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Communication from Cyprus (07/09/2021) in the case of XENIDES-ARESTIS v. Turkey (Application No. 46347/99).

Information made available under Rule 8.2a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1411e réunion (septembre 2021) (DH)

Communication de Chypre (07/09/2021) relative à l'affaire XENIDES-ARESTIS c. Turquie (requête n° 46347/99) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

XENIDES-ARESTIS GROUP v TURKEY
No. 46347/99

MEMORANDUM BY THE GOVERNMENT OF THE REPUBLIC OF CYPRUS

1411th CM(DH) MEETING, September 2021

INTRODUCTION

1. The 36 cases examined by the Committee under the *Xenides-Arestis* group concern the continuing denial of access to and consequent loss of control of property in the occupied areas of Cyprus, and (in some cases) the violation of the applicants' right to respect for their homes. They are before the CM(DH) in September 2021:

   a. because just satisfaction which fell due in 33 of those cases at various dates between 2007 and 2012 remains unpaid; and

   b. in *Loizidou v Turkey,*[1] for examination of individual measures concerning the properties of Mrs Loizidou.

   Also outstanding in *Loizidou* is the issue of just satisfaction in respect of the period 28 January 1987 - 21 January 1990, i.e. the interval between Turkey's recognition of the right of individual petition and its acknowledgment of the jurisdiction of the Court.

JUST SATISFACTION

2. In 33 cases of the *Xenides-Arestis* group, Turkey remains in violation of its unconditional obligation to pay the just satisfaction ordered by the Court between 2007 and 2012. In *Xenides-Arestis* itself (no. 46347/99), the judgment on just satisfaction became final on 23 May 2007: the subsequent delay of more than 14 years is believed to be the longest in the history of the Court.

3. In three interim resolutions on *Xenides-Arestis* adopted in 2008, 2010 and 2014,[2] the Committee deeply deplored the fact that Turkey had not complied with its obligation to pay

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[1] The Deputies at the 1324th CM(DH) (September 2018) decided to resume consideration of the other cases of the *Xenides-Arestis* group at their June 2019 DH meeting: CM/Del/Dec(2018)1324/24.

[2] CM/ResDH(2008)99, CM/ResDH(2010)33; CM/ResDH(2014)185.

the amounts awarded to the applicant. In 2010 and 2014, the Committee declared further that "*Turkey's continuing refusal to comply with the judgement of the Court is in* ***flagrant conflict with its international obligations****, both as a High Contracting Party to the Convention and as a member State of the Council of Europe*" (emphasis added), and exhorted Turkey to pay without any further delay the just satisfaction awarded by the Court, as well as the default interest due.

4. In recent years the Committee has returned to the issue at every opportunity, and never wavered in its insistence. In their most recent Decisions on the *Xenides-Arestis* group, at the 1340th meeting in March 2019, the Deputies:

> "*insisted again firmly on the unconditional obligation to pay without further delay the just satisfaction awarded by the European Court in 33 cases of the Xenides-Arestis group*".[3]

5. As the Republic of Cyprus has consistently maintained, the integrity of the Convention system itself is threatened by Turkey's blatant disregard for its legal obligations. The duty to comply with the terms of the Court's judgments under Article 46 ECHR is unconditional. Any attempt by Turkey to qualify that obligation, by attempting to merge it with questions relating to the 'Immovable Property Commission' ('IPC'), has always and correctly been rejected by the Committee as unacceptable. The Court itself rejected Turkey's reasoning to this end in the *Xenides-Arestis* just satisfaction judgment.[4]

6. Remarkably, in its Memorandum of June 2021 (as in its Memorandum of May 2019),[5] Turkey in addressing the *Xenides-Arestis* cases does not even refer to the issue of its own outstanding debt – debt which even in March 2019, and in those cases alone, exceeded 50 million Euros.[6] No intention to pay is expressed in the Memorandum, and no explanation given for Turkey's default.

7. Turkey has treated the applicants in those cases, and the Committee, with utter contempt. This is deplorable. In the circumstances, Cyprus requests (as it did in its Memorandum of May 2019)[7] the preparation of a fourth interim resolution as a mark of the Committee's

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3 CM/Del/Dec(2019)1340/H46-26.

4 No. 46347/99, 7 December 2006, §37.

5 DH-DD(2019)552.

6 The outstanding sums including interest as of 13 March 2019 were €52,842,414.97 for the *Xenides-Arestis* group): DH-DD(2019)277. This is without taking into account the outstanding debts of €103,493,835.62, as of the same date, in the inter-State case together with €244,692.99 in *Varnava*.

7 DH-DD(2019)603, para 15.

disapproval, and in the hope that it will persuade Turkey finally to fulfil its unconditional and indisputable obligations.

LOIZIDOU: INDIVIDUAL MEASURES

8. The Secretariat expressed the view, following the *Demopoulos* admissibility decision in 2010, that it was open to Mrs Loizidou to bring her remaining claims before the Immovable Property Commission ('IPC'), set up under 'Law 67/2005' of the 'TRNC', stating that this body was '*better placed than the Committee of Ministers to decide on the possibilities of redress*', and pointing out dissatisfied applicants to the IPC may have further recourse to the 'Administrative Court of Appeal' and indeed to the Court itself.[8]

9. That proposition is already controversial: persons with the benefit of a judgment from the Court should in principle be able to count on the Committee to secure its execution, without being thrown back on mechanisms devised by the respondent State. That is so, particularly, when the efficacy and timeliness of those mechanisms is open to doubt.[9] But whatever the general merits of the proposition, it cannot be sustained in the specific case of *Loizidou*. In that case, the IPC is fatally compromised by the fact that it has already examined the case, uninvited and of its own motion and made a (manifestly inadequate) offer of compensation to Mrs Loizidou.

10. The relevant facts are as follows:

    a. In its Judgment of 18 December 1996, the Court established a breach of Article 1 of Protocol 1 due to "*the denial of access to the applicant's property and consequent loss of control thereof*".

    b. In the absence of any individual measures 10 years after the Judgment, at the 987th DH meeting of 14 February 2007, the Deputies took a decision in Mrs Loizidou's case by which they "*invited **the Turkish authorities** to adopt without further delay concrete measures in favour of the applicant*" (emphasis added). No such measures were adopted or proposed by the Turkish authorities.

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8 CM/Inf/DH(2010)21, paras 18-23.

9 That doubt is demonstrated not only by the unacceptable delay found by the Court in the case of *Joannou* no. 53240/14 (judgment of 12 December 2017) but by further cases concerning the operation of the IPC that have been communicated to Turkey in recent years, e.g. *KV Mediterranean Tours Limited v Turkey*, Appl. No. 41120/17, and *Panagi and Shiartou v Turkey*, Appl. no. 6178/18.

c. On 20th November 2007 (and indeed three years prior to the Court's admissibility decision in *Demopoulos*), without any application or submissions having been made by Mrs Loizidou to the IPC, the Secretary of the IPC sent a letter to Mrs Loizidou's lawyer. In summary:

i. In relation to the issue of restitution, the letter expressed the following final view:

"The Commission ... has reached the ***conclusion*** *that it is not possible to apply the restitution option in the present case in application of Section 8(2) of the Law 62/2005 [sic].*

In the present case, the properties in question (see Table 1) have been acquired by persons in exchange of property left behind in the south of Cyprus, such persons having had to leave the south of Cyprus and to move to the North. Furthermore, the Commission, ***through detailed survey, has come to the conclusion that the properties in question have undergone considerable changes, preventing the application of the restitution option after the settlement of the Cyprus problem****. It is therefore not possible to restore these properties to your client. Consequently, exchange or compensation in lieu of restitution are the only means of address available to your client."* (emphasis added)

ii. In relation to the issue of compensation in lieu of restitution, the conclusions of the IPC were also given with finality. It assessed the market value of the properties at £476,249 (CYP 403,601), on the basis of "*the estimates and data mentioned in the enclosed Tables 2 and 3*", and assessed compensation for loss of use on the basis of "*data produced by Mr Turgut Ersoy, Chartered Valuation Surveyor*".

iii. The IPC expressed itself ready to hear Mrs Loizidou on the issues of exchange of property and non-pecuniary damage, but extended no such express invitation in relation to the core issues of market value and loss of use.

d. As subsequently recorded in the Order of Business for the December 2008 1043rd CM(DH) meeting, the applicant nonetheless submitted comments on the IPC's offer, criticising both the refusal of restitution and the calculation of compensation. The IPC, by letter of 27 February 2008, maintained its original position.

e. The Committee in June and September 2008 "*found that the offer made by the applicant by the Turkish authorities still raises questions which need to be clarified, as regards inter alia the reasons against restitution of the property at issue*", and decided

to resume consideration of the issue at its meeting of December 2008.[10] At that meeting, the Committee concluded only that "***a first reading of this information*** shows that the offer made to the applicant is in compliance with ['Law 67/2005']" (emphasis added),[11] indicating that no final position had been reached on that issue.

f. Turkey is therefore demonstrably and crucially wrong when she asserts, in her Memorandum of June 2021 (p.5), that the Committee in December 2008 "***finally*** *decided that the offer was in compliance with the IPC Law, Law No. 67/2005*".

g. No further substantive consideration has been given by the CM(DH) to the issue of whether the offer made to Mrs Loizidou complied with the terms of "Law 67/2005".

11. There are a number of reasons why an application by Mrs. Loizidou to the IPC cannot ensure redress in the circumstances of her case.

12. ***First***, it is wrong in principle to require an applicant who already has the benefit of a judgment of the Court to apply to a body such as the IPC in order to secure execution of that judgment. It is the Committee, not the IPC, that has the responsibility of supervising the execution of judgments of the Court.

13. In that regard, the Court held as follows in the *Xenides-Arestis* just satisfaction judgment at paragraph 37, reproduced in *Demopoulos* at paragraph 76:

> "*The Court cannot accept the Government's argument that the applicant should now be required at this stage of the proceedings when the Court has already decided on the merits to apply to the new Commission in order to seek reparation for her damages.*"[12]

The Secretariat in its information document of 2010 sought to limit those remarks to just satisfaction:[13] but there is no logical reason why they should not apply also to individual measures, given also the growing doubts in relation to the efficacy and timeliness of the IPC referred to at para 9 above.

14. ***Secondly***, the IPC cannot in any event be advanced as an effective and impartial remedy, and particularly in the circumstances of this case, for the following reasons:

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10 CM/Del/OT/DH(2008)1043, pp. 9-10.
11 CM/Del/Dec(2008)1043, p. 17
12 *Xenides-Arestis v. Turkey*, no. 46347/99, 7 December 2006, §37.
13 CM/Inf/DH(2010)21, para 20.

a. It was completely inappropriate for *the IPC* itself to make an offer to Mrs Loizidou of its own motion, in circumstances where she had made no application or submissions to it, and had no opportunity to challenge the IPC's reasoning. The Committee plainly envisaged at its 987th meeting of February 2007 that any offer would come from *the Turkish authorities*; and the procedures of the IPC do not allow for determinations *proprio motu*, particularly in the absence of submissions from the party affected.

b. Having volunteered its "*conclusions*" at that preliminary stage and having proved impervious to subsequent arguments by Mrs Loizidou, it is evident that the IPC has pre-judged its position and can no longer be advanced as an effective and indeed impartial remedy for Mrs Loizidou.

c. The inadequacy of the IPC's offer of 20 November 2007 is further evident from the following facts:

   i. It relied, in refusing restitution, on a suggestion that "*the properties in question have undergone considerable changes, preventing the application of the restitution option after the settlement of the Cyprus problem*". Yet a number of those properties are in fact empty and undeveloped, which invalidates the reasoning of the IPC (and casts doubt on its other, unevidenced, reason for refusing restitution: the alleged acquisition of the property by Turkish Cypriots who left property in the government - controlled areas).

   ii. Even in relation to the 8.5-year period for which compensation for loss of use was offered (1998-2006), the offer was at a considerably lower level (CYP 186,332) than the award which the Court made in its just satisfaction judgment of 1998 for the period 1990-1998 (CYP 300,000), a divergence which is nowhere explained.

d. Were there to be any doubt as to the inadequacy of the IPC as a mechanism which could decide fairly and impartially on Mrs Loizidou's claim for restitution, that doubt would be dispelled by the highly partial views attributed to the former Chairman of the IPC in the quotation reproduced in a press article in *Diyalog* on 24 March 2018, set out at paragraph 21 of the Government's Memorandum on *Cyprus v Turkey* for the September 2018 CMDH meeting (1324th meeting), in which he stated, inter alia: "... *the more land is Turkified, the right of the Greek Cypriot side to demand land in the north will be abolished*".

15. ***Thirdly***, the Committee has never in the past come to a firm or final conclusion of its own in relation to the issue. As noted in the account of the relevant facts above, the conclusion in the Committee's Decision of December 2008 that the offer made to the applicant was compliant with "Law 67/2005" was no more than a tentative provisional one, based on "***a first reading***" of the information before it.[14]

16. At the September 2018 CM(DH) meeting, the Secretariat acknowledged that the Committee's conclusion had been qualified, and sought to suggest that the qualification was a reference to the then pending case of *Demopoulos*.[15] But an inspection of the December 2008 Decision shows that this was not the case:

    a. The Deputies noted the information provided by the Turkish authorities and then noted "*that a first reading* ***of this information*** *shows that the offer made to the applicant is in compliance with this law*".

    b. Any final verdict would have required – indeed still requires – further scrutiny of *that information*, including obtaining evidence of the matters referred to.

    c. The allusion to *Demopoulos* comes later in the final decision, when the Deputies recalled that the Court had yet to pronounce on the effectiveness of the IPC mechanism. That passage is not concerned with scrutiny of the factual conclusions expressed by the IPC in its uninvited letter.

17. ***Fourthly***, a reliable assessment of the IPC's offer will only be possible once the gaps in the relevant information have been filled. Those gaps are few in number, but vitally important. In particular:

    a. ***When was the property transferred to new users?*** In particular, was this before or after the judgment on the merits of 1996 that confirmed the validity of Mrs Loizidou's title deeds?

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[14] CM/Del/Dec(2008)1043, p. 17.

[15] The Republic of Cyprus made the following transcript of the Secretariat's remarks: "*The Committee used the wording 'first reading' because the issues of the effectiveness of the mechanism remained to be addressed by the Court, because this Committee did not want to interfere with those proceedings of the Court at that moment.*"

b. ***What is the development status of Mrs Loizidou's property?*** The Republic of Cyprus understands some of that property – contrary to the assertion of Turkey[16] – to be empty and undeveloped, and so in principle available for restitution. Mrs Loizidou's lawyer, Achilleas Demetriades, wrote to the Secretariat enclosing photographic evidence of this fact, which was referred to at the 1348th meeting of June 2019.

c. ***Where is the evidence that those users were Turkish Cypriots who left property in government – controlled areas by way of exchange?*** The importance of this issue is that without a transfer to such 'refugees', Mrs Loizidou would have been entitled to the restitution of her property. Yet despite repeated requests, no evidence has been provided on the identity of the transferees or the time of the transfers (before or after the judgment).[17]

d. ***Why was the offer so low?*** As explained above, the IPC valued the use of the property at barely half the rate awarded by the Court for the previous eight-year period.[18]

18. Turkey has long been aware of these questions (which were set out in precisely the above form in Cyprus's Memorandum of February 2019), and yet has done nothing whatever to answer them. The Committee recalled in December 2018 that at the 1324th meeting of September 2018, "*certain delegations requested information in relation to the situation of the applicant's property in the Loizidou case*".[19]

19. Turkey must provide answers to these questions if the Committee is to be able to take a fully informed decision on the matter. Indeed, it would be irresponsible of the Committee to act without having first carefully assessing the said information. The fact that some of Mrs Loizidou's property appears to be empty, undeveloped and so eligible for restitution – contrary to the assertion of Turkey – makes it all the more important for Turkey to produce the evidence that would allow her other claims to be either verified or disproved. Turkey

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16 The Turkish authorities stated to the Committee through written communication dated 26 November 2007 that "*...the properties in question have undergone considerable changes, preventing the application of the restitution option after the solution of the Cyprus Problem...*".

17 The Secretariat said at the September 2018 meeting: "*The Secretariat's position is that once property has been transferred to refugees and is no longer owed by the state authorities, it is then immaterial whether the property is occupied or developed, or whether the refugee has sold or transferred it to other persons.*" That is however to leave unexamined the proposition that the property was transferred to "*refugees*" (more properly expressed, in terms of "Law 67/2005", Turkish Cypriots who left property in the non-occupied areas by way of exchange).

18 The Secretariat at the September 2018 CM(DH) meeting stated that the IPC's methodology was approved by the Court, but offered no explanation as to how the IPC's valuation of the use of the property could produce such a radically different result as the Court's valuation of precisely the same property.

19 CM/Del/Dec(2018)1331H46-31, decision no. 3.

has not taken the opportunity to present such evidence with her Memorandum of June 2021. To resolve those uncertainties without evidence, and to close the case notwithstanding Turkey's refusal to cooperate with the work of the Committee, would be manifestly unjust.

LOIZIDOU AND FORMER ARTICLE 32 ECHR

20. There is also an outstanding issue in *Loizidou* relating to the payment of just satisfaction in respect of the period in respect of the period 28 January 1987 - 21 January 1990, i.e. the years after Turkey recognised the right of individual petition but before it acknowledged the jurisdiction of the Court. Mrs Loizidou has, through her lawyer, asked the Committee to initiate proceedings under former Article 32 of the Convention in respect of this unpaid just satisfaction. That is a course which, as is generally acknowledged, gives rise to a number of unresolved procedural questions.[20]

21. The Committee at the 1324th CM(DH) of September 2018 "*instructed the Secretariat to prepare and distribute an information document containing proposals in respect of the former Article 32 of the Convention in relation to the Loizidou case for consideration at their 1331st meeting*". Thereafter in its decisions at the December 2018 meeting, it "*noted that the Secretariat has prepared an information document on the procedural issues arising under former Article 32 of the convention in relation to the Loizidou case and decided to consider it at the 1348th meeting*" in June 2019. No decision was taken at the 1348th meeting. Cyprus repeats its request that the Committee proceed to an examination of the *Loizidou* case under former Article 32 without delay, on the basis of the document prepared for the purpose by the Secretariat.

OTHER CASES: INDIVIDUAL MEASURES

22. Cyprus once again reiterates that it has no objection to the closure of the examination of the *Tymvios* and *Alexandrou* cases from the *Xenides-Arestis* group, which have been the subject of friendly settlements endorsed by the Court.

23. Apart from *Loizidou* which is addressed separately above, so far as the 33 remaining cases from this group are concerned, in which violations have been found of Article 1 Protocol 1, Article 8 and/or Article 3 have been found by the Court, Turkey in her Memorandum of 15 May 2019 requests the Committee to issue "*a decision directing the remaining applicants in the Xenides-Arestis group to the IPC*", claiming that such a decision would

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[20] See the Information Note on the Committee of Ministers' competence under the former Article 32 of the Convention, H/Exec(2018)1, 27 February 2018.

"*give the right message to the applicants in making reasoned decisions*".[21] Accordingly, under these circumstances, any request for closure of this case would be unfounded.

24. That request is misconceived. The Committee should not be directing applicants who already applied to the Court and have a judgment in their favour to pursue their redress through lengthy and possibly costly mechanisms and procedures that are not even obligatory at this stage of proceedings. The Committee is still obligated under the Convention, to itself ensure that the judgements are complied with in full, without resort to any other mechanism, and in this case the IPC, the efficacy of which is in any event (and without prejudice to the above position), still under examination. Accordingly, and in combination with the fact that just satisfaction in these cases has been outstanding for between 7 and 13 years, there should be no question of closing the examination of individual measures in the manner suggested by Turkey.

CONCLUSIONS

25. For the reasons set out in this Memorandum, the Republic of Cyprus invites the Committee to:

a. express its grave concern that the unconditional obligation to pay just satisfaction in 33 cases of the *Xenides-Arestis* group has been neglected for many years, despite the Committee's repeated calls for the Turkish authorities to pay the sums awarded by the Court;

b. instruct the Secretariat to prepare an interim resolution requiring the Turkish authorities to pay without delay the just satisfaction awarded by the Court in those cases for adoption at their next examination by the Committees;

c. resume consideration of the issue of payment of just satisfaction in the cases of the *Xenides-Arestis* group at the next opportunity;

d. call upon Turkey to provide the information and details specified at paragraph 17 above; and

e. resume consideration of the individual measures in the *Loizidou* case once Turkey has provided the information and details specified at paragraph 17 above.

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[21] DH-DD(2019)552, p7.