Die Zulässigkeit territorialer Beschränkungen bei der Anerkennung der Zuständigkeit des Europäischen Gerichtshofs für Menschenrechte

Anmerkung zum Urteil des Europäischen Gerichtshofs für Menschenrechte im Fall *Loizidou* gegen die Türkei vom 23. März 1995

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Die im Anhang abgedruckte Entscheidung des Europäischen Gerichtshofs für Menschenrechte im Fall *Loizidou*[1] ist für das gesamte Konventionssystem von großer Bedeutung. Sie befaßt sich mit der Wirksamkeit der territorialen Beschränkungen, die die Türkei ihrer Unterwerfungserklärung unter das Individualbeschwerdeverfahren und die Gerichtsbarkeit des Gerichtshofes beigefügt hatte, und betrifft damit die wichtige – im Bereich des internationalen Menschenrechtsschutzes immer wieder aufgeworfene – Frage der Wirkung von Vorbehalten und Beschränkungen im Rahmen von Menschenrechtsverträgen[2].

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[1] Council of Europe, European Court of Human Rights, Judgement of 23 March 1995 (Preliminary objections), Case No. 40/1993/435/514, Loizidou v. Turkey, abgedruckt unten S. 439 ff.; vgl. hierzu C. Focarelli, Sulle riserve all'accettazione della competenza della Corte Europea: La sentenza Loizidou, Rivista di Diritto Internazionale 78 (1995), 738 ff.

[2] Vgl. hierzu T. Giegerich, Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenz von Vertragsgremien, ZaöRV 55 (1995), 713; W.A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, Brooklyn Journal of International Law 22 (1995), 277; R. Kühner, Vorbehalte zu multilateralen völkerrechtlichen Verträgen (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 91) (1986); ders., Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention, ZaöRV 42 (1982), 58 ff.

1. Obwohl die Türkei die Konvention bereits im Jahre 1954 ratifiziert hatte[3], hinterlegte sie erst am 29. Januar 1987 beim Sekretariat des Europarates die Erklärung zur Anerkennung des Individualbeschwerderechts nach Art. 25 EMRK. Am 22. Januar 1990 folgte die Erklärung nach Art. 46 EMRK[4], daß die Türkei die Gerichtsbarkeit des Gerichtshofes als obligatorisch anerkenne. In beiden Erklärungen beschränkte die Türkei in nahezu identischen Formulierungen die Wirksamkeit der Erklärungen auf das Staatsgebiet der Türkei[5].

Ausgangspunkt des Verfahrens war eine Beschwerde einer aus Kyrenia/Nordzypern stammenden Frau (Titina Loizidou), die nach ihrer Heirat im Jahre 1972 nach Nicosia umgezogen war[6]. Sie hatte behauptet, Eigentümerin einiger Landparzellen in ihrer Heimatstadt zu sein, auf denen angeblich bereits mit dem Bau von Wohnungen begonnen worden war. Seit der Invasion türkischer Streitkräfte im Jahre 1974 sei es ihr nicht möglich gewesen, nach Kyrenia zurückzukehren und ihren Grundbesitz zu nutzen. Sie hatte Individualbeschwerde vor der Kommission erhoben und u. a. die Verletzung von Art. 8 EMRK sowie Art. 1 des 1. Zusatz-

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[3] Vgl. Hierzu C. Rumpf, Die Anerkennung des Individualbeschwerderechts gemäß Art. 25 EMRK durch die Türkei, ZaöRV 47 (1987), 778, 781.

[4] Hierzu C. Rumpf, Die Anerkennung der Zuständigkeit des Europäischen Gerichtshofs für Menschenrechte gem. Art. 46 EMRK durch die Türkei, EuGRZ 17 (1990), 53 ff.

[5] In der Erklärung gemäß Art. 25 EMRK vom 28.1.1987 heißt es: "The recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable". Die Türkei wiederholte diesen Vorbehalt in der nachfolgenden Erklärung zu Art. 25 (gültig für drei Jahre ab dem 28.1.1990), präzisierte dann in der dritten Erklärung (gültig ab dem 28.1.1993) dahin gehend, "... concerning acts or omissions ... performed within the boundaries of the national territory of the Republic of Turkey".

In der Erklärung vom 22.1.1990 zu Art. 46 heißt es: "The Government of the Republic of Turkey ... hereby recognizes as compulsory ... the jurisdiction of the European Court of Human Rights in all matters ... which relate to the exercise of jurisdiction ... performed within the boundaries of the national territory of the Republic of Turkey ...". Diese Erklärung wurde für einen weiteren Dreijahreszeitraum, beginnend mit dem 22.1.1993, erneuert.

[6] Zur Situation in Zypern und deren völkerrechtlicher Beurteilung vgl. Z.M. Necatigil, Cyprus Question and the Turkish Position in International Law, 2nd ed., 1993; G. v. Laffert, Die völkerrechtliche Lage des geteilten Zypern und Fragen seiner staatlichen Reorganisation, 1994; T. Oppermann, Cyprus, in: R. Bernhardt (Hrsg.), Encyclopedia of Public International Law, Vol. I, 1992, 923 ff.

protokolls geltend gemacht[7]. Die Kommission erklärte die Beschwerde für zulässig[8], kam jedoch in ihrem Bericht vom 8. Juli 1993 zu dem Ergebnis, daß keine Konventionsverletzung vorliege[9]. Die Republik Zypern hat daraufhin den Gerichtshof angerufen, wozu sie nach Art. 48 b) EMRK befugt war. In der im Anhang abgedruckten Zulässigkeitsentscheidung setzt sich der Gerichtshof mit den Vorabeinwendungen (*preliminary objections*) der Türkei auseinander.

2. Den von der Türkei zunächst an der Aktivlegitimation der Regierung der Republik Zypern geäußerten Zweifeln entgegnet der Gerichtshof in wenigen Worten. Er verweist zu Recht darauf, daß die Republik Zypern ein von der internationalen Gemeinschaft anerkannter Staat ist, der wirksam den Beitritt zur Konvention vollzogen hat. Die gegenseitige Anerkennung der an einem Verfahren vor dem Gerichtshof beteiligten Vertragsstaaten stellt keine Verfahrensvoraussetzung dar. Erfolglos hat die Türkei zudem versucht, die völlig autonome Verantwortung der Turkish Republic of Northern Cyprus (TRNC) für alle Geschehnisse in Nordzypern ins Felde zu führen und sich auf die Position des "amicus curiae" der TRNC zurückzuziehen. Der Gerichtshof stellt klar, daß es nicht im Ermessen der Türkei stehe, über ihre Beteiligung am Verfahren zu entscheiden. Gegen sie sei die Individualbeschwerde erhoben worden, deshalb sei sie auch Partei des Verfahrens[10].

Bei der Prüfung der Frage, ob der von der Beschwerdeführerin vorgetragene Sachverhalt überhaupt der "jurisdiction" – also der Herrschafts-

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[7] Im März 1989 hatte die Beschwerdeführerin an einem Protestmarsch einer Frauengruppe teilgenommen ("Women Walk Home"), in dessen Verlauf von einem Teil der Gruppe die durch UN-Blauhelme gesicherte Pufferzone sowie die Grenze zu Nordzypern überschritten wurde. Die Beschwerdeführerin wurde von Angehörigen des türkischen Militärs festgenommen und nach zehnstündiger Haft den UN-Blauhelmen übergeben. Im Verfahren vor der Kommission hatte die Beschwerdeführerin geltend gemacht, die Festnahme und Haft stelle einen Verstoß gegen Art. 3, 5 und 8 EMRK dar. Die Regierung Zyperns, die den Fall dem Gerichtshof vorgelegt hat, verzichtete darauf, diese Rügen auch zum Gegenstand des Verfahrens vor dem Gerichtshof zu machen, da sich dieser Vorfall klar vor Wirksamwerden der Unterwerfungserklärung der Türkei unter die Gerichtsbarkeit des Gerichtshofes am 22.1.1990 ereignete. Vgl. zu dem Protestmarsch den Bericht des UN-Generalsekretärs vom 31.5.1989, Dokument S/20663, sowie J. Polakiewicz, Anmerkung zur Zulässigkeitsentscheidung der Europäischen Kommission für Menschenrechte im Fall *Chrysostomos u. a./Türkei*, ZaöRV 51 (1991), 145, 146 ff.

[8] Entscheidung der Kommission vom 4.3.1991 (*Chrysostomos and others/Turkey*), in Auszügen abgedruckt in ZaöRV 51 (1991), 156 ff.; vgl. hierzu die Anmerkung von J. Polakiewicz, ibid., 145 ff.

[9] Vgl. Ziff. 35 der vorliegenden Entscheidung.

[10] Vgl. Ziff. 47 – 52 der Entscheidung.

gewalt – der Türkei i. S. von Art. 1 EMRK unterfällt, behält sich der Gerichtshof eine genaue Analyse der Situation in Nordzypern der später folgenden Sachentscheidung ("merits") vor. Eine genauere Untersuchung der Zustände und Befehlsstrukturen in Nordzypern[11] hätte im wesentlichen das Ergebnis der Begründetheit vorweggenommen und war daher im derzeitigen Verfahrensstadium tatsächlich nicht angebracht. Hier genügte der Hinweis auf die bisherige Entscheidungspraxis[12], daß sich die Herrschaftsgewalt der Vertragsstaaten i.S. von Art. 1 EMRK nicht auf das jeweilige Staatsgebiet beschränkt, sondern sich bei Ausübung einer gewissen Kontrolle, sei es durch eigene Streitkräfte oder eine untergeordnete örtliche Verwaltung, auch auf andere Territorien erstrecken kann. Da die Ursächlichkeit sowohl der türkischen Militäroperation im Jahre 1974 als auch der seitdem fortbestehenden Truppenpräsenz für den Ausschluß der Eigentumsnutzung im vorliegenden Verfahren außer Frage stand, konnte der Gerichtshof relativ schnell zu dem Ergebnis gelangen, daß ein Betroffensein der türkischen "jurisdiction" im Bereich des Möglichen liegt[13].

3. Die Türkei hat die Zuständigkeit des Gerichtshofs bestritten mit dem Hinweis auf die den Erklärungen nach Art. 25 und 46 EMRK beigefügten territorialen Beschränkungen (Einwände *ratione loci*) und darüber hinaus vorgetragen, der der Beschwerde zugrunde liegende Sachverhalt habe sich zeitlich vor der Anerkennung der Gerichtsbarkeit des Gerichtshofes nach Art. 46 EMRK zugetragen (Einwände *ratione temporis*).

Der Gerichtshof nimmt – wie zuvor bereits die Kommission – ohne weiteres die Befugnis für sich in Anspruch, über die Gültigkeit der von der Türkei erklärten territorialen Beschränkungen zu entscheiden. Dies stellt nicht nur eine konsequente Fortentwicklung der Entscheidungspraxis der Konventionsorgane dar, sondern spiegelt eine mittlerweile im gesamten Bereich des internationalen Menschenrechtsschutzes vordringende Auffassung wider. Wurde die Frage der Zulässigkeit von Vorbehalten zu multilateralen Verträgen zunächst als eine Angelegenheit der Vertragsstaaten angesehen[14], so setzte sich mit der Zeit doch die Auffassung durch, daß die besondere Natur von Menschenrechtsverträgen gepaart mit der

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[11] So gefordert in dem Sondervotum der Richter Gölcüklü und Pettiti, s. im Anhang S. 458 f.

[12] *Soering /Vereinigtes Königreich,* Urteil vom 7.7.1989, HRLJ 11 (1990), 358 ff.; *Cruz Varas u. a./Schweden,* Urteil vom 20.3.1991, HRLJ 12 (1991), 151 ff.; *Vilvarajah u. a./Vereinigtes Königreich,* Urteil vom 30.10.1991, HRLJ 12 (1991), 443 ff.

[13] Vgl. Ziff. 59 – 64 der Entscheidung.

[14] Vgl. Schabas, Anm. 2, 314; Kühner, Vorbehalte zu multilateralen ..., Anm. 2, 141 ff.

Einrichtung spezieller Organe zur Überwachung der daraus resultierenden Vertragspflichten es verlange, daß die Kompetenz zur Überprüfung von Vorbehalten den Überwachungsorganen zusteht[15]. So hat sich erst kürzlich der Menschenrechtsausschuß des Internationalen Paktes über bürgerliche und politische Rechte in einem "General Comment", der zwar keine bindende Wirkung entfaltet[16], aber von nicht zu unterschätzender Bedeutung für das künftige Verständnis der Paktbestimmungen ist[17], ausführlich zur Zulässigkeit von Vorbehalten und zur diesbezüglichen Überprüfungskompetenz des Ausschusses geäußert.[18]

Die Konventionsorgane haben in einer ganzen Reihe von Entscheidungen zur Frage der Gültigkeit von Vorbehalten Stellung bezogen[19]. Der Gerichtshof hat sich erst kürzlich in dem Verfahren *Schmautzer* gegen *Österreich*[20] und fünf ähnlich gelagerten Fällen[21] zur Reichweite der zu Art. 5 EMRK erklärten Vorbehalte Österreichs geäußert. Im vorliegenden Fall nimmt der Gerichtshof keine genaue rechtliche Einordnung der territorialen Beschränkungen der türkischen Unterwerfungserklärungen nach

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[15] J.A. Frowein, Reservations to the European Convention on Human Rights, in: Protecting Human Rights: The European Dimension, Festschrift für G.J. Wiarda, 1988, 197; Nguyen Quoc Dinh [*et al.*], Droit International Public, 1994, 181; G. Cohen-Jonathan, Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988), Revue Génerale de Droit International Public, 1989, 271, 279 ff.; I. Cameron/F. Horn, Reservations to the European Convention on Human Rights: The Belilos Case, GYIL 33 (1990), 67, 87 ff.; Giegerich, Anm. 2, 758 ff.

[16] Vgl. aber zur maßgebenden Bedeutung der "General Comments" für die Auslegung des Paktes (nachfolgende Praxis) und der einzigartigen Rolle des Ausschusses als Wächter des Paktes, T. Opsahl, The General Comments of the Human Rights Committee, in: Des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für K.J. Partsch, 1989, 273 ff.; M. Nowak, U.N. Covenant on Civil and Political Rights (CCPR Commentary), 1993, Art. 40, RdNr. 50 ff.

[17] Vgl. Giegerich, Anm. 2, 715, 766 ff.

[18] United Nations Human Rights Committee, General Comment No. 24 (52) of 2 November 1994 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, HRLJ 15 (1994), 464 ff.

[19] Vgl. Kommissionsbericht im Verfahren *Temeltasch*, abgedruckt in ZaöRV 43 (1983), 834 ff.; Urteile des Gerichtshofes in den Verfahren *Belilos* (abgedruckt in ZaöRV 48 [1988], 522 ff.), *Weber* (EuGRZ 17 [1990], 265 ff.) und *Chorherr* (Série A: Judgements and Decisions, Vol. 266 – B). Zum Fall *Temeltasch* vgl. B. Wagner/L. Wildhaber, Der Fall Temeltasch und die auslegende Erklärung der Schweiz, EuGRZ 10 (1983), 145 ff.

[20] Case *Schmautzer v. Austria*, Judgement of the Court (adopted 23 October 1995) No. 31/1994/478/560.

[21] Cases *Umlauft* (32/1994/479/561), *Gradinger* (33/1994/480/562), *Pramstaller* (35/1994/482/564), *Palaoro* (36/1994/483/565) und *Pfarrmeier* (37/1994/484/566) alle versus *Austria*.

Art. 25 und 46 vor und läßt damit offen, ob derartige Beschränkungen Vorbehalte darstellen[22]. Sie unterscheiden sich von völkervertragsrechtlichen Vorbehalten zumindest insoweit, als nicht der Umfang der vertraglichen Bindung festgelegt werden soll, wie dies bei den Vorbehalten zur Konvention selbst nach Art. 64 EMRK der Fall ist, sondern über die Zuständigkeit eines durch den Vertrag errichteten Überwachungsorgans. Dies ist substantiell etwas anderes, da die Erklärungen nach Art. 25 und 46 im Zusammenhang mit einem zwischen den Vertragsparteien in Kraft befindlichen Vertrag erfolgen, während Vorbehalte über das Zustandekommen des Vertragsbandes entscheiden. Der Gerichtshof stellt inzident jedenfalls klar, daß derartige Beschränkungen, ob sie nun in technischer Hinsicht Vorbehalte sind oder nicht, der Gültigkeitsprüfung durch die Konventionsorgane unterliegen.

4. Im Ergebnis hält der Gerichtshof die territorialen Beschränkungen der Türkei für unvereinbar mit den Bestimmungen der Konvention und weist die türkischen Einwände in allen Punkten zurück.

Die Türkei hat versucht, ihre Argumente für die Zulässigkeit der Beschränkungen durch einen Hinweis auf Art. 36 Abs. 2, 3 IGH-Statut zu untermauern. Bei der Anerkennung der Zuständigkeit des Internationalen Gerichtshofes nach der Fakultativklausel sind in der bisherigen Staatenpraxis umfangreiche Beschränkungen erklärt worden[23]. In der Tat stand Art. 36 IGH-Statut der Formulierung des Art. 46 EMRK Pate[24]. In ihrer kompetenzbegründenden Funktion sind die Erklärungen nach Art. 25 und 46 EMRK auch durchaus mit der Unterwerfungserklärung nach Art. 36 IGH-Statut vergleichbar[25], völlig zu Recht streicht der Gerichtshof jedoch die fundamentalen Unterschiede zwischen dem Rechtsschutzsystem der EMRK und der Aufgabe des Internationalen Gerichtshofes heraus[26]. Während der Internationale Gerichtshof stets in Streitigkeiten

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[22] Diese Frage war in der Literatur umstritten, vgl. Polakiewicz, Anm. 7, 148. Die türkische Regierung hat in ihrem Schreiben vom 26.6.1987 an den Generalsekretär des Europarates die Auffassung vertreten, die territorialen Beschränkungen zu Art. 25 stellten keine Vorbehalte dar, sondern seien Bedingungen ("conditions"), die die Zuständigkeit der Kommission beschränkten, vgl. Bericht der Kommission im Fall *Chrysostomos*, ZaöRV 51 (1991), 161.

[23] S. hierzu S.A. Alexandrov, Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice, 1995; Kühner, Vorbehalte zu multilateralen ..., Anm. 2, 50 ff.

[24] Vgl. J.A. Frowein, in: Frowein/Peukert, EMRK-Kommentar, 1985, Art. 46, RdNr. 1.

[25] Vgl. Polakiewicz, Anm. 7, 148.

[26] Vgl. Ziff. 82 – 85 der Entscheidung.

zwischen einzelnen Staaten zu entscheiden hat, die alle möglichen Fragen des Völkerrechts betreffen (vgl. Art. 38 IGH-Statut), so ist die Rolle des Europäischen Gerichtshofes für Menschenrechte im Individualbeschwerdeverfahren doch eine ganz andere. Seine Funktion beschränkt sich auf die Überwachung der Einhaltung eines "law-making treaty"[27], der Konvention, in einem gerichtsförmigen Verfahren, in dem in der großen Vielzahl der Fälle nur ein Staat Partei ist.

Dem Rechtsschutzsystem der Konvention liegt gerade nicht der Gedanke der gegenseitigen Staatenverpflichtung zugrunde. Es unterscheidet sich in diesem Punkt deutlich von der auf Gegenseitigkeit beruhenden Unterwerfung unter die Gerichtsbarkeit des Internationalen Gerichtshofes nach Art. 36 Abs. 2 IGH-Statut[28].

Die Zulassung weitreichender Beschränkungen bei Abgabe der Unterwerfungserklärungen nach Art. 25 und 46 hätte einschneidende Folgen für das Funktionieren des gesamten Konventionssystems. Sie würde ein System vollkommen aufgesplitterter Durchsetzungsmöglichkeiten schaffen, das dem objektiven Charakter der Konventionspflichten nicht gerecht wird und die Effektivität der Konvention als ein "constitutional instrument of European public order" verringert[29]. Mit dem Rückgriff auf den von der Kommission geprägten Begriff eines europäischen Verfassungsinstruments[30] unterstreicht der Gerichtshof eindrucksvoll den besonderen Charakter der Konvention, die durch die unabhängige Spruchpraxis ihrer Organe wichtige gesamteuropäische Standards gesetzt hat und sich damit wesentlich von anderen völkerrechtlichen Verträgen zum Schutz der Menschenrechte unterscheidet[31].

In Anbetracht dieser Tatsache hätte die Zulässigkeit territorialer Beschränkungen ausdrücklich in Art. 25 und 46 EMRK vorgesehen werden

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[27] So der Gerichtshof in Ziff. 84 der Entscheidung.

[28] Dies haben die Konventionsorgane schon frühzeitig klargemacht. Vgl. hierzu das Memorial der Kommission vom 26.1.1976 (in: European Court of Human Rights, Serie B, Nr. 21, 115, 117 ff.), zum Versuch Dänemarks, die Anerkennung der Gerichtsbarkeit des Gerichtshofes durch die Bedingung der Gegenseitigkeit auf Staatenbeschwerden zu beschränken und die Möglichkeit der Vorlage durch die Kommission auszuschließen. Vgl. auch Entscheidung des Gerichtshofes im Fall *Irland/Vereinigtes Königreich*, EuGRZ 6 (1979), 149.

[29] Vgl. Ziff. 75 der Entscheidung.

[30] Vgl. Bericht der Kommission, Anm. 8, ZaöRV 51 (1991), 167. Die Kommission hatte bereits in ihrem Bericht im Verfahren *Österreich/Italien* darauf hingewiesen, daß es das Ziel der Vertragsstaaten gewesen sei, "to establish a common public order of the free democracies of Europe ..." (Application No. 788/60, Yearbook of the European Convention on Human Rights 1961, 116, 138).

[31] Vgl. hierzu J.A. Frowein, Die Herausbildung europäischer Verfassungsprinzipien, in: Rechtsstaat und Menschenwürde, Festschrift für W. Maihofer, 1988, 149, 152 ff.

müssen. Zutreffend verweist der Gerichtshof in diesem Zusammenhang auf die im Sinne eines größtmöglichen Rechtsschutzes gebotene dynamische Auslegung der Konventionsbestimmungen, im Rahmen derer die ursprüngliche Intention der Verfasser der Konvention nicht ausschlaggebend sein kann, sondern entscheidend auf die nachfolgende Staatspraxis Rücksicht genommen werden muß[32]. In der bisherigen Unterwerfungspraxis hatte keine der Hohen Vertragsschließenden Parteien andere als die in Art. 25 und 46 EMRK ausdrücklich vorgesehenen Beschränkungen erklärt.

In Reaktion auf die türkischen Erklärungen zu Art. 25 und 46 gaben einige Konventionsstaaten gegenüber dem Generalsekretär des Europarates Stellungnahmen ab, in denen zum Teil starke Zweifel an der Zulässigkeit der türkischen Beschränkungen geäußert wurden.

An dieser Stelle drängt sich die Frage nach der rechtlichen Relevanz dieser Reaktionen und Widersprüche auf. Bei Vorbehalten zu völkerrechtlichen Verträgen sind Einsprüche bedeutsam für die Bestimmung der untereinander eingegangenen Verpflichtungen[33]. Im System der MRK befinden jedoch nicht die Vertragsstaaten über die Zulässigkeit von Vorbehalten und Beschränkungen, sondern die Konventionsorgane. Ein Konsens der Vertragsstaaten könnte nicht dazu führen, einen nach der Konvention unzulässigen Vorbehalt doch zuzulassen[34]. Dies wird durch den objektiven Charakter der Konvention verhindert. Widersprüche zu Vorbehalten und Beschränkungen haben im Konventionssystem keine rechtlich ausschlaggebende Bedeutung; insoweit können die Ausführungen des Gerichtshofes hierzu nur als Argumentationsstütze verstanden werden.

Im Ergebnis sind bei Abgabe der Unterwerfungserklärungen nach Art. 25 und 46 EMRK keine anderen Beschränkungen zulässig als eine zeitliche Begrenzung der Gültigkeit. Die Vertragsstaaten haben damit an sich nur die Wahl, sich der Gerichtsbarkeit des Gerichtshofes zu unterwerfen oder nicht[35].

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[32] Vgl. Ziff. 71, 72 der Entscheidung.

[33] Vgl. Kühner, Vorbehalte zu multinationalen ..., Anm. 2, 178 ff.; P.-H. Imbert, Les réserves aux traités multilatéraux, 1978, 178 ff., 383 ff.

[34] Nach allgemeinem völkerrechtlichen Vertragsrecht bleibt es letztlich den Vertragsparteien überlassen, an sich unzulässige Vorbehalte (vgl. Art. 19 WVK) oder Beschränkungen durch Einvernehmen zu genehmigen, vgl. W. Heintschel von Heinegg, in: K. Ipsen, Völkerrecht, 1990, 151 f. Vgl. auch S. Marks, Reservations Unhinged: The Belilos Case before the European Court of Human Rights, ICLQ 39 (1990), 300, 314 ff.

[35] Vgl. Frowein, in: Frowein/Peukert, Anm. 24, Art. 46, RdNr. 5.

5. Nachdem der Gerichtshof damit zu dem Ergebnis der Unwirksamkeit der von der Türkei erklärten territorialen Beschränkungen gelangt war, hatte er sich mit der schwierigen Frage der Rechtsfolgen auseinanderzusetzen. Die EMRK gibt hierauf ebensowenig eine explizite Antwort wie das völkerrechtliche Vertragsrecht[36]. Dem Gerichtshof haben im Prinzip drei Lösungsvarianten offengestanden:

1) völlige Unwirksamkeit der Anerkennung der Gerichtsbarkeit des Gerichtshofes durch die Türkei;

2) Bindung der Türkei an die Anerkennung unter Ausklammerung der durch die ungültigen Beschränkungen belasteten Bereiche (Teilanerkennung);

3) Bindung der Türkei in vollem Umfang an die Anerkennung der Gerichtsbarkeit des Gerichtshofes, ungeachtet der erklärten Beschränkungen.

Unter Hinweis auf den speziellen Charakter der Konvention als ein Instrument des europäischen "ordre public" und die im Fall *Belilos* gegen die *Schweiz* festgestellte volle Bindung der Schweiz an die Konvention trotz Unwirksamkeit ihrer einschränkenden "auslegenden Erklärung" zu Art. 6 Abs. 1 EMRK, meint der Gerichtshof, die Türkei in vollem Umfang an ihren Unterwerfungserklärungen festhalten zu können. Hierin liegt die eigentliche Sensation des Falles.

Hatte sich der Gerichtshof in der *Belilos*-Entscheidung noch auf die kryptische[37] Feststellung zurückziehen können, daß die Schweiz unabhängig von der Wirksamkeit der auslegenden Erklärung zu Art. 6 an die Konvention gebunden sei[38] – im nachfolgenden Fall *Weber* finden sich nach der Feststellung der Unwirksamkeit des Vorbehalts gar keine Ausführungen mehr zu der Frage, ob dies etwas an der Bindung der Schweiz

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[36] S. Kühner, Vorbehalte zu multilateralen ..., Anm. 2, 220 ff.; W. Kälin, Die Vorbehalte der Türkei zu ihrer Erklärung gemäß Art. 25 EMRK, EuGRZ 14 (1987), 421, 429; R.St.J. MacDonald, Reservations under the European Convention on Human Rights, Revue Belge de Droit International 21 (1988), 429, 448 f.; R. Kühner, Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention, ZaöRV 43 (1983), 58, 82 ff.

[37] So S. Oeter, Die "auslegende Erklärung" der Schweiz zu Art. 6 Abs. 1 EMRK und die Unzulässigkeit von Vorbehalten nach Art. 64 EMRK, ZaöRV 48 (1988), 514, 519; zu den Reaktionen in der Schweiz vgl. M.E. Villiger, Handbuch der EMRK, 1993, 27 f.

[38] "It is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration", *Belilos* v. *Switzerland*, Serie A Nr. 132, 28.

ändere[39] –, so mußte dies im Falle der Türkei schon differenzierter betrachtet werden. In bezug auf die Schweiz konnte vernünftigerweise gar kein Zweifel an der weiteren Bindung an das Konventionssystem bestehen, trotz Unwirksamkeit der Vorbehalte[40]. Der Vertreter der Türkei hatte im Gegensatz dazu bereits im März 1987 im Ministerrat erklärt, daß die türkische Regierung die territorialen Beschränkungen für so wesentlich halte, daß deren Nichtbeachtung oder Unwirksamkeit die gesamte Erklärung nach Art. 25 EMRK null und nichtig mache. Im Verfahren vor Kommission und Gerichtshof hat die türkische Delegation diese Auffassung in bezug auf beide Anerkennungserklärungen wiederholt.

Diese Erklärungen der Türkei legen die dem Vertragsrecht entlehnte Argumentation nahe, die Türkei könne nicht an etwas gebunden sein, ohne ihre Zustimmung erklärt zu haben[41]. Im Schrifttum ist daher die Auffassung vertreten worden, die Türkei habe wegen der Unwirksamkeit der territorialen Beschränkungen weder das Individualbeschwerdeverfahren vor der Kommission noch die Zuständigkeit des Gerichtshofes wirksam anerkannt[42]. Der Gerichtshof hingegen trennt – wie zuvor bereits die Kommission – die Unterwerfungserklärungen der Türkei in einen unwirksamen "Beschränkungsteil" und einen davon unberührten wirksamen "Unterwerfungsteil". Die nach Abgabe der Anerkennungserklärung erfolgten Äußerungen der türkischen Regierung im Ministerrat und vor den Konventionsorganen hält der Gerichtshof für nicht ausschlaggebend. Vielmehr müsse sich die türkische Regierung angesichts der bestehenden bedingungslosen Anerkennungspraxis der Vertragsstaaten und der Entscheidungspraxis der Kommission zu Art. 46[43] bewußt gewesen sein, daß die erklärten territorialen Beschränkungen von zweifelhafter Gültigkeit waren[44]. Die Reaktion einiger Vertragsstaaten auf die türkischen Erklärungen erhärteten diesen Befund.

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[39] Vgl. Europäischer Gerichtshof für Menschenrechte, Urteil vom 22.5.1990, EuGRZ 17 (1990), 265, 266.

[40] In dem mündlichen Verfahren vor dem Gerichtshof hatte der Vertreter der schweizerischen Regierung eine dahin gehende Stellungnahme abgegeben.

[41] So auch der IGH in seinem Gutachten über Vorbehalte zur Völkermordkonvention, ICJ Reports 1951, 21: "It is well established that in its treaty relations a State cannot be bound without its consent ...".

[42] Vgl. Rumpf, Anm. 3, 799, 800.

[43] Der Gerichtshof nimmt hier u. a. Bezug auf die Stellungnahme der Kommission im Fall *Kjeldsen u. a./Dänemark* (Urteile des Gerichtshofes vom 9.2.1967, Serie A, Nr. 5, und vom 7.12.1976, Serie A, Nr. 23).

[44] Vgl. Ziff. 95 der Entscheidung.

Die Kommission hatte in ihrer Entscheidung auf das ambivalente Verhalten der türkischen Regierung verwiesen. Diese hatte in ihrer Anhörung vor der Kommission einerseits die essentielle Bedeutung der territorialen Beschränkungen für den Unterwerfungswillen betont, andererseits aber zuvor ausdrücklich die Kompetenz der Kommission anerkannt, Reichweite und Gültigkeit der Unterwerfungserklärung zu beurteilen[45]. In Wahrnehmung dieser Überprüfungskompetenz[46] war auch die Kommission zu dem Ergebnis gelangt, daß allein die ursprüngliche Intention der Türkei, nach Art. 25 EMRK gebunden zu sein, ausschlaggebend sei und dieser Bindungswille durch spätere mit Ziel und Zweck der Konvention unvereinbare (beschränkende) Erklärungen nicht beeinträchtigt werden könne.

Die Erneuerung der Unterwerfungserklärungen durch die Türkei trotz der erfolgten Reaktionen, wertet der Gerichtshof als ein Indiz, daß die Türkei bewußt das Risiko eingegangen ist, nach Ungültigerklärung der territorialen Beschränkungen durch die Konventionsorgane an ihren Erklärungen nach Art. 25 und 46 festgehalten zu werden. Dieses Argument des Gerichtshofes wird durch die Tatsache gestützt, daß die letzten Erklärungen der Türkei nach Art. 25 und 46[47] zu einem Zeitpunkt erfolgten, als die Kommission bereits ihre Zulässigkeitsentscheidung zu dem vorliegenden Fall getroffen hatte[48].

Da nach dem Wortlaut der Konventionsbestimmungen nur zeitliche Begrenzungen der Unterwerfung gültig sind, muß ein Staat, der sehenden Auges unzulässige territoriale Beschränkungen anbringt, auf jeden Fall als der Gerichtsbarkeit unterworfen angesehen werden.

Die Möglichkeit einer Teilanerkennung der Gerichtsbarkeit des Gerichtshofes unter Ausklammerung der von der territorialen Beschränkung betroffenen Bereiche[49] wird vom Gerichtshof nicht in Betracht gezogen. Sie hätte im Endeffekt auch nur zu dem von der Türkei gewünschten Ergebnis geführt und den Beschränkungen in der Sache zur Wirksamkeit

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[45] Entscheidung der Kommission, Anm. 8, 172.

[46] Vgl. hierzu bereits oben, S. 429.

[47] Erklärung nach Art. 25 gültig für drei Jahre ab dem 28.1.1993, s. Ziff. 26 der Entscheidung. Erklärung nach Art. 46 gültig für drei Jahre ab dem 22.1.1993, s. Ziff. 27 der Entscheidung.

[48] Entscheidung vom 4.3.1991, ZaöRV 51 (1991), 156 ff. Wie bereits erwähnt, hatte die Kommission aus den gleichen Gründen wie jetzt der Gerichtshof festgestellt, daß die territorialen Beschränkungen der Türkei unwirksam sind.

[49] So I. Cameron, Turkey and Article 25 of the European Convention on Human Rights, ICLQ 37 (1988), 887, 921; Kälin, Anm. 36, 429.

verholfen. Dies hätte einen für das Konventionssystem äußerst gefährlichen Präzendenzfall mit unabsehbaren Folgen geschaffen.

Mit diesem Urteil hat der Gerichtshof eine wichtige Wegmarke gesetzt. Die Effektivität des Konventionssystems kann nur gewahrt werden, wenn der Zulässigkeit ausufernder Vorbehalte und Beschränkungen wirksam entgegengetreten wird, wie dies der Gerichtshof mit der These der uneingeschränkten Bindung an Unterwerfungserklärungen bei unzulässigen Beschränkungen getan hat.

Inwieweit das Urteil Auswirkungen auf die allgemeine völkerrechtliche Vorbehaltsdiskussion haben wird, muß vorsichtig beurteilt werden. Hier darf nicht außer acht gelassen werden, daß der besondere verfassungsrechtliche Charakter der Konvention maßgeblich zu dem gefundenen Ergebnis beigetragen hat und daher eine Übertragung der formulierten Grundsätze auf das allgemeine Vorbehaltsrecht nicht ohne weiteres möglich ist. Den Überwachungsorganen anderer internationaler Menschenrechtsverträge wie dem Pakt über bürgerliche und politische Rechte und der Amerikanischen Menschenrechtskonvention könnte das Urteil des Gerichtshofes jedoch wichtige Impulse verleihen[50].

Die türkischen Einwendungen *ratione temporis* werfen nach Ansicht des Gerichtshofes schwierige rechtliche und tatsächliche Fragen auf, die er im gegenwärtigen Verfahrensstadium nicht beantworten kann. Hier wird in der Sachentscheidung zu klären sein, ob die geltend gemachte fortdauernde Eigentumsverletzung[51] seit dem Wirksamwerden der Unterwerfungserklärung am 22. Januar 1990 in die Verantwortung der türkischen Regierung fällt.

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[50] Vgl. hier die Diskussion bei Schabas, Anm. 2, 313, 316 ff.

[51] Zu diesem Problem vgl. das Urteil des Gerichtshofes vom 24.6.1993 (*Papamichalopoulos u. a.* gegen *Griechenland*), HRLJ 15 (1994), 190 ff.

Anhang

European Court of Human Rights
Case of *Loizidou* v. *Turkey* (Preliminary objections) (40/1993/435/514) Judgment of 23 March 1995*

AS TO THE FACTS

(...)

A. Turkey's declaration of 28 January 1987 under Article 25 of the Convention

15. On 28 January 1987 the Government of Turkey deposited the following declaration with the Secretary General of the Council of Europe pursuant to Article 25 of the Convention:

"The Government of Turkey, acting pursuant to Article 25 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms hereby declares to accept the competence of the European Commission of Human Rights and to receive petitions according to Article 25 of the Convention subject to the following:

(i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable;

(ii) the circumstances and conditions under which Turkey, by virtue of Article 15 of the Convention, derogates from her obligations under the Convention in special circumstances must be interpreted, for the purpose of the competence attributed to the Commission under this declaration, in the light of Articles 119 to 122 of the Turkish Constitution;

(iii) the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed forces;

(iv) for the purpose of the competence attributed to the Commission under this declaration, the notion of a "democratic society" in paragraphs 2 of Articles 3, 9, 10 and 11 of the Convention must be understood in conformity with the principles laid down in the Turkish Constitution and in particular its Preamble and its Article 13;

(v) for the purpose of the competence attributed to the Commission under the present declaration, Articles 33, 52 and 135 of the Constitution must be understood as being in conformity with Articles 10 and 11 of the Convention.

This declaration extends to allegations made 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. This declaration is valid for three years from the date of deposit with the Secretary General of the Council of Europe."

* Human Rights Law Journal 16 (1995), Nos. 1–3.

B. Exchange of correspondence between the Secretary General of the Council of Europe and the Permanent Representative of Turkey

16. On 29 January 1987 the Secretary General of the Council of Europe transmitted the above declaration to the other High Contracting Parties to the Convention indicating that he had drawn the Turkish authorities' attention to the fact that the notification made pursuant to Article 25 §3 of the Convention in no way prejudged the legal questions which might arise concerning the validity of Turkey's declaration.

17. In a letter dated 5 February 1987 to the Secretary General, the Permanent Representative of Turkey to the Council of Europe stated that the wording of Article 25 §3 of the Convention offered no basis for expressing opinions or adding comments when transmitting copies of the Turkish declaration to the High Contracting Parties. He added:

> "International treaty practice, in particular that followed by the Secretary General of the United Nations as depository to similar important treaties as the Statute of the International Court of Justice or the covenants and conventions dealing with human rights and fundamental freedoms, also confirms that the depository has to refrain from any comments on the substance of any declaration made by a Contracting Party."

C. Reaction of various Contracting Parties to Turkey's Article 25 declaration

18. On 6 April 1987 the Deputy Minister of Foreign Affairs of Greece wrote to the Secretary General stating *inter alia* that reservations to the European Convention on Human Rights may not be formulated on the basis of any provision other than Article 64. He added:

> "Furthermore, Article 25 provides neither directly nor implicitly the possibility of formulating reservations similar to the reservations set out in the Turkish declaration. The position cannot be otherwise, for if reservations could be made on the basis of Article 25, such a method of proceeding would undermine Article 64 and would sooner or later destroy the very foundations of the Convention.
> (...)
> It follows that the Turkish reservations, as they are outside the scope of Article 64 must be considered as unauthorised reservations and, accordingly, as illegal reservations. Consequently, they are null and void and may not give rise to any effect in law."

19. In a letter of 21 April 1987 the Permanent Representative of Sweden wrote to the Secretary General stating *inter alia* that "the reservations and declarations ... raise various legal questions as to the scope of the [Turkish] recognition. The Government therefore reserves the right to return to this question in the light of such decisions by the competent bodies of the Council of Europe that may occur in connection with concrete petitions from individuals."

20. The Minister of Foreign Affairs of Luxembourg, in a letter of 21 April 1987 to the Secretary General stated *inter alia* that "Luxembourg reserves to itself the right to express ... its position in regard to the Turkish Government's declaration" before the competent bodies of the Council of Europe. He indicated that "the absence of a formal and official reaction on the merits of the problem should not ...

be interpreted as a tacit recognition by Luxembourg of the Turkish Government's reservations."

21. In a letter of 30 April 1987 to the Secretary General the Permanent Representative of Denmark stated *inter alia* as follows:

> "In the view of the Danish Government, the reservations and declarations which accompany the said recognition raise various legal questions as to the scope of the recognition. The Government therefore reserves its right to return to these questions in the light of future decisions by the competent bodies of the Council of Europe in connection with concrete petitions from individuals."

22. The Permanent Representative of Norway, in his letter of 4 May 1987 to the Secretary General, stated that the wording of the declaration could give rise to difficult issues of interpretation as to the scope of the recognition of the right to petition. He considered that such issues fell to be resolved by the European Commission on Human Rights in dealing with concrete petitions. He added:

> "It is therefore desirable to avoid any doubt as to the scope and validity of the recognition by individual States of this right which may be raised by generalised stipulations in respect of the context in which petitions would be accepted as admissible, interpretative statements or other conditionalities."

23. In a letter dated 26 June 1987 to the Secretary General, the Permanent Representative of Turkey stated that the points contained in the Turkish declaration were not to be considered as "reservations" in the sense of international treaty law. He pointed out, *inter alia,* that the only competent organ to make a legally binding assessment as to the validity of the condition attaching to the Article 25 declaration was "the European Commission of Human Rights, when being seized of an individual application, and eventually the Committee of Ministers, when acting pursuant to Article 32 of the Convention."

24. The Permanent Representative of Belgium, in a letter of 22 July 1987 to the Secretary General, stated that the conditions and qualifications set forth in the declaration raised legal questions as to the system of protection set up under the Convention. He added:

> "Belgium therefore reserves the right to express its position in regard to the Turkish Government's declaration, at a later stage and before the competent bodies of the Council of Europe. Meanwhile the absence of a formal reaction on the merits of the problem should by no means be interpreted as a tacit recognition by Belgium of the Turkish Government's conditions and qualifications."

D. Turkey's subsequent Article 25 declarations

25. Turkey subsequently renewed her declaration under Article 25 of the Convention for three years as from 28 January 1990. The declaration read as follows:

> "The Government of Turkey, acting pursuant to Article 25 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms hereby declares to accept the competence of the European Commission of Human Rights to receive petitions according to Article 25 of the Convention on the basis of the following:

(i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the national territory of the Republic of Turkey;

(ii) the circumstances and conditions under which Turkey, by virtue of Article 15 of the Convention, derogates from her obligations under the Convention in special circumstances must be interpreted, for the purpose of the competence attributed to the Commission under this declaration, in the light of Articles 119 to 122 of the Turkish Constitution;

(iii) the competence attributed to the Commission under this declaration shall not comprise matters regarding the legal status of military personnel and in particular, the system of discipline in the armed forces;

(iv) for the purpose of the competence attributed to the Commission under this declaration, Articles 8, 9, 10 and 11 of the Convention shall be interpreted by giving special emphasis to "those legal and factual features which characterize the life of the society" (European Court of Human Rights, Judgment of 23 July 1968, p. 34) in Turkey, as expressed notably by the Turkish Constitution including its Preamble.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to 28 January 1987, date of the deposit of the previous declaration by Turkey. This declaration is valid for three years as from January 28, 1990."

26. A further renewal for a three-year period as from 28 January 1993 reads as follows:

"The Government of Turkey, acting pursuant to Article 25 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereby declares to accept the competence of the European Commission of Human Rights, to receive petitions which raise allegations concerning acts or omissions of public authorities in Turkey in as far as they have been performed within the boundaries of the national territory of the Republic of Turkey.

This declaration extends to allegations made in respect of facts, including judgments which are based on such facts which have occurred subsequent to 28 January 1987, date of the deposit of the first declaration made by Turkey under Article 25 of the Convention. This declaration is valid for three years from 28 January 1993."

E. Turkish declaration of 22 January 1990 under Article 46 of the Convention

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

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 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 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, 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 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."

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

28. The Secretary General of the Council of Europe acknowledged deposit of the Turkish declaration under Article 46 in a letter dated 26 January 1990 and pointed out that her acknowledgement was without prejudice to the legal questions that might arise concerning the validity of the Turkish declaration.

29. In a letter of 31 May 1990 to the Secretary General of the Council of Europe, the Permanent Representative of Greece stated *inter alia* as follows:

"Article 46 of the said Convention is clear and to be strictly interpreted and applied. It provides that declarations of recognition of the Court's jurisdiction may be subject to two conditions *only*: a) on condition of reciprocity, if they are not made unconditionally, and b) for a specified period.

Consequently, the above-mentioned declaration of the Turkish Government which, in addition to these two conditions, contains further restrictions or reservations, is, where the latter are concerned, incompatible with Article 46 and with the European Convention on Human Rights in general, as indeed was already pointed out in the Greek Government's letter of 6 April 1987 in connection with the Turkish Government's declaration under Article 25 of the said Convention. It follows that these restrictions or reservations are null and void and may have no legal effect."

(...)

PROCEEDINGS BEFORE THE COMMISSION

34. 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. She further complained that the refusal of access to her property constituted a continuing violation of Article 8 of the Convention and Article 1 of the Protocol no. 1.

35. On 4 March 1991 the Commission declared the applicant's complaints admissible in so far as they raised issues under Article 3, 5 and 8 in respect of her arrest and detention and Article 8 and Article 1 of Protocol no. 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 of a continuing violation of her property rights before 29 January 1987 was declared inadmissible.

In its report of 8 July 1993, it expressed the opinion that there had been no violation of Article 3 (unanimously); Article 8 as regards the applicant's private life (eleven votes to two); Article 5 §1 (nine votes to four); Article 8 as regards the

applicant's home (nine votes to four) and Article 1 of Protocol no. 1 (eight votes to five).

FINAL SUBMISSION TO THE COURT
(...)

AS TO THE LAW

I. THE STANDING OF THE APPLICANT GOVERNMENT

39. Throughout the proceedings the Turkish Government systematically referred to the applicant Government as the "Greek Cypriot administration". They indicated, without developing any arguments on this point, that they did not accept the capacity of the applicant Government to represent the people of Cyprus and that their appearance before the Court in the present case should not be understood as amounting to any form of recognition of that Government.

40. The Court confines itself to noting, with reference *inter alia* to the consistent practice of the Council of Europe and the decisions of the Commission in the inter-State cases of Cyprus v. Turkey, that the applicant Government have been recognized by the international community as the Government of the Republic of Cyprus (see in this connection, Applications nos. 6780/74 and 6950/75, Cyprus v. Turkey, 26 May 1975, Decisions and Reports (DR) 2, p. 125 at pp. 135–136; no. 8007/77, Cyprus v. Turkey, 10 July 1978, DR 13, p. 85, at p. 146). Its *locus standi* as the Government of a High Contracting Party to the Convention cannot therefore be in doubt. Moreover it has not been contested that the applicant is a national of the Republic of Cyprus.

41. In any event recognition of an applicant Government by a respondent Government is not a precondition for either the institution of proceedings under Article 24 of the Convention or the referral of cases to the Court under Article 48 (see Application no. 8007/77, loc. cit., pp. 147–148). If it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralized by the interplay of recognition between individual Governments and States.

II. ALLEGED ABUSE OF PROCESS

42. The Turkish Government submitted that the overriding aim of the application was political propaganda. The decision of the applicant Government to bring the case before the Court was not, in fact, made in order to complain of the alleged violations of the applicant's rights but rather to stimulate a debate before the Court on the status of the "Turkish Republic of Northern Cyprus" (the "TRNC"). Such an approach amounted to an abuse of process. The complaints therefore fell outside the Court's competence since they seek to pervert the character of the judicial control procedure.

43. The applicant Government and the Commission took issue with this submission. The Government of Cyprus argued *inter alia* that the applicant's case is one of thousands of instances of displaced persons who have been deprived of their property because of the illegal Turkish occupation of northern Cyprus. Moreover, it was only natural that the Government of Cyprus should be interested in the fate of their citizens. The applicant, for her part, considered that the claim lacked the status of a preliminary objection.

44. The Court observes that this objection was not raised in the proceedings before the Commission. Accordingly the Turkish Government is estopped from raising it before the Court in so far as it applies to Mrs. Loizidou.

45. In so far as it is directed to the applicant Government, the Court notes that this Government have referred the case to the Court *inter alia* because of their concern for the rights of the applicant and other citizens in the same situation. The Court does not consider such motivation to be an abuse of its procedures.

It follows that this objection must be rejected.

46. In the light of this conclusion it leaves open the question whether it could refuse jurisdiction in an application by a State under Article 48 (b) on the grounds of its allegedly abusive character.

III. THE TURKISH GOVERNMENT'S ROLE IN THE PROCEEDINGS

47. The Turkish Government submitted that, in essence, the present case did not concern the acts or omissions of Turkey but those of the "TRNC" which they claimed to be an independent State established in the north of Cyprus. As the only Contracting Party to have recognised the "TRNC", with whose authorities it has close and friendly relations, its role before the Court was limited to that of an *amicus curiae* since the "TRNC" was not itself able to be a "party" to the present proceedings.

48. For the applicant Government, it was not open to Turkey under the Rules of Court to change its status in this way and to appear on behalf of an illegal regime which had been established in defiance of international law and which has not been recognised by the international community.

49. The applicant for her part considered that the Turkish Government's position amounted, in effect, to an objection *ratione loci.*

50. The Commission maintained that Turkey appeared not as an *amicus curiae* but as a High Contracting Party to the Convention.

51. The Court does not consider that it lies within the discretion of a Contracting Party to the Convention to characterise its standing in the proceedings before the Court in the manner it sees fit. It observes that the case originates in a petition made under Article 25, brought by the applicant against Turkey in her capacity as a High Contracting Party to the Convention and has been referred to the Court under Article 48 (b) by another High Contracting Party.

52. The Court therefore considers – without prejudging the remainder of the issues in these proceedings – that Turkey is the respondent Party in this case.

IV. SCOPE OF THE CASE
(...)

V. OBJECTIONS RATIONE LOCI

55. The respondent Government have filed two preliminary objections *ratione loci*. In the first place they claimed that the Court lacks competence to consider the merits of the case on the grounds that the matters complained of did not fall within Turkish jurisdiction but within that of the "TRNC". In the second place they contended that, in accordance with their declarations under Articles 25 and 46 of the Convention (see paragraphs 3, 15 and 27 above), they had not accepted either the competence of the Commission or the Court to examine acts and events outside their metropolitan territory.

The Court will examine each of these objections in turn.

A. Whether the facts alleged by the applicant are capable of falling within the jurisdiction of Turkey under Article 1 of the Convention

1. Submissions of those appearing before the Court

56. The respondent Government first pointed out that the question of access to property was obviously outside the realm of Turkey's "jurisdiction". This could be seen from the fact that it formed one of the core items in the inter-communal talks between the Greek-Cypriot and Turkish Cypriot communities.

Furthermore the mere presence of Turkish armed forces in northern Cyprus was not synonymous with "jurisdiction" any more than it is with the armed forces of other countries stationed abroad. In fact Turkish armed forces had never exercised "jurisdiction" over life and property in northern Cyprus. Undoubtedly it was for this reason that the findings of the Commission in the inter-State cases of Cyprus v. Turkey (Applications nos. 6780/74, 6950/75 and 8007/77, *supra* cit.) had not been endorsed by the Committee of Ministers whose stand was in line with the realities of the situation prevailing in Cyprus following the intervention of Turkey as one of the three guarantor powers of the Republic of Cyprus.

Nor did Turkey exercise overall control of the border areas as found by the Commission in its admissibility decision in the present case. She shares control with the authorities of the "TRNC" and when her armed forces act alone they do so on behalf of the "TRNC" which does not dispose of sufficient forces of its own. The fact that the Turkish armed forces operate within the command structure of the Turkish army does not alter this position.

According to the respondent Government, far from being a "puppet" State as alleged by the applicant, the "TRNC" is a democratic constitutional State with

impeccable democratic features and credentials. Basic rights are effectively guaranteed and there are free elections. It followed that the exercise of public authority in the "TRNC" was not imputable to Turkey. The fact that this State has not been recognized by the international community was not of any relevance in this context.

57. The applicant, whose submissions were endorsed by the Government of Cyprus, contended that the question of responsibility in this case for violations of the Convention must be examined with reference to the relevant principles of international law. In this respect the Commission's approach which focused on the direct involvement of Turkish officials in violations of the Convention was not, under international law, the correct one. A State is, in principle, internationally accountable for violations of rights occurring in territories over which it has physical control.

According to the applicant, international law recognises that a state which is thus accountable with respect to a certain territory remains so even if the territory is administered by a local administration. This is so 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 political dependency. A State cannot avoid legal responsibility for its illegal acts of invasion and military occupation, and for subsequent developments, by setting up or permitting the creation of forms of local administration, however designated. Thus the controlling powers in the "puppet" States that were set up in Manchukuo, Croatia and Slovakia during the period 1939–1945 were not regarded as absolved from responsibilities for breaches of international law in these administrations (Whiteman, Digest of International Law, vol. 8, pp. 835–837 (1967)). In the same vein, the international accountability of the protecting or ultimate sovereign remains in place even when a legitimate political dependency is created. This responsibility of the State in respect of protectorates and autonomous regions is affirmed by the writings of authoritative legal publicists (Rousseau, Droit international public, Vol. V, 1983, p. 31 (para. 28); Reuter, Droit international public, 6th ed., 1983, p. 262; Répertoire suisse de droit international public, Vol. III, 1975, pp. 1722–1723; Verzijl, International Law in Historical Perspective, Vol. IV, 1973, pp. 710–711).

The applicant further submitted that in the present case to apply a criterion of responsibility which required the direct intervention of Turkish military personnel in respect of each *prima facie* violation of the Convention in northern Cyprus would be wholly at variance with the normal mode of applying the principles of State responsibility set out above. To require applicants to fulfil such a standard at the merits stage would be wholly unrealistic and would also involve a *de facto* amnesty and a denial of justice.

Finally, if Turkey was not to be held responsible for conditions in northern Cyprus, no other legal person can be held responsible. However the principle of

the effective protection of Convention rights recognised in the case-law of the Court requires that there be no lacuna in the system of responsibility. The principles of the Convention system and the international law of State responsibility thus converge to produce a regime under which Turkey is responsible for controlling events in northern Cyprus.

58. On this issue the Commission was of the opinion that the applicant had been prevented from gaining access to her property due to the presence of Turkish armed forces in the northern part of Cyprus which exercise an overall control in the border area. This refusal of access was thus imputable to Turkey.

2. The Court's examination of the issue

59. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] Convention."

60. The question before the Court is whether its competence to examine the applicant's complaints is excluded on the grounds that they concern matters which cannot fall within the "jurisdiction" of the respondent Government.

61. The Court would emphasise that it is not called upon at the preliminary objections stage of its procedure to examine whether Turkey is actually responsible under the Convention for the acts which form the basis of the applicant's complaints. Nor is it called upon to establish the principles that govern State responsibility under the Convention in a situation like that obtaining in the northern part of Cyprus. Such questions belong rather to the merits phase of the Court's procedure. The Court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the "jurisdiction" of Turkey even though they occur outside her national territory.

62. In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention (see, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35–36, §91 = 11 HRLJ 358–359 (1990); the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, §§69 and 70 = 12 HRLJ 151 (1991) and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, §103 = 12 HRLJ 443 (1991)). In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the Drozd and Janousek v. France and Spain judgment of 26 June 1992, Series A no. 240, p. 29, §91 = 13 HRLJ 447 (1992)).

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may 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.

63. In this connection the respondent 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". Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.

64. It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 of the Convention. Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase.

B. The validity of the territorial restrictions attached to Turkey's Article 25 and 46 declarations

65. The relevant provisions of Article 25 of the Convention read as follows:

(...)

66. Article 46 of the Convention states:

(...)

67. The respondent Government submitted that the relevant territorial and other restrictions contained in the Article 25 and 46 declarations of 28 January 1987 and 22 January 1990 (as renewed on 22 January 1993) respectively, are legally valid and bind the Convention institutions. The system set up under Articles 25 and 46 is an optional one into which Contracting States may, or may not, "contract-in". There is no indication that the Contracting Parties agreed when the Convention was being drafted that a partial recognition of the competence of the Commission and Court was impermissible. If they had meant to prohibit restrictions in Article 25 and 46 declarations they would have included a special provision to this effect as is common in the treaty practice of the Council of Europe.

In fact the Convention system has multiple clauses, such as Articles 63 and 64, Article 6 §2 of Protocol no. 4 and Article 7 §2 of Protocol no. 7, which provide the basis for "à la carte" undertakings by the Contracting Parties. Moreover, other States have attached substantive restrictions to their instruments of acceptance such as the United Kingdom (see paragraph 33 above) – in this case a territorial restriction – and Cyprus (see paragraphs 30 and 32 above).

The respondent Government also referred to the established practice under Article 36 of the Statute of the International Court of Justice to permit the attach-

ment of substantive, territorial and temporal restrictions to the optional recognition of the Court's jurisdictional competence. The wording in Article 36 §3 of the Statute is, in all material respects, the same as that used in Articles 25 and 46 of the Convention. In this connection, the drafting history of the Convention reveals that Article 36 of the Statute served as a model for Article 46 of the Convention. It is a well established principle in international treaty law that an expression used in one treaty will bear the same meaning if used in another.

In the respondent Government's further submission, Articles 25 and 46 must be interpreted with reference to their meaning when the Convention was being drafted. This principle of contemporaneous meaning is part of the "good faith" interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties. At this time, international judicial practice permitted the addition of conditions or restrictions to any optional recognition of the jurisdiction of an international tribunal. The fact that the drafters of the Convention did not choose to use different words indicates that they intended to give States the same freedom to attach restrictions to their declarations as is enjoyed under Article 36 of the Statute of the International Court of Justice.

Finally, with regard to subsequent treaty practice, while there have been statements opposing the Turkish interpretation of Articles 25 and 46, it has not been established that there is a practice reflecting an agreement among all Contracting Parties concerning the attachment of conditions to these instruments of acceptance.

68. For the applicant and the Government of Cyprus, when States make declarations under Articles 25 and 46 recognizing the competence of the Commission and Court, the only conditions permitted are those *ratione temporis*. In reality, the territorial restriction in the Turkish declarations is tantamount to a disguised reservation.

Furthermore, the long-established practice of the International Court of Justice in accepting restrictions on the jurisdiction of the Court under Article 36 of the Statute affords no assistance in the present case because of the substantial differences between the two systems. The International Court of Justice is a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention.

69. The Commission, with reference to its admissibility decision in the present case, also considered that the restrictions attaching to the Turkish Article 25 declaration were invalid with the exception of the temporal restriction. It expressed the same view as regards the territorial restriction contained in the Article 46 declaration.

70. The Court observes that Article 25 and 46 of the Convention are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance

of the engagements undertaken by the High Contracting Parties" (Article 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms.

As was observed in the Court's Ireland v. the United Kingdom judgment of 18 January 1978 (Series A no. 25, p. 90, §239)

> "Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual bilateral undertakings, objective obligations which in the words of the preamble benefit from a 'collective enforcement'."

71. That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (see, *inter alia*, the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, pp. 15–16, §31). Such an approach, in the Court's view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46, which govern the operation of the Convention's enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.

Accordingly, even if it had been established, which is not the case, that restrictions, other than those *ratione temporis,* were considered permissible under Articles 25 and 46 at a time when a minority of the present Contracting Parties adopted the Convention, such evidence could not be decisive.

72. In addition, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the above-mentioned Soering v. the United Kingdom judgment, p. 34, §87 = 11 HRLJ 357 (1990), and the Artico v. Italy judgment of 13 May 1980, Series A no. 37, p. 16, §33).

73. To determine whether Contracting Parties may impose restrictions on their acceptance of the competence of the Commission and Court under Articles 25 and 46, the Court will seek to ascertain the ordinary meaning to be given to the terms of these provisions in their context and in the light of their object and purpose (see, *inter alia*, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 24, §51, and Article 31 §1 of the Vienna Convention of 23 May 1969 on the Law of Treaties). It shall also take into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (see Article 31 §3 (b) of the above-mentioned Vienna Convention).

74. Both Article 25 §2 and Article 46 §2 of the Convention explicitly permit the respective declarations to be made for a specified period. These provisions

have been consistently understood as permitting Contracting Parties also to limit the retrospective application of their acceptance of the competence of the Commission and the Court (see, *inter alia*, the Stamoulakatos v. Greece judgment of 26 October 1993, Series A no. 271, p. 13, §32). This point has not been disputed.

75. Article 25 contains no express provision for other forms of restrictions (see paragraph 65 above). In addition, Article 46 §2 provides that declarations "may be made unconditionally or on condition of reciprocity ..." (see paragraph 66 above).

If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*"ordre public"*). Moreover, where the Convention permits States to limit their acceptance under Article 25, there is an express stipulation to this effect (see, in this regard, Article 6 §2 of Protocol no. 4 and Article 7 §2 of Protocol no. 7).

In the Court's view, having regard to the object and purpose of the Convention system as set out above, the consequences for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However, no such provision exists in either Article 25 or Article 46.

76. The Court further notes that Article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under Article 64 is, however, a limited one, being confined to particular provisions of the Convention "to the extent that any law then in force in [the] territory [of the relevant Contracting Party] is not in conformity with the provision." In addition reservations of a general nature are prohibited.

77. In the Court's view, the existence of such a restrictive clause governing reservations suggests that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their "jurisdiction" from supervision by the Convention institutions. The inequality between Contracting States which the permissibility of such qualified acceptances might create would, moreover, run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights.

78. The above considerations in themselves strongly support the view that such restrictions are not permitted under the Convention system.

79. This approach is confirmed by the subsequent practice of Contracting Parties under these provisions. Since the entry into force of the Convention until the present day, almost all of the thirty parties to the Convention, apart from the respondent Government, have accepted the competence of the Commission and Court to examine complaints without restrictions *ratione loci* or *ratione materiae*. The only exceptions to such a consistent practice appear in the restrictions attached to the Cypriot declaration under Article 25 (see paragraphs 30 and 32) which have now been withdrawn (see paragraph 32 above) and – as is claimed by the respondent Government – the United Kingdom Article 25 declaration (see paragraph 33 above).

80. In this respect, the Commission suggested that the restriction was formulated by the United Kingdom, in the light of Article 63 §4 of the Convention, in order to exclude the competence of the Commission to examine petitions concerning its non-metropolitan territories. In the present context the Court is not called upon to interpret the exact scope of this declaration which has been invoked by the respondent Government as an example of a territorial restriction. Whatever its meaning, this declaration and that of Cyprus do not disturb the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 of the Convention do not permit territorial or substantive restrictions.

81. The evidence of such a practice is further supported by the reactions of the Governments of Sweden, Luxembourg, Denmark, Norway and Belgium, as well as the Secretary General of the Council of Europe as depositary, which reserved their positions as regards the legal questions arising as to the scope of Turkey's first Article 25 declaration (see paragraphs 18–24 above) and the Government of Greece which considered the restrictions to Turkey's declarations under Article 25 and 46 to be null and void (see paragraph 18 above).

82. The existence of such a uniform and consistent State practice clearly rebuts the respondent Government's arguments that restrictions attaching to Article 25 and Article 46 declarations must have been envisaged by the drafters of the Convention in the light of practice under Article 36 of the Statute of the International Court of Justice.

83. In this connection, it is not disputed that States can attach restrictions to their acceptance of the optional jurisdiction of the International Court. Nor has it been contested that Article 46 of the Convention was modelled on Article 36 of the Statute. However, in the Court's view, it does not follow that such restrictions to the acceptance of jurisdiction of the Commission and Court must also be permissible under the Convention.

84. In the first place, the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on *inter alia* to examine any legal dispute between States

that might occur in any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.

85. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46, provides a compelling basis for distinguishing Convention practice from that of the International Court.

86. Finally, although the argument has not been elaborated on by the respondent Government, the Court does not consider that the application of Article 63 §4, by analogy, provides support for the claim that a territorial restriction is permissible under Articles 25 and 46.

According to this argument, Article 25 could not apply beyond national boundaries to territories, other than those envisaged by Article 63, unless the State specifically extended it to such territories. As a corollary, the State can limit acceptance of the right of individual petition to its national territory – as has been done in the instant case.

87. The Court first recalls that in accordance with the concept of "jurisdiction" in Article 1 of the Convention, State responsibility may arise in respect of acts and events outside State frontiers (see paragraph 62 above). It follows that there can be no requirement, as under Article 63 §4 in respect of the overseas territories referred to in that provision, that the Article 25 acceptance be expressly extended before responsibility can be incurred.

88. In addition, regard must be had to the fact that the object and purpose of Article 25 and Article 63 are different. Article 63 concerns a decision by a Contracting Party to assume full responsibility under the Convention for all acts of public authorities in respect of a territory for whose international relations it is responsible. Article 25, on the other hand, concerns an acceptance by a Contracting Party of the competence of the Commission to examine complaints relating to the acts of its own officials acting under its direct authority. Given the fundamentally different nature of these provisions, the fact that a special declaration must be made under Article 63 §4 accepting the competence of the Commission to receive petitions in respect of such territories, can have no bearing, in the light of the arguments developed above, on the validity of restrictions *ratione loci* in Article 25 and 46 declarations.

89. Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey's Article 25 and Article 46 declarations are invalid.

It remains to be examined whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question.

C. Validity of the Turkish declarations under Articles 25 and 46

90. The respondent Government submitted that if the restrictions attached to the Article 25 and 46 declarations were not recognised to be valid, as a whole, the declarations were to be considered null and void in their entirety. It would then be for the Turkish Government to draw the political conclusions from such a situation.

In this connection, the Turkish Delegate at the session of the Committee of Ministers of the Council of Europe in March 1987 had underlined that the conditions built into Turkey's Article 25 declaration were so essential that disregarding any of them would make the entire declaration void with the consequence that Turkey's acceptance of the right of individual petition would lapse. This position, it was argued, was equally valid for Turkey's Article 46 declaration.

It was further submitted that in accordance with Article 44 § 3 (a) and (b) of the Vienna Convention on the Law of Treaties the burden fell on the applicants to show that the restrictions, in particular the territorial restrictions, were not an essential basis for Turkey's willingness to make the declarations.

91. For the applicant, with whom the Government of Cyprus agreed, the respondent Government, in drafting the terms of these declarations, had taken the risk that the restrictions would be declared invalid. It should not now seek to impose the legal consequences of this risk on the Convention institutions.

92. The Commission considered that it was Turkey's main intention when she made her Article 25 declaration on 28 January 1987 to accept the right of individual petition. It was this intention that must prevail. In addition, before the Court the Delegate of the Commission pointed out that the respondent Government had not sought to argue the invalidity of their acceptance of the right of individual petition in cases which had come before the Commission subsequent to the present case.

93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*"ordre public"*) for the protection of individual human beings and its mission, as set out in Article 19, "to ensure the observance of the engagements undertaken by the High Contracting Parties."

94. It also recalls the findings in its Belios v. Switzerland judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64, that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (Series A no. 132, p. 28, § 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her

representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.

It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the Belgian Linguistics (Preliminary objection) and Kjeldsen, Busk Madsen and Pedersen v. Denmark cases (judgments of 9 February 1967 and 7 December 1976, Series A nos. 5 and 23 respectively) that Article 46 did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, Series B no. 1, p. 432, and the memorial of the Commission (preliminary objections) of 26 January 1976, Series B no. 21, p. 119).

The subsequent reaction of various Contracting Parties to the Turkish declarations lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 – the latter subsequent to the statements by the Contracting Parties referred to above – indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declaration themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic – albeit qualified – intention to accept the competence of the Commission and Court.

96. It thus falls to the Court, in the exercise of its responsibilities under Article 19, to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's "jurisdiction" within the meaning of Article 1 of the Convention.

97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 contain valid acceptances of the competence of the Commission and Court.

VI. OBJECTION RATIONE TEMPORIS

99. The respondent Government recalled that it has only accepted the jurisdiction of the Court in respect of facts or events occurring after 22 January 1990 – the date of deposit of the instrument (see paragraph 27 above). They pointed out that the Commission has made a clear distinction between instantaneous acts, even if they have enduring effects and continuing violations of Convention rights (Application no. 7379/76, X v. the United Kingdom, 10 December 1976, DR 8, pp. 211–213, and no. 7317/75, Lynas v. Switzerland, 6 October 1976, DR 6, pp. 155–169). It has also found that the action by which a person is deprived of his property does not result in a continuing situation of absence of property (Application no. 7379/76, *supra* cit.). However, the deprivation of property of which the applicant complains is the direct result of an instantaneous act, pursuant to the Turkish intervention in 1974, which occurred prior to the acceptance of the Court's jurisdiction.

According to the respondent Government, it follows from the above that the Court is incompetent *ratione temporis* since the alleged violation results from an instantaneous action which occurred prior to Turkey's acceptance of the optional clauses.

100. The applicant, the Government of Cyprus and the Commission maintained that the applicant's complaints concern continuing violations of Article 1 of Protocol no. 1 on the ground that she has been and continues to be prevented by Turkey from using and enjoying her property in the occupied part of Cyprus. She referred in this respect to the Court's Papamichalopoulos and Others v. Greece judgment of 24 June 1993 where it was held that a *de facto* expropriation of land amounted to a continuing violation of Article 1 of Protocol no. 1 (Series A no. 260-B, pp. 75–76, §§45–46 = 15 HRLJ 192 (1994)).

The applicant further submitted that the relevant date for the determination of the Court's jurisdiction was 27 January 1987 – the date of the Turkish declaration recognizing the competence of the Commission – rather than 22 January 1990. She maintained that the case brought before the Court was that based upon the original application. It would be anomalous if the Turkish Article 46 declaration, which accepted the jurisdiction of the Court only in respect of facts which have occurred subsequent to the deposit of the declaration (see paragraph 27 above), could frustrate the Court's examination of matters which had been properly referred to it under Article 48. Such a result would be incompatible with Articles 45 and 48 and would in general conflict with the procedural order created by the Convention. It would also deprive the

applicant of a remedy in respect of an additional three years of deprivation of her rights.

101. The Commission disagreed on this point. It considered the critical date to be 22 January 1990 when Turkey recognised the jurisdiction of the Court.

102. The Court recalls that it is open to Contracting Parties under Article 46 of the Convention to limit, as Turkey has done in her declaration of 22 January 1990, the acceptance of the jurisdiction of the Court to matters which occur subsequent to the time of deposit (see paragraph 27 above). It follows that the Court's jurisdiction extends only to the applicant's allegations of a continuing violation of her property rights subsequent to 22 January 1990. The different temporal competence of the Commission and Court in respect of the same complaint is a direct and foreseeable consequence of separate Convention provisions providing for recognition of the right of individual petition (Article 25) and the jurisdiction of the Court (Article 46).

103. 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, raise difficult legal and factual questions.

104. The Court considers that on the present state of the file it has not sufficient elements enabling it to decide these questions. Moreover, they are so closely connected to the merits of the case that they should not be decided at the present phase of the procedure.

105. It therefore decides to join this objection to the merits of the case.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the preliminary objection concerning an alleged abuse of process;

2. *Holds* by sixteen votes to two that the facts alleged by the applicant are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 of the Convention;

3. *Holds* by sixteen votes to two that the territorial restrictions attached to Turkey's Article 25 and 46 declarations under the Convention are invalid but that the Turkish declarations under Article 25 and 46 contain valid acceptances of the competence of the Commission and Court;

4. *Joins* unanimously to the merits the preliminary objection *ratione temporis*."

(...)

JOINT DISSENTING OPINION of Judges Gölcüklü and Pettiti

"We voted with the majority as regards point 1 of the judgment's operative provisions, concerning the rejection of the preliminary objection in which an abuse of process was alleged, and point 4, concerning joinder to the merits of the

preliminary objection *ratione temporis*. We were in the minority as regards points 2 and 3, taking the view, essentially, that the Court could not rule on the issue under Article 1 of the Convention raised in the Turkish Government's preliminary objection ("everyone within their jurisdiction") without examining the *de jure* and *de facto* situation in northern Cyprus as to the merits. We consider that the Court was not yet in possession of all the information it needed in order to assess the administration of justice, the nature and organisation of the courts and the question who had "jurisdiction" under the rules of international law in northern Cyprus and the Green Zone where the United Nations forces operated.

In the first sub-paragraph of paragraph 62 of the judgment the Court holds:

> "In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, pp. 35–36, §91 = 11 HRLJ 358–359 (1990); the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, §§69 and 70 = 12 HRLJ 151 (1991) and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 34, §103 = 12 HRLJ 443 (1991)). In addition, the responsibility of Contracting Parties can be invoked because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the Drozd and Janousek v. France and Spain judgment of 26 June 1992, Series A no. 240, p. 29, §91 = 13 HRLJ 447 (1992))."

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.

With regard to the validity of the Turkish Government's declaration

The Court concludes in paragraph 89, on the basis of the considerations set out in paragraphs 77 to 88, that the restrictions *ratione loci* are invalid, while holding that Turkey is bound by the declaration.

Such an approach raises the question whether the Convention institutions are empowered to sever the terms of a declaration by a High Contracting Party by

declaring them invalid in part. We consider that, regard being had to the circumstances in which the Turkish declaration was made, its terms cannot be severed in this way as the case stands at present, since this would mean ignoring the scope of the undertaking entered into by a State.

From the point of view of the State concerned this is a manifestation of its intention, for both public and private law purposes, which fixes the limits of its accession and consent, in a form of words which it considers indivisible. The declaration may be declared invalid, but not split into sections, if it is the State's intention that it should form a whole. It was up to the political organs and the member States to negotiate and decide matters otherwise.

Only five States reserved their position with regard to the legal issues which might arise concerning the scope of the first Turkish declaration (the Greek Government contending that the restrictions were null and void).

That means that the other member States and the Committee of Ministers have not formally contested the declaration as a whole, nor accepted any one part as essential or subsidiary. Consequently, it cannot be concluded that there is a uniform and consistent practice (paragraph 82) or practically universal agreement (paragraph 80).

At this stage it is useful to point out that numerous declarations set out in instruments of ratification were couched in complex terms or ran to a number of sections (see the appended declarations of France, the United Kingdom and the Netherlands; see also those of Malta and Portugal, the Cypriot declaration of 9 August 1988 or the "colonial" clauses). States expressly named "territories for whose international relations [they were] responsible"; Turkey has not done so in respect of northern Cyprus. Apart from the territorial reservations within the strict meaning of the Convention (800 international treaties include such reservations), the chart of signatures and ratifications shows that some States have made both declarations and reservations. In the Belgian Congo case (Decision of 30 May 1961 on the admissibility of application no. 1065/61, X and Others v. Belgium, Yearbook of the Convention, vol. 4, pp. 261–277) the Commission upheld the international relations argument. By analogy, in order to determine the scope of a declaration, it should be pointed out that, according to the Vienna Convention (Article 44: "Separability of treaty provisions"), a ground for invalidating or terminating a treaty may only be invoked with respect to particular clauses where "(a) the said clauses are separable from the remainder of the treaty with regard to their application" and "(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole." According, in our opinion, it was inappropriate at the stage reached by this case in the proceedings before the Court to sever the terms of the Turkish declaration.

The only satisfactory solution in our view was to join all the objections to the merits and to hold a public hearing on the merits giving the Parties the possibility of adducing all relevant evidence on the expression "within [the] jurisdiction" (Article 1) and on the way the international relations of northern Cyprus are conducted. This debate on the merits would also enable all Parties to make known their views about the international undertakings and possible intervention of a "third party" or the TRNC under the auspices of the United Nations, the European Union and the Council of Europe (1989 Declaration consisting in two instruments signed by three signatories, including the TRNC; References and Reports of the Secretary General of the United Nations, from 3 April 1992 to 30 May 1994; Council of Europe report of 15 December 1994, Doc. 7206)."

APPENDICES

Declaration by France (3 May 1974)

"*Article15, paragraph 1*

...

The government of the Republic further declares that the Convention shall apply to the whole territory of the Republic, having due regard, where the overseas territories are concerned, to local requirements, as mentioned in Article 63."

Declaration by the United Kingdom (14 January 1966)

The British declaration under Article 25 of 14 January 1966, periodically renewed since then, is reproduced in paragraph 33 of the judgment.

The declaration under Article 63 of 23 October 1953 listed 43 relevant territories (including Cyprus, the Isle of Man and Gibraltar). The declaration of 10 June 1994 listed the States which had become independent. The declaration of 14 August 1964 listed the territories omitted.

Declaration by the Netherlands (24 December 1985)

"The island of Aruba which is at present still part of the Netherlands Antilles, will obtain internal autonomy as a country within the Kingdom of the Netherlands as of 1 January 1986. Consequently the Kingdom will from then on no longer consist of two countries, namely the Netherlands (the Kingdom in Europe) and the Netherlands Antilles (situated in the Caribbean region), but will consist of three countries, namely the said two countries and the country Aruba.

As the changes being made on 1 January 1986 concern a shift only in the internal constitutional relations within the Kingdom of the Netherlands, and as the Kingdom as such will remain the subject under international law with which treaties are concluded, the said changes will have no consequences in international law regarding treaties concluded by the Kingdom which already apply to the Netherlands Antilles, including Aruba. These treaties will remain in force for Aruba in its new capacity of country within the Kingdom. Therefore these treaties will as of 1 January 1986, as concerns the Kingdom of the Netherlands, apply to the Netherlands Antilles (without Aruba) *and* Aruba.

Consequently the treaties referred to in the annex, to which the Kingdom of the Netherlands is a Party and which apply to the Netherlands Antilles, will as of 1 January

1986 as concerns the Kingdom of the Netherlands apply to the Netherlands Antilles *and* Aruba."

(...)

INDIVIDUAL DISSENTING OPINION of Judge Gölcüklü

"In addition to the matters I raised in my joint dissenting opinion with Mr. Pettiti concerning the preliminary objections on the questions of "jurisdiction" (Article 1 of the Convention; paragraphs 62 and 64 of the present judgment) and the "inseparability" of the Turkish declarations under Articles 25 and 46 of the Convention (paragraphs 94 *et seq.*), I cannot agree, to my great regret, with the Court's conclusions on two other aspects of this case.

1. I consider that it is not possible in this case to reach a conclusion on the role of the "Turkish Government", or in other words on its status as "respondent", without first looking into the merits of the case. On 21 April 1994 the plenary Court *did not* decide whether Turkey had the status of respondent, *but* only considered the question submitted to it by the President, under Rule 34 of Rules A and decided, without prejudice to the preliminary objections raised by the Government of Turkey or the merits of the case, that *the applicant Government had standing under Article 48 (b) of the Convention to refer the case to the Court* and that the Chamber should resume consideration of the case (paragraph 7). And in its final submissions Turkey had asked the Court to hold that the applicant's allegations lay outside the jurisdiction of Turkey within the meaning of Article 1 of the Convention. It goes without saying that this question of "respondent status" is closely bound up with the question of "jurisdiction" within the meaning of Article 1 of the Convention. The Court took the view that it was not within the discretion of a Contracting Party to characterise its standing in the proceedings before the Court as it saw fit (paragraph 51). By the same token, the applicant is not entitled to name any State she sees fit as respondent in a case before the Court, nor is it for the Court to build a whole procedure on top of this unverified allegation. Therefore, instead of delivering a separate judgment on this specific question, as it has done, the Court should have joined the preliminary objection in question lodged by Turkey to the merits of the case.

2. With regard to point 3 of the judgment's operative provisions, I entirely agree with the dissenting opinion expressed in this case by five eminent members of the Commission (Mr Nørgaard, the President, and Mr Jörundsson, Mr Güzübüyük, Mr Soyer and Mr Danelius) in which they declared:

> "... Moreover, under Article 63 of the Convention, certain territorial limitations are also expressly provided for. However, Article 63 concerns territories for whose international relations a Contracting State is responsible, and the northern part of Cyprus cannot be regarded as such a territory. Nevertheless, Article 63 shows that, when making a declaration under Article 25, a Contracting State may, in some circumstances, make a distinction between different territories.

If a State may exclude the application of Article 25 to a territory referred to in Article 63, there would seem to be no specific reason why it should not be allowed to exclude the application of the right of individual petition to a territory having even looser constitutional ties with the State's main territory. If this was not permitted, the result might in some circumstances be that the State would refrain altogether from recognizing the right of individual petition, which would not serve the cause of human rights.

We consider that the territorial limitation in the Turkish declaration, insofar as it excludes the northern part of Cyprus, cannot be considered incompatible with the object and purpose of the Convention and that it should therefore be regarded as having legal effect.

In these circumstances, it is not necessary to examine what the legal consequences would have been if the territorial limitation had been held not to be legally valid.

It follows that ... the Commission is not competent to deal with the applicant's complaints of violations of the Convention in Cyprus. For these reasons, we have voted against any finding of a violation of the Convention in the present case."

I interpret Article 6 of Protocol no. 7 in the same way. I would also like to cite, in this connection, another opinion to the above effect, that of Professor Christian Tomuschat.

"Turkey's refusal to accept the supervisory authority of the Commission with regard to all other areas than the Turkish national territory itself ... may be justifiable under Article 63 §4. This provision admits of a differentiation between metropolitan territories and other territories 'for whose international relations' a State is 'responsible'. Although the text avoids speaking of colonial territories, the intention of the drafters was precisely to leave States Parties some latitude with regard to their extra-European dependencies. If interpreted in this restricted sense, Article 63 §4 could not be relied upon by Turkey. However, doubts may be raised as to the precise scope of Article 63 §4. The United Kingdom also invoked it in respect of its European dependencies, namely the Bailiwicks of Guernsey and Jersey and the Isle of Man. Originally, Guernsey and the Isle of Man were mentioned in the first declaration under Article 25 of 12 September 1967 which defined the competence of the Commission in territorial terms. When the declaration was renewed for the first time in 1969, Guernsey and the Isle of Man were excluded. Afterwards, the two territories were again added to the geographical lists accompanying the relevant declarations. As mentioned above, the Isle of Man was dropped from those lists in 1976. Strangely enough, Jersey is mentioned for the first time explicitly in the declaration of 4 December 1981, though in a positive sense, as being placed again ("renew") under the control mechanism of Article 25. To date, no objections have been lodged against this practice. It might be argued, therefore, that Article 63 §4 has evolved into a clause conferring unfettered discretion on States concerning the territorial scope of their declarations under Article 25, whenever territories beyond the national boundaries are concerned.

Additionally, it might be contended that valid substantive reasons could be identified to support such a conclusion. The extraterritorial legal effect of human rights standards is particularly difficult to assess. While there can be no doubt that States have to refrain from interfering with human rights irrespective of the place of their actions, to ensure human rights beyond their boundaries is mostly beyond their capabilities. It is noteworthy, in this connection, that the International Covenant on Civil and Political Rights limits the commitments of States to individuals within their territory and subject to their jurisdiction" ("Turkey's declaration under Article 25 of the European Convention on Human Rights", *Festschrift für Felix Ermacora*, Kehl, Engel, 1988, pp. 128–129).

For other examples supporting this argument, it is sufficient to cast a glance at the long list of reservations and declarations deposited by the Contracting States.

I therefore consider valid the territorial restrictions contained in the Turkish declarations under Article 25 and 46, applying, at least by analogy, Article 63 of the Convention."

INDIVIDUAL DISSENTING OPINION of Judge Pettiti

"The solution advocated, i.e. joining all the preliminary objections to the merits, had the advantage of permitting an overall view of the situation of Cyprus and Turkey regarding the disputes concerning *northern Cyprus*. It is not appropriate to sever the objection *ratione loci* from interpretation of Article 1; to my mind these issues are inseparable. Consideration of the merits as a whole would have made it easier to elucidate the question of the TRNC's international or other status, and that of the agreement concluded as a result of the relations and negotiations conducted at the United Nations, under which people *do not* enjoy liberty of movement in both directions.

I consider that this overall examination of the merits, before consideration of the first objection and the declaration, was necessary in order to decide the very scope of the declaration. The European Convention is not an international treaty of the traditional type nor a synallagmatic convention, as legal writers, and particularly Professor Cohen-Jonathan, have pointed out, since it is not based on reciprocity.

It is based on the principle that all individual subjects of law are its beneficiaries, so that fundamental rights can be protected more securely. The Court is the guarantor of the Convention and must endeavour to extend its protection as far as possible; it is therefore empowered to draw the consequences of instruments deposited by the States. Consequently, the Court can better fulfil its protective role by having at its disposal all the information necessary to assess the legal and factual situation.

In the search of a peaceful compromise, the northern Cyprus question has been discussed in all international negotiations concerning Greece, Cyprus and Turkey, including those relating to European Union customs agreements or GATT agreements.

At the examination of preliminary objections stage, after the discussion at the public hearing, which was limited to analysis of these objections by all 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 Kälin, 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."