

Loizidou v. Turkey

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it refers to territory controlled by the party, and if control equals occupation, which begins almost immediately, then there is no reason for the Convention to include both “in the hands of” a party to the conflict and “Occupying Power.” On the basis of the traditional rules of treaty interpretation, one could find support for the position that the terms “occupation” and “in the hands of a party to the conflict,” and thus occupation and assertion of control, are distinct, and that only the former is relevant to protected property. Article 53 of the Fourth Geneva Convention refers only to the occupying power; no mention is made of being in the hands of a party to the conflict. Articles 2 and 6 of the Convention do not necessarily establish the contrary because they are general in nature and are applicable once a state of occupation occurs.<sup>29</sup> Additionally, the traditional interpretation of the term “occupation” seems to suggest that, although control is crucial, the law of occupation does not apply until actual control is established, which occurs after the invasion; thus, occupied territory does not include areas that are still embattled and not subject to permanent occupational authority.<sup>30</sup> Nevertheless, the recognition that civilian property is protected from the beginning of hostilities, albeit made within the context of Rule 61 proceedings, is a significant development in the attempt to protect civilians from the consequences of war.

Once the trial chamber had determined that the Bosnian Croat forces, under a test of agency distinct from the test in *Nicaragua*, were controlled by Croatia, it seems to have used this determination to settle the remaining issues of protected persons and protected property—in effect seemingly merging the various standards into one, when in fact control for purposes of establishing internationality appears to be different from control for purposes of determining protected persons, which in turn is clearly distinct from the standard for determining protected property. According to the chamber’s reasoning, in the context of the Rule 61 phase, once it is determined that the conflict is international in character, given the broad interpretation of protected persons and property, civilian persons and property seem almost always to be protected, albeit only for purposes of subject matter jurisdiction.

Two final observations can be made in this regard. First, despite the trial chamber’s qualifications, findings for the purpose of subject matter jurisdiction are extremely important, not only for this case and other cases before the Tribunal, but also for the application of the grave breaches regime to other conflicts to which the Geneva Conventions are applicable. Second, although, strictly speaking, these findings are applicable only to the Rule 61 phase, time alone will tell whether they remain so.

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*European Convention on Human Rights—continuing violation—effective control exercised by Turkey over territory of Northern Cyprus—attribution of human rights violations to controlling power—effect of nonrecognition as a state*

LOIZIDOU v. TURKEY (Merits). No. 40/1993/435/514.  
European Court of Human Rights, December 18, 1996.

In its first judgment concerning human rights violations in Northern Cyprus, the European Court of Human Rights (the Court) found Turkey responsible for such acts because it exercises effective overall control over that territory. Refusing to rule on the legality of the presence of Turkish troops in the area, the Court referred to the almost-universal nonrecognition of the “Turkish Republic of Northern Cyprus” (“TRNC”),

<sup>29</sup> For the pertinent clauses of Articles 2 and 6, see the discussion of Article 53 of the Convention at p. 527 *supra*.

<sup>30</sup> See Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 209, 244 (Dieter Fleck ed., 1995).

and held that the applicant's right to enjoy her property had been violated continuously (Ryssdal, President, and Wildhaber, J., concurring; Baka, Bernhardt, Gölcüklü, Jambrek, Lopes Rocha and Pettiti, JJ., dissenting). The Court's scanty reasoning reveals the considerable disagreement on the relevant points of law among the members of the Grand Chamber.

The case originated in an application by a Greek Cypriot woman who owned property in Northern Cyprus. She stated that, since the occupation of Northern Cyprus on June 20, 1974, Turkish troops had prevented her from returning to her land, where she had planned to build flats, including one as a home for her family. On May 19, 1989, she was arrested by Turkish troops and subsequently detained for about ten hours by the Turkish Cypriot police force because she had crossed the cease-fire line in a march organized by a women's group to assert the right of Greek Cypriot refugees to return to their homes. In its decision on the preliminary objections raised by Turkey, the Court had declared the application admissible despite the territorial limitation contained in Turkey's declaration accepting the Court's jurisdiction, and had joined the question of its competence *ratione temporis* to the merits.<sup>1</sup>

The first question before the Court was whether it had jurisdiction *ratione temporis* to examine the case. The answer would have been negative had the complaint exclusively concerned facts that had taken place before January 22, 1990, the day on which the Republic of Turkey recognized the Court's jurisdiction in accordance with Article 46 of the European Convention on Human Rights (the Convention). This recognition was limited to "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the deposit of the . . . [d]eclaration."<sup>2</sup> On that point, Turkey argued that the applicant had lost ownership of her property by virtue of the Constitution of the "TRNC" of May 7, 1985, which provided in Article 159 that abandoned property became property of the "TRNC." The Court rejected this argument by pointing out that treaty interpretation had to take into account any relevant rule of international law applicable between the parties.<sup>3</sup> It referred to resolutions of the United Nations Security Council and the Committee of Ministers of the Council of Europe, and statements by the European Communities and the Commonwealth Heads of Government,<sup>4</sup> that had pronounced the establishment of the "TRNC" legally invalid and called upon all states not to recognize this act. Consequently, the Court felt unable to attribute legal validity to Article 159 of the "TRNC Constitution" for the purpose of determining at what time the applicant had lost her property. It added that its nonrecognition would not have any detrimental effect on the inhabitants of the territory concerned, so that general international law did not call for an exception to the rule that the acts of an authority established in violation of international law must not be recognized. Since Turkey had not advanced evidence of any other act by which the property had been taken, the Court concluded that the applicant was still owner of the land in question. Therefore, it found that the alleged interference with her property rights concerned a continuing violation, and Turkey's objection *ratione temporis* had to fail.

<sup>1</sup> 310 Eur. Ct. H.R. (ser. A) (1995) [hereinafter Preliminary Objections Judgment]; see also the note on this case by Juliane Kokott & Beate Rudolf, 90 AJIL 98 (1996).

<sup>2</sup> Quoted in No. 40/1993/435/514, para. 24 [hereinafter Decision]. The Court, *id.*, para. 34, considered that there should have been a comma after the words "such facts," because otherwise the sentence did not make sense.

<sup>3</sup> Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(3)(c), 1155 UNTS 331.

<sup>4</sup> SC Res. 541, UN SCOR, 38th Sess., Res. & Dec. at 15, UN Doc. S/INF/39 (1983); and Res. 550, UN SCOR, 39th Sess., Res. & Dec. at 12, UN Doc. S/INF/40 (1984); Committee of Ministers Res. (Nov. 24, 1983), discussed in Explanatory Memorandum, Eur. Parl. Ass., 35th Sess., Doc. No. 5165, para. 1 (1984). For the Council statement of November 16, 1983, and the Commonwealth Heads of Government press communiqué of November 29, 1983, see Decision, paras. 22, 23.

The Court then turned to the question whether the applicant's right to peaceful enjoyment of her property (Article 1 of Protocol No. 1 to the Convention<sup>5</sup>) had been infringed. It considered, first, whether the continuous denial of access to the applicant's property was imputable to Turkey and, second, whether this constituted an interference with her property rights. Regarding the question of imputability, the Court reaffirmed its view espoused in the decision on the preliminary objections that effective control over an area outside a state's national territory, exercised directly or through a subordinate authority, entails that state's responsibility. **The Court stated that it was not required to establish whether Turkey was in actual control of the actions of the "TRNC" authorities, but that effective overall control of the territory would be sufficient.** The Court deduced such control from the large number of Turkish troops stationed in Northern Cyprus. In the Court's view, this "obvious" control entailed Turkey's responsibility for the policies and actions of the "TRNC." **The Court's finding was independent of the determination whether Turkey's military intervention on the island had been lawful under international law.** Instead, the Court pointed to the fact that the "TRNC" was not recognized as a state by the international community, implicitly rejecting the dissenters' view that it should examine whether the "TRNC" was an independent state under international law.<sup>6</sup>

Having thus found that the impugned acts were attributable to Turkey, the Court considered whether the denial of access constituted a violation of the applicant's right to the peaceful enjoyment of her property. The Court stated that the situation complained of did not merely concern physical access to property, and that the case therefore did not require an answer to the question whether freedom of movement is a corollary of the right to peaceful enjoyment of property.<sup>7</sup> Rather, Article 1 of Protocol No. 1 was applicable, since the applicant had been refused access to her property for over sixteen years, which amounted to preventing her from enjoying the possession of that land. Without further elaboration, the Court held that there was interference with the applicant's right because she had effectively lost control of her property and the ability to use it. It rejected as inconclusive the justification put forward by Turkey that the need to rehouse Turkish Cypriot refugees in the north of the island had necessitated interference with the applicant's property. Nor did the Court consider it relevant that property rights were a subject of the ongoing intercommunal talks, which according to Turkey's submission would have been undermined by a judicial decision. The Court concluded by finding a continuing violation of the applicant's right to the peaceful enjoyment of her property.

However, it found no violation of her right to respect for her home (Article 8), stating that the mere intention to build a family residence on the land in question did not suffice to make it a "home" in the sense of that provision. Given the sensitive nature of the case and the fact that the question of compensation pursuant to Article 50 of the Convention had not been discussed during the proceedings, the Court finally held that the issue was not ready for decision and, accordingly, reserved the question.

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The decision and the accompanying dissenting opinions reveal the difficulties encountered in applying the concept of a "continuing violation." This concept, which is also applied by other human rights bodies, extends jurisdiction to cases that originated before

<sup>5</sup> Protocol No. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. TS No. 9.

<sup>6</sup> See the dissenting opinions of Judge Pettiti, and of Judge Gölcüklü, para. 3.

<sup>7</sup> This had been the Commission's approach in the case. See Comm'n Rep., paras. 98–99, *reprinted in* Preliminary Objections Judgment, note 1 *supra*, at 45.

the entry into force of the declaration of acceptance (the “critical date”), but that produced legal effects after that date. The European Commission of Human Rights (the Commission) first recognized the concept in the *De Becker* case by holding that it has jurisdiction *ratione temporis* when the applicant complains not of the lasting effects of an act that occurred at a given point in time, but rather of a “legal provision giving rise to a permanent situation.”<sup>8</sup> In a subsequent decision, however, the Commission did not refer to the legal nature of the impugned act but merely to the permanence of the legal situation created.<sup>9</sup> If, in contrast, the disadvantages complained of are of a factual nature and result from a decision taken at a specific time, there is no continuing violation.<sup>10</sup>

Thus, instantaneous acts of a state are characterized by the fact that they are completed once the addressee has performed the required action or has abstained from a specific action in a defined situation. The only lasting effect of such instantaneous acts is the legal situation thus brought about. Conversely, in cases of continuing violations, the state’s act has a more specific lasting legal effect, in that the addressee is required to perform a certain act repeatedly or to abstain from a certain action for a certain time period or permanently.<sup>11</sup> Because of that inherent temporal element in the state’s act, the individual’s freedom of action is restricted continuously. Being attributable to the state, that restriction in itself constitutes a violation.<sup>12</sup> Consequently, it is that violation, not the act committed before the critical date, that is subjected to international scrutiny by recognizing the Commission’s and the Court’s jurisdiction *ratione temporis* for continuing violations.

A second category of continuing violation encompasses cases concerning the right to free enjoyment of property. Both the Commission and the Court found that occupying an applicant’s land without assuming title, or announcing an intended expropriation, or taking other steps hindering the applicant from using that land, could be regarded as a continuing violation.<sup>13</sup> This group of cases has to be distinguished from those involving the taking of property or other rights *in rem* in the legally prescribed procedure, which is an “instantaneous act and does not produce a continuing situation of ‘deprivation of rights’.”<sup>14</sup> Here, the decisive criterion is that the violation itself has a temporal element; an infringement of property rights occurs only if the act of the state, which does not purport to have a legal effect, lasts for a considerable amount of time. In these cases, the Commission and the Court may even take into account facts that took place before the critical date.<sup>15</sup> Consequently, and in contrast to the first category of continuing

<sup>8</sup> *De Becker v. Belgium*, App. No. 214/56, [1958] 2 Y.B. EUR. CONV. ON H.R. 214, 234. The applicant had lost certain civil and political rights as a legal consequence of a criminal conviction for collaboration with the enemy. This holding was affirmed in *X. v. Belgium*, App. No. 8701/79, 18 Eur. Comm’n H.R. Dec. & Rep. 250, 253 (1980). See also *X. v. United Kingdom*, App. No. 7202/75, 7 Eur. Comm’n H.R. Dec. & Rep. 102, 102–03 (1977).

<sup>9</sup> *X. v. Switzerland*, App. No. 7031/75, 6 Eur. Comm’n H.R. Dec. & Rep. 124, 126 (1977) (deportation order prohibiting reentry into a country).

<sup>10</sup> *X. & Y. v. Portugal*, App. Nos. 8560/79 & 8613/79, 16 Eur. Comm’n H.R. Dec. & Rep. 209, 212 (1979) (exclusion from advancement in military career resulting from assignment to reserve corps).

<sup>11</sup> For a similar interpretation, see the ILC’s commentary to draft Article 24, THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 220 (Ralf Günther Wetzel & Dietrich Rauschnig eds., 1978).

<sup>12</sup> For this view, see the dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 2.

<sup>13</sup> See the Court’s *obiter dicta* in *Papamichadopoulos v. Greece*, 260–B Eur. Ct. H.R. (ser. A) para. 40 (1993); and in *Agrotexim v. Greece*, 330–A Eur. Ct. H.R. (ser. A) para. 58 (1995); and the holding of the Commission in *Agrotexim v. Turkey*, No. 14807/89, 13 HUM. RTS. L.J. 318, 320 (1992).

<sup>14</sup> See, e.g., *A. B. & Co. A.F. v. Federal Republic of Germany*, App. No. 7742/76, 14 Eur. Comm’n H.R. Dec. & Rep. 146 (1978); *Mayer, Weidlich, Fullbrecht, Hasenkamp & Golf v. Germany*, App. Nos. 18890/91, 19048/91, 19049/91, 19342/91 & 19549/92, translated in 23 EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT 386, 390 (1996); and *Szechenyi v. Hungary*, App. No. 21344/93 (June 30, 1993).

<sup>15</sup> Similarly, the Court held that, in determining the length of detention or of criminal proceedings, it must take into account the state of the proceedings before the critical date. See *Yagci & Sargin v. Turkey*, 319–A Eur. Ct. H.R. (ser. A) para. 40 (1995); *Mansur v. Turkey*, 319–B Eur. Ct. H.R. (ser. A) para. 44 (1995); *Mitap & Müftüoğlu v. Turkey*, No. 6/1995/512/595–596, para. 28 (Mar. 25, 1996). The Commission applied the same rule in the case of *Ventura v. Italy*, App. No. 7438/76, 12 Eur. Comm’n H.R. Dec. & Rep. 38, 46 (1978).



violations, the proper question here is not whether there are any lasting legal effects of the state's acts, but whether sustaining a certain situation constitutes a violation.

In *Loizidou*, the Court considered the denial of access to the applicant's property to be such a violation. It referred to the "fact that the applicant has been refused access to the land since 1974," without naming instances in which she had actually tried to enter Northern Cyprus, such as the demonstration in 1989. Thus, the "refusal of access" does not seem to be an act of a state directed against the applicant but, rather, a result of the division of Cyprus itself. For some of the dissenting judges, in contrast, the closing of the border in 1974 was an instantaneous act, since it changed the legal and factual situation at that point in time.<sup>16</sup> Both approaches are flawed because they focus on the deprivation of access to the property. However, even if the applicant had been able to travel to her land, she could not have enjoyed her property, because the local authorities would not have recognized her claim, but would have relied on the "TRNC" Constitution of 1985 instead. It is the continued application of that Constitution in Northern Cyprus, which is internally operative despite international nonrecognition, that in fact prevented the applicant from enjoying her property and thus infringed her rights. Thus, the particular problem raised by the *Loizidou* case is that the continuing violation of property is brought about by a legal act, but that its legal effects cannot be taken into account, so that it cannot be regarded as the relevant instantaneous act. By focusing on the refusal of access, the decision becomes vulnerable to the criticism that it is not only Turkish troops, but also UN forces guarding the border that make it impossible for Greek Cypriots to travel to their property in the north. Hence, Turkey alone could not be held responsible for the violation.<sup>17</sup>

As regards imputability—which in the Court's view was restricted to the denial of access to the applicant's land—it is striking that the Court did not examine in detail whether Turkey actually exercised effective control over Northern Cyprus. In its judgment on the preliminary objections, it had limited its finding to holding that the impugned acts were *capable* of falling within Turkish jurisdiction, and had reserved the determination of actual responsibility to the decision on the merits.<sup>18</sup> Yet, in the final judgment, the Court merely stated that the presence of a large contingent of Turkish troops clearly indicated effective Turkish control over the territory. It did not even consider whether the "TRNC" government had ceased to be a subordinate authority, and whether it would be internationally responsible for its acts. This approach confirms the analysis of the preliminary objections decision that **effective control due to military presence can be presumed unless there is clear evidence to the contrary**. When, in that context, the Court referred to the fact that the "TRNC" was not recognized internationally, it weighed the evidence before it and concluded that the presumption could not be rebutted in view of overwhelming state practice.

The central argument in the judgment is the consideration that the member states of the Council of Europe are obliged under international law not to recognize acts of the "TRNC." Both the determination of a continuing violation and the imputability of the alleged violations hinge on that consideration. **The decisive question in the case, therefore, was whether the Court should make its own determination as to whether the "TRNC" could be regarded as a state under international law and whether, in consequence, the legal effects of the internal acts of the "TRNC" were to be respected and these acts attributed to it. A positive answer to that question not only would have put the Court in conflict with the prevailing legal opinion of the international community,**

<sup>16</sup> Dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 2; dissenting opinions of Judges Pettiti and Baka; and dissenting opinion of Judge Gölcüklü, para. 4.

<sup>17</sup> See the dissenting opinion of Judges Bernhardt and Lopes Rocha, para. 3; and the dissenting opinion of Judge Gölcüklü, para. 4.

<sup>18</sup> Preliminary Objections Judgment, note 1 *supra*, para. 64.

but also would have rendered the territory of Northern Cyprus a zone outside the scope of the Court's human rights jurisdiction.

To avoid these pitfalls, the Court ingeniously relied on the obligation under international law neither to recognize the "TRNC" nor to attribute legal effects to its acts. This obligation does not stem from resolutions of the UN Security Council since they were not taken under Chapter VII of the UN Charter and are therefore not binding. The Court seems to have treated these resolutions and nonbinding declarations of other international bodies as proof of an *opinio juris* underlying the almost-universal state practice not to recognize the "TRNC." From that perspective, the existence of a special rule of customary international law dealing with the matter rendered superfluous the consideration of whether the establishment of the "TRNC" had been legal under general international law.

The decision on the existence of a continuing violation should not be misunderstood as opening the door to the reconsideration of the property transfers that took place before the democratic revolutions in Communist states or during the war in the territory of the former Yugoslavia. The facts of the present case differ considerably from the situation in the respective member states of the Council of Europe.<sup>19</sup> The Court found a continuing violation because international law required it not to take into account the expropriation under the Constitution of the "TRNC." If, however, an expropriation is effected by a state that is recognized at the time, it would have to be regarded as an instantaneous act without continuing legal effect.

The case raises the fundamental question whether an international tribunal should show judicial restraint in opening the door to a new category of cases. Should the Court refrain from doing so if its judgment entails the possibility that thousands of similar complaints will be lodged with the Convention organs and threaten the effectiveness of human rights protection within the Council of Europe?<sup>20</sup> The result would be to leave the resolution of the problem entirely to the political sphere. However, national constitutional courts faced with similar situations have developed means of coping with them. These include the selection and decision of exemplary cases, which highlight the applicable legal principles for resolving the other cases. By deciding on the merits in *Loizidou*, the Court opted for the latter approach. Thus, it not only did justice to the individual applicant, but also underlined that the refugees' property rights are not negotiable. In doing so, the Court emphasized that the member states' obligation to respect human rights is absolute, and cannot be subordinated to considerations of political expediency.

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*Treaties—Extradition Treaty between United States and United Kingdom—extradition to Hong Kong for alleged bribery by Hong Kong citizen—effect of Hong Kong's reversion to China and possible application of Chinese law providing for execution after July 1, 1997—role of U.S. judiciary in extradition process*

LUI v. UNITED STATES. 110 F.3d 103.  
U.S. Court of Appeals, 1st Cir., March 20, 1997.

Appellant, the United States, appealed a decision of the United States District Court for the District of Massachusetts<sup>1</sup> granting a writ of habeas corpus to the appellee, Lui Kin-

<sup>19</sup> But see the dissenting opinion of Judge Baka; and the dissenting opinion of Judge Jambrek, para. 8.

<sup>20</sup> See, for an affirmative answer, the dissenting opinion of Judge Jambrek, para. 8.

<sup>1</sup> Lui Kin-Hong v. United States, 957 F.Supp. 1280 (D. Mass. 1997).