Expert Opinion of

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In the matter of Police Director of Nicosia vs. Shimon Mistriel Aykout

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Executive Summary

This expert opinion addresses the legal questions related to title to abandoned property in the northern, occupied part of Cyprus under the law of occupation and European human rights law, as discussed in two editions of my book, *The International Law of Occupation* (1993, 2012), which both the defence and prosecution referenced in their arguments. I was instructed not to address the additional argument that, under customary international law, Cypriot courts lack jurisdiction over this case—an issue for which the parties did not cite my publications during the proceedings.

Background: The regulation of immovable property in the northern part of Cyprus:
The Turkish Republic of Northern Cyprus (TRNC) is an entity that exercises public functions in the occupied part of Cyprus but is not recognized as a state under international law. International law considers the TRNC an organ of Turkey, which, under international law, is an occupying power exercising effective control over northern Cyprus. An occupying power is obligated and empowered by international law to "restore and ensure public order and safety" in the territory "actually placed" under its authority.

The law of occupation applies to occupied territories even if the occupation is deemed unlawful due to the occupying power's intent to exercise permanent rather than temporary control.

In 2005, the TRNC enacted the *Law for the Compensation, Exchange, and Restitution of Immovable Properties*, which fall under sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended ("Law 67/2005"). This law provides remedies to original owners of abandoned immovable property in the TRNC, including restitution and compensation, through a judicial process involving two international members.

Law 67/2005 and the property regime it created can be viewed as an effort to provide reparations under international law for the original takings of property and denial of

access, which had been found to violate the international law of occupation and the European Convention on Human Rights (ECHR). This reparations regime aligns with contemporaneous efforts, backed by the United Nations, to resolve the Cyprus conflict by allowing only a limited and gradual return of some refugees on both sides. In its 2010 *Demopoulos v. Turkey* judgment, the European Court of Human Rights (ECtHR) unanimously endorsed this regime as compatible with international and European human rights law.

The legality of the TRNC property regime under the European Convention for Human Rights and international law:

Under general international law (including the law of occupation) and the ECHR, transactions involving abandoned property after the promulgation of Law 67/2005 are legally valid. Buyers and sellers of such properties can, therefore, assume in good faith that their transactions are lawful. They can also reasonably assume that original owners have been appropriately remedied in accordance with ECHR and international law, or that such remedies are accessible through the Immovable Property Commission (IPC).

This outcome reflects two important distinctions under international law: (a) the distinction between a state's obligation to another state and its responsibility to make reparations for breaching that obligation, and (b) the distinction between the interstate effects of a violation and the individual consequences of the violating act.

A third layer of protection for individuals arises from the recognition that, under international and European human rights law, the "secondary occupants" of abandoned property also have human rights that merit respect and must be balanced against those of the original owners. This consideration is particularly relevant when breaches are addressed generations later.

Furthermore, as the Cyprus conflict saw massive number of refugees, international law provides mechanisms for resolving dispute at the inter-state level. International law assigns to States the exclusive capacity to bring inter-state claims on behalf of their affected citizens. This is reflected in the doctrine of "diplomatic protection" which provides governments that exercise diplomatic protection the widest discretion in deciding on the outcomes of the negotiations.

The cumulative result of these distinctions (a) and (b) above, together with the understanding that "secondary occupants"[1] also have internationally recognized human rights, is that the rights of individuals who purchased in good faith abandoned property according to the law prevailing in an area that is controlled by an illegal entity may benefit from a three-layered

[1] On this term see discussion *infra* on the Pinheiro Principles.

protection: the restitution of the property may be "materially impossible;" such a claim for restitution is subjected to the state's discretion to negotiate such rights away, particularly as part of a comprehensive peace agreement; and in any event, the illegality of the regime that controls the area where the property is located does not impact the legal validity of the private title to the property acquired under it.

The TRNC's property regime complies with the ECHR's demands. Therefore, individuals who purchase property under this regime can rely in good faith on the ECtHR's endorsement of its compatibility with European human rights and international law, thereby securing valid and unencumbered titles.

The TRNC's property regime complies with the requirements of general international law (including the law of occupation). Law 67/2005 represents the lawful exercise of the occupying power's authority under international law, acting through the TRNC. Rather than expropriating private property, the law provides reparations for prior illegal expropriations.

The law of occupation requires the occupying power to respect, in principle, the laws in force within the occupied territory, unless absolutely prevented. This includes amending laws to "restore and ensure public order and safety" (Article 43 of the Hague Regulations) and to fulfill obligations under the Fourth Geneva Convention (Article 64).

Regulating abandoned property is essential in occupied territories, where original owners cannot access their properties, which must be protected against trespass and misuse. The regulation also addresses housing needs for refugees and displaced persons while maintaining public order and safety for the local population.

The TRNC property regime aligns with international law on state responsibility and occupation, reflecting its intent to facilitate peace and stability, as envisioned during its introduction in 2005—three decades into the occupation and amid UN-led peace initiatives.

The legal obligations of the Republic of Cyprus and its courts under the ECHR and general international law:

On the basis of the international legality of Law 67/2005, the Republic of Cyprus and its courts have an obligation to recognise and respect the rights owners of property obtained under that law. The Republic of Cyprus must not interfere in such transactions and thereby harm the welfare of the occupied population and undermine the public order in the occupied territory.

The obligation to recognise and respect the property regime under Law 67/2005 stems from the law on occupation which, as discussed above, recognizes the authority of an occupying power

to regulate private transactions for securing stability and order in the occupied area. Such authority necessitates the *in rem* protection of rights acquired according to the law of the occupying Power. In this sense, the law of occupation limits not only the occupying Power; it limits as well the occupied State organs and third parties, who are expected to refrain from issuing prescriptions that would conflict with the occupant's lawful measures.

To the extent that the balance struck between the original owners, secondary occupants and third parties is accepted as legal by independent and impartial international judicial bodies such as the ECtHR, they reflect international legality that binds also the Republic of Cyprus.

These conclusions are reflected in my book, the International Law of Occupation (2nd Edition, 2012). The 2012 treats this topic significantly different than the earlier, 1993, edition.

In my 1993 edition I proposed a test that I called "the international legality test." This test suggested that returning sovereigns were obliged to respect lawful measures of the occupying powers. But as I mentioned in my 1993 edition, despite these scholars' admonition, until the end of World War II the obligation to respect and give effect to the legal acts of the occupying Power was not respected by ousted sovereigns and their courts.

However, as I detail in the 2012 edition, a major change occurred between the time the 1993 and the 2012 editions of my book appeared, reflecting the fact that both national constitutional law and international human rights law have come to protect also the rights of those inhabitants in the occupied territory who have relied in good faith on the occupant's illegal measures.

This obligation of the Republic of Cyprus to respect and recognise the validity of transactions in abandoned property subsequent to Law 67/2005 is also grounded in ECHR law.

As mentioned earlier, the Republic of Cyprus has acknowledged this regime without reservations when, in its argument in *Güzelyurtlu v. Cyprus and Turkey*, it pointed out "the requirement under the Convention that individual applicants might need to engage with domestic remedies provided within the 'TRNC'" (referring to the *Demopoulos* case).

It follows, that because the properties that the charges against Mr. Aykout refer to were all purchased following the promulgation of Law 67/2005, which is valid under international law and European human rights law, his transactions are all legally valid under the ECHR and general international law.

Hence, the failure by the Republic of Cyprus or its courts to recognize those transactions as valid would infringe Mr. Aykout's rights that are protected by the ECHR and its Protocol 1.

Beyond the harm to Mr. Aykout's rights, the proceedings against him have adverse consequences for the people living in the occupied area. These proceedings question the validity of their titles and diminish their economic value. Leaving aside the question whether or not the courts of the Republic of Cyprus have jurisdiction over the "territory" under Article 1 (contrary to the approach which holds that under customary international law such jurisdiction does not exist, a question this Expert Opinion does not address) the very existence of such efforts have an adverse effect on these people. Furthermore, they transform these individuals into criminal suspects. Such consequences fall "within the jurisdiction" of Cyprus in the sense of Article 1 of the ECHR which requires State Parties to "secure [ECHR rights] to everyone within their jurisdiction." As the ECtHR has confirmed in a number of judgments, the sovereign state remains bound by the ECHR even in its occupied areas and has positive obligations toward the people living there.

The economic, judicial or other measures that the Republic of Cyprus or its courts have taken or will take with respect to the property regime in the occupied part of the country – such as the decision to indict Mr. Aykout, to detain him and to conduct the criminal trial against him are "within the jurisdiction" of Cyprus. The effects of such measures will also be felt throughout the occupied part, and therefore be also "within the jurisdiction" of the Republic of Cyprus. These existing and future measures therefore render the Republic of Cyprus responsible for the infringement of the ECHR rights of those located in the occupied part of the state who have relied on the property regime grounded in Law 67/2005.

In light of the lawful transactions made under Law 67/2005, the criminal charges against Mr. Aykout and his continued detention constitute infringement of his right to liberty and security protected by Article 5(c) of the ECHR which requires a "reasonable suspicion of having committed an offence" for that lawful arrest or detention, and his right to a fair trial before a "tribunal established by law" (Article 6(1) of the ECHR). Under ECHR there can be no reasonable suspicion of having committed any offence in relation to the relevant properties. For the same reasons, there can be no reasonable suspicion of having committed an offence of money laundering in this context. The case against Mr. Aykout simply does not show any illegal activities on his part. Under ECHR there can be no law that can authorize a court to ignore the property regime established under Law 67/2005 and endorsed by the ECtHR and moreover impose criminal charges for relying on that law.

Conclusions:

For these reasons, the criminal proceedings against Mr. Aykout and his detention, have the direct effect of violating his human rights under the ECHR, as well as the rights of property owners throughout the occupied part of Cyprus. In addition to these violations of individual rights, these proceedings also violate the obligations of the Republic of Cyprus under general international law, in particular the law of occupation.

Opinion

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I. Introduction

1. I was invited by Berkman & Co. Law Offices and by Maria Neophytou L.L.C to provide my expert opinion on the international law aspects arising in the case of *Police Director of Nicosia vs. Shimon Mistriel Aykout*, currently before the District Court of Nicosia. Specifically, I was instructed to address the legal questions related to title to abandoned property in the northern, occupied part of Cyprus under the law on occupation and European human rights law, as addressed in two editions of my book, The International Law of Occupation (1993, 2012), to which the defence and the prosecution referred to in

their arguments. I was instructed not to address the additional argument according to which under customary international law Cypriot courts do not have jurisdiction over this case, issues for which the parties did not refer to my publications to base their arguments during the proceedings.

2. I have prepared this expert opinion with the understanding that it may be used in this case. I consent to the opinion being presented to courts in Cyprus or any other jurisdiction.

3. In providing this expert opinion, I have been guided by the rules governing the provision of expert opinions in the English courts as set out in Part 35 of the Civil Procedure Rules,[2] and by the instructions of Adv. Maria Neophytou.

4. As background, Mr. Aykout is detained in Cyprus and is facing criminal charges in relation to transactions in immovable property located in the northern, occupied part of Cyprus.

5. I am the *emeritus* Whewell Professor of International Law at the University of Cambridge, the former Director of the Lauterpacht Centre of International Law, University of Cambridge, Global Visiting Professor at New York University School of Law, and currently a Professor at Tel Aviv University, Faculty of Law. I am the co-Editor of the British Yearbook of International Law, an Honorary Editor of the American Journal of International Law, and a Member of the *Institut de Droit International*.

6. I specialise in public international law. I have taught and researched international law for five decades. I have published various articles and books including on the legality of occupation regimes under international law and on the legal effects of dispossession of immovable properties by displaced owners, including in the context of Cyprus and the Turkish Republic of North Cyprus.[3] I am now working on the third edition of my treatise, The International Law of Occupation, under contract with Oxford University Press.

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[2] Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDA0JICC.

[3] See EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (Oxford University Press, 2nd Ed., 2012) (hereinafter: Benvenisti, 2012), in particular pp 306-317; ELIAV LIEBLICH AND EYAL BENVENISTI, OCCUPATION IN INTERNATIONAL LAW (Oxford University Press, 2022).

7. My report is structured as follows. After this introduction, I provide (II) a brief background on the legal status, under international law and the law of the European Convention on Human Rights (ECHR), of the regulation of abandoned immovable properties in the occupied part of Cyprus and assess its legality under international law from the perspective of individuals who purchase such properties. Part III addresses the legal obligations of the Republic of Cyprus with respect to that regulation. Finally, Part IV analyses the potential legal consequences of a failure by Cyprus or its courts to recognise the validity of transactions in property in the occupied part of the country.

II. The legal status of abandoned immovable property in northern Cyprus according to international law and European human rights law

This Part begins with (a) a brief description of the Turkish Republic of Northern Cyprus (TRNC), and the way the TRNC regulates abandoned immovable property. Section (b) then assesses the legality of that regulation under (b.1) European Human Rights Law, and (b.2) general international law including the law of occupation

a. Background: The regulation of immovable property in the northern part of Cyprus

8. The TRNC, an entity that exercises public functions in the occupied part of Cyprus is not a recognized state under international law. International law considers the TRNC as an organ of Turkey, which, according to international law is an occupying power which exercises effective control over the northern part of Cyprus.[4] An occupying power is required and empowered by international law to "restore and ensure public order and safety" in the area that "is actually placed" under its authority as "the hostile army."[5]

9. The law of occupation applies to an occupied territory even if the occupation is deemed unlawful due to the intent of the occupying Power to exercise permanent rather than

[4] Benvenisti, 2012, p. 193.

[5] Articles 42 and 43 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 187 C.T.S 227 [hereinafter the Hague Regulations]; See also Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 64, August 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287 [hereinafter: the Fourth Geneva Convention].

temporary control.[6] As the International Court of Justice (ICJ) recently stated, the illegality of such a regime

> "*does not release it from its obligations and responsibilities under international law, particularly the law of occupation, towards the [local] population and towards other States in respect of the exercise of its powers in relation to the territory until such time as its presence is brought to an end. It is the effective control of a territory, regardless of its legal status under international law, which determines the basis of the responsibility of a State for its acts affecting the population of the territory or other States*."[7]

Therefore, even if the TRNC and the Turkish occupation were recognised as illegal under the tests put forward by the ICJ, that would not affect the obligations that the illegal occupier has while exercising control over the territory. This was also the premise of the European Court for Human Rights (ECtHR) when it examined the legality of the property regime that had been set up by the TRNC, despite referring to the occupation as "illegal."[8]

10. The TRNC has enacted in 2005 the *Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended* ("Law 67/2005"). This law offers remedies to the original owners of abandoned immovable property in the TRNC, which include restitution, exchange and compensation, through a judicial process that include two international members.[9]

11. Law 67/2005 established the Immovable Property Commission ("IPC") and instructed claimants to bring their claims before the IPC. Law 67/2005 authorized the IPC to "*decide as to restitution of the immovable property …, or to offer exchange of the property to the said person,*

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[6] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, at ¶ 261 ("The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful.")

[7] *Id.*, at ¶. 264.

[8] *Demopoulos and Others v. Turkey*, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010), at ¶. 94 ("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 [ECHR]").

[9] Available at https://tamk.gov.ct.tr/Portals/37/67-2005yasaING.pdf

or decide as to payment of compensation."[10] Restitution could be offered only if the ownership or use of which has not been transferred to any natural or legal person other than the TRNC, or if although owned by the TRNC, in light of its location, physical condition or use for public interest reasons (including for military purposes).[11] The IPC is a judicial body, composed of seven members, at least two of whom shall not be nationals of the Turkish Republic of Northern Cyprus, United Kingdom, Greece, Greek Cypriot Administration or Republic of Turkey.[12] Their decisions may be appealed at the High Administrative Court, and thereafter to the ECtHR.[13]

12. Upon receiving compensation, or new immovable property by way of exchange, the successful applicant *"can under no condition, make a claim of right of ownership over immovable property for which they have received compensation [or new property]."*[14]

13. The consequences of this legal regime are:

    (1) The ownership of "abandoned" immovable property within the TRNC is vested in the TRNC;

    (2) Hence the TRNC may transfer title in such properties to third parties who then obtain valid, full title;

    (3) Following the successful application to the IPC, the original owner relinquishes all claims with respect to their property.

14. Law 67/2005 and the property regime it created can be regarded as an effort to provide reparations according to international law to the initial takings of property and denial of access to them that been found in violation of international law of occupation and of the ECHR.[15] This reparation regime can be seen as such in the context of the then contemporaneous effort backed by the United Nations to resolve the conflict in Cyprus in

[10] Article 8.
[11] Article 8(1).
[12] Article 11.
[13] Article 9.
[14] Article 10 (1) and (2).
[15] *Loizidou v. Turkey* (Application no. 15318/89) (Merit) (1996); *Cyprus v. Turkey (Application no. 25781/94*) (2001).

a way that provides for a limited and gradual return of only some of the refugees on both sides of the conflict, with certain territorial modifications to be agreed upon by the parties.[16]

15. Law 67/2005 law was promulgated in response to instructions given by the ECtHR in the judgment of *Xenides-Arestis v. Turkey* (2005) to ensure its compatibility with the ECHR's regime for the protection of property rights, and was approved by the ECtHR as compatible with the ECHR in 2006.[17] In 2010, in the *Dempoulos v. Turkey* judgment,[18] the question of compatibility was comprehensively discussed and unanimously endorsed.

b. The legality of the TRNC property regime under the European Convention for Human Rights and international law

16. This Part explains why the TRNC regime on abandoned properties is valid under the ECHR and under international law.

17. As I will explain below, according to general international law (including the law of occupation) and well as the ECHR, transactions in abandoned property following the promulgation of Law 67/2005 are legally valid.

18. Because such transactions are legally valid, buyers and sellers of such properties can assume that their transactions are legally valid. They can also assume in good faith that the original owners have been remedied appropriately in line with the requirements of the ECHR and general international law, or at least, that they can obtain such remedies from the IPC if they decide to apply for such.

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[16] See UN Secretary General Boutros Ghali 's "Set of Ideas on an Overall Framework Agreement on Cyprus Annex to the Report of the Secretary-General to the Security Council S/24472, of August 21, 1992, at pp. 9-25; Secretary General Kofi Annan's plan from 2003 (Report of the Secretary-General on his mission of good offices in Cyprus, 1 April 2003, (S/2003/398), which was endorsed by the UN Security Council Resolution 1475 (2003), 14 April 2003, Sec. 4. ("*Gives its full support* to the Secretary-General's carefully balanced plan of 26 February 2003 as a unique basis for further negotiations, and calls on all concerned to negotiate within the framework of the Secretary-General's Good Offices, using the plan to reach a comprehensive settlement as set forth in ¶¶ 144-151 of the Secretary-General's report;").

[17] *Xenides-Arestis v. Turkey* (just satisfaction), (App. no. 46347/99) (2006), ¶ 37: "the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on the admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005.").

[18] *Demopoulos and Others v. Turkey*, (App. no. 46113/99), ECtHR Grand Chamber (2010).

19. This consequence may initially seem difficult to accept, especially when the property was originally owned by a refugee who had been expelled from their home and never allowed to return. However, upon further reflection, it is necessary to acknowledge certain moral and policy reasons for recognizing that the rights of the original owner must be weighed against the rights of another who acquired possession of the property in good faith. This approach is reflected in most, if not all, domestic legal systems, which rely on concepts such as *market ouvert* or statutes of limitations to deny restitution to the original owner. This principle also applies to international law. Importantly, it is not that the illegal act leading to the dispossession becomes valid through prescription or market conditions. Rather, it is the factual situation created by the invalid act and the expectations that arose therefrom which the law must respect. *Ex injuria ius non oritur*, but the right is derived from the intervening factual consequences: *Ex factis jus oritur*.

20. This distinction between the primary obligation (to follow the law; in this context, to protect private property) and the secondary obligation (to make reparations for breaching the primary obligation) is reflected in three different distinctions that international law makes. One is (a) the distinction between the obligation that one state owes to another and the responsibility to make reparations for the violation of its obligation. The second distinction (b) is between the effects of the violation in the interstate level and the effects of that violation for individuals who are subjected to the consequences of the violating act.

    I will now elaborate on these two distinctions:

    (a) First distinction, at the inter-state level, between the norm and the consequences of its breach:

21. International law establishes rights and obligations primarily at the inter-state level. If one state breaches its obligation to another state, the legal consequences for that breach remain at the inter-state level. Even at that inter-state level not every breach imposes automatically an obligation for restitution. As the ICJ recalled, in the 2024 Advisory Opinion concerning *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024,

> **"***the essential principle is that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'"* [19]

The Court clarified that "in the event that [...] restitution should prove to be materially impossible" the responsible state must compensate.[20]

22. The term "materially impossible" is mentioned in Article 35(a) of the Articles on the Responsibility of States for Internationally Wrongful Acts.[21] The authoritative Commentary of this provision explains:

> "*Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. … In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. […] But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution*." [22]

23. In other words, **on the inter-state plane,** there is a clear distinction between the primary norm and its secondary legal effects. As described fully below, this distinction has acquired significant weight in recent years with the growing understanding that third parties could be individuals who have human rights that are internationally protected. Consequently, a responsible state is not necessarily required to offer restitution for its violation of its international obligation.

(b) Second distinction, between the effects of the violation in the interstate level and the effects of that violation in relations to individuals who are subjected to the consequences of the violating act:

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[19] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, at ¶ 269, citing *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47).

[20] *Id*., at ¶ 271.

[21] "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible;…"

[22] Article 35(a) of ILC Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001). See James Crawford, State Responsibility: The General Part (2013), at p. 98.

24. Regardless of the legality or illegality under international law of the legal regime to which individuals are subjected to, international law generally recognises the good faith expectations of such individuals must be respected. Life goes on, and individuals need to conduct their lives under the law that governs them. Hence, international law limits the scope of non-recognition (and thereby the consequences of illegality) to the public, inter-state sphere. This proposition has been endorsed most famously by the ICJ in its Advisory Opinion regarding the effects of the illegal South African rule in Namibia.[23] Although the court declared the South African administration illegal under international law, it stopped short of extending this illegality to private transactions based on the laws of the illegal regime. The latter must be recognized as having valid legal title. The famous paragraph 125 of the opinion states:

> *"while official acts performed by [South Africa with respect to Namibia] are illegal and invalid, this invalidity cannot be extended to those acts, 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*."[24]

25. Judge Dillard's separate opinion in that case emphasized that "*the maxim of* ex injuria jus non oritur *is not so severe as to deny that any source of right whatever can accrue to third persons acting in good faith*."[25]

26. In his analysis of this judgment, Professor (later Judge) James Crawford suggests that the ICJ judges generally agreed "*that acts unrelated to the political ends of the South African administration, or else such that non-recognition would harm rather than benefit the people of the territory, could be recognized as valid*."[26] This distinction, Crawford notes, "*has found widespread support in practice*."[27] Crawford also justifies this distinction and regards Judge Dillard's position as "*justified in principle*."[28]

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[23] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion [1971] I.C.J. 16.
[24] *Id.,* at ¶ 125.
[25] Judge Dillard, Separate Opinion, *id.*, at pp 166-167.
[26] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 167 (2nd Ed., 2006).
[27] *Id.*, *id.*
[28] *Id.*, at p. 168.

27. Importantly, in support of his statement, Crawford refers to the ECtHR case of *Cyprus v. Turkey* (2001) as reflecting a "cognate" application of the Namibia exception.[29] Crawford also refers in this context to another author, Frank Hoffmeister, who also endorsed the ECtHR decision, opining that "*in an effort to protect the safety and security of both Greek and Turkish Cypriots living in a bizonal Cyprus, certain restrictions of the […] right to one's own home may be justified*."[30]

28. Similarly, Professor Willem Riphagen, writing as the Special Rapporteur for the International Law Commission on the topic of State responsibility, wrote:

> "*It would not seem that [the Namibia] statement should be construed as an exception to the duty of nonrecognition, but rather as a reminder of the fact that – like any other right or obligation – the obligation not to recognize as legal should not be interpreted blindly, but in its context and in the light of its object and purpose, …*"[31]

29. Earlier, the Permanent Court of International Justice (PCIJ) also refrained from translating breaches of international obligations to the sphere of private law. Its opinion in *Interpretation of the Statute of the Memel Territory,*[32] despite having declared the action under scrutiny incongruent with treaty obligations, it stopped short of referring to the implications of such a holding for municipal law, and explicitly suggested that the action "*is not to be regarded as void*."[33]

30. The same principle was endorsed by the courts in the United Kingdom, and in fact was extended to the regulation of rights in property by the Turkish-Cypriot administration. In a decision to reject a claim of Greek-Cypriot owners of hotels in the northern part of the Island rights, Lord Denning said:

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[29] *Id*., fn. 265.

[30] Frank Hoffmeister, *Cyprus v. Turkey. App. No. 25781/94*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 445, 451-52 (2002).

[31] Willem Riphagen, Third report on the content, forms and degrees of international responsibility (Part Two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur Topic: State responsibility A/CN.4/354 and Corr.1 and Add.1 & 2 (1982), at p. 49.

[32] *Publications of the P.C.I.J,* Series A/B, nos. 49, 294 (decision of August 11, 1932).

[33] *Id*., at p. 336.

"I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, ***their leases****, their occupations, and so forth."* [34]

31. We need to recall that by the time Law 67/2005 was adopted, the prevailing international effort endorsed by the United Nations Security Council was to resolve the Cyprus conflict in a way that would secure two distinct communities on the island. Under such circumstances, the non-recognition of Law 67/2005 and its ramifications could be seen as harming rather than benefiting the people of the relevant territory, namely in the TRNC, being one part of the then envisioned two communities of Cyprus.

32. An additional, third layer of protection for individuals is the recognition that (as will be detailed below) under general international law and European human rights law, the "secondary occupants" of the abandoned property also have recognized human rights that merit respect and require balancing against the rights of the original owners. This is a particularly weighty consideration when the consequences of the breaches are addressed generations later, especially when the individuals who had been deprived of their property or livelihood by the occupant have managed in the meantime to find comparable alternatives. [35]

33. Furthermore, as the Cyprus conflict saw massive number of refugees, international law provides mechanisms for resolving dispute at the inter-state level. International law assigns to States the exclusive capacity to bring inter-state claims on behalf of their affected citizens. This is reflected in the doctrine of "diplomatic protection" which provides governments that exercise diplomatic protection the widest discretion in deciding on the

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[34] *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd*. [1978] Q.B. 205, [1978] 1 All E.R. 277 (A.C); the other Law Lords, also on appeal, did not address this point but rejected the claims with respect to immovable property on other grounds: *Hesperides Hotels v. Muftizade*, [1978] 3 W.L.R. 378 (H.L.).

[35] Yaël Ronen, *The Dispossessed and the Distressed: Conflicts in Land-Related Rights in Transitions from Unlawful Territorial Regimes*, in Eva Brems (Ed.) CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 521, 545 (2008). For a philosophical reflection see Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRY IN LAW (2004); Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, *in* JUSTICE, ETHICS AND NEW ZEALAND SOCIETY 139 (Graham Oddie & Roy Perrett eds., 1992); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992).

outcomes of the negotiations. They may determine what individual remedies to pursue, they may abandon the claims or settle them. This is the case in particular with respect to mass claims that arise in a phase of transition or in the aftermath of armed conflict or massive waves of displaced persons. By exercising diplomatic protection in the context of settling mass claims in view of reaching peace agreements, governments have the power to extinguish any additional or residual rights the individuals may have under international law as well as under domestic law.

34. As stipulated by the International Court of Justice (ICJ) in the *Barcelona Traction* case in 1970:

> *"… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. […] The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."*[36]

35. This doctrine reflects the realization that it is necessary *also for the individual* to ensure the state's ability to protect and promote the rights of its citizens. Indeed, diplomatic protection remains the most potent tool to ensure individual rights and to claim redress for violations of international law. Professor John Dugard, the Special Rapporteur of the International Law Commission on this issue, has emphasized this reality in his First Report on Diplomatic Protection.[37] This is the case also in situations where the breaches include war crimes perpetrated against citizens.[38]

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[36] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 3, at p. 44.

[37] John Dugard, "First Report on Diplomatic Protection," A/CN.4/506, ¶¶ 23-25. Available at: http://untreaty.un.org/ilc/documentation/english/a_cn4_506.pdf.

[38] See the Eritrea-Ethiopia Claims Commission, Decision No. 8 "Relief to War Victims" from July 27, 2007 in https://pcacases.com/web/sendAttach/750 . See also HANS VAN HOUTTE, BART DELMARTINO AND IASSON YI, POST WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW, VOL. I: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW, at 306 (2008).

36. Due to these considerations, it is widely recognized that governments that exercise diplomatic protection have the widest discretion in deciding on the outcomes of their negotiation.

37. For these reasons the ECtHR, in the inter-state dispute between *Cyprus and Turkey* (2001)[39] and (2014),[40] could maintain a disjunction between the validity of transfer of title under the *Demopoulos* judgment while at the same time declare Turkey as legally responsible to the violation of the rights of the original owners and its still-pending obligation to provide reparations for their losses.[41] Because of this disjunction, the ECtHR could issue a declaratory statement to the effect that Turkey had violated the ECHR, regardless of the court's endorsement of Law 67/2005 as compatible with the same convention.[42] The declaration that found Turkey having violated the ECHR[43] remained a declaration at the inter-state level, without effecting the rights of old or new property owners, rights that may be conflicting and should be resolved as part of an inter-State settlement. In fact, the court itself acknowledged that such a declaration was necessary because in fact, it will have no practical effects, in light of the "situation which will be difficult, if not impossible, to remedy *ex post facto*."[44]

38. In the several judgments, including the *Demopoulos* judgment, the ECtHR has explained this disjunction between the right of the original owners and the (limited) remedy they are entitled to, while recognising the lawful need to provide individuals in the occupied area stability and order, indeed even when the latter are subjected to illegal regimes. Moreover, the passage of time after actual dispossession attenuates the connection between the original owner and their property, and increases the need to protect the expectations of

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[39] *Cyprus v. Turkey*, (App. no. 25781/94) (Judgment) (2001).

[40] *Cyprus v. Turkey*, (App. no. 25781/94) (Just satisfaction) (2014).

[41] *Id.*, at ¶ 63 ("…*the Court's decision in the case of Demopoulos and Others, cited above, to the effect that cases presented by individuals concerning violation-of-property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, taken on its own, to dispose of the question of Turkey's compliance with Part III of the operative provisions of the principal judgment in the inter-State case.*")

[42] *Cyprus v. Turkey*, (App. no. 25781/94) (Judgment) (2001). See the Just Satisfaction case, *supra* note 40., at ¶ 21 ("*The provision of compensation as a remedy for a human rights violation is not to be confused with the duty of States not to commit and to put an end to violations of the Convention. […] 'the State [cannot] escape from its obligations merely by paying compensation*'").

[43] *Id*, at ¶ 23.

[44] *Id*, at ¶ 22.

new users. Furthermore, the realization that the resolution of major conflict requires political solutions added to the Court's reluctance to limit the possibilities for the peaceful resolution of disputes.

39. The cumulative result of distinctions (a) and (b) above, together with the understanding that "secondary occupants"[45] also have internationally recognized human rights, is that the rights of individuals who purchased in good faith abandoned property according to the law prevailing in an area that is controlled by an illegal entity may benefit from a three-layered protection: the restitution of the property may be "materially impossible," such a claim for restitution is subjected to the state's discretion to negotiate such rights away, particularly as part of a comprehensive peace agreement, and in any event, the illegality of the regime that controls the area where the property is located does not impact the legal validity of the private title to the property acquired under it.

These layers of protection are further elaborated in the following two sections.

b.1 The validity of the TRNC property regime under the ECHR

40. As the ECtHR stated in the inter-state case of *Cyprus v. Turkey* of 2001:[46]

> "*[T]he obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and in the very interest of the inhabitants, the acts of these authorities related thereto cannot simply be ignored by third States or by international institutions, especially courts, including this one.* ***To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.*** *[...]*
>
> *"For the Court, the conclusion to be drawn is that it cannot simply disregard the judicial organs set up by the "TRNC" in so far as the relationships at issue in the present case are concerned. It is in the very interest of the inhabitants of the "TRNC", including Greek Cypriots, to be able*

[45] On this term see discussion *infra* on the Pinheiro Principles.

[46] *Cyprus v. Turkey* (App. no. 25781/94) (2001).

to seek the protection of such organs; and ***if the*** *"TRNC" authorities had not established them, this could rightly be considered to run counter to the Convention."*[47] (my emphases)

41. In the *Demopoulos* case, the court repeated this proposition:

> "*[T]he 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 [ECHR]. […] In the Court's view, the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights. Pending resolution of the international dimensions of the situation, the Court considers it of paramount importance that individuals continue to receive protection of their rights on the ground on a daily basis. The right of individual petition under the [ECHR] is no substitute for a functioning judicial system and framework for the enforcement of criminal and civil law.*"[48]

42. The same consideration is repeated in a subsequent judgment from 2019. In *Güzelyurtlu v. Cyprus and Turkey*, the ECtHR referred to *Demopoulos* and subsequent judgment as reflecting the court's

> "*recognition of] the validity of those remedies and acts to the extent necessary for Turkey to be able to secure all the Convention rights in northern Cyprus and to correct any wrongs imputable to it. The key consideration for the Court was to avoid a vacuum which would operate to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights*."[49]

43. Already in its judgment of December 2006, the ECtHR found that Law 67/2005 satisfied the requirements of the ECHR.[50] A fuller examination of the law was the focus of its

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[47] *Id.*, at ¶¶ 96, 98. In ¶ 97 the court mentions that this position is "*confirmed both by authoritative writers on the subject of* de facto *entities in international law and by existing practice, particularly judgments of domestic courts on the status of decisions taken by the authorities of* de facto *entities. This is true, in particular, for private-law relationships and acts of organs of de facto authorities relating to such relationships. Some State organs have gone further and factually recognised even acts related to public-law situations, for example by granting sovereign immunity to* de facto *entities or by refusing to challenge takings of property by the organs of such entities.*"

[48] *Demopoulos and Others v. Turkey*, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010), at ¶¶ 94-96.

[49] *Güzelyurtlu v. Cyprus and Turkey* (App. no. 36925/07) (2019), ¶ 250.

[50] *Xenides-Arestis v. Turkey* (just satisfaction), (App. no. 46347/99) (2006), ¶ 37.

Demopoulos v. Turkey judgment delivered on 5 March 2010.[51] In this judgment, the Grand Chamber of the European Court for Human Rights (ECtHR) unanimously endorsed Law 67/2005 as compatible with the requirements of the European Convention of Human Rights with respect to an effective domestic remedy according to Article 35 § 1 of the ECHR.[52] The ECtHR elaborated on how Law 67/2005 responded adequately to the guidelines the ECtHR had delineated in its earlier judgment of *Xenides-Arestis* (in which the ECtHR had found the earlier law, Law 49/2003 incompatible with the requirements of an effective domestic remedy),[53] and therefore fulfilled the requirements of the ECHR for a domestic remedy that injured individuals should exhaust before applying to the ECtHR.

44. In particular, in *Demopoulos v. Turkey*, the ECtHR determined that the IPC established under Law 67/2005 was a sufficiently independent and impartial body, because the panels of the IPC included two members who were "independent international members,"[54] and all panel members were subjected to "similar rules [that] appl[ied] as to senior members of the judiciary in the "TRNC" vis-à-vis appointment and termination, and conditions of employment,"[55] and, finally, that "[p]ersons who occup[ied] Greek-Cypriot property [were] expressly excluded."[56]

45. The same judgment also noted approvingly that Law 67/2005 allowed for restitution of property as one of the possible remedies (as opposed to the earlier Law 49/2003 that did not). It further rejected the claim that any law, to be compatible with the ECHR had to secure restitution to all or most original owners. The Court recognised that

> "*it must leave the choice of implementation of redress for breaches of property rights to Contracting States, who are in the best position to assess the practicalities, priorities and conflicting interests on a domestic level even in a situation such as that pertaining in the*

[51] *Demopoulos and Others v. Turkey*, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010),.
[52] Article 35 § 1 of the ECHR: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."
[53] *See Demopoulos and Others v. Turkey*, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010), at ¶ 73.
[54] *Id.*, at ¶ 120.
[55] *Id., id.*
[56] *Id., id.*

northern part of Cyprus. No problem therefore arises as regards the impugned discretionary nature of the restitutionary power under the Law 67/2005."[57]

46. The court specifically pointed out the Law 67/2005 "*made good*" the earlier shortcoming of Law 49/2003 which did not include any provision for restitution.[58] It further stated that the fact that "*only a small proportion of the property under occupation would in practice be eligible for restitution under* [Law 67/2005]" does not "*undermine[] the effectiveness of the new scheme*."[59]

47. Finally, the ECtHR was satisfied that Law 67/2005 authorised the IPC to grant sufficiently adequate, accessible and efficient remedy, as required by the generally recognised principles of international law.[60] Accordingly, the court required claimants to bring their claims to the IPC instead of to the ECtHR.

48. It is to be noted, that the ECtHR emphasized that its focus was on the human rights aspect rather than on the question of title to immovable property, and that the procedure at the IPC couldn't transfer title "*[a]s the "TRNC" regime was not regarded as being capable of depriving the property owners of title.*"[61] It also rejected the notion that "*military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power*."[62] But this analysis refers to the inter-State level. As mentioned above, the resolution of the private property claims under Law 67/2005 does not in and of itself absolve the State of Turkey from its direct obligations to the State of Cyprus for preventing original owners from enjoying their properties in the TRNC, and of the obligation to make reparations.[63] That matter remains to be addressed in the inter-State level.

49. The legal validity of the precedence of the remedy of monetary compensation over restitution was further underlined by subsequent judgments of the ECtHR. In *Meleagrou v.*

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[57] *Id.*, at ¶ 118.
[58] *Id.*, at ¶ 119.
[59] *Id., id.*
[60] *Id.*, at ¶¶ 124-127.
[61] *Id.*, at ¶ 110.
[62] *Id.*, at ¶ 112.
[63] *Cyprus v. Turkey* (Just Satisfaction) (App. No. 25781/94) (2014), ¶ 63 ("*the Court's decision in the case of Demopoulos […] cannot be considered, taken on its own, to dispose of the question of Turkey's compliance with Part III of the operative provisions of the principal judgment in the inter-State case*").

Turkey (2013),[64] the court addressed the claim of a Greek-Cypriot owner who had refused to apply to the IPC for anything but restitution but the IPC refused to accept their application. The ECtHR opined that the owner had no valid complaint because, as the court had found in *Demopoulous*,

> "*restitution did not have to be afforded in every case. The range of remedies available before the IPC, which included not only restitution but exchange of land and the payment of pecuniary compensation and non-pecuniary compensation, was found to be effective in the circumstances. … It follows that the applicants have not made proper use of the available remedies that could give them financial redress or redress in kind for loss of enjoyment of their properties.*"[65]

50. In the case of *Sargsyan v. Azerbaijan*,[66] the Grand Chamber referred to the property regime set up by the TRNC, that also the applicant(!) as a model Azerbaijan should emulate.[67] It determined that the failure of the Azerbaijani Government to take "any alternative measures to restore his property rights or to provide him with compensation for his loss of their enjoyment placed and continues to place an excessive burden on him."[68] The ECtHR explicitly endorsed such alternative measures to judicial intervention, explaining that,

> "*While the issues raised fall within the Court's jurisdiction …, it is the responsibility of the two States involved in the conflict to find a political settlement to the conflict. Comprehensive solutions to such questions as the return of refugees to their former places of residence, repossession of their property and/or payment of compensation can only be achieved through a peace agreement*."[69]

51. The ECtHR has examined several claims against the IPC framework that have been lodged following the *Demopoulos* judgment. The ECtHR has done so while subjecting the IPC to the rigorous standards of "fair trial" as stipulated in Article 6 § 1 of the ECHR. These

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[64] *Meleagrou v. Turkey* (App. no. 14434/09) (2013).
[65] *Id*. at ¶¶ 14-15.
[66] *Sargsyan v. Azerbaijan* (Application no. 40167/06) (16 June 2015) (GC).
[67] *Id.*, at ¶ 263.
[68] *Id.*, at ¶ 241. See also at ¶ 272 (referring to "the respondent State's failure to create a mechanism which would allow the applicant, and others in a comparable situation, to have his rights in respect of property and home restored and to obtain compensation for the losses suffered.").
[69] *Id*., at ¶ 216.

standards provides that "*In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law,*"[70] and the ECtHR has confirmed the IPC processes qualified as providing for "fair trial."[71]

52. In only one case did the ECtHR find the IPC failing to process a claim "with coherence, diligence and appropriate expedition."[72] But the ECtHR hastened to state that it remained confident that the IPC provided adequate remedies in compliance with the ECHR:

> "*[T]here is nothing at present persuading the Court to conclude that the possible delays or difficulties arising in the processing of particular cases before the IPC call into doubt its findings in the Demopoulos and Others case […], according to which that remedy is accessible and capable of efficiently delivering redress*."[73]

53. In that judgment, the ECtHR asserted that it remained vigilant of the work of the IPC and would not hesitate to intervene if the IPC remedies fell short of the legal requirements:

> "*Indeed, and without prejudice to its findings regarding the applicant's specific arguments concerning her case before the IPC, the Court emphasises that it is perfectly possible that a remedy that is in general found to be effective operates inappropriately in the circumstances of a particular case. […] [T]he Court would stress that it remains attentive to the developments in the functioning of the IPC remedy and its ability to effectively address Greek Cypriot property claims.*"[74]

54. It is noteworthy, that the Republic of Cyprus has acknowledged without reservation, in its argument in *Güzelyurtlu v. Cyprus and Turkey* (2019), "*the requirement under the Convention that individual applicants might need to engage with domestic remedies provided within the 'TRNC'*"[75] (referring to the *Demopoulos* case).

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[70] ECHR Article 6 – "Right to a fair trial: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[71] See *Meleagrou v. Turkey* (App. no. 14434/09) (2013), ¶¶ 17-22; *Loizou v Turkey*, (App. No.50646/15) (2017), ¶¶ 45-51.

[72] *Joannou v. Turkey,* (App. no. 53240/14) (2019), at ¶ 104.

[73] *Id.*, ¶ 85.

[74] *Id.*, at ¶ 86

[75] *Güzelyurtlu v. Cyprus and Turkey* (App. no. 36925/07) (2019), at ¶ 208.

55. The time factor was also referred to in the cases cited above. As the ECtHR asserted in relation to the settlement of the claims of property owners in northern Cyprus, the passage of very long time away from home one was born in and left long ago could attenuate the owners' claim as a deprivation of a right to a "home" under Article 8 of the ECHR.[76] After several decades, the balancing between the different stakeholders raises "*profound problems of intergenerational justice*,"[77] which include the concern with fairness to lay the burden of redress on succeeding generations.

56. As the ECtHR stated in *Demopoulos*,

> "*At the present point, many decades after the loss of possession by the then owners, property has in many cases changed hands, by gift, succession or otherwise; those claiming title may have never seen, or ever used the property in question. The issue arises to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice. The losses thus claimed become increasingly speculative and hypothetical. There has, it may be recalled, always been a strong legal and factual link between ownership and possession and it must be recognised that with the passage of time the holding of a title may be emptied of any practical consequences. […] 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. 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 [ECHR]*"[78]

57. Specifically, with respect to the protracted conflict in Cyprus, the ECtHR emphasized that

> "*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*

[76] *Demopoulos and Others v. Turkey, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010),* at ¶ 136-137.
[77] RUTI G. TEITEL, TRANSITIONAL JUSTICE 119 (2000).
[78] *Demopoulos and Others v. Turkey, (App. no. 46113/99) (2010), ECtHR Grand Chamber (2010)*, at ¶¶ 111-113.

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 children even with the aim of vindicating the rights of victims of violations of the Convention.

"It is evident from the Court's case-law that while restitution laws implemented to mitigate the consequences of mass infringements of property rights caused, for example, by communist regimes, may have been found to pursue a legitimate aim, the Court has stated that 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. Thus, there is no precedent in the Court's case-law to support the proposition that a Contracting State must pursue a blanket policy of restoring property to owners without taking into account the current use or occupation of the property in question."[79]

58. Finally, the ECtHR noted the expectation that any solution to the property problem will be grounded in an overall political settlement, rather several specific judicial proceedings between individuals:

"*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.*

"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

[79] *Id.*, at ¶¶ 116-117.

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.

"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."[80]

59. The conclusion from the above analysis is that the property regime created by the TRNC is compatible with the demands of the ECHR. At the very least, individuals who purchase property that is or was subjected to that property regime can rely in good faith on the endorsement of that regime by the ECtHR as being compatible with European human rights law and international law. Hence, from the perspective of the ECHR, they obtain valid and unencumbered title to such properties. To the extent that they are denied such title by domestic legislation which restricts or even denies the reliance they are entitled to under the ECHR, such a denial would constitute an illegal infringement of their rights.

b.2 The validity of the TRNC property regime under general international law

60. The analysis concerning the impact of international law on the rights of individuals invites an assessment of the legality under international law of the TRNC property regime from the perspective of the individuals. The fact that one state has breached its obligation under international law toward another state has only muted consequences from the perspective of individuals who have relied in good faith on public acts that could be regarded by them as lawful.

[80] *Id.*, at ¶¶ 83-85.

61. This is particularly the case in the context of occupied territories, where the promulgated regime was designed to promote the interests of the local population, which is its "basic duty." As recently stated by the ICJ,

> *"[The occupying power's]* ***basic duty to administer the territory for the benefit of the local population****, and all the individual obligations arising thereunder, endure [throughout the occupation].* ***To conclude otherwise would be contrary to the object and purpose of the Fourth Geneva Convention*** *and would deprive the population subject to an ongoing occupation of the protection that it enjoys under international humanitarian law."*[81]

62. Law 67/2005, and the property regime it has established, can be regarded as the lawful exercise by the occupying power of its authority under the international law of occupation (acting through the TRNC). As the International Court of Justice recently stated,[82] this law

> "*exceptionally allows the occupying Power to [quoting Article 64 of the Fourth Geneva Convention]*
>
> > *"subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the [Fourth Geneva] Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."*[83]

63. As the ICJ explains,[84] the law of occupation imposes on the occupying Power the obligation to "**in principle** respect the law in force in the occupied territory unless absolutely prevented from doing so." (my emphasis). This obligation comes with the explicit authorisation to amend the law in force in the occupied area to "restore and ensure public order and safety" (Article 43 of the Hague Regulations), to "fulfil its obligations under the

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[81] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, at ¶ 106. My emphasis.
[82] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024.
[83] *Id*., ¶ 143.
[84] *Id*., *Id*.

[Fourth Geneva] Convention, [and] to maintain the orderly government of the territory." (Article 64 Fourth Geneva Convention).

64. The regulation of abandoned property is necessary in occupied territories, because the original owners cannot access them and they must therefore be protected against trespass and against uses that harm adjacent areas. There may also be a need to house refugees and displaced persons, and to "restore and ensure public order and safety" interpreted, in light of the object and purpose of law, for the benefit of the local population.

65. As I explain below, the TRNC property regime follows the requirements of the international law of state responsibility together with the law of occupation. This is how the regime was envisioned when the law 67/2005 was introduced, some thirty years into the occupation, and taking into account contemporaneous UN-led initiatives to promote a peaceful solution in Cyprus which would not entail massive return of refugees.[85]

66. The adoption of Law 67/2005 coincided not only with the jurisprudence of the ECtHR which endorsed it (as discussed above), but also with the adoption of the so-called "Pinheiro Principles" by the Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, also in 2005.[86]

67. The Pinheiro Principles sought to elaborate on the requirements of international law with respect to "Housing and Property Restitution for Refugees and Displaced Persons."[87] In its subsequent decisions, the ECtHR referred to these principles as reflecting "relevant international standards"[88] that are similar to the ECtHR's own approach.[89]

68. The Pinheiro Principles elaborate on the types of reparations that withdrawing occupiers are obliged to provide under international law. As reiterated by the ICJ most recently, the

[85] On these see *supra* note 11 and accompanying text.
[86] The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 28 June 2005, E/CN.4/Sub.2/2005/17, Annex),
[87] *Id*.
[88] *Sargsyan v. Azerbaijan* (Application no. 40167/06) (16 June 2015) (GC), at ¶ 238.
[89] *Id*., at ¶ 184.

primary reparation is restitution, unless "materially impossible."[90] Article 2 of the Pinheiro Principles assert that

> "*2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.*
>
> *"2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution*."

69. At the same time, the Pinheiro Principles recognise the rights of "Secondary Occupants" against eviction. Secondary occupants, according to these principles, are "*persons who take up residence in a home or on land after the legitimate owners or users have fled due to, inter alia, forced displacement, forced eviction, violence or threat of violence, natural or human-made disasters*."[91] With respect to such occupants, these Principles suggest that

> "*17.1 States should ensure that secondary occupants 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 which is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including, inter alia, an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress."*

[90] See ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, at ¶ 271.

[91] Housing and property restitution in the context of the return of refugees and internally displaced persons, Final report of the Special Rapporteur, Paulo Sérgio Pinheiro Addendum Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced PersonsE/CN.4/Sub.2/2005/17/Add.1, ¶ 63 (2005).

70. The Pinhiero Principles also realize that the secondary occupants could, in turn, transfer their rights in their new homes to third parties, and the Principles seek to protect the expectations of those third parties as well, if their eviction is deemed justifiable and unavoidable:

> "17.4 States may consider, in cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, establishing mechanisms to provide compensation to injured third parties."

The same Principle (17.4) raises the possibility that the "egregiousness of the underlying displacement," might prompt a party to the conflict to issue a "constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases." But the formation of good faith is a matter of fact. In the case of Law 67/2005, its endorsement by the ECtHR was arguably sufficiently robust to secure the bona fide of any secondary occupant of third party purchaser who relied on the endorsement of Law 67/2005 by the ECtHR in its judgments, an endorsement which did not distinguish between the new owners on the basis of their nationality or on any other basis.

71. The Council of Europe's European Commission for Democracy through Law (the Venice Commission) has also acknowledged the obligation to respect and give effect to the expectations and indeed the rights of secondary occupants. The Commission addressed Georgia's attempt to regulate property rights in Abkhazia and South Ossetia, areas which since the early 1990s have been controlled by local secessionist forces and in 2008 occupied by Russia.[92] In an "Interim Opinion on the Draft Law on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict of Georgia,"[93] the Commission noted that

> "*… the Commission has identified the right to return to one's original home as a basic international standard to be applied. The Commission has also recognised the legitimate public interest purpose and respect of the principle of proportionality as a pre-condition for limitations*

[92] On the situation in Abkhazia and South Ossetia see Benvenisti, 2012, at pp. 194-97; Antal Berkes, *International Law and De-Occupation Legislation,* 3 RUTGERS INT'L L. & HUM. RTS. J. 143, 159-60 (2023).

[93] European Commission for Democracy Through Law (Venice Commission) Opinion no. 364/2005 CDL-AD(2006)007 (2006).

of the right to property and as the key in deciding on whom to attribute the immovable property, especially in the relationship between the original owner or resident and a bona fide *successor*."[94]

Commenting on the distinction between *bona fide* and *mala fide* the Commission contemplated the difficulties in ascertaining facts and practical difficulties:

"*Given that more than a decade has passed since the conflict it may not be easy in all cases to distinguish between* bona fide *and* mala fide *owners. Is a person who purchases for full value from the* mala fide *owner himself* mala fide *if he knows of the circumstances in which the previous owner came by the property? Assuming the law provides for actual restitution rather than monetary compensation at least where the property is owned by a* mala fide *owner, the displaced person should still have a right to opt for monetary compensation if he or she prefers. This is because the changed circumstances of the displaced person since the hostilities took place may make restitution impractical*."[95]

72. The Venice Commission also addressed[96] Georgia's "Law on the occupied territories of Georgia" adopted in 2008 with respect to the territories that remained since the early 1990s outside Georgia's control. This law addressed the validity of title to immovable property left behind by Georgian owners. The Commission invoked the Hague Regulations and the Fourth Geneva Convention as reflecting "the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern of those involved in a conflict."[97] On this basis, The Commission criticized the law's failure to take sufficiently into account "the right to peaceful enjoyment of one's possessions," as well as "legal certainty," and hence recommended that "[f]or transactions in [the period of occupation] it might therefore be necessary to find regulations balancing the interests of the old and the potential new owners, in order not to violate Article 1 of the First Protocol to the ECHR."[98]

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[94] *Id.*, at ¶ 6.
[95] *Id.*, at ¶ 29.
[96] Opinion on the Georgian Law on Occupied Territories, Opinion no. 516/2009 (17 March 2009), CDL-AD(2009)015.
[97] *Id.*, at ¶ 35.
[98] *Id.*, at ¶¶ 24-25.

The Commission again criticized the Law's non-recognition of acts of occupation authorities, cautioning that

> "*Generally speaking, each State is free to recognize or not to recognize acts of state issued by other States or by de facto authorities (for example, the recognition of these acts can be refused on the basis of considerations of* ordre public*). On the basis of international customary law there is no obligation to recognize such acts.* ***Nevertheless, this freedom ends where basic human rights would be violated***."[99] (my emphasis)

73. More recently, the Venice Commission has criticised a draft Ukrainian law concerning the legal situation in Ukrainian territory occupied by Russia.[100] The law would have ownership rights to real estate located in the occupied territories governed by the laws of Ukraine and contradictory transactions would be null and void.[101] The Commission stated:

> "*In the view of the Venice Commission, the proposed legislation is very far-reaching, especially taking into account that the relevant territories have already been outside the control of the Ukrainian authorities since 2014 so that a "clean slate" – as if nothing had happened over the years – is illusory. For the sake of safeguarding the human rights of those living in those territories, a more differentiated approach is recommended*."[102]

74. A similar approach to this question was provided in 2010 by the Parliamentary Assembly of the Council of Europe (PACE) "on solving property issues of refugees and displaced persons."[103] That Resolution proposes that "restitution of property […] or compensation, are forms of redress necessary for restoring the rights of the individual and the rule of law."[104] It invites member states to "ensure the effectiveness of redress through restitution

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[99] *Id.*, at ¶ 43 (My emphasis).
[100] Venice Comm'n, *Ukraine Opinion on the Draft law on the Principles of State Policy of the Transition Period,* Opinion No. 1046/2021, CDL-AD(2021)038.
[101] Venice Comm'n, *Draft law on the Principles of State Policy of the Transition Period,* Opinion No. 1046/2021, CDL-REF(2021)055 (Aug. 24, 2021).
[102] *Id.*, at ¶ 44.
[103] Art. 3, Parliamentary Assembly of the Council of Europe (PACE) Resolution 1708 (2010) on solving property issues of refugees and displaced persons, available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17814&lang=en
[104] Art. 3, Parliamentary Assembly of the Council of Europe (PACE) Resolution 1708 (2010) on solving property issues of refugees and displaced persons, available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17814&lang=en

of, or, where necessary, compensation for the value of abandoned property…"[105] The ECtHR in *Sargsyan v. Azerbaijan* referred also to the PACE Resolution as reflecting the same international standard.[106]

75. As I conclude the discussion of this topic in my 2012 book,

> "*There is no doubt that recognizing the effects of illegal and invalid occupation measures diminishes the effectiveness of the law of occupation. It gives the occupant perverse incentives: if you hold on long enough, if you deny the temporary character of your administration, you increase the probability that your policies will stick. But as we saw, there are normative, institutional, and pragmatic considerations weighing in the other direction, considerations which convinced governments and courts to adopt a balancing approach to regulate the post-occupation phase which takes into account the gravity of the harm, the good faith expectations of the inhabitants of the occupied territory, the length of time the latter benefited from the occupant's measures, the protection of group and minority rights, and the prospects of a peaceful transition to a sustainable peace. Skeptics may still suspect, as Felice Morgenstern did in 1951, that this approach is just an elegant way of succumbing to realpolitik and the weakness of international law. This is obviously part of the story. But the question that the skeptics must answer is whether it is justified to correct one wrong by creating another. Perhaps the better view is to focus on more effective international responses to ongoing violations, and on them improvement of the remedies that can be used directly against the occupant*."[107]

76. To conclude from the above, the TRNC property regime grounded in Law 67/2005 reflects international law as it applies in the domestic sphere as a consequence of a breach of international law in the inter-state plane. Despite the illegality of the occupation regime in general or the illegality of the initial attempts to take private property, under international law, as well as under ECHR law, Law 67/2005 is compatible with international law as it balances the rights of all individuals, the primary owners and the secondary occupants. Therefore, those who purchased property on the basis of Law 67/2005 have acquired title that is recognised as good title, because at the time they could rely in good faith on the

[105] *Id*., Art. 10.8

[106] *Sargsyan v. Azerbaijan* (Application no. 40167/06) (16 June 2015) (GC), at ¶. 238.

[107] Benvenisti, 2012, at 317.

TRNC property regime as one that provides valid title to immovable properties under its control.

77. Moreover, in light of the above discussion, even if Law 67/2005 was incompatible with international law, individual reliance on this law in the circumstances prevailing at the time of its adoption and its endorsement by the ECtHR must, according to international law, be respected by third parties and transactions in such properties according to Law 67/2005 must be regarded as legally valid.

III. The legal obligations of the Republic of Cyprus and its courts under the ECHR and general international law

78. This Part addresses the legal consequences of the conclusions reached above concerning the legality of the property regime established under Law 67/2005. It explains why The Republic of Cyprus and its courts have an obligation to recognise and respect the rights owners of property obtained under Law 67/2005.

a. The legal obligations of the Republic of Cyprus under general international law

79. In this section I elaborate on the obligations of the Republic of Cyprus under general international law in relation to the status of abandoned properties in its northern part. This discussion will also be used to clarify some misunderstandings related to the distinctions between the treatment of this topic between the first edition of my book in 1993 and the second edition which is from 2012.

80. The obligation to recognise and respect the property regime under Law 67/2005 stems from the law on occupation which, as discussed above, recognizes the authority of an occupying power to regulate private transactions for securing stability and order in the occupied area. Such authority necessitates the *in rem* protection of rights acquired according to the law of the occupying Power. In this sense, the law of occupation limits not only the occupying Power; it limits as well the occupied State organs and third parties, who are expected to "refrain from issuing prescriptions that would conflict with the occupant's lawful

measures."[108] In the two editions of my book I referred to this obligation as related to "the international legality test."[109]

81. In the 2012 edition, I added a new chapter (Chapter 11) that was not included in the 1993 book. It was titled "*The Law on Post-Occupation: The Lasting Effects of the Occupant's Legislation*." I offered there the following observation:

> "*This chapter explores the long-term legal effects of the occupant's measures and prescriptions. It identifies the normative, institutional, and political considerations that have prompted national and international courts to develop for the post-occupation phase a nuanced attitude to occupation measures even when such measures exceeded the limits that international law placed on the occupant's regulatory power (which will be referred to as "the international legality test"). The wish to respect legitimate expectations of individuals who relied in good faith on occupation measures, the forward- looking wish to ensure a smooth and effective post-conflict transitional process to a stable and just peace, and the courts' own institutional limitations in enforcing international law, seem to have informed the tendency in the post-occupation phase not to insist too strongly on the international legality test. This tendency is reflected in the distinction between the* ex ante *legality of the occupant's measures and the* ex post *validity of their outcomes; or, stated differently, between the primary norms which define the "do's" and "don'ts" during occupation and the secondary norms that define the consequences of the breach of primary norms.*"[110]

82. This new chapter in the 2012 edition was needed to describe the evolution of the law during the intervening two decades, when the law has changed through caselaw, authoritative decisions and practice to reflect the applicability of international and European standards of human rights, as described above and in the new chapter of the 2012 book. It must be recalled that in 1993, the very question whether international and European human rights law applied in occupied territories was contested.[111] Perhaps more important reason for the change was the fact that during the 1990s and 2000s several

[108] See Benvenisti, 1993, p. 22; Benvenisti, 2012, pp. 299, 300.
[109] On this test and its ramifications see Benvenisti, 1993, pp. 21-26; Benvenisti, 2012, 299-317.
[110] Benvenisti, 2012, p. 299.
[111] Benvenisti, 1993, p. 187-189.

regional and international courts and other bodies were seized with such questions and they were able to produce authoritative articulations of the law.

83. Let me now elaborate on the change that took place in the intervening years between 1993 and 2012.

84. In my 1993 edition I proposed a test that I called "the international legality test." This test suggested that returning sovereigns were obliged to respect lawful measures of the occupying powers. In proposing this test I relied on the object and purpose of the law of occupation, which is to protect the population in the occupied territory,[112] and the concern that *"[c]onflicting prescriptions by exiled governments (or foreseeable conflicting legislation after liberation) may … have a substantial adverse impact on civil life during the occupation*."[113] This observation was also grounded in what the scholar Felice Morgenstern had described as "remarkable agreement amongst authors."[114] Citing Lassa Oppenheim, Charles Hyde, Arnold McNair, Antoine Pillet, Albéric Rollin, John Westlake, and Alexandre Mérignhac, the highest authorities in the field at the time, Morgenstern concluded that

> *"it is recognized that the legitimate acts of the occupant produce legal effects the retroactive annulment of which would, in accordance with general notions, be contrary to legal principle."*[115]

85. Despite these scholars' admonition, until the end of World War II the obligation to respect and give effect to the legal acts of the occupying Power was not respected by ousted sovereigns and their courts. As I mention in my 2012 edition, in the earlier, post 1945 phase,

> "*actual practice has varied from the proposition endorsed by most scholars. Ample evidence of the conduct of exiled governments and returning governments during and immediately after*

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[112] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, at ¶ 106.

[113] Benvenisti 1993, at p. 22. See also Benvenisti 2012 at p. 106 (""Arguably, the same concern with aggressive legislation by the ousted government designed to harm the occupied population applies with equal force to the interpretation and implementation of the ousted sovereign's law by its national courts. […] national courts in the unoccupied area, just like the ousted government, must heed the interests and rights of the occupied population and refrain from using the national law as a vehicle to undermine public order and civil life in the occupied area"). *See also* Antal Berkes, *International Law and De-Occupation Legislation*, 3 RUTGERS INT'L L. & HUM. RTS. J. 143 (2023).

[114] Felice Morgenstern, *Validity of Acts of the Belligerent Occupant*, 28 BYIL 291, 298 (1951).

[115] Benvenisti, 2012, at 299.

the two world wars shows that by and large those institutions did not conceive themselves as bound by the international legality test, nor did they always find it expedient to respect the lawful measures of the occupation authorities."[116]

86. However, as I detail in the 2012 edition,[117] a major change occurred between the time the 1993 and the 2012 editions of my book appeared, reflecting the fact that:

> "*both national constitutional law and international human rights law have come to protect also the rights of those inhabitants in the occupied territory who have relied in good faith on the occupant's illegal measures*."[118]

87. To reach my conclusion I could rely on several decisions of national constitutional courts, and of the ECtHR, as well as on opinions and conclusions such as those of the Venice Commission and the Pinheiro Principles.

88. As I described above, according to the law as it evolved during the 1990s and 2000s, the rights of secondary occupants are protected under international law and require the respect of the lawful sovereign.

89. To the extent that the balance struck between the original owners, secondary occupants and third parties is accepted as legal by independent and impartial international judicial bodies such as the ECtHR, they reflect international legality that binds also the Republic of Cyprus.

90. On the basis of the above, it is submitted that the Republic of Cyprus is legally obligated under international law to respect the validity of good faith transactions implemented through the TRNC property regime, a regime that reflects international legality, as explained above. The Republic of Cyprus must not interfere in such transactions and thereby harm the welfare of the occupied population and undermine the public order in the occupied territory.

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[116] Id., at 301. This observation was also mentioned in Benvenisti, 1993, in pp. 22-23.
[117] Id., at 304-317, and also in pp. 104-106.
[118] Benvenisti, 2012, at p. 305.

b. The legal obligations of the Republic of Cyprus under the ECHR

91. This obligation of the Republic of Cyprus to respect and recognise the validity of transactions in abandoned property subsequent to Law 67/2005 is also grounded in ECHR law. This principle is acknowledged by the ECtHR in the *Cyprus v. Turkey* judgment of 2001 mentioned above[119] which stated that the acts valid under international law must be respected by third states:

> "*To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled*."[120]

92. As mentioned earlier, the Republic of Cyprus has acknowledged this regime without reservations when, in its argument in *Güzelyurtlu v. Cyprus and Turkey*, it pointed out "the requirement under the Convention that individual applicants might need to engage with domestic remedies provided within the 'TRNC'"[121] (referring to the *Demopoulos* case).

93. It follows, that because the properties that the charges against Mr. Aykout refer to were all purchased following the promulgation of Law 67/2005, which is valid under international law and European human rights law, his transactions are all legally valid under the ECHR and general international law. Hence, the failure by the Republic of Cyprus or its courts to recognize those transactions as valid would infringe Mr. Aykout's rights that are protected by the ECHR and its Protocol 1.

94. Beyond the harm to Mr. Aykout's rights, the proceedings against him have adverse consequences for the people living in the occupied area. These proceedings question the validity of their titles and diminish their economic value. Furthermore, they transform these individuals into criminal suspects. Assuming the approach is adopted whereby the courts of the Republic of Cyprus are deemed to have jurisdiction over the "territory" under

[119] *Cyprus v. Turkey* (App. no. 25781/94) (2001).
[120] *Id.*, at ¶ 96.
[121] *Güzelyurtlu v. Cyprus and Turkey* (App. no. 36925/07) (2019), at ¶ 208.

Article 1 (contrary to the approach which holds that under customary international law such jurisdiction does not exist), such consequences fall "within the jurisdiction" of Cyprus in the sense of Article 1 of the ECHR which requires State Parties to "secure [ECHR rights] to everyone within their jurisdiction."

95. This responsibility of the sovereign government toward those individuals who are present in its sovereign territory yet in areas subject to foreign occupation has been recognized by the ECtHR, in the context of Russia's occupation of parts of Georgia. The ECtHR has determined that that those occupied parts of Georgia remain legally within Georgia's jurisdiction, even if Georgia's obligations in that area are effectively limited.[122] This Court stated that the presumption that a state exercises its jurisdiction throughout the State's Territory

> *"may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory, which may be as a result of (i) military occupation by the armed forces of another State which effectively controls the territory concerned, (ii) acts of war or rebellion, or (iii) the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned."* [123]

Nevertheless, the Court stated that

> "***The above-mentioned limitation of the "normal" exercise of jurisdiction means in practice that when a State is prevented from exercising authority over a territory due to exceptional circumstances, it does not lose the jurisdictional link within the meaning of Article 1 of the Convention altogether but rather has its responsibility under the Convention significantly reduced to discharging a number of positive obligations, such as, for instance, taking diplomatic, economic, judicial or other measures.***" [124]

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[122] *Bekoyeva v Georgia* (App. no. 48347/08, 5 October 2021), see also *Tskhovrebova v. Georgia* (App. no. 48348/08, 5 October 2021).

[123] *Bekoyeva v Georgia* (App. no. 48347/08, 5 October 2021), at ¶ 34

[124] *Id., id*. See also *O.J. and J.O. v. Georgia and Russia* (App. nos. 42126/15 and 42127/15, 19 March 2024) at ¶¶ 59-60; *Mamasakhlisi and Others v. Georgia and Russia* (App. no. 29999/04, 7 March 2023), at ¶¶ 317-19.

96. Clearly, in that case, the court was referring to the measures the absent sovereign was expected to take to address human rights violations committed by the illegal authority. This would apply even more strongly in case the measures are taken by the absent sovereign itself.

97. Assuming the approach is adopted whereby the courts of the Republic of Cyprus are deemed to have jurisdiction over the "territory" under Article 1 (contrary to the approach which holds that under customary international law such jurisdiction does not exist), the "economic, judicial or other measures" that the Republic of Cyprus or its courts have taken or will take with respect to the property regime in the occupied part of the country – such as the decision to indict Mr. Aykout, to detain him and to conduct the criminal trial against him are "within the jurisdiction" of Cyprus, and so are the effects of such measures that are or will be felt throughout the occupied part, effects that are also "within the jurisdiction" of the Republic of Cyprus. These existing and future measures therefore render the Republic of Cyprus responsible for the infringement of the ECHR rights of those located in the occupied part of the state who have relied on the property regime grounded in Law 67/2005.

98. The proceedings against Mr. Aykout disrupt an established legal order with respect to abandoned properties in northern Cyprus. Bringing charges against Mr. Aykout in relation to such properties is expected to impose significant burdens on the property market in northern Cyprus, and therefore to adversely affect the value of such properties and disrupt the entire economy of that region, infringing Article 1 of Protocol 1 of the ECHR which protects the right to property and the right to respect their private and family life, and their home (Article 8 ECHR).

99. Under Article 1(1) of Protocol 1,

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

100. As mentioned above, "the public interests" includes the interests of everyone "within the jurisdiction" of Cyprus, and this encompasses the interests of those situated in the occupied part of the country. Their interest is clearly to maintain public order and safety that Law 67/2005

provides. Interfering with the peaceful enjoyment of possessions will also be incompatible with the general principles of international law.

101. Such measures also violate the right of individuals in the occupied parts of Cyprus to respect their private and family life, and their home (Article 8 ECHR). These rights are extended to "everyone" and these include also the individuals that reside in the occupied part, and who continue to be "within the jurisdiction" of Cyprus in this context.

102. Moreover, in light of the lawful transactions made under Law 67/2005, the criminal charges against Mr. Aykout and his continued detention constitute infringement of his right to liberty and security.

103. As per Article 5 of the ECHR (Right to liberty and security),

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *[…]*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on* ***reasonable suspicion of having committed an offence*** *or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."*

104. In the case of Mr. Aykout, the key condition enumerated in ECHR Article 5(c) has not been met. Mr. Aykout has acquired the properties lawfully both under domestic TRNC and international law. In light of the above legal analysis of the status of the relevant properties, there can be no reasonable suspicion of having committed an offence by relying on the property regime established under Law 67/2005. Under international law and the law of the ECHR, the Cypriot law must recognize the legality of the regime of Law 67/2005.

105. For the same reason, because there can be no reasonable suspicion of having committed any offence in relation to the relevant properties, there can be no reasonable suspicion of having committed an offence of money laundering in this context. Such an offence requires

the use of proceeds from the commission of illegal activities, but in light of the above legal analysis, the case against Mr. Aykout does not show any illegal activities on his part.

106. Similarly, and for the same reason, the right to a fair trial before a "tribunal established by law" (Article 6(1) ECHR) is infringed in these proceedings. Under ECHR there can be no law that can authorize a court to ignore the property regime established under Law 67/2005 and endorsed by the ECtHR and moreover impose criminal charges for relying on that law.

IV. Conclusion

107. In conclusion, the criminal proceedings against Mr. Aykout and his detention, have the direct effect of violating his human rights under the ECHR, as well as the rights of property owners throughout the occupied part of Cyprus. In addition to these violations of individual rights, these proceedings also violate the obligations of the Republic of Cyprus under general international law, in particular the law of occupation.

This opinion is based on my professional expertise, and I certify that its contents are in accordance with my sincere beliefs.

Eyal Benvenisti

Date: 5 December, 2024