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CURRENT LEGAL DEVELOPMENTS

Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos* Case?

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Abstract
On 10 May 2001, the European Court of Human Rights delivered its judgment in the case of *Cyprus* v. *Turkey* pronouncing on the legal consequences of Turkey's invasion and occupation of the northern part of Cyprus since 1974. The Court found Turkey responsible for continuing violations of the right to the home and property of Greek-Cypriots. Invoking the *Namibia* principle, the Court found that remedies in the occupied part of Cyprus may be regarded as domestic remedies of Turkey and that the question of their effectiveness was to be considered in the specific circumstances in which it arises. On 1 March 2010, the Court decided that a Commission in the occupied area was a remedy that should be exhausted by the complainants for the above violations. Significant legal questions were determined relating to the effectiveness of this remedy with far-reaching consequences concerning the right to home and property as well as other aspects of human rights and international law.

Key words
home; property; remedies in occupied territory

1. Introduction

The article explores the decision as to admissibility in the case of Demopoulos and seven others of 1 March 2010 concerning the effectiveness of a remedy provided by Turkey in the area of Cyprus occupied by the Turkish forces with respect to complaints of displaced Greek-Cypriots for continuing violation of Article 8 and of Article 1 of Protocol No. 1 of the Convention by reason of the refusal to allow them to return to their homes and to have access to and enjoyment of their properties. The decision is important in many respects, from both an international-law and a human-rights aspect. This is the first time that the Court examined the effectiveness of a remedy provided by an occupying country for alleged violations of human rights committed by that country in the area where the proposed remedy is established. Significant legal questions relating to the effectiveness of this remedy were raised, such as its illegality, the restricted means of reparation, the applicability of

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principles of international law, the difficulties faced by the victims of the violations in asking a remedy from a state occupying their country, the question of whether the applicants are absolved of exhausting domestic remedies because of a policy of similar violations, and the issue of the required safeguards of the organ providing the remedy.

The case analysis of the article examines the reasoning of the decision and its conclusion and expresses the view that the decision is legally wrong for (i) being inconsistent with previous relevant jurisprudence of the Court; (ii) misapplying the Namibia exception and other principles of international law (e.g. prohibition of settlers from the occupying country and disregard of the right of *restitutio in integrum*); (iii) relying on erroneous comparisons (e.g. equating the case of appeals to official bodies of a state where there is a rule of law with a case of appeals to authorities of an illegal occupying military regime); (iv) disregarding the policy of Turkey of not restoring relevant rights of Greek-Cypriots in the occupied part of Cyprus in spite of relevant judgments of the Court; (v) accepting as independent and impartial organs of the regime of the occupied area; and (vi) making statements and findings inconsistent with the true facts and the objectives of human rights (e.g. 'with the passage of time the holding of a title may be emptied of any practical consequences', even though the owners of the title were prevented by the occupying country from using their title during that time, and also that the non-solution of a political problem, for which the applicants had no responsibility, negatively affected their case). It is the submission of this author that the case has far-reaching negative consequences on concepts of human rights, such as 'property', 'home', and 'continuing violations', and has serious implications for the victims of aggression in occupied territories or under similar regimes. According to this author, the decision amounts to a serious setback to the Court's prescribed mission under the Convention.

2. Exhaustion of domestic remedies and the *Demopoulos* case

2.1. The requirement of exhaustion of domestic remedies

Before examining the merits of an application, the European Court of Human Rights ('the Court') must be satisfied that the conditions for admissibility under Article 35 of the European Convention on Human Rights ('the Convention') have been complied with. The first and most important condition is that of exhaustion of domestic remedies. The relevant provision states that 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'. This requirement has been the subject of extensive jurisprudence interpreting and applying the relevant rule to a variety of situations.

The object of requiring applicants to exhaust domestic remedies before asking the Court to decide their complaints is to afford the contracting states the opportunity of preventing or putting right the violations alleged against them before those

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allegations are submitted to the Court.[1] Thus, the rule is founded on the principle of the international law that states must first have the opportunity to redress the wrong alleged in their own legal system.[2] The Court will first examine the compatibility of the application with the aforesaid requirement on its own motion. After communication of the application to a respondent state that invokes non-exhaustion, it is up to the respondent to prove that the remedy was an effective one available in theory and in practice, namely that it was accessible, that it was capable of providing redress with respect to the alleged violation, and that it offered reasonable prospects of success.[3]

The examination of the question of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions. As regards repetitive cases, if a new remedy is created, the Court will examine whether it is effective in a leading case. Whether a remedy is available, adequate, and effective depends on the particular facts and circumstances of each case. The Court adopted the approach that the rule of domestic remedies has to be applied with some degree of flexibility and without excessive formalism,[4] but, in practice, this approach is not always followed.[5] In any event, the rule does not apply where it is established that there is an administrative practice regarding the relevant violations.[6] The notion of administrative practice presupposes a repetition of acts with official tolerance.[7]

An important jurisprudence of the Court has developed as regards the special circumstances where an applicant is absolved from the requirement to exhaust. Reference has already been made to the administrative-practice exemption. More interesting is the case law on this subject related to abnormal, non-peaceful situations. For instance, in the *Akdivar & Others* v. *Turkey* case,[8] the Court had to decide complaints regarding the destruction of the applicants' homes during security operations in south-east Turkey during a time of serious disturbance. The Turkish government had argued that there were a number of remedies available to the applicants. In rejecting this submission, the Court held that it had to take 'realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate'.[9] Considering the prevailing situation in south-east Turkey, the Court found that there were obstacles to the proper functioning of the system of the administration of justice and also that the prospects of success for civil proceedings against the security forces were negligible in view of the severe civil strife in the region.

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1 *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999 (1999/V).
2 D. J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention of Human Rights* (2009), 764, note 49.
3 *Akdivar & Others v. Turkey*, Application No. 21893/93, Judgment of 16 September 1996 (1996/IV).
4 *Selmouni v. France*, *supra* note 1.
5 Harris, O'Boyle, and Warbrick, *supra* note 2, at 776.
6 *Greece v. UK*, No. 299/57, (1959) 2 YB 186, at 192; *Cyprus v. Turkey*, No. 8007/77, (2001) 13 DR 85 (1978), at 151–2.
7 *Donnelly v. UK*, 4 DR 64 (1975); *Ireland v. UK*, A 25 (1978).
8 *Akdivar & Others v. Turkey*, *supra* note 3.
9 Ibid., para. 69.

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Some years later, the Court applied its ruling in Akdivar in the first Chechen cases,[10] in which the applicants complained about the deaths of their relatives and their own injuries as a result of the bombing of Grozny in October 1999. The Court found that although the judicial remedies proposed by the government were, in principle, available under Russian law, the practical difficulties referred to by the applicants and the fact that the law-enforcement bodies were not functioning properly in Chechnya at the time amounted to special circumstances that absolved the applicants from the obligation to exhaust domestic remedies.

The cases arising from the continuing Turkish occupation of Cyprus ever since 1974 and concerning massive systematic violations of human rights in the Turkish-occupied area of Cyprus, including the right to property of Greek-Cypriot citizens, led to the establishment of an important jurisprudence regarding the rule of exhaustion of domestic remedies. These cases were first dealt with by the European Commission of Human Rights in the *Cyprus* v. *Turkey* applications nos. 6780/74 and 6950/75. With respect to the claim of the respondent government that a number of effective remedies were available to persons claiming to be victims of violations in the aforesaid area, the Commission stated the following:

> 13. With regard to the question whether the remedies indicated by the respondent Government can in the circumstances of the present case be considered as effective, the Commission notes that the applicant Government's allegations of large-scale violations of human rights by Turkish authorities in Cyprus relate to a military action by a foreign power and to the period immediately following it. It is clear that this action has deeply and seriously affected the life of the population in Cyprus and, in particular, that of the Greek Cypriots who were living in the northern part of the Republic where the Turkish Troops operated. This is especially shown by the very great number of refugees who are at present in the south of the island.
> 14. In these circumstances the Commission finds that remedies which, according to the respondent Government, are available in domestic courts in Turkey or before Turkish military courts in Cyprus could only be considered as effective 'domestic' remedies under Art. 26 of the Convention with regard to complaints by inhabitants of Cyprus if it were shown that such remedies are both practicable and normally functioning in such cases. This, however, has not been established by the respondent Government. In particular, the Government have not shown how Art. 114 of the Constitution of Turkey can extend to all the alleged complaints or how any proceedings could be effectively handled given the very large number of these complaints.
> 15. The Commission therefore does not find that, in the particular situation prevailing in Cyprus since the beginning of the Turkish military action on 20 July 1974, the remedies indicated by the respondent Government can be considered as effective and sufficient 'domestic remedies' within the meaning of Art. 26 of the Convention.[11]

A similar approach was followed by the Commission in the third *Cyprus* v. *Turkey* application no. 8007/77.

In the first case before the Court of a Greek-Cypriot citizen complaining about the refusal of Turkey to allow her to use and control her property in the Turkish-occupied part of Cyprus (*Loizidou* v. *Turkey*),[12] the Court, as regards acts of the de facto

10 *Isayeva, Yusupova* and *Bazayeva v. Russia, Hudoc*, (2005) 41 EHRR 847.
11 2 DR, at 137–8.
12 *Loizidou v. Turkey*, Judgment of 18 December 1996 (Merits), Reports of Judgments and Judgments (1996-VI), at 2223, paras. 16–17.

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authorities in that part of Cyprus, noted the *Namibia* doctrine (to which reference is made herein below).[13] This doctrine was later reiterated by the Court in the case of *Cyprus* v. *Turkey*[14] and was considered as a basis for finding that remedies provided in the occupied part of Cyprus 'may be regarded as "domestic remedies" of the respondent state and that the question of their effectiveness is to be considered in the specific circumstances where it arises'. As submitted herein below, this approach was wrong because the *Namibia* doctrine was intended to be applied for acts that were inevitable for the daily life of the inhabitants, such as the registration of births, and not for optional recourses to the authorities of an illegal regime.[15] In any event, the Court proceeded to find that there was no need for the displaced owners of properties in the occupied part of Cyprus to exhaust domestic remedies in the occupied part, inter alia because 'it was not possible for displaced Greek Cypriots to return to their homes in the north pending agreement on an overall political solution to the Cypriot question'.[16] There followed the case of *Xenides-Arestis* v. *Turkey*[17] in which the Court sent a positive message to Turkey's creation of a commission to deal with claims regarding properties of Greek-Cypriots in the occupied part of Cyprus. The question of whether such a commission satisfied the requirements of adequacy and effectiveness of domestic remedies under Article 35 was examined and decided in the case of Demopoulos and seven others against Turkey (*Demopoulos* case).[18] The decision in that case had far-reaching effects concerning aspects of the rule of domestic remedies, the right to property, and human rights and international law in general. Therefore, it deserves a close examination and commentary.

2.2. The *Demopoulos* case

The decision of the Court in the case of Demopoulos and seven others against Turkey[19] caused disappointment to those who believed in the efficiency of the system. The decision concerned primarily the question of exhaustion of domestic remedies as a condition for access to the Court. In examining this question, the Court dealt also with other matters, such as the right to property in occupied areas and other questions concerning the special situation of remedies offered in such areas to persons who were deprived of their properties because of the policy of the occupying power. The case related to the part of Cyprus occupied by Turkey and the properties of Greek-Cypriots in respect of which the Court on many occasions in the past had found that the property owners had been forcibly, and on a continuing basis, deprived of their use by Turkey contrary to the Convention.[20]

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13 *Loizidou v. Turkey*, *supra* note 12, para. 45 of the Judgment.

14 *Cyprus v. Turkey*, Application No. 25781/94, 10 May 2001, Report of the European Commission of Human Rights of 4 June 1999, Decisions and Reports 2.

15 Ibid.

16 Ibid.

17 *Xenides-Arestis v. Turkey*, Application No. 46347/99, 7 December 2006.

18 *Demopoulos and Others v. Turkey*, Application Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 199/93/04, and 21819/04 decision as to admissibility dated 1 May 2000 (hereinafter 'the Decision'), judgment as to admissibility dated 1 March 2010.

19 Ibid.

20 See inter alia *Cyprus v. Turkey*, *supra* note 14; *Loizidou v. Turkey*, *supra* note 12; *Demades v. Turkey*, No. 16219, 31 July 2003.

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In the *Demopoulos* case, which was a pilot case of eight Greek-Cypriot owners of properties in the Turkish-occupied part of Cyprus, the Court decided inter alia that:

1. The owners in question had first to resort to a Commission established by Turkey in the Turkish-occupied area many years after the lodging of their applications before their complaints for violations of their rights to property and home were examined by the Court; in the meantime, the relevant applications before the Court – not yet declared admissible – had to be dismissed for non-exhaustion of domestic remedies.
2. The title to property in the occupied area of Cyprus, with the passage of time, may be emptied of any practical consequences and an occupying power cannot be asked to ensure that the owners in question obtain access to and possession of their properties if others have in the meantime got possession of these properties.
3. The non-solution of the political problem of Cyprus was a negative factor that should be taken into account in relation to the claims of the applicants.
4. The fact that 35 years have passed since the applicants lost possession of their properties, that Turkish-Cypriots refugees have settled in the north [where the properties of the applicants were situated] and Turkish settlers from Turkey have arrived in large numbers and established their homes there, and that 'much Greek Cypriot property' has changed hands at least once, are factors affecting negatively the claims of the applicants.[21]

For the reasons set out herein below, it is submitted that the decision is wrong. This article will not only focus on the way in which the Court approached the application of the rule of exhaustion of domestic remedies; it also deals with other issues arising out of statements and findings of the Court that are disturbing and have serious implications for the victims of an aggression in occupied territory – primarily for Cyprus, but also for other similar situations prevailing in other parts of the world.

It is submitted that in reading this decision, one will have no difficulty accepting that a political approach is more prominent in the decision than a strictly legal one. The factual background, the syllogisms, the structure, the expressions used, the style and tenor, as well as the findings in the decision, are political in form and effect. It seems that the drafters of this decision were decisively influenced in a negative way by a certain political approach to the issues and thus came to wrong conclusions. This point is illustrated by the following passages of the text. The Court stated that it examined the legal issues in the light of the following considerations:

> 83. The Court observes that the arguments of all the parties reflect the long-standing and intense political dispute between the Republic of Cyprus and Turkey concerning the future of the island of Cyprus and the resolution of the property question.
> 84. In the present applications, some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed.

21 Para. 84 of the Decision.

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> The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance.
> 85. Thus, the Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.[22]

Typical of the damage that can be caused to an examination of a legal issue under the influence of political considerations is the fact that such considerations:

1. may not give much weight to the accuracy of their factual basis;
2. are more concerned with expediency than with legitimacy; and
3. may reflect the political positions of one of the parties to the relevant dispute, rather than an objective assessment and statement of the political situation behind the legal issues under consideration.

Reading the above text of the decision, one observes the following: the Court, by referring to 'the long-standing and intense political dispute between the Republic of Cyprus and Turkey concerning the future of the island of Cyprus and the resolution of the property question',[23] does not seem to take into account the relevant factual situation existing in Cyprus – as found by the Court itself in previous cases[24] – namely that 'the dispute' consists of a military occupation by Turkey of practically 37 per cent of Cyprus's territory since 1974 and of continuing violations by Turkey of the rights of Greek-Cypriots displaced by the Turkish forces since that year and not allowed by Turkey to return to their homes and lands in the occupied territory. The gist of the 'dispute' therefore concerns, in reality, the termination of the illegal Turkish occupation[25] and the restoration of the human rights violated by Turkey. It is submitted that the Court's standpoint in this respect does not do justice to the question of responsibility for the *sub judice* violations of the rights of the applicants, their nature, and the cause of their continuance. One could even go as far as to say that the approach of the Court does not appear to be even-handed.

22 Paras. 83–85 of the Decision.
23 Para. 83 of the Decision.
24 E.g., *Cyprus v. Turkey*, *supra* note 14, at 95.
25 In the same judgment, the Court stated in para. 114 the following: 'While it goes without saying that Turkey is regarded by the international community as being in illegal occupation of the northern part of Cyprus, this does not mean that, when dealing with individual applications concerning interference with property, the Court must apply the Convention any differently.'

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3. Politicizing questions of human rights

It must be a common ground that the Convention must be interpreted and applied with integrity, without fear, without favour, and without politicizing the issues. The result of politicizing questions of human rights 'is that the rights of the individual may be sacrificed to political expediency'[26] and this naturally constitutes the main danger to any human-rights system.

Questions of human rights and other legal questions may indeed be intertwined with political questions and form one aspect of a wider dispute or problem. This, however, is not a reason to affect the application of the relevant legal principles or the granting of the appropriate legal remedy. The jurisprudence of the International Court of Justice supports this view. Thus, in the case concerning US Diplomatic and Consular Staff in Tehran of 1980, the Court stated:

> Legal disputes between Sovereign States by their very nature are likely to occur in political contexts and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them . . . if the Court were, contrary to its settled jurisprudence, to adopt such a view it would impose a far- reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes . . . the resolution of such legal questions by the Court may be an important, and sometimes decisive factor in promoting the peaceful settlement of the dispute.[27]

In fact, the European Court of Human Rights has, in the past, also rejected political arguments in dealing with the application of the Convention. This occurred in particular with cases brought before the Court by individual owners of property in the Turkish-occupied area of Cyprus (like the applicants in the *Demopoulos* case). For instance, in *Loizidou* v. *Turkey*,[28] the Court had emphatically rejected the argument by the Turkish government that because the interference with the property rights of the Greek-Cypriots in the Turkish-occupied part of Cyprus was the subject of inter-communal talks, this was a ground for rejecting the applicant's complaint for a total and continued denial of access to her property. The Court stated: 'Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention.'[29]

Similarly, in the *Cyprus* v. *Turkey* case,[30] the political arguments that Turkey raised before the European Commission of Human Rights under the title of 'special agreement to settle the dispute by means of other international procedures'[31] (inter-communal talks, involvement of the United Nations in finding a peaceful solution,

26 G. Ezejiofor, *Protection of Human Rights under the Law* (1964), 132; L. G. Loucaides, *Essays in the Developing Law of Human Rights* (1995), 227.
27 [1980] ICJ Rep. 90.
28 *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996, at 64.
29 Ibid., para. 64.
30 *Cyprus v. Turkey*, *supra* note 14.
31 Report of the Commission in Application No. 25781/94, 4 June 1999, paras. 7 and 22.

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etc.) did not distract the attention of the Commission or, later, that of the Court. Both engaged in a strict legal examination of the case under the Convention.

In this context, and as regards in particular the political aspect of the situation under consideration, it should be stressed that the correct position should be that restoration of human rights should not await the settlement of related political issues but, on the contrary, should be used as a means to bring about such settlement. This is not only dictated by juridical considerations – that is, the necessity to have a settlement on the basis of respect for human rights (the only one that is valid under international law) at the earliest possible stage – but also by the practical necessity, in the interest of world peace and welfare, not to allow states for any reason to have unfettered freedom to deny basic human rights to people under their authority.[32] This is the *raison d'être* of any human-rights system. To accept the contrary would inevitably lead back to the times when oppression in any form was an acceptable instrument for creating law. If political differences were allowed to block the way to the protection of human rights, that would render the very notion of human rights entirely meaningless, for serious violations of human rights are, as a rule, the result of political controversies. If, then, it is accepted that no remedy is possible pending the solution of such controversies, this would amount to condoning continuing violations of human rights – on any scale – ad infinitum at times at which these rights are in special need of protection.

4. The previous findings of the Court

It should be recalled that the Court in *Cyprus* v. *Turkey*[33] found 'that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus'[34] and that:

> there has been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.[35]

Taking into account such continuing mass violations of rights of Greek-Cypriots by Turkey, is it fair to speak of 'the long-standing and intense political dispute between the Republic of Cyprus and Turkey concerning the future of the island of Cyprus and the resolution of the property question' as if these violations are nothing more than just a 'political dispute' between two states that stand on an equal footing as regards responsibility? And is it just and legally correct to take into account as a negative factor against the applicants the fact that no solution 'of the problem' was found 'on a political level'? Were the applicants expected to solve the 'problem'? And, so long

32 L. M. Goodrich, *The United Nations* (1960), 242; Ezejiofor, *supra* note 26, at 13; L. Oppenheim, *International Law*, Vol. I (1955), 737.
33 *Cyprus v. Turkey*, *supra* note 14.
34 Para. 175 of the Decision.
35 Para. 189 of the Decision.

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as Turkey did not intend to solve it in line with the rule of law and human rights, are the Greek-Cypriots responsible for that? And on what legal basis can the Court qualify the examination of the violations of human rights complained of on the basis that 'This reality [the non-solution of 'the problem' on a political level] as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention?'.[36]

Since when have the strict legal examination and finding of whether a violation of an individual human right has occurred or not depended upon 'the continuing evolution of the broader political dispute'? That approach clearly subjects human rights to political considerations and expediencies – an approach incompatible with the effective protection of human rights, endangering at the same time the whole system of the Convention. Moreover, in fact, 'the passage of time' does not reduce, but adds to, the severity of continuing violations, such as those at issue in the cases under consideration.

The applicants were entitled to restoration of their right to property and home and to compensation for the loss of use of their possessions, regardless of the length of time that had elapsed in the meantime for which only the state responsible for the violations was to blame. This is the obligation that emerges directly from the relevant judgments of the Court, especially that of the inter-state case whose implementation is still under the supervision of the Committee of Ministers in line with Article 46 of the Convention. Under the Convention, this obligation of implementing or executing a judgment of the Court is not subject to any prescription. According to international law, breaches of its rules such as the protection of human rights entail reparation that must, as far as possible, 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[37]

5. Contradiction of previous jurisprudence

One should also point out the contradiction between the decision made in these cases, 36 years after the commencement of the violations, and previous judgments of the Court with respect to similar violations that were delivered on exactly the same factual background and raising the same issues in 2009 (*Ioannou*[38] and *Alexandrou*[39]) in 2005 (*Xenides-Arestis*[40]), or in 2001 (*Cyprus* v. *Turkey*[41]), namely 35, 31, and 27 years after the commencement of the violations. Is it reasonable to speak about passage of time as a fact affecting negatively the responsibility and remedy for the violations when it relates to 36 years in one case and not when it relates to 35 or

36 Para. 83 of the Decision.

37 Judgment of the Permanent Court of International Justice, 13 September 1928, concerning the factory at Chorzów (Collection of Judgments, Series A No. 7, at 47); see also J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), 216; the *Pinheiro* principles on the right of return and of restitution of properties of displaced persons; E/CN.4/Sub.2/2005/17.

38 Application No. 18364/91, Judgment of 27 January 2009.

39 Application No. 16/62/90, Judgment of 20 January 2009.

40 *Xenides-Arestis v. Turkey*, *supra* note 17.

41 *Cyprus v. Turkey*, *supra* note 14.

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31 in other cases, or even 27 years? Account should also have been taken of the fact that one of the cases with respect to which the judgment was taken was filed in 1999 and the others in 2002 or 2004, which means that the passage of time ever since then up to 2009 was the Court's responsibility and not that of the applicants. In any event, the Court seems to have tried to introduce a principle according to which responsibility and/or remedy for violations of human rights are reduced due to passage of time with respect to continuing violations. This conflicts with the legal approach that continuing illegalities, such as continuing usurpation of properties – like the present case – continuing illegal detention, etc., cannot be subject to prescription or exculpation through lapse of time, because they call for a remedy for as long as they last. This is the correct position as a matter of law and logic – as a matter of law because of the very nature of continuing violation that amounts to a breach *de die in diem*[42] and as a matter of logic because, otherwise, it would have meant that the continuation of illegality or violation of human rights that, in reality, takes the form of new wrongs will be left without remedy and the state responsible for such wrongs will not be accountable for causing them. It is therefore difficult to understand the somewhat sarcastic statement of the Court in its decision:

> This has led to the situation that individuals claiming to own property in the north may, in theory, come to the Court periodically and indefinitely to claim loss of rents until a political solution to the Cyprus problem is reached.[43]

So long as the wrong continues, such a claim is in all respects justified: *ubi jus ibi remedium*. For a court of human rights to have a different opinion is unorthodox and unacceptable because it is expected for such a court to condemn violations of human rights as long as they last, for, otherwise, continuing violations would escape the judicial control of the court, especially if they last for a long time, and the responsible state will enjoy immunity with respect to them.

6. Misinterpretation and misapplication of the principles regarding exhaustion of domestic remedies

6.1. The *Namibia* principle

The Court, in considering the question of exhaustion of domestic remedies on the facts of the particular cases, namely whether applicants who were displaced from their homes and properties in the Turkish-occupied area of Cyprus, should resort to a commission established by 'TRNC' – which, according to the Court, is the subsidiary administration of Turkey in that area[44] – started from the premise of the so-called '*Namibia* principle'.[45] According to this principle, even if the

42 See L. G. Loucaides, 'The Concept of "Continuing" Violations of Human Rights', in P. Mahoney, F. Matscher, H. Petzold, and L. Wildhaber (eds.), *Protecting Human Rights: The European Perspective, Studies in Memory of Rolf Ryssdal* (2000), at 803 ff. and the authorities cited therein.

43 Para. 111 of the Decision.

44 *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, 23 March 1995, para. 62.

45 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276 (1970)*, [1971] ICJ Rep. 56, para. 125.

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legitimacy of the administration of a territory is not recognized by the international community:

> international law recognizes the legitimacy of certain legal arrangements and transactions in such a situation such as, for instance, the registration of births, deaths and marriages the effects of which can be ignored only to the detriment of the inhabitants of the territory.[46]

It is submitted that this principle, which was first adopted and applied by the Court for similar violations by Turkey in Cyprus in the case of *Cyprus* v. *Turkey*,[47] was wrongly considered applicable with respect to the 'remedies' provided in the occupied part of Cyprus, which was the issue both in the inter-state case and in the case under consideration. The principle accepts the recognition of certain everyday transactions that are unavoidable *ex necessitate* in the daily relations of the individuals. The opinion does not require the inhabitants of an occupied territory to resort to illegal remedies established by the de facto organs before they have a right to bring their case before an international court. As rightly observed by the dissenters in the aforesaid case, 'Episodic recognition by foreign Courts is one thing the exhaustion requirement is another'.[48] The Court repeats its misapplication of the '*Namibia* principle' in the *Demopoulos* case and finds that the applicants had to resort to the 'Compensation Commission' in the occupied part of Cyprus for their complaints.

The Court, in its decision, agreed that:

> the issue before the I.C.J was different, and that the situation in Namibia differs from that in northern Cyprus, in particular since the applicants in these cases are not living under occupation in a situation in which basic daily reality requires recognition of certain legal relationships but are rather seeking to vindicate, from another jurisdiction, their rights to property under the control of the occupying power. It nonetheless derives support from this source, and others (see Cyprus v. Turkey, §§ 89–102, for the Grand Chamber's previous treatment of this question) for its view that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention.[49]

It is submitted that the effort of the Court to justify the application of the *Namibia* principle to the requirement of exhaustion of domestic remedies for the purposes of the European Court of Human rights remains unconvincing. The Court did not have due regard to the specific facts and circumstances of the case (optional resort to the organs of an illegal regime of military occupation, plus an unchanged general policy of denying the return of the displaced applicants for 36 years,[50] plus no

46 Para. 93 of the Decision; ibid.
47 *Cyprus v. Turkey*, *supra* note 14.
48 See the article of this author, 'The Judgment of the European Court of Human Rights in the Case of Cyprus v. Turkey', (2002) 15 LJIL 1, at 225.
49 Para. 94 of the Decision.
50 The refusal by Turkey to allow displaced applicants to return to their homes as found by the Court in the case of *Cyprus v. Turkey* still continues.

effective remedy for such return,[51] plus ethnic discrimination,[52] etc.[53]). Moreover, it is difficult to reconcile the application of the *Namibia* principle – especially in view of the breadth given to it by the Court – with respect to the cases under consideration, with the principle adopted by the jurisprudence of the Court according to which the Rule of Law is a principle that is 'inherent in every Article of the Convention'.[54]

6.2. The degrading effect of applying to the Commission

In its erroneous effort to sustain the aforesaid remedy, the Court fails convincingly to answer the argument of the applicants that, being the victims of occupation in their own country, they should not be expected to go to the occupying authorities to ask for a remedy for the evils caused by such occupation. Their feelings of dignity and love for their country will be deeply wounded. It would be degrading and unfair for these people to be forced to cross the 'border' into the militarily occupied territory and apply to the illegal occupying authorities to help them solve their problems, created by the occupation.

The Court answers this as follows:

> It acknowledges the strength of feeling expressed by some of the applicants. However, the argument that it would be galling to have recourse to authorities in northern Cyprus cannot be given decisive weight – against the background of conflict and hostility, similar argument might be raised in respect of any official body or authority on the Turkish mainland, or indeed *by any victim of a violation who is faced with the prospect of asking for redress from a State which has been responsible for the injury suffered*. The fact that applicants live outside the occupied area furnishes no reason in principle why they should not be expected to apply to a 'TRNC' body where it can be demonstrated that a remedy is both practicable and normally functioning . . .. Borders, factual or legal, are not an obstacle per se to the exhaustion of domestic remedies; *as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding.*[55]

The Court is again relying on an erroneous comparison, equating the case of appeals to official bodies of a state where there is rule of law with the case of appeals to authorities of an illegal occupying military regime. It wrongly considers that crossing a military line dividing the territory of a victim's country into two areas (one where the rule of law prevails and another where the military occupation, its

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51 Even the Commission of Compensation, established in the occupied part of Cyprus and the subject of the *Demopoulos* case, does not provide for a restoration of the right of displaced persons to return to their homes and properties.

52 Only those inhabitants who are Greek-Cypriots in the occupied part of Cyprus are not allowed to return thereto and were the victims of mass violations ever since the Turkish invasion in 1974 (see the report of the European Commission of Human Rights in Application Nos. 6780/74 and 6950/75, at 167: 'the acts violating the Convention were exclusively directed against members of one of the two communities in Cyprus, namely the Greek-Cypriot community.'

53 See, e.g., the findings about inhuman treatment of the relatives of the Greek-Cypriot missing persons in the case of *Cyprus v. Turkey*, *supra* note 14, paras. 157–158.

54 See *Amuur v. France*, Application No. 19776/92, 25 June 1996, Reports of Judgments and Decisions (Reports) (1996/III) and *Engel v. The Netherlands*, Series A No. 22, where the Court observed that the wide interpretation supported by the government 'would entail consequences incompatible with the notion of the Rule of Law from which the whole Convention draws its whole inspiration'.

55 *Cyprus v. Turkey*, *supra* note 14, para. 98 (emphasis added).

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policies, and consequent violations against the victim and other victims of the same national origin prevail) is no different from and equally acceptable to the crossing of normal borders of a country in order to approach authorities where the rule of law applies. It is submitted that a militarily controlled regime cannot, by definition, offer effective remedies for violations of human rights by the military activities of the army in control of the regime for the simple reason that this army does not allow objective and independent judicial control of such activities in an area occupied by it. Again, the dissenting opinion in the case of *Cyprus* v. *Turkey*[56] states convincingly that:

> To require those subject to the exigencies of an occupying authority to have recourse to the courts as a precondition to having their complaints of human-rights violations examined by this Court is surely an unrealistic proposition given the obvious and justifiable lack of confidence in such a system of administration of justice . . .. Is it a credible proposition that there exists a haven of juridical relief ready and able to defend the rights of this beleaguered population notwithstanding the existence of an official policy of containment and oppression?[57]

It is submitted that a militarily controlled regime can in no way be equated with the exercise of *de jure* jurisdiction by a state where the conduct of the authorities can be effectively controlled by democratic institutions and an independent and effective judiciary.

In the circumstances of the cases under consideration, the principle is applicable according to which there is no obligation to have recourse to domestic remedies that are inadequate or ineffective or, because of special circumstances, the applicants are absolved from the obligation to exhaust such remedies (see the authorities set out in para. 70 of the *Demopoulos* case).[58]

6.3. Unfounded statements and findings

The persistent effort of the Court to give standing to the commission proposed by Turkey and find that the applicants should first exhaust the 'remedies' provided by the 'law' of the occupying state with respect to this commission – in spite of the fact that the applicants filed their recourses long before its establishment – is contrary to principle and has led the Court to commit serious errors in its reasoning. For instance, one of the arguments of the applicants was that complaints of discrimination contrary to Article 14 of the Convention with respect to the exercise of their rights to their homes and properties were not covered by the proposed

56 *Cyprus v. Turkey, supra* note 14.

57 *Cyprus v. Turkey, supra* note 14, para. 98.

58 Another matter that was thoroughly argued by the applicants against the proposition of exhausting the remedies proposed by Turkey was that the procedure of exhausting those remedies would have been unduly prolonged, taking into account the long time that had elapsed since the lodging of their applications before the Court and the time required to spend on the examination of their case by the proposed Commission in the occupied area plus the proceedings before the Administrative Court in the same area. Yet, the Court gave no due consideration to the matter (cf. the Judgment in the Southern African Development Community SADC (T), Case No.2/2007, where the tribunal, basing itself on the African Charter on Human and People's Rights, found that no exhaustion of legal remedies was required because 'the procedure of achieving the remedies would have been unduly prolonged').

remedies of the commission in the Turkish-occupied part of Cyprus. In answer to that, the Court stated the following:

> The Court would observe that it has so far not found any separate breach arising under Article 14 of the Convention in previous cases concerning property in northern Cyprus (see, amongst others, Cyprus v. Turkey, cited above, § 199, Xenides-Arestis, judgment on the merits cited above, § 36, Ioannou v. Turkey, no. 18364/91, 27 January 2009, § 43).
>
> . . .
>
> Further, having regard to the facts of the cases, the submissions of the parties *and its findings under Article 1 of Protocol No. 1 and Article 8 of the Convention*, the Court considers that no further issue arises for examination concerning the remaining complaints made by the applicants.[59]

It is correct that in the previous cases mentioned by the Court in this part of the decision, no separate breach arising under Article 14 was found, but this was because, in all these cases, that was linked with the fact that the Court found in those cases violations of the provisions of Article 8 of the Convention and Article 1 of Protocol No. 1. The following passage from the case of *Xenides-Arestis* illustrates the point:

> The Court notes that in the above-mentioned Cyprus v. Turkey case it found that, in the circumstances of that case, the Cypriot Government's complaints under Article 14 amounted in effect to the same complaints, albeit seen from a different angle, as those considered in relation to Article 8 of the Convention and Article 1 of Protocol No. 1. Since it had found violations of those provisions, it considered that it was not necessary in that case to examine whether there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1 by virtue of the alleged discriminatory treatment of Greek Cypriots not residing in northern Cyprus as regards their rights to the peaceful enjoyment of their possessions (see Cyprus v. Turkey, cited above, § 199). The Court sees no reason in this case to depart from that approach. Bearing in mind its conclusion on the complaints under Article 8 of the Convention and Article 1 of Protocol No. 1, it finds that it is not necessary to carry out a separate examination of the complaint under Article 14 in conjunction with these provisions.[60]

In the case of Demopoulos, however, it was wrong for the Court to say that it took into account 'its findings under Article 1 of Protocol No. 1 and Article 8 of the Convention'. This is for the simple reason that the Court did not make any findings under these articles in the case. The only findings referred to the inadmissibility and not the merits of the relevant complaints.

6.4. Administrative practice

A well-established principle regarding the requirement of exhaustion of domestic remedies is that applicants are absolved from satisfying such a requirement where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the state authorities has been shown to exist,

59 Paras. 142–143 of the Decision (emphasis added).
60 *Xenides-Arestis v. Turkey, supra* note 17, para. 35.

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and is of such a nature as to make proceedings futile or ineffective.[61] One of the principal arguments of the applicants raised and explained extensively before the Court was that there was an administrative practice as part of the policy of Turkey of not restoring the properties of Greek-Cypriots to their owners and of not allowing them to return to their properties to use and control them in spite of the Court's judgments finding Turkey responsible for the relevant violations. This important argument was not given the attention it deserved by the Court. And, what is worse, the argument has not, according to the decision, been properly examined – with the result that no conclusion of the Court on this subject appears in the same decision. Something is said in paragraph 90 that is confusing and incomplete, and the matter is left at that. In that paragraph, the Court refers to the topic of administrative practice and says that:

> There is now legislation which seeks to provide a mechanism of redress and which has been interpreted so as to comply with international law, including the Convention . . . and the political climate has ameliorated, with borders to the north no longer closed. It must be open to a Government to take steps to eliminate an administrative practice.[62]

The finding that 'There is now legislation which seeks to provide a mechanism of redress and which has been interpreted to comply with international law, including the Convention' calls for strong criticism for the simple reason that this finding is no more than the rejection by the 'Constitutional Court of the TRNC' of an objection against this law in the occupied area. This appears from paragraph 38 of the decision (to which the Court refers in this respect) and what follows in paragraph 39, which reads:

> The 'TRNC' Constitutional Court rejected these applications. It had regard to international conventions and treaties concerning human rights and the elimination of discrimination as well as texts and agreements under international law concerning property in occupied areas and judgments of this Court, in particular what was said about the scope of any effective remedy for property complaints in the judgment on admissibility in Xenides-Arestis v. Turkey ((dec.) no. 46347/99, 14 March 2005). It considered that it should interpret the Constitution in a manner such as to reconcile it with international law and held that it was not contrary to the Constitution for restitution of possession to be made and compensation to be paid to Greek-Cypriot right owners.[63]

It is submitted that the least one can say for this approach of the Court is that, as a matter of legal and prudent thinking, the Court is not expected to rely on what an organ of an illegal military regime – driven by temporary expediencies[64] – says

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61 See the *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978, Series A No. 25, at 64, para. 159, and the report of the Commission in the same case, Series B No. 23-I, at 394–7, adopted also in the *Demopoulos* case in para. 70.

62 Para. 90 of the Decision.

63 Para. 39 of the Decision.

64 In particular, by the necessity to facilitate the objectives of the occupant country to get the approval of the Court for the 'remedy' established in the occupied part of Cyprus in order to avoid the pressing control of the Court, even though the relevant 'law' providing the 'remedy' was plainly contrary to Art. 159 of the 'TRNC' Constitution, which provided as follows:

'All immovable properties, buildings and installations which were found abandoned on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned

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to justify the validity of the 'laws' of that regime. The question of whether the mechanism of redress complied 'with international law, including the Convention' had to be decided by the Court itself and not 'the Constitutional Court of TRNC'. But the Court failed to do so. Moreover, it is difficult to understand in what way the opening of 'borders' to the north changed the administrative practice in question so long as that was not accompanied by allowing the displaced Greek-Cypriots not just to visit the occupied area, but also to get control of their properties in the same area. The amelioration of the political climate is an abstract approach that has nothing to do with the administrative practice because the military occupation of Turkey remained unchanged and continued to prevent the applicants from enjoying their property. Therefore, there appears to be nothing to show that the administrative practices to which the applicants referred have disappeared and the Court did not say anything about those particular policies. The Court stated that, in the inter-state case, the Commission had expressly found administrative practices 'as regards the acknowledged public policy not to allow the entry of Greek Cypriots into northern Cyprus'[65] and the legislation and practice vis-à-vis interferences with property rights (Section 90).

In actual fact, the Commission, in its Report, stated specifically:

> that the prevention of the physical possibility *of the return of Greek Cypriot refugees to their homes in the north of Cyprus* amounts to an infringement, imputable to Turkey, of their right to respect of their homes which could not be justified under any ground under paragraph 2 of Article 8.[66]

The Court in the *Demopoulos* case then made the incorrect statement that the Grand Chamber, in its *Cyprus* v. *Turkey* judgment, 'put weight on the non existence of effective redress due to the applicable legislation and to prevailing official attitudes and policies'.[67]

In this respect, the Court overlooked its finding in paragraph 171 in the same judgment, according to which:

> The Court notes that in the proceedings before the Commission the respondent Government did not dispute the applicant Government's assertion that it was not possible for displaced Greek Cypriots to return to their homes in the north. It was their contention that this situation would remain unchanged pending agreement on an overall political solution to the Cypriot question. In these circumstances the Court, like the Commission, considers that the issue of whether the aggrieved persons could have been expected to avail themselves of domestic remedies in the 'TRNC' does not arise.[68]

The Court in the *Demopoulos* case, basing itself on its above incorrect and incomplete statements in the judgment, continued 'That situation has changed' (Section 90).

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or ownerless after the above-mentioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined . . . and . . . situated within the boundaries of the TRNC on 15 November 1983, shall be the property of the "TRNC" notwithstanding the fact that they are not so registered in the books of the Land Registry Office; and the Land Registry Office shall be amended accordingly.'

65 *Cyprus v. Turkey*, *supra* note 14, paras. 264–265.

66 Report of the Commission in Application No. 25781/94, *supra* note 31, para. 265 (emphasis added).

67 Para. 90 of the Decision, section 90.

68 *Cyprus v. Turkey*, *supra* note 14, para. 171.

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This conclusion amounts to treating the administrative practice as if it was limited to a general contention that the practice consisted only of the policy of not allowing 'the entry of Greek Cypriots into northern Cyprus'.[69] But, in actual fact, the administrative practices, about which the applicants complained and the Commission and the Court found, consisted of the refusal of the Turkish authorities to allow Greek-Cypriot owners of properties in the occupied area to return to their properties as a matter of policy.[70] *And this practice has not changed.* What changed was that Greek-Cypriots have, since April 2003, been permitted by the Turkish army and 'TRNC' police to go through 'crossing points' across the buffer zone to visit the 'TRNC' – in other words, the occupied area. But, to this day, Greek-Cypriots are not permitted by the 'TRNC' laws (analysed by the Commission and Court in *Cyprus* v. *Turkey*) *to return to their homes.* It is the refusal to allow Greek-Cypriots to return to their homes that led the Court in the *Cyprus* v. *Turkey* case to come to the conclusion that 'In these circumstances the Court, like the Commission, considers that the issue of whether the aggrieved persons could have been expected to avail themselves of domestic remedies in the "TRNC" does not arise'.[71]

So long as the situation remained the same, without the slightest sign – to the knowledge of the Court or anybody else – of a possible actual change of the relevant policy in the future, it is difficult to see why the Court departed from this position.

6.5. Independence and impartiality safeguarded in the occupied area

Further damage to the cause of human rights is inflicted by the conclusion of the Court in accordance with which the commission proposed by Turkey as a remedy and even the judiciary in the occupied part of Cyprus should be considered as independent and impartial in spite of the illegal nature of the regime in that area, in spite of 'the on going presence of Turkish military personnel or the appointments of the members of the Commission by the "TRNC"',[72] and in spite of the established policy of the occupying power's illegally taking the properties of the displaced Greek-Cypriots and discriminating against them. The Court made no serious attempt to deal with these major objections. The relevant part of the decision reads:

> The Court notes that the IPC is made up of five to seven members, two of whom are independent international members and that similar rules apply as to senior members of the judiciary in the 'TRNC' *vis-à-vis* appointment and termination, and conditions of employment. Persons who occupy Greek-Cypriot property are expressly excluded. While the applicants and intervening Government asserted that no-one in the north could claim to be unaffected by the widespread problem, this general allegation is insufficient to cast doubt on the composition. Nor is it persuaded that the illegal nature of the regime under international law and the ongoing presence of Turkish military personnel or the appointment of members of the Commission by the 'TRNC' President removes any objective impartiality or independence from the IPC in carrying out the functions imposed upon it under Law 67/2005. No specific, and substantiated, grounds

69 Report of the Commission, *supra* note 52, paras. 264–265.

70 *Cyprus v. Turkey*, *supra* note 14, paras. 171, 177, 282, 292, 293, and 296 of the judgment in the case of *Cyprus v. Turkey* to which the Court referred and paras. 264–265 of the relevant Report of the Commission.

71 *Cyprus v. Turkey*, *supra* note 14, paras. 171 and 293.

72 Para. 120 of the Decision.

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> concerning any lack of subjective impartiality of members of the IPC have been put forward.[73]

The Court fails to take into account: (i) that 'the independent international members' are retired officers of the Council of Europe who work on a contractual basis with the authorities of Turkey without any security of tenure; (ii) that the majority of the members of the Commission in question are Turkish-Cypriots or Turks living in a regime of a militarily controlled area; (iii) that the organs of the regime, whether they are administrative, legislative, or judicial, whatever their conditions of employment on paper, cannot, by definition, enjoy impartiality and independence – especially in respect of the subject matter at issue – bearing also in mind the policy followed by the masters of the regime, namely Turkey, of not allowing Greek-Cypriots, such as the applicants, to even live in area where their properties are situated; (iv) that the illegality of the regime deprives *ipso facto* the Commission of the guarantees of the rule of law[74] such as judicial impartiality and independence.

Again, the pertinent words of the dissenters in the case of *Cyprus* v. *Turkey* should be reiterated:

> To require those subject to the exigencies of an occupying authority to have recourse to the courts as a precondition to having their complaints of human-rights violations examined by this Court is surely an unrealistic proposition given the obvious and justifiable lack of confidence in such a system of administration of justice . . .. Is it a credible proposition that there exists a haven of juridical relief ready and able to defend the rights of this beleaguered population notwithstanding the existence of an official policy of containment and oppression?[75]

7. Compliance with principles of international law

The Court in the past has always applied the Convention in line with the principles of international law. On many occasions, the Court stressed the view that the Convention should as far as possible be interpreted in line with other rules of international law and used principles and concepts of international law to solve problems before it.

In the *Golder* case,[76] the Court had recourse to Article 31 of the Vienna Convention on the Law of Treaties in order to interpret Article 6 of the Convention.

In the *Soering* case,[77] the Court sought to interpret the scope of Article 2 of the Convention by reference to other international practice of state parties to the Convention with respect to such instruments.

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73 Ibid.

74 Which is inherent in every Article of the Convention and from which the whole Convention draws its whole inspiration: *Amuur v. France*, *supra* note 54, and *Engel v. The Netherlands*, *supra* note 54.

75 *Cyprus v. Turkey*, *supra* note 14, at 101: partly dissenting opinion of Judge Palm joined by Judges Jungwiert, Levits, Pantiru, Kovler, and Marcus-Helmons, at 102–4.

76 ECHR (Ser. A No. 28), paras. 31 ff. See also the case of *Johnston and Others v. Ireland*, Application No. 9697/82, para. 1.

77 ECHR (Ser. A No. 161), para. 51.

In the case of *Al-Adsani* v. *United Kingdom*,[78] the Court stated that the Convention should, so far as possible, be interpreted in harmony with other rules of international law of which it forms part, including those relating to state immunity.

In the case of *Mamakulov and Askarov* v. *Turkey*,[79] the Court relied on international law to solve questions raised before it.

The special character of the Convention does, of course, affect the interpretation of its norms. Cohen-Jonathan points out that the Court refers to the general principles of international law whenever that is useful for the proper functioning of the European system or sometimes for its enrichment on condition that such reference should not be incompatible with the specificity and autonomy of the Convention.[80] In interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms.[81]

In view of the special nature and objectives of the Convention, the Court, on occasions, departs from the general principles of international law, including those set out in the Vienna Convention, so as to satisfy the requirements of its substantive human-rights guarantees. This has been proved, for example, in the case of *Belilos*[82] and in *Loizidou*,[83] in which the Court did not apply the rules of the Vienna Convention as regards the reservations to treaty provisions that were considered by the Court as inappropriate with regard to the Convention.

The respect shown by the Court to the principles of international law has reached the point of allowing these principles to control the exercise of certain rights under the Convention, such as the right of access to the Court – a situation that is illustrated by the cases of *Al-Adsani* v. *United Kingdom*,[84] *McElhinney* v. *Ireland*,[85] and *Fogarty* v. *United Kingdom*.[86]

In any event, it is submitted that it would be unacceptable for the Court to disregard principles of international law that safeguard human rights set out in the Convention and further the objectives of the Convention either in the form of supplementary norms or as aids to a progressive interpretation of the Convention, enhancing or enriching the protection of the individual against the state.[87]

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78 ECHR, Application No. 35763/97, para. 55.

79 Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005.

80 M. Cohen-Jonathan, 'Le rôle des principes généraux dans l'interpretation et l'application de la Convention Européenne de droits de l'homme', in L. E. Pettiti (ed.), *Mélanges en hommage à Louis Edmond Pettiti* (1998), 167.

81 *Ireland v.United Kingdom*, Judgment of 13 May 1980, Series A No. 37, at 16, para. 33.

82 A 132 (1988); 10 EHRR 466.

83 *Loizidou v. Turkey*, *supra* note 12.

84 *ECHR*, *Application No. 35763/97*, *supra* note 78.

85 Application No. 31253/96, 21 November 2001.

86 Application No. 37112/97.

87 See inter alia *Demir and Baykara v. Turkey*, Application No. 34503/97, Judgment of 12 November 2008, where it was stated that 'it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights'. See also case of *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, Judgment of 6 July 2010, where it was stated: 'The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken of any relevant rules of international law applicable in the relations between the parties,

Yet, it is submitted that such principles were in fact disregarded by the Court in the *Demopoulos* case and the relevant decision is, in many respects, contrary to the strict legal approach and character of a legal judgment in applying the Convention in line with its objectives.

8. The non-solution of the 'problem' and breaches of international law

One who knows the real facts – and the Court was in a position to know them from its previous relevant judgments – would wonder what is the responsibility of the Greek-Cypriot applicants – displaced by the Turkish forces, and not allowed to go back to their homes and properties because of the Turkish policy – for the non-solution of their problem and for the resulting protracted situation, which should, as a matter of principle, amount to an aggravating circumstance rather than a mitigating factor affecting the responsibility and remedy for the relevant violations.

At this point, the following passage from the decision quoted above not only shows how political is the approach of the Court, but also how much it fails to take into account basic breaches of international law. The Court stated the decision, inter alia:

> In the present applications, some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance.[88]

This text fails to take into account facts that, according to international law, amount to serious illegalities – some of them, such as the implantation of Turkish settlers on private properties seized by Turkey from the lawful Greek-Cypriot owners, being war crimes or crimes against humanity.[89] Yet, these are treated by the Court as factors

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> . . . in particular the rules concerning the international protection of human rights . . .. The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see the numerous references in paragraphs 49–56 above, and in particular Article 24 § 2 of the European Union's Charter of Fundamental Rights). As indicated, for example, in the Charter, "[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests".'

88 Para. 84 of the Decision.

89 'Occupied territories' are subject to special rules of international law, which are set out in particular in the Hague Regulations and in the Geneva Conventions of 1949, as supplemented by the Additional Protocols 1 and 2 of 1977. These Conventions in their greater part, including that which is set out herein below, reflect both general principles of international law and rules of general customary law (see inter alia T. Meron, *Human Rights and Humanitarian Norms, as Customary Law* (1989), 45) and are applicable not only in cases of occupation as a consequence of war, but also in cases of occupation as a result of any military operations, which include even those that are carried out by states in accordance with the UN Charter (see inter alia J. G. Starke, *An Introduction to International Law* (1972), 495, at 517–18). Art. 49 of the Geneva Convention adopted on 12 August 1949 (the Convention has been signed by Turkey) provides, in para. 6: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their

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mitigating the seriousness of the massive and continuing violations of the human rights of the applicants, which (violations) were the legal issue before the Court as regards the effectiveness of the remedy offered by Turkey.

In this context, it is useful to point out that Turkey did not claim that any of her acts in the occupied part of Cyprus were justified under the exceptions allowed by the international law regarding occupied territories. On the contrary, it did not admit that it is an occupying country and, in the case of *Cyprus* v. *Turkey* (referred to above), did not even appear before the Court to make any statement, exhibiting thus an exceptional contempt for the Court proceedings and an unprecedented arrogance on which the Court failed to make any comment.

In any event, the above-quoted passage of the decision considered as a whole is also in direct contradiction to the elementary principle of international law *ex injuria jus non oritur*.[90] This conclusion becomes even more evident from other statements and findings of the Court, such as the following:

> It must be recognized that with the passage of time the holding of a title may be emptied of any practical consequences (§111) . . .. Yet it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes[91] . . .. The Court can only conclude that the attenuation over time of the link between the holding of title and the possession and use of the property in question must have consequences on the nature of the redress that can be regarded as fulfilling the requirements of Article 35 § 1 of the Convention[92] . . .. The applicants argued that this would allow Turkey to benefit from her illegality. The Court would answer that, from a Convention perspective, property is a material commodity which can be valued and compensated for in monetary terms. If compensation is paid in accordance with the Court's case-law, there is in general no unfair balance between the parties. Similarly, it considers that an exchange of property may be regarded as an acceptable form of redress.[93]

In the above passages, the contradiction between the approach of the Court and well-established principles of international law is obvious. The Court completely disregards the fact that the factors for which it finds that title holders (owners)

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motive . . .. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. According to the First Protocol to that Convention breach of such obligation amounts to a war crime. This provision appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary.' 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,' is also considered a crime against humanity under the Statute of the International Criminal Court: Article 8(2)(b)(viii). Seizing the enemy's property (unless such seizure be imperatively demanded by the necessities of war) is again a war crime under the same statute. Settlers may address their claims for any violations of their rights to Turkey who has been responsible for their transfer to the occupied part of Cyprus. They cannot have any complaints against the Republic of Cyprus so long as they were never accepted or tolerated by the latter in its territory. If it were otherwise, the prohibition of settlers would have been undermined because occupant countries would have been confident that after the passage of some time, the settlements would be condoned on humanitarian or human rights grounds.

90 See inter alia M. N. Shaw, *International Law* (2008), 104.

91 Para. 112 of the Decision.

92 Para. 113 of the Decision.

93 Para. 115 of the Decision.

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suffered an acceptable loss (such as passage of time or interferences by third persons, etc.) are the direct consequences of an illegal military occupation. International law gives no legal recognition to such factors, nor does any principle or Convention in the field of human rights accept that such factors can be lawful impediments to or restrictions on the titles in question. If it were otherwise, an occupied territory would become a legal paradise for violations of human rights, particularly the right to property and the respect for the homes of its inhabitants. It is true that the Court has established the application of the Convention in such territory occupied by a Convention party but, with the decision in the *Demopoulos* case, it reduced the protection of human rights in the same territory; in other words, it diminished the security that it itself has very correctly extended.

The strange thing is that the Court itself seems to accept the contradiction of its findings with international law and tries to justify its approach in a way that, it is submitted, any reader conversant with human rights and their objectives would not accept. The following is the Court's position:

> It is correct, as the applicants and intervening Government asserted, that the Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (Al-Adsani v. United Kingdom, [GC], no. 35763/97, § 60, ECHR 2001-XI); however, the Court must also have regard to its special character as a human rights treaty (amongst many authorities, Banković and Others v. Belgium and 16 Other Contracting States (dec.), [GC], no. 52207/99, § 57, ECHR 2001-XII). The Convention system deals, overwhelmingly, with individual applications. The present applications are cases about interferences with individual property rights, and the availability of redress therefor – *they cannot be used as a vehicle for the vindication of sovereign rights or findings of breaches of international law between Contracting States.*[94]

In any event, the political and erroneous approach of the Court expressed in the last sentence of the Court's decision quoted above proceeds on the unfounded assumption that the victims of the violations regarding their property were seeking redress as a vehicle for the vindication of sovereign rights or findings of breaches of international law between contracting states while, in reality, they were only concerned with the loss of their properties. Wrong assumptions are also found in other parts of the decision, such as the part that follows the above passage and runs as follows:

> The Court must also remark that some thirty-five years after the applicants, or their predecessors in title, *left their property*, it would risk being arbitrary and injudicious for it to attempt to impose an obligation on the respondent State to effect restitution in all cases, or even in all cases save those in which there is material impossibility, a suggested condition put forward by the applicants and intervening Government which discounts all *legal* and practical difficulties barring the permanent loss or destruction of the property. It cannot agree that the respondent State should be prohibited from taking into account other considerations, in particular the position of third parties. It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the *forcible eviction* and rehousing of potentially large numbers of men, women and

94 Ibid. (emphasis added).

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> children even with the aim of vindicating the rights of victims of violations of the Convention.[95]

Again, the Court seems to proceed as if there is no illegal occupation in the area where the violations of the right to property of the applicants took place and as if the applicants left their property willingly while, in actual fact – as the Court itself found inter alia in the case *Cyprus* v. *Turkey*[96] – the applicants, like many other Greek-Cypriots, were forced to leave their homes as a result of the Turkish military invasion and occupation and Turkey has continued to refuse to allow them to return to their homes. Furthermore, the Court refers to legal problems in effecting restitution in all cases, even though restitution is the established correct remedy in international law[97] and is necessary for the effective protection of human rights – applicable a fortiori to properties in occupied territories with respect to which the occupying state can give no rights and no third parties can acquire bona fide rights.[98]

9. *RESTITUTIO IN INTEGRUM* AND 'FORCIBLE EVICTION'

Furthermore, there is a wrong assumption by the Court that, by finding that there should be a *restitutio in integrum*, as dictated by international law, this would result in a forcible eviction of the present occupants of properties. Confirming a right of return of properties to the lawful owners does not, in law or in fact, entail a forcible eviction of the occupants. This is apparent from the principles evolved in international law under the auspices of the United Nations as expressed in the Pinheiro Code,[99] which provides that:

> All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence in safety and dignity . . .. States should ensure that secondary occupants[100] *are protected against arbitrary or unlawful forced eviction.* States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, *that evictions are carried out in a manner that is compatible with international human rights law*

95 Para. 116 of the Decision (emphasis added).

96 *Cyprus v. Turkey*, *supra* note 14; see also the reports of the ECHR in the inter-state cases of *Cyprus v. Turkey* in Application Nos. 6780/74, 6950/75, and 8007/77.

97 This does not appear to be disputed by the Court. In any event, in support of this principle, see the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case, PCIJ Rep., (1928) Series A No. 17, at 47–8, where it was held that 'the essential principle is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed'; see also *Democratic Republic of the Congo v. Belgium*, Judgment of February 14 2002, [2002] ICJ Rep. 3; and P. Daillier and A. Pellet, *Droit international public* (1999), para. 495; see also L. G. Loucaides, 'Reparations for Violations of Human Rights under the European Convention and Restitution in Integrum', (2008) 2 *European Human Rights Law Review* 182 ff.

98 See Art. 46 of the Hague Regulations, with respect to which L. Oppenheim, *International Law: Disputes, War and Neutrality*, Vol. II (1952), 403, at 619, states the following: 'Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property . . . if the occupant has appropriated and sold such private or public property as may not legitimately be appropriated by a military occupant, it may afterwards be claimed from the purchaser without payment of compensation.'

99 Document E/CN.4/Sub.2/2005/17.

100 Document E/CN.4/Sub.2/2005/17/Add.1, 11 July 2005, para. 63: 'Secondary occupants are persons who take up residence in a home after the home's rightful occupants have fled due to, inter alia, forced displacement, forced eviction, violence or threat of violence, or natural or human-made disasters.'

> *and standards, such as secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.*[101] States should ensure that the safeguards of due process extended to secondary occupants *do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.*[102]

Even more interesting is what the Court itself said in the case of *Doğan and Others* v. *Turkey*.[103] This was a case in which the applicants were several villagers living in Turkey who complained that they had been evicted or forced to flee from their homes and to leave their villages[104] as a result of violent confrontations between the Turkish Security Forces and members of the PKK; they had also been denied access to their possessions since 1994. The Court found a violation of their right of respect to their homes under Article 8 of the Convention and a breach of their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 to the Convention. As regards the displacement of the applicants, the Court stated:

> the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (see in this respect principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement, E/ CN.4/1998/53/Add.2 dated 11 February 1998).[105]

10. *RESTITUTIO* IN THE FORMER COMMUNIST COUNTRIES

To justify its position of rejecting the general application of *restitutio in integrum* in the case of the properties of displaced Greek-Cypriots in Cyprus – a remedy that was not properly covered by the 'law' establishing the proposed commission in the occupied area[106] – the Court makes an effort to refer to 'the restitution laws implemented to mitigate the consequences of mass infringements of property rights caused by communist regimes'.[107] According to the decision, these laws:

> may have been found to pursue a legitimate aim [but] it is still necessary to ensure that the redress applied to those old injuries does not create disproportionate new wrongs. To that end, the legislation should make it possible to take into account the particular circumstances of each case.[108]

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101 Document E/CN.4/Sub.2/2005/17, *supra* note 99, para. 17.1 (emphasis added).
102 Ibid., para. 17.2 (emphasis added).
103 *Doğan and Others v. Turkey*, Judgment of 29 June 2004, ECHR (2004/VI).
104 The case resembles in substance those of the applicants in the *Demopoulos* case.
105 *Doğan and Others v. Turkey, supra* note 103, para. 154.
106 The relevant text of the 'TRNC law' on this subject is as follows: '8. (1) Immovable properties that are subject to a claim for restitution by the applicant, ownership or use of which has not been transferred to any natural or legal person other than the state, may be restituted by the judgment of the Commission within a reasonable time period, provided that the restitution of such property, having regard to the location, and the physical condition of the property, shall not endanger *national security and public order and that such property is not allocated for public interest reasons and that the immovable property is outside the military areas or military installations*' (emphasis added).
107 Para. 117 of the Decision.
108 Ibid.

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The comparison is erroneous for the simple reason that the interferences with property in the former communist regimes were the result of acts of internationally recognized lawful states, even though these were administered by undemocratic governments. In the case of the displaced Greek-Cypriots, the interferences were arbitrary acts of an occupying country in the occupied territory, trying to establish a state not recognized by any country other than the occupant. Such interferences amounted also to racial discrimination. What is more is that, in the case of the displaced Greek-Cypriots, the interferences were by a party to the European Convention and such interferences were continued for 36 years – even after findings by the judicial organs of the Council of Europe that they amounted to continuing violations of the Convention. In the case of the former communist regimes, the interferences were instantaneous acts by lawful authorities, they took place at a time at which the states concerned were not parties to the Convention, and they were not found to be continuing illegalities.

11. The factor of passage of time

11.1. As regards the remedy concerning properties

In dealing with the adequacy of the relevant domestic remedy regarding breaches of the right to respect for the property, the Court held the view that, with the passage of time, 'the holding of a title may be emptied of any practical consequences'[109] and that:

> The Court can only conclude that the attenuation over time of the link between the holding of title and the possession and use of the property in question must have consequences on the nature of the redress that can be regarded as fulfilling the requirements of Article 35 § 1 of the Convention.[110]

This is equivalent to saying that if you are unlucky enough to be prevented from using your title of property for a long time as a result of the military forces of the country that occupies the territory in which your property is situated, then you are not entitled to the normal rights of an owner and negative consequences on the nature of the redress for the interference with your property are inevitable. In other words, a person has less protection under the Convention against interferences with his property because of an occupation than with respect to interferences in a state where the rule of law applies and judicial remedies exist. It is a remarkable feature of this decision of a human-rights court that it accepts that an occupying state can get away with just about any violation of the right to property simply by maintaining the occupation and the consequent violation for long enough. In this respect, it is useful to recall and apply *mutatis mutandis* the logic of the prescription of a right by the lapse of time (*longi temporis praescriptio*), which presupposes that the person entitled to the relevant right was all along in a position to exercise it but neglected to

109 Section 111.
110 Section 113.

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do so. This does not apply to those persons like the applicants who were prevented by force from exercising their right of ownership.

Yet, once again, we find the Court underestimating the unlawfulness of the continuing military occupation that is responsible for the deprivation of the use and enjoyment by the applicants of their properties. And, although, in the next paragraph of its decision, the Court refers to this illegality, it continues thereafter to neutralize its effects as follows:

> This is not to say that the applicants in these cases have lost their ownership in any formal sense; the Court would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power. Yet it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.[111]

Nobody expected the Court to 'directly order' any government to do anything. The Convention does not give such power to the Court. But the Court certainly has the power to declare that certain acts or omissions of a state amount to violations of the Convention and afford just satisfaction to the injured party if no reparation is made (Art. 41). And, in fact, it has in the past found that the refusal to allow *the return* of any Greek-Cypriot displaced persons *to their homes* and the refusal to allow *access and control, use and enjoyment of their property* (in the same occupied area) were continuing violations of Articles 8 and 1 of Protocol No. 1, respectively: judgment in the *Cyprus* v. *Turkey* case, 10 May 2001. It is difficult to reconcile these findings with the expressed impossibility of the Court doing the same now or in the future so long as the situation remains the same and even more aggravated because of the passage of time.

As to the qualification of the Court concerning the persons that may now be living in the property of the applicants or that such properties may be 'in a militarily sensitive zone or used for vital public purposes', it is submitted that the Court wrongly (i) makes allowances for persons living on the properties of the applicants, granted that all those persons who do use the properties in question without the consent of the lawful owners are trespassers, let alone the settlers whose stay amounts also to international crime, and (ii) relies on exceptions of the rule that the occupant cannot seize private property, although, as already stated above, Turkey, the occupant country, has never admitted that it is occupying any part of Cyprus and, for that matter, has not invoked any rights of an occupant country with respect to private properties in the northern part of Cyprus over which it exercises military control. In any event, an occupant country cannot confiscate any private property under any circumstances.[112] Therefore, the invocation by the Court of the exceptions in question regarding 'military sensitive zone' and 'vital public purposes' has no legal basis.

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111 Para. 112 of the Decision.

112 Art. 46 of the Hague Regulations.

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In any event, by its overly broad qualification, the Human Rights Court is in fact unwillingly encouraging and supporting the confiscation and use of private properties by occupying countries for the purposes of their illegal occupation. This nullifies the expected protection of human rights under the Convention.

11.2. As regards the right to respect for the home

The Court found that there was no remedy through the proposed commission in the occupied part of Cyprus as regards the complaint of an applicant that she has been denied access to her home in the north. Therefore, the Court decided to examine the substance of this applicant's complaint. The applicant lived in the home owned by her father until the age of two and she claimed that this property was still regarded strongly as a family home some 35 years later. In the meantime, the Turkish army refused to allow her and her family to return to that home. The Court rejected the applicant's complaint as manifestly ill-founded for the following reasons, set out in the decision:

> it is not enough for an applicant to claim that a particular place or property is a 'home'; he or she must show that they enjoy concrete and persisting links with the property concerned (see *e.g. Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109). The nature of the ongoing or recent occupation of a particular property is usually the most significant element in the determination of the existence of a 'home' in cases before the Court. However, where 'home' is claimed in respect of property in which there has never been any, or hardly any, occupation by the applicant or where there has been no occupation for some considerable time, it may be that the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8 (see, for example, *Andreou Papi v. Turkey*, no. 16094/90, § 54, 22 September 2009). Furthermore, while an applicant does not necessarily have to be the owner of the 'home' for the purposes of Article 8, it may nonetheless be relevant in such cases of claims to 'homes' from the past that he or she can make no claim to any legal rights of occupation *or that such time has elapsed that there can be no realistic expectation of taking up, or resuming, occupation in the absence of such right*s (see, *mutatis mutandis*, *Vrahimi v. Turkey*, no. 16078/90, § 60, 22 September 2009, where the applicant had never had any 'possession' in the property which had been owned by a company). Nor can the term 'home' be interpreted as synonymous with the notion of 'family roots', which is a vague and emotive concept (*e.g. Loizidou*, judgment on the merits cited above, § 66).
>
> 1. Turning to the facts of this case, the Court recalls that the second applicant was very young at the time she ceased to live in the then family home in 1974, which was some fifteen years before the Court's temporal jurisdiction commenced and some twenty-eight years before the date of introduction of her application. For almost her entire life, the applicant has been living with her family elsewhere.[113]

In sum, the reasoning of the Court amounts to saying that, although someone does not have to own a house to claim that he/she lost a 'home', it is necessary to show that he/she has concrete and persisting links with the property concerned and, in cases in which there has never been any, or hardly any, occupation by the applicant or no occupation for some considerable time, the links to that property may be so attenuated as to cease to substantiate a right to home. *And if he/she had no legal right*

113 Paras. 136–137 of the Decision.

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of occupation, he/she may lose the right for home if 'such time' had elapsed that there can be no realistic expectation of taking up occupation.

In light of the above, the case of the applicant was dismissed because she was very young at the time she ceased to live in the then family home in 1974 and thereafter lived her entire life with her family elsewhere.

In effect, the Court accepts that if an applicant had a 'home' and left it for a long time, he/she loses the right to such a 'home' *if 'such time' had elapsed that there can be no realistic expectation of taking up occupation.* That does not sound unreasonable at first sight. If you abandon a home and you take another one in its place, you cannot claim the original home. But what if an applicant is forced out of his/her home by an army or the use of any other force and is not allowed by the perpetrator of the force to go back for any number of years? The Court does not seem to give any consideration to that possibility and there is no reasoning for rejecting an application because of absence from home due to continuing use of force. It is submitted that to accept such a possibility as justifying losing one's home can have very disturbing consequences with respect to all those persons who were forcibly evicted from their homes by armed forces who continue to refuse to allow the displaced persons to return thereto in furtherance of political objectives such as ethnic cleansing, massive violations of human rights, and, possibly, even genocide. In fact, to accept such a possibility amounts to condoning such continuing illegal evictions and deprivations of homes with the seal of a human-rights court. In any event, there are several additional reasons why such approach by the Court is erroneous:

1. Both in its judgment in the *Cyprus* v. *Turkey* (2001)[114] case and in its judgment in individual applications such as the *Ioannou* case (2009),[115] the Court found Turkey responsible for violations of the right to respect for the homes of Greek-Cypriots forcibly displaced from their homes in the occupied part of Cyprus because they were denied access to them since 1974, even though, in fact, such time had elapsed that there could have been no realistic expectation by the victims of taking up occupation. In other words, the cases in question were substantially the same as that of the applicant whose complaint was dismissed by the Court in the *Demopoulos* case. In the absence of any convincing explanation as to what has intervened between the above judgments and the decision under consideration, it is impossible to reconcile the relevant findings of the Court.

2. Reference has already been made above to the *Pinheiro* principles of international law according to which 'All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence in safety and dignity'.[116] No time limit is prescribed for the exercise of such a right. And, it is submitted, no such limit could reasonably be legally recognized: for, otherwise, the role of international law on human rights as an instrument to deter or avert

114 *Cyprus v. Turkey, supra* note 14.
115 Application No. 18364/91, *supra* note 38.
116 Para. 136 of the Decision.

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the prevalence of force or injustice – especially in continuing situations like the ones under consideration – will be frustrated.

3. United Nations resolutions on human rights calling upon occupying powers 'to take immediate steps for the return of all displaced inhabitants to their homes or former places of residence' many years after such displacement has taken place will become meaningless.[117] It is submitted that such a situation will be outside the objectives of international law.

Therefore, it is submitted that this finding of the Court in the *Demopoulos* case is again wrong.[118]

12. Is it worth having a human-rights court that shrinks from exercising its proper role and functions?

Perhaps most serious is the Court's admission that it does not want to 'risk being injudicious [and] attempt to impose an obligation on the respondent State'.[119]

The above-cited paragraph makes it clear that the Court is concerned with practical difficulties. (Indeed, the Court declares that 'the current situation of occupation . . . is beyond the Court's competence to resolve' so that it assesses 'the redress' offered by Turkey as 'realistic'.[120])

Being 'injudicious' is to lack practical wisdom, or to be imprudent, impolitic, inexpedient, unsagacious, ill-advised, or unwise. The Court would not risk such an assessment of its conduct and therefore washed its hands of the problem of imposing on a military occupier the obligation of taking measures for the restoration of human rights in Cyprus, leaving the fate of the applicants' properties to the practice and desires of the occupying power. Had the Court carried the matter further than the past judgments against Turkey on the same subject, there would have been consequences if Turkey failed to comply with the relevant judgments: her membership of the Council of Europe and potentially of the European Union would have possibly been put at issue. The Court was too timorous to risk defiance by Turkey and to bring about circumstances in which other appropriate institutions would have had the duty of dealing with the consequences of Turkey's illegal conduct.

13. Concluding remarks

For the reasons given above, it is submitted that the decision of the Court in the *Demopoulos* case is in many respects wrong. For a court, on occasions, to make wrong judgments is understandable. But for a court of human rights to reach a wrong and

117 UN Doc. Res 41/63 (d) (1986) concerning the Israeli military occupation on the Palestinian and other Arab territories. Cf. UN Doc. Res. 581 (1986), UN Security Council: condemning the racist apartheid regime in South Africa.

118 See also the cases against Turkey mentioned in the above reasoning of the judgment and the case of *Asproftas v. Turkey*, Application No. 16079/90, Judgment of 27 May 2010; see on the subject of the right of return L. G. Loucaides, *The European Convention on Human Rights: Collected Essays* (2007), 246 ff.

119 Para. 116 of the Decision.

120 Para. 127 of the Decision.

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'political' judgment, which is also contrary to international law, incompatible with the jurisprudence of the Court in similar cases, and against the effective protection of human rights as explained above, is an inexcusable blow to the cause of human rights and a sad setback to the Court's prescribed mission under the Convention. It is submitted that even a single wrong step in the lifetime of any organization may be enough to destroy its credibility and standing. This is true with human beings. It is a fortiori true with international organizations that are bound by prescribed principles and whose acts affect many individuals that have entrusted them with their hopes and expectations on the basis of such principles.

The decision was hailed by the Turkish government with statements such as 'This judgment is one of the greatest *diplomatic* victories we had ever since 1974' (Davutoğlu, Minister of Foreign Affairs of Turkey reported by Hasan Kahfetzioglu in *Politis*, 15 March 2010, 8, emphasis added). However, it was received with great disappointment by the victims of the massive, organized, and continuing violations of human rights by Turkey in Cyprus. All in all, it has shaken the confidence of people who believed in the institution of the European Court of Human Rights and has seriously damaged the international judicial protection of human rights in the European Public Order and in the field of human rights in general. At the same time, it has encouraged those who do not believe in human rights, the rule of law, and international law, but are interested only in getting benefits through the use of force, de facto or through the passage of time, at the expense of the weak and unprotected.

The change in factual conditions must inevitably be taken into account but, in a situation in which a choice must be made between two hardships suffered by different groups of persons, the interests that better accord with the rule of law and justice must prevail over those that accord less well. This is generally the objective of the law whenever a solution must be found with respect to conflicting claims, interests, or situations. And, although it is correct to admit that fait accomplis through the passage of time may establish situations that may be complicated and hard to be reversed, the law should retain as much and as long as possible its constructive role as an instrument to deter or avert the prevalence of force over justice. This must be so if the rule that the fruits of aggression must not be recognized is to have any meaning. 'Ex injuria jus non oritur is an inescapable principle of law.'[121] And, as rightly propounded, 'no peace can be sustained against the background of unfulfilled desires for return: they will remain destabilizing factors for generations to come. We cannot betray the right to return to homes of origin'.[122]

121 L. Oppenheim, *International Law: A Treatise*, Vol. II (1952), 218.

122 M. Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', (1998) 47 ICLQ 628.