Legal Issues arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974

I. The Scope and Purpose of the Opinion

We are asked by the Republic of Cyprus to advise on the question of the lawfulness under both general international law and the regime established by the European Convention on Human Rights of forced population transfers and of certain proposals for compulsory transfers of property belonging to persons displaced as a result of forced population transfers in Cyprus from mid-1974 onwards. In particular, we are asked to deal with the following matters:

- the right of return of displaced persons;
- the right of such persons to their homes and property located in areas from which they have been displaced;
- the lawfulness or otherwise of a compulsory global exchange of properties of the displaced persons, with property rights being replaced by individual rights to apply for compensation.

These issues have arisen in the context of the refusal of Turkey to implement the decision of the European Court of Human Rights in the *Case of Loizidou v Turkey*. Apart from challenging the *res judicata* effect of that decision on the ground, essentially, that the decision was of an "exceptional" nature, Turkey has claimed that the decision could only be implemented within the framework of a Turkish Cypriot proposal for a "Joint Property Claims Commission" which envisages compulsory acquisition of Greek Cypriot and Turkish Cypriot properties against compensation to be provided, eventually, from various sources including contributions from third States and international organizations. We were provided a copy of the "Joint Property Claims Commission" proposal, which we understand has been transmitted to the United Nations Secretary-General.

Before turning to the issues presented for our opinion, we make an elementary point about the two decisions of 18 December 1996 and 28 July 1998 in the *Loizidou* case. These decisions are binding on Turkey under Article 52 ("The judgment of the Court shall be final") and Article 53 ("The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties") of the European Convention. Moreover, Article 54, which provides that "[t]he judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution", gives no discretion to the Committee as to whether a judgment is to be executed. The only duty upon the Committee is to ensure via its supervision that it be duly implemented.

II. The Relevant Factual Situations of Population Transfer

Mass population transfers can occur both between States and within a given State. We are not concerned with large-scale movements of persons caused by economic factors, such as the desire to seek work, policies of urbanisation, industrial development of certain areas, etc. Even where there are strong economic or other pressures or incentives for the persons concerned, they retain a measure of freedom as to whether, where and how to move, and whether to return. These cases are quite different from those of forcible mass transfer or enforced displacement where there is no option either to stay or to return.

Mass transfers can occur in a variety of ways, including the following:

(a) forcible transfer or enforced flight, where the government of the sending State or of some territorial unit within it expels the populations concerned, or deliberately causes them to leave by targeting particular groups or communities;

(b) large scale movements as a side-effect of armed conflict;

(c) enforced displacement resulting from a refusal to permit the return of persons in categories (a) and (b).

It should be stressed that the creation of barriers to return has the clear effect of endorsing, and perpetuating, the initial policy of forcible mass transfer.

III. The Legality of Forcible Transfer: Existing Legal Standards

Although they may overlap in particular cases, it is useful for present purposes to distinguish the following legal contexts:

(a) Forcible transfers as breaches of particular human rights standards;

(b) Forcible transfers as racial, religious or other discrimination: "ethnic cleansing";

(c) Large scale forcible transfers as a crime against humanity;

(d) Forcible expulsion by a belligerent or unlawful occupant.

We will discuss these in turn, before going on to consider the legal consequences of forcible transfers, and in particular the requirement of restitution in such cases.

(a) <u>Forcible transfers as breaches of particular human rights standards</u>

First and foremost, the forcible transfer of populations necessarily entails the violation of a series of internationally recognised human rights and this has been confirmed, for example, by the European Commission and European Court of Human Rights.

Thus the Universal Declaration of Human Rights of 1948 declared that "Everyone has the right to life, liberty and security of person" (Article 3); that "No one shall be subjected

to… cruel, inhuman or degrading treatment…" (Article 5); that "No one shall be subjected to arbitrary… exile" (Article 9); that "No one shall be subjected to arbitrary interference with his privacy, family, home…" (Article 12), and that "No one shall be arbitrarily deprived of his nationality…" (Article 15 (2)). These and other fundamental rights relevant to mass transfer have become part of the corpus of international law, being set forth in widely ratified treaties at the universal and regional level. See, respectively, the International Covenant on Civil and Political Rights of 1966 (in particular, Articles 6, 7, 9, 12, 17), and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, with its Protocols (in particular, Articles 2, 3, 5, 8; Protocol 1, Article 1; Protocol 4, Articles 2-4).

It is true that enforced population exchanges have occasionally occurred in the past: for example, Greece and Turkey under the Treaty of Lausanne of 1923, and the expulsion of Germans in 1945 under the Potsdam arrangements. However, the legality of forced transfers after the First World War did not go uncriticised, and in the latter case "the Allies specifically registered their disapproval of unilateral unsupervised expulsions". It is our opinion that the forcible transfer of populations is now clearly contrary to international law as it has evolved. Thus Special Rapporteur Al-Khasawneh in his Final Report on "Human Rights Dimensions of Population Transfer" for the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities underlined the illegality of such transfers and their prohibition under international human rights and humanitarian law. This view was endorsed by the Sub-Commission in its consideration of the Report.

(b) Forcible transfers as racial, religious or other discrimination: "ethnic cleansing"

The prohibition of discrimination on, *inter alia*, racial or ethnic grounds may be found, for example, in the Universal Declaration of Human Rights 1948 (Articles 1, 2 and 7) and the International Covenant on Civil and Political Rights (Articles 2 and 26). The norm is particularly evident in the International Convention on the Elimination of All Forms of Racial Discrimination 1965. Article 1, in a definition reflective of customary international law, prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms". Scrutiny of compliance with the Convention is a matter for the Committee on the Elimination of Racial Discrimination, which hears States' reports and individual petitions, and makes comments. In its Decision 2 (47) of 17 August 1995 on the situation in Bosnia and Herzegovina, the Committee declared that "any attempt to change or to uphold a changed demographic composition of an area, against the will of the original inhabitants, by whichever means is a violation of international law" (A/50/18, 1995, para. 26).

In 1970 the International Court, delivering judgment in the *Barcelona Traction* case, referred to obligations *erga omnes* in contemporary international law, which are "by their very nature… the concern of all States..." (ICJ Reports, 1970, p. 32). It gave as an example of such obligations, "the outlawing of acts of aggression, and of genocide" as

well as "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (ibid.).

Although the Court was referring here to principles of universal application, many steps have been taken to give effect to them at regional level. In particular the Final Act of the Helsinki Conference of 1975 contained a "Declaration of Principles Guiding Relations between Participating States", which included a section on human rights. This said, *inter alia*:

"In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration on Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound."

It is evident that the participating States in the Helsinki Conference recognised that human rights standards form part of general international law. Furthermore, the Charter of Paris for a New Europe, adopted by the leaders of the 34 members of the Conference on Security and Co-operation in Europe affirmed that:

"Human rights and fundamental freedoms are the birthright of all human beings, and are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government."

The Charter affirmed the commitment by the participating States to protect the rights listed therein, including non-discrimination, and to ensure recourse to effective remedies against violation of those standards.

The practice of "ethnic cleansing", that is, forcing out from a particular area the people of one race or ethnic group, in order to bring about and maintain the changed demographic complexion of the area, has been strongly condemned by the United Nations. The Security Council has, for example, termed such practices as unacceptable and expressed the determination of the Council to bring them to an end (see e.g. SC resolution 941 (1994)). It was particularly emphasised that those who have committed such acts will be held individually responsible. Ethnic cleansing was declared to constitute a violation of international humanitarian law (see e.g. SC resolutions 771 (1992); 780 (1992); 808 (1993) and 820 (1993). The General Assembly has also attacked the notion of ethnic cleansing and declared it a "grave and serious violation of international humanitarian law" (see, e.g., GA resolutions 46/242 and 47/80).

(c) Large scale forcible transfers as a crime against humanity

Deportation, defined as a forcible transfer of a civilian population, was included as a crime against humanity in the London Agreement 1945 creating the Nuremberg Tribunal, as well as in Control Council Law No. 10 (enacted by the Allied Powers in Germany), although at that time crimes against humanity were specifically linked to war crimes.

Subsequently crimes against humanity have been disengaged from war crimes, and the character of large scale forcible expulsion of populations as a crime against humanity is now established. It is included in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 5) and Rwanda (Article 3), both of which were clearly intended as declaratory of the substantive international law. Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind adopted by the UN International Law Commission in 1996 declares that "arbitrary deportation or forcible transfer of population" constitutes a crime against humanity "when committed in a systematic manner or on a large scale and instigated or directed by a Government". Article 7 (1) (d) of the Rome Statute of the International Criminal Court 1998 declares that "[d]eportation or forcible transfer of population" constitutes a crime against humanity "when committed as part of a widespread or systematic attack, directed against any civilian population". To summarize, the view that large-scale forcible expulsion of people is a crime under international law is now well established. Such conduct is no longer linked with the category of war crimes: it involves a crime against humanity, whether carried out in armed conflict or otherwise. Indeed, as the Commission of Experts for the Former Yugoslavia noted, mass expulsion of a population could in certain circumstances "also fall within the meaning of the Genocide Convention", where the requirements of conduct and specific intent set out in that Convention are satisfied.

(d) Forcible expulsion by a belligerent or an unlawful occupant

So far we have been dealing with cases of forcible mass transfer perpetrated by a State on its own territory. The unlawfulness of forcible mass transfer applies *a fortiori* where the State concerned is merely in occupation of the territory in question.

For example, mass forcible transfers of populations in armed conflict are serious war crimes. Article 49 of the Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, provides:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

Under Article 147 of the Convention, "grave breaches" of the Convention include "unlawful deportation or transfer… of a protected person". Article 85 (4) (a) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) includes amongst "grave breaches" of that Protocol, "when committed wilfully and in violation of the Conventions or the Protocol":

"the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention".

Further, Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 provides:

"1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

These various provisions are reflected in Article 8 (2) of the Rome Statute of the International Criminal Court of 1998

The position is even more strictly regulated where a State is unlawfully in occupation of the territory concerned. The International Court of Justice in the *Namibia Opinion* recognised that a narrow range of acts carried out by an unlawful occupant (in that case, South Africa in respect of Namibia) might need to be regarded as lawful because of the interests of the indigenous population of the territory themselves: it instanced the registration of births, deaths and marriages. But conduct of an unlawful occupant which goes beyond those narrow limits is unlawful, and especially where it involves the forcible mass transfer of the population itself. Where, as in the case of Namibia or Cyprus the illegality of the occupation has been authoritatively recognised, it follows that no validity can be attributed to such conduct; and third States generally are precluded from recognising it as lawful.

(e) Conclusion: The existence of a general principle prohibiting forcible expulsion and the remedy of return

For the reasons we have given, forcible mass transfer is intrinsically unlawful, and engages the responsibility of any State concerned. In our opinion, the rules discussed above prohibiting forcible mass transfer – as a series of breaches of fundamental human rights, as a crime against humanity and as ethnic cleansing – have the character of peremptory norms of general international law, from which no derogation is permitted. In other words, they have the status of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties. This conclusion is also widely accepted in the literature. As a general matter, the commission of an internationally wrongful act imposes on that State an obligation to make full reparation, and where the wrongful act has a continuing character, to cease that conduct, without prejudice to the responsibility already incurred. These remedial consequences have particular rigour and salience in cases where the underlying norm violated is peremptory in character. In such a case, the requirements of these norms cannot be set aside by agreement between any of the States that may be involved. Moreover the primary consequence of a breach of such norm must be full and complete restitution. Otherwise the wrongdoing State would in effect be allowed, by the

payment or even the promise of compensation, to purchase the benefits of derogating from such a norm, and the original wrong would be endorsed and entrenched, in its character and its consequences. Thus in the case of forcible mass transfer in violation of a peremptory norm, the right of the individuals concerned to return to their country is itself the primary form of restitution. Their right to return is a peremptory consequence of the breach to which they have been subjected.

IV. *Restitutio in Integrum* and the Right to Return

In the cases we are considering, the right to return acquires peremptory force from the character of the fundamental breach involved, i.e. from the initial act of forcible transfer. In such cases, the legal bases of the right to return consist in, first, the establishment of the people concerned on particular territory, and secondly, the violation of their right of residence by forcible transfer or enforced displacement, on the part of an administration which has no authority to transfer them or to enforce their displacement. Where mass forcible displacement of a people has occurred, the relevant remedy is *restitutio in integrum*. In such cases this is the legal foundation of the right to return, and the explanation for its peremptory character.

A clear illustration of this is provided by the resolution adopted by various organs in the context of the Kosovo crisis. A series of Security Council Resolutions have reaffirmed in the strongest terms "the right of refugees and displaced persons to return to their homes in safety": see SC resolutions 1199 (1998), 1203 (1998) and 1239 (1999), where the responsibility of the Federal Republic of Yugoslavia for creating the conditions for the right of return to be realised is emphasised. Furthermore the General Assembly in Resolution 53/164 of 9 December 1998;

"Call[ed] upon the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) and ethnic Albanian leaders to allow for and facilitate the free and unhindered return to their homes, in safety and with dignity, of all internally displaced persons and refugees, and expresses its concern about reports of continuing harassment or other impediments in this regard".

Security Council resolution 1244 (1999) further decided that establishing a secure environment to achieve this is included in the responsibilities of the international security presence to be deployed in Kosovo.

It follows that where unlawful forced transfers of populations have occurred, the imposition of measures intended to prevent the effective enjoyment of *any* right of return to the territory of origin will amount to an aggravation of the offence. It will amount to an attempt to legitimate the violations that have taken place. If the initial forcible population transfer constitutes a breach of international law, which it clearly does, then any

arrangement that consolidates the illegality and its consequences, imposed without the full and free consent of those directly affected, can only be seen as an attempt to ratify the original wrong. The egregious character of the breach in question is underlined by the fact that by definition the act will have been directed against an ethnic or other group in circumstances amounting to systematic discrimination against that group, and by the characterisation of forcible mass transfer of populations as a crime against humanity.

These conclusions have implications not only for a direct prohibition on the right to return to a territory following forcible mass transfer, but for other compulsory arrangements calculated to produce the same result. In particular, the compulsory acquisition of the homes and property of the displaced population, located in their former homeland, would be legally problematic, even if secure and adequate compensation were provided. Under normal circumstances the compulsory acquisition of private property, for a public purpose and against compensation, is lawful, and no question of breach of a peremptory norm arises. The position is different, however, where the targeted group is defined, to their disadvantage, by reference to their racial or ethnic origins. Where the purpose and effect of the expropriation measure is to prevent any exercise of the right to return of the people concerned to their homes, and to entrench the original ethnic discrimination, the illegality would be compounded. The right to return must not be emptied of effective content, any more than it can be denied outright in such cases. Faced with a violation of a peremptory norm, the primary responsibility of the States concerned under international law is to restore the property in question to the victims. Only if this proves impossible, or if the victims themselves chose otherwise, is compensation the appropriate alternative.

This is the position taken, for example, in the Dayton/Paris Agreement with respect to Bosnia-Hercegovina. Article 1 of Annex I to the Dayton/Paris Agreement states that displaced persons "*shall have the right* to have restored to them their property... and to be compensated for any property that cannot be restored to them" (emphasis added: see also Article XI (3) and SC resolution 820 (1993)).

In conclusion, any scheme involving involuntary expropriation of property rights is unlawful inasmuch as it would be incompatible with any form of restitution. Moreover in cases of illegal occupation the authority has no power to expropriate *ab origine*: thus a new expropriation is called for, and this again will single out an ethnic or racial group irrespective of the preferences of the members of that group.

V. Compulsory Transfer of Property in Situations of Forcible Expulsion and Enforced Displacement: The Proposed "Joint Property Claims Commission"

We turn to the case of Cyprus, and to the proposed "Joint Property Claims Commission". The first point to note is that, since August 1974, Turkey’s continuing occupation of the northern part of Cyprus has been authoritatively recognised as unlawful, by the Security

Council and General Assembly and in a *jurisprudence constante* of the relevant European bodies. See, in particular:

(a) Decision of European Commission, *Cyprus v. Turkey*, Applications Nos. 6780/74 and 6950/75, *Report of the Commission*, 10 July 1976, p.163 (Conclusion").

(b) Decision of European Commission, *Cyprus v. Turkey*, Application No. 8007/77, *Report of the Commission*, 4 October 1983, pp. 47-48 (Conclusion").

(c) *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights, 23 March 1995, 103 ILR p.622, paras. 56-64.

(d) *R v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd* (Case C-432/92) Court of Justice of the European Communities, 5 July, 1994, ECR I-3087; 100 ILR p.257.

(d) *Loizidou v. Turkey (Merits)*, European Court of Human Rights, 18 December 1996, 108 ILR p.443, paras. 42-64.

Essentially the same stand has been taken as to the position of Turkey, and the lack of any international status of the "TRNC" or its precursor the "TFSC", by national courts in many cases including:

a. *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd* [1979] AC 508; 73 ILR 9 (House of Lords);
b. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 917 F. 2d 278 (7th Cir. 1990), 108 ILR 488;
c. *R v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd* 100 ILR p. 244 (High Court, Queen's Bench Division, 23 February 1994);
d. *Polly Peck International plc v. Nadir and others (No. 2)* [1992] 4 All ER 769 at p. 773 (Court of Appeal, Civil Division (Lord Donaldson MR, Stocker & Scott LJJ));
e. *Caglar v. Billingham (Inspector of Taxes) and Related Appeals* [1996] STC (SCD) 150; 108 ILR 510 (Special Commissioners (Stephen Oliver QC and Dr. AN Brice)).

It follows from these decisions, and from the considerations set out in Section III above, that the forced mass displacement of these persons from the north of Cyprus in and after 1974 is fundamentally unlawful, and that nothing has happened since to change this situation. The persons concerned have a right of return, which right is, for the reasons stated, peremptory in character. They cannot simply be excluded from exercising it by any imposed scheme.

With regard to Cyprus particularly, a number of Security Council and General Assembly resolutions have explicitly…

- emphasised the importance of the "voluntary return of the refugees to their homes in safety" (GA resolution 3395 (XXX); see also GA resolution 3212 (XXIX) of 1 November 1974, para. 5 (adopted unanimously), unanimously endorsed by SC resolution 365 (1974));
- urged the parties concerned "to permit persons who wish to do so to return to their homes in safety" (SC resolution 361 (1974)), and
- referred to "the right to return and the right to property" (SC resolution 774 (1992)).

General Assembly resolutions have particularly called for "the institution of urgent measures for the voluntary return of the refugees to their homes in safety" (see, for example, GA resolutions 33/15; 34/30, and 37/253).

The nearest that the international community has come to providing a settlement plan (the "Set of Ideas on an Overall Framework Agreement on Cyprus" formulated by the UN Secretary-General in 1992: see S/24472, Annex), provides that displaced persons may if they chose "select the option to return" (ibid., para. 79). This "Set of Ideas" has been endorsed by the Security Council on several occasions, for example, in SC resolutions 750 (1992); 774 (1992); 789 (1992); 889 (1993); 969 (1994);1032 (1995); 1062 (1996) and 1146 (1997). It is interesting to note that the Report of the Secretary-General of 19 November 1992 contains the following statement:

"Concerning displaced persons, I welcomed the acceptance by Mr Denktas of the principle of the right to return and the right to property. At the same time, while expressing understanding for the practical difficulties involved in resolving the issue of displaced persons, I stated that the manner in which these difficulties were addressed must not by itself deny the principle of the right to return and the right to property." (S/24830, para. 3, see also S/24472, para. 37).

This is the legal context in which the "Joint Property Claims Commission" is to function. Reference to that proposal has already been made (see above, paragraph 2). The essential elements of the proposal are as follows:

- The Commission is to be established "as early as possible";
- It is compulsory; individual property owners will have no choice not to accept compensation. If they do not claim within 6 months they lose the right to claim.
- The Government of Cyprus is to expropriate all Turkish Cypriot properties in the territory under its control, without compensation. Compensation is to be made by the Turkish Cypriot side.
- The earlier unlawful confiscation, by the Turkish Cypriot side, of all Greek Cypriot properties in the north of Cyprus is to be ratified.
- A "shortfall in funds necessary for compensation" is envisaged, which will be covered by "various possible sources".
- Although properties are to be valued "at the current market value", there will be "windfall taxes on the increased value of the transferred properties". Who will pay these is unclear.

There are numerous difficulties with this proposal. It provides no security of compensation at all, quite apart from other considerations. Thus Turkish Cypriot owners of property in the unoccupied area (many of whom are now, in fact, resident in and even nationals of third States) will see their existing property rights under the law of Cyprus compulsorily converted into an uncertain right to compensation from unspecified sources. As to Greek Cypriot properties in the northern part, the European Court has held it is still theirs, and that they have a right of access to it under the Convention (even though they are presently denied the exercise of that right). Thus the deprivation of rights of all the affected individuals, implicit in the proposal, would not meet the standards of Article 1 of Protocol 1 of the European Convention of Human Rights. But there is an even more fundamental difficulty with the proposal.

Legislation which purports to affect the property of persons by reason of their belonging to an ethnic or linguistic group is plainly unlawful under international law, and no validity can be attributed to it. In the case of the Greek Cypriot owners of property, the element of discrimination is exacerbated, since the property is confiscated without any element of choice on their part. The effect of the proposal, having regard to the context, would be to preclude their return to the homes and areas from which they were unlawfully expelled after 1974. It would substantially impair, and more likely completely preclude, any effective exercise of the right of return. This amounts, in effect and intent, to the ratification of ethnic cleansing. In our opinion, arrangements which lack the consent of the people affected and which are intended to perpetuate or entrench the changed demographic composition of an area, where that change follows from mass forced displacement contrary to international law, will themselves be contrary to international law and in particular will violate the core principle of the prohibition of discrimination, which is binding upon all States. These principles have consistently been endorsed by the organs of the United Nations.

The decision of the European Court in the *Loizidou* case is directly relevant here. It should be stressed that the substantial damages awarded in that case were for the applicant’s loss of use and enjoyment of her property. There was no claim for expropriation. The decision clearly recognises the right of a person in the situation of Mrs Loizidou to elect to maintain her property rights and not to be limited to compensation for their loss.

Article 1 of Protocol No. I provides that "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." This requires that *any* taking of property must conform with international law, and the better view is that this requirement applies to nationals as well as to aliens. Since the proposed imposed arrangements would not only impose an exchange of property upon Cypriot nationals by reference, ultimately to their ethnic origin and to internationally unlawful discrimination against them, but would also

preserve a situation created in violation of international law, it follows that "the general principles of international law" would not be respected by the proposed scheme.

VI. The Inadmissibility of a Bar on Applying to the European Court of Human Rights Accompanying Any Claims Mechanism

The European Convention system was and is intended as a public order arrangement for Europe. It operates autonomously, with its sphere of operation dictated by Article 1 of the Convention.

The European Court has strongly underlined "the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms" (*Loizidou v Turkey (Preliminary Objections)*, 23 March 1995, para. 70), which "creates over and above a network of mutual bilateral undertakings, objective obligations which in the words of the preamble benefit from a 'collective enforcement'" (*Ireland v UK*, 15 January 1978, para. 239). In addition, the Court has emphasised that the Convention constitutes "a constitutional instrument of European public order ('ordre public')" (*Loizidou v Turkey (Preliminary Objections)*, para. 75).

Article 1 of the European Convention on Human Rights requires High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in section I. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member State's jurisdiction from scrutiny (*Matthews v UK*, judgment of 18 February 1999, para. 29). It also extends to arrangements or provisions which result from other international agreements. It may be that the requirements of the Convention are satisfied if the other agreement embodies its own safeguards guaranteeing, as a minimum, the standard of treatment stipulated by the European Convention and applicable Protocols. But this was not the case in *Matthews* and there is no trace of it in relation to the proposed "Joint Property Claims Commission".

Thus the States parties to the Convention are responsible under Article 1 for the consequences resulting from international instruments entered into subsequent to the coming into force of the Convention (see *Matthews*, para. 33). This means that relevant parties to any scheme will bear responsibility under the Convention for violations (including those of a continuing nature: see Articles 25 and 26 of the International Law Commission's Draft Articles on State Responsibility, A/51/10, 1996, pp. 133-134) resulting from it. Thus any arrangement related to the properties of persons forcibly transferred in Cyprus since 1974 will be subject to scrutiny by the European human rights organs at the instance of individuals affected (or, indeed, any other Member State of the Council of Europe). This scrutiny cannot be excluded by any separate status that may be

accorded to any part of the territory of a member State, or by any subsequent treaty or other arrangement between particular States subject to the jurisdiction of the Court.

VII. Conclusions

For the reasons we have given, it is our opinion that:

Forced population transfers, effected on a discriminatory basis and carried out on a large scale, are unlawful under international law, whether they take place within or between States and whether in time of peace or armed conflict.

(b) It is unlawful to seek to maintain a situation arising from forced population transfers or ethnic cleansing, by legal or other measures prohibiting return of the displaced population, in particular where such measures discriminate on racial, ethnic, religious or linguistic grounds.

(c) Where populations have been unlawfully displaced on a large scale, compulsory exchanges of property belonging to persons affected are unlawful if their purpose is to legitimise a situation arising from forced population transfers or ethnic cleansing.

(d) In addition, such a scheme, as envisaged in the proposal for a "Joint Property Claims Commission", would violate the provisions of Article 1 of Protocol No. 1, in conjunction with Article 14, of the European Convention on Human Rights.

(e) Such a compulsory property exchange arrangement, even if contained in a treaty, could not be immunised from scrutiny under the European Convention on Human Rights.

(f) For these reasons the Republic of Cyprus could not, consistently with its international obligations, accept or implement the proposal for a "Joint Property Claims Commission".

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NOTE

The attached joint opinion was prepared by a group of international law experts, at a consultation held in Geneva on 26-27 June 1999, convened by the Attorney General of the Republic of Cyprus Mr. Alexandros Fr. Markides. The views set out were expressed independently. Another invited expert (Professor Greenwood) was unable to be present during the actual discussions, but approved the text of the final opinion and its reasoning and indicated his willingness to be a co-signatory. The signatories are as follows:

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