bi-communal framework for a solution that emerged as a result of inter-communal negotiations, under the auspices of the UN Secretary General, and as set out in the two summit agreements concluded in 1977 and 1979 between the Greek Cypriot and Turkish Cypriot leaders, the Set of Ideas of 15 July 1992 prepared by the UN Secretary General, and in Security Council resolutions, particularly Resolution 716 of 11 October 1991 and 744 of 25 August 1992.

The property rights issue and reciprocal compensation is a manifestation of the conflict on the island. As such, these issues can only be settled through negotiations, and on the basis of already agreed principles of bi-zonality and bi-communality. Inevitably, the realisation of bi-zonality will involve an exchange of Turkish Cypriot properties in the South with Greek Cypriot properties in the North and, if need be, the payment of compensation for any difference. The principle of bi-zonality implies that the population of the federated state in the North will be predominantly Turkish Cypriot and that the so-called ‘three freedoms’, that is to say, the freedoms of movement and settlement and the right to property, will be restricted, and a ceiling will be agreed upon concerning the number of Greek Cypriots that will reside and own property in the North.

The UN Secretary General's Set of Ideas of 15 July 1992, endorsed by Security Council Resolutions 744 of 26

August 1992 and 789 of 24 November 1992, provide for these issues in the following manner:

“The freedom of movement, the freedom of settlement and the right to property will be safeguarded in the federal constitution. The implementation of these rights will take into account the 1977 high-level agreement and the guiding principles set out above. The freedom of movement will be exercised without any restrictions as soon as the Federal Republic is established, subject only to non-discriminatory normal police functions. The freedom of settlement and the right to property will be implemented after the resettlement process arising from territorial adjustments has been completed. The federated states will regulate these rights in a manner to be agreed upon during a transitional period consistent with the federal constitution.”

As to compensation for immovable properties of displaced persons, the Set of Ideas of the UN Secretary General provided as follows:

“Other areas under Greek Cypriot and Turkish Cypriot administration. Each community will establish an agency to deal with all matters related to displaced persons.

The ownership of the property of displaced persons, in respect of which those persons seek compensation, will be transferred to the ownership of the community in which the property is located. To this end, all titles of properties will be exchanged on a global communal basis between the two agencies at the 1974 value plus inflation. Displaced persons will be compensated by the agency of their community from funds obtained from the sale of the properties transferred to the agency, or through the exchange of property. The shortfall in funds necessary for compensation will be covered by the federal government from a compensation fund obtained from various possible sources such as windfall taxes in the increased value of transferred properties following the overall agreement, and savings from defence spending. Governments and international organisations will also be invited to contribute to the compensation fund. In this connection, the option of long-term leasing and other commercial arrangements may also be considered. Persons from both communities who in 1974 resided and/or owned property in the federated state administered by the other community or their heirs will be able to file compensation claims.

Persons belonging to the Turkish Cypriot community who were displaced after December 1963 or their heirs may also file claims”.

The Loizidou judgement does not discuss the above facts of obvious relevance to the property claim of the applicant.

FAILURE TO TAKE INTO CONSIDERATION THE STATUS OF THE UN BUFFER ZONE

The Loizidou judgement makes no reference to the UN controlled buffer zone between the two lines separating the two communities in the island. However, by its finding that Turkey is in violation of Article 1 of Protocol No. 1 in preventing applicant’s access to her property across the buffer zone, the Court is taken to have refused, contrary to the UN position on the matter, to take into consideration the existence of the buffer zone as a relevant point in issue.

It should be recalled that the UN Secretary General has persistently insisted on the preservation of the status and the integrity of the buffer zone as a necessary element of preserving the peace on the island.⁴²

The UN Secretary General’s report, S/21981 of 7 December 1990, on preserving the integrity of the buffer-zone in Cyprus, states that in this zone, set up between the two communities to preserve the military status quo, the UN peacekeeping force has a duty to prevent all unauthorised intrusion and civilian activities. The civil authorities of both communities have accepted the inviolability of this particular zone and it is their duty to ensure compliance with the undertaking in question. In addition, paragraph 6 of the UN Unmanning Agreement of May 1989 stipulates, “in case a violation persists, the other force will be free to take

proportionate action in the area concerned”.

In his report to the Security Council of 31 May 1992, the Secretary General stated that the UNFICYP has a function that has enabled it to keep the peace in Cyprus since 1974, “namely control of the buffer zone”.⁴³ The Secretary General has persistently referred in his subsequent reports to the necessity of preserving “the integrity of the buffer zone from unauthorised entry or activities by civilians”.⁴⁴

It is due to the Greek Cypriot side’s complete disregard of the UN call for respect of the integrity of the buffer zone that the situation deteriorated in the summer of 1996 to a level unparalleled since 1974.⁴⁵

The judgement of the Court also ignores the findings of the Commission relating to the integrity of the buffer zone. No reasons are given why the Court differed from the Commission on this issue. However, in its report of 8 July 1993, the Commission referred to the UN Secretary General’s report of 31 May 1989 to the Security Council about the demonstration of 31 May 1989 in which the applicant had taken part.⁴⁶ In his report the Secretary General stated in para.11 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.”

In para.82 of its report, the Commission had noted that,

“the demonstration on 19 May 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 (cf. para. 39 above). The provisions under which the applicant was arrested and detained (see paras. 43-45 above) served to protect this very area. This cannot be considered as arbitrary”.

The fact that the Court did not take into account the status of the UN buffer zone, which is an element that should have been taken into account in considering the right to property (as a correlative of the right of free movement), is a serious omission which may encourage violations of the buffer zone and lead to incidents and wide-scale troubles in the area, and repercussions all over the island, affecting in a negative way the prospects for a peaceful settlement.

CONCLUSIONS

The Turkish Cypriot side reacted strongly to the majority judgement of the Court mainly because it denied the equal political status of the Turkish Cypriot community, whose status under the 1960 Cyprus treaties is that of a co-founder partner of the bi-communal Republic of Cyprus, and in so doing, it unjustifiably bolstered the status of the Greek Cypriot Administration, wearing the mantle of the ‘Government of Cyprus’, thus equating recognition with legitimacy. This emerges particularly from the reference in paragraph 44 of the judgement to the “legitimate Government of Cyprus” being itself “bound to respect international standards in the field of the protection of human and minority rights”. If this means that the Turkish Cypriot community on the island is a minority, the judgement of the Court is not only in conflict with the international Treaties of 1959-60 and the now defunct Cyprus Constitution of 1960, but also it would run counter to the basic elements and principles underpinning the inter-communal talks. The majority judgement therefore carries with it an incorrect assessment furthering a legally distorted suggestion of possible far-reaching repercussions. Even more surprising is the concurring opinion of the two honourable judges (Wildhaber and Ryssdal) on the right to self-determination, referring to the TRNC as having been “constituted by what was originally a minority group in the whole of Cyprus” (i.e. the ‘Turkish Cypriots’). Enough has already been said above to show that the

author does not agree with the assessment in question.

It is unacceptable that the Court could regard the bi-communal Republic of Cyprus as a unitary state composed of one community only, the Greek Cypriots, and that the sovereignty of that Republic,⁴⁷ which was entrusted to the two communities conjointly,⁴⁸ could be attributed to one of the communities to the exclusion of the other.

International law cannot forever ignore the facts and realities of Cyprus. International law cannot be based on theoretical assumptions; it should keep abreast with the facts and developments.

As for the status of the TRNC, as already explained above, it was not necessary for the Court to decide on this, as the issue of imputability could be determined by examining whether the acts complained of were those of Turkey or those of the TRNC. Imputability was a matter of exercise of substantive authority or jurisdiction, and not of status. By deciding upon the question of status, the Court undesirably treaded upon political grounds, whereas it chose to do otherwise as to the right of freedom of movement, and the right to possessions, which the Court decided in isolation from the inter-communal talks and the de facto division of the Island, thus undermining the principle of bi-zonality agreed upon within the context of the inter-communal talks. The Court refused to take into consideration the suggestion, also made by the Committee of Ministers in the earlier inter-state case, that the full enjoyment of human rights in Cyprus depends on a political settlement in the island.⁴⁹

In view of the foregoing, the judgement of the Court is bound to have a negative effect on the inter-communal talks, for it undermines the principle of bi-zonality agreed upon between the two sides, which entails regulation of the 'three freedoms' (the freedom of movement and settlement and the right to property) on the lines proposed by the UN Set of Ideas. If the judgement of the Court were used to negate the principles underpinning the inter-communal talks, it would not contribute to a peaceful and agreed settlement of the Cyprus problem.

- 1 UN Security Council doc. S/20663, para.11.
- 2 Para.58 of the report of the Commission of 8 July 1993.
- 3 Ibid., paras.78 and 79.
- 4 Ibid., para.82.
- 5 Ibid., para.88.
- 6 Ibid., paras.93-95
- 7 Ibid., para.97.
- 8 Ibid., para.98.
- 9 Ibid., paras.99 and 100.
- 10 The case before the Court is numbered 40/1993/435/514.

11 Judgement of the Court (Preliminary Objections) of 23 March 1995.

12 Ibid., paras.55-98.

13 Ibid., paras.100-102.

14 Ibid., paras.103-105.

15 Judgement of the Court (Merits) of 18 December 1996, para.42.

16 Ibid., paras.41 and 44-47.

17 Ibid., para.56

18 Ibid., para.68. However, the Court did not find a violation of Article 8 of the Convention (respect for home) as the applicant had moved to Nicosia in 1972.

The Court also decided to reserve the question of compensation and invited the parties to submit observations on this question within six months (paras.67-69).

19 Report of the Commission of 8 July 1993.

20 See, Zaim M. Necatigil, 'The Turkish Republic of Northern Cyprus: Statehood and Recognition', *Journal for Cypriot Studies*, Vol. 2, No. 1(1996), pp.3-17.

21 (1978) 1 All ER 277, at p. 285.

22 (1992) 2 LLR 238 (CA).

23 (1978) 1 All ER 277, at p. 285.

24 Seidl-Hohenveldern on 'Austria' in Lauterpacht & Collier (eds.), *Individual Rights and the State in Foreign Affairs*, p. 26.

25 Wail on 'France' in Lauterpacht & Collier (eds.), *supra*, p. 291; *Clerget v. Banque Commercial pour L'Europe* (1971), *Court of Cassation*, 65 ILR 54; *Matte et Ross v. La Societe des Ferges et des Chambres de la Méditerranée* (1991) 18 JDI 868.

26 Seidl-Hohenveldern on 'Germany' in Lauterpacht & Collier (eds.), *Individual Rights and the State in Foreign Affairs*, p. 259; *Reichsgericht* 10 May 1921 *Fontes Juris Gentium A. 2 I No.224*; and *Reichsgericht* 29 June 1920 *Fontes Juris Gentium A.21 No. 202*.

27 *VEB Carl Zeiss Jena v. Carl Zeiss Heidenheim* (72 *International Law Reports* 550, at pp. 562 and 560).

28 Report of the European Commission of Human Rights of 8 July 1993. See article by Zaim M. Necatigil, 'Chrysostomos and Papachrysostomou v. Turkey: Some Aspects of State Responsibility', *Journal for Cypriot Studies*, Vol. 2, No. 3 (1996), pp. 217-266.

29 Judgement of 18 December 1996 (Merits), paras. 42 and 44.

- 30 See article referred to in note 19, above, where the criteria of statehood are examined in some detail.
- 31 Ibid., paras. 16-17.
- 32 Ibid., paras. 19-24.
- 33 Ibid., para.44.
- 34 The Commission was composed, inter alia, of Mr Robert Badinter, Chairman, at the time President of the French Conseil Constitutionnel and Prof. Roman Herzog, at the time President of the German Constitutional Court and now President of the Federal Republic of Germany.
- 35 29 November 1991, 92 ILR 737.
- 36 (1994) ECR1-3087, relating to the validity of phytosanitary certificates issued by the authorities in the TRNC.
- 37 British position: Comments by Sir Colin Crewe at 1589th Meeting, 6 October 1971, Official Records of the Security Council, S/PV.1589, p. 5, paras. 49-53; and at 1598th Meeting, 20 October 1971, Ibid., S/PV.1598, p. 3., paras. 25-26; Belgian position: Comment by Mr Longerstacy at 1590th Meeting of the Security Council, 14 October 1971. Ibid., S/PV.1594, pp. 5-6, para. 51; French position: Comments by Mr Kosciusko-Morizet at 1588th Meeting of the Security Council, 5 October 1971. Ibid., S/PV.1588, pp. 2-3, paras. 6-8; and Italian position: Comments by Mr Voini at 1589th Meeting of the Security Council, 6 October 1971. Ibid., S/PV.1589, p. 11, para. 6; and at 1595th Meeting, 20 October 1971. Ibid., S/PV. 1595, p. 17, para. 167.
- 38 Article 2 of the Constitution.
- 39 Statement in the House of Commons on 19 December 1956.
- 40 Geneva Declaration of 30 July 1974, signed by the foreign ministers of UK, Greece and Turkey.
- 41 S/23300 of 19 December 1991, para. 6.
- 42 See particularly the UN Secretary General's report S/12253 of 9 December 1976, para. 19.
- 43 S/24050, para. 50.
- 44 S/26777 of 22 November 1993, para. 16.
- 45 UN Secretary General's report S/1996/1016 of 10 December 1996.
- 46 S/20663.
- 47 Restricted as it was, because Cyprus could not change its Constitution and, moreover, it could not enter into economic and political union with any state whatsoever.
- 48 The two community leaders had signed all the documents establishing the Republic of Cyprus.
- 49 There have been references to the political dimension of the Loizidou case in other organs of the Council of Europe. For instance, in presenting the opinion of the Committee on Legal Affairs and Human

Rights at a session of the Parliamentary Assembly of the Council of Europe on 29 January 1997 the Chairman of the Committee, Mr Jurgens said:

“the political situation means that human rights are being violated on both sides of the island. That is such a massive problem that legal advice does not help, although the Court of Human Rights here in Strasbourg recently—in the Loizidou case in December—stated specifically that members of the Cypriot community whose property is on the other side of the wall should not lose their property rights. Whether or not those rights can be reinstated is a political matter. They can be reinstated only if the political situation is such that each side is prepared to acknowledge the rights of the other.” (As(1997)CR4).

Again, at the 585th session of the Committee of Delegates of the Council of Europe on 25 February 1997, when the Loizidou judgement came up for examination under Article 54 of the Convention, the Director of Human Rights, Mr Pierre-Henri Imbert said that, because of the political dimension of the case, the application of the judgement involved significant political difficulties. This was not a matter of mathematics; the case was different from the others; it was not restricted to compensation, as the applicant had asked also for other relief.