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Thesis for the Degree of Doctor of Philosophy
on the subject of the
European Human Rights Law
with emphasis on the
Cyprus Question: Land Claims and Human Rights
Arguments before the European Court of Human Rights

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(January 2014)

Statement

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature

Bugem Galip

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SUMMARY

This thesis presents a critical analysis of the property rights in terms of Article 1 of Protocol No. 1 (P1-1) of the European Convention on Human Rights (ECHR) to the property conflict in Cyprus. The theme that runs through the paper is whether property disputes in Cyprus have had an impact on the established case law of the European Court of Human Rights (ECtHR). Also addressed is the extent to which Cypriot property claims caused the Court to depart from its traditional approach concerning property rights under the ECHR and whether these cases before the Court have introduced a new aspect to the understanding and interpretation of the protection of property rights in the Convention system, specifically the application of the P1-1 to the Convention. The Court's approach, in its various precedents, in examining property rights within the remit of P1-1 will be compared with the property claims from Cyprus in order to determine the unique and significant character of the Cypriot property cases and to analyse their relationship with the right to property under P1-1 to the ECHR.

Acknowledgements

The journey of researching and writing of this thesis has been a long road for me. This journey has been the sweet and savoury delight of my life. I would like to express my heartfelt gratitude to my supervisors Professor Susan Millns and Professor Paul Omar who always gave me hand when I needed most. I thank Professor Susan for her support, advice and careful attention to detail who encourage me to pursue this degree. To Professor Paul, who gave me constructive comments as to the legal questions of the thesis and guided me throughout my journey. Without their patience, advice, support and encouragement, my journey would never have been completed.

I am especially grateful to my parents, Alev Galip and Lemi Galip, and my sister, my other half Bengu Galip Tasci, who encouraging me in all my pursuits and who always wanted the best for me. Thank you for supporting me emotionally and financially and also inspiring me to follow my dreams. I am deeply grateful for your continued support, love and for encouraging me to finish my Ph.D. thesis during my most difficult moments. It is impossible to describe all the unconditional support emotionally and financially, that I have received from my family for the whole of my life so my deepest gratitude goes to them.

I express my deep gratitude to Salih Kayra, who has always been with me, cheering me up in many different ways even in the most difficult times and providing a delightful distraction from this long journey. I am grateful to him for his patience and for believing in our love at the point where we had to be apart from each other and spend time together. I am also grateful to him who has broadened and shaped my horizons through our numerous conversations and arguments.

I am very grateful my friend Pervin Yigit who shared this incredible journey as a PhD student. I will never forget our memories, conversations and our very different ways to feel happy and have fun while sharing the same house in this journey. I am also deeply grateful to my dear friend Damla Onurhan, for her continued prayers, support and love, as well as for encouraging me to finish my Ph.D. thesis during my most difficult moments. Thank you for being with me whenever and wherever I need you although we had to be apart. I am very thankful to Johanna Robinson who read closely at the final version of the thesis regarding English proofreading, correcting and offering suggestions for

improvement; working with me all day and night long at the final stage of the writing up process. I am also thankful to all my friends in Brighton, thank you for your good memories you have left in my heart and I will forever miss all the good times we had together.

Finally and most importantly, I would like to express enormous gratitude to my mum who allowed me to be as ambitious as I wanted to be for making my dreams to come true for the whole of my life. I thank to her for her faith in me. No thanks will ever be enough for my mum. Thank you for teaching me how to learn, to be happy, to understand myself and others and thank you for teaching me how to stand when I fall. Her words of support and encouragement have always stand in my heart and continued to echo there (can I repeat 'in my heart'? again) all throughout this journey. It is to my mum that I dedicate this thesis. Thank you for being my mum and always being there for me.

Table of Abbreviations

AB	Avrupa Birliği (European Union)
AKP	Adalet ve Kalkınma Partisi (Justice and Development Party)
CA	Consultative Assembly
CE	Council of Europe
CYP	Cypriot Pounds
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EOKA	Εθνική Οργάνωσις Κυπρίων Αγωνιστών (National Organisation of Cypriot Fighters)
IPC	Immoveable Property Commission
NATO	North Atlantic Treaty Organisation
RoC	Republic of Cyprus
TFSC	Turkish Cypriot Federated State of Cyprus
TMT	Türk Mukavemet Teskilati (Turkish Resistance Organisation)
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNSC	United Nations Security Council
UNFICYP	United Nations Peacekeeping Force in Cyprus

Introduction

The first man who, having enclosed a piece of ground, bethought himself of saying This is mine, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not anyone have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, “Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself belongs to nobody.” Jean Jacques Rousseau, *A Discourse on the Origin of Inequality*.

Property Disputes in a Divided Country: A Conflict in Need of Resolve to Achieve Peace and Stability in Cyprus

Coming from the northern part of an island that is not internationally recognised by any states other than Turkey, I have first-hand experience of being treated as ‘the one from an occupied area of Cyprus’, in any country that I have visited, even in the southern part of my own country of origin and in every country in which I have spent some part of my life living. My country has been divided into two, and because of this situation, its people have not had the opportunity to visit their homes and the land where they grew up and spent most of their lives. Moreover, in Cyprus, although these people have been ‘allowed’ to visit their homeland since 2003, they have to present their identity cards in order to travel from the south to the north or vice versa, at the border checkpoints that divide the island.

Having grown up as a citizen of an unrecognised ‘state’ and coming from a community which has been regarded as an ‘occupier’, with the majority of its population having been displaced and victims of the war, I know what it is like to come from a country whose people have experienced displacement and resettlement. I also know what it is like to be a witness of the social memory of those experiences that have been passed on to future generations. I believe that, although the passage of time does not heal the bleeding wounds of the past injustices that both Greek Cypriots (hereinafter G/Cypriots) and Turkish Cypriots (hereinafter T/Cypriots) have experienced, these injuries can be ameliorated through effective, sustainable and mutually agreed remedies. I am deeply aware that the property issue is the biggest obstacle on the path towards peace on the island. The resolution of the property dispute is achievable through efforts and compromises and by promoting a comprehensive settlement for the Cyprus problem.

The history of Cyprus has witnessed one of the most sorrowful fates in any state: the displacement of people. As a result of the political disputes between the two communities living in Cyprus, a significant number of Cypriots had to flee from their homes and become refugees. The political and legal consequences of displacement are still continuing both in the domestic and international arenas.

This thesis contains a detailed examination of understandings of property rights within the context of domestic regulation and the case law of the European Court of Human Rights (ECtHR). While the thesis does not attempt to explain in detail the political and interventionist role of the ECtHR in conflict and post-conflict situations (and indeed this is well documented elsewhere)¹, the originality of the thesis lies in its critical reflection upon the case law of the Court around property ownership in Cyprus. Inevitably, the political situation in which these cases occur presents the opportunity to engage with the broader context of the conflict which has existed in Cyprus since 1974.

The great majority of existing publications about the Cyprus problem provide a background of extensive information, placing the dispute in its historical, social and ethno-political context. In this respect, the pre-independence period (1571-1960) of the Republic of Cyprus (RoC); the evolution of the inter-communal conflict and the division of the island have always been the key subjects of the studies, discussions and research. Additionally, the failure of the Annan Plan inspired significant amounts of literature about Cyprus, its accession to the European Union, as well as the role of Turkey in political matters in Cyprus. Because of the unresolved status of the Cyprus conflict which has become a major international conflict, the aforementioned issues still demand further research. Having said that, there are some readings (noted throughout the thesis) which provide a critical analysis of the ECtHR judgments concerning the issues deriving from the Cyprus problem. The works of Coban, Erhurman, Ozersay, Gürel, Sermet, Loucaides and Buyse have been particularly insightful for this research.²

¹ For further development of the role of the ECtHR in a political environment see: Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland*, New York: Oxford University Press, (2012); Helen Keller & Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, New York: Oxford University Press, (2008).

² Ali R. Coban, *Protection of Property Rights within the European Convention on Human Rights*, Surrey: Ashgate Publishing Ltd (2004); Tufan Erhurman, *Kıbrıs'ta Akil Tutulması*, Lefkosa, Isik Kitapevi Yayinlari (2007); Gürel A & Ozersay K, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle', *Middle Eastern Studies*, 44 (2008) 290; Laurent Sermet, 'The European Convention on Human Rights and Property Rights', *Human Rights Files*, vol. 11 (revised

In pursuing the question of the legal resolution of the Cyprus problem, this thesis will make an important contribution to the literature by integrating the examination of the issue of property and property rights in terms of Article 1 of the First Protocol to the European Convention on Human Rights with the ECtHR's approach to the cases concerning property claims from Cyprus. Therefore, the thesis not only concentrates on the property disputes between Cypriots but also examines the ECtHR's attitude in its Cyprus rulings. A great number of applications have been brought before the ECtHR by Cypriots, which thus established an interaction between the case law of the ECtHR and the property rules of both Cypriot communities. This thesis derives from dissatisfaction with the way property, as a human right, is deliberately being distorted in political disputes and turned into a political tool to negotiate a bargain among the parties in order to create a political settlement in Cyprus. Moreover, when this issue was taken to the international arena, the ECtHR became involved in this political debate and became the key legal actor in the property war in Cyprus.

The property dispute between G/Cypriots and T/Cypriots is the most contentious and enduring issue within the well-known Cyprus problem. It is not only Cypriots who have suffered from property disputes: it has also been carried to the international level by foreign buyers of disputed lands located in the northern part of the Country. The issue of property is the crux of the unresolved Cyprus problem and represents one of the major reasons for the longstanding political deadlock on the island. In order to understand the reason for the property problems which still remain unresolved, this thesis will examine the legal, political and historical reasons that caused these disputes on the island. The purpose of the thesis is to examine the property disputes between G/Cypriots and T/Cypriots in the light of Article 1 of Protocol 1 to the European Convention on Human Rights (P1-1 of the ECHR).

Soon after the establishment of the Republic of Cyprus (hereinafter RoC), a constitutional crisis launched the inter-communal violence which resulted in the collapse of the bi-

edition), Strasbourg: Council of Europe Publishing (1990); Loukis G. Loucaides, 'Current Legal Developments: Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos Case*?' *Legal Journal of International Law*, vol. 24 (2011) pp.435–465; Antoine Christian Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective, With a Case Study in Bosnia and Herzegovina*, School of Human Rights Research, vol. 25, Intersentia Uitgevers N.V (2008).

communal power sharing of the Republic. During the years 1963 and 1964, one-quarter of the T/Cypriot population of the time and 700 G/Cypriots were displaced. These numbers dramatically increased after the war in 1974, which led to the present *de facto* division of the island.³ An attempt will be made to provide the number of displaced Cypriots and the percentages of the privately owned lands affected by the property dispute in order to illustrate the significance of the property problem on the island. The T/Cypriot administration is in the north, and not recognised by any other state apart from Turkey and the G/Cypriot administration, which is the *de jure* government for the entire island, presents in the south.

An examination will be made of the two contradictory property mechanisms of the two communities in handling the property rights of the people who have been displaced as a result of the war and division of the island. The ECtHR mechanism for the protection of the right of property will be analysed in order to illustrate the interaction between the domestic property regulations and the Court's case law regarding property rights settled under the ECtHR. In this regard, an attempt will be made to diagnose the significance of Cyprus property cases in terms of understanding property rights within the meaning of the ECtHR mechanism. The departure of the Court from its traditional approach in its Cyprus ruling will be examined in order to arrive at an understanding of the substantiality of these property cases by taking a view as to how they bring a new dimension to the system of the European Convention on Human Rights (hereinafter the Convention).

The property question is the Gordian knot of the Cyprus problem, which has been the most ancient unsolvable political dispute in the Eastern Mediterranean and the Middle East. The thesis will provide a historical introduction to the disputed issues that led to a separation of viewpoints of the two communities. An outline will also be given on how the two opposing perspectives of the G/Cypriot and T/Cypriot authorities on the Cyprus conflict guided the said authorities into establishing formulas which are considerably differentiated from each other in the search for the settlement of the property debate. Where appropriate, a detailed examination will be made of these standpoints and the

³ Ayla Gürel & Kudret Ozersay, *The Politics of Property in Cyprus: Conflicting Appeals to 'Bizonality' and 'Human Rights' by the Two Cypriot Communities*, International Peace Research Institute (PRIO) Cyprus Centre Report (3/2006) pp. 1-5.

underlying reasons for having contradictory perspectives will be determined. In light of the differences in approaches between the two communities, the thesis will outline how these opposing stands have influenced the formation of the domestic property regulations concerning the displaced persons on the island.

The thesis will take a detailed look at the concept of property and property rights in terms of P1-1. In this regard, there will be a focus on the examination of the right to property in various precedent cases of the ECtHR. The Court's approach to these cases will be contrasted with each other and will also be compared with property claims from Cyprus in order to arrive at an understanding of the Court's differentiated attitude in its Cyprus ruling. The implementation of the provisions under P1-1 to the cases at issue will be analysed in detail in order to determine the applicability of the standards set under P1-1 to the *sui generis* cases of Cypriots.

The thesis will also outline how the fundamental components of P1-1 have applied to the 'taking' of properties in Cyprus; how the acts of the respondent state (Turkey) concerning the alleged violation of property rights were placed under P1-1 in comparison with the Court's ruling in similar cases against other contracting states; and how the Court assessed the factual circumstances of the cases from Cyprus with the burden of political and historical complexities. Predictions will be made, where appropriate, of underlying justifications of the Court's differentiating approach among these cases.

An examination will be made of the ECtHR's Cyprus ruling by analysing four landmark cases:⁴ *Loizidou v. Turkey*, *Cyprus v. Turkey*, *Xenides-Arestis v. Turkey* and *Demopoulos v. Turkey*. The reason for examining these particular cases is the roles they play in the progress of property disputes in Cyprus within the context of legal and political aspects. The thesis will also go on to consider how the judgment of these cases represented a further step within the issue of property rights on the island. From the key findings that will be elucidated through the case analysis, from both the perspectives of the Court and the parties of these cases, a view will be taken of the determination to diagnose the Court's

⁴ *Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey* (2010) ECHR 306.

amended approach towards its Cyprus ruling, the developments of the legal remedies and impact of the ECtHR case law on the dynamics of the political and social context in Cyprus.

The first case concerning property disputes in Cyprus was examined by the ECtHR in 1996. From 1996 to 2010, the ECtHR was the primary Court to which the displaced G/Cypriots applied in respect of their property claims. During the fourteen-year time-line, the Court gradually changed its approach towards the legal regulations of disputed G/Cypriot properties that were settled by T/Cypriot administration. The thesis will take a look at and attempt to illustrate the considerable impact of the Court's amended stance over the negotiations between the two communities. Additionally, an analysis will be made to determine the factors which influenced the Court's traditional pattern in its Cyprus judgments that followed until the year 2010. Some reference will also be made to how time-varying policy effects, laws, social and cultural elements internationalised the political saga of the Cyprus property problem through the cases of the Cypriots in their pursuit of their property rights before the ECtHR. All of these cases have been burdened with highly intense political, legal and historical complexities that were taken before the Court. In this regard, an attempt will be made to diagnose to what extent the ECtHR has refrained from becoming an actor in this political deadlock.

An examination will be made of the process of the developments of domestic regulations regarding the property rights of displaced people. The cases concerning the property rights at issue have spread through the fourteen-year time-line and, within this period, the T/Cypriot administration has settled laws and regulations that were subject to various amendments in order to gain legal recognition at the international level. An outline will also be given of the influence of the Court's assessments and decisions in its Cyprus ruling over the local remedies. There will be a focus on the impact of the ECtHR ruling over the remedies of the T/Cypriot administration that restrained the Court from being the primary solution producer for the property conflict.

The thesis will take a detailed look at the interaction between the mechanism for the protection of property rights within the meaning of P1-1 and the local laws of the disputed properties in Cyprus. In this regard, an attempt will be made to diagnose how the *sui generis* nature of the Cyprus property cases brought a different angle to the understanding

of the right to the property within the ambit of the Convention system. It will be instructive here to determine which factual circumstances of these cases have become determinant factors in the Court's traditional approach with respect to the property rights of displaced people in Cyprus.

Once an analysis of the cases has been provided, the thesis will then take a look at the new era for the property conflict in Cyprus, which began with the failure of a United Nations (hereinafter UN) proposal, known as the Annan plan, to resolve the Cyprus problem. It will attempt to emphasise the impact of this plan over the developments of the domestic property system and the ruling of the Court regarding the Cyprus property claims. This will be provided by comparing the Court's judgments held before and after the failure of the Annan plan. In light of these considerations, it will attempt to determine the previous findings from which the Strasbourg Court departed and on which grounds it rationalised its new stance towards Cyprus property matters. Once an outline of these differentiations has been provided, an attempt will be made to predict whether the Court's decisions were politically motivated or whether the decisions at issue were reached in accordance with the effective protection of property rights within the Convention mechanism.

The conclusion will attempt to provide recommendations for achieving mutually acceptable domestic remedies to property disputes in accordance with the protection of property rights under the Convention mechanism. It will also focus on the responsibilities of the parties and the approaches that need to be revised in order to achieve the comprehensive settlement of the property conflict within the Cyprus problem on a political level. In light of these conclusions, an attempt will be made to state the conditions under which the two communities can create a legal framework for assistance in order for property matters to succeed at domestic level.

Collecting 'Cyprus Property Cases Before the ECtHR' for this Research Project: Research Methodology

This case study has been conducted through researching primary sources, case studies and secondary sources, all of which have the potential to reveal how the Cyprus property cases have an impact on the protection mechanism of the right to property in the

Convention system and which demonstrate the necessity of considering these cases within the framework of ECtHR case law and the right to property. The secondary sources provided the raw material, by witnessing the actors and factors in this debate, for examining in detail how property is protected under the ECHR and how the property issue became the crux of the Cyprus problem. It also provided an opportunity to scrutinise the underlying reasons for the property conflict which has remained unresolved for more than five decades, the application of the P1-1 to the Cyprus property cases, the impact of the ECtHR ruling on the domestic regulations and politics and finally the progress of the Court's departure from its established approach in these cases.

The materials I have used in the research are human rights texts and the cases before the ECtHR, in the sense that they are documents of legal character. Two kinds of documents have been used: domestic and international. The domestic documents are the property regulations established within the G/Cypriot and T/Cypriot legal frameworks, the UN Comprehensive Settlement Plan for Cyprus, and official documents of inter-communal talks between the authorities of the communities and articles. The international documents mainly include the ECHR, the cases regarding the right to property before the ECtHR, and the UN reports and resolutions. To my knowledge, this material has not hitherto been used to research the interaction between the Cyprus property cases and the ECtHR mechanism for the protection of property rights.

The precedent cases regarding the violation of property rights within the ambit of P1-1 to the Convention and published articles of case analysis are relevant to my research project. This is because the meaning, scope and method of applying P1-1 were identified and established through particular cases and validated with subsequent cases. The comparison of the ECtHR judgments and articles on these cases involve human rights information to a great extent and they also offer me, as a researcher, the opportunity to investigate the impact of the ECtHR case law on the politics of the Cyprus problem and vice versa.

Because the research deals with cases and events burdened with a political, historical and factual complexity stemming from a problem that has not been resolved since the 1960s, updated legal and political developments have been considered through the thesis in order to provide the most recent developments. Additionally, the inseparable character of

property disputes and politics in Cyprus impelled me to determine political developments and the impact of these developments on the property case law of the island.

I have undertaken more than six months of archival research in the Supreme Court of Cyprus (in the south) and the Supreme Court of the TRNC (in the north), the Cyprus Library, the University of Cyprus, the Near East University, the Eastern Mediterranean University of Cyprus, the Immovable Property Commission, and the Institute of Advanced Legal Studies in London. An integral part of the premises on which this project was initially conceived was formed on the ground of some underlying assumptions of this research. Accordingly, I address three primary questions: (1) whether property disputes in Cyprus have had an impact on the Court's established case law and to what extent those cases caused the ECtHR to depart from its traditional approach concerning property rights; (2) whether Cyprus property claims before the ECtHR have brought a new aspect to the understanding of the protection of property rights in respect of the Convention system and the application of the P1-1 to the Convention; (3) whether a mutually agreed, effective and sustainable property mechanism is achievable at the domestic level within the context of resolving the Cyprus property dispute.

The human rights texts and cases on property rights I have collected reflect criticism, ideas and practices concerning the application of the P1-1 to the Convention and to the precedent cases by the ECtHR. I have adopted a broad disclosure approach for comparing and examining them, which led me to explore the various ways in which the ECtHR's approach to applying the regulation of the protection of this right in its rulings were discussed, criticised and written about. As indicated above, four particular cases concerning property claims in Cyprus represent a source of inspiration for my project:⁵ *Loizidou v. Turkey*, *Cyprus v. Turkey*, *Xenides-Arestis v. Turkey and Demopoulos v. Turkey*. Two reasons encouraged me to focus on these cases: first, the judgment of each case generates considerable key changes and developments within the process of the property issue at a domestic level. Second, because the Court held decisions in these particular cases that deviated from its earlier case law on Cyprus, the judgments of these

⁵ *Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey* (2010) ECHR 306.

cases illustrate the gradual departure of the Court from its traditional approach in its Cyprus rulings.

By critically comparing the impact of the Court's ruling over the domestic regulations and officials on the island, the Court's manoeuvre in its adopted approach towards Cyprus property issues helped me to interrogate the interaction between Cyprus property claims and the Court's case law concerning the protection of property rights. The legislative and political debates were analysed, as well as assumptions about whether the Court's recent decisions in these cases, particularly in *Demopoulos*, were politically and strategically held in order to refrain from the backlog of clone cases from Cyprus.

Finally, the employment of one method of analysing and comparing the property cases before the ECtHR as well as its attitude, which has changed in parallel with the political developments on the island, has enabled the research to be carried out by engaging, on the one hand, with the interface between the theory and the application of the provision of the protection of property rights. On the other hand, the research followed an approach which investigated the political, legal and historical circumstances which have caused the property issue to become the crux of the unresolved Cyprus problem. My main purpose for choosing this discourse approach in analysing cases on property claims from both Cyprus and other states, is to draw attention to the changes of the Court's approach to P1-1 in these cases with the passage of time and to determine the differentiated application of this provision to these cases.

The standards and requirements for the restriction of property rights are set under P1-1 to the ECHR. In choosing one method of comparing judgments concerning the property claims of applicants from various contracting states, I attempted to illuminate the extent to which the ECtHR complied with those standards and followed the same approach in the application of P1-1 to the 'same line' of property cases. I critically examined and focused on the variations of the application of P1-1 and attempted to determine the major factors that generate inconsistencies in the case law of the ECtHR regarding the protection mechanism of property rights in P1-1. For instance, in the case of *Sporrong and Lönnroth v. Sweden*⁶ the Court asserted that it 'must look behind the appearances and investigate

⁶ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63; *Brumarescu v. Romania* (2001) 33 EHRR 36 GC, para. 76.

the realities of the situation' to determine whether there has been a *de facto* expropriation. However, in its judgment on the case of *Loizidou*,⁷ the ECtHR mainly took into account the division of the island into two, which denied the applicant access to her property and led to her losing all control over it as land. The Court also considered this as interference with the substance of property without examining whether there was *de facto* expropriation nor examining the grounds of its judgment.

It is proposed that the Court should examine the factual realities of the situation in Cyprus such as the historical and legal circumstances and should explain in great detail its reasoning for not considering the interference as *de facto* expropriation. The authoritative interpretation of the requirements for justifiable interference with property rights in P1-1 and the method of applying this Article have been established in its case law.⁸ In this regard, it is suggested that differences in the applications of P1-1 and the extent of the compliance of the standards in P1-1 with the Court's case law may be considered a result of an indefinite interpretation and absence of a strict criterion on the meaning and scope of P1-1. For instance, the term *de facto* expropriation was used for the first time in the *Papamichalopoulos* case,⁹ twenty-eight years after P1-1 came into force, and neither its concept nor requirements are explicitly defined under P1-1.

By engaging critically with the application of P1-1 through the case analysis and the theory of property rights, possible future complexities in terms of the protection mechanism of these rights are attempted to be envisaged. In light of this discourse approach, it is presumed that the case law of the ECtHR concerning P1-1 is likely to grow consistently in accordance with two major factors: the passage of time and the backlog of cases. In this regard, the main concern here is that the Court may deviate from the measures set out under P1-1 in its case law in the event of an increase in the number of applications from such member states in which a gross violation of property rights has taken place. For instance, a large group of people from former Communist states have lost their properties without compensation. Accordingly, many applications were lodged by these people concerning the violation of property rights with the dissolution of these

⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁸ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, paras. 61-63.

⁹ *Papamichalopoulos v Greece* (1993) 16 EHRR 440, para.43.

states.¹⁰ In choosing the method for analysing and comparing the Court's judgments on the cases concerning property matters, I draw attention to the inconsistency in the case law of the Court regarding the application of P1-1, which may have stemmed from legal, political and temporal factors.

By engaging critically with the Court's changing approach and the increase in the number of cases concerning P1-1, striking perceptions of a growing cautiousness to the ECtHR were analysed. For instance, the legal issues and debates regarding property matters that were raised in the Cyprus cases are very close to those of the former Communist states.¹¹ It was argued that the application of the European standards became difficult with the accession of these states.¹² This approach also helped me to explore the question of the extent to which the absence of the Court's explanation of the rationale of its judgments has affected the interpretation of P1-1 and has caused the Court to depart from its traditional case law regarding this provision.

Taking the former socialist states who are party to the Convention as an example, since an overwhelming number of people from these countries had to leave their territory and lost their properties,¹³ it is likely that the Court will be faced with thousands of cases close to those repetitive property claims in Cyprus. In the long run, this possible scenario may have a considerable impact on the interpretation, application and the Court's case law concerning P1-1, and may result in the weakening of the standards established under it. In the case of *Broniowski v. Poland*,¹⁴ which deals with the violation of P1-1, the Court highlighted the number of 80,000 people whose property rights were subject to P1-1 and determined this situation as a threat to the future effectiveness of the Convention mechanism.¹⁵

¹⁰ Vojtech Cepl, 'A Note on the Restitution of Property in Post-Communist Czechoslovakia', *Journal of Communist Studies*, vol. 7 (1991) p. 365; Jonathan Sharpe, *The Conscience of Europe: 50 Years of European Court of Human Rights*, UK: Third Millennium Publishing Ltd. (2011) p. 176.

¹¹ See: the dissenting Opinion of Judge Baka in *Loizidou v. Turkey*, (1996) 23 EHRR 513.

¹² Frédéric Sudre, 'La 'perméabilité' de la Convention européenne des droits de l'homme aux droits sociaux', in *Mélanges J. Mourgeon*, Bruxelles : Bruylant (1998) pp. 467-478.

¹³ Aeyal M. Gross, 'Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries – a Study of the Case Law', *European Journal of International Law* vol. 7, no. 1 (1996) pp. 89–102.

¹⁴ *Broniowski v. Poland* (2004) 40 EHRR 21.

¹⁵ *ibid.*, para. 193; Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', *German Law Journal*, vol.12, pp. 1241–1252.

By looking specifically at the Court's changing stance in respect of P1-1, mainly focusing on the 'Cyprus property line of cases',¹⁶ possible consequences that may emerge from its inconsistent attitude are attempted to be envisaged. By following this comparative approach, I also draw attention to the debates considering the impact of politics that overshadowed the Court's decision-making mechanism with respect to its most recent Cyprus ruling in the case of *Demopoulos*. To illustrate these arguments, discussions from scholars, judges and governmental officials were analysed. The concern here is not simply that the Court's decision in *Demopoulos* was regarded as highly political and thus 'wrong',¹⁷ but this perception preponderated the fundamental principle of subsidiarity that is the cornerstone to the functioning of the Convention mechanism.¹⁸ Although the ruling had fostered enthusiasm to tighten up the domestic remedies, it raised divergent opinions among parties in Cyprus. According to one group, the Court did not provide a legal decision but rather a political one, and this was because the decision makers were influenced by a political approach to the issue.¹⁹ By contrast, the opponents justified the decision on the grounds of the pilot judgment procedure in order to deal with clone cases.²⁰ The underlying assumptions about the decision are also analysed through both contextual and textual data which allowed me to explore the various ways in which the most recent decision on the Cyprus property problem was discussed.

By using this discourse approach in analysing debates on the Court's major shift in the Cyprus ruling, which had occurred with *Demopoulos*, I draw attention to the way in which this switch in the Court's position may not be without consequences within the context of its mechanism for the protection of property rights. This approach also helped to evaluate differences of opinion, the diversity of perceptions and the shared perceptions within this context. Additionally, this method also helped me to illuminate two areas of difficulties that the ECtHR is facing, which stemmed from its *Demopoulos*²¹ ruling. In this regard, the Court's most recent approach in Cyprus case law established a set of

¹⁶ The ECtHR's wider rulings on property disputes in Europe.

¹⁷ Loucaides (n 2) p. 440.

¹⁸ See: Interlaken Follow-up, 'The Principle of Subsidiarity' Note by the Jurisconsult, p.2 <http://www.echr.coe.int/NR/rdonlyres/D932C687-6805-4C0B-8828EE7862873D0D/0/Interlaken_followup__Subsidiarity.pdf> accessed: 27 August 2013.

¹⁹ Loucaides (n 2) pp. 440; Alexia Solomou, 'Case Report on *Demopoulos & Others v. Turkey*', *The American Journal of International Law*, vol. 104, no.4 (2010).

²⁰ Rhodri C. Williams and Ayla Gürel, *The European Court Of Human Rights and the Cyprus Property Issue: Charting a Way Forward*, Peace Research Institute Oslo (2011) p.10

²¹ *Demopoulos and Others v. Turkey* (2010) ECHR 306.

arguments among Cypriots. As indicated above, the Court was implicated in its changed attitude, which caused two contentions to stand against each other: first, the decision was mainly political and, second, it was the consequence created by the principle of subsidiarity. The concern here is two-fold. On the one hand, the decision was welcomed by mainly T/Cypriot officials and was evaluated as a requirement of the application of the principle of subsidiarity. According to this perspective, the efficiency of the Court mechanism was under threat from the large number of repetitive cases concerning not only property claims from Cyprus, but also from other states in which property issues were very close to those in Cyprus. On the other hand, the decision was considered as political or ‘wrong’²² and this method of dealing with repetitive cases was regarded as ‘purely logistic’ mainly by G/Cypriot authorities.²³

Consequently, in choosing one method of analysing the aforementioned differences of opinions and case law in property rights over another, I have attempted to illustrate the significance of the *Demopoulos* case within the context of property rights in the Convention mechanism. It is through case analysis that the final Cyprus ruling may invite various numbers of cases from citizens, particularly whose properties were expropriated by the Communist regimes.²⁴ In line with the scope of two contradictory perspectives in *Demopoulos*, it is proposed that if the Court had not applied the so-called pilot judgment procedure, it might have been faced with a backlog of ‘Cyprus-line cases’ from other contracting states. This would threaten the entire ECtHR system, which was already struggling under a vast backlog of cases.²⁵ However, adoption of this method by the Court in its *Demopoulos* ruling to deal with clone cases was considered a ‘purely logistical decision’.²⁶

Both the contradictory standpoints are in opposition to the Court’s efficiency, where the principle of subsidiarity is not applied, as well as to its reliability by considering its

²² Loucaides (n 2) p. 440.

²³ Crises Group Europe Report, *Cyprus: Bridging the Property Divide*, No. 210, 9 December 2010.

²⁴ Gross (n 13) pp. 89–102.

²⁵ At the time of the *Demopoulos* decision, the number of applications lodged to a judicial formation was 61,300. As of December 31st, 2012, the number of applications lodged with the ECtHR was approximately 128,100 and more than half of these applications had been lodged against one of four countries: Russia, Turkey, Italy and Ukraine; See ECtHR, *Annual Report 2010*, Strasbourg: Registry of the ECtHR 2011; ECtHR Overview 1959-2012 (February 2012).

²⁶ Crises Group Europe Report (n 23) p.12.

decisions as political. By engaging critically with the case law and debates on this issue, I have attempted to provide an in-depth explanation and interpretation of the rationale to the Cyprus property disputes that were carried into the international arena. It is through the thesis that, in case of further shifts in the Court's attitude towards the property rights issue, the users of the Court's mechanism may lose confidence in the reliability and confidence of its system in the long run. Additionally, the possibility that its decisions as politically motivated by parties which determined themselves as adversely affected by its ruling may cause applicants to lose confidence in the reliability of the ECtHR as an external but major actor within the protection mechanism of property rights.

It may be true to state that the Cyprus property cases and legislative debates embedded within them may serve as important precedents for future judgments in the ECtHR. Due to the increase in number of applications before the Court, and the variety of legal, political and historical complexities that exist within these applications, an enrichment in the meaning and scope of P1-1 may be generated.

Furthermore, the property issue has been the Gordian knot of the Cyprus problem since the early 1960s. Both T/Cypriots and G/Cypriots became victims of a massive displacement and lost their land, properties, houses and working places as a result of inter-communal attacks. Accordingly, the issue of property turned into an open wound and became a political problem on the island. Various negotiations, inter-communal talks and intensive efforts to achieve a comprehensive settlement of the Cyprus problem have failed. In line with the legal, political and social changes with the passage of time, this issue became the most complex and controversial debate of the Cyprus problem. With the loss of hope for a resolution of the property issue, the Cypriots started to seek new approaches to it. In the search for a remedy for their property rights, the ECtHR became the main actor when various claims concerning property debates were brought before it. In addition to property matters, other issues involving highly political and historical complexities were carried through these claims to the international arena. Consequently, the property issue became a major obstacle to the comprehensive settlement of the Cyprus question and urgent measures through mutually agreed mechanisms needed to be produced.

It is for this reason that I addressed this research gap in my thesis by analysing the Cyprus property claims and the ECtHR's mechanism regarding P1-1. It is through this analysis that an attempt to unearth the ambiguities in the interpretation and the application of the P1-1 to the Convention will be made. Finally, I attempted to provide both a substantial and original contribution to the field of property rights as a human right within the context of the unresolved Cyprus problem.

Outline of Chapter Development

Chapter 1 outlines the historical and legal background of the property conflict between G/Cypriots and T/Cypriots with a special emphasis on the very roots of the Cyprus problem which has led to the arousal of the property conflict which still remains unresolved today. This chapter will state the historical and legal developments from the British period on the island until the time of writing this thesis, 2013. The consideration of the establishment of the Republic of Cyprus (RoC) will be followed with the period involving the division of the island. There will be a focus on the underlying reasons of the unsolvable Cyprus problem within the context of the property crux. This chapter will also attempt to explain the rationale of how contradictory perspectives of G/Cypriots and T/Cypriots have led to the adoption of the two opposing property mechanisms dealing with disputed properties, which were abandoned after the division of the island. A special look will be taken at the extent to which the complexity of the property issue stems from these opposite sides and how regulations at a domestic level concerning disputed properties were affected by these notably different aspects of the parties.

Chapter Two covers the birth of the property issue and the protection of this right within the meaning of the ECHR. A historical introduction will be given of the process of the right to property. Since Cypriot property cases have been examined under the P1-1 of the Convention, this chapter will state the creation of the property issue, property rights within the context of P1-1 to the ECHR and the structure of P1-1 by considering related cases which develop a general approach to the Court regarding P1-1.

Once an examination of the protection mechanism of the right to property has been provided in this chapter, it will then outline the rules for this right and the traditional approach of the ECtHR on the right at issue, by examining its judgments concerning

property claims against other contracting states. The consideration of the Court's ruling of this right, in particular states, will be of paramount interest in analysing its established approach in order to compare its attitude in the Cyprus rulings. The application of provisions in P1-1 to the Cyprus property cases will be investigated and the acts of the responding state that were regarded as a violation of property rights falling within the ambit of the rules in P1-1 will be examined. An analysis will be performed of the Court's amended stance in those cases at issue and an attempt will be made to determine the rationale of this departure from its traditional approach.

Chapter Three will examine the four landmark cases²⁷ which have established the ECtHR's approach towards the legal regulations of the TRNC. These cases evidence the developments of Cyprus case law and illustrate their significant impact on the progress of local property regulations throughout the fourteen-year time-line. In light of these conclusions, an attempt will be made to determine the critical issues that arose during the judgments of those cases which constitute grounds for the significance of property cases from Cyprus.

The purpose of considering these cases in particular is their determinative role in the progress of Cyprus property case law in accordance with the Court's decisions. An attempt will be made to enlighten how the Court's assessment in each of these cases made a major contribution to the progress of local remedies of the disputed G/Cypriot properties. An examination will be made of various efforts of the respondent government, Turkey, in accordance with those cases, to achieve property regulation which is regarded as an adequate and effective remedy within the context of the Convention system. In parallel with the Court's assessments and decisions in each of the cases at issue, significant debates such as the notion of extraterritorial jurisdiction, and the legitimacy of certain legal arrangements of an unrecognised state/entity were raised by commentators. In this regard, this chapter will also look at different views on debates from legal and political perspectives.

²⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey* (2010) ECHR 306.

This chapter is also an attempt to diagnose the impact of factual circumstances, both legal and political, that have changed in parallel with the passage of time and are related to the property conflict. In the latest decision of the Court, *Demopoulos v. Turkey*, concern was attributed to the passage of time. Accordingly, this chapter will state how legal and political progress, with the lapse of time, launched a new era for the interpretation of property claims in Cyprus. This chapter will also focus on the contributing elements that allow the property mechanism to take a further step and that triggered the amendments within the Strasbourg Cyprus ruling.

An attempt will be made to outline the establishment of the new property laws and to consider the property mechanism that was settled in the Annan Plan. A special look will be taken at whether the failure of this plan had a role in the ECtHR's Cyprus judgments. It will outline how changing components of the property issue in Cyprus, including reforms to domestic regulations, have formed the views of academics and national authorities. The final stage of the property progress will be highlighted together with the Court's departure from its traditional attitude in its Cyprus ruling which attracted criticism maintaining the 'politicalisation' of its decisions, particularly in the latest cases. Accordingly, in this thesis, contrary remarks which advocate the decisions as a consequence of the Convention system in order to provide effective protection of the fundamental rights were made.

A view is also taken of the role of the Annan Plan, especially of the consideration of the property mechanism in the Annan Plan in the most recent case of *Demopoulos*. A major shift in the Court's stance had occurred in this case, which was not without political and legal consequences. In light of these conclusions, an attempt will be made to predict whether the current domestic remedies of the respondent state will assist the development of the property dispute in Cyprus.

Chapter Four is an outline of the requirements of the right to property within the meaning of the ECtHR Cyprus rulings. This chapter will examine state obligations that arise in accordance with P1-1, the stability of the ECtHR assessment regarding interference with property rights and the application of the provisions provided in P1-1 to the Cyprus property cases. It will also focus on the continuing nature of the alleged violations and the 'fair balance' test in those cases at issue, which constituted the most controversial

debates within the property cases from Cyprus. The concept, scope and the implementation of these two principles in the ECtHR rulings will be compared in various cases, where appropriate, in order to arrive at an understanding of the differentiation of the application of these principles within the ambit of the Court's Cyprus ruling. In light of these considerations, an attempt will be made to determine the legal interaction between the protection of the property rights under the Convention system and the cases concerning property disputes in Cyprus.

Conclusions

The final part of the thesis will outline the conclusions reached through the investigation carried out in this thesis. In this part, an attempt will be made at summarising the essential features of domestic remedies that seem to enjoy broad support at both the national and international level which may be used as a ground for the mutually agreed property mechanism for G/Cypriots and T/Cypriots. A view will be taken of previous and existing property proposals in order to determine how far these meet the conditions that are identified for a sustainable future property system that will be successfully applied by both the communities.

A summary will be made of the history and development of the property regulations, owing to the difficulties in seeking achievable remedies for the violation of property rights. Following the analysis of the applications of the requirements provided in P1-1 to the Cyprus cases, a view will be taken of whether the recommendations for an effective property mechanism fulfil the conditions for a mutually agreed system. Finally, the thesis will summarise the political and legal responsibilities of the parties of the property dispute in Cyprus in order to achieve a settlement to this crux.

Chapter 1

The Cyprus Property Dispute in a Historical Perspective

Introductory Remarks

Since the early 1960s, more than 230,000 Cypriots have been displaced, lost their homes, lands and left their motherland as a result of inter-communal strife. A fundamental constant, which has remained unchanged over the past fifty-three years in the history of Cyprus, is the hope of a return to those abandoned homes and lands.¹ One of the major changes within this history, stemming from inter-communal events, is the ‘internationalisation’ of the property conflict. With the passage of time, the property debate has become the crux of the Cyprus question and the major obstacle blocking progress and attempts to reach a comprehensive settlement of the Cyprus problem as a whole. It is notable that the initial cause of this conflict is Cyprus’ own turbulent history, which has both witnessed and led to this massive displacement of its people.

The main purpose of this chapter is to review the history of Cyprus. As the property conflict between Turkish Cypriots (hereinafter T/Cypriots) and Greek Cypriots (G/Cypriots) is directly related to the history of Cyprus, it forms part of the narrative of the Cyprus question as it has played out. The ambition here is to place the property problem within a historical context and to provide a starting point for the determination of the relevant factors that have led to the property conflict between the two communities on the island.

The first section of this chapter (1.1) reviews the Ottoman and British period in Cyprus and explains the significance of Cyprus being under the controlling power of those regimes. It also explains how foreign administration gradually weakened on the island and paved the way for the establishment of the Republic of Cyprus (RoC). The second section (1.2) focuses on the period between the establishment of the Republic of Cyprus and the division of Cyprus. It looks at the structure of the Republic, which was based on the co-founding partnership of T/Cypriots and G/Cypriots. This section highlights the

¹Ayla Gürel, Mete Hatay, Christella Yakinthou, *Displacement in Cyprus: Consequences of Civil Strife and Military Strife, Turkish Cypriot Legal Framework, An Overview of Events and Perceptions*, International Peace Research Institute (PRIO) Cyprus Centre, Report 5 (2012) p. 12.

conflicting issues between the two sides, which prepared the ground for the division of the island. Moreover, it discusses the roles of the external actors in the inter-communal relations during this period. In particular, the political relationship between Greece-G/Cypriots and Turkey-T/Cypriots as well as the impact of these relations on the failure of bi-communality is also examined.

The third section (1.3) examines how the issue of property has become the Gordian knot of the Cyprus problem following the division of the island. The underlying reasons behind the establishing of the property war between the two communities is analysed. The contradictory understanding of the property debate and the regulations that were settled in accordance with these greatly opposing perspectives (1.3.1–1.3.2) have been examined. Consideration of the underlying reasons behind the property conflict is significant on two grounds: to prevent the recurrence of the same detrimental disputes; and to comprehend the rationale of the problem in order to enlighten the way forward for a feasible and durable solution. Finally, the concluding part of this chapter recapitulates the idea that the property issue is a major deadlock for the Cyprus question and that its resolution may depend on a comprehensive settlement of the Cyprus problem. It also asserts that both parties should prepare compromises in various areas to achieve a mutually agreeable settlement on the island.

1.1 The Ottoman Period and the British Colony

It has been stated that ‘the Cypriots know that they cannot become a World Power; but they have succeeded in becoming a World Nuisance, which is almost as good’.² Cyprus is a small island, which, with its grievous history, has always been on the agenda of the international community. Its geopolitical position turned this small island into a desired place for various civilisations all through its history. Cyprus is the third largest island in the Mediterranean, and is located to the south of Turkey, west of Syria, north of Egypt and east of Greece. It functions as a bridge between East and West, being at a crossroads of three continents: Europe, Asia and Africa. Its strategic position accounted for it being taken over and controlled by numerous civilisations. The vital importance of Cyprus arose

² George Mikes, *Eureka! Rummaging in Greece*, London: Andre Deutsch (1965) p. 1.

when the Venetian maritime navy extended its boundaries of commerce to the Levant in the 15th century. The Byzantines' sovereignty over the island was followed by that of the Ottomans for more than 300 years. Following British power, which lasted for 40 years, the RoC was finally founded in 1960 by the Cypriots.³

After the opening of the Suez Canal, Cyprus became the stepping stone to it. At the crossroads of British and French interests en route to India, the island gained renewed importance.⁴ This turned the 'perfectly useless island'⁵ into a captivating place and its occupation became worthy of British rule at that time. In 1878, with the rise of the Crimean War, a golden opportunity for taking part in the ruling of the island had arisen. During this war, when the Russian army reached Istanbul, the fear that Istanbul might fall carried Cyprus to the bargaining table. It was agreed that Britain would provide military support to the Ottomans in return for the administration of Cyprus. Following negotiations between the British Ambassador, Henry Layard, and the Ottoman Sultan, a secret agreement called the 'Convention of Defensive Alliance between Great Britain and Turkey' was signed in Istanbul, on June 4, 1878. As a result, the control of Cyprus was granted to Great Britain in exchange for its support for the Ottoman Empire.⁶

Although there was no discretion for Britain to decide the annexation of Cyprus under the aforementioned Convention, the island was annexed unilaterally from Turkey by the written command of Britain on November 5, 1914 with the adoption of an Order in Council on the grounds that the Ottoman Empire had decided to enter the First World War on the side of Germany.⁷ At the same time, the government of Greece, under the leadership of Eleftherios Venizelos, known as the 'maker of Modern Greece',⁸ maintained good relations with Britain. Joining the war on the side of Britain was

³ Clement Dodd, *Storm Clouds over Cyprus: A Briefing*, Cambridgeshire: Eothen (2001) p.1; Ahmet C. Gazioglu, "Bi-Communality in Cyprus", *Perceptions*, vol.10, no.4 (2005) pp.89–113.

⁴ Rıfat Uçarol, *1878 Kıbrıs Sorunu ve Osmanlı-İngiliz Anlaşması*, İstanbul: Edebiyat Fakültesi Basımevi (1978); Eyup Ozveren, "Geo-Strategic Significance of Cyprus: Long-Term Trends & Prospects", *Journal of International Affairs*, vol. VII, No.4 (December 2002–February 2003) p. 39.

⁵ Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper & Row (1942) p. 275.

⁶ Convention of Defensive Alliance between Great Britain and Turkey, with respect to the Asiatic Provinces of Turkey. Signed at Constantinople, 4th June, 1878; Ahmet Aydogdu, *Kıbrıs Sorunu Cozum Arayislari 'Annan Planı ve Referandum Sureci'* 1stedn, Ankara, AsinYayin Dagitim Ltd. Sti (2005) p.5.

⁷ UK Parliament SIs 1786-1949/1914/1601-1650/[R] Cyprus (Annexation) Order in Council 1914 (SI 1914/1629).

⁸ John W. Duffield, *The New York Times*, Sunday 30 October 1921.

considered as a way through to achieve the Greek ideology of Μεγάλη Ιδέα (the Great Idea). The fundamental objective of this ideology was that the Greek nation would encompass all ethnic Greeks who had lived in the Mediterranean area. Accordingly, the unification of Cyprus with Greece for Greeks and G/Cypriots would be achieved by the Allies' support and with the annexation of Cyprus.⁹

With the ending of the First World War, a new period started on the island. The defeat of the Ottomans by the Allied powers resulted in the loss of its control power over Cyprus. Finally, the Treaty of Lausanne, which finalised the war, was signed between the British Empire, France, Italy, Japan, Greece, Romania, the Serb-Croat-Slovene State and Turkey on July 24, 1923, effectively partitioning the Ottoman Empire. Two of its articles determined the new power holder on the island. According to Articles 16 and 20 of this treaty, Turkey relinquished, *de jure*, its rights to Cyprus and the island became a Crown Colony of Britain in 1925.¹⁰

Indeed, there is strong evidence that the Treaty of Lausanne not only led to the annexation of Cyprus but also empowered Britain to make a decision over the nationality of T/Cypriots living there. This was contained in the provision concerning the acquisition of nationality in Article 21. According to this article:

Turkish nationals ordinarily resident in Cyprus on the 5th November, 1914, will acquire British nationality subject to the conditions laid down in the local law, and will thereupon *lose their Turkish nationality. They will, however, have the right to opt for Turkish nationality* within two years from the coming into force of the present Treaty, provided that they leave Cyprus within twelve months after having so opted.

Turkish nationals ordinarily resident in Cyprus on the coming into force of the present Treaty who, at that date, *have acquired or are in process of acquiring British nationality in consequence of a request made in accordance with the local law, will also thereupon lose their Turkish nationality.*¹¹

⁹ Dimitri Pentzopoulos, *The Balkan Exchange of Minorities and its Impact on Greece*, London: Hurst & Company (2002) p.28; Zenon Stavrinides, *Cyprus Conflict: National Identity and Statehood*, Nicosia: Stavrinides Press (1999) p. 12.

¹⁰ Renée Hirschon, “‘Unmixing Peoples’ in the Aegean Region” in Hirschon, R. *Crossing the Aegean*, vol.12, Chapter 2, New York, Berghahn Books (2004) p.9.

¹¹ Article 21 of the Treaty of Lausanne; Report of the International Law Commission on the Work of its Forty-Eighth Session, in UN, *Yearbook of the International Law Commission*, 1996, vol. II, Part 2, (emphasis added) p. 132.

According to this provision, T/Cypriots had to choose between British or Turkish citizenship within two years after having opted for it. It is worthwhile emphasising that the T/Cypriots were allowed to choose between repatriation to Turkey or settlement in Cyprus in return for relinquishing their nationality. Not surprisingly, this situation was not without consequences. Approximately 4,000 to 8,500 T/Cypriots left the island and moved to Turkey between the years of 1921 and 1925.¹² In essence, it can be stated that the indirect approach of Article 21 was the compulsory movement of Turkish people from Cyprus.

At this juncture, it is reasonable to state that, although the issue of displacement occurred in Cyprus in the 1960s, as a ‘temporary’ remedy in order to stop violence among Cypriots as a consequence of civil strife, repercussions appeared at a global level. The act of forcing people to choose between their nationality and their motherland has not received same level of reaction from other states. Even without taking into account, the mass movement of T/Cypriots, a new era was launched with the British rule on the island.

The British colonial administration, which lasted for forty-six years, established the basis for a rise in the nationalism of both G/Cypriots and T/Cypriots with the ‘divide and rule’ British policy. The pursuance and encouragement of this policy diminished the emergence of a Cypriot nationality.¹³ The cooperation of the two communities on significant aspects of social and political life interfered with this policy. The religious-based division, through the ethnic dimension, was disseminated among Cypriots in accordance with this ‘divide and rule’ policy.¹⁴ Indeed, there is strong evidence of this situation in that ‘Muslims’ became ‘Turks’ and ‘Christians’ were determined as ‘Greeks’, which paved the way for a politicisation of differences. The educational systems of the

¹² Sir George Hill, *A History of Cyprus: Volume IV: The Ottoman Province, the British Colony, 1571–1948*, Cambridge: Cambridge University Press (1952), pp. 412–413; Sabahattin Ismail & ErginBirinci *Ataturk Doneminde Turkiye-Kibris Iliskileri*, Akdeniz Haber Ajansi Yayinlar (1989) p.79; Vergi Bedevi *Tarih Boyunca Kibris-AnadolulliskilerineBirBakis*, Lefkosa (1978) p.37

¹³ Georgios Kyris, “An ‘Unrecognised’ Case of Europeanisation: European Union Enlargement and the Turkish-Cypriot Community” (DPhil Thesis, University of Manchester, 2011) p. 77.

¹⁴ Christopher Hitchens, *Hostage to History: Cyprus from the Ottomans to Kissinger*, London: Verso, (1997); Stavrinides (n9) p.12; Hubert Faustmann, ‘Cypriotness in Historical Perspective, in: German-Cypriot Forum (Deutsch Zyprisches Forum) (ed.): ‘Culture in Common-Living Cultures in the Cypriot Communities’ Proceedings of German-Cypriot Forum Conference, in Berlin/Üdersee (22–24 May 2003), pp.11–12; Dan Lindley, ‘Historical, Tactical, and Strategic Lessons from the Partition of Cyprus’, *International Studies Perspectives*, vol. 8 (2007) pp. 224–241; James Ker-Lindsay & Hubert Faustmann, ‘The Government and Politics of Cyprus’, Bern et al: Peter Lang, (2008), p.46.

Muslim and Orthodox populations were differentiated and the representation of the two communities in various advisory bodies was separated.¹⁵ The underlying reason for promoting the ethnic polarisation was to prevent combined action against colonial rule.¹⁶ In light of this, the policy had a remarkable impact on the rise of nationalism on the island, which ultimately invited Greece and Turkey to become involved in the politics of Cyprus, which in turn sowed the seeds of the Cyprus question.

The rise of Greek nationalism under British rule provoked an ambition for the political union of Greece and Cyprus, called *enosis* (Ένωσις in Greek). The demand for the union with Greece was presented by the G/Cypriot members of the Legislative Council, and soon after, with the launch of widespread riots, the Council was abolished.¹⁷ Not surprisingly, this campaign was not without consequences and, as a response to the idea of union with Greece, Turkish nationalism emerged. The reaction to the Greek campaign was embodied by the promotion of awareness and by the identification with the 'motherland' of Turkey.

After joining the North Atlantic Treaty Organisation (NATO) with Greece, Turkey maintained the right to join the decision-making process, like Greece, in accordance with the Treaty of Lausanne in case of any changes in the colonial status of Cyprus.¹⁸ Meanwhile, Greece also applied to the United Nations (UN) in order to discuss the denial of the right of self-determination to Cypriots under the UN Charter by Britain. However, this was refused by the UN since the discussion of the Cyprus debate was inadmissible under the terms of Article 2(7) of the Charter.¹⁹ This refusal triggered violent attacks by Greek demonstrators in Greece and then was taken to Cyprus by *enosis* supporters.²⁰

According to T/Cypriots, the attainment of the right of self-determination would have rendered the achievement of *enosis* possible since large numbers of G/Cypriots would vote for it. As a reaction, the T/Cypriots subsequently raised the ideology of partition (*taksim* in Turkish). At the heart of this ideology was the belief that the assimilation of

¹⁵ Christopher Hitchens, *Cyprus*, New York: Quarta Books (1982) p.192.

¹⁶ Vassillis Foukas & Heinz A. Richter, *Cyprus and Europe: The Long Way Back*, Bibliopolis, (2003), pp.77–81–164; Kyris (n13) pp.77–80.

¹⁷ Stavrinides (n9) p.19.

¹⁸ Aydogdu, (n6) pp.18–19.

¹⁹ Nancy Crawshaw, *The Cyprus Revolt*, London, George Allen & Unwin (1978) p.83.

²⁰ *ibid.* p.89.

T/Cypriots, due to the G/Cypriot majority, should be prevented and the Turkish presence on the island should be guaranteed. With the idea of achieving *enosis*, a clandestine organisation called the National Organization of Cypriots Fighters (EOKA) was formed by the G/Cypriot army officer, George Grivas.²¹ It was an instrument to respond to the requirements of right-wing political extremism. In 1955, EOKA launched a campaign. For the British, this action constituted a terrorist movement against British rule;²² however, for Greeks, it was an armed insurrection.²³

In order to resolve the Cyprus crises, Sir John Harding was sent to Cyprus as the governor for negotiations with the G/Cypriots. A constitutional plan, based on the self-government of the Cypriots, was proposed, and subsequently rejected by the Greek leader due to the fact that the right of self-determination was not included under this plan.²⁴ This rejection was followed with violent demonstrations and gradually increased to assassination level. As a response to these developments, the T/Cypriots formed an organisation called 'Turk Mukavemet Teskilati' (TMT) in order to take action against these attacks. The TMT supported the ideology of *taksim*.²⁵ *Taksim* constituted the partition of Cyprus between G/Cypriots and T/Cypriots in order to prevent the assimilation of the latter due to the Greek majority and aimed to guarantee a Turkish presence on the island. Grievous clashes and violent attacks were engaged by these organisations and formed an unforgettable wound in the memory of Cypriots. As a result, this period was finalised with the launch of negotiations between Greece, Turkey and Britain, which paved the way for the independence of Cyprus.

²¹ Kyris (n13) pp. 79–82.

²² Monteagle Stearns, *Entangled Allies –US Policy Toward Greece, Turkey, and Cyprus*, New York: Council on Foreign Relations Press, (1992), p.25.

²³ Andreas Neocleous and others, *Neocleous's Introduction to Cyprus Law*, 3rd edn, Andreas Neocleous & Co LLC, (2011), p.8

²⁴ Aydogdu (n6) pp. 25–26.

²⁵ On 21 March 1956, an assassination attempted by EOKA on Harding's life took place, but which failed as the time bomb was found before its activation by Guard Commander, Michael Buckley, who "...took the time bomb outside and placed it in a sandbagged dugout. Ten minutes later its gelignite charge exploded with a force that would have demolished half of the Government House itself." Therefore, Makarios was exiled to the Seychelles for a year. See: *Time Magazine* "Cyprus: The Field Marshal's Pea", vol. LXVII, No. 14, 2 April 1956, <<http://www.time.com/time/magazine/0,9263,7601560402,00.html>> accessed 29 November 2013.

1.2 Towards the Republic of Cyprus and the Division of the Island

The shared violence of the Cyprus conflict during the 1950s was followed by negotiations and finally resulted in the independence of the island. The significance of international policies became more apparent by Cyprus receiving support for the solution of its conflict, particularly support from the United States (US).²⁶ The main incentive for this support was the role of Greece and Turkey within the US foreign policy, they being the southern flank of NATO. Cyprus, under the British rule, 'presented fewer strategic uncertainties for NATO than a Greek or independent Cyprus'.²⁷ The Suez campaign in 1956 was a turning point for Britain in respect of its role on the island. Although Cyprus had maintained its strategic importance for airborne operations in the Middle East, Britain was at the time not strong enough to keep the canal open and protect its power in the Middle East. Accordingly, the reason for keeping the island as British had ceased and Cyprus could no longer be seen as a British colonial problem.²⁸

The changed status of Britain was embodied with an announcement in the House of Commons concerning the right of self-determination, which must be exercised for both T/Cypriots and G/Cypriots. It was maintained that the Turkish community should have equal rights with the Greek community without considering the majority/minority factor among them. The Prime Minister of Great Britain, Harold Macmillan, proposed a plan to establish a partnership scheme between the two communities. Although it was accepted by Turkey, with the condition of giving equal rights to the T/Cypriots in government with the G/Cypriots, the Greek government rejected it as it did not want Turkey to take part in the Cyprus problem and thus the conflict remained unresolved.²⁹

The rationale for keeping Cyprus as a British colony was that to have military bases there constituted a station in the Middle East. This led Britain to announce her intention to leave the administration of Cyprus to Cypriots in return for keeping military bases on the island.³⁰ Accordingly, negotiations concerning the independence of Cyprus took place

²⁶ Joseph S. Joseph, *Cyprus: Ethnic Conflict and International Politics: From Independence to the Threshold of the European Union*, Basingstoke: Macmillan (1999) p.19.

²⁷ Stearns (n22) pp. 26–27.

²⁸ *ibid.*

²⁹ Aydogdu (n6) pp.30–31.

³⁰ Aydogdu (n6) pp.34–35.

between the representatives of Britain, Greece and Turkey in Zurich. Finally, the establishment of an independent RoC was agreed on February 10, 1959. Following the Zurich Agreement, the leaders of Britain, Greece and Turkey, together with G/Cypriots and T/Cypriots, met in London to confirm the final agreement, the London Agreement, establishing the RoC on February 19, 1959.

The Zurich–London agreements comprised three treaties: first, the ‘Treaty of Establishment’ established the RoC and provided two military bases for Britain and the cooperation of common defence for Cyprus by the parties of this agreement; secondly, the ‘Treaty of Guarantee’ guaranteed the territorial integrity of Cyprus by prohibiting the union of Cyprus with another state and also the division of the island; thirdly, the ‘Treaty of Alliance’ provided military bases for Greek and Turkish soldiers. The Constitution of Cyprus established a bi-communal federation, and its settlement was guaranteed by the Guarantor States (Turkey, Greece and Britain). The representation was based on a 7:3 ratio: 30% of T/Cypriots and 70% of G/Cypriots participated in the Republic’s structure. The direct or indirect unification or division of the island was banned and the Treaty highlighted that if any action against the security and territorial integrity of the island took place, the High Contracting parties would cooperate for defence. Finally, the constitution was signed and the RoC was established on August 16, 1960.

Three years after independence, the two Cypriot communities once again faced inter-communal conflict. However, this time, the fundamental cause of the conflict was the framework of the constitution of the RoC. Although the constitution was agreed by both of the communities, in essence, its true character held the separation of the two communities within itself. Here, there is strong evidence that the first article of the constitution stated that the G/Cypriot president would be elected by the G/Cypriot community, and the T/Cypriot vice president would be elected by the T/Cypriot community.³¹ In addition to the disagreement over this article, other significant issues such as civil service, taxation, army units and municipalities have also been raised and created the grounds for controversial debates. Put another way, although the constitution was mutually agreed on, it can be understood from the constitutional conflict that it was interpreted differently by the communities. While for G/Cypriots the RoC was formed to

³¹ Article 1 of The Constitution of the Republic of Cyprus (1960).

be a unitary state, in contrast, for T/Cypriots it was established to be a partnership state.³² These controversial debates resulted in the failure of the leaderships of the two communities, which impaired the inter-communal relations and accelerated mistrust among them.

The seeds of inter-communal violence were sown when the G/Cypriot president Makarios published a proposal so-called ‘The Thirteen Points’ in order to modify the constitution of the RoC in 1963.³³ Although the purpose of these amendments was determined as enhancing the state’s functioning, in reality the fundamental objective was to reduce the T/Cypriots to the status of a minority and also to weaken their governmental power. For instance, the abandoning of the T/Cypriot vice president’s power of veto was included in these amendments.³⁴

The constitutional deadlock resulted in the withdrawal of T/Cypriots from the government, which triggered bloody inter-communal violence. On 21 December 1963, the G/Cypriot police stopped and wanted to search a T/Cypriot car, asking for the identity cards of the people in the car. While the T/Cypriots were refusing to be searched, a group of T/Cypriots had gathered in anger and started a clash. This event, which occurred on the border of Nicosia, resulted in the first casualties of that period. Two T/Cypriots were killed and one G/Cypriot policeman was badly injured by a group of armed Cypriots.³⁵ This incident triggered severe inter-communal fighting between the two communities who used to live together in peace. Within a few days, the violence reached civil war level. Civilians were killed and many hostages were taken as pawns. Meanwhile, as a result of the assaults, 103 Turkish villages were evacuated, and nearly 20,000 T/Cypriots fled from their lands.³⁶ This unfortunate date is engraved in the memory of the T/Cypriot community as ‘Bloody Christmas’.³⁷

³² Dodd (n3) p.11.

³³ See: The Thirteen Amendments to the Constitution of the Republic of Cyprus as proposed by President Makarios, November 1963, <http://www.cyprus-conflict.net/13_points.html>accessed: 29 November 2013.

³⁴ See: Special Research Report No. 3, published by Security Council Report, entitled “Cyprus: New Hope After 45 Years on the Security Council Agenda.”, September 4, 2008, p.4.

³⁵ Zeki Halil and Cemaliye Emirali were the first victims of the violence. See: Ata Atun ‘21 Aralık 1963’ *KibrisPostasi*, 21 Aralık 2011; Dodd (n3) p.13.

³⁶ Crawshaw (n19) p.368.

³⁷ Bloody Christmas (*Kanlı Noel* in Turkish): violent attacks against T/Cypriots for the implementation of the *Akritis* Plan, which called for the removal of T/Cypriots from Cyprus and to terrorise T/Cypriots into

On December 23–25, 1963, Turkey called upon the Guarantor States to provide security in accordance with the Treaty of Guarantee. The British Secretary for Commonwealth Relations, Duncan Sandys, proposed an agreement to establish a buffer-zone separating the Turkish quarter of Nicosia. Therefore, following a meeting of the representatives of the two communities, the ‘Green Line’³⁸ became a division on the map, which was established between G/Cypriots and T/Cypriots.³⁹

In order to settle the inter-conflict, the governments of the United Kingdom, Turkey, Greece and the two communities of Cyprus gathered at the London Conference in January 1964, and once more the parties failed to reach an agreement.⁴⁰ In March 1964, the United Nations Peacekeeping Force (UNFICYP) arrived on the island to prevent fighting, maintain law and take measures to stop violence. Despite the involvement of the UNFICYP in the conflicts, inter-communal attacks erupted again. However, this time Turkey took a different stance as a response and declared that, in the case of continuing violent attacks on the T/Cypriots, it would use its right of intervention, as provided for under the Treaty of Guarantee. Accordingly, G/Cypriots responded by stating that Turkey could not unilaterally intervene under this treaty.⁴¹

As a result, the vicious cycle of fighting during the period 1963 to 1967 led to a strict separation of the communities and a collapse of inter-communal relations. The inter-communal negotiations, which commenced in 1968, finished with failure in 1974, due to inter-communal hostility that was fed by genuine mistrust, regardless of the memory of the past when the two communities lived side by side in peace.

The conflict in Cyprus reached boiling point when the Greek military *junta* in Greece operated a *coup d'état* in Cyprus on July 15, 1974 in order to achieve *enosis* and thus to

accepting a minority status and then to unite the island with Greece (*Enosis*), the period of 21–31 December 1963.

³⁸ The term ‘Green Line’ refers to the ceasefire line that divides the island into a Turkish-Cypriot northern region and a Greek-Cypriot southern region. UNFICYP is responsible for the area that separates the two sides, or the Buffer Zone.

³⁹ Hugh D. Purcell, *Cyprus*, London, Ernest Benn Limited (1969) p.333.

⁴⁰ United Nations Peacekeeping Force in Cyprus, *Background*, http://www.unficyp.org/nqcontent.cfm?a_id=1600&tt=graphic&lang=11 accessed 11 June 2013; Aydogdu (n6) pp. 54–56; Ismail Sabahattin, *Kıbrıs Cumhuriyetinin Dogusu-Cokusu ve KKTC'nin Kurulusu (1960-1983)* Akdeniz Haber Ajansi Yayinlari, (1992), p.318.

⁴¹ Kudret Ozersay, *Kıbrıs Sorunu Hukusal Bir Inceleme*, 2ndedn. Ankara: ASAM Yayinlari (2002) p.72.

establish 'The Hellenic Republic of Cyprus'. The coup was led by Nikos Sampson and was supported by the Greek officers of the Cyprus National Guard against President Makarios. As a result of the attacks against G/Cypriot supporters of independence, 3,000 G/Cypriots were killed and an annihilation plan to exterminate T/Cypriots (so-called AKRITAS Plan) was put into effect.⁴² As a response to these severe attacks, the issue of Turkey's emerging intervention was raised. At this juncture, the reaction of Turkey is significant in understanding the arrival of the Turkish troops on the island, its policy⁴³ and its role over the northern part of Cyprus. On July 20, 1974, Turkey launched an operation called 'Peace Operation' in order to protect T/Cypriots against attacks, to stop violence and bring peace to the island. However, for G/Cypriots, this was an 'invasion' by Turkey as a part of Turkish expansionism.⁴⁴

In this regard, Turkey maintained that her right to intervene stemmed from the Treaty of Guarantee that was provided by the 1960 constitution.⁴⁵ Here, the conflicted interpretation of Turkey's intervention became apparent. For G/Cypriots this period is called the 'Memory of the dark days' and calls what is a 'Peace Operation' for T/Cypriots a Turkish 'invasion'.⁴⁶ The 1974 war led to a mass displacement of people. It was estimated that around 45,000 T/Cypriots⁴⁷ and 142,000 G/Cypriots⁴⁸ fled their homes and were displaced. T/Cypriots moved from the south to the north for their own security and G/Cypriots moved from north to the southern part of the island to protect themselves from Turkish attacks.⁴⁹ In 1974, negotiations towards a settlement began and continued

⁴² History of Cyprus "Archbishop Makarios on the Invasion of Cyprus by Greece" Available: <<http://www.cypnet.co.uk/ncyprus/history/republic/makarios-speech.html#speech>> Accessed 14 November 2013; Clement Dodd, "Cyprus: A Historical Introduction" in C.H. Dodd (ed.), *The Political, Social, and Economic Development of Northern Cyprus*, Huntingdon, Cambridgeshire: Eothen Press (1993).

⁴³ Kyril (n13) pp.80–95.

⁴⁴ Dodd, (n3) p.7.

⁴⁵ Zenon Stravanides, *The Cyprus Conflict*, Loris Stravanides Press (1976) p.90; Salahi Sonyel, *Cyprus: The Destruction of a Republic and its Aftermath (1960-1974)*, Nicosia: CYREP (2003) p.347.

⁴⁶ Aigli Andrea Pittaka, *Cultures of Peace Enabled Zoom Along Cyprus*, ProQuest (2007) p. 78.

⁴⁷ An official report of the Turkish Cypriot administration dated 20 October 1974.

⁴⁸ ROC Press and Information Office (PIO), *The Cyprus Question* (2003) Nicosia: Cyprus, p.12.

⁴⁹ Ayla Gürel & Kudret Ozersay, *The Politics of Property in Cyprus: Conflicting Appeals to 'Bizonality' and 'Human Rights' by the Two Cypriot Communities*, International Peace Research Institute (PRIO) Cyprus Centre Report (3/2006) pp.3–5; Internal Displacement Monitoring Centre, 'Cyprus: Lack of Political Settlement Prevents the Displaced from Fully Enjoying Their Property Rights, A profile of the Internal Displacement Situation' (18 December 2007), pp.7-8 <[http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/94CBD5921CA280ECC12573B50039AF47/\\$file/Cyprus%20-December%202007.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/94CBD5921CA280ECC12573B50039AF47/$file/Cyprus%20-December%202007.pdf)> accessed 11 June 2013.

through the 1970s. In spite of several attempts to present a settlement, the parties failed to reach an agreement.

Following the collapse of intense but unfruitful negotiations, the Turkish Cypriot Federated State of Cyprus (TFSC) was declared on February 13, 1975. It was declared that the TFSC administration would govern T/Cypriots until a new Federal Republic of Cyprus was established and the regulations in the 1960 constitution of the RoC were implemented.⁵⁰ Despite the new position of T/Cypriots, efforts to resolve the conflict have been made at international level through the Vienna Talks in 1977–1979, which were arranged by the UN Secretary-General.

The new series of inter-communal talks between the leaders of the two communities were finalised with the Vienna III Agreement on August 2, 1975, which was confirmed by the UN Secretary-General's Report.⁵¹ This agreement provided that the T/Cypriots living in the south were allowed to move to the north, if they wanted to do so, with the assistance of the UNFICYP; the G/Cypriots then residing in the north were free to stay, and every assistance in leading a normal life, including facilities for education and religion, would be given; the G/Cypriots in the north would be permitted to move to the south at their own request; access to G/Cypriot villages and habitations in the north was free for the UNFICYP.⁵²

Although the communities reached an agreement, interpretation of the Vienna Agreement by the communities remains disputed: T/Cypriots refer to it as the '1975 Voluntary Population Exchange Agreement' while G/Cypriots maintain that it was a temporary measure addressing important humanitarian aspects affecting the lives of the enclaved known as the 'Vienna III (Humanitarian) Agreement'.⁵³ In essence, it can be argued that the two different interpretations of the agreement reflect the perspectives, concerns and requirements of each side. For T/Cypriots, it represented a ground for bi-zonality and

⁵⁰ Ozersay (n 41) pp.110–111.

⁵¹ The Vienna III Agreement, UN Document S/11789, signed in August 2, 1975; Dodd (n3) pp. 99–101.

⁵² The Vienna III Agreement, UN Document S/11789, signed in August 2, 1975.

⁵³ Gürel & Ozersay (n 49) p.18; ROC Press and Information Office, 'Enclaved' <<http://www.moi.gov.cy/moi/pio/pio.nsf/All/803883940B86E8D3C2256D6D001EB5CA?OpenDocument>> accessed: 12 June 2013; Olga Demetrious *Displacement in Cyprus-Consequences of Military and Civil Strife, Life Stories: Greek Cypriot Community*, International Peace Research Institute (PRIO) Cyprus Centre Report 1 (2011) p. 6.

security; however, for G/Cypriots it was a constrained agreement to prevent the Turks from expelling the remaining G/Cypriots in the north and to take precautions against further attacks.⁵⁴

At this point, it should be highlighted that the importance of recognising the T/Cypriot perspective on the Vienna Agreement had increased over twenty years after 1975. How the T/Cypriots interpreted the agreement is important in understanding their constant strategy, which was established in the face of the alleged violations of the G/Cypriots regarding their property rights that were carried before the European Court of Human Rights (ECtHR) in the late 1990s.⁵⁵ Following the displacement and continued failure to reach an agreement, the property debate transferred to the external level. A number of applications against Turkey have been brought to the ECtHR ('the Court' hereafter) to seek remedy for their property claims. It is notable that since the first judgment of the Court concerning property disputes in Cyprus,⁵⁶ there has been a strategy by the Turkish government to justify the actions over those properties established on the grounds of their understanding of the Vienna Agreement. The Turkish government followed the same adopted approach in almost all of the property claims against it without any strategic manoeuvre.

In 1977, another series of inter-communal talks were organised in which the parties failed to reach an agreement.⁵⁷ This time, the G/Cypriots carried the Cyprus question to the UN General Assembly. Although the resolutions adopted by the UN General Assembly were promoted by G/Cypriots, those were one-sided resolutions from the point of view of the T/Cypriots since they were adopted in the absence of this side.⁵⁸ The approval of those resolutions dealt with intense issues – for example, Resolution 37/253 concerning the immediate withdrawal of Turkish forces⁵⁹ – and the final position of the T/Cypriots at the negotiations was established. As a result, frustrated by decades of unfruitful negotiations,

⁵⁴ Ozersay (n 41) p. 18.

⁵⁵ The strategies of T/Cypriots and G/Cypriots concerning property claims of displaced Cypriots before the ECtHR will be examined in Chapter 3 of the thesis.

⁵⁶ *Loizidou v. Turkey* (1995) 20 EHRR 99, para.36.

⁵⁷ Dodd (n 3) p.101.

⁵⁸ *ibid*, pp. 102–103.

⁵⁹ Nathalie Tocci, *EU Accession Dynamics and Conflict Resolution: Catalysing Peace or Consolidating Partition in Cyprus?* Hampshire: Ashgate Publishing Ltd, (2004), p. 57.

the TFSC unilaterally declared independence and established the Turkish Republic of Northern Cyprus (TRNC) on November 15, 1983.

Subsequently, the UN Security Council declared in Resolution 541(1983) that the T/Cypriot declaration of independence was incompatible with the 1960 Treaty of Establishment and the Treaty of Guarantee and thus the establishment of the 'TRNC' is invalid.⁶⁰ Accordingly, the Security Council Resolution 550 (1984) reaffirmed Resolution 541 (1983) and the condemnation of 'all secessionist actions'.⁶¹ With these resolutions, the Security Council called upon all states not to recognise the TRNC.

As a result, while the TRNC has never been recognised by any other states than Turkey, the RoC is recognised by all states and enjoys international recognition. Lauterpacht argues that it is wrong for the Security Council to express legal opinions as this role is more suited to a judicial body, which the Security Council is clearly not. Its decisions are limited to the prescription of specific actions in order to maintain or restore international peace and those decisions should not extend beyond that.⁶²

From the wording of these resolutions which the Security Council was concerned, one can assume that the illegality of the declaration of independence represented the violation of the 1960 treaties. In this regard, it is questionable whether such a violation is sufficient to establish the grounds for an international 'obligation of non-recognition' of a state.⁶³ In fact, the question of whether a purported secession is lawful within international law is a closed one. The determination of whether an attempt to secede is in accordance with international law is unclear since there is an absence in international standards for determining whether such an attempt is illegal or invalid.⁶⁴

⁶⁰ UN Security Council, 2500th Meeting. *Resolution 541 (1983)* (S/RES/541) 18 November 1983. <<http://www.unhcr.org/refworld/docid/3b00f16528.html>> accessed 12 June 2013.

⁶¹ UN Security Council, 2539th Meeting. *Resolution 550 (1984)* (S/RES/550) 11 May 1984. <[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550\(1984\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550(1984))>, accessed 12 June 2013.

⁶² UN General Assembly, 44th Session, *Question of Cyprus: The Status of Two Communities in Cyprus, Opinion of Mr E. Lauterpacht*. (A/144/968.S/2146), 9 August 1990, p.4.

⁶³ Yaël Ronen, *Transition from Illegal Regimes under International Law*, Cambridge: Cambridge University Press, (2011), pp.65-66.

⁶⁴ John Cerone, 'The Legality and Legal Effect of Kosovo's Purported Secession and Ensuing Acts of Recognition,' 3 *Annals – Belgrade Law Review* (2008), pp. 62-64.

Looking at the point of the Security Council Resolutions on the TRNC's attempted establishment, proclamation of its illegality is mainly grounded on the violation of the 1960 treaties by the intervention of Turkey. Although it was not expressly determined in the resolutions, the establishment of the TRNC originated from Turkish intervention. This sense has been obscured by calling upon all states to 'respect the sovereignty, independence and territorial integrity of Cyprus'.⁶⁵ Here, what needs to be pointed out is that the establishment of the 'TRNC' was proclaimed nine years after the Turkish intervention, which 'was the culmination of the process of political and administrative evolution within the Turkish Cypriot people'.⁶⁶ In this respect, the ground for the declaration of the legally invalid status of the 'TRNC' may be refuted.

In the case of Cyprus, although the T/Cypriots' attempted secession was declared as legally invalid, this declaration has been made without providing any clear legal merits within international law discourse. The exclusion of secession from a test of illegality and incoherency of legal requirements, which culminated in the non-recognition of any secession, may lead the way to the 'politicalisation' of this concept, particularly when the interest of the international community is in question.

1.3 Two Communities with Two Contradictory Perspectives and Property Mechanisms

In 1974, when a group of G/Cypriot nationalists launched a *coup d'état* to gain control of the country, Turkey carried out an armed operation in Cyprus to assure the security of T/Cypriots and took control of 36% of the island.⁶⁷ With the fear of further violence, G/Cypriots living in the north moved to the south and T/Cypriots residing in the south moved to the northern part of Cyprus. The majority of people from each community were displaced and left their homes behind. This situation created a major social and psychological trauma for Cypriots whose effects still continue for many displaced persons. The prolonged inter-communal conflicts between the two communities and the failure of the representatives to make a concrete effort to reach an agreement had a major impact on this unfortunate event.

⁶⁵ UN Security Council, 1781st Meeting. *Resolution 353 (1974)* (S/RES/353) 20 July 1974.

⁶⁶ Zaim Necatigil 'Judgement of the European Court of Human Rights in the Loizidou Case: A Critical Examination' *Journal of International Affairs*, vol. IV, no.3 (1999).

⁶⁷ Keith Kyle, *In Search of Peace*, London: Minority Rights Group International (1997) pp. 16-21.

Since the early 1960s, the total number of displaced persons, including both G/Cypriots and T/Cypriots, was 210,000, which constitutes 30% of the total population in Cyprus at that time.⁶⁸ Ownership of the abandoned properties has always been controversial and may be the most intense issue, and one which has remained stagnant within the Cyprus problem. Although several attempts have been made, parties have failed to resolve this debate. With the passage of time, this crucial debate not only became more complex but was also carried to the international arena within the context of property rights. This deadlock and its consequences have gained high importance at a global level more than ever before.

The civil strife in 1974 resulted with the *de facto* division of the island, which led the property issue to become the Gordian knot of the Cyprus conflict. Following the division, the T/Cypriot community established their administration and started living in the T/Cypriot-controlled areas of Cyprus under their own political structure.⁶⁹ The territory of the 'TRNC', which is not recognised by any states apart from Turkey, represents a third of the island and it is referred to in the external arena as 'those areas of the RoC in which the government of the RoC does not exercise effective control',⁷⁰ whereas the G/Cypriot population are living under the control of an internationally recognised RoC.

The issue of property ownership has been a controversial debate since the early 1960s. Its significance in any future geopolitical settlement makes this issue the most sensitive one. Although this debate was one of the major issues within the inter-communal conflict, verification of ownership claims, at that time, were difficult since both of the communities refrained from opening their land registration books to an impartial audit.⁷¹

Not surprisingly, the figures for the number of displaced persons and the privately owned lands affected by the property dispute, provided by the authorities, differ greatly. More

⁶⁸ Official Report of the Turkish Cypriot administration dated 20 October 1974; Gurel & Ozersay (n 49) p.1; Ahmet An, *Kibris Nereye Gidiyor*, Istanbul, Everest (2002) p.319; RoC Press and Information Office (PIO), *The Cyprus Question*, Nicosia (2003) p.12.

⁶⁹ Ayla Gurel, *Displacement in Cyprus: Consequences of Civil Strife and Military Strife, Turkish Cypriot Legal Framework*, International Peace Research Institute (PRIO) Cyprus Centre, Report 4 (2012) p. 3.

⁷⁰ Article 1 of Protocol No. 10 of the EU Treaty of Accession (2003).

⁷¹ Richard A. Patrick, "Political Geography and the Cyprus Conflict: 1963-1971", ed. James H. Bater & Richard Preston, Ontario: Department of Geography publications, University of Waterloo (1976) p.15.

than 25,000 T/Cypriots and 700 G/Cypriots were displaced between the years 1963 and 1964.⁷² These numbers dramatically increased after the division of the island in 1974. Following the *de facto* division, 142,000 G/Cypriots (approximately 30% of the entire G/Cypriot community at that time) had to move from the north to the southern part of the island⁷³ and 45,000 T/Cypriots (approximately 40% of the entire T/Cypriot community at that time) were displaced from the south to the north.⁷⁴ Displaced people from both communities left their houses and lands for security reasons and were enclaved in villages, military camps, refugee camps or schools. Correspondingly, percentages of privately owned land affected by the property dispute are also considerable, although there are no figures mutually accepted.

The figures of privately owned land in the post-1974 territories and their incoherency among the two communities are considerable. According to G/Cypriot records on privately owned land in the north: 78% of this land belongs to G/Cypriots, 21.1% belongs to T/Cypriots; privately owned land in the south: 85.7% is owned by G/Cypriots and 13.9% by T/Cypriots.⁷⁵ According to the T/Cypriot estimates on privately owned land in the north: 63.8% belongs to G/Cypriots, 33.1% belongs to T/Cypriots; percentages of this land in the south: 76.2% owned by G/Cypriots and 22.8% by T/Cypriots.⁷⁶ Although these percentages provided by the sources of the two communities do not match, they are considerable, not only within the scope of the Cyprus conflict but also in the matter of future ownership claims that may be brought before the Court concerning the issue of property rights under the European Convention on Human Rights ('ECHR' or 'the Convention' hereafter) system.

In respect of the Convention mechanism, the percentages of ownership that fall within the ambit of disputed lands (78.5%, 13.9% for G/Cypriots and 63.8%, 22.8% for T/Cypriots) may indicate the level of threat against the effectiveness of the ECtHR system

⁷² *ibid.*, pp.74–79.

⁷³ Gürel & Ozersay (n 49) p.13.

⁷⁴ An (n 68) p.139; Gürel & Ozersay (n 49) p. 3.

⁷⁵ These figures do not include the percentages of G/Cypriot Church properties, T/Cypriot *Evkaf* (traditional Muslim establishments), Buffer Zone patrolled by the UNFICYP. The Department of Land and Surveys of Cyprus, 'Historical

Background' <http://www.moi.gov.cy/moi/dls/dls.nsf/dmlhistory_en/dmlhistory_en?opendocument> Accessed: 14 June 2013; Gürel & Ozersay (n 49) pp. 4–9.

⁷⁶ Claire Palley, *An International Relations Debacle*, Oregon: Hart Publishing (2005) p.175; Gürel & Ozersay (n 49) pp. 8–9.

and possible caseload crises regarding property claims. In this respect, it may be argued that the establishment of regional remedies will be more efficient mainly on two grounds: firstly, a bi-communal commission can be established to deal with property claims and provide the agreed figures of disputed lands. In the case of such a commission, access to the local records and registries of those properties will be feasible and thus a reliable evaluation on the value of those properties can be provided.⁷⁷ This local remedy will be able to serve a large extent of displaced people in terms of local accessibility and could produce a quick solution for the claims. Secondly, the Court's caseload will be reduced.

1.3.1 Turkish Cypriot Perspective on the Property Issue and the Regulations on the Abandoned Greek Cypriots' Properties in the North

It can be argued that the root cause of the property deadlock has been created by three correlated components: 'different interpretations of the causes of the dispute'⁷⁸ (first) generate 'contradicted demands' (second) from the communities which established a ground for the formation of 'contradicted legal measures' (third), which can be called the 'conflict of property triangle'.

The perceptions of the two communities are considerably contrasted respectively in these three aspects. According to the T/Cypriot perspective, the opposition, which created the division of the island, was a result of the violation of the 1960 constitution by the G/Cypriots aiming to reduce the T/Cypriots to a minority level. This situation paved the way for the creation of a zone, after the 1974 events, in which they could securely live under their own legal and political system. During the inter-communal negotiations, their suggested solution was centred on 'bi-zonality', which represented their demands on 'the constituent states to have the unfettered right to decide who could establish residency'.⁷⁹ Not surprisingly, their regulations on land-ownership were established on the principle of 'bi-zonality'. Correspondingly, the ownership of the abandoned G/Cypriot properties,

⁷⁷ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.97.

⁷⁸ Gürel and others (n 1) p. 12.

⁷⁹ UN Security Council, *Report of the Secretary General on His Mission of Good Offices in Cyprus*, (S/2003/398) 1 April 2003, para. 107. The term "*principle of bi-zonality*" was adopted under the main Article 10 of the Plan in 2004, finalising negotiations by stating that: "The claims of persons who were dispossessed of their properties by events prior to entry into force of this Agreement shall be resolved in a comprehensive manner in accordance with international law, respect for the individual rights of dispossessed owners and current users, and the principle of bi-zonality"; Gürel & Ozersay (n49) pp.11–12.

located within the areas under T/Cypriot control, was gradually given to the people living there.

As a result, T/Cypriot leadership presumed that the resolution of the Cyprus problem could have been achieved through a permanent separation of the two communities in that each community should create its own internal structure in its own area and thus live securely without being under a security threat.⁸⁰ Therefore, the rationale of the T/Cypriots regarding the settlement of the property problem is established on these perspectives. These T/Cypriot approaches have been presented during prolonged inter-communal negotiations for the settlement of the Cyprus conflict, sponsored by the UN. The demands of the T/Cypriots were explained by the UN Secretary-General as follows:

In their wish to avoid the intermingling of Greek Cypriots and Turkish Cypriots, the Turkish Cypriot side wanted the constituent states to have the unfettered right to decide who could establish residency, therein, this was their concept of bi-zonality.

The Turkish Cypriot side argued that property claims should be settled through liquidation by means of a global exchange and compensation scheme, meaning that no displaced persons, from either side, would have the right to have their properties reinstated.⁸¹

In this respect, the property dispute should be resolved in parallel with the principle of bi-zonality, which constitutes a method for a solution through ‘global exchange and compensation’.⁸² This idea was supported on the ground of the view that another resolution method might lead to significant problems concerning property matters due to the fact that 63.8% (according to T/Cypriot figures) of private property in the T/Cypriot-controlled area belongs to G/Cypriots, which was allocated to T/Cypriots. The settlement of the property conflict through the global exchange and compensation method became an established formula that would have prevented the displaced G/Cypriots from returning to their lands and homes that they left behind in the north. Since 1977, until the publication of the UN proposal for the comprehensive settlement of the Cyprus problem (the so-called Annan Plan) in 2002, this has been the approach put forward by T/Cypriots.⁸³

⁸⁰ Gürel and others (n1) p. 12.

⁸¹ U.N. Security Council (S/2003/398) para. 107.

⁸² Gürel & Ozersay (n 49) pp.12–13.

⁸³ Gürel (n 69) p.15.

As a result of continued failures to reach an agreement, the ‘TRNC’ administration unilaterally adopted some legal measures to resettle and rehabilitate the displaced T/Cypriots. These regulations were settled on the basis of the principle of global exchange and compensation. Therefore, for the first time, the concept of bi-zonality, embodied in the ‘TRNC’ constitution, came into force in 1985. According to Article 159 (1) (b) of this constitution, all abandoned G/Cypriot properties situated within the T/Cypriot-controlled area ‘shall be the property of the TRNC notwithstanding the fact that they are not so registered in the records of the Land Registry Office’.⁸⁴ In fact, although the T/Cypriot authorities adopted the said regulations with the purpose of rehabilitation, they unwittingly sowed the seeds of the property deadlock that will be carried over to the global level. Article 159 (1) (b) of the TRNC constitution provides, where relevant, as follows:

All immovable properties, buildings and installations which were found abandoned on 13th February, 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or not being owned after the abovementioned date, or which should have been in the possession or control of the public even though their ownership had not yet been determined...and ... situated within the boundaries of the Turkish Republic of Northern Cyprus on 15th November 1983, shall be the property of the Turkish Republic of Northern Cyprus notwithstanding the fact that they are not so registered in the records of the Land Registry Office; and the Land Registry Office records shall be amended accordingly.

Additionally, the granting of title to abandoned G/Cypriot properties was allowed by the Housing, Allocation of Land and Property of Equal Value Law, No. 41/1977 (*Iskan, Topraklandırma ve Esdeger Mal Yasası* (ITEM law) in Turkish) with an amended legislation called the Amendment Law No. 52/1995. The concept of ‘equal value’ or ‘equivalent property’ was taken as the grounds for the allocation system. This concerned granting the T/Cypriots, who left property in the south, the possession of abandoned G/Cypriot property of equal value. Title to those abandoned properties was granted after all rights of T/Cypriot properties, which were left in the south, was transferred to the ‘TRNC’. Concordantly, a property evaluation and exchange system was represented by the value unit of a ‘point’ system.⁸⁵

As a result, T/Cypriots who have properties in the south were assigned points in exchange for submitting their title deeds of those properties in the north to the T/Cypriot

⁸⁴ Article 159 (1) (b) of the Constitution of the Turkish Republic of Northern Cyprus (7 May 1982).

⁸⁵ Gürel and others (n1) p.13.

government. In order to relinquish their right to the properties in the south in favour of the T/Cypriot state, individuals were required to sign a document called *feragatname* (certificate of renunciation) indicating their agreement to relinquish their rights. After obtaining points, an owner could exchange these for an abandoned G/Cypriot property in the north. Point holders were also allowed to trade, donate or inherit their points.⁸⁶

Moreover, the purpose of the rehabilitation and resettlement of displaced T/Cypriots through these property arrangements was gradually extended. There is strong evidence that, besides representing the concept of equivalent property, those points were also issued as compensation to people who did not move from the south to the north or leave any properties such as: victims of the civil strife, people who served in the inter-communal conflict, people with low incomes and Turkish immigrants who arrived and settled in Cyprus before 1982.⁸⁷ Furthermore, the right to transfer a mortgage to the G/Cypriot property received in exchange for points was provided by an official document called the ‘definitive possessory certificates’ (‘kesin tasarruf belgesi’ in Turkish), which were issued between 1982 and 1995. These certificates have been replaced by ‘immovable property title deeds’ since 1995.

The T/Cypriot property approach through unilaterally adopted regulations remained stable until ownership claims from displaced G/Cypriots were brought before the ECtHR. With the influence of the Court’s assessment, the property arrangements were slightly amended by preserving the notion of ‘remedy through only compensation’. Accordingly, the ‘Law as to Compensation for Immovable Properties Located within the Boundaries of the TRNC, which are Within the Scope of the Article 159, Law no. 49/2003’ was adopted. The main objective of the law was to provide remedies that could be recognised by the ECtHR as effective domestic remedies for G/Cypriot property claims.

As the name of the law reflects, the new law was based on a ‘compensation’ scheme. Therefore, the only remedy which has been proposed for the ‘taking’ act of abandoned G/Cypriot properties through Article 159 of the ‘TRNC’ constitution was compensation. Not surprisingly, since this law had the spirit of ‘bi-zonality’, which is opposed to the

⁸⁶ Gürel and others (n1) pp.13–14; Gürel (n69) p.6.

⁸⁷ Gürel (n69) p.6.

G/Cypriots' perspective, it was not put into practice. The 'TRNC' government insisted on preserving the notion of compensation until December 2005. However, following another ruling of the ECtHR, the law for 'the Compensation, Exchange and Restitution of Immovable Properties, which is within the Scope of Sub-paragraph (B) of Article 159 of the Constitution', (Law no. 7/2005), was enacted.⁸⁸ Additionally, the 'Immoveable Property Commission' (IPC) was established to examine G/Cypriot property applications under the new regulation. With the said law, the global exchange or compensation line of remedies was replaced by three other possible solutions: restitution, exchange or compensation, which have been welcomed by the Court.⁸⁹ The 'TRNC' government took a further step by adopting regulations in accordance with the Court's ruling as approximately 1,400 G/Cypriot applications have been struck out from the ECtHR's list and transferred to the IPC.⁹⁰ This development was significant for T/Cypriots as, for the first time, a TRNC authority was recognised in the international arena and thus its decision would have legal effects elsewhere in the world regardless of its unrecognised status.

1.3.2 Greek Cypriot Perspective on the Property Issue and Regulations of the Abandoned Turkish Cypriot Properties in the South

While the Cyprus problem was a direct consequence of the 1960 constitutional conflict on the T/Cypriot side, in contrast, for G/Cypriots, it was a result of Turkey's invasion and occupation of the northern part of the island in 1974.⁹¹ The UN Secretary-General sums up the G/Cypriot perspective and demands as follows:

The Greek Cypriots argued that the Turkish Cypriot position amounted to ethnic purity and that basic human rights and the principles of the *acquis communautaire* should allow any Cypriot citizen to settle anywhere on the island, any limitations being acceptable only in the first few years, for them bi-zonality meant only two distinct zones administered by Greek Cypriots and Turkish Cypriots respectively.⁹²

⁸⁸ Law for 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" (Law no. 67/2005) 22 December 2005. Although this law can be considered as a converted version of Law no. 49/2003, it in fact abolished that law.

⁸⁹ Section 8 of Law no. 67/2005; *Xenides-Arestis v. Turkey*, (2005) 44 EHRR SE 185, para.37; Kudret Ozersay, AIHM'nin *Xenides-Arestis Kararı*, *SBF Dergisi*, vol.61, no.1 (2006).

⁹⁰ *Xenides-Arestis v. Turkey*, (2005) 44 EHRR SE 185.

⁹¹ Glafkos Clerides, *Cyprus: My Deposition*. Nicosia: Alithia Publishing, (1992) pp.295–299.

⁹² UN. Security Council, (S/2003/398) para.98.

The Greek Cypriot side advocated a solution based on full respect for property rights so that all displaced persons, from either community, would have the right to have their properties reinstated.⁹³

According to the G/Cypriot perspective, the conflict and property problems on the island stemmed from Turkey's violation of human rights by invading the northern part of Cyprus in 1974. In essence, this explains why G/Cypriots refer to the first year of inter-communal strife as 1974, while this period constitutes the early 1960s for T/Cypriots.⁹⁴ Concordantly, the G/Cypriot interpretation of the cause of the conflict has reflected their prospective resolution to the property dispute. Therefore, the property puzzle could have only been solved by the removal of Turkey's alleged violation of human rights, which could be achieved through allowing the right for all of the G/Cypriots to repossess and return to their former properties and houses.

On this basis, the G/Cypriot method for property resolution was subject to two conditions: first, the right to repossess and return to their former homes, lands and properties; second, the application of the so-called 'three freedoms' (freedom of movement, settlement and right to property) across the whole of the island.⁹⁵ In essence, the appearance of the two dramatically opposed perspectives and opposing expectations of the communities started to ring the alarm bells around the property deadlock as a prolonged inter-communal conflict.

In parallel with the G/Cypriot angle, which determines the division of the island as a temporary situation, a regulation to deal with the abandoned T/Cypriot properties located in the south has been enacted. The same attitude has appeared by T/Cypriots when T/Cypriot authorities adopted laws in line with their position on the Cyprus problem. Therefore, in order to regulate the use and management of the abandoned T/Cypriot properties within the G/Cypriot-controlled area, the 'Turkish-Cypriot properties' (Administration and other matters) (Temporary Provisions) Law of 1991' (hereinafter

⁹³ *ibid*, para. 107.

⁹⁴ The Permanent Mission of the Republic of Cyprus to the United States, Statement by H.E.Mr Tassos Papadopoulos, President of the Republic of Cyprus, at the General Debate of the 59th Session of the General Assembly of the United Nations, New York, 23 September 2004: Mr Papadopoulos stated that: '*The Cyprus problem is not always perceived in its correct parameters. The fact remains that this problem is the result of a military invasion and continued occupation of part of the territory of a sovereign state*'.

⁹⁵ "Statement by Mr Tassos Papadopoulos on the Territorial Proposal of the Greek Cypriot Side on 31 March 1977" in Necati M. Ertekun, *Inter-communal Talks and the Cyprus Problem*, Nicosia: TFSC Press (1977) pp.137–139; Gürel & Ozersay (n 49) pp. 20–21.

Law no. 139 /1991), and the so-called ‘The Guardianship Law’ were implemented.⁹⁶ The G/Cypriot interpretation of the present situation of the island as a ‘temporary’ division is reflected in the name of this law as it was enacted as a ‘temporary provision’.⁹⁷

The reason for adopting this law was correlated with and explained as being the cause of the division. Therefore, the massive removal of the T/Cypriot population was a result of the Turkish invasion to the areas occupied by the Turkish invasion forces. Accordingly, movable and immovable T/Cypriot properties were abandoned due to the prohibition by such forces of the movement of the population within the areas of the RoC.⁹⁸ The regulations under Law no. 139/1991 were settled on the grounds of the view that all G/Cypriot and T/Cypriot properties still belong to the original owners.⁹⁹ According to the G/Cypriot measures on dealing with temporarily abandoned T/Cypriot properties, the Minister of the Interior was appointed as custodian of all T/Cypriot properties in the south in order to take possession and administration of all those properties and *Evkaf*¹⁰⁰ properties.

The custodian is entitled to administer such properties until a final settlement is achieved. The custodian is allowed to make arrangements, conclude or terminate contracts, undertake obligations or charges in relation to every such property and lease it, collect rents or other sums to be held on behalf of the owner.¹⁰¹ Additionally, compulsory acquisition, distribution or sale of such properties was also allowed under specific conditions. Moreover, the law exceptionally provided the transfer of the title to the

⁹⁶ Law on the Administration of Turkish Cypriot Properties in the Republic and Other Related Matters (Temporary Provisions) Law no.139/1991 (24 April 1991) was enacted according to its preamble to regulate the administration of Turkish-Cypriot properties in the Republic of Cyprus:

‘Whereas, because of the massive removal of the Turkish-Cypriot population as a result of the Turkish invasion to the areas occupied by the Turkish invasion forces and the prohibition by such forces of the movement of such population within the areas of the Republic of Cyprus, properties which consist of movable and immovable property were abandoned,

And whereas it became essential for the protection of those properties to take immediate measures,

And whereas the measures taken included the administration of such properties by a special committee which was constituted through administrative arrangements,

And whereas the regulation by law of the question of the Turkish-Cypriot properties in the Republic became necessary ...’

⁹⁷ Law no. 139/1991.

⁹⁸ *ibid.*

⁹⁹ Gürel and others (n1) p.14.

¹⁰⁰ The *Evkaf* foundation was established as a *Vakf* institution in 1571. Since 1571, it has accumulated *evkaf* properties (Muslim establishments for charitable uses). These properties cannot be sold.

¹⁰¹ Article 6 (v) of Law no. 139/1991; Gürel and others (n1) p.15.

property if such actions were considered as beneficial for the owner or necessary in the public interest.

Contrary to the T/Cypriot measures on displaced G/Cypriot properties, G/Cypriot legislation did not allow, apart from in some exceptional situations, the granting of title deeds to G/Cypriot citizens. Having said that, the payment of compensation or any amount owed to an owner of T/Cypriot property in relation to his/her property is suspended until a final comprehensive settlement is achieved.¹⁰² Here, it can be argued that although the way in which the G/Cypriot legislation has dealt with the ownership of T/Cypriot properties seems more legitimate and credible than the T/Cypriot one, in practice there is an implicit prevention of T/Cypriots from reclaiming their ownership rights over those properties. There is strong evidence that T/Cypriot requisition arising from their ownership has been suspended for an indefinite period of time. Moreover, the custodian has allowed a number of T/Cypriot properties to be improved, developed, modified and used for both private and public purposes, which has led to the restitution of such properties in future settlements impossible.¹⁰³

In light of all the above considerations, one could argue that although both sides require a resolution to the property dispute, it is crystal clear from the measures adopted by both communities that their processes and procedures for rehabilitation and resettlement of displaced Cypriots are beyond the reach of the human rights' approach to property rights.

Conclusion

As a result of prolonged, intense and unfruitful inter-communal negotiations, parties have failed to reach any agreement since the early 1960s. Antipodal perspectives of the causes of the conflict have paved the way for the establishment of contradictory regulations for the properties of the two communities who have both suffered and shared the experiences of displacement and resettlement.

In current practice, the two communities are living in two separate zones in a divided Cyprus. With the passage of more than four decades, the displaced Cypriots have settled

¹⁰² Article 9 of Law 139/1991.

¹⁰³ Article 6 of Law 139/1991; Gürel (n1) pp.15–16.

and have adapted to their new social and economic environments on both parts of the island.¹⁰⁴ However, the property conflict still remains unresolved today. This is due to the opposing perceptions and demands of the two sides. On the one hand, the G/Cypriot side argues that the property conflict should be achieved by reinstating all properties to their legal owners. On the other hand, T/Cypriots advocate a solution through liquidation by means of global exchange and a compensation scheme.

In essence, within the story of the two communities, it should be recognised that both have suffered from the past experiences of displacement and have become the victims of unfortunate political and historical events. Although it has been more than five decades, the conflict has remained stagnant. In this respect, the leadership of the two communities should undertake full responsibility for finding a durable and feasible solution that protects the rights of the two communities without discrimination on any ground.

To conclude, it is crucial to maintain that although the property conflict is perhaps the most sensitive and thus most difficult to solve, its settlement is really about people and not just principles, and about inter-communal relationships and not just regulations. Although principles and regulations are significant, they are not powerful enough to build an inter-communal peace nor to make people forget their experiences of displacement or civil strife. It may be said, with some conviction, that the property crux can be resolved through trust and compromise. Lessons can be learned from past injustices and political wrongs which can prevent future generations from repeating them. Therefore, a mutually agreed and durable settlement is achievable if these lessons are to be seriously considered and not disregarded in the search for a comprehensive settlement.

¹⁰⁴ Internal Displacement Monitoring Centre (iDmc) *Cyprus: Prospects Remain Dim of Political Resolution to Change Situation of IDPs* (2009)< [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountries\)/2B0A6371D0C915CA802570A7004C797B?OpenDocument](http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/2B0A6371D0C915CA802570A7004C797B?OpenDocument)> accessed: 29 November 2013.

Chapter 2

Concept of Property and Property Rights Within the Context of International Law and Article 1 of Protocol No. 1 (P1-1) to the European Convention on Human Rights

Introductory Remarks

Throughout history, property has always been one of the most emotive issues and a major source of conflict particularly in post-conflict societies. It has also been considered as a powerful force in the formation of civil society in the way that the nature of a relationship between man and property has led to the foundation of a civil society. According to Rousseau,¹ in the progress of mankind, developments have established in parallel to the requirements of a civil society. The first awareness of human beings was the existence of himself, which was followed by the necessity of self-preservation. A way towards the idea of property has evolved, using the first tree, caves and then making shelters with mud and clay, which ‘was the epoch of a first revolution, which established and distinguished families, and introduced a kind of property, in itself the source of a thousand quarrels and conflicts’.²

Property as a human right has been subject to controversial debates as it is determined as both central to the concept of human rights and also as an instrument for abuse by others.³ As will be examined in this chapter, the complicated nature of property as a human right, which is subject not only to qualifications but also limitations, is reflected in the ECtHR case law concerning property rights. Accordingly, interpretation and application of this right have developed – and is still developing– through the Court’s case law, which has raised controversies as well as inconsistencies among the ECtHR’s judgments.

In order to understand the development of jurisprudence of the Strasbourg Court concerning the right to property under the European Convention on Human Rights

¹ Jean-Jacques Rousseau, *Discourse on the Origins of Inequality* (The Second Part) in Brumfitt, J.H & Hall J.C. in *The Social Contract and Discourses* (1973) Great Britain: C. Nicholls & Company Ltd. pp. 76–79..

² *ibid*, p.79.

³ Sepúlveda Magdalena, Theo Van Banning and others, *Human Rights Reference Handbook*, (3rd ed. rev. ed.), Ciudad Colon, Costa Rica: University of Peace (2004) p. 293.

(ECHR), it must be noted that reaching an agreement on the formulation of this right under the Convention was very difficult and gave rise to controversial debates among contracting parties during the drafting process of the ECHR (the Convention). The right to property was considered as a complex right, since it was regarded as a civil right and even as an integral right.⁴ While many member states were opposed to the right to property, there was strong support for this right by other members.⁵ The complex nature of the right to property became more obvious at the international level during the drafting process of the ECHR. From the early stages of drafting the European Convention, P1-1, the inclusion of the right to property, created heavily controversial disputes, and as a result of long discussions on numerous problems and points of view, the provision for the right to property was adopted by allowing the Contracting States a wide power to interfere with this right.⁶

Taking into account the controversial and complicated character of the right to property, it can be argued that a conflict arising from the right to property is, perhaps, one of the most difficult ones to resolve, among others that are protected under the Convention. The property crux of the *ancient* Cyprus problem reflects this situation very well, particularly if one considers the continuity of the problem that has stretched for more than five decades. The property conflict due to the division of the island can be considered as the major impediment to achieving the resolution of the Cyprus problem. This may be a result of opposing approaches towards property of the T/Cypriots and G/Cypriots towards the Cyprus conflict.

In order to understand the implementation of the right to property, provided in Article 1 of Protocol No.1 (P1-1) to the ECHR, and the application of it to the complaints of the G/Cypriots concerning alleged violation of their property rights, this chapter will examine the meaning and scope of P1-1 by focusing on the ‘three distinct rules’.⁷ In order to determine whether the Court’s attitude towards the claims concerning property rights in P1-1 is consistent, its judgments in respect of claimants from other contracting states will

⁴ Sepúlveda Magdalena, Theo Van Banning and others, *Human Rights Reference Handbook*, (3rd ed. rev. ed.), Ciudad Colon, Costa Rica: University of Peace (2004) p. 293.p. 293.

⁵ Tom Allen, *Property and the Human Rights Act 1998*, Oxford: Hart Publishing (2005) pp. 20–30.

⁶ David J. Harris, Michael O’Boyle and others, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd edn, Oxford: Oxford University Press (2009) p. 655.

⁷ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, para. 61.

be considered. In this regard, significant cases that are regarded as contributing to the development of the context of P1-1 to the Convention will be observed. On the grounds of the findings through this case analysis, the ECtHR's Cyprus rulings in relation to the property complaints will be examined in the next chapter. This approach aims to further enlighten the rationale behind the Court's position towards Cypriot claims.

The comparison of the application of P1-1 to the cases brought against Turkey and other contracting parties will shed light on the interaction between the Court's jurisprudence and the Cypriot property disputes, which will in turn illustrate the significance of Cypriot property cases within the context of property rights under the ECHR. Meanwhile, this approach will help to identify the determinative factors – political, legal and historical – that create grounds for the Court to depart from its traditional approach in this context and change gradually towards a different position.

2.1 A Guarantee for the Protection of Property Rights and the 'Three Distinct Rules' within the Ambit of Article 1, Protocol No.1 to the ECHR (P1-1)

The meaning and scope of P1-1 is relevant to the purpose of this chapter as explained above.

Article 1 of Protocol 1 reads:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Convention was drafted in the aftermath of the Second World War. The historical events during this period had a considerable impact on the drafting process of the property clause. As a result of the war, an excessive number of people lost their homes and became victims of the property rights' violations. As a result, property issues arising from these violations became the most significant and controversial debates during the drafting process of the Convention. The core of the fierce debates was the inclusion of the right

to property itself within the ECHR.⁸ Finally, the Convention was approved without the right to property and it was left as a separate protocol.⁹

The changing political balance in East and Central Europe had an impact on the notion of human rights. In particular, the communist takeover in Czechoslovakia triggered the ambition for the ECHR. This paved the way for the first initiative for the ECHR in April 1948. As a result of the takeover, Western Europe speeded up the drafting process. The consideration of the Czech situation was reflected in the introduction of the first proposal of the Convention in the following statement:

If countries, which are still now free, are to avoid sharing the recent fate of Czechoslovakia, they must together take steps to preserve their common heritage...The conclusion of a binding treaty for the collective protection of individual rights and the establishment of judicial machinery for enforcing it, is a pressing necessity.¹⁰

The communist takeover in Czechoslovakia was a deterrent example for the rest of the European countries. It was *necessarium* to prevent disputes between nations and protect human rights.¹¹ The writing process of the first draft for the European Convention was started by the International Juridical Section of the European Movement in 1949. The movement towards the right to property was launched in order to take measures to accomplish the main purpose of the Council of Europe ('CE' hereafter) for the first session of the Consultative Assembly ('CA' hereafter) of the CE in August 1949. This would be in accordance with Article 1 of the Statute concerning the realisation of human rights and fundamental freedoms. The proposal was on the agenda of the CA and it was referred to the Committee on Legal and Administrative Questions in August 1949. The drafting process of the right to property continued longer than the preparation of the whole Convention due to the influence of challenging debates.¹²

The drafting process of the property rights was exposed to controversies mainly focused on the inclusion of this right with other social and economic rights. The arguments were raised on the grounds that property rights should not be differentiated from other social

⁸ Theo R.G. van Banning, *The Human Right to Property*, School of Human Rights Research Series, vol.14 Antwerpen: Intersentia (2002) pp.65–66.

⁹ Allen (n 5), p. 24.

¹⁰ Banning (n 8), p.66.

¹¹ *ibid*, pp.66–67.

¹² *ibid*, pp. 64–75.

and economic rights that were to be excluded from the Convention. The utility and social functions of property were other objects at issue. It was not possible to evaluate the legitimacy of the charges and restrictions on private property as a consequence of the inherent character of property. The social function and general utility of private property were not constant as they vary according to the economic and social conditions of states. This argument was supported with the idea that it would be difficult to provide protection if disputes regarding property rights were brought to the international arena.¹³

The complete deletion of the right to property was also suggested as its insertion would bring domestic political questions before the Council of Europe. This thought process was the result of the political nature of nationalisation in that period. It is likely that the proponents of the exclusion of the right to property were mostly socialist members. Conversely, members who were supporting the inclusion of the property issue were taking the fascist regimes as a base to support their argument by considering how deprivation was used by these regimes in repression in the past. The confiscation of the properties of refugees and minorities in Europe was pointed out. Additionally, it was agreed that states should be entitled to prevent arbitrary deprivation and to use its power for the common good.¹⁴ The contentious period continued until the approval of the final text. Finally, the right to peaceful enjoyment of one's possession was included in Protocol No. 1 which was signed on 20 March 1952 and entered into force on 18 May 1954.

In this regard, there is no doubt that economic and cultural circumstances have played a determining role in the comprehension of the right to property in a particular state. This is because there is no single definition or understanding of the issue of property. However, differing understandings of this issue can be minimised by uniting under and respecting the international rules concerning property rights. This would help to reduce the number of disputes on property rights at the national and international level. The potential of property to protect, and the potential to deprive the owner of that property, despite their possession, makes the right to property perhaps the most sensitive human right, not least also because of the emotional bond the owner has with it. Moreover, although the property is protected by provisions, it is also subject to limitations and appropriation by a state, making the notion of property a conflicted issue. The complicated case law of the ECtHR on property rights can be considered as proof of its complexity and controversy.

¹³ Banning (n 8), p.67.

¹⁴ *ibid*, p. 69.

As can be seen from the writing of P1-1, a very wide scope of protection is provided with types of possessions without differentiating or defining the types of property that fall within the ambit of this provision. Moreover, the extent of the protection provided in P1-1 is not determined. The indeterminate and broad scope of P1-1 has been developing through the Court's case law since the early years of its adoption.

P1-1 not only provides protection for the peaceful enjoyment of one's possession but also allows states to interfere with a person's property rights in specific circumstances. In essence, although it is not explicitly stated, this article provides both positive and negative guarantees within its scope. On the one hand, the notion of a positive guarantee is implied by stating that 'every natural and legal person is entitled to the peaceful enjoyment of his possessions'. On the other hand, a negative guarantee is provided with the statement that 'no one shall be deprived of their possessions' except in certain circumstances.¹⁵ In this respect, both positive and negative obligations are imposed upon states by P1-1.¹⁶

In respect to negative obligations in the Convention, a state should refrain from actions which demand a state abstention.¹⁷ For instance, actions that constitute an interference with the exercise of property rights, such as the right to not be tortured, fall within the scope of negative obligations.¹⁸ Within the context of P1-1, positive obligations do not require a state to ensure a distribution of property rights that a person does not already own and positive obligations do not provide the right for a person to claim the acquisition of property from the state. These obligations protect the existing property rights of a person and should be understood as the responsibility of a state to protect private ownership.¹⁹ In one of the Court's earliest cases, the *Marckx* case,²⁰ the Court and the European Commission (the Commission) held that P1-1 does no more than enshrine the right of everyone to the peaceful enjoyment of their possessions. Accordingly, this

¹⁵ Deborah Rook, *Property Law and Human Rights*, London: Blackstone Press (2001) p.61.

¹⁶ Harris and others (n 6) pp. 664–665.

¹⁷ Yvonne Donders & Vladimir Volodin, *Human Rights in Education, Science, and Culture: Legal Developments and Challenge*, Hampshire: Ashgate Publishing Ltd (2007) p. 237.

¹⁸ Antoine Christian Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective, With a Case Study in Bosnia and Herzegovina*, School of Human Rights Research, vol. 25, Intersentia Uitgevers N.V. (2008) pp. 17, 59.

¹⁹ Ali R. Coban, *Protection of Property Rights within the European Convention on Human Rights*, Surrey: Ashgate Publishing Ltd (2004) pp. 163–164.

²⁰ *Marckx v. Belgium* (1979) 2 EHRR 330, para.50.

provision applies only to a person's existing possessions and does not guarantee the right to acquire possessions. Additionally, the positive guarantee does not require a state to take measures to provide a protection for a reduction in the value of privately owned property.²¹

In the case of *X v. Federal Republic of Germany*²² the applicant contested the levy of a tax on the interest earned on his savings accounts during the year 1994. At that time, the inflation rate was higher than the interest paid by the savings institutions. His payment of the income tax of his capital while inflation was continuously eroding was improper. Laws that impose taxation as a means of financial expenditure are promulgated by every state's power.²³ Therefore, a positive guarantee protects the rights over property that an owner already owns, and it does not entrench the right to obtain property. In this respect, in terms of the enforcement of property rights, a legal system should be provided by the state. This system of private ownership should be preserved as the responsibility of the state by taking the form of positive guarantee.²⁴

2.1.1 The Structure of P1-1 to the ECHR

As indicated above, although a very wide scope of protection is provided with a wide range of possessions, property rights are not absolute rights and restrictions may be imposed for reasons of public interest.²⁵ Conditions where a person may be deprived of his/her possession by a state without violating this article are iterated in the same provision that protects the right to property. The Strasbourg Court explained the main objective of P1-1 in its *Marckx* judgment on 13 June 1979, stating that:

By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by

²¹ Deborah Rook (n 15) p.61.

²² *X v. Federal Republic of Germany*, (1980) 20 DR 226.

²³ Annamaria Viterbo, 'The ECHR's Protection of Property against Inflation vs. the EC Price Stability Principle', (2006), European University Institute-Working Paper RSCAS No.2006/38, Robert Schuman Centre for Advanced Studies European Forum, p.6.

²⁴ Coban, (n 19), p.164; Peter van den Broek, 'The Protection of Property under the European Convention on Human Rights', *Legal Issues of European Integration* (1986) pp. 52–90; Buyse (n 18), p. 85.

²⁵ Anetta Faye Jacobsen, *Human Rights Monitoring: A Field Mission Manual*, Leiden: Brill Academic Publishers, (2008), p. 346; See the case of *Aquacultur and Hydro Seafood*, 10 July 2003, Joined Cases C-20/00 and 64/00; Ioannis Lianos, 'A Regulatory Theory of IP: Implications for Competition Law', CLES Working Paper Series, (1/2008),

<<http://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-1-2008>> accessed 25 July 2013.

the words ‘possessions’ and ‘use of property’ (in French: ‘biens’, ‘propriété’, ‘usage des biens’); the ‘travaux préparatoires’, for their part, confirm this unequivocally: the drafters continually spoke of ‘right of property’ or ‘right to property’ to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1 (P1-1).²⁶

The ECtHR examined the meaning and scope of P1-1 in detail in the case of *Sporrong Lönnroth v. Sweden*.²⁷ In its examination, the Court also identified that this article comprises three distinct rules, which have gradually been approved in almost all subsequent cases concerning property rights, and have become an established method in the application of P1-1.²⁸ In its judgment of 23 September 1982, the Court stated:

Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.²⁹

According to the Court’s case law, these three rules are not distinct in the sense of being unconnected and the relationship between the components of P1-1 has gradually been established.³⁰ This relationship was explained in *James v. UK*. The Court held:

The three distinct rules are not, however, ‘distinct’ in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.³¹

The three rules in P1-1 hereafter in the thesis are referred to as Article 1/1/1 (first rule), Article 1/1/2 (second rule) and Article 1/2 (third rule). According to the Court’s ruling, the first rule is a statement of principle, which also provides a ground for interference with the right to property that is not regarded as a deprivation of a person’s possessions within the ambit of the second rule or third rule.³²

²⁶*Marckx v. Belgium* (1979) 2 EHRR 330, para.63.

²⁷*Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35.

²⁸Rook (n 15), p. 61.

²⁹*Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para.61.

³⁰Harris and others (n6), pp. 666–667; Aida Grgic and others, *The Right to Property under the European Convention of Human Rights, A Guide to the Implementation of the European Convention on Human Rights and its Protocols*, Human Rights Handbook No. 10, Strasbourg: Council of Europe (2007) p. 10.

³¹*James v. UK* (1986) 8 EHRR 123, para. 37.

³²Harris and others (n6), p.666.

According to the Court's traditional approach, the first rule is the first sentence of the paragraph which states that 'every natural and legal person is entitled to the peaceful enjoyment of his possession'. This is the overarching rule of the provision and provides a general guarantee of the right to property. The second rule is the second sentence of the first paragraph, which regulates the deprivation of possessions and determines specific conditions for interference with property rights as 'no one shall be deprived of his possession except in the public interest, and subject to the conditions provided by law and by the general principles of international law'. It is obvious from its wording that this rule imposes requirements for the taking of the property in specific circumstances. The third rule is set out in the second paragraph of the article, which provides that 'the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions'. Finally, the third rule regulates the states' power to control the use of property in accordance with the general interest.³³

According to the Court's classical method in the examination of the cases under P1-1, it first determines whether there has been any interference with the right to the property in question. Finally, the Court determines which of the three rules are applicable to the case.³⁴ The Court held that when analysing cases it needs to decide the nature of an interference, therefore it first determines whether the second and third rules are applicable. If neither is applicable, then the Court considers the first rule and determines whether it has been complied with.³⁵

It may be worth noting that although it has become the established method that P1-1 comprises three distinct rules, the Court has not adopted any particular approach regarding a requirement to identify which of the three rules are applicable in a particular case. In the majority of cases, the Court indicated under which rules a case is being decided. However, in some rare instances, P1-1 is considered as a whole without identifying the applicable rule(s).³⁶

³³ Harris and others (n 6) pp. 666–667; Coban (n 19) p. 174.

³⁴ Grgic (n 30) pp. 10–11.

³⁵ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para.61; Harris and others (n 6) p.667; Rook (n 15) p. 62.

³⁶ Harris and others (n 6) pp.667–668; Rook (n 15) p.61.

2.1.2 The Second Rule of P1-1: Deprivation of Property

As regards to the writing of the second rule, it should be noted that the term ‘deprivation’ is interpreted as ‘expropriation’ under P1-1.³⁷ In order to claim for the deprivation of property, the applicant must illustrate that he or she was entitled to it.³⁸ In principle, deprivation of property is deemed to occur only when all the legal rights of the owner are extinguished. This may occur either by operation of law³⁹ or by the exercise of a legal power to the same effect.⁴⁰ Deprivation, in principle, involves the direct transfer of a property title to a public body or private individual or destruction of it.⁴¹ What is remarkable, however, is that it is not always simple to determine when an interference constitutes deprivation. This is because in some instances, actions that are not based on a legal procedure take place with the same effect as those of formal expropriation. Generally, in cases when a substantial interference with the enjoyment of possession by the authorities occurs, this may be regarded as *de facto* expropriation.⁴²

It was the case of *Papamichalopoulos v. Greece*⁴³ in which the term *de facto* expropriation was used for the first time by the Strasbourg Court. The Court, without explicitly stating the existence of deprivation, held that the physical occupation of land was so extensive and the possibility of dealing with it so remote that there was *de facto* expropriation.⁴⁴ According to the Court’s traditional approach, in the absence of a formal expropriation, in order to determine whether there is a deprivation of property which falls within the ambit of P1-1, it should look behind appearances and investigate the realities of the situation complained about. This stems from the rationale that the Convention intended to guarantee rights that are ‘practical and effective’ and therefore the Court should examine whether the complaint situation constitutes a *de facto* expropriation.⁴⁵

³⁷ Andries J. Van der Walt, *Constitutional Property Clauses-A Comparative Analysis*, Cape Town: Juta & Co Ltd (1999) p. 110.

³⁸ *Holly Monasteries v. Greece* (1994) 20 EHRR 1, para. 60.

³⁹ *Pressos Compania Naviera SA v. Belgium* (1995) 21 EHRR 301.

⁴⁰ *Lithgow v. UK* (1986) 8 EHRR 329; Laurent Sermet, *The European Convention on Human Rights and Property Rights*, Strasbourg: Council of Europe Publishing (1998) p.23.

⁴¹ Sermet (n 40) p.23.

⁴² Harris and others (n 6) p. 678.

⁴³ *Papamichalopoulos v. Greece* (1993) 16 EHRR 440, paras. 45–46.

⁴⁴ *ibid*, paras. 45–46; Harris and others (n 6) p. 528.

⁴⁵ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, para. 63.

According to the Court's case law, a reduction in the possibility of disposing of the properties or limitations on the right of property does not amount to a deprivation within the ambit of the second rule. The Court takes the substance of the right to property as a basis in order to determine whether there is a deprivation. Even if the right in question lost some of its substance, this cannot be regarded as deprivation unless it disappears.⁴⁶ Following from this, interference with property rights under the second rule of P1-1 occurs when there is a formal or *de facto* deprivation of the title in a property.

Turning to the Cyprus property claims, the Strasbourg Court established a pattern in respect of analysing interference with property rights in the very first application brought against Turkey. As will be apparent, until very recently, the Court followed the same approach in almost all subsequent Cypriot property cases. The case of *Loizidou*⁴⁷ was the first G/Cypriot application brought before the Court that concerned disputes over property ownership that had appeared following the division of the island. This case has set a precedent for similar applications to be brought against the Turkish government concerning the similar property claims of displaced Cypriots. The *Loizidou* is regarded as a landmark case, not only in the history of law relating to human rights and the development of international law, but also in the jurisprudence of the ECtHR.⁴⁸

The Court, in the *Loizidou* judgment,⁴⁹ held that there has been continuing violation of property rights and thus the displaced G/Cypriots did not lose their entitlement to their properties. This decision was made on the grounds that the Turkish Republic of Northern Cyprus is not recognised under international law. The Constitution of the TRNC, which recognised the taking of the property as expropriation according to the T/Cypriot authorities, could not be regarded as legally valid and thus those expropriations were not valid. The fact that the applicant had been forbidden access to her property and lost all

⁴⁶*ibid*, paras. 62–63.

⁴⁷*Loizidou v. Turkey* (1996) 23 EHRR 513.

⁴⁸The case of *Loizidou* is characterised as the first truly landmark case on the extraterritorial application of the ECtHR, See: Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford: Oxford University Press (2011) p.26; Council of Europe, 'Parliamentary Assembly Official Report of Debats' 2002 Ordinary Session Fourth Part, September 2002, vol. IV, p. 892; Attorney General of the Republic of Cyprus characterised the Strasbourg Court's decision in *Loizidou* as 'historic' at the press conference <<http://www.hri.org/news/cyprus/cypio/1996/96-12-19.cypio.html>> accessed 26 July 2013.

⁴⁹*Loizidou v. Turkey* (1996) 23 EHRR 513, para.47.

control over it since the division of the island was determined as interference with the substance of property,⁵⁰ rather than *de facto* expropriation, without a clear explanation.

As a result, since the TRNC legislation was not regarded as legally valid, expropriation made in accordance with the TRNC Constitution was also invalid. Therefore, the existence of a legitimate expectation was based on international law regardless of the established domestic laws. Put another way, since the laws of the RoC are formally valid, regulations established by the non-recognised TRNC are considered null and void and could not be deemed to have replaced the laws of the RoC. In a nutshell, the legitimate expectation was based on the valid legislation of the RoC, which regarded the applicant as owner of the properties in question.⁵¹

In this regard, it can be argued that the decisive criterion for determining the continuing interference of property was the unrecognised status of the TRNC. Accordingly, it can be maintained that if the entity is not recognised under international law, its acts or legislation cannot be regarded as legally valid either. Although there is the existence of a domestic legal framework for displaced persons' properties in the north, the Court did not consider those regulations and instead took into account the laws of the RoC as it is recognised internationally.

2.1.2.1 A Legitimate Interference with Property Rights

Although the right to property is a fundamental right and enshrined in P1-1, it is limited by restrictions set out in P1-1. The wording of this provision determines two types of interference which will be considered below. However, the Court has developed another type of interference through its case law that is not stated under the provision: interference with the substance of property. According to P1-1, persons may legitimately be deprived of their possessions 'in the public interest and subject to the conditions provided for by law and by the general principles of international law' which represented the first type, and 'in the general interest or to secure the payment of taxes or other contributions or penalties',⁵² which is determined as the second type of interference, in the second and third rule respectively. Since the second type of interference will be examined in the

⁵⁰ *ibid*, para.47.

⁵¹ Buyse (n 18) pp. 67–68.

⁵² Article 1 of Protocol No. 1 (P1-1) to the European Convention on Human Rights.

analysis of the third rule of P1-1 and the interference with the substance of property will be considered under the first rule of the same provision in the following subsections of this chapter, the first type will be considered in this part.

For a legitimate interference with the right to property to comply with P1-1, interference must have a legitimate aim. The requirement of a legitimate aim is set out in the second sentence of P1-1 by stating ‘in the public interest’ which serves as a safeguard against arbitrary measures of states.⁵³ Since there is no standard means of determining the public interest, a wide margin of appreciation is granted to states in identifying the public interest.⁵⁴

In *James v. UK*,⁵⁵ the Court assessed the public interest and the general interest without making any fundamental distinction between them. The Court maintained that the purpose and object of P1-1 was to guard against the arbitrary confiscation of property and maintained that ‘the taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being “in the public interest”’.⁵⁶ It further held that a compulsory transfer of property from one individual to another may also be considered in the public interest if the taking is in pursuance of legitimate social policies.⁵⁷

In *James*, the Court explained its approach on the issue of margin of appreciation. It has recognised that since the national authorities have direct knowledge of their society and its needs, it is for those authorities to make the initial assessment of the existence of a problem of public concern warranting interference with property rights and remedial action to be taken.⁵⁸ The Court clarified its stance on the grounds that the decision to enact laws concerning interference with property will commonly involve the consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely.⁵⁹ In this regard, definitions of public

⁵³ Sermet (n 40) p.32.

⁵⁴ Yves Winisdoerffer, ‘Margin of Appreciation and Article 1 of Protocol No. 1’, *Human Rights Law Journal*, (1998), vol.19, no.1, p. 18.

⁵⁵ *James v. UK* (1986) 8 EHRR 123, para. 43.

⁵⁶ *ibid*, paras. 41–42.

⁵⁷ *ibid*, para. 39.

⁵⁸ *ibid*, p. 46.

⁵⁹ *ibid*.

and general interest vary from country to country and over time⁶⁰ this leaves the contracting parties a margin of appreciation. As a result, the Court has determined its limited supervision in the concept of public and general interest.⁶¹

2.1.2.2 The Requirement of Lawfulness

Interference with the right to property must first satisfy the requirement of lawfulness. This requirement has been expressly stated as ‘subject to the conditions provided by law’ in the second rule of P1-1. The legality requirement stems from the ‘rule of law, one of the fundamental principles of a democratic society, inherent in all the Articles of the Convention’.⁶² The requirement of lawfulness is a general condition within the context of the Convention for all measures limiting human rights in order to protect individuals against the arbitrary actions of public authorities.⁶³

The legality requirement is regarded as the first and most important requirement of P1-1, and accordingly, any interference with property by a public authority should be lawful.⁶⁴ In the context of the legality requirement, the state must have a basis in domestic law⁶⁵ for interference and its law must be accessible, precise, and foreseeable.⁶⁶ The term ‘law’ within the scope of P1-1 ‘does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention.’⁶⁷

As indicated above, the lawfulness of interference is the most important requirement of P1-1. In some cases, when the Court finds that interference with property falls within the ambit of the first rule, it directly examines the proportionality of the interference without examining the lawfulness. In contrast, the Court in the *Beyeler v. Italy*⁶⁸ case held that an essential condition for an interference to be deemed compatible with P1-1 is that it should

⁶⁰ Winisdoerffer (n 54) pp.18–20.

⁶¹ Jochen Frowein, ‘The Protection of Property’ in Macdonald, Matscher and Petzold (eds.), *The Protection System for The Protection of Human Rights*, London: Kluwer AP, (1993); Sermet (n 40) p.31; Harris and others (n 6).

⁶² Harris and others (n6) p. 669; *Iatridis v. Greece* (1999) 30 EHRR 97, para.58; Grgic and others (n 30) p.12.

⁶³ Coban (n 19), p195.

⁶⁴ *Iatridis v. Greece* (1999) 30 EHRR 97, para. 58.

⁶⁵ *ibid*, para. 62; *Spacek, sro v. Czech Republic* (1999) 30 EHRR 1010; Harris and others (n 6) p. 669.

⁶⁶ *Beyeler v Italy* (2000) 33 EHRR 52, para.88.

⁶⁷ *Malone v. United Kingdom* (1984) 7 EHRR 14, para.67; *Lithgow v. UK* (1986) 8 EHRR 329, para.110.

⁶⁸ *Beyeler v Italy* (2000) 33 EHRR 52, para.108.

be lawful. Additionally, with respect to the examination of domestic laws, the Court has asserted that it does not interpret and examine whether national law has been applied correctly since it does not function as a ‘fourth instance’.⁶⁹ However, the Court followed a different approach in the case of *Beyeler* and decided that it was required to verify the manner in which domestic law was interpreted and applied. Therefore, the Court examined the lawfulness of the interference.⁷⁰

At this juncture, it is worth referring to the Court’s approach concerning the legality requirement in the case of *Loizidou*.⁷¹ Although the Court clarifies the concept of the lawfulness requirement, its approach concerning the application of this issue is not consistent within its case law. In *Loizidou*,⁷² the Court did not consider it desirable to examine the requirement of the lawfulness of the legislative and administrative acts of the TRNC on the grounds that its Constitution was a product of an illegal entity. Here, it is of great importance to note that the *Loizidou* case is considered such a significant one that it may affect the way in which the Court deals with future cases, since its decision might invite another one hundred thousand or so similar cases.⁷³ Taking this into account, it is questionable why the Court did not follow such an approach, neither examining the requirement of lawfulness, as it did in the case of *Beyeler*, nor determining the rule under which the interference falls within the ambit of P1-1 in this significant and precedent case.

In light of all the above considerations regarding the case of *Loizidou*, it should be highlighted that the Court faced a case which was burdened with highly complex political, legal and historical issues. Here, the absence of an examination of the lawfulness of the legislative and administrative acts of the TRNC, the Court’s departure from its traditional method in determining which of the three rules under P1-1 were applicable to the interference, and the lack of a definition in relation to the taking of the property in question by the T/Cypriot authorities may be a result of the Court’s intention to refrain from creating controversial debates, mainly political, concerning the status of

⁶⁹ Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law Int: London, (1998), p.635.

⁷⁰ *Beyeler v Italy* (2000) 33 EHRR 52, para.110.

⁷¹ *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁷² *ibid*, paras. 44–47.

⁷³ *Loizidou v. Turkey* (1996) 23 EHRR 513, dissenting opinion of Judge Jambrek.

the TRNC and the lawfulness of its legislative as well as administrative acts at the international level.

Among the possible consequences of adopting a different approach from the one that the Court adopted in *Loizidou*, would have been tremendous conflicts between the contracting states. For instance, bearing in mind the fact that the TRNC is a non-recognised entity in the international arena, if the Court regarded the taking of the applicant's property by the T/Cypriot authorities as unlawful, this would mean the removal of the reinstatement of G/Cypriot properties in the north to their original owners. Therefore, the underlying reason for the Court's stance in the Cyprus ruling may be the intention to prevent possible complexities that might have stemmed from such scenarios, which would have been chaotic for some states. That is to say, the nature of the Cypriot property issues, as a 'hot political potato', may have prevented the ECtHR from following its traditional approach in applying P1-1 to the Convention in the case of *Loizidou*.

The position in the *Loizidou* judgment has been adopted and became the Court's established formulation in all subsequent cases concerning the property disputes in Cyprus. In almost all of these cases, the Court failed to name the action of interference with property rights, such as deprivation, expropriation or *de facto* expropriation. Additionally, without examining and clarifying the nature of those interferences in question, it held that there have been continuing violations of P1-1 in all similar Cypriot property cases following the *Loizidou* judgment. In respect of the Court's Cyprus ruling concerning the aforementioned considerations, it would have been beneficial if the Court had decided to examine and explain the context of interference in the Cyprus property claims in detail within the component parts of P1-1 in order to remove any concerns in respect to the Court's consistency as well as credibility in the examination of cases burdened with highly political debates. This would have enlightened and guided the local authorities in Cyprus to provide considerable attempts to achieve a settlement regarding property disputes over property ownership on the island.

2.1.2.3 The Principle of Proportionality

As was established in the Court's case law, the national authorities are better placed than the international judges to assess the policy aims and the factual circumstances of a case on the grounds that those authorities have direct knowledge of their society and its needs.⁷⁴ One of the rationales for the formation of the principle of proportionality is to provide protection against arbitrary interference by public authorities with the right to property. This principle has been developed as a form of supervision by the Court and it is inherent in the whole of the Convention.⁷⁵

The principle of proportionality was explicitly expressed in the case of *Sporrong and Lönnroth*.⁷⁶ In this judgment, the Court held that this principle was reached through examination by determining 'whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights'.⁷⁷ Therefore, the term 'fair balance' is used for the consideration of this requirement. It was also recognised that if the person in question had had to bear an excessive and individual burden then the fair balance was not satisfied.⁷⁸ Since the search for this balance is inherent on the whole of the ECHR, all types of interference with property must respect proportionality. As regards to the proportionality of an interference, the Strasbourg Court considered whether 'a measure must be both appropriate for achieving its aim and not disproportionate thereto'.⁷⁹ The test varies and has been developed gradually in the Court's case law. In order to determine whether a state interference with a right is proportionate, the ECtHR set out an approach in the case of *Handyside v. UK*.⁸⁰

According to the classical formulation of the Court's judgments, interference with the right of property can be justified if particular conditions are satisfied: the interference must be subject to the conditions provided by law; the interference must pursue a

⁷⁴ *James v. UK* (1986) 8 EHRR 123, para. 46.

⁷⁵ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe Publishing, Human Rights Files No. 17, Strasbourg, (2000) pp.12–13; Sermet (n 40) pp.24–25.

⁷⁶ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, para. 63.

⁷⁷ *ibid*, para. 69.

⁷⁸ *ibid*, para. 73.

⁷⁹ *James v UK* (1986) 8 EHRR 123, para.50.

⁸⁰ *Handyside v. UK* (1976) 1 EHRR 737.

legitimate aim in the public interest; it must be appropriate for achieving its aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁸¹ In the case of *Gillow v. UK*,⁸² the Commission recognised that in exercising its supervisory role, two questions needed to be considered: first, ‘whether the control legislation pursues a legitimate aim in the general interest’ and second, whether the operation of the legislation and the control thereby exercised on the applicants’ use of the property is proportionate to the legitimate aim pursued. The Commission further added that that measure of proportionality varies in determining whether the interference in question constituted control or deprivation on the basis that a deprivation of property is inherently more serious than the control of its use, since in the former, full ownership is retained. It also pointed out that in the proportionality test, ‘the severity of the restrictions imposed’ must be assessed.⁸³ In essence, since the level of interference with property determines the level of concern for private interest, the supervision of proportionality may vary from case to case.⁸⁴

According to Sermet,⁸⁵ it seems reasonable to identify two ways of supervising proportionality: one, applying it to deprivation and second, applying it to the three other types of interference with property (control of the use of property, deprivation of property constituting the control of the use of property, and interference with the substance of property). The rationale behind this finding is that in cases where deprivation of property is found, proportionality is respected if the dispossessed owner is awarded compensation. In the matter of the other three types of interference, supervision of proportionality is always defined in the same way even though this supervision varies in content.⁸⁶

In the case of *Gillow*, in order to comply with the proportionality or balancing test, the Court considered whether interference by public authorities was arbitrary, whether interference was in accordance with law, whether compensation has been provided and whether legitimate expectations have been respected.⁸⁷ As a result, in order to determine

⁸¹ *ibid*; *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, para. 69; *James v UK* (1986) 8 EHRR 123, para.50; *Lithgow v. UK* (1986) 8 EHRR 329, para.120.

⁸² *Gillow v. UK* (1982) 11 EHRR 335, para. 146.

⁸³ *Ibid*, para. 148–157.

⁸⁴ Sermet (n 40), p.35.

⁸⁵ *ibid*, p.36.

⁸⁶ *ibid*.

⁸⁷ Coban (n 19) p.206; Grgic and others (n 30) p. 5.

whether interference with property rights was justified, the Court, in principle, considers three questions: was the interference lawful? Was it in the public interest? Have the public authorities acted lawfully and provided the right balance between the interests of the affected individuals and the interests of the state?⁸⁸ In this regard, a balance needs to be struck between the interests of the community and the fundamental rights of an applicant. In a contrary situation, the right to the property of an applicant is regarded as being violated.

In the examination of interference with property rights, the Court made clear its position that if the interference concerned is not in accordance with the law, then it does not need to determine the legitimacy of the state's objective or the proportionality of that interference. In such cases, interference will be automatically regarded as a violation of P1-1 and thus the Court will not consider whether such unlawful interference was conducted as a legitimate aim or whether it had been proportionate.⁸⁹

2.1.2.4 Compensation

It is established under the Convention that compensation is a requirement of P1-1 in cases of interference with property rights as a necessity of legitimate interference. If an interference with the right to property is legitimate, there will not be violation of property. Since the right to property concerns the 'thing itself' and not a right to the 'value of it', compensation is not a replacement of property.⁹⁰ Therefore, paying compensation does not provide a power to a state to interfere with property rights of the owners. A legitimate interference with property by paying compensation requires strong public necessity in this regard.⁹¹ Although compensation is a requirement of interference in accordance with the Court's case law,⁹² the Court has also recognised that in some exceptional situations interference can also be justified without compensation.⁹³

⁸⁸*Gillow v. UK* (1982) 11 EHRR 335, para. 147; See: Icelandic Human Rights Centre, 'Major Requirements: Lawfulness and Proportionality', <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttoproperty/lawfulness/>> accessed: 28 July 2013.

⁸⁹ *Grgic and others* (n 30) p.13.

⁹⁰ *Coban* (n 19) p.210.

⁹¹ *ibid*, pp.210–211.

⁹² *Holly Monasteries v. Greece* (1994) 20 EHRR 1.

⁹³ *Sermet* (n 40); *Jahn and Others v. Germany* (2004) 42 EHRR 49.

In this context, the Court, in the case of *James v. UK*,⁹⁴ observed that under the legal systems of the contracting states, the taking of property in the public interest without paying compensation was treated as justifiable only in exceptional circumstances. As to the standard of compensation the Court in the same judgment went on to state that the taking of property without payment of a reasonable compensation – an amount reasonably related to the value of the property – would normally constitute a disproportionate interference which could not be considered justifiable under P1-1. The Court pointed out that P1-1 does not guarantee a right to full compensation in all circumstances. In cases which the legitimate objective concerns public interest, the amount of compensation may be less than the full market value of the property in question.⁹⁵

In this regard, it seems that this approach of the Strasbourg Court was not in line with the Commission's assessment in some judgments such as the case of *Holy Monasteries v. Greece*.⁹⁶ Here, the Commission, on the one hand, held that taking of property without compensation was justifiable. The Court, on the other hand, maintained that the legislature, which took measures to expropriate a large proportion of monastery agricultural property, could not be regarded as exceptional circumstances that justify the absence of compensation. Taking this as a ground, the Court found that there was a violation of P1-1 to the Convention.⁹⁷

As to the issue of compensation within the context of interference with G/Cypriot properties located in the northern part of the island, the Court, until very recently, followed one approach towards its Cyprus rulings. Accordingly, it has consistently ordered Turkey to pay compensation only for loss of use of property and not loss of an actual ownership of such a property. According to the G/Cypriot perspective on the issue of property, restitution should be automatic in the absence of material impossibility and thus monetary compensation can only be regarded as a remedy in situations whereby the physical restitution of property was materially impossible.⁹⁸ As will be examined in the next chapter, the position of the Strasbourg Court in this context has gradually developed following the rejection of the comprehensive settlement plan for the resolution of the

⁹⁴ *James v UK* (1986) 8 EHRR 123, para. 54.

⁹⁵ *ibid*; *Lithgow v. UK* (1986) 8 EHRR 329.

⁹⁶ *Holly Monasteries v. Greece* (1994) 20 EHRR 1, paras.74–75.

⁹⁷ *ibid*.

⁹⁸ *Loizidou v Turkey* (1996) 23 EHRR 513.

Cyprus problem. Therefore the Court adopted a new stance and new rules in the cases of *Xenides-Arestis*⁹⁹ and *Demopoulos v. Turkey*¹⁰⁰ in this area.

In the case of *Demopoulos*,¹⁰¹ the Court maintained that although restitution was an indispensable component of remedies for the interference with property rights, it had imposed the alternative requirement on the contracting state to pay compensation to the value of the property in accordance with the Court's case law. Differing from its previous Cyprus judgments, here, the Court further emphasised that property is a material commodity that can be valued and compensated for in monetary terms. In fact, by following this approach, the Court explicitly rejected the G/Cypriot view concerning automatic restitution of their properties.¹⁰²

2.1.3 The Third Rule of P1-1: Control of Use

The third rule of P1-1 to the ECHR allows the contracting states a power to impose restrictions on the use of property that falls within the ambit of the second paragraph of P1-1. The notion of 'control' of property is correspondingly wider than 'deprivation' in the second rule.¹⁰³ The second paragraph of P1-1 is worded as follows:

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The power of a state to intervene with a person's right to property by controlling the use of property which falls within the third rule is a wide one. Control of the use of property has two functions, which serve as the basis of two different objectives: to serve the public interest and to secure the payment of taxes or other contributions or penalties.¹⁰⁴

⁹⁹ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

¹⁰⁰ *Demopoulos and Others v. Turkey* (2010) ECHR 306. The cases concerning G/Cypriot property claims will be examined in Chapter 3.

¹⁰¹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras.114–118.

¹⁰² Rhodri C. Williams and Ayla Gürel, *The European Court Of Human Rights and the Cyprus Property Issue: Charting a Way Forward*, Peace Research Institute Oslo (2011) pp. 4–6.

¹⁰³ Harris and others (n6) p.686.

¹⁰⁴ Sermet (n 40) p.25; Harris and others (n6) pp. 686–694.

2.1.3.1 Control of the Use of Property in the General Interest

The power of control of the state under the third rule is wide and not restricted. Public authorities may control the use of property by requiring positive action by individuals and legal persons. A state may also control it by imposing restrictions on the activities of the owner. The situations for imposing restrictions may arise from town planning, environmental orders, economic regulation of professionals, sanctioned regimes, and the regulation of the sale of alcohol and crime control.¹⁰⁵

In 1982, a new type of interference ‘with the substance of ownership’ was introduced by the Court in the case of *Sporrong Lönnroth v Sweden*¹⁰⁶ based on the first rule of P1-1 to the ECHR. Under the Convention, there is no any definition or criteria provided in order to differentiate between interference that amounts to control of the use of property and interference with the substance of property.¹⁰⁷ As a result of this absence, numerous disputes have been raised in this context. For instance, in the case of *Sporrong Lönnroth*,¹⁰⁸ the Court recognised that the prohibitions on the construction in question clearly amounted to a control of the use of property, which falls within the ambit of the second rule of the ECHR. It further held that the ‘expropriation permits’ must be examined under the first rule. This is because those permits were an initial step in a procedure leading to deprivation. Taking this as a ground it decided that expropriation permits constituted interference with property and thus did not fall within the meaning of the second rule of P1-1.¹⁰⁹

Under P1-1 to the Convention, it is explicitly indicated that the notion of ‘control’ concerns the use of property. Taking into account the Court’s case law, it seems that this term, in practice, also concerns the right to dispose of property. For instance, in the case of *X v. Austria*,¹¹⁰ the Commission stated that restrictions on the amount of rent for certain leases, as well as the right of the owner to terminate the lease, did not constitute a deprivation of property but could constitute control of the use of property. On the grounds of its reasoning, it further maintained that interference with an exclusive right of the

¹⁰⁵ *ibid.*

¹⁰⁶ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35; Sermet (n 40), p.182.

¹⁰⁷ Sermet (n 40), p. 25; Coban (n 19) p.182.

¹⁰⁸ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, paras. 64–65.

¹⁰⁹ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, paras. 64–65; Sermet (n 40) pp.24–25.

¹¹⁰ *X v. Austria*, (1979) 3 EHRR 285 72 DR 17, para. 80; Sermet (n 40) pp.24–28.

owner failed to equate to interference with the enjoyment of a possession. Another example could be the case of *Banèr v. Sweden*,¹¹¹ in which the Court stated that exclusive fishing rights that came together with ownership of a lakeside property and that were abolished later by law could be considered as a possession. Additionally, it has been held that abolishing those rights could be determined as interference with property. On this ground, the Court stated that the restrictions of the applicant's property constituted control of use.

In the case of *Pine Valley Developments*¹¹² the Court recognised that the planning measures, which did not deprive the owner of his legal title to the property, fell within the meaning of the control of use of property. Here, the applicants in this judgment alleged that there had been a deprivation of their possession on the basis of the Irish Supreme Court's decision, which ruled that the outline planning permission for the applicant's land was null and void. According to the applicants, this decision prevented them from using their land for industrial purposes and also reduced its value. In this regard, the Court declared that the interference fell under the third rule and constituted a control of the use of the property rather than deprivation under the second rule. In reaching this decision, the Court explained its rationale on three grounds: first, the applicants retained ownership of the land; second, the land could be used for alternative means such as agricultural purposes even though it could not be used for industrial purposes as they had intended, and finally, it added that although the value of the land in question was substantially reduced as claimed by the applicants, this land was not rendered worthless.¹¹³

In light of these considerations, the absence of a distinction as to when an act constitutes deprivation or control of use regarding the duty to compensate has been defined as 'an untidy and unsatisfactory' one.¹¹⁴ The Court's disinclination in numerous cases to classify interference as a control rather than as a deprivation was determined by taking into account the fact that compensation must be paid when a person is deprived of property.

¹¹¹ *Banèr v. Sweden* (1989) 60 DR 125, paras. 5-6; *Mellacher v. Austria* (1989) 12 EHRR 391.

¹¹² *Pine Valley Developments v. Ireland* (1991) 14 EHRR 319, para.55.

¹¹³ *Pine Valley Developments v. Ireland* (1991) 14 EHRR 319, paras. 55-56; *Denev v. Sweden* (1989) 59 DR 127, paras.55-56.

¹¹⁴ David Anderson, 'Compensation for Interference with Property', *European Human Rights Review*, (1999), vol. 6, p.553; Rook (n 15) p. 75.

In this regard, a judge of the Court has the discretion to decide whether an absence of compensation is acceptable or not.¹¹⁵

2.1.3.2 Control of the Use of Property to Secure Payment of Taxes and Other Contributions or Penalties

The third rule of P1-1 explicitly grants power to a state ‘to enforce such laws as it deems necessary to secure the payment of taxes or other contributions or penalties’. The powers of the contracting states under this rule are very wide as the power to levy taxes is one of the fundamental attributes of national sovereignty.¹¹⁶ The power to secure the payment of taxes is a specific aspect of the state’s right to control the use of property¹¹⁷ and thus this power is not restricted by the Convention, apart from the non-discrimination rule in Article 14.¹¹⁸ Accordingly, it has been suggested that the decision of a state to raise taxes is not examined by the Convention organs.¹¹⁹ However, the protection of property rights is not entirely excluded from the concept of taxation.

In the case of *Svenska Mangementgruppen AB v. Sweden*,¹²⁰ the European Commission determined that ‘a financial liability arising out of the raising of taxes or contributions may adversely affect the guarantee of ownership if it places an excessive burden on the person concerned or fundamentally interferes with his financial position’. Therefore the Court retains the power to review whether the imposition of taxes is disproportionate and unjustifiably interferes with property rights.¹²¹ Accordingly, the Convention bodies review the proportionality between the level of taxes and the means of those who are required to pay them.¹²² The proportionality test has developed within this area. As a result, due to the state’s right to control the use of property, the power to secure the payment of taxes or other contribution or penalties falls within the ambit of the third rule.

¹¹⁵ *ibid.*, p. 7; Rook (n 15) pp. 74–75.

¹¹⁶ Sermet (n 40) pp. 24–25.

¹¹⁷ Harris and others (n6) pp.692–693.

¹¹⁸ Sermet (n 40) p. 25; Coban (n 19) p.182.

¹¹⁹ Sermet (n 40) pp 25–27.

¹²⁰ *Svenska Mangementgruppen AB v. Sweden* (1985) 45 DR 211, para. 211.

¹²¹ Rook (n 15) p.86.

¹²² Sermet (n 40) p. 25.

2.1.4 The First Rule: The Peaceful Enjoyment of a Possession

The concept of the peaceful enjoyment of a possession is set out under the first rule of P1-1 as a general rule. This principle involves all situations that interfere with the individual's property rights. The first sentence of P1-1 is worded as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

The first rule is often regarded as a general 'catch-all'¹²³ rule which regulates interference with a person's peaceful enjoyment of his possession. This is the general nature of the first rule, which involves all situations that interfere with the individual's property rights. The first rule is separate from and is additional to the second and third rules.¹²⁴ As indicated above, according to the Court's case law, in the analysis of the cases under P1-1, the Court first determines whether either the second or third rule is applicable. If the interference with the right to property cannot be regarded as deprivation or a control of use, then it is examined under the first rule. Following this, the ECtHR examined whether an act constitutes interference with the owner's peaceful enjoyment of possessions.

As mentioned earlier, in the case of *Sporrong Lönnroth v. Sweden*,¹²⁵ the Court decided that the expropriation permits and the prohibitions on construction for the purpose of the redevelopment of the city (that remained in force for twenty-three and eight years for the permits; twenty-five and twelve years for the prohibitions) did not constitute deprivation of property. This is because although these permits remained in force for a long time, the applicants could continue to utilise their possessions. In addition to this, although it became very difficult to sell those properties in question, the possibility of selling subsisted. The Court held that neither the expropriation permits nor consequential prohibitions on construction amounted to a deprivation. Instead, they were determined as an initial step in a procedure leading to the deprivation of possession. As a result, they did not fall under the second or third rule but the Court decided that there had been

¹²³ *ibid*, pp. 28–29; Carss-Frisk, Monica, 'The Right to Property – A Guide to the Implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights', *Council of Europe, Human Rights Handbooks*, No. 4, Strasbourg (2001) p.24.

¹²⁴ Harris and others (n6), p. 672.

¹²⁵ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35.

interference with the enjoyment of possessions within the meaning of the first rule in P1-1 to the Convention.¹²⁶

In respect of its ruling in *Sporrong and Lönnroth*,¹²⁷ the Court has come to the approach that if an interference neither transfers nor intends to control the use of the property, then an interference falls within the scope of the first rule as a form of an interference with the substance of property. Within the context of the Court's Cyprus ruling it adopted this approach in almost all of the cases concerning property claims. The Court, on the same basis as its reasons in the case of *Sporrong and Lönnroth*, held that in cases where the state denies access to property, this will constitute an interference with the peaceful enjoyment of possessions.¹²⁸

As a result, the Court identified the concept of 'interference with the substance of ownership' in the *Sporrong and Lönnroth* case as falling within the scope of the first rule of P1-1 and followed the same stand in various subsequent cases. This ruling has created a precedent and thus it has been adopted that such interference does not deprive an owner of his property.¹²⁹ Although this new type of interference with property has been found in various cases, its identification has met with severe criticism mainly on two grounds.¹³⁰

First, it has been argued that P1-1 set out only two types of interference with property: deprivation and control. The former irrevocably nullifies, whether or not the property is transferred, property rights of the owner whereas in the matter of the latter type, the owner can exercise, even to a limited extent, some of his property rights.¹³¹ Secondly, it has been said that although these types of interference have been developed by the Court's case law, there is an absence of a principle to determine whether an interference falls within the ambit of control or interference with the substance of ownership in P1-1.¹³² The level of interference and its duration are the only criteria in determining whether interference

¹²⁶ *ibid*, paras. 63–65.

¹²⁷ *ibid*.

¹²⁸ *Loizidou v. Turkey* (1995) 20 EHRR 99; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey* (2010) ECHR 306.

¹²⁹ *Sporrong Lönnroth v Sweden* (1982) 5 EHRR 35, para.63.

¹³⁰ Rosalyn Higgins, 'The Taking of Property: Recent Developments in International Law' *Recueil des cours de l'Académie de Droit international*, vol. 176, The Hague (1983) pp.324–327; Sermet (n 40), p.29.

¹³¹ Sermet (n 40) pp. 28–29.

¹³² Harris and others (n6) p.672; Sermet (n 40) p.29.

falls within the context of control or substance of property.¹³³

In the case of *Iatridis v. Greece*¹³⁴ the Court held that an interference with a leasehold interest by the state was in breach of national law and thus it fell within the first rule of P1-1. This interference was regarded as neither a deprivation, as the applicant held less than an ownership interest in the premises, nor as a control on use of the property. The Court considered that the interference in question was manifestly a violation of national law, which was incompatible with the applicant's right to the peaceful enjoyment of possessions and thus it decided that there had been a violation of P1-1. On this basis, the Court found it unnecessary to ascertain whether a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.¹³⁵

With respect to the Court's ruling in *Iatridis v. Greece*¹³⁶ it has been determined that an interference with a leasehold interest constituted interference with the substance within the first rule of P1-1. In essence, however, the Court's approach in reaching its decision without giving reasons, is questionable. It expressly stated that P1-1 requires that any interference by a public authority satisfies the requirement of lawfulness. Moreover, this was determined as the first and most important requirement of P1-1. The Court further added that these conditions stem from the rule of law, one of the fundamental principles of a democratic society.¹³⁷ As indicated above, within the context of the lawfulness requirement, the state must have a basis in national law to justify its interference.¹³⁸ The national law must be sufficiently accessible, precise, and foreseeable. Additionally, the law concerned has to be qualitatively sound and should not be arbitrary.¹³⁹ Having said that, in its judgment in the *Iatridis* case, the Court, recognised that the refusal of national authorities to reinstate the applicant in the property in question was in breach of national law. According to the Court, the interference in question was manifestly in breach of

¹³³ Sermet (n 40) p. 29.

¹³⁴ *Iatridis v. Greece* (1999) 30 EHRR 97, para. 62-63.

¹³⁵ *ibid*, paras. 58-63.

¹³⁶ *ibid*, para. 68.

¹³⁷ *ibid*, para. 58.

¹³⁸ *Iatridis v. Greece* (1999) 30 EHRR 97, para. 62; *Bosphorus Airways v. Ireland* (2005) 42 EHRR 1.

¹³⁹ *James v. UK* (1986) 8 EHRR 123; *Spacek, sro v. Czech Republic* (1999) 30 EHRR 1010; *Beyeler v Italy* (2000) 33 EHRR 52, para. 88.

Greek law and thus incompatible with the applicant's right to the peaceful enjoyment of his possession.

At this juncture, it is worth noting that although the Court in the same ruling expressly stated that it must consider whether an interference complies with the principle of lawfulness in cases where an interference amounted to the peaceful enjoyment of possession within the meaning of the first rule of P1-1, without explaining its reasoning, it held that it was not necessary to determine whether a fair balance had been struck, since the interference was unlawful.¹⁴⁰ In this case, the Court also departed from its classical approach¹⁴¹ and did not examine whether the interference in question constituted a *de facto* expropriation either.

In the case of *Stran Greek Refineries and Stratis Andreadis v. Greece*,¹⁴² the applicants alleged that the national law had the effect of depriving them of their property rights in respect of the debt in their favour recognised by the arbitration award. They further claimed that as a result of the length and the dilatory nature of the proceedings, their right to property guaranteed under P1-1, had been infringed. The Court held that the Greek law that declared the award in question void and unenforceable, represented an interference with the applicant's right to property, guaranteed by P1-1. It pointed out that this interference was neither an expropriation nor a measure to control the use of property; it fell to be dealt with under the first sentence of P1-1.¹⁴³ After the Court had concluded that there was an interference with the applicants' property right, it analysed whether the interference was justifiable. Following this, the Court considered whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In its examination, however, it did not consider whether the interference constituted a *de facto* expropriation.¹⁴⁴

The Court interestingly followed another approach in *Pressos Compania Naviera*,¹⁴⁵

¹⁴⁰ *Iatridis v. Greece* (1999) 30 EHRR 97, para. 58; Harris and others (n6) pp. 670–674.

¹⁴¹ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, paras. 62–63; Harris and others (n6) p. 678.

¹⁴² *Stran Greek Refineries and Stratis Andreadis v. Greece* (1994) 19 EHRR 293, para. 62–68.

¹⁴³ *ibid*, paras. 66–68.

¹⁴⁴ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63; Harris and others (n6) p. 678.

¹⁴⁵ *Pressos Compania Naviera SA v. Belgium* (1995) 21 EHRR 301.

although the facts of this case were same as those in the case of *Stran Greek Refineries*. In *Pressos Compania Naviera*, it was decided that the retrospective annulment of compensation claims stemming from the general law of tort amounted to a deprivation of property within the meaning of the second sentence of the first paragraph of P1-1.¹⁴⁶ The Court, in its differentiated approach to these cases, between which there was no difference on their facts, could not escape criticism. It was argued that there was no reason not to find deprivation in the *Stran Greek Refineries* case.¹⁴⁷

In the case of *Papamichalopoulos*,¹⁴⁸ the Court's assessment was that, in accordance with the Convention's intention to safeguard rights that are practical and effective, it has to be considered whether the interference concerned amounted nevertheless to a *de facto* expropriation.¹⁴⁹ The Court considered that the occupation of land was so extensive, with serious consequences, and the attempts made to remedy the matter complained of were so remote that there was a *de facto* expropriation.¹⁵⁰ The Court, without expressly stating that there was a deprivation, decided that interference was incompatible with the right to the peaceful enjoyment of the applicants' possessions.

Within the context of the Cyprus property cases,¹⁵¹ which are subject to the extensive occupation of lands, the Court departed from its ruling in *Papamichalopoulos* and did not examine whether there has been *de facto* expropriation. In the case of *Loizidou* and all subsequent cases concerning the property claims of the displaced persons, the Court maintained that displaced G/Cypriots were forbidden access to their properties in the north and lost all control over them as a result of the division of the island. This situation was considered a continuing interference with property rights within the meaning of the first rule of P1-1 but not a deprivation of property. According to the *Loizidou* judgment, if a state denies access to a property, then such a situation constitutes interference with the peaceful enjoyment of possessions. Hence, in line with the Court's ruling, if interference with property is not provided by law then there will be violation of P1-1.¹⁵²

¹⁴⁶ *ibid*, paras. 33–34.

¹⁴⁷ Coban (n 19) p. 188; Sermet (n 40) p. 29.

¹⁴⁸ *Papamichalopoulos v Greece* (1993) 16 EHRR 440.

¹⁴⁹ *ibid*, paras. 42–45.

¹⁵⁰ *ibid*, para.45.

¹⁵¹ *ibid*.

¹⁵² Harris and others (n 6) p. 678.

With regards to the Court's ruling in the case of *Loizidou*, it has been argued that the Court should have applied the criteria established in the judgment of *Papamichalopoulos* without considering the argument about the illegality of the TRNC Constitution and thus should have found a *de facto* expropriation. The Court's differentiated approach among these rulings was characterised as 'playing devil's advocate' since its disinclination to find a *de facto* expropriation was because of the possibility that these cases might have been out of the jurisdiction of the Court *ratione temporis* had it decided otherwise.¹⁵³

Another judgment that needs to be considered is the case of *Beyeler*.¹⁵⁴ In the *Beyeler* case the applicant contended that the Italian authorities had expropriated a painting of which he claimed to be the legal owner and alleged a violation of P1-1. According to national law, a contract for the purchase of a painting was null and void. The Court determined that the applicant had been in possession of the painting for several years and moreover the authorities had considered the applicant as having a proprietary interest in the painting and even as its real owner. The Strasbourg Court decided on this basis that the applicant had a proprietary interest which constituted a possession for the purposes of P1-1.¹⁵⁵ Taking these considerations into account, the Court did not find it necessary to rule on whether the second sentence of P1-1 was applicable to the case.

The Court refrained from assessing the correctness of the Italian court's decision which considered the sale as null and void. Nor did the Court determine whether the applicant should have been considered the real owner of the painting under national law. This decision has been made on the grounds of the Court's assessment, which maintained that 'the complexity of the factual and legal position prevents its being classified in a precise category'.¹⁵⁶ Since the determination of the correctness of the national court's decision would have been required to determine the type of interference under the second and third rule,¹⁵⁷ the Court examined the situation and complained about it within the first rule of P1-1, although it could have considered that it constituted deprivation. Here, the Court's approach to the issue of classification under the second and third rules seems very questionable. It can be argued that since the applicant was regarded as having a

¹⁵³ Coban (n 19) p. 188.

¹⁵⁴ *Beyeler v Italy* (2000) 33 EHRR 52, para. 78.

¹⁵⁵ *ibid*, paras. 104–105.

¹⁵⁶ *ibid*, para. 106.

¹⁵⁷ *Beyeler v Italy* (2000) 33 EHRR 52, paras. 106–107; Harris and others (n 6), p. 673.

proprietary interest in the painting, which constituted a possession by the Court, it could have been decided that there was a deprivation within the second rule of P1-1. There was no reason not to determine deprivation by the national authorities.¹⁵⁸

In light of the Court's ruling in *Beyeler*,¹⁵⁹ it could be suggested that in cases in which property is held in possession contrary to national law or under a contract which is null and void, the Court examines the circumstances of a case in detail.¹⁶⁰ As for the compliance with the principle of lawfulness, the Court held that it has limited power to review compliance with domestic law.¹⁶¹ Nevertheless, if the national legal provisions in question have been applied manifestly erroneously or so as to reach arbitrary conclusions¹⁶² then the Court may also undertake the interpretation or the application of national law.¹⁶³

To conclude, although P1-1 expressly sets out two types of interference, the Court has developed another type of interference with property through its case law. This new type of interference with the substance of property has been approved in a number of cases. It can be argued that the Court's approach to the application and interpretation of interference with the substance of property in its case law seems inconsistent. This situation may derive from the absence of the Court's criteria in respect of the interference with the substance of property.

It has been argued that the only substantive criterion concerning the consideration of this type of interference is the 'level of interference... its duration and more or less definitive character'.¹⁶⁴ There is no difference between examining a case under the first rule and the second rule or the third rule of P1-1 since interference with substance does not necessarily mean violation of the right to property.¹⁶⁵ In cases concerning interference with property rights, the Court should examine lawfulness and legitimacy of interference and apply a fair balance test. These requirements in the analysis of interference render the type of

¹⁵⁸ Coban (n 19) p.189.

¹⁵⁹ *Beyeler v Italy* (2000) 33 EHRR 52.

¹⁶⁰ *ibid*, para.106; *Harris and others* (n 6) p. 659.

¹⁶¹ *Håkansson and Sturesson v. Sweden* (1983) 5 EHRR 297, para. 47.

¹⁶² *Beyeler v Italy* (2000) 33 EHRR 52, para.108; *Tre Traktörer Aktiebolag v. Sweden* (1989) 13 EHRR 309, para.58.

¹⁶³ *Harris and others* (n 6) p. 670.

¹⁶⁴ *Sermet* (n 40) p. 29.

¹⁶⁵ Coban (n 19) p. 189.

interference with substance of property unnecessary in determining whether an act of state constitutes a violation of P1-1.¹⁶⁶

Taking the Court's inconsistent approach in classifying interferences into account, it can be emphasised that the concept of interference with the substance of property is used by the Court mainly in cases in which it is difficult to determine within which rule of P1-1 a particular case falls. In essence, by its very concept as a general rule, a potential legal escape route from classifying interferences has been established for the Court when it is faced with cases in which it is difficult to determine whether an act has violated P1-1 to the Convention. This may explain the determination of interference with substance of property as a 'kind of catch-all category for any kind of interference which is hard to pin down'.¹⁶⁷

Conclusion

The thrust of this chapter was to explore the structure, meaning and scope of Article 1 of the First Protocol. This approach will shed light on the application of P1-1 to the cases concerning disputes over property ownership in Cyprus following the division of the island due to inter-communal violence, which will be examined in detail in the following chapter. In this chapter, it has been shown that the right to property is a fundamental right and enshrined in P1-1. Although this provision protects peaceful enjoyment of an existing possession, it does not prevent the contracting states from interfering with this right by satisfying certain conditions set out under the same provision. According to P1-1, the public authorities may interfere with property rights for legitimate purposes on the bases of a balancing test between the interest of the individual and that of society. The Convention organs developed measures in order to identify the limits and conditions for a legitimate interference.

As considered above, P1-1 comprises three distinct rules that provide separate grounds for three kinds of interference, which are based on the effect of interference on property rights. Although the Court has developed the relationship between these rules, it has not produced clear criteria to determine within which rule a particular case falls. As a result,

¹⁶⁶ Sermet (n 40) p. 29.

¹⁶⁷ *ibid.*

the identification of the type of interference with property in some cases has become very difficult due to the absence of such criteria. In this regard, it may be said with some conviction that the rationale behind the Court's recent approach, in refraining from determining the type of interference and thus within which sentence a case falls, derives from this vagueness. What is remarkable here, however, is that the Court's stance in applying directly a balancing test, regardless of the applicable rule under which a case is being decided, turns the fair balance test into a legal gap-filler mechanism. To some extent, the uncertainty and inconsistency in the application of P1-1 to the ECHR tends to provoke confusion within the concept of this provision, which may undermine not only the credibility but also the effectiveness of the protection mechanism of the Convention concerning property rights.

As was indicated in the beginning of this chapter, there has been an examination of the protection of property rights provided by P1-1 in order to understand the Court's approach in its Cyprus rulings as will be examined in the next chapter. As to the application of P1-1 to the Cyprus property cases, the Court found a state interference with property rights in almost all property claims of the G/Cypriots.

Loizidou is the first case that was brought before the ECtHR to deal with property claims on the island. The Court held that there has been a continuous denial of access to the applicant's right by Turkish military forces which amounted to an interference with the applicant's rights under P1-1. This interference was not regarded as being either a deprivation or a control of use but determined that it fell within the meaning of the first rule of P1-1 as an interference with the peaceful enjoyment of possessions.¹⁶⁸ Finding a violation on this ground has considerable consequences for the right of return for internally displaced persons.¹⁶⁹ This is because such a decision may affect the way in which the Court might handle future cases involving other contracting states where significant numbers of people were displaced and the alleged violation of property rights would be counted in millions, not 'only' in hundreds and thousands of possible cases.¹⁷⁰

¹⁶⁸ *Loizidou v. Turkey* (1996) 23 EHRR 513, para.63.

¹⁶⁹ *Harris and others* (n 6) p. 663.

¹⁷⁰ *Loizidou v. Turkey* (1996) 23 EHRR 513, dissenting opinion of Judge Jambrek.

In light of the above considerations, it can be stated that the concept of the right to property has been developing in accordance with the Court's judgments. However, the absence of a clear definition concerning the types of interference and a lack of any criteria to distinguish when an act constitutes interference with substance or control of use has led to an inconsistency across the Court's judgments. In order to avoid the creation of such an inconsistency, which may give rise to considerable confusions among the contracting states, one can suggest that the components of P1-1 should be interpreted clearly by providing some distinct features within their context. Following the same approach in similar cases may likely provide consistent, predictable and credible outcomes.

As a result, the Court should determine the requirements for legitimate interference within the ambit of each category under P1-1 and explain the reasons for its decisions in each judgment. Although the components of the context of right to property cannot be restricted due to its wide scope, absence of definite measures in determining the notions under P1-1 may be satisfied –at least to some extent– by following the same line of attitude in cases which have similar facts. Taking the various numbers of cases before the Court into account, the Court should provide clear guidance in order to prevent any contradictions within its protection mechanism concerning the right to property under the Convention mechanism. Adopting an approach in line with previous judgments may, perhaps, encourage the contracting states to reinforce their national laws in accordance with the Court's judgments and also increase the credibility of the Court's case-law.

To sum up, the gradual development in the assessment of interference with property rights through the Court's case law mainly stems from a lack of definitive criteria concerning P1-1. In respect of the Court's Cyprus rulings, what is remarkable is the interaction between the Court's case law and the property dispute on the island. The next chapter will examine significant property complaints of G/Cypriots which were brought before the Court. As will become apparent, the development of local regulations, as well as politics regarding the Cypriot property conflict, have occurred in accordance with the developments within the case law of the Strasbourg Court itself.

Chapter 3

Cypriot Property Claims Before the European Court of Human Rights

Introductory remarks

In this chapter, a detailed analysis will take place on the application of P1-1 to the ECHR ('the Convention' hereafter) to the cases from Cyprus and other Contracting States in the field of right to property under the Convention. By using this approach in analysing and comparing the application of P1-1 in similar cases, attention will be drawn to the determination of the extent to which P1-1 has been differently applied to the Court's Cypriot case law in comparison with other judgments concerning other Contracting States.

The case analysis and the focus on the application of P1-1 to various cases will reflect the importance of the Cyprus case law in relation to the jurisprudence of the ECtHR (the Court hereafter). In light of the determinations that will be provided, it will be suggested that special attention should be paid to the Court's approach in its rulings on Cyprus in order to facilitate understanding of the issue of right to property under the Convention mechanism. This chapter will further examine, local developments, particularly those undertaken by the TRNC authorities concerning the regulations that deal with the ownership claims of G/Cypriots which have been developed by taking into account the Court's decisions. The examination will concentrate on the overall case law of the Court that has had considerable impact on the process of producing effective domestic remedies for the property claims of Cypriots.

As will become apparent, the attitude of the Court towards the cases on Cyprus, spread over a decade, has gradually changed. The reason for the change in the Court's position will be analysed in order to indicate and understand the interaction between the protection mechanism of property rights under the Convention system and the unresolved property conflict on the island. It will be questioned as to whether the Court's departure from its traditional rulings in Cypriot case law, following the failure of the comprehensive settlement plan for the Cyprus problem, was a consequence of the rejection of this plan. On the basis of the aforementioned findings, considerations will be given to whether the

political situation in Cyprus has influenced the approach of the Court towards its rulings on Cypriot cases and thus whether it has itself gradually turned into a political actor in the Cyprus conflict. It will be argued that a different application of P1-1 to the case law in Cyprus is understandable if one considers the *sui generis* nature of the property claims of Cypriots, which renders those cases relevant to being subject to examination in the context of the protection mechanism of property rights under the ECHR system.

Accordingly, this chapter will examine four particular cases that were lodged before the Court mainly by G/Cypriots against Turkey. All these cases concern the alleged violation of property rights of displaced G/Cypriot owners of those properties located in the north of Cyprus. The applicants alleged that violation of property rights is a result of Turkey's occupation over the northern part of the island as well as of the division of the island. The cases that will be focused on are: *Loizidou v. Turkey*; *Cyprus v. Turkey* (also known as the Fourth Interstate application of Cyprus against Turkey); *Xenides-Arestis v. Turkey* and *Demopoulos and Others v. Turkey*.¹

The reason for focusing particularly on these aforementioned judgments is that these are the cases that clearly trace the gradual change in the Court's attitude towards its case law on Cyprus and the rationale behind this change in the course of fourteen years. The examination will therefore indicate how these cases have contributed to the ongoing progress of property-related issues within the ambit of the Cypriot property conflict and how the Court's rulings in these four cases have gained a prominent place in the issue at hand. It also aims to show the effect of changes in factual circumstances over the Court's position towards the Cyprus rulings.

These four rulings of the Court have not only served as a major contribution to reforming the local framework concerning the issue of property, but were also used as precedents both by the Court itself and by other Contracting States' parties in cases that are similar to those from Cyprus. This situation will be analysed in order to illustrate the considerable interaction between the property matters on the island and the case law of the Court in the field of property rights. Against this backdrop, it can be said with some conviction that

¹*Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey*, (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey*, (2010) ECHR 306.

the above-mentioned landmark cases deserve a detailed examination.

3.1 The Landmark Case in the History of Human Rights Law and in the Jurisprudence of the European Court of Human Rights: *Loizidou v. Turkey*

On 15 July 1974, a *coup d'état* took place by Greek troops with the backing of Greek Cypriots against Makarios,² the president of the Republic of Cyprus (hereinafter the RoC), with the aim of effecting *enosis*. In response to the coup, Turkish military forces landed in Cyprus on 20 July 1974, justifying this action by claiming compliance with the terms of the 1960 Treaty of Guarantee, in order to protect Turkish Cypriots against the violence in the island. These were the major events that led up to the war of 1974, the effects of which are still sorely felt.³

The war of 1974 ended in the partition of the island along what is called the 'Green Line', which still divides Cyprus today. It is a ceasefire line which serves as a barrier running across the island and is supervised by the UN. In the aftermath of the war of 1974, the overwhelming majority of Cypriots were displaced and left their properties behind. The effect of this massive displacement on both T/Cypriots and G/Cypriots was traumatic. Approximately 40% of the entire T/Cypriot community and 30% of the entire G/Cypriot community at that time relocated from the south to the north and vice versa. The total population of Cyprus, including both T/Cypriots and G/Cypriots, was 636,000 in 1974.⁴ As a result of the events that occurred in 1974, approximately 210,000 persons, which corresponded to 30% of the entire population of the island, including both communities, were displaced.⁵ In essence, even taking only these numbers into account is enough to illustrate the significance of the property conflict and its consequences that have arisen or may arise in Cyprus.⁶

² Makarios III was the first president of the Republic of Cyprus and also the archbishop of the Cypriot Orthodox Church.

³ The rise of the inter-communal strife and the historical background of displacement in Cyprus is examined in Chapter 1.

⁴ L. W. St John-Jones, *The Population of Cyprus*, London: Institute of Commonwealth Studies (1983) pp.34–62.

⁵ Ayla Gürel & Kudret Ozersay, *The Politics of Property in Cyprus: Conflicting Appeals to 'Bizonality' and 'Human Rights' by the Two Cypriot Communities*, International Peace Research Institute (PRIO) Cyprus Centre Report (3/2006) pp.3–4.

⁶ *ibid*, pp.3–5; L. W. St John-Jones (n 4) pp.34–62.

As a result of the continuing division of the island for more than three decades, the issue of ownership in respect of those properties located in the north and owned by displaced G/Cypriots has become one of the major complexities of the inter-communal negotiations on the resolution of the Cyprus problem. Both communities have suffered great tragedy. As to the consequences within the legal sphere, repercussions of this massive displacement of Cypriots from their land and houses have been continuing both at the local and international level since the early 1990s.

Two decades have now elapsed since the consequences of 1974 events have been brought before the Court by the victims, mainly G/Cypriots, of this massive displacement. The complaints of those displaced G/Cypriots concerned their property rights over the properties that they had to leave behind in the northern part of the Green Line due to the division of the island. Meanwhile, the repeated attempts of the authorities of both sides to resolve the Cyprus conflict have continuously failed. Therefore, no settlement of the Cyprus conflict has been achieved and thus neither has the issue of property been resolved.

The continuing failure of authorities to resolve the property problems led Cypriots, exhausted by prolonged and vain negotiations, to seek remedies at the international level. It seems that Cypriots, unlike the negotiators to the dispute, were determined to remediate their losses that arose from the conflict. As a result, the property claims have reached fruition – at least to some extent–via the Strasbourg Court. As time went by, more claims concerning the property matters in Cyprus have been lodged before the Court and it started to play a decisive role within the process of seeking a resolution of the Cyprus question. As a result of increased involvement by the Court, and of its assessments and decisions on the Cypriot cases that came before it, in parallel with the increased number of G/Cypriot applications, the Court gained a more prominent place in the progress of reaching a resolution of the Cyprus problem than had the communities' authorities.

Over the course of fourteen years, the Court's Cyprus rulings have gone far beyond the legal scope and it has lit the torch to show which approach the parties to the Cyprus conflict should follow in order to achieve a settlement of the property dispute. In this regard, it is even suggested that for a permanent and durable resolution, the Court's decisions on Cypriot cases should be taken as grounds for any negotiated property

settlement by the parties of this conflict.⁷

The case of *Loizidou v. Turkey*⁸ is the first case that brought the key issues in respect of the Cyprus property conflict before the Court. The case provided the opportunity to examine the lawfulness of legislative and administrative acts of the TRNC at the global level. One of the major features of this case is that it is the first case before the Court that concerns the violations of G/Cypriot rights under P1-1 to the Convention. As will be shown below, the Court's judgment in *Loizidou* can be regarded as a contribution to the ECtHR case law within the context of property rights in post-conflict situations. As will also be demonstrated below, it is the case that has launched the development process of the property conflict in Cyprus. Moreover, it opened the way for hundreds of other displaced G/Cypriots to bring their property claims before the Court.

In its *Loizidou* judgment, the Court held that Turkey was responsible for all acts and omissions in the northern part of Cyprus by virtue of exercising effective overall control through its military forces in this part of the island.⁹ As regards the issue of Turkey's responsibility for the matters complained of, the Court pointed out the unrecognised status of the TRNC in accordance with international practice and regarded the TRNC as a subordinate local administration of Turkey.¹⁰ By taking these considerations into account, the Court decided that Turkey was liable for the administrative acts and decisions of the TRNC due to the existence of the large number of troops that were engaged in active duties in the north.¹¹

What is remarkable here is that the Court reached this decision through factual circumstances of the case rather than substantive jurisdiction,¹² which was considered sufficient to hold that the issues complained of were imputable to Turkey. As a result of

⁷ Rhodri C. Williams and Ayla Gürel, *The European Court Of Human Rights and the Cyprus Property Issue: Charting a Way Forward*, Peace Research Institute Oslo (2011) p.1.

⁸ *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁹ Council of Europe, 'Parliamentary Assembly Official Report of Debates' 2002 Ordinary Session Fourth Part, September 2002, vol. IV, p. 892.

¹⁰ *Loizidou v. Turkey* (1996) 23 EHRR 513, paras.44–57.

¹¹ *ibid*, para.56.

¹² Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, vol. 14 (2003) p.545.

this determination, the issue of the extraterritorial application of the ECHR was raised and the Court established that:

... although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of “jurisdiction” under this provision is not restricted to the national territory of the High Contracting Parties. According to its established case-law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention ... In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.¹³

It can be argued that *Loizidou* is a case which contributes to the development of the notion of a continuing violation of P1-1 of the ECHR within the scope of the Court’s case law.¹⁴ Moreover, by means of this finding, the *Loizidou* judgment was considered as one of the most authoritative cases on the extraterritorial application of the ECHR.¹⁵ After considering various issues burdened with highly political and legal matters the Court held that there has been a continuous breach of P1-1 due to the denial of access to the applicant’s property and consequent loss of all control over it, which was imputable to Turkey.¹⁶

As a result of this decision, thousands of G/Cypriots and the RoC brought applications against Turkey concerning their property rights that have been affected by the political dispute in and since 1974. Since then, the Court has played a significant role in the Cyprus property conflict. As will become apparent, the reason behind this is that the Court’s decisions in this regard have had a considerable impact not only over the politics but also over the juridical issues concerning the Cyprus question, to which attention will now turn.

¹³ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 62.

¹⁴ Antoine Christian Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective, With a Case Study in Bosnia and Herzegovina*, School of Human Rights Research, vol. 25, Intersentia Uitgevers N.V (2008) p.238.

¹⁵ Dobrosława C. Budzianowska, ‘Some Reflections on the Extraterritorial Application of the European Convention on Human Rights’, *Wroclaw Review of Law, Administration & Economics*, vol.2, no.1 (2012) p. 54.

¹⁶ *Loizidou v. Turkey* (1996) 23 EHRR 513.

3.1.1 Significant Findings in the case of *Loizidou v. Turkey*

In *Loizidou*,¹⁷ the Court was faced with complicated issues, since the facts of the case derive from a problem which was burdened with historical and political complexities. The G/Cypriot applicant, Ms Loizidou, fled her home located in the northern part of Cyprus following Turkey's intervention in 1974 and settled in the south of the island. She complained that there had been continued denial of access to her property and thus she had effectively lost all control over it. On this ground, she alleged that Turkey was responsible for violation of her rights under P1-1 to the Convention.¹⁸

On 8 July, 1993, in its Report, the Commission characterised the refusal of the applicant's access to property in the north of Cyprus as an issue of freedom of movement and stated that 'a distinction must be made between claims concerning the peaceful enjoyment of one's possessions and claims of freedom of movement'.¹⁹ According to the Commission, the refusal of access to the property may be an indirect effect of the limitations of the freedom of movement. However, it could not be regarded that a deprivation of liberty, as a type of restriction of access to an area, interfered directly with the right to property under P1-1. On the grounds of this reasoning, the Commission found that the applicant's claim of free access to the north of the island could not be based on her alleged ownership of property in that part of Cyprus and thus it concluded that there had been no violation of P1-1.²⁰

At the hearing on the merits, on 18 December, 1996, the Strasbourg Court rejected the Commission's argument and stated that Ms Loizidou's complaint not only concerned the issue of physical access but also the continuing violation of P1-1. The rationale behind this was that the refusal of her access during the passage of sixteen years has gradually affected her right to a peaceful enjoyment of possession, which constituted a continuing violation of P1-1.²¹ At this point, it can be argued that the Court's approach in deciding that the denial of access to the applicant's property and consequent loss of control was attributable to Turkey, by taking into account the presence of Turkish forces in that area,

¹⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513.

¹⁸ *ibid*, para. 49.

¹⁹ *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, (1991) 68 DR, para.97.

²⁰ *ibid*, paras. 97-99

²¹ *Loizidou v Turkey* (1996) 23 EHRR 513, para. 60.

can be considered as a new test for the issue of jurisdiction.²² Moreover, besides taking the existence of Turkish troops as a ground, the Court also considered the denial of physical access to the property in its finding of a violation of P1-1. It has been argued that this approach may have significant implications in the context of right of return for internally displaced persons.²³

Loizidou,²⁴ on the other hand, is the case in which the concept of ‘continuing violation’ as well as the ‘extraterritorial reach’ of the Convention has been developed and confirmed respectively. The compliance of states with their obligations under the Convention is considered within the notion of a continuing violation in ECtHR case law.²⁵ As regards the case of *Loizidou*, the applicant argued that Turkey was responsible for a continuing violation of her rights on the grounds of the fact that she had been denied access to her property since 1974.²⁶ As a response, Turkey contended that the taking of property started in 1974 and ‘ripened into an irreversible expropriation’²⁷ in accordance with Article 159(1)(b) of the 1985 TRNC Constitution which was prior to Turkey’s acceptance of the Court’s jurisdiction, on 22 January 1990, under Article 46 of the Convention.²⁸ The Court rejected this argument and concluded that the act of preventing the applicant from having access to her land constituted a continuing violation of peaceful enjoyment of her possessions under P1-1 due to the fact that the legal owner of the land in question was still Ms Loizidou.²⁹

In fact, a yardstick was adopted in the case of *Loizidou*. One of the most significant findings in this case was about the nature of alleged violations against Turkey. The Court held that alleged violations of human rights provided under the Convention were continuing in nature. This finding was attributed to the fact that the applicant was still the legal owner of the land and she had been continuously denied access to this property as

²² Karen de Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden: Martinus Nijhoff Publishers (2012) p. 108.

²³ David J. Harris, Michael O’Boyle and others, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd edn, Oxford: Oxford University Press (2009) p. 19

²⁴ *Loizidou v. Turkey* (1996) 23 EHRR 513.

²⁵ Draft articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session in 2001, reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part II, United Nations publication, Sales No. E.04.V.17 (Part 2) p. 112.

²⁶ *Loizidou v. Turkey* (1996) 23 EHRR 513, para.36.

²⁷ *ibid*, para. 35

²⁸ *ibid*.

²⁹ *ibid*, paras. 39–47.

its legal owner. Due to the fact that Article 159 of the TRNC Constitution, purporting to expropriate the land, was not legally valid since the international community does not regard the TRNC as a state, the Court determined the applicant as the legal owner. In reaching the determination of the continuity nature of the violation, the Court did not take the closing of the border, which divides the island into two, into account. Although it is crystal clear that the roots of this situation lie in the unresolved and prolonged political dispute, the Court disregarded this fact and failed to clarify the reason for its ignoring it.

What is remarkable, however, is that the aforementioned decision was attributed to the illegality of the TRNC Constitution, which had originated from the same political conflict that gave rise to the establishment of the border-line. Furthermore, and rather obscurely, although the mainstay of the finding that the continuing violation was the legally invalid character of the TRNC Constitution,³⁰ the Court was disinclined to elaborate on the lawfulness of the legislative and administrative acts of the TRNC. Against this background, it can be argued that the Strasbourg Court, by failing to clarify its reasoning in concentrating on the invalid nature of the TRNC, rather than on the closing of the border-line in reaching its decision, had not refrained from becoming a political actor and therefore adding a political element to this ruling. As a result, in light of the above considerations, the political conflict in Cyprus began to overshadow the ECtHR's stand in its Cyprus ruling with the case of *Loizidou*.

Another interesting finding of the Court in *Loizidou* is related to the issue of the extraterritorial application of the ECHR, which contributes to this judgment being considered as one of the most authoritative cases in this field.³¹ In *Loizidou*, the Court held that 'the concept of jurisdiction under Article 1 of the Convention is not restricted to the national territory of the Contracting States.'³² Therefore, Contracting States can be held responsible for acts and omissions of their authorities that produce effects outside their territory. The Court further pointed out the relevant principles of international law concerning this issue and added that the responsibility of a Contracting State could also arise when 'as a consequence of military action – whether lawful or unlawful – it exercises

³⁰ *Loizidou v. Turkey* (1996) 23 EHRR 513, paras. 41–47.

³¹ Budzianowska (n 15), p. 54.

³² *Loizidou v. Turkey* (1995) 20 EHRR 99, para. 62 referred in *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 52.

effective control of an area outside its national territory'.³³

In *Loizidou*,³⁴ the Court found that the matter of continuous denial of the applicant's access to her property located in north of Cyprus and ensuing loss of all control over it fell within the jurisdiction of Turkey for the purpose of Article 1 of the Convention. The decision was attributed to the 'large number' of Turkish troops that were stationed in north Cyprus. According to the Court, it was evident from the 'large number' of forces that Turkey exercised 'effective overall control' over that part of Cyprus. Turkey's responsibility for the policies and actions of the TRNC stemmed from such control. Accordingly, it decided that those affected by such policies or actions fell within the jurisdiction of Turkey.³⁵

The Court made clear its position in the extraterritorial application of the Convention in the *Loizidou*³⁶ judgment and reiterated that position and its reasoning in almost all subsequent Cypriot property cases³⁷ brought against Turkey. However, this clarity was undermined by the Court itself in its ruling on *Banković*.³⁸ In the *Loizidou* judgment, the Court, with its approach to the issue of applying the Convention extraterritorially, has provided further guidance within its case law.³⁹ In essence, taking into account 'effective control' to ascertain whether jurisdiction has been established, as in *Loizidou*, widens the potential for applying the ECHR extraterritorially.⁴⁰ However, considerable confusion was subsequently created in the Court's ruling on *Banković*. This is the case in which the Strasbourg Court adopted the most restrictive view regarding the determination of whether there has been effective control exercised by a state.⁴¹

As regards the 'effective control' test, the Court departed from its *Loizidou* approach in the case of *Banković*.⁴² As will be seen, this manoeuvre resulted in a strong tendency

³³ *Loizidou v. Turkey* (1996) 23 EHRR 513, para.52.

³⁴ *ibid*, paras.54–56.

³⁵ *ibid*, para.56.

³⁶ *ibid*.

³⁷ *Cyprus v. Turkey* (2001) 35 EHRR 731; *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; *Demopoulos and Others v. Turkey* (2010) ECHR 306.

³⁸ *Banković and others v. Belgium* (2004) 44 EHRR SE 75.

³⁹ Buyse (n 14) p. 54.

⁴⁰ *ibid*.

⁴¹ *Banković and others v. Belgium* (2004) 44 EHRR SE 75.

⁴² *ibid*.

towards an inconsistent application of this test. In the case of *Banković*,⁴³ the Grand Chamber of the ECtHR had to deal with an issue concerning the applicants, who were injured and whose relatives had been killed in the air bombing on the territory of a non-party to the Convention, the Federal Republic of Yugoslavia (hereinafter 'FRY'), at the Serbian Radio and Television building by NATO in 1999.⁴⁴ The applicants complained of a number of violations, including the right to life (Article 2 of the ECHR), provided under the ECHR. The applicants alleged that their claims fell within the jurisdiction of the respondent states (all states parties to the ECHR were also members of NATO) and further added that the extent of the positive obligation under Article 1 of the ECHR to secure Convention rights would be 'proportionate to the level of control in fact exercised'.⁴⁵ The defendant states maintained that the complaints did not fall within their jurisdiction under Article 1 of the Convention. The Court did not examine the merits of applicants' claims since it declared the application inadmissible on the grounds that the applicants fell outside the respondent states' jurisdiction and thus held that it was not competent to adjudicate their claims.⁴⁶

In a nutshell, the Court in *Banković*, focused on the 'essential question'⁴⁷ of whether the applicants and their deceased relatives were, as a result of that extraterritorial act, capable of falling within the jurisdiction of the respondent states. The Court reached its decision on three grounds. First, the Court stressed that the jurisdictional competence of the Contracting States is primarily territorial.⁴⁸ Although extraterritorial jurisdiction of a state is recognised in international law, the concept of jurisdiction, as a general rule, is limited by the sovereign territorial rights of the other relevant states. It further added that in accordance with public international law, the 'ordinary meaning' of the term 'jurisdiction' in Article 1 of the Convention is primarily territorial.⁴⁹

In *Loizidou*, the Court emphasised that 'the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their

⁴³ *Banković and others v. Belgium* (2004) 44 EHRR SE 75.

⁴⁴ *ibid.*

⁴⁵ *ibid.*, para.42.

⁴⁶ *ibid.*, para.111.

⁴⁷ *ibid.*

⁴⁸ Orakhelashvili (n 12) p.539.

⁴⁹ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para. 59.

own territory’⁵⁰ and decided on this ground that the concept of ‘jurisdiction’ is not restricted to the national territory of the Contracting States. It further maintained that, taking into account the object and purpose of the Convention, an act falls within a state’s jurisdiction under Article 1 in cases when a state exercises effective control of an area outside its national territory and the existence of such control leads to the obligation to secure, in such an area, the rights and freedoms set out in the Convention.⁵¹

As a result, in the case of *Loizidou*, the Court held that extraterritorial applicability of Article 1 of the Convention stems from the relevant principles of state responsibility and thus such applicability is a normal consequence of Article 1.⁵² However, rather obscurely, in the case of *Banković*, since survivors and relatives of the victims of the NATO aerial bombing were not considered to fall within the jurisdiction of respondent states under the scope of Article 1, the NATO member states were not found to be responsible for violations of human rights due to the bombing.⁵³ At this point, the inconsistency in the Court’s approach to the issue of ‘jurisdiction’ between its *Loizidou* and *Banković* rulings became evident. While ‘extraterritorial applicability’ was determined as a ‘normal consequence’ of Article 1 of the Convention in the case of *Loizidou*, the Court shifted from this stance in *Banković*⁵⁴ and held that the acts of the states that produce effects outside their territory could amount to an exercise of their jurisdiction within the meaning of Article 1 of the Convention ‘only in exceptional cases’.⁵⁵

In contrast with its *Loizidou* ruling, the Court in the case of *Banković* interpreted the notion of ‘jurisdiction’ by taking into account public international law and applied a very restrictive interpretation of effective control. Therefore, this ruling broke with the antecedent case and the Court did not apply Article 1 extraterritorially. As a result of its *Banković* decision, the Court could not prevent itself from attack and its position received strong criticism concerning restrictive interpretation of this approach from commentators who claimed that ‘the Court limited itself to black letter law principles, not attaching

⁵⁰ *Loizidou v. Turkey* (1996) 23 EHRR 513, para.52; *Drozd and Janousek v. France* (1992) 14 EHRR 745, para. 91; *Chrysostomos, Papachrysostomou and Loizidou v. Turkey* (1991) 68 DR, para.121; *Loizidou v. Turkey* (1995) 20 EHRR 99, para.62.

⁵¹ *Loizidou v. Turkey* (1995) 20 EHRR 99, para.63.

⁵² *Loizidou v. Turkey* (1996) 23 EHRR 513, para.52.

⁵³ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para. 67.

⁵⁴ Orakhelashvili (n 12) p.539.

⁵⁵ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para. 67.

enough weight to the purpose and spirit of the Convention. Fortunately it has not been, and hopefully will not be, followed in the later case law.’⁵⁶

Second, the Court in *Banković* held that extraterritorial jurisdiction was exceptionally found when a respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, ‘exercises all or some of the public powers normally to be exercised by that government’.⁵⁷ However in *Loizidou*, the Court determined that extraterritorial applicability can arise by way of acts and omissions of Contracting States or their authorities.⁵⁸ The Court shifted from this approach in *Banković* and introduced a new requirement for the exercise of extraterritorial jurisdiction through ‘all or some of the public powers’⁵⁹ of a Contracting State which notably was not mentioned in *Loizidou*.⁶⁰

Third, which can also be considered as the Court’s third contrast among these aforementioned cases, in *Banković* it held that extraterritorial applicability to jurisdiction was ‘essentially regional’ and ‘notably in the legal space (*espace juridique*)’.⁶¹ In this respect, the Court regarded the Convention as a multi-lateral treaty that operated in the legal space of the Contracting Parties and was not to be applied throughout the world. On this basis, it concluded that the FRY ‘clearly’ was not within this legal space and thus the applicants and their deceased relatives did not fall within the jurisdiction of the respondent states.⁶² In this regard, the situation in *Banković* was determined as ‘entirely different’ from the Cyprus cases.

The rationale behind this differentiation was the fact that, while the Cypriot government has been a Contracting State, on the other hand, the FRY was not at the time of the bombing. Bearing all this in mind, it is arguable that the desire to avoid a vacuum as regards responsibility for violations of human rights was used in favour of

⁵⁶ Budzianowska (n 15), p. 56; Amnesty International, “*Collateral Damage*” or *Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, at 41–48 (2000).

⁵⁷ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para.71; Orakhelashvili (n12), p.539.

⁵⁸ *Loizidou v. Turkey* (1995) 20 EHRR 99, para. 52.

⁵⁹ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para.71.

⁶⁰ *Loizidou v. Turkey* (1995) 20 EHRR 99, para. 52.

⁶¹ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para. 80.

⁶² *ibid*, para. 82.

extraterritoriality in cases when the territory in question would normally be covered by the Convention such as in Cyprus property cases. In its Cyprus ruling, the Court did not adopt a conservative approach and instead widened the application of extraterritoriality through finding of effective control. However, in *Banković* it was determined that no vacuum had been created since Belgrade was not covered by the Convention.⁶³ In this regard, a conservative approach was adopted through the ‘primarily’ territorial notion of jurisdiction under Article 1.⁶⁴

Against this background, it can be argued that the *Banković* decision is completely inconsistent with the Court’s approach in *Loizidou*. It is, perhaps, for this reason that these two cases have been considered as the most authoritative cases in examining the extraterritorial application of the ECHR.⁶⁵ The Court’s dilemma⁶⁶ and its contradictory positions that have become apparent through its rulings in these two cases have met with some criticism. Although its stance in *Banković* was supported by some,⁶⁷ it could not prevent itself from objection by the majority of others.⁶⁸

Considerable confusion has been created in the Strasbourg jurisprudence on *Loizidou* and *Banković*. It can be argued that the shift in its attitude in examining the factors that were relevant to the Court in reaching these decisions can be considered as a potential legal escape route from the consistent application of extraterritoriality. The Court took into account the large number of troops as an obvious element when deciding extraterritoriality in *Loizidou*. This raises the question of under what rationale the NATO

⁶³ *Banković and others v. Belgium* (2004) 44 EHRR SE 75, para. 80.

⁶⁴ Orakhelashvili (n 12), pp. 529–568; Budzianowska (n15) p. 54; Rick Lawson, ‘Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights’ in Fons Coomans & Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) pp.85,123.

⁶⁵ Budzianowska (n15) p. 54.

⁶⁶ Mark Gibney, Erik Roxstrom & Tenje Einarsen, ‘The NATO Bombing Case (*Banković v. Belgium et al.*): One Step Forward or Two Steps Back?’ *Boston University Journal of International Law*, vol.23 no.55 (2005) p. 87.

⁶⁷ Georg Ress, ‘State Responsibility for Extraterritorial Human Rights Violations. The Case of Banković’, *Zeitschrift für Europarechtliche Studien* vol. 6 (2003) pp. 73–89; Michael O’Boyle, ‘The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on “Life after Banković”’ in: Fons Coomans & Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) pp. 125–139.

⁶⁸ Buyse (n 14) p. 260; Orakhelashvili (n 12) pp. 529–568; Lawson (n 64) pp. 91–92; Martin Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in: Fons Coomans & Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004) pp. 73–81; Michal Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?’, *Netherlands International Law Review*, vol. 52 (2005) pp. 349–387.

bombing, which resulted in the killings and serious injuries of people, was not considered as effective control that generates extraterritoriality, while the number of troops ‘clearly’ raised the issue of extraterritoriality. If such an act with consequences of the killings and injuries of innocent people was not regarded as a result of a control of a state within the meaning of ‘effective control’ then it can be said with some conviction that the Convention organs have sorely failed to fill a vacuum in interpreting this significant term of ‘effective control’.

Another question that went unanswered was ‘why the *Banković* Court would spend so much time on the legality of a Contracting State’s extraterritorial activities when, apparently, it does not seem to matter... [W]hy is it that the Court has spent so much time defending its territorial reading of the Convention when territory has not proven dispositive either?’⁶⁹ The Court’s inconsistent approach to the extraterritorial application of Article 1 is worrying. Another case that illustrates that the application of extraterritoriality was left in abeyance⁷⁰ is *Issa and Others v. Turkey*⁷¹ to which attention will now turn.

*Issa and Others v. Turkey*⁷² is the case that implicitly overrules the case of *Banković*.⁷³ In *Issa*, the Court was faced with the complaints of six Iraqi nationals who alleged that Turkey had violated various provisions of the Convention through a military operation in northern Iraq. The applicants, who were the relatives of the deceased persons, complained of the unlawful arrest, detention, ill-treatment and subsequent killing of their relatives due to Turkey’s military operation in that area.⁷⁴

As regards the concept of ‘jurisdiction’, the Court in its *Issa* judgment drifted away from the territorial notion of jurisdiction and stressed, by referring to *Banković*, that, in accordance with public international law, a state’s jurisdictional competence is primarily territorial. It further added that this concept was not necessarily restricted to the national

⁶⁹ Gibney and others (n 66), p. 90.

⁷⁰ Oliver de Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’, *Baltic Yearbook of International Law*, vol. 6, (2006), pp.10–11.

⁷¹ *Issa v. Turkey* (2005) 41 EHRR 567.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*, para. 4

territory of the contracting states and this time it referred to the case of *Loizidou*.⁷⁵ The Court stated that:

... a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State'. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.⁷⁶

In light of these determinations, the Court expressed its dissatisfaction concerning the claim that the applicants' relatives were within the jurisdiction of the respondent state.⁷⁷ As regards the determination of extraterritoriality by considering the state's 'authority and control', as it appeared in *Banković*, the position was reiterated in *Issa*. While the Court, in *Loizidou*, defined the creation of responsibility of a state by using the term 'area',⁷⁸ in *Issa* the Court's language became clearer by replacing this term with 'territory'.⁷⁹ In the *Issa* case, the Court also considered the possibility that the respondent state could be held responsible through a consequence of military action, in this case that was temporarily exercised, for six weeks, amounting to effective overall control of a particular portion of the territory of northern Iraq.⁸⁰ In this regard, the *Issa* Court did not find sufficient grounds for holding that Turkey exercised effective overall control of the entire area of northern Iraq.⁸¹ The Court reached this determination notwithstanding the large number of troops involved in the aforementioned military operations.

It was inevitable that the case of *Loizidou* would be referred to at this point when the Court stressed the amount of troops involved in the Turkish military operation. Accordingly, the Court held that:

Notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which was obtained in northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases (...). In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case (...)) but with the difference that

⁷⁵ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 67–68.

⁷⁶ *Issa v. Turkey* (2005) 41 EHRR 567, para. 71

⁷⁷ *ibid*, para. 82.

⁷⁸ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 52

⁷⁹ *Issa v. Turkey* (2005) 41 EHRR 567, para. 71; Buyse (n14) p.263; Schutter (n 70) pp. 183–245.

⁸⁰ *Issa v. Turkey* (2005) 41 EHRR 567, para. 74.

⁸¹ *ibid*.

the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.⁸²

Here, the Court made a distinction from its *Loizidou* judgment. Although the number of Turkey's armed forces in Cyprus was no less than the number in Iraq, the Court's decision was not the same as its *Loizidou* ruling. Taking this into account, it can be stated that another new 'measure' for the application of extraterritoriality was introduced to the Court's case law. The distinctive line between these cases was that: in contrast with the case of *Issa*, the presence of Turkish forces in northern Cyprus was over a very much longer period of time and these forces were stationed throughout the whole of the territory of northern Cyprus.⁸³

In essence, in line with the *Issa* case, it is reasonable to state that the length of the passage of time and the extent of the territory over which military forces were present became determining 'new' factors within the context of extraterritoriality. In this regard, since the scope of territoriality is becoming more inconsistent with new measures, it can be argued and expected that within a couple of years the ambiguities in extraterritoriality will increase and become more unpredictable. Turning to the Court's approach, differentiated in *Issa* from its *Loizidou* ruling, it has been suggested that the admissibility decision in *Issa* derives either from the fact that Turkey did not exercise effective control over the entire area of northern Iraq or 'the judicial mechanism of Turkey, a foreign country, was physically and financially inaccessible to them'.⁸⁴

3.2 The case of *Cyprus v. Turkey* (The Fourth Interstate Application of *Cyprus v. Turkey*)

The case of *Cyprus v. Turkey*⁸⁵ is another landmark case for Strasbourg case law, and it also has great importance for Cypriots as well as for the future the property conflict on the island. As will be seen, the Court's gradual change in its attitude towards the Cypriot property claims has become more visible with the judgment of this case. The ambiguity

⁸² *Issa v. Turkey* (2005) 41 EHRR 567, para. 75.

⁸³ *ibid.*

⁸⁴ Rick Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State', in Gerard Kreijen, *State Sovereignty, and International Governance*, Oxford: Oxford University Press, (2004), p. 292.

⁸⁵ *Cyprus v. Turkey* (2001) 35 EHRR 731.

of the Court's approach in the application of P1-1 will evolve in subsequent cases concerning the property rights of displaced G/Cypriots.

As indicated in the beginning of this chapter, this part will examine the gradual change in the Court's attitude in its Cyprus rulings. In order to identify the issues on which the Court has shifted from its previous stance, the examination of these will extend throughout this section. For instance, although the issue of *de facto* expropriation was raised in the *Loizidou* case, this matter will be considered in the following case of *Cyprus v. Turkey*. This approach avoids unnecessary duplication in the Cypriot case analysis. This is because, although the Court has continuously adopted new stands regarding the property cases of Cypriots, in almost all of its subsequent judgments on Cypriot property cases, the Court referred to its previous findings and assessments. This analysis will also illustrate the factors that have influenced the Court's position in the course of these particular cases. Additionally, due to the purpose of this thesis, the focus will be on the issue of the property dispute in the examination of this judgment.

In the case of *Cyprus v. Turkey*,⁸⁶ the RoC alleged that Turkey had continuously violated the majority of the provisions (except for Articles 7, 12, 15 and 16) set out under the ECHR due to its occupation of the northern part of Cyprus since 1974. As a result of this judgment, Turkey was found to be responsible for securing all human rights provided under the Convention and the Protocols it has ratified. The grounds of this decision was Turkey's effective control over northern Cyprus. While reaching this decision, the Court referred to the *Loizidou*⁸⁷ judgment and finally held that the facts complained of fell within the jurisdiction of Turkey. The decision was a bitter disappointment for the Turkish side as the Court held that there had been fourteen violations of the Convention by Turkey. At this juncture, it can be stated that this finding explains why the ruling of *Cyprus v. Turkey* was considered a milestone decision and the 'most important victory on the legal plane'⁸⁸ by the G/Cypriot side.

⁸⁶ *Cyprus v. Turkey* (2001) 35 EHRR 731.

⁸⁷ *Loizidou v. Turkey* (1995) 20 EHRR 99; *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁸⁸ Nikola Kyriakou, 'Enforced Disappearances in Cyprus: Problems and Prospects of the Case Law of the European Court of Human Rights', Université Catholique de Louvain CRIDHO Working Papers, (2011) <<http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO%20WP%202011-01.pdf>> accessed 17 September 2013; Ministry of Foreign Affairs of the Republic of Cyprus, 'The Council of Europe and the Cyprus Question', (15 April 2008), <<http://www.mfa.gov.cy/mfa/mfa2006.nsf/All/90ADC505C94B392BC22571EA00271CC6?OpenDocument>> accessed: 17 September 2013.

In the *Cyprus v. Turkey*⁸⁹ judgment, in respect to the issue of property and the return of displaced G/Cypriots, Turkey argued that these issues were the subject of inter-communal negotiations and further added that the claims regarding property rights could only be resolved through negotiations aimed to achieve the comprehensive settlement of the Cypriot problem.⁹⁰ The rationale behind this is the view that returns would occasion ‘the risk of conflict which the intermingling of the Greek and Turkish-Cypriot communities’ would create.⁹¹

In this regard, the Court maintained that displaced persons continued to be prevented from returning to their previous homes, which constituted a continuing violation of Article 8 of the Convention. The Court reached this consideration regardless of Turkey’s appeal to public safety and domestic law within the ambit of the second paragraph of Article 8. As to Turkey’s view, that the issue of property should be resolved within the framework of the inter-communal negotiations, the Court held that political negotiations, which were still far from reaching any result, could not be invoked to justify the continuing violations of the Convention.⁹² In essence, taking the Court’s approach into account, it is questionable whether the finding of a violation without considering the existence of domestic law would create a ground for the justification of similar interference in cases in which such a law exists.⁹³

Turkey, as a response to the allegation of the RoC regarding its continuing violation of the majority of human rights guaranteed under the Convention as a result of her occupation in the north, claimed that, with the same reasoning as put forward in the previous *Loizidou*⁹⁴ judgment, the acts and omissions complained of were imputable to the TRNC as it is an independent state that had exclusive control and authority over the territory in the north of Cyprus. They further stressed that the Court in its *Loizidou* ruling had erroneously decided that the TRNC was a local administration of Turkey.⁹⁵

⁸⁹ *Cyprus v. Turkey* (2001) 35 EHRR 731.

⁹⁰ *ibid*, paras.16, 33.

⁹¹ *ibid*, para.173.

⁹² *ibid*, para. 169.

⁹³ Buyse (n 14), p. 58.

⁹⁴ *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁹⁵ *Cyprus v. Turkey* (2001) 35 EHRR 731, para. 69.

The Court rejected this argument and reiterated its findings in its former *Loizidou* ruling. It further stated that the grounds of this decision were framed ‘in terms of a broad statement of principle as regards Turkey’s general responsibility under the Convention for the policies and actions of the TRNC authorities’.⁹⁶ Turkey’s responsibility derives from the acts of its soldiers and also the acts of the local administration which survives due to Turkish military or other support. As a result, it held that ‘in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey’.⁹⁷

In fact, in light of the Court’s attitude towards Turkey’s position within the context of the Cyprus conflict, it can be assumed that any violations of the provisions under the Convention occurring in the northern part of the island, which are relevant to the events of 1974, are automatically attributable to Turkey.⁹⁸ It can be argued that the Court disguised the rationale behind its policy on Turkey and established, in essence, the principle of the automatic responsibility of Turkey concerning the violations of human rights in the TRNC. Against this background, it is questionable whether the Court, in the future, will follow the same approach in cases like *Loizidou* concerning other Contracting States to the Convention.

Turkey’s obligation to secure the rights and freedoms provided under the Convention in northern Cyprus is a significant issue that needs to be considered within the context of the Court’s change in its position in its Cyprus ruling. In almost all Cypriot property claims, it was reiterated by referring to the international community’s view that the government of the RoC is the sole legitimate government of Cyprus and thus the TRNC was an illegal entity under international law.⁹⁹ This position was adopted and applied by the Court by taking the Resolutions¹⁰⁰ of the United Nations Security Council (UNSC) as a base. According to these Resolutions, since the sole legitimate government in the island is the RoC, Turkey, in this respect, could not enforce its laws in the north under

⁹⁶ *Cyprus v. Turkey* (2001) 35 EHRR 731, para. 77.

⁹⁷ *ibid.*

⁹⁸ Gibney and others (n 66), p.84.

⁹⁹ *Cyprus v. Turkey* (2001) 35 EHRR 731, para.70.

¹⁰⁰ UN Security Council, *Resolution 550 (1984) Adopted by the Security Council at its 2539th meeting, on 11 May 1984*, S/RES/550 (1984), available at: <[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550\(1984\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550(1984))>, accessed 12 June 2013.

international law.¹⁰¹

In respect of Turkey's obligation in northern Cyprus, to secure the rights and freedoms provided under the Convention, the Court adopted a position which was reiterated in almost every case concerning the property rights of G/Cypriots against Turkey. According to its position, which was established by taking the view of the international community as a base, it considered that the TRNC is not a state under international law and thus the RoC is the sole legitimate government in Cyprus.¹⁰² Flowing from this determination, Turkey cannot enforce its laws in northern Cyprus under international law due to the fact that the RoC is the only legitimate government on the island.¹⁰³

The Court, however, undermined the basis of its decision, in which it regarded Turkey as the responsible state for all violations of human rights that have been occurring in the northern part of Cyprus. This becomes clear when the Court, surprisingly, supported the view that Turkey must introduce remedies 'to individuals generally in northern Cyprus to enable them to secure redress for violations of their Convention rights'.¹⁰⁴ Moreover, in order to support its new position in this respect, it pointed out the purpose of Article 35 of the Convention and therefore continued to maintain that remedies available in the TRNC may be regarded as domestic remedies of Turkey.¹⁰⁵ However, while reaching its decision on Turkey's responsibility, the Court took into account the UN Security Council Resolutions, which stated that Turkey had no legal right to enforce its laws in the TRNC. Against this background, by concluding that Turkey must produce remedies in northern Cyprus, one can assume that the Court implicitly recognised that Turkey had a right to govern that part of Cyprus.¹⁰⁶

Hence, the Court made clear its position on the imputability question by stigmatising Turkey as the sole responsible state for securing all human rights in the TRNC, under the Convention, and by relying on international law as well as the opinion of the international

¹⁰¹ Gibney and others, (n 66), p. 85.

¹⁰² *Cyprus v. Turkey* (2001) 35 EHRR 731, para.70; UN Security Council, *Resolution 550 (1984) Adopted by the Security Council at its 2539th meeting, on 11 May 1984*, S/RES/550 (1984), available at: <[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550\(1984\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/550(1984))>, accessed 12 June 2013.

¹⁰³ Gibney and others, (n 66), p. 85.

¹⁰⁴ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras. 90–102.

¹⁰⁵ *ibid*, para. 102.

¹⁰⁶ Gibney and others, (n 66) p.85.

community. Bearing the foregoing consideration in mind, it is reasonable to state that the Court's opposed approaches, which emerged from the same mainstay, stemmed from the absence of distinct criteria for the application of the Convention's principles. Put another way, it can be argued that, as a result of the Convention's open-ended character regarding interpretation and application of its provisions, the Court in its Cyprus case law 'revived the dead' following the declaration of death of the TRNC.

As regards the Court's decision in the case of *Cyprus v. Turkey*,¹⁰⁷ which required applicants to exhaust domestic remedies in the TRNC in accordance with Article 35 of the Convention, the Court pointed out the advisory opinion of the International Court of Justice in the case of *Namibia*.¹⁰⁸ It is notable that this reference to the *Namibia* case, in order to support the Court's amended attitude towards the domestic remedies in the TRNC, was taken further and became the Court's model case in the ruling of its *Cyprus v. Turkey* judgment.¹⁰⁹ This is evident from the Court's examination of the requirement to exhaust domestic remedies in the *Cyprus* case as it not only took into account the advisory opinion of the International Court of Justice but also applied the same line of thinking from the *Namibia* ruling in its *Cyprus* judgment.

As a result of taking the *Namibia* case as a model in respect of the examination of the validity of legislative and administrative acts of the TRNC, the Court gave a green light to Turkey for the establishment of domestic remedies in accordance with international law, in order to secure redress for violations of the rights provided and guaranteed under the Convention. It ruled that since that there is no obligation in international law to disregard the legitimacy of certain legal arrangements and transactions of *de facto* regimes such as the TRNC, international law recognises the validity of certain legislative and administrative acts of such regimes, 'for instance as regards the registration of births, deaths, and marriages, the effects of which can only be ignored to the detriment of the inhabitants of the [t]erritory'.¹¹⁰

¹⁰⁷ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras. 90–91.

¹⁰⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16.

¹⁰⁹ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras. 91–98.

¹¹⁰ *ibid*, para. 90; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16.

The Court takes the position that if, in a case, it can be proven that remedies in question have been provided for the benefit of individuals and secures prevention of the violations of rights guaranteed under the Convention, then such remedies should be used by individuals. While addressing the special character of the Convention as an instrument for the protection of individuals, the Court highlighted the significance of a vacuum in the protection of the human rights provided under the Convention. On this basis, the Court held that in order to avoid a vacuum in the protection of human rights in the territory of northern Cyprus, use may be made of the remedies set out by the TRNC courts.¹¹¹

The Court supported its position by emphasising that the failure of institutions of *de facto* regimes to produce remedies for human rights violations would work to the detriment of that community. Despite the Court's invitation for the formation of domestic remedies, it did not disregard the possibility of a failure of such institutions to fulfil the requirements indicated by the Court. As a result, these remedies may be required to be exhausted, unless their inexistence or ineffectiveness can be proved – an issue that needs to be examined on a case-by-case basis.¹¹²

It is important at this stage to stress some interesting points in respect of the Court's approach on the lawfulness of legislative and administrative acts of the TRNC within its Cyprus rulings. First, as is indicated above, in the case of *Loizidou*, the Court took the view of the international community on the status of the TRNC into account as a ground for its decision. It considered Article 159 of the TRNC Constitution, which, according to the Turkish authorities, purported to expropriate G/Cypriot properties within the boundaries of the TRNC that were considered abandoned after 1975, as legally invalid under international law. The underlying reason for this determination was that this Article was produced by a secessionist illegal entity whose origin lies in the illegal use of Turkish forces in northern Cyprus.¹¹³

Despite the illegality of the TRNC Constitution being the core of the Court's reasoning in its decisions regarding property claims of Cypriots, it failed to examine the legality of

¹¹¹ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras.78, 91, 92, 98.

¹¹² *ibid*, para. 98.

¹¹³ *Loizidou v. Turkey* (1996) 23 EHRR 513, paras.44–46.

the TRNC and its legislative acts and as a result it adopted the view of the international community instead. It explicitly confined itself with this view by emphasising its unwillingness to deal with the lawfulness of the TRNC and its relevant acts in Cypriot property cases. In other words, the Court omitted all consideration of such a significant issue, and this came to represent the backbone of the Court's established pattern in all subsequent cases concerning the issue of disputed property rights in Cyprus.

The general impression flowing from *Loizidou* and *Cyprus* is that the Strasbourg Court sowed the seeds of belief that, despite the ongoing political negotiations between the parties of this conflict, the issue of property would be resolved in favour of the G/Cypriots by the Court through obligatory restitution.¹¹⁴ Not surprisingly, the Court's favourable position on the property rights of displaced G/Cypriots paved the way for various clone cases being submitted to the Court. In this regard, the number of property cases pending before the Court, primarily by G/Cypriots against Turkey, was approximately 1,400 in 2005.¹¹⁵ This trend, which has resulted in a number of rulings in favour of the G/Cypriot applicants, has contributed to the failure of attempts to achieve a comprehensive and negotiated settlement for the property conflict within the Cyprus problem.

After the failure in 2004 of the G/Cypriots to approve the peace plan, proposed by UN Secretary-General Kofi Annan (the so-called Annan Plan), for the reunification of the island by finalising the long-lasting Cyprus problem in a referendum, the widespread expectation that the Court would take a position in favour of the G/Cypriot perspective on property claims has changed. Although the impact of this political failure on the Court's stance towards the property claims of displaced G/Cypriots has not been explicitly stated, it became abundantly clear with the case of *Xenides-Arestis*.¹¹⁶ Against this background, in order to explore the development of the anomaly of the Court's position in its Cyprus rulings, it is necessary to examine particular factors which gave a new impetus to the issue of property in Cyprus.

¹¹⁴ Williams and Gürel (n 7), p.5.

¹¹⁵ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, para.38.

¹¹⁶ *ibid.*

3.3 The Cypriot Property Saga Has Taken Yet Another Turn with the Case of *Xenides-Arestis v. Turkey*:

Within the case law of the ECtHR in respect of the Cypriot property claimants, *Xenides-Arestis*¹¹⁷ can be regarded as another important case that has contributed not only to the issue of property in Cyprus but also to the ECHR mechanism, within the context of property rights guaranteed under the Convention, in different respects. It is the first application after the failure of the Annan Plan that the Court had to deal with. What is also worth considering in this case is that the Court applied a pilot judgment procedure, adjourning all other cases, in order to examine Law no. 49/2003. In its decision, it held that this law did not provide an effective remedy. Therefore it ordered Turkey to introduce a remedy which would secure genuinely effective redress not only for the applicant in the case of *Xenides-Arestis*, but also for all similar applications pending before it.

It should also be stressed that *Xenides-Arestis* is the case in which it is clearly illustrated how the weight of politics in Cyprus started to increase in the Court's case law in the matter of Cypriot property claims. In a sense, it is a landmark case which reflects the attempts of the parties to use the Courtroom in Strasbourg as a battlefield for the property war among themselves by using the Annan Plan as a weapon in order to develop their arguments. At this juncture, it is worth noting that in 2010 the Court had met with severe criticism from the G/Cypriot side on the grounds that the *Demopoulos v. Turkey and 7 other cases*¹¹⁸ ruling, in which the Court adopted the so-called pilot judgment procedure, was highly political in that it was an attempt to avoid repetitive Cypriot property cases being brought before it.¹¹⁹ In this regard, it can be argued that, it was not the Court but, mainly, the Turkish and the G/Cypriot sides that started to implicitly politicise the Court's case law through their arguments around the admissibility stage of the *Xenides-Arestis* case. This raises the question of whether the political nature of the property cases has been used by the parties to object to the Court's rulings when a judgment is made against them. The answer will be apparent in the following section of this chapter where the case

¹¹⁷ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

¹¹⁸ *ibid.*

¹¹⁹ Alexia Solomou, 'Case Report on *Demopoulos & Others v. Turkey*', *The American Journal of International Law*, vol. 104, no.4 (2010) p.631; Loukis G. Loucaides, 'Current Legal Developments: Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos* Case?' *Legal Journal of International Law*, vol. 24 (2011) pp.435–465; Williams and Gürel (n7) pp. 11–13.

of *Demopoulos* will be examined. Against this backdrop, the facts of the *Xenides-Arestis* and the parties' attitudes in this case deserve to be examined.

In the case of *Xenides-Arestis*, the applicant, Myra Xenides-Arestis, was a Cypriot national of G/Cypriot origin who complained of a continuing violation of her right to respect for the home (Article 8), her right to peaceful enjoyment of her possessions (P1-1) and the prohibition of discrimination (Article 14) under the Convention. She owned a plot of land and three houses, including her home where she lived with her family in Famagusta, a town in northern Cyprus. The applicant complained that she has been prevented from living in her home or using her property since 1974 due to the division of the island by the conduct of Turkish military forces in the northern part of the island. She further alleged that this act amounted to discrimination under the ECHR.

At the admissibility stage of the *Xenides-Arestis* application, the Turkish side raised the preliminary objection that the applicant should exhaust Law no. 49/2003 as a domestic remedy as required by Article 35 of the Convention. In relation to the availability, effectiveness and adequacy of the remedy proposed under Law no. 49/2003, the Turkish government referred to the Annan Plan to support the view that this law should be accepted as a domestic remedy. The Turkish government further argued that the significance of the plan lies in the acknowledgement of the reality that the 'physical restitution of property is likely to be limited and is only likely to be available as part of a wider political settlement and not by way of individual applications to the Court'.¹²⁰ According to the applicant, due to the fact that Law no. 49/2003 arose from an illegal source established as a subordinate local administration of Turkey that has no validity in international law, this remedy was inadequate and ineffective. Therefore, Law no. 49/2003 could not be regarded as a domestic remedy for the purposes of Article 35(1) of the Convention.

After considering the arguments of the parties, the Court rejected the Turkish government's plea of inadmissibility for non-exhaustion of domestic remedies on the grounds that the remedy proposed by the TRNC did not satisfy the requirements provided under Article 35(1) of the ECHR. In this respect, the Court held that Law no. 49/2003

¹²⁰ ECtHR, *Xenides-Arestis v. Turkey* (admissibility decision of 14 March 2005 (unpublished)).

was not an effective or adequate means for redressing the complaints of the applicant. What is remarkable here is that, in addition to the determination of the unsatisfactory nature of Law no. 49/2003 as a complete system of redress, the Court took a further step and pointed out the deficiencies of this law.

It can be argued that, although this decision was not in favour of the T/Cypriot side, in essence, the Court, by stressing the deficiencies, took the first step to assist the Turkish government in producing an effective and adequate domestic remedy for the property claims. This approach in reaching this decision was remarkable in the sense that if the Turkish authorities would set down another law in accordance with the Court's suggestions, then this new law might be considered as a domestic remedy to deal with property claims in the TRNC.¹²¹ The Court's implicit invitation to the Turkish government to produce another law that could be determined as a domestic remedy became evident in the judgment on merits of the *Xenides-Arestis*.

By taking into account the Court's assessment of the remedy proposed by the TRNC authorities, it can be said that *Xenides-Arestis* is one of the leading authoritative cases on the issue of whether compensation and restitution mechanisms of post-conflict societies¹²² and of 'entities that look and act like states'¹²³ could be seen as effective remedies. In this regard, the significance of the case in question and all other Cypriot property cases ought to be made apparent by realising their actual relationship to the issue of property claims of displaced persons and refugees in post-conflict situations. Since the Court's judgment at the admissibility stage of *Xenides-Arestis* set out guidelines by pointing out the deficiencies of Law no. 49/2003 and suggestions for the amendments of the property compensation mechanism provided under this law, the Court's findings in this case deserve a close examination.

As indicated above, the Court rejected Turkey's preliminary objection that the applicant should exhaust the domestic remedy provided by Law no.49/2003 on the grounds that the proposed remedy by the Turkish government did not satisfy the requirements under

¹²¹ Ayla Gürel & Kudret Ozersay, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle', *Middle Eastern Studies*, vol.44, no.2 (2008) pp.291–292.

¹²² Buyse (n 14) p.212.

¹²³ Nina Caspersen and Antje Herrberg, 'Engaging Unrecognised States in Conflict Resolution: An Opportunity or Challenge for the EU?', *The Crisis Management Initiative (CMI)*, Brussels, 2010, p. 7.

Article 35(1) of the Convention and thus it was not considered as an effective or adequate remedy. What is particularly important in this assessment is that the Court explicitly highlighted that the elimination of the restitution award was the major defect of the law in question. According to the Court, a property mechanism to remediate the rights of displaced persons could not be regarded as a complete system of redress for the interference of property rights if it fails to provide the possibility of restitution as a remedy, but only compensation. In order to support its finding, the Court referred to the cases of *Papamichalopoulos and Others v. Greece* and *Brumărescu v. Romania*¹²⁴ in which it held that:

If the nature of the breach allows of restitution in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 50 (art. 50) empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.

Although the Court in *Xenides-Arestis*, as well as in a number of cases regarding the property claims of displaced G/Cypriots,¹²⁵ has repeatedly ruled that the applicants had not lost title to their property located in northern Cyprus, no requirement for specific restitution as a precondition for the adequacy of a domestic remedy has been established. In other words, the holding of legal title may not require the restitution of possession of property to the G/Cypriot owners. Against this backdrop, it can be stated that the Court, without any explicit statement, did not disregard the interest of the current users who had possession of the properties of displaced G/Cypriot owners.

In the *Xenides-Arestis* judgment, the Court did not lay down clear criteria as to what type of alternatives – such as exchange and/or compensation – must be provided by a domestic remedy in order to consider it as a complete system of redress. As indicated above, the Court explicitly stated that the major defect of the TRNC's purported remedy was the absence of the possibility of restitution. By taking into account the Court's assessment, it is conceivable that even if the other deficiencies, which were pointed out by the Court,

¹²⁴ *Papamichalopoulos v Greece* (1993) 16 EHRR 440, paras.34–38; *Brumărescu v. Romania* (2001) 33 EHRR 36, paras. 19–22.

¹²⁵ *Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731; *Demades v. Turkey*, (decision of 31 July 2003), (unreported); *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey* (2003) 39 EHRR 772.

had been cured, the elimination of the restitution award would have turned this remedy into an inadequate remedial mechanism. The Court's approach to the issue of effectiveness of a domestic remedy seems to suggest that providing a restitution option should be the minimum requirement for the creation of an effective domestic mechanism within the context of property claims.¹²⁶

In this regard, it has been maintained that the Court's assessment in *Xenides-Arestis* of the compensation-based remedy of the TRNC is applicable to the issue of local compensation and a restitution system in respect of post-conflict societies. It has been further argued that by means of this decision in question, the Strasbourg Court made clear its position in examining the effectiveness of domestic remedies in the post-conflict context. Accordingly, states should provide at least the restitution option under their property mechanism for refugees or displaced persons within the matter of the compensation scheme of the post-conflict situations.¹²⁷

In addition to the major striking feature of Law no. 49/2003, the Court underlined additional points that need to be considered. First of all, it stressed that the compensation offered by Law no.49/2003 was limited to damages concerning pecuniary loss for immovable property and no provision was made concerning movable property or non-pecuniary damages. Second, the law did not address the applicant's complaints under Article 8 and Article 14. Although the Court stressed that the aforementioned issues were withheld under the proposed remedy, it did not explicitly explain the rationale behind its concerns in this respect, stating instead, 'although compensation is foreseen, this cannot in the opinion of the Court be considered as a complete system of redress regulating the basic aspects of the interferences complained of.'¹²⁸ In this connection, one could suggest that the terms of an effective domestic remedy would have considered the compensation for non-pecuniary damages and the notion of home under Article 8 of the Convention.¹²⁹

Finally, the Court made a suggestion in respect of the composition of the compensation commission that was established in accordance with the provisions of Law no. 49/2003.

¹²⁶ Buyse (n 14) p. 213.

¹²⁷ Anneke Smit, *The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution*, New York: Routledge (2012) pp. 18–19; Buyse (n 14), p. 213.

¹²⁸ *Xenides-Arestis v. Turkey*, (admissibility decision of 14 March 2005) (unpublished), p.21.

¹²⁹ Buyse (n 14) p. 213.

Since the majority of the commission's members were living in the displaced G/Cypriot properties, the Court raised its concern on the issue of impartiality of the compensation commission. In this respect, the Court recommended that an international composition would enhance the commission's standing and credibility.

As a result, in its 2005 admissibility decision, the Court held that the compensation-based remedy proposed by the Turkish government could not fully redress the negation of the applicant's property and therefore, Law no.49/2003 was not an adequate or effective remedy. In the judgment, on the merits, of December 22, 2005 in the *Xenides-Arestis* case, the Court followed the same approach in its previous Cyprus property rulings and once again held that there had been violation of the rights to the home and to property (Article 8 and P1-1 respectively) under the Convention. However, what is considerably different from its previous judgments was that the Court in this judgment ordered Turkey to introduce a remedy which 'secures the effective protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 in relation to the present applicant as well as in respect of all similar applications pending before the Court'.¹³⁰ Accordingly, the Court adjourned its consideration of all similar Cypriot property complaints.

Taking into account the Court's attitude at the judgment on the merits of *Xenides-Arestis*, it can be stated that this is another landmark case within the context of property disputes in the Court's case law in which the Court initiated a pilot judgment procedure by pointing out the various number of repetitive cases pending before it by G/Cypriots against Turkey. The rationale behind the Court's amended attitude in this respect was the fact that the violation of the applicant's rights in the instant case was flowing from a problem affecting a large number of people. The Court stressed the seriousness of this situation, which could not be ignored, by highlighting the approximate number of 1,400 repetitive property cases pending before it.¹³¹

It seems clear from the Court's assessment in *Xenides-Arestis* that the increased number of cases had a profound impact on its shift in attitude towards the case law in respect of the Cypriot property claims. In essence, the caseload that resulted from a number of

¹³⁰ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, para.40.

¹³¹ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, paras. 38–40.

repetitive cases, which was driven from the same problem, preponderated over the realisation of the complexity of those Cypriot property complaints. In line with the Strasbourg Court's reasoning, it can be argued that the concern about the ability to cope with significant numbers of repetitive cases not only led the Court to retain its role in relation to the principles of subsidiarity¹³² in its Cyprus case law but also created grounds for the recognition of a compensation or restitution mechanism of an unrecognised entity as an effective remedy.

The Court held, in a number of cases, that large numbers of applications deriving from the same cause represent a significant threat to the future effectiveness of the Convention's machinery.¹³³ In such cases, the Court has underlined the subsidiary character of its own nature. This explains why the subsidiary nature of the Strasbourg system has gained a prominent position in the case of *Xenides-Arestis*.

Similarly, in a number of cases, the Court ruled that it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent state's obligations under Article 46 of the Convention.¹³⁴ On the grounds of this reasoning, the Court adopted an approach and has ruled repeatedly in such cases that:

...in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate ... the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases.¹³⁵

In the same vein, the Court in the *Xenides-Arestis* judgment retained its subsidiary role in order to lower the backlog of approximately 1,400 property cases pending before it.¹³⁶ In

¹³² Buyse (n 14) p. 214; Williams and Gürel (n7) p.214.

¹³³ *Broniowski v. Poland* (2004) 40 EHRR 21, para. 193; *Bottazzi v. Italy* (1999) ECHR 62, para.22; *Di Mauro v. Italy* (1999) ECHR 63, para.23.

¹³⁴ *Broniowski v. Poland* (2004) 40 EHRR 21, para. 193.

¹³⁵ *Bottazzi v. Italy* (1999) ECHR 62, para.22; *Di Mauro v. Italy* (1999) ECHR 63, para.23.

¹³⁶ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, para.38.

accordance with the Court's approach in this judgment, it can be argued that, in respect of post-conflict property rights, an entity which is not internationally recognised as a state but is regarded as a subordinate local authority of a Contracting State, may also be able to produce a restitution or compensation mechanism that can be regarded as an effective domestic remedy. As for Cyprus, the Court created the grounds to recognise a property regulation of the Turkish government that may be seen as a domestic remedy to deal with G/Cypriot property claims.

Moreover, the Court played a pivotal role in showing which route the Turkish side should follow in order to be able to produce an effective local remedy. Although the failure of the Turkish government to produce an acceptable local remedy was confirmed in *Xenides-Arestis*, in essence, the Court gave endorsement for it to take the right steps in the next attempt. It was clear that the present case could help avoid future failures by the Turkish side if they agreed to set out a new property mechanism by taking the Court's guidance as a basis.

Within the context of the Cyprus issue, the Strasbourg Court, with the *Xenides-Arestis* decision, took a further step, which both parties of this prolonged conflict had repeatedly failed to do for more than five decades. Moreover, this decision can also be considered as a significant case within the context of post-conflict property remedies,¹³⁷ as it has opened the door to a new form of redress which would be determined as a domestic remedy.

By the time the Court made its judgment on just satisfaction in *Xenides-Arestis*, in order to implement the Court's order at the merits stage of this case, the TRNC Parliament enacted the new 'Law for the Compensation, Exchange and Restitution of Immovable Properties' (hereinafter 'Law no. 67/2005') which entered into force on December 22, 2005 and the 'By-Law made under Sections 8(2)(A) and 22 of 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 Convention' (Law no. 67/2005) which entered into force on March 20, 2006. It appeared from its name that the legal framework of the aforementioned law rendered this proposed remedy *prima facie* capable of providing effective redress in respect of G/Cypriot property claims.

¹³⁷ Buyse (n 14) pp. 214, 217.

Following its enactment, the new Law no. 67/2005 was in need of a new commission in order to examine G/Cypriot applications. Accordingly, the Turkish government took into account the Court's recommendations in the *Xenides-Arestis* case and established the new 'Immovable Property Commission' (hereinafter the IPC) under Law no.67/2005 to deal with property claims made in respect of properties within the scope of the new regulation. It is notable that the major difference between the new Commission and the former one that had been set up under Law no. 49/2003 was that the IPC had the competence to decide on the restitution, exchange of properties or payment of compensation.

One of the most considerable differences between Law no. 67/2005 and the former property regulation was that Law no.67/2005 allows restitution in situations in which the ownership or the use of the property 'has not been transferred to any natural or legal person other than the State' and when the restitution of such property 'shall not endanger national security and public order and ... such property is not allocated for public interest reasons and ...the immovable property is outside the military areas or military installations'.¹³⁸ In this respect, one could argue that the new legal phase within the context of Cypriot property matters has begun to follow the enactment of the new property mechanism produced by the Turkish side.

Another further step taken in line with the Strasbourg Court's guidance in *Xenides-Arestis* concerned the composition of the new commission. Under the new legislation, the IPC, composed of a president, a vice-president, and a minimum five, maximum of seven members was established. In order to implement the Court's advice in respect of the impartiality of a property commission, it was regulated under the new legislation that at least two members of the IPC 'shall not be nationals of the Turkish Republic of Northern Cyprus, United Kingdom, Greece, Greek Cypriot Administration or Republic of Turkey'.¹³⁹ Furthermore, with regard to the issue of retrospective effect of Law no. 67/2005, it was explicitly indicated that those people who had applied to the Court, regarding their complaints on those properties located in the north of Cyprus, before the

¹³⁸ Section 8 of the 'Law for 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' (Law no. 67/2005), 22 December 2005.

¹³⁹ Section 11/1 of the Law no.67/2005.

entry into force of the new law, may also apply to the IPC.¹⁴⁰

Against this backdrop, it should be said without any prejudice that the Turkish government took into account the Court's recommendations, pointed out in its decision on admissibility and the judgment on the merits of *Xenides-Arestis*, in order to produce an effective domestic remedy to deal with property claims of G/Cypriots. On 7 December 2006, the Court in its final judgment of *Xenides-Arestis* (just satisfaction) held that:

The Court welcomes the steps taken by the Government in an effort to provide redress for the violations of the applicant's Convention rights as well in respect of all similar applications pending before it. The Court notes that the new compensation and restitution mechanism, in principle, has taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005.¹⁴¹

The question to which an answer is sought here is whether the Turkish government departed from its traditional stance in respect of the settlement of the property issue and adopted an opposite approach, not only in theory but also in practice, to their well-known 'global exchange and compensation' perspective. In order to illustrate that they pulled their weight and took concrete steps in accordance with the Court's recommendations, the Turkish side submitted the numbers of applications that the IPC examined at the time of the judgment on *Xenides-Arestis*.¹⁴² There were sixty applications that had been lodged with the IPC and the examination of nine of these had been concluded. In six of these applications, the applicants received a payment by way of compensation and in the remaining applications the IPC decided on the restitution of the properties in question.¹⁴³

The Court's new attitude, which seemed to be in favour of the Turkish side, became obvious when it explicitly 'welcome[d] the steps taken by the government'.¹⁴⁴ What is notable, however, is that although the Court held that Turkey as a respondent government, 'in principle', took all necessary measures into account in complying with the previous judgments,¹⁴⁵ the Court did not examine and confirm the effectiveness of the proposed remedy, Law no. 67/2005. Not surprisingly, the aforementioned shift in the Court's

¹⁴⁰ Article 21 of Law no.67/2005.

¹⁴¹ *Xenides-Arestis v. Turkey (just satisfaction)* Judgment 7 December 2006, 44 EHRR SE 13, para.36.

¹⁴² *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

¹⁴³ *Xenides-Arestis v. Turkey (just satisfaction)* Judgment 7 December 2006, 44 EHRR SE 13, para. 12.

¹⁴⁴ *Xenides-Arestis v. Turkey (just satisfaction)* Judgment 7 December 2006, 44 EHRR SE 13, para. 37.

¹⁴⁵ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

position was not without consequences. Following its assessment on the new compensation and restitution mechanism, the Court met with some criticism. In particular, there was a strong correlation between the Court's appreciation of the Turkish government's effort to provide redress for the violation of the Convention rights and the rejection of the Annan Plan by the G/Cypriots.¹⁴⁶

The basis for the foregoing argument was that there was a considerable number of clone cases that were brought primarily by G/Cypriots before the Court against Turkey. Following the decision in the case of *Loizidou*, the number of applications deriving from the same problem has ballooned to an unmanageable level. By the time of the judgment in *Xenides-Arestis*, there were more than 1,400 repetitive G/Cypriot cases before the Court. If the comprehensive settlement plan had been approved by both G/Cypriots and T/Cypriots, G/Cypriot property cases would have been out of the Court's jurisdiction. However, since the plan was not approved in the G/Cypriot referendum, the settlement plan did not enter into force. This meant that the effectiveness of the Court and thus the human rights protection system of the Convention were still under threat of repetitive Cypriot cases.¹⁴⁷

Taking the unresolved Cyprus problem into consideration, it could convincingly be argued that the Strasbourg Court is not the one that should pay the price for such a long-standing political failure of the parties. With the increase in the caseload as well as the issue of the Convention's effectiveness, the establishment of an effective remedy became more significant than ever in respect of the Court's case law on its Cyprus rulings. In 2010, the Court took a further step and adopted a new approach in order to deal with those cases of G/Cypriots. In order to examine whether Law no. 67/2005 satisfied the requirements of adequacy and effectiveness of domestic remedies under Article 35 of the ECHR, the Court selected eight test-cases: the *Demopoulos v. Turkey and 7 other cases*.

The case of *Demopoulos* is, perhaps, one of the most significant cases in respect of the

¹⁴⁶ Nikos Skoutaris, 'Building Transitional Justice Mechanisms without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus Issue', *European Law Review*, vol. 35 no.5 (2010) p.633.

¹⁴⁷ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, para 38; Nikos Skoutaris, 'The European Courts as Political Actors in the Cyprus Conflict' in Francis Snyder and Imelda Maher (eds.), *The Evolution of the European Courts: Institutional Change and Continuity: Sixth International Workshop for Young Scholars (WISH)* Bruylant, Brussels (2009) pp. 235–257.

Court's case law concerning the property complaints of Cypriots. As will be examined, this judgment has changed the stagnant framework of the property debate within the context of the Cypriot conflict in many respects, from both a political and a legal aspect. Put another way, it is the landmark case that has broken the line of the Court's Cyprus rulings into a 'pre-*Demopoulos*' and a 'post-*Demopoulos*' era. Not surprisingly, the Court's new attitude against the property cases from Cyprus has considerable consequences both at the local and international level. With its decision on *Demopoulos*, the Strasbourg Court has met with severe criticism and moreover, for the first time within the line of Cypriot property cases within the Court's case law, the efficiency of the Convention's system was questioned. In this regard, the case of *Demopoulos*, which has carried the issue of property conflict into a new era, deserves to be examined in detail.

3.4 The Last Stop of the Property Claims: *Demopoulos v. Turkey and 7 other cases*

On March 1, 2010, the *sui generis* nature of the cases concerning the property conflict in Cyprus became more apparent than ever when the Strasbourg Court delivered its decision in *Demopoulos v. Turkey*.¹⁴⁸ This is the first judgment in which the Court examined the effectiveness of a remedy set out by the authorities of an entity which is not recognised as a state at international level.¹⁴⁹ The decision created a controversial area that has raised significant legal debates and opposing views concerning the effectiveness of Law no. 67/2003 as a domestic remedy. With this judgment, the Court has become the main actor in respect of the property saga on the island.

In the case of *Demopoulos and 7 others*,¹⁵⁰ all of the applicants were Cypriot nationals of G/Cypriot origin who claimed to own immovable and/or movable property in the northern part of Cyprus under the control of the TRNC. They alleged that they had been deprived of their property rights since 1974 due to the division of the island by the Turkish military forces. The applicants argued that they had been prevented from having access to and from using and enjoying their homes and property in that part of the island by the Turkish forces following the invasion of northern Cyprus by Turkey. In this respect, they complained principally under Article 8 of the Convention and P1-1.

¹⁴⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306.

¹⁴⁹ Skoutaris (n 148), p. 720.

¹⁵⁰ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 40.

The Court mainly examined whether the proposed remedy of the TRNC satisfied the requirements that were set out in the Court's previous decision in *Xenides-Arestis*,¹⁵¹ in which the pilot judgment procedure was developed in order to deal with large numbers of repetitive cases that derive from the same widespread problem. In its decision, it found that Law no. 67/2005, established by the TRNC authorities, could constitute an effective domestic remedy within the meaning of Article 35(1) of the ECHR and the G/Cypriot applicant property owners were required to exhaust this remedy before applying to the Court. By virtue of the fact that the applicants in *Demopoulos* had not made the use of this mechanism, their complaints under P1-1 were rejected on the ground of non-exhaustion of domestic remedies in accordance with Article 35(1) of the Convention.¹⁵²

In light of the aforementioned finding, the Court's new approach towards the Cypriot property claims, introduced in the *Xenides-Arestis* case, took the most concrete and recent form with the judgment in *Demopoulos*. This becomes clear when the Court's findings in the case of *Demopoulos* are considered in detail. Moreover, the reasoning in reaching these findings explains why legal and political debates in respect of the issue of property have been raised, particularly following the decision in the *Demopoulos* case. Therefore, in order to grasp the way in which a new dimension¹⁵³ to the right to property within the Convention mechanism has been brought about with the *Demopoulos* decision, it will be useful to analyse the Court's assessments on particular points that have received some severe criticisms in the legal and political arena.

In establishing its framework for examining the *Demopoulos* case, the Strasbourg Court primarily applied the pilot judgment procedure to cases concerning property in northern Cyprus. In respect of the issue of exhaustion of domestic remedies, the Court stressed that the protection mechanism established by the Convention was subsidiary to the national systems safeguarding human rights. In this respect, the Court pointed out its supervisory role in the implementation of the obligations of the Contracting States under the

¹⁵¹ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185, para. 38.

¹⁵² *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 127. Article 35(1) of the ECHR provides that: 'The Court may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

¹⁵³ Williams and Gürel (n 7) p. 5.

Convention. Since it was the responsibility of the Contracting States to ensure that the fundamental rights and freedoms under the Convention were respected and protected on a domestic level, it could not usurp this role. This situation derived from the fact that the rule of exhaustion of domestic remedies was the fundamental aspect of the functioning of this system of protection.¹⁵⁴

In applying the principle of exhaustion of domestic remedies in the *Demopoulos* case as a pilot case of eight G/Cypriot applicants, the Court made significant determinations regarding the context of these applications. It should be highlighted that these determinations had not been pointed out until the present judgment in a way that enabled the Court to approach its decisions on Cyprus cases consistently. In this respect, the Court stressed that the arguments of all the parties mirrors the chronic political conflict between the RoC and Turkey concerning the resolution of the property issue.

The Court further underlined the passage of thirty-five years since the applicants lost possession of their property in the northern part of the island. Interestingly, departing from its former judgments on Cyprus, the Strasbourg Court, this time, called attention to the chain of inevitable consequences in respect of the property issue that had been brought on by the elapsing of thirty-five years as follows:

Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance.¹⁵⁵

On the basis of the aforementioned observation, the Court held that the present cases were burdened with a political, historical and factual complexity flowing from a problem. The highly complicated context of such a problem primarily requires to be resolved by all parties assuming full responsibility for finding a political solution on a political level. The Court considered it necessary to interpret and apply the Convention to the case of *Demopoulos* by taking into account the combination of factors as the factual circumstances of this judgment: the complex origin of the cases, the passage of time and

¹⁵⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 69; *Akdivar and others v. Turkey* (1996) 23 EHRR 143.

¹⁵⁵ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 84.

the prolonged failure of the parties to reach a political solution to the Cyprus problem.¹⁵⁶

In light of the above observation, it can be argued that it is only at a very late stage that the Court has become aware of the highly political nature of the Cyprus property cases, which primarily require a political resolution at the domestic level. This is evident when one takes into account the former judgments on Cyprus. In almost all these cases concerning the property claims of Cypriots, the Turkish government has repeatedly argued that the issue of property was one of the core items in the inter-communal talks, such negotiations being the only appropriate way of resolving this problem. This view was put forward for the first time in the case of *Loizidou* and has been followed in all subsequent cases regarding the property claims from Cyprus. What is remarkable, however, is that, as a response to this argument, the Court held that the fact that property rights were the subject of inter-communal talks involving the two communities could not justify the interference with property rights under the Convention.¹⁵⁷ This determination was adopted by the Court and became a traditional approach as well as a basis in reaching its decisions in this respect until very recently.

Here, it should be stressed that the Turkish side, by supporting the view that the question of right to property could only be resolved within the framework of the inter-communal talks,¹⁵⁸ did not attempt to justify the interference with property rights, but essayed to procure acceptance of the political nature of the Cypriot property claims. It can validly be argued that the Turkish government was all along supporting the Court's most recent position towards the complexity of the cases deriving from a problem that should be resolved by both communities. Put another way, it seems from the *Demopoulos* judgment that the Court, after more than a decade, departed from its traditional approach and tends towards the position of the Turkish government.

With regard to the first question of whether remedies available in the TRNC, in particular, the IPC mechanism, could be regarded as domestic remedies of Turkey for the purposes of Article 35(1) of the Convention, the Court held that the IPC procedure may be so

¹⁵⁶ *ibid*, paras. 83–86

¹⁵⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 64.

¹⁵⁸ *Cyprus v. Turkey* (2001) 35 EHRR 731, para. 29.

regarded.¹⁵⁹ In light of the above considerations regarding the complex nature of cases, the Court, in determining whether the IPC system may be regarded as a domestic remedy, focused on four main issues.

First, the Court examined the applicants' arguments that the assessment as to exhaustion of domestic remedies should be, in principle, carried out with reference to the date on which the applications were lodged with it. In respect of their case, the applicants alleged that since there were no exceptional situations to justify a departure from this rule, they were not required to exhaust a remedy which was set out after they lodged their applications.¹⁶⁰ As a response, the Court held that such an assessment was normally carried out with reference to the date on which the applications were lodged. However, this rule is subject to exceptions that may be justified by the particular circumstances of each case.¹⁶¹ In a number of judgments, the Court departed from this general rule, particularly in cases, for example, concerning remedies against the excessive length of proceedings¹⁶² and cases in respect of a new compensation for interference with property.¹⁶³

As to the circumstances in *Demopoulos*, the Court stressed that remedies proposed by the Turkish side, particularly the IPC mechanism, were produced to provide redress for the Convention violations of persons whose applications were pending before the Court that concerned similar issues. By taking this situation into account with the subsidiary character of its role, the Court held that the aforementioned exception was applicable in this case.¹⁶⁴ Therefore, although the remedies under consideration were enacted after the applications had been lodged, the applicants were required to exhaust these remedies.

Second, the Court examined the government of the RoC's argument that the applicants were not required to exhaust the IPC as it was a TRNC remedy. They further maintained that, according to the rule of exhaustion of domestic remedies, the applicants were only

¹⁵⁹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 103.

¹⁶⁰ *ibid.* para.58.

¹⁶¹ *Baumann v. France* (2001) 34 EHRR 1041.

¹⁶² *Nogolica v. Croatia* (2002) ECHR 2002-VIII. *Andrášik and Others v. Slovakia* (2002) ECHR 2002-IX; *Icyer v Turkey*, Judgment of 9 February 2006, (unreported).

¹⁶³ *Charzyński v. Poland* (2005) ECHR 2005-V.

¹⁶⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras. 87–88.

required to exhaust G/Cypriot remedies.¹⁶⁵ The Court considered this as an artificial argument and rejected it. In order to support this decision, the Court then went on to explain the reason for this rejection on two grounds.

In this regard, the first rationale behind this decision revolves around the issue of imputability. The Court stated that its competence to examine the claims brought by G/Cypriots against Turkey concerning their property located in the north of the island derives from the fact that Turkey has been held responsible for the acts and omissions of the authorities that produce effects in that part of Cyprus in a number of cases. In this respect, the Court went on to state that any domestic remedy that is produced by the TRNC authorities or institutions ‘may be regarded as a “domestic remedy” or “national remedy” vis-à-vis Turkey for the purposes of Article 35 § 1’.¹⁶⁶ As to the second reason for rejecting this argument, the Court stressed that Law no. 67/2005 and the IPC were established as a consequence of its holding in *Xenides-Arestis*¹⁶⁷ that Turkey had to introduce a remedy which secures the effective protection of the rights set out in P1-1 in relation to the applicant in *Xenides-Arestis* as well as in respect of all similar applications pending before the Court.¹⁶⁸

On the basis of the reasoning made, it can be argued that the Court was in line with its earlier judgments in respect of complaints against Turkey concerning the alleged violation of human rights in north Cyprus. In this connection, it can correctly be presumed that it would have been self-contradictory for the Court not to reject the argument in question. By the same token, in such a situation, tremendous inconsistencies among its previous findings in significant issues would have been created. This is because, in examining the Cyprus cases, significant determinations have been made in respect of the application and interpretation of the provisions under the Convention.

In essence, what is remarkable here is that the Court, in examining the cases regarding the property conflict in Cyprus, reached some authoritative findings concerning important issues within its case law. For instance, the determinations of the Court in the question of

¹⁶⁵ *ibid.*, para. 64.

¹⁶⁶ *ibid.*, para. 89; *Cyprus v. Turkey* (2001) 35 EHRR 731, para. 101–102.

¹⁶⁷ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

¹⁶⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 89.

imputability, the extraterritorial application of the Convention and the establishment of state responsibility¹⁶⁹ have been referred to in similar subsequent applications against other Contracting States.¹⁷⁰ Therefore, it seems that, if the Court had not rejected the present argument, its credibility in assessing significant issues within its case law would have been undermined.

The Court, thirdly, examined the argument that no obligation to exhaust domestic remedies arose since there was an administrative practice of ongoing violations of the applicants' rights. The Court referred to the inter-state case,¹⁷¹ in which the European Commission of Human Rights found that the TRNC authorities' refusal to allow the entry of G/Cypriots into northern Cyprus reflected the acknowledged public policy of the authorities and therefore constituted an administrative practice. This was because, at the time of this holding, the applicable legislation and official policies did not render the formation of effective remedies possible.¹⁷² However, in the case of *Demopoulos*, the Court held that this situation has changed with Law no.67/2005, which sought to provide a mechanism of redress, and found it necessary to open the way for Turkey to take further steps to eliminate administrative practice.

It is abundantly clear that, within the context of the Cyprus property dispute, continuing failure of politics to achieve a mutually agreed compensation or restitution mechanism at the local level has gradually become a serious threat to the Convention mechanism. As indicated above, the new property mechanism under Law no. 67/2005 and the IPC came into existence as the consequence of the Court holding in *Xenides-Arestis* that Turkey had to introduce a remedy which secured the effective protection of the rights under the Convention.¹⁷³

Importantly, in respect of property claims of Cypriots, it has taken nearly a decade for the Court to support the Turkish government, under its guidance, in producing adequate

¹⁶⁹ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 52.

¹⁷⁰ *Banković and others v. Belgium* (2004) 44 EHRR SE 75.

¹⁷¹ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras. 264–265.

¹⁷² *ibid*, paras. 171–184.

¹⁷³ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185; UN General Assembly, *Implementation of General Assembly Resolution 60/251* of 15 March 2006 entitled 'Human Rights Council', Report of the Office of the High Commissioner for Human Rights on the Question of Human Rights in Cyprus: Note by the Secretary-General, p 3.

redress for its violations in northern Cyprus, since its first judgment concerning the alleged violation of property rights under the Convention. In essence, the Court reached a point in which it adopted its most recent position in its Cyprus rulings, subsequent to the rejection of the Annan Plan, a position which included a property mechanism for the resolution of the property issue, in favour of the G/Cypriots. In addition to the repetitive cases of Cypriots, the subsidiary character of the Strasbourg Court has become more of an issue within the Court's case law regarding the Cyprus cases with the realisation that these cases constitute a serious threat to the future effectiveness of the Convention's machinery.

Against this backdrop, it really has to be asked what the Court's attitude towards the repetitive Cyprus cases would be, should the comprehensive settlement plan never come into existence. To be more precise: which factual circumstances would have triggered the Court to depart from its traditional pattern in Cyprus rulings? Taking into account the fourteen-year timeline of the Court's case law in respect of northern Cyprus, a considerable change in the Court's approach to the Cypriot property cases can clearly be observed. However, the Court's standards in its Cyprus judgments are still unclear and unpredictable. There is no doubt that this situation derives from the origin of these cases which, can be regarded as an 'ancient conflict' between two communities. But what is even more considerable is the essentially unresolved status of this problem. Accordingly, it can be maintained that, with regard to the aforementioned questions, as long as the Court examines cases that are the consequence of unresolved conflicts between the parties of the claims particularly burdened with historical, legal and political issues, there will be an increase in the inconsistencies among its judgments.

Bearing all this in mind, it is conceivable that, in addition to the increased number of clone cases, the examination of cases originating from an unresolved conflict that affects a significant number of individuals may also represent a serious threat to the Convention's mechanism. This becomes abundantly clear when one considers that there is no established case law regarding such conflicts, as there is in Cyprus cases, including where the violation of Convention rights may arise in an unrecognised entity/ state at international level. This may lead to an unpredictability and inconsistency in the jurisprudence of the Court and therefore may become a threat to the effectiveness and credibility of the Strasbourg Court.

Turning to the case of *Demopoulos*, the Court rejected the fourth argument, that requiring exhaustion lent legitimacy to an illegal occupation. In order to support its decision, the Court referred to the previous finding in the inter-state case¹⁷⁴ and to the so-called ‘Namibia Principle’¹⁷⁵ by maintaining that ‘... even if the legitimacy of the administration of a territory is not recognised by the international community, “international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory”’.¹⁷⁶ It went on to state that the mere fact that there was an illegal occupation ‘does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention’.¹⁷⁷

The Court, in line with its previous judgments on northern Cyprus, held that Turkey was the responsible state for the actions and policies of the TRNC and for those affected by such policies and actions. This is due to the overall control exercised by Turkey over the territory of northern Cyprus. These policies and actions fall within the jurisdiction of Turkey for the purpose of Article 1 of the Convention, which makes Turkey accountable for violations of Convention rights that take place in that part of the island. This accountability entails Turkey taking positive steps for the protection of Convention rights.¹⁷⁸ In essence, the rationale behind this reasoning can also be considered as the avoidance of the Court’s self-contradiction concerning its previous findings in this respect.

In addition to Turkey’s accountability for violations of the Convention in the TRNC, another crucial consideration for the Court was to avoid a vacuum. In the Court’s view, the creation of a legal vacuum would operate to the detriment of the inhabitants of the TRNC or to those who live outside of that territory who may claim to have been the victims of infringements of their rights. Receiving protection of the Convention rights of individuals on a daily basis has an outstanding importance in the Court’s jurisdiction.

¹⁷⁴ *Cyprus v. Turkey* (2001) 35 EHRR 731, paras. 89–102.

¹⁷⁵ *Advisory Opinion of the International Court of Justice in the Namibia case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), [1971] International Court of Justice Reports 16., p. 56, para. 125).

¹⁷⁶ *ibid*; *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.94.

¹⁷⁷ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.94.

¹⁷⁸ *ibid*, para. 95.

Therefore, regardless of in which part of the island the applicants live, the rule of exhaustion of domestic remedies under Article 35(1) of the Convention is applicable if an effective remedy is available in the northern part of the island for the complaints of the applicants concerning their rights under the Convention.¹⁷⁹

In light of these findings, the Court held that remedies available in the TRNC, in particular the IPC procedure, may be regarded as domestic remedies of Turkey for the purpose of Article 35(1) of the Convention. Following this finding, the Court went on to examine the effectiveness of Law no. 67/2005 and the IPC mechanism.

3.5 Determination of Whether Law no. 67/2005 and the IPC Provide Practical and Effective Remedies

In respect of the existence of practical and effective remedies, the Court found that Law no. 67/2005 provides an accessible and effective framework of redress concerning complaints about interference with the property owned by G/Cypriots.¹⁸⁰ In assessing the applicants' and the government of RoC's arguments on the lack of effectiveness of the IPC mechanism, the Court examined four issues in this regard: the adequacy of the redress, the independence and impartiality of the redress, the adequacy of the compensation to G/Cypriots and the accessibility and efficiency of the remedy.

As regards the adequacy of the redress, the applicants and the government of the RoC put forward that the main objective of the IPC mechanism was to legitimise the illegal seizure of the G/Cypriot property but not to provide effective redress for property owners. On this basis, they regarded the new restitution and compensation system as a 'sham or smoke screen' mechanism. This argument was supported on two bases. First, there was no provision in the IPC procedure to acknowledge the breaches of the rights and, second, the IPC mechanism was based on Article 159 of the TRNC Constitution which purported to expropriate the G/Cypriot property.¹⁸¹ They underlined the low percentage of property that had been restored and further argued that restitution had to be the primary remedy.¹⁸²

¹⁷⁹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 95.

¹⁸⁰ *ibid.*, para. 127.

¹⁸¹ *ibid.*, para. 106.

¹⁸² *ibid.*

As a response to the argument concerning the ambition to legitimise the illegal seizure of the G/Cypriot property, the Court reiterated the finding in the case of *Loizidou* which had become a doctrine concerning the status of the TRNC. On the basis of the fact that the international community did not regard the TRNC as a state under international law, and thus the sole legitimate government of Cyprus was the RoC, the Court held that it could not attribute legal validity to Article 159 of the TRNC Constitution. Although the fact that Article 159 had not been repealed, according to the Court, the international law position and the findings of the Court in this regard have been acknowledged by the TRNC authorities.¹⁸³

Additionally, the Court maintained that the Turkish government no longer contested their responsibility under the Convention for the areas in the northern part of the island that are under the control of the TRNC. The Court continued to note that the Turkish authorities acknowledged the rights of G/Cypriot owners to remedies for breaches of their rights under P1-1, which was reflected to the IPC mechanism. This acknowledgement was considered as an indication that the IPC mechanism sought to apply the Court's findings and guidance in the earlier cases.¹⁸⁴ Moreover, the Court also maintained that the specific recognition of a violation of rights by the authorities was not generally a requirement under Article 35(1) of the Convention.¹⁸⁵ In light of the above consideration, the Court found no basis to hold that 'the adequacy of the remedy is affected by lack of any formal indication of unlawfulness or breach of rights'.¹⁸⁶

In assessing the criticism regarding an 'overly-restrictive' approach to the restitution of possession of property to G/Cypriots, the Court reiterated that the validity of Article 159 of the TRNC Constitution was rejected in its previous cases.¹⁸⁷ Since G/Cypriot owners continued to be regarded as the legal owners of title, there was a continuing violation of P1-1 due to the continuing denial of access to and enjoyment of G/Cypriot property. For this reason, G/Cypriot owners did not claim compensation for the loss of the properties

¹⁸³ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 107.

¹⁸⁴ *ibid*, para. 108.

¹⁸⁵ *ibid*, para. 109.

¹⁸⁶ *ibid*, para. 109.

¹⁸⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 44.

but only pecuniary damages.¹⁸⁸ What is remarkable, here, is that the Court, differing from its previous Cyprus rulings, drew attention to the possible outcome of this situation. In this regard, it could be the case that G/Cypriot owners of properties located in the north may apply to the Court ‘periodically and indefinitely’ in order to claim loss of rents until the comprehensive settlement of the Cyprus problem.

In this regard, the Court stressed the time-dependent changes following the loss of possession by the owners. In many cases, property has changed hands in various ways such as by gift or succession. Another concern of the Court was possible property claims of those who may have never seen or ever used the property in question. In light of these presumptions, after the Court questioned ‘to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice’, it regarded such losses ‘increasingly speculative and hypothetical’.¹⁸⁹ In this respect, the Court recalled that ‘there has 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’.¹⁹⁰

Taking this rationale into account, it could be argued that the Court disregarded the property claims of legal successors of G/Cypriot owners. Although the Court recognised the legal ownership of the applicants over the properties in question, this approach seems to exclude the individuals who have never seen or used the property in question. In line with the Court’s position in this respect, one could argue that the protection of rights of G/Cypriot claimants whose property could be regarded their ‘home’¹⁹¹ within the meaning of Article 8 of the Convention outweighs the rights of individuals who have no significant links to those properties they left in the northern part of the island. The Court, in the case of *Gillow*,¹⁹² ruled that an applicant who built a house and moved into that house with an intention to live in it and established no other domicile elsewhere could be regarded to have ‘strong and sufficient links’¹⁹³ with his or her house. According to the Court, this was sufficient to consider that house his or her home within the meaning of

¹⁸⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 110.

¹⁸⁹ *ibid.*, para. 111.

¹⁹⁰ *ibid.*

¹⁹¹ *Gillow v. UK* (1982) 11 EHRR 335, para. 46.

¹⁹² *ibid.*

¹⁹³ Buyse (n 14), p. 115.

Article 8 of the ECHR.¹⁹⁴

It seems that the claim of a property owner whose house falls within the notion of ‘home’ under Article 8 will receive more lenient assessment than the legal owner who had not retained ‘sufficient and continuing links’ with his or her house. It is conceivable on this point that the passage of time factor has gained importance within the scope of property claims of individuals from post-conflict societies.

In the same vein, the Court gave a prominent place to the time factor in assessing G/Cypriot property claimants’ rights to the home under Article 8 of the ECHR and current T/Cypriot occupants. The claims concerning the loss of possession by G/Cypriot owners whose property was not to be considered their ‘home’ was regarded as ‘increasingly speculative and hypothetical’. The Court went on to state that the passage of time may break a link between ownership and possession and may also eradicate the holding of a title.¹⁹⁵

In this regard, the Court emphasised that recognition of the breaking power of the time factor should not be equated to the applicants in *Demopoulos* having lost their ownership. Taking into account the cause of the eviction, it has been held that title could not be legally imputed to the invading power as a form of adverse possession in the case of military occupation. That being said, the Court found it unrealistic to directly order Turkey to ensure that the 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’.¹⁹⁶ In essence, the current situation of the claimed properties has become a determinant factor in assessing the property claims of G/Cypriot owners. Although the loss of possession caused by military forces does not remove ownership, it may weaken the link between owner and the claimed property with the passage of time.

In this respect, it may true to state that it is at a very late stage that the rights of current

¹⁹⁴ Grgic and others, *The Right to Property under the European Convention of Human Rights, A Guide to the Implementation of the European Convention on Human Rights and its Protocols*, Human Rights Handbook No. 10, Strasbourg: Council of Europe (2007) p. 19.

¹⁹⁵ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 111.

¹⁹⁶ *ibid*, 112.

users or other factors related to those properties in question (whether they are located in a militarily sensitive zone or used for vital purposes) are considered noteworthy enough to be taken into account while examining the rights of G/Cypriot property claimants. In fact, it seems clear that any interference with the rights of persons who currently occupy the properties in question may not be justified for the protection of the rights of the owners.

In light of these considerations, the Court noted that the attenuation over time of the tie between the holding of title and the possession of the property must have consequences on the nature of the redress which can be considered as fulfilling the requirements of Article 35(1) of the Convention.¹⁹⁷ What is remarkable is that the Court gave a green light to the Turkish government to produce remedies that take into account the current situations of the occupants and the properties claimed for.

As for the nature of the redress, it has been established in the Court's case law that the Contracting Parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. If the nature of the breach allows *restitutio in integrum*, it is for the respondent state to implement it. However, if it is not possible to restore the position, in such situations where national law does not allow or allows only partial reparation, the Court has imposed alternative forms of reparation. It is Article 41(1) of the ECHR which empowers the Court to impose alternative requirements on the Contracting State¹⁹⁸ to pay compensation for the value of the property.¹⁹⁹

The Court noted that this approach has been consistently applied in various cases, even to those concerning unlawful expropriations of property.²⁰⁰ It has been accepted by the Court that this principle is also applicable where the illegality is on an international level. In respect of Turkey's occupation in the northern part of the island, the Court may not depart from this approach in assessing applications concerning interference with property rights. Following this position, the Court seems to be taking the position that the

¹⁹⁷ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 113.

¹⁹⁸ *Selcuk and Asker v. Turkey* (1998) 26 EHRR 477.

¹⁹⁹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 114; *Papamichalopoulos v Greece* (1993) 16 EHRR 440.

²⁰⁰ *Papamichalopoulos v Greece* (1993) 16 EHRR 440; *Iatridis v. Greece* (1999) 30 EHRR 97.

respondent government can award the property claimant other forms of redress including compensation and alternative non-monetary redress. It appears that State Parties are not obliged to implement *restitutio in integrum* even if violation of property rights derive from illegal occupation of a Contracting State over the territories of other states.

As a response to the applicant's argument that to allow Turkey to apply alternative remedies other than *restitutio in integrum* would lead Turkey to benefit from its own illegality, the Court stressed the notion of property within the Convention mechanism. It further went on to indicate that 'property is a material commodity which can be valued and compensated for in monetary terms'.²⁰¹ No unfair balance between the parties appears as long as compensation is paid in accordance with the Court's case law. Besides compensation, the Court recognised that an exchange of property may also be an acceptable redress within this field.

The Court explained the rationale behind this approach by stressing the passage of some thirty-five years since the applicants or their predecessors in title left their property in the north. According to the Court, the lapse of some thirty-five years was sufficient to refrain from imposing an obligation on the respondent state to implement restitution in all cases, as to act otherwise 'it would risk being arbitrary and injudicious' for the Court.²⁰² It further rejected an argument aimed at preventing the respondent State from taking into account other considerations, in particular the position of third parties. Imposing an obligation on Turkey to provide restitution would mean ignoring the rights of the current occupants of the properties claimed. It has been stressed that following such an approach would pave the way for new violations of human rights.

It has been stressed that following such an approach would establish a basis for new violations of human rights that would affect various numbers of individuals. In this context, the Court held that:

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.²⁰³

²⁰¹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 115.

²⁰² *ibid*, para. 116.

²⁰³ *ibid*, para. 116.

In a nutshell, the Court seems in its most recent Cyprus ruling to be taking the position that the lapse of thirty-five years is thus sufficient: to allow the respondent state to implement remedies other than restitution even though the cause of violation originates from an illegal use of force; to consider the situations of current users to those properties in question; to weaken the link between the owner and the claimed property, which may outweigh the rights of current users and not to consider any interference with the rights of these users justifiable to protect the rights of the owners.

It is notable that, by accepting ‘compensation’ and ‘exchange’ as alternative forms of redress, the Court did not reject ‘restitution’ as a remedy for the violation of applicants’ rights. Within the scope of the Convention mechanism, the Court stated that the principal purpose of restitution is to mitigate the consequences of violations of property rights. However, imposing an obligation on the respondent state to effect restitution to put an end to the violations and re-establish the situation concerning property matters may create new violations of human rights. In order to refrain from creating new breaches of property rights of various numbers of people, the Court found it crucial to ensure that the redress applied to those old injuries does not create new violations of individuals’ rights.²⁰⁴ Therefore, the property mechanism provided to remedy the breaches of property rights should consider the particular circumstances in each case.

Taking into account the Court’s earlier judgment in *Xenides-Arestis*, it appears that restitution was seen as a precondition for a remedial mechanism concerning the property claims of displaced persons.²⁰⁵ The absence of any provision for restitution was regarded as the major deficiency of the proposed remedy, Law no. 49/2003, of the respondent state. Taken together with the Court’s approach in *Demopoulos*, it seems clear that balancing the interests of G/Cypriot property owners with the interests of the current occupants has also gained a prominent place within the context of a complete system of redress. This became evident in the case of *Demopoulos* when one considers the Court’s stance, which allowed Turkey to choose the type of redress to remedy its violations of property rights on the grounds of the concept of a margin of appreciation.

²⁰⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 117.

²⁰⁵ *Xenides-Arestis v. Turkey*, (2005) 44 EHRR SE 185.

Failure of a domestic remedy in creating a balance between the aforementioned interests of individuals may result in new violations of rights protected by the Convention. According to the Court such a balance can best be obtained by Contracting States as it is they are ‘who are in the best position to assess the practicalities, priorities and conflicting interests on a domestic level’.²⁰⁶ This rationale impelled the Court to leave the choice of implementation of the most appropriate form of reparation to Contracting States. It explicitly stated that this approach can also be followed in the case of the northern part of Cyprus. Taking these considerations into account, as to the new law of the respondent government, the Court held that ‘no problem therefore arises as regards the impugned discretionary nature of the restitutionary power under Law 67/2005’.²⁰⁷

Finally, in assessing the adequacy of Law no. 67/2005, the Court noted that the amount of property that is eligible for restitution in practice, whether a small proportion or not, cannot be considered as a factor that undermines the effectiveness of the new redress of the respondent government. The Court recalled its previous finding, in which the lack of any provision for restitution was determined as a defect. Taking into account the fact that restitution of property had already occurred at the time of its judgment in *Demopoulos*, the Court concluded that ‘the amended law has made good of this shortcoming’.²⁰⁸

The independence and impartiality of the IPC is another issue that needed to be examined in order to decide whether the IPC provided a practical and effective form of redress to G/Cypriot property claimants. Since Law no.67/2005 would be implemented by the IPC, its composition was crucial in the matter of independence and impartiality of the property mechanism. The Court rejected the applicants’ arguments in this respect and found ‘no specific, and substantiated, grounds concerning any lack of subjective impartiality of members of the IPC have been put forward’.²⁰⁹

In reaching this decision, two factors were taken into account. First, the Court pointed out that the IPC is made up of a minimum of five (and a maximum of seven) members, two of whom are independent international members. Second, none of its members are living

²⁰⁶ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 118

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*, para. 119.

²⁰⁹ *ibid.*, para. 120.

in houses owned or built in property owned by G/Cypriots as such persons are expressly excluded. The Court further noted that the illegal nature of the regime under international law and the existence of the Turkish army or the appointment of the IPC members by the TRNC president could not remove any objective impartiality or independence from the IPC.

It appears that the Court's stance taken here is in line with its earlier judgment.²¹⁰ In assessing the composition of the former commission, which was established under Law no. 49/2003, it had raised concerns about its independence and impartiality as the majority of its member were occupants of G/Cypriot property. Moreover, the Court in *Xenides-Arestis* suggested that an international composition would enhance the commission's standing and credibility.²¹¹

As to the arguments of the applicants concerning the adequacy of the compensation, the Court was not convinced that 'the sums of compensation awarded under Law no. 67/2005 will automatically fall short of what can be regarded as reasonable compensation.'²¹² It noted that the amount of compensation awarded for pecuniary damages in *Xenides-Arestis* was EUR 800,000, which was the equivalent of the figure of CYP 466,289 put forward by the IPC. In assessing this issue, the Court also pointed out the case of *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey* in which a friendly settlement had been reached and then approved by the Court.²¹³

The final examination was the accessibility and efficiency of the remedy. The concern of the applicants in this issue was the burden of proof which was placed on claimants by Law no. 67/2005. The Court explicitly stated that the requirement that immovable or movable property claimants provide title deeds or proof of ownership was a necessary and unavoidable precondition to making an application. The Court concluded that applicants claiming property are required to prove their ownership or title beyond reasonable doubt by noting that the same burden of proof is often relied on by the

²¹⁰ *Xenides-Arestis v. Turkey*, Decision on Admissibility of 14 March 2005, unpublished.

²¹¹ *ibid.*

²¹² *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.123.

²¹³ *Eugenia Michaelidou Developments Ltd. and Michael Tymvios v. Turkey* (2003) 39 EHRR 772, para. 121.

Court.²¹⁴

The Court noted that the need to attend numerous sessions of the IPC as a part of the process for submitting a claim for property does not render the IPC mechanism ‘unduly onerous or inaccessible’.²¹⁵ As to another concern, that decisions were unreasoned and lacking in transparency, the Court pointed out that most of the claims have been settled at an earlier stage of a decision on the merits from the IPC. There are only few cases that have reached the merits stage of a decision, which is not sufficient enough to draw any general conclusion concerning the process of the IPC.²¹⁶ According to the new compensation and restitution mechanism, a right of appeal lay with the TRNC High Administrative Court. Therefore, the Court noted that if any property claimant considered that there had been material unfairness or procedural irregularity they would have a right to appeal the IPC decision before the TRNC High Administrative Court.

In light of these considerations, the Court concluded that Law no. 67/2005 provides an accessible and effective framework of redress to G/Cypriot property claimants for their complaints about interference with property rights. As to the case of *Demopoulos*, since the applicant property owners had not made use of the IPC mechanism in respect of property claims, the Court rejected their complaints under P1-1 to the Convention for non-exhaustion of domestic remedies.²¹⁷

In this respect, the Court made its finding clear in that applicants are not required to apply to the IPC. If applicants do not want to submit their claims for a decision by the IPC, they may choose to await a comprehensive settlement of the Cyprus problem. In any event, if any applicant wishes to bring a claim concerning his or her rights under the Convention before the Court, the aforementioned principles and approach will be applied in the admissibility of this claim. Accordingly, applicants who have exhausted available domestic remedies in pursuant to Article 35(1) of the Convention can bring their complaints before the Court, through its supervisory jurisdiction, in conformity with the principle of subsidiarity.²¹⁸

²¹⁴ *ibid*, para.124.

²¹⁵ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 126.

²¹⁶ *ibid*.

²¹⁷ *ibid*, para.127.

²¹⁸ *ibid*, para. 128.

In a number of cases, the Court stressed that the supervision system set up by the Convention is subsidiary in character.²¹⁹ The principle of subsidiarity represents one of the cornerstones of the Court's case law and has extremely important consequences for the process of applying the Convention.²²⁰ It has been recognised as a basic principle for the process of implementing the Convention.²²¹ The Court explicitly indicated the subsidiary nature of the Convention as follows:

The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ...The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26).²²²

In this respect, the rule of exhaustion of domestic remedies is generated from the subsidiary nature of the Convention. In a number of cases, the Court reiterated that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention 'obliges those seeking to bring their case against the state before an international judicial organ to use first the remedies provided by the national legal system.'²²³ Therefore, states are given an 'opportunity to put matters right through their own legal system'.²²⁴ It has been recognised that this rule is based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system.²²⁵ Here, the underlying rationale is the principle of subsidiarity, which recognises that 'the primary competence and duty of the State [is] to protect effectively within the domestic legal order the fundamental rights and freedoms enshrined in the Convention'.²²⁶

As has been recognised in Article 1 of the Convention, it is for the Contracting Parties to secure the rights of everyone within their jurisdiction. In other words, a person has to exhaust national remedies that have been provided in relation to the alleged violations.

²¹⁹ *Akdivar and Others v. Turkey* (1996) 23 EHRR 143, para. 64.

²²⁰ *ibid.*, para. 3.

²²¹ Herbert Petzold, "The Convention and the Principle of Subsidiarity" in Ronald St. J. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for the Protection of Human Rights*, The Hague: Martinus Nijhoff Publishers (1993) pp. 50, 59–60.

²²² *Handyside v. UK* (1976) 1 EHRR 737, para. 48.

²²³ *ibid.*, para. 48; *Aksoy v. Turkey* (1996) 23 EHRR 553, para. 51.

²²⁴ *Akdivar and Others v. Turkey* (1996) 23 EHRR 143, para. 64; *Handyside v. UK* (1976) 1 EHRR 737, paras. 47–48.

²²⁵ *ibid.*, para. 64.

²²⁶ Petzold (n 223) pp. 59–60.

As is set out in Article 1 of the Convention, the primary responsibility for securing the enjoyment of the rights and freedoms guaranteed by the Convention falls upon the national authorities while the responsibility of the Convention institutions are secondary in this respect due to the fact that their main objective is ‘essentially to guide and to assist with a view to ensuring that the Convention States secure to individuals the necessary protection through their own institutions and procedures.’²²⁷

As to the case of *Demopoulos*, the Court found no grounds for exception of the application of the principle of subsidiarity. The paramount importance of this principle of ensuring the protection of rights at national level was stressed.²²⁸ It appears that, where practical and effective remedies are available, the principle of exhaustion of those remedies is applicable.

At this juncture, it is interesting to note that, less than two weeks before the Court’s decision in *Demopoulos*, the significance of the subsidiary nature of the supervisory mechanism established by the Convention was emphasised at the High Level Conference meeting at Interlaken on February 18–19, 2010. A deep concern in respect of a large backlog of applications before the Court was stressed and the crucial consequences of this situation were explicitly indicated:

...this situation causes damage to the effectiveness and credibility of the Convention and its supervisory mechanism and represents a threat to the quality and the consistency of the case-law and the authority of the Court.²²⁹

During the conference, it was reiterated that the State Parties are obliged to ensure that the rights and freedoms set forth in the Convention are fully secure at the national level. In this regard, a call has been made to those states for a strengthening of the principle of subsidiarity. The conference also invited the Court to ‘apply uniformly and rigorously the criteria concerning admissibility and jurisdiction and take fully into account its subsidiary role in the interpretation and application of the Convention.’²³⁰

²²⁷ *ibid*, p.61.

²²⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.101.

²²⁹ The ‘High Level Conference on the Future of the European Court of Human Rights’ ended with the passing of the Interlaken Declaration, 19 February 2010, <<http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/>>accessed: 17 September 2013.

²³⁰ *ibid*.

It seems clear that the principle of subsidiarity is fast gaining importance in line with the increase in applications before the Court. This situation is stressed by the president of the Court, Jean-Paul Costa, when he called upon the State Parties to the Convention to use the Interlaken Conference to emphasise state support for the Court as well as to initiate a process of long-term reform of the Strasbourg control system.²³¹

In the memorandum of President Costa with a view to preparing the Interlaken Conference, he noted that the Convention system and the Court had achieved remarkable success. However, he expressed a deep concern about the consequences of the Court's heavy caseload and pointed out that the number of new applications was almost 50,000 and the number of cases pending was almost 100,000 at the end of 2008. He went on to identify three categories of cases from these numbers: first, the numerous inadmissible cases; second, repetitive applications usually well founded and reflecting a structural problem already diagnosed by the Court; and third, rare applications raising new issues.

Turning to the situation in Cyprus, it is clear that G/Cypriot applications concerning the alleged violations of property rights fall under the second category. Importantly, it must be noted, a particular emphasis has been placed on what maybe the appropriate measures that could be taken immediately without amending the Convention. The ones that are relevant to the Cypriot claims can be determined as follows:

Many of the problems will be resolved if the States take the necessary preventive and corrective measures at national level ... and if they execute the Court's judgments promptly. The Court can and must help them by... adopting a judicial policy giving more extensive effect to Article 13 which is one of the key elements of *subsidiarity* and in respect of which Article 35 (the obligation to exhaust domestic remedies before bringing a case to Strasbourg) is the opposite side of the coin.

States should be encouraged to participate in certain methods or procedures initiated by the Court: friendly settlements and unilateral declarations; *pilot judgments* and 'freezing' of cases of the same type pending a general solution.

More effective implementation at national level and application by the national courts not only have the potential to reduce the case-load. They also make it easier for the Court to maintain an appropriate distance from national proceedings in *full compliance with the principle of subsidiarity*.²³²

²³¹ Alastair Mowbray, 'The Interlaken Declaration: The Beginning of a New Era for the European Court of Human Rights?' *Human Rights Law Review* (2010) vol. 10, no.3, pp. 519–528

²³² Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, < www.coe.int/t/dc/files/themes/protocole14bis/03072009_Memo_Interlaken_anglais.pdf.> accessed: 11 June 2013.

In the case of *Demopoulos*, the Court's approach to the issue of domestic remedies in the north part of Cyprus seems in parallel to the points stressed in the Interlaken Conference. Although the Court's decision – Law no. 67/2005 provides an accessible and effective framework of redress in respect of complaints about interference with the property owned by G/Cypriots – has met with severe criticism,²³³ it can correctly be argued that this decision is the major contributor to the progress of the property dispute in Cyprus. This is evidently true if one considers that the number of repetitive cases, all based on similar property issues, from Cyprus, was more than 8,000 at the time of *Demopoulos*.²³⁴ In addition to its local impact, the Court decision in *Demopoulos* is also of importance, to some extent, in relation to the effectiveness of the Convention system through reducing the flood of repetitive applications before the Court.

Demopoulos is the first case in which the Court, for the first time in its Cyprus rulings, rejected the G/Cypriot complaints under P1-1 to the Convention for non-exhaustion of domestic remedies by way of the TRNC. Since the Court found the IPC to be an effective domestic remedy for the purpose of Article 35(1) of the Convention, with this ruling, G/Cypriots have no longer direct recourse to the Court for their complaints concerning interference with property rights. Hence, this judgment broke with the Court's traditional approach towards the Cypriot property cases. Not surprisingly, the decision triggered strong criticism, which will be examined in the next chapter of this thesis, in respect of the Court's new stance in such cases.

3.6 The Property Regime of the Annan Plan and its Impact on the Cyprus Rulings of the Strasbourg Court

A proposal for a comprehensive settlement of the Cyprus problem, the so-called Annan Plan, failed since the majority of the G/Cypriots voted against it. Therefore, the plan has become null and void, and has no legal effect. To put it differently, the peace plan is effectively dead and thus as is the property mechanism proposed under it. However, it

p. 6. (emphasis added).

²³³ Arguments in this debate will be examined in Chapter 4.

²³⁴ Press and Information Office of the RoC, 'Commentaries, Editorials and Analysis' (8 August 2010), <www.moi.gov.cy/moi/pio/pio.nsf/All/24C351AE3A568355C22576E0004B72DF?OpenDocument> accessed: 19 September 2013.

can validly be argued that the spirit of the dead plan is still around and the plan itself remains a point of reference within the context of the property issue in Cyprus. This is clear if one considers two particular cases. The first one is the case of *Xenides-Arestis* in which the parties to the case attempted to use the Annan Plan to develop their arguments. The second one is the case of *Demopoulos*, which can be differentiated from *Xenides-Arestis*. This is because, in *Demopoulos*, it was the Strasbourg Court that referred extensively to the Annan Plan and further analysed the complex treatment of property claims provided by the plan. In order to understand whether the plan had an impact on the Court's recent Cyprus ruling, it will be beneficial to briefly look at the property mechanism set out by the plan.

Following the displacement due to the division of the island in 1974, authorities of both communities established rules for the dispossessed properties of displaced Cypriots. As indicated earlier, the nature of these regulations was in line with the contradictory perspectives of the two communities on the Cyprus problem. In particular, the T/Cypriot side had no concerns in respect of G/Cypriot properties in the north as they were supporting the view that the property conflict should be resolved in accordance with the 'established principle of bi-zonality' or otherwise through 'global exchange and compensation'.²³⁵ Accordingly, a provision, in line with this perspective, was provided under the TRNC Constitution, which declared abandoned G/Cypriot properties in the north as 'the property of the TRNC notwithstanding the fact that they are not so registered in the books of the Land Registry Office'.²³⁶ This approach had no legal consequences until the advent of the *Loizidou* case.

On 28 January 1987, Turkey accepted the competence of the European Commission of Human Rights and of it to receive petitions according to Article 25 of the Convention and on 22 January 1990, it recognised the compulsory jurisdiction of the Court in all matters concerning the interpretation and application of the Convention that relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention. These were the major developments which were regarded as strategic moves aimed at facilitating Turkey's membership to the EU.²³⁷

²³⁵ Gürel & Kudret (n 5), p.12.

²³⁶ Article 159 of the TRNC Constitution.

²³⁷ Dilek Kurban 'Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation,

As to Turkey's presence in Cyprus, the aforementioned recognition opening the way for displaced G/Cypriots to access the Court and bring their claims concerning the alleged violation of their rights against Turkey. *Loizidou* was the first judgment in this context and the Court found Turkey responsible for human rights violations in the northern part of Cyprus. This finding was reiterated in all subsequent cases concerning similar complaints by G/Cypriots and became a well-known fact in the Court's Cyprus rulings. It is important to note that when the Turkish government rejected the implementation of the Court's decision in *Loizidou*, on the basis that the issue was related to the settlement of the Cyprus problem, the case became a significant political obstacle for Turkey.

During the year of 1999, the pressure on Turkey to comply with this ruling had steadily grown. Turkey faced possible suspension of its membership of the Council of Europe. Additionally, Turkey's refusal to comply with the Court's decision in *Loizidou* would also jeopardise its EU accession prospects.²³⁸ Taking these considerations into account, Turkey, finally, implemented the Court's decision and thus paid Ms Loizidou over one million dollars in compensation for the loss of use of her property in the north. In essence, with the rise of G/Cypriot property claims before the Court, settlement of the Cyprus conflict was a prerequisite of the EU accession process of Turkey.²³⁹

The European Council Summit, held in 1999, recognised Turkey as a candidate for EU membership. Turkey's contribution to the settlement of the Cyprus problem was therefore one of the requirements for its accession into the EU. On 11 November 2002, the new government of Turkey formed by the AKP (Justice and Development Party) clearly supported the final version of a UN-sponsored proposal for the reunification of Cyprus. The Annan Plan was put to separate and simultaneous referenda in both parts of the island on April 24, 2004. In the referenda, 64.9% of T/Cypriots voted for the plan, whereas 75.8% of G/Cypriots vetoed it. The Annan Plan did not enter into force and became null and void. Following the rejection, the RoC entered the EU as a divided island on 1 May 2004.

Implementation and Domestic Reform' Turkish Economic and Social Studies Foundation (TESEV) Publications, (2007); Tufan Erhurman, *Kibris'ta Akil Tutulmasi*, Lefkosa, Isik Kitapevi Yayinlari (2007) p.193.

²³⁸ Erhurman (n 237) pp. 194–196.

²³⁹ *ibid*, p.201.

The proposed Foundation Agreement in ‘The Comprehensive Settlement of the Cyprus Problem’ was submitted to separate simultaneous referenda. It therefore did not enter into force. The rejection of the plan was regarded as a ‘missed opportunity’ to resolve the Cyprus question. While the G/Cypriots’ decision to veto the plan marked a ‘major setback’, the decision of the T/Cypriots was ‘welcomed’. In his report, the UN Secretary-General clearly expressed his disappointment with this result and called upon the members of the Council to ‘give a strong lead to all States to cooperate both bilaterally and in international bodies, to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development’²⁴⁰ and added that such a support must be interpreted as a positive contribution to the resolution of the Cyprus question and not a recognition of the TRNC as a state.

As a result, the strong support of the T/Cypriots for reaching a settlement had no legal consequences other than ‘gaining a moral high ground’²⁴¹ at international level. As to Turkey’s stance during the referendum period, the UN Secretary-General maintained that ‘the effort to reach a settlement received an immeasurable boost’ with Turkey’s support and its new policy on Cyprus.²⁴² As to the G/Cypriot position, particularly the G/Cypriot President Tassos Papadopoulos’ call for rejecting the plan three days before the referenda, enlargement commissioner Günter Verheugen declared that he was disappointed in this attitude of the G/Cypriot leadership and emphasised this in his speech held in the European Parliament:

I feel personally cheated by the Government of the Republic of Cyprus. I have done my utmost,..., in good faith and trusting in the promises made by the Greek Cypriot Government, to establish parameters which would enable the Greek Cypriots to endorse this plan. Sadly, this has not been achieved. ... Never before in the history of the European Commission has a member of the European Commission been banned from making statements on a key European issue in a Member State on the grounds that it constitutes interference in its domestic affairs. I call upon President Papadopoulos to ensure that in his country, the basic freedoms of information and opinion are strictly guaranteed, and that from today onwards, free access is granted in the Cypriot media to all those who are able to provide a full explanation of this plan in line with the United Nations’ intentions. As before, I am willing to do so.²⁴³

²⁴⁰ UN Security Council, *Report of the Secretary-General on his mission of good offices in Cyprus*, (S/2004/437), 28 May 2004, <<http://www.unhcr.org/refworld/docid/41176f4a.html>>, accessed 26 November 2013.

²⁴¹ Tarık Oğuzlu, ‘Turkey and the Cyprus Dispute: Pitfalls and Opportunities’, *Ankara Bar Review*, (2010), p.74.

²⁴² UN Security Council, (S/2004/437), para.78.

²⁴³ European Parliament, Debates, 21 April 2004, Strasbourg, EU Enlargement Commissioner Verheugen’s statement to the European Parliament,

As a consequence, the referenda ‘marked a watershed in the history of United Nations efforts in Cyprus’²⁴⁴ and the efforts to resolve the long-standing Cyprus problem failed. Although considerable steps were taken during the negotiations, none of these was ‘a substitute for a comprehensive settlement’. In spite of the non-compliance of the G/Cypriot side,²⁴⁵ Cyprus acceded to the EU as a divided island and the T/Cypriots continued to be the people of an internationally unrecognised entity. It has been argued that with the accession of the divided island, the EU has imported ‘the long-lasting conflict into its institutions and bodies, and thus, paradoxically, has failed to comply with its own procedures.’²⁴⁶

The short overview of the referendum period has attempted to show initial steps taken towards the formation of a bridge between the Court and the Annan Plan. Among others, one of the main reasons for the G/Cypriot rejection of the plan in the 2004 referendum was the property regime proposed under the settlement plan. Since it is far beyond the purpose of this thesis to consider all other key reasons for this rejection, there will be a brief look at the basic provisions of the property regime of the Annan Plan. The reason for this brief analysis, although the plan has no legal effect, is the Court’s explicit reference to the property regime of the Annan Plan in its most recent case of *Demopoulos*. As mentioned before, the Court in the case of *Demopoulos* extensively referenced the property provisions of the Annan Plan although it was rejected. In this context, an issue that can be raised here is whether the property mechanism under the plan can be taken as a basis for the formation of a new property system by the Cypriots. In essence, by following this approach, the Court seems to take the position that property complaints can well be treated through a domestic mechanism of the same nature as the one proposed under the Annan Plan.

The Annan Plan is the latest and the most comprehensive settlement plan of the Cyprus problem. It envisaged the formation of a federal state, ‘The United Cyprus Republic’,

<<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20040421&secondRef=ITEM-001&format=XML&language=EN>> accessed: 17 September 2013.

²⁴⁴ UN Security Council, (S/2004/437).

²⁴⁵ Stefan Engert, *EU Enlargement and Socialization: Turkey and Cyprus*, Oxon: Routledge, (2010), p. 65.

²⁴⁶ James Ker-Lindsay, Hubert Faustmann, Fiona Mullen, *An Island in Europe: The EU and the Transformation of Cyprus (International Library of Twentieth Century History)*, IB Tauris, p. 14.

consisting of two constituent states called ‘Turkish Cypriot Constituent State’ and ‘Greek Cypriot Constituent State’ based on the principles of bi-zonality and bi-communality.

Annex VII of the Annan Plan provided detailed provisions to deal with properties that had been affected by events since 1963. A property regime was established in order to resolve the claims of persons who were dispossessed of their properties ‘in a comprehensive manner in accordance with international law, respect for individual rights of dispossessed owners and current users and, the principle of bi-zonality’. An impartial and independent Property Board would be created to deal with property claims and implement the provisions of the property mechanism.²⁴⁷

The plan proposed that properties in the areas subject to territorial adjustment would be reinstated to dispossessed owners. These areas are currently under the control of the TRNC but would become part of the Greek Constituent state. In areas that remain outside territorial adjustment, property rights would be exercised through reinstatement or compensation. Dispossessed owners who opted for compensation would receive ‘full and effective compensation for their property on the basis of value at the time of dispossession adjusted to reflect appreciation of property values in comparable locations’. All other dispossessed owners would have the right to reinstatement of one-third of their property (in value and land area of their property ownership) and to receive full and effective compensation for the remaining two-thirds.²⁴⁸

In this respect, it was estimated that the T/Cypriot-administered territory would be reduced from around 36% to 29% of the territory of the 1960 RoC.²⁴⁹ The area that would be subject to territorial adjustment and would be reinstated to dispossessed owners was around 7% of the territory of Cyprus. This would have led 54% of G/Cypriots who were displaced in 1974 to be reinstated. The number of inhabitants who would have to be relocated would be a quarter of the current population of the north.²⁵⁰

The plan provided a domestic remedy for the resolution of all issues related to affected

²⁴⁷ Article 10 in the Main Articles of ‘The UN Comprehensive Settlement Plan of the Cyprus Problem’, (so-called the Annan Plan), 31 March 2004 (fifth version).

²⁴⁸ *ibid.*

²⁴⁹ UN Security Council, (S/2003/398), para. 112.

²⁵⁰ *ibid.*, para. 116.

property pursuant to Article 37 of the ECHR. The United Cyprus Republic would be the sole responsible State Party and would request the Court to strike out any proceedings before it concerning affected property. Therefore these cases would be solved through the domestic mechanism provided in the plan. This provision is particularly relevant with the application of the subsidiarity principle to the Cypriot property cases brought before the Court after the rejection of the Annan Plan.

As to the claims and applications, the plan proposed that a dispossessed owner would be entitled to claim compensation or reinstatement of his or her title to property. Additionally, the plan also provided protection to current occupants of affected properties who are dispossessed owners and to persons who made significant improvements to affected properties. These persons may apply to receive title to such properties. All such claims and applications would be made to the Property Board.²⁵¹

This short overview of the basic provisions of the property regime provided in the Annan Plan shows that Law no. 67/2005, which was determined as an effective domestic remedy for the property claims, is in line with the proposed strategy in the plan. In assessing the effectiveness and adequacy of the IPC, the Court in *Demopoulos* held that it constitutes an effective and available remedy by referring to those aforementioned provisions in the Annan Plan. This also explains why, in particular, those provisions in the plan have been chosen to be considered in this thesis. Although the resolution plan was rejected and thus its property mechanism, it is difficult to say that it is totally dead, at least within the context of the ECtHR case law. The fact that it has no legal effect does not lead the Court to ignore the relevant provisions concerning the property claims brought before it. This is evident when one considers the Court's focus on this rejected property regime in *Xenides-Arestis* and *Demopoulos*. These are the major cases that reflect the impact of the Annan Plan over the Court's Cyprus rulings and may even justify the gradual change of the Court towards the clone cases from Cypriots.

Notably, the Court in *Demopoulos* emphasised that the Annan Plan provided a balance between the property rights of G/Cypriots and the rights of Turkish settlers as well as

²⁵¹ Annex VII, Article 6 of the Foundation Agreement in 'The Comprehensive Settlement of the Cyprus Problem'.

T/Cypriot refugees who are currently occupying the properties of G/Cypriots. In light of the Court's approach in *Demopoulos*, it can be argued that compensation and restitution mechanisms concerning post-conflict societies, which are in line with the property strategy proposed in the Annan Plan, may also be regarded as effective remedies. In this sense, not only the property regulations under the plan but also the Cypriot property cases provide additional and considerable criteria for other states in similar situations to those in Cyprus.

Conclusion

The property cases of displaced Cypriots examined above articulate an interaction, spread throughout the fourteen-year timeline, between the ECtHR case law and the Cypriot property cases. On the basis of the case analysis made, it can validly be argued that the case law of the Court concerning Cypriot property complaints is a contribution to the Court's jurisprudence in various respects, particularly in relation to post-conflict situations. Just one example which served to illustrate this in the above part is the case of *Loizidou*. This is the case in which the crucial issues, mainly concerning the Cyprus problem, were raised and discussed at the global level. For instance, the concept of jurisdiction under Article 1 of the Convention is only one of these issues that has been analysed in detail from different aspects.

In assessing the Cypriot property complaints, numerous other cases, concerning the violation of property rights, against other Contracting Parties have been referred to by the parties as well as by the Court. For instance, the Court's approach in the cases of *Loizidou* and *Banković* were compared in order to illustrate how the notion of jurisdiction was interpreted and thus applied differently within the case law of the Strasbourg Court. While the Court in the case of *Loizidou* held that jurisdiction was not restricted to the national territory of the Contracting States and effective overall control over a territory was enough to bring it within a state's jurisdiction, in the *Banković* case it maintained that the jurisdictional competence of a state is essentially territorial in nature while not excluding exceptional cases.

Since 1996, with the advent of the *Loizidou* judgment, the Court's case law on Cyprus has not only developed, but its attitude towards property claims has also gradually

changed with the influence of political, legal and factual realities on the island. Not surprisingly, the major as well as the most apparent change in the Court's attitude took place following the failure of the comprehensive settlement plan for the Cyprus problem, which could have finalised the prolonged property conflict on the island.

In the course of more than a decade, significant numbers of property claims have been lodged before the Court and crucial matters in many respects have been discussed. At the time of the writing of this thesis, the property dispute still remains unresolved today. It is notable that, although the most recent case is at a critical junction in the process of solving the property dispute on the island, it should be borne in mind that this judgment – besides being a turning point for Cypriot property cases – is also a way towards a temporary mechanism to temporarily remediate the property conflicts in Cyprus. Such a solution, which is temporary in nature, does not provide a durable settlement of the property problem. In fact, it has to be acknowledged by both T/Cypriots and G/Cypriots that the property crux on the island can only be resolved through the comprehensive settlement of the Cyprus question. It needs to be recognised that the establishment of a durable peace can be achieved by explicitly solving the conflicted matters with mutually flexibility, confidence and a compromise.

Chapter 4

Requirements of the Right to Property Within the Meaning of the ECtHR Cyprus Rulings

Introductory Remarks

Property is a highly sensitive and emotional issue particularly for persons who have been forcibly displaced from their own land and houses by civil strife or conflict. As a result of its level of significance, property represents one of the major issues of the areas of human rights. Besides the fact that the right to property is enshrined under Article 1, Protocol 1 (P1-1) of the ECHR (the Convention), this right is not absolute. The rationale behind this is the fact that states can interfere with property rights under specific circumstances. The ECHR is one of the principal tools for the protection of the right to property and it also identifies the conditions in which these rights may be restricted.

Within the scope of the Convention mechanism, although the right to property is significant, no definition of ‘property’ is provided, as it does not have a single definition that is recognised internationally. This reason is clearly understandable. The lack of a definition of the word under the Convention is because the issue of property differs from country to country, based on and influenced by their political, legal and historical structure. Throughout this thesis, there has been an attempt to understand property rights under the P1-1 to the Convention and the requirements for a legitimate interference with the right to property. In order to achieve this purpose, an examination has been made of property rights of Cypriots within the scope of the ECtHR (the Court) case law, specifically in respect of the conflicted rights of displaced persons over the properties in question, by considering other rulings on property disputes in Europe.

It should be noted that the purpose of this chapter is not to assert that the decisions and judgments of the ECtHR on Cyprus cases were faulty. The objective of this chapter is to analyse and understand the approach of the Court, which has gradually changed, in assessing property rights in Cyprus in the context of its wider rulings on property disputes in Europe and to determine whether crucial features and circumstances of these cases have adequately been examined in reaching its decisions.

4.1 State Obligations Within the Context of P1-1 of the ECHR

In accordance with Article 1 of the Convention, the Contracting Parties should secure the rights and freedoms were entrenched under the Convention. The wording in Article 1 has been interpreted as containing an imposition of both negative and positive obligations upon states when the text of later articles regarding rights is taken into account. In the matter of negative obligation, a state should respect human rights and is required to abstain from interference. An example of this is Article 3 of the Convention, which considers the issue of torture: states ‘should refrain from’. Such obligations are typical of those that applied to civil and political rights.¹ As to positive obligations, these are raised when a state ‘must take action’ in order to secure human rights. Economic, cultural and social rights are generally determined under positive obligations. Additionally, these obligations can be imposed where they concern civil and political rights, for instance: to hold free elections (Article 3, First Protocol); obligation to protect the right to life by law (Article 2(1)); to provide prison conditions that are not inhuman (Article 3).² Hence, while positive obligations require positive intervention by a state, negative obligations require a state to refrain from interference.³

Turning to the issue of property, as mentioned earlier, property is a highly sensitive and emotional issue which involves both sentimental and material value. In this respect, another issue arises: although the Convention protects the right to property, to what extent – if at all – does P1-1 offer protection for violation of property rights that occurred in the past? Indeed, the issue of past violations represents, perhaps, the most complex issue within the Court’s jurisprudence if one considers the period after the end of the Second World War.

In this regard, it is questionable ‘whether a state can be held responsible for lack of action to restore past injustices’.⁴ In essence, the question as to whether cases concerning

¹ David J. Harris, Michael O’Boyle and others, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd edn, Oxford: Oxford University Press (2009) pp. 18-19

² *ibid.*

³ Jean Francois and Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights’, *Human Rights Handbooks* (2007) no.7, Strasbourg: Council of Europe <http://echr.coe.int/echr/en/50/50_HRHandbooks>, accessed: 8 November 2013, p. 11.

⁴ Ali R. Coban, *Protection of Property Rights within the European Convention on Human Rights*, Surrey: Ashgate Publishing Ltd (2004) pp. 163–164.

confiscation of private property without compensation during the socialist era can be brought before the Court⁵ is of great importance for former socialist states party to the Convention. Here, a note can be made that, since the largest population movements in European history, which brought about massive violation of property rights, arose prior to accession of the human rights treaties by states, unfortunately it seems unachievable for the Court to deal with all possible claims in this regard.

Following the embodiment of the right to property under the Convention, the issue of past violations of this right gained a prominent place at the international level. Displaced persons who had been forced to leave their houses, land and lives behind, as well as having experienced war-related traumas, may have considered the formation of the protection of property rights as the 'light at the end of tunnel' in terms of remediating their losses at least to some extent. In a country that remained in conflict, the resolution of the property issue would become increasingly significant. Cyprus is probably the best example of this situation.

The concept of protecting the rights of individuals under the Convention is itself evidence of the injustices of the past. In the matter of past violations, the land and property problems can be considered mainly as the consequences of the Second World War. As a result of the war, the properties of millions of people were destroyed or confiscated. Thirty-one million people were expelled from their home lands, displaced and left their valuables behind between the years 1945 and 1952.⁶

In accordance with the Convention system, a Contracting Party cannot be held responsible for an act that took place before the date of entry into force of the Convention in respect of that state.⁷ The Convention does not impose any obligation on Contracting States to provide redress for wrongs or damage caused prior that date. Therefore such claims will be out of the jurisdiction of the Court, *ratione temporis*. From the ratification of the Convention, when jurisdiction *ratione temporis* applies, all Contracting Parties'

⁵ *ibid.*, 164.

⁶ Icelandic Human Rights Centre, 'Ratione Temporis', <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttoproperty/ratione/>> accessed: 17 December 2013.

⁷ *Blečić v. Croatia* (2006) 43 EHRR 48; *Šilih v. Slovenia* (2009) ECHR 571, para. 140; *Varnava and Others v. Turkey* (2009) ECHR 1313, para. 130.

acts and omissions must conform to the Convention.⁸ In this respect, the significance of the issue of continuing violation becomes obvious, particularly for people of a state in which large numbers of houses and properties were confiscated without compensation during its history– such as people from the former socialist states⁹ and Cyprus – people who became victims of a violation of property rights. This issue of continuing violation represents the core consideration for such people within the context of property rights under the Convention.

The existence of a vast number of such displaced persons in Europe, whose land has been arbitrarily confiscated, creates great concern as to the possible millions of future cases arising from such states. This begs the question as to whether confiscation of property without compensation, deriving from past injustices, can be brought before the Court. In this respect, it is useful to consider the Court's wider rulings on property conflicts from European states while examining its cases law on Cyprus.¹⁰

The 2004 *Kopecký*¹¹ judgment is a clear example in the case law of the Court in this context. In its judgment, the Court stressed that 'the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention'. However, what is remarkable here is that in some situations it is not as simple as determining whether the facts of the complaint brought before the Court occurred prior to the entry into force of the Convention with respect to the Contracting State in question. This is of great significance to claimants in terms of whether their applications are found admissible by the Court, particularly if the established case law means that the provisions of the Convention do not bind a Contracting Party in relation to any act or omission that took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (the critical date). In situations in which an act constitutes a violation of rights occurs by way of an instantaneous act that occurs prior to the critical date, an application is rejected for lack of jurisdiction *ratione temporis* and thus the Court adjourns the examination of the remainder of an application.

⁸ European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Council of Europe-European Court of Human Rights, 2011, <www.echr.coe.int>accessed: 18 December 2013.

⁹ Coban (n 4) p.164.

¹⁰ *ibid.*, p. 164.

¹¹ *Kopecký v. Slovakia* (2004) 41 EHRR 944, para. 38.

In addition to the issue of instantaneous acts, the Court also considers the notion of a continuing violation by emphasising its significance for complaints brought under P1-1, particularly those from former communist states. In its judgments concerning deprivation of property under communist regimes, the Court has adopted a common approach. It has distinguished nationalisation and its continuing effects from any subsequent proceedings in relation to the restitution that was initiated after the ratification of the Convention.¹² This distinction has been made by taking continuity and instantaneity of act as a ground. In fact, such distinction is of great importance to consequences of those acts. It has been recognised by the Court that deprivation of ownership is, in principle, an instantaneous act and thus does not produce a continuing situation. In this connection, applications complaining solely of nationalisation by communist regimes are rejected on the basis of lack of jurisdiction *ratione temporis*.¹³

The Court also supports the possibility that once a Contracting State produces legislation that provides for full or partial restoration of property confiscated under a previous regime, such a remedial mechanism may be regarded as generating a new property right protected by P1-1 of the Convention. It has also accepted that this may apply to regulations for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the ratification of Protocol 1 to the Convention by the Contracting State.¹⁴ A clear example of this is the judgment of *Broniowski v. Poland*¹⁵ in which the Court ordered the Polish government to secure the implementation of the property right in question through appropriate measures or to establish a remedy in accordance with the principles of protection of property rights under P1-1.

In the case of *Broniowski*,¹⁶ the Strasbourg Court had to deal with a case concerning a Polish citizen, who belonged to a large category of persons who were subject to the same issue in question, and who had been deprived of his property after the Second World War. Polish law, ordering compensation to those persons who had to abandon their property located within the ‘territories beyond the Bug River’ before the year of 1945, was the

¹² Harris and others (n1) p.802.

¹³ *ibid*, p.803.

¹⁴ *ibid*.

¹⁵ *Broniowski v. Poland* (2004) 40 EHRR 21.

¹⁶ *Broniowski v. Poland* (decision on admissibility) [GC] no. 31443/96, 19 December 2002, ECHR, X.

main point in question. As to the facts of the case, Poland had adopted an obligation to compensate owners who had to leave their properties behind in an international agreement concluded in 1944. On this basis, Polish law provided compensation to those persons who had been deprived of their properties. In the judgment on the admissibility of the case in 2002,¹⁷ the applicant argued that his entitlement to his abandoned property had not been satisfied, and alleged that this situation constituted a violation of P1-1 to the Convention. According to the applicant, the state's continuous failure to satisfy his entitlement had been caused by a series of acts and omissions on the part of the authorities and further argued that a failure amounted to an interference with his property rights. In his view, the interference complained of was a result of the state's failure to fulfil its legislative duty to regulate claims in respect to the question of the Bug River and to establish conditions for the implementation of the claimants' rights.

In order to support its argument, the Polish government directed the Court to approach this issue regarding deprivation of ownership, in principle, as an instantaneous act that did not produce a continuing violation of a right. In respect of the present case concerned, Poland maintained that deprivation of property had occurred at the moment when the applicant had been repatriated from the territories beyond the Bug River, which had taken place prior to Poland's ratification of Protocol No. 1. Since there had been no interference with the applicant's rights under P1-1 at that time, the Polish government could not be held responsible and a continuing violation could not be found in the case.¹⁸

Following the assessment of the arguments of the parties, the Court stressed that its jurisdiction-*ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent state. Accordingly, the Court, in respect of the present case, held that it was competent to examine the facts of the case because the acts had occurred after the date of ratification of Protocol No. 1 by Poland. As a response, the Polish government this time argued that the alleged acts that potentially affected the applicant's situation had occurred prior to the ratification date and the act which could be considered as a deprivation of property had taken place at the moment when the property was abandoned. In this regard, the Court emphasised that the applicant neither complained of being deprived of the property nor complained about the denial of a

¹⁷ *ibid.*

¹⁸ *ibid.*, paras. 68–69–77.

compensation claim based on laws or facts prior to the ratification date. Moreover, it pointed out that the applicant's complaint was not directed against a single specific decision or measure taken before, or even after the relevant date. The Court further stated that the factual basis of the applicant's claim was the alleged failure to satisfy an entitlement to the compensation that was vested in him under Polish law on the ratification date. Taking these considerations into account, the Court concluded that the application was compatible *ratione temporis* by virtue of the fact that the applicant's complaints were based on the Polish state's acts and omissions in respect of the implementation of an entitlement to a compensatory measure.¹⁹

Turning to the issue of the Contracting States' obligation to correct the past injustices under P1-1, the Court has adopted another approach, which is to allow those states to enact a new act concerning the properties formerly confiscated without compensation. The issue of whether a state can be held responsible for lack of 'retroactive' remedies in order to restore past violations is particularly relevant for Romanian cases. Case law on this particular type of case has been developed through the judgments of the Court. In particular, in a significant number of cases from Romania,²⁰ applicants whose properties were unjustifiably confiscated brought their repossession claims before the domestic courts. Although in the Romanian cases, the Court of First Instance upheld the applicants' rights of ownership, the Supreme Court of Justice quashed those judgments of the Court of First Instance and dismissed the application for confirmation of title. The Supreme Court explained that the courts did not have jurisdiction to examine the lawfulness of confiscations.²¹ After these cases were brought before the ECtHR, it was held that there had been a violation of P1-1 in all these cases, depending on the decisions of the Court of First Instance. These courts' decisions in these cases were considered as a new act of public authorities, and was found sufficient to apply P1-1 to the Convention for past interferences with property by the Court.²²

¹⁹ *Broniowski v. Poland* (2004) 40 EHRR 21, paras.20–23, 60–77.

²⁰ Coban, (n 4), p.165; *Brumărescu v. Romania* (1999) 35 EHRR 887.

²¹ Coban, (n 4), pp.164–165; *Vasilii v. Romania* (2002) ECHR 459; *Hodos and Others v. Romania* (2002) ECHR 455.

²² Coban, (n 4), p.165; *Vasilii v. Romania* (2002) ECHR 459; *Hodos and Others v. Romania* (2002) ECHR 455.

A salient example in this regard is the case of *Brumărescu v. Romania*,²³ in which the Romanian government took possession of the applicant's parents' house in 1950 under Decree no. 92/1950 on nationalisation. In 1993, the applicant brought an action before the Court of First Instance and alleged that nationalisation was null and void. He argued that the property of employees could not be nationalised in accordance with Decree no. 92/1950 and since his parents had been employed at the time of nationalisation, the act was null and void. Against this argument, the Court of First Instance held that the nationalisation under Decree no. 92/1950 had been a mistake since his parents were under the category of persons whose property the decree exempted from nationalisation. It further added that the state could not have acquired title to the house under Decree no. 218/1960 nor Decree no. 712/1966 since those instruments had been contrary to the Constitutions of 1952 and 1965 respectively.

In this regard, the court ordered the administrative authorities to return the house to the applicant. However, the Supreme Court of Justice quashed this judgment in 1993 on the grounds that the Court of First Instance had exceeded its jurisdiction in examining the lawfulness of the application of Decree no. 92/1950. After the applicant lodged an application regarding his aforementioned case before the Strasbourg Court, he alleged that the judgment of the Supreme Court had had the effect of infringing his right to peaceful enjoyment of his possession. As a response, the ECtHR maintained that the Supreme Court of Justice did not intend to rule on the applicant's claim to a property right; however, it held that there had been an interference with the applicant's right to property on the grounds of the fact that the Supreme Court of Justice's judgment quashed the final judgment in 1993 vesting the house in the applicant, even though the judgment had been exhausted.²⁴

In *Brumărescu v. Romania*,²⁵ the ECtHR took into consideration the decision of the Court of First Instance, which ordered the administrative authorities to return the house to the applicant. However, all the rights of the applicant regained in the final judgment in his favour were removed by the Supreme Court of Justice and the state had demonstrated its

²³ *Brumărescu v. Romania* (1999) 35 EHRR 887, paras. 14–15.

²⁴ *ibid*, paras. 20, 66, 74.

²⁵ *Brumărescu v. Romania* (1999) 35 EHRR 887, para. 76; *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63.

title to the house under the nationalisation decree. Following this, the applicant was informed that the house would again be classified as state property. As a result of the judgment of the Supreme Court of Justice, the applicant was deprived of the rights of ownership of the house, which had been vested in him by virtue of the final judgement in his favour. Therefore, he was no longer able to sell, devise, donate or dispose of the property. After observing these developments, the Strasbourg Court held that the effect of the judgment of the Supreme Court of Justice was to deprive the applicant of his possessions within the meaning of the second sentence of the first paragraph of P1-1.²⁶ Therefore an examination has been made by the ECtHR in order to determine within the meaning of which rule provided in P1-1 the interference in question fell.

The Court noted that in order to determine whether an interference with property falls within the ambit of the second rule, it should be considered whether there has been a formal taking or expropriation of property and it must also look behind the appearances and investigate the realities of the situation complained of. As a result of the fact that the Convention is intended to guarantee rights that are practical and effective, it has to be ascertained whether the situation amounted to a *de facto* expropriation. In this respect, the Court explicitly indicated that a taking of property within this second rule can only be justified if it is in the public interest and subject to the conditions provided for by law. Additionally, the requirement of proportionality must also be satisfied. Another crucial point is that a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.²⁷

As a result of its examination, the Court finally held that no justification had been offered for the situation brought about by the judgment of the Supreme Court of Justice. Deprivation of property as being in the public interest was justified neither by the Supreme Court of Justice nor by the government. The applicant had been deprived of the ownership of the property for more than four years without being paid compensation equivalent to its real value.²⁸ Finally, the Court emphasised that, even assuming that the

²⁶ *Brumărescu v. Romania* (1999) 35 EHRR 887, para. 77; The three rules under P1-1 to the Convention is analysed in detail in Chapter 2 of this Thesis.

²⁷ *Brumărescu v. Romania* (1999) 35 EHRR 887, paras. 76–78; *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, paras. 69–74.

²⁸ *Brumărescu v. Romania* (1999) 35 EHRR 887, para. 79.

taking could be shown to serve some public interest, a fair balance was upset and that the applicant bore and continued to bear an individual and excessive burden. Accordingly, there had been and continued to be a violation of P1-1.²⁹

In light of all the above considerations, the case could be made that the Strasbourg Court established an approach in its case law in respect of the issue of the responsibility on behalf of the Contracting Parties to restore past injustices. To summarise, the Court's approach requires waiting for an establishment of a new remedy pertaining to those properties that were formerly confiscated without compensation. In a large number of cases, the Court followed the same pattern, particularly in cases from former socialist states such as in the cases of *Brumărescu v. Romania*, *Broniowski v. Poland* and other Romanian cases.³⁰ At this juncture, it is notable that although the facts of these cases are similar to those from Cyprus, the Court, interestingly, did not consider applying the same approach in property complaints brought before it by displaced Cypriots. In order to understand the rationale behind the Strasbourg Court's attitude in this respect, it will be useful to consider the consistency of the Court's case law concerning the protection of property rights within the scope of P1-1.

4.2 Is the ECtHR Assessment on Interference with Property Rights Stable?

As indicated and examined in Chapter 2 of the thesis, the right to property is a fundamental right and subject to restrictions in certain situations. As to the right to property, P1-1 to the Convention protects citizens of contracting states against the arbitrary deprivation of property, not against the deprivation of property in itself.³¹ The requirements imposed upon the Contracting Parties that amount to a justifiable interference with property are determined in P1-1. Accordingly, in cases in which a state does not comply with the principles identified as a justifiable interference and takes a person's property arbitrarily, the ECtHR declares a violation of property rights guaranteed under the Convention, by the state in question. A pertinent example of this field is the

²⁹ *ibid*, para. 80.

³⁰ *Vasilu v. Romania* (2002) ECHR 459; *Hodos and Others v. Romania* (2002) ECHR 455.

³¹ Jacques Sluysmans & R.L. de Graaff, 'Land reform in the case law of the European Court of Human Rights. Lessons for South-Africa?' (The Conference on 'Land Divided: Land and South African Society in 2013, in Comparative Perspective', University of Cape Town, 24 – 27 March 2013) <<http://www.landdivided2013.org.za/sites/default/files/sluysmans%20european%20court%20of%20human%20rights.pdf>> accessed: 12 November 2013.

judgment of the Court in *Sporrong and Lönnroth v Sweden*.³² This case is one of the authoritative cases within the context of property rights in P1-1 since it contains significant determinations that have been made with respect to the interpretation and application of P1-1 that have contributed to the Court's case law. In its examination of *Sporrong and Lönnroth*, the ECtHR explicitly identified that P1-1 to the Convention comprises three distinct rules.³³ The Court repeatedly applied this approach in almost all subsequent cases that were brought before it by Contracting States. This finding has become the Court's traditional approach through its case law in this respect.

Turning to the Court's case law on Cypriot property claims of displaced persons, understanding the remit of P1-1 is of great importance not only to G/Cypriot claimants but also to current occupants of those properties owned by G/Cypriots. Taking into account its significance in relation to the issue of property disputes in Cyprus, P1-1 will be examined within the scope of property cases of G/Cypriot claimants. In order to determine whether the Court's rulings on Cyprus are in line with similar judgments concerning other contracting States, different cases with similar facts will be considered. This approach aims to demonstrate the coherency (or otherwise) of the Court's case law and will also help to illustrate the *sui generis* nature of the property cases from Cyprus. Accordingly, this analysis will be based on the question of whether the notion of the three rules in P1-1 to the Convention corresponds with the path the Court has followed in examining the facts and the features of cases concerning the property complaints of the displaced G/Cypriots.

4.3 The Application of P1-1 of the ECHR to Cyprus Property Cases

In order to achieve the scope of this thesis, concerning the *sui generis* character of Cypriot cases, which needs to be considered within the understanding of P1-1 using the case law of the Strasbourg Court, the rulings of the Court will be compared and examined. The Court's traditional approach, in the examination of applications brought under P1-1, was to adopt a method of applying P1-1 to judgments. The Court's usual formulation in applying P1-1 is to first consider whether the second or third rule applies. If neither of the

³² *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 61.

³³ Deborah Rook, *Property Law and Human Rights*, London: Blackstone Press Limited (2001) p.61.

rules is applicable to the case at issue, following this, the Court continues to examine whether the first rule is applicable. The examination of these rules will be in line with the Court's own order for assessing the rules. Therefore, it helps to reiterate the second sentence of the first paragraph of P1-1 of the Convention, which provides that:

No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by general principles of international law.

Interference with one's property within the meaning of the second rule is regarded as 'deprivation'. As explained in Chapter 2 of this thesis, the term 'deprivation' under P1-1 should be understood as 'expropriation' within the meaning attributed to it by the Strasbourg of the Strasbourg Court. Although the second rule provides for deprivation of property without guaranteeing compensation or a requirement of compensation, according to the established case law, deprivation will require, in principle, the payment of compensation in all but exceptional cases.³⁴ Additionally, deprivation within the meaning of the second rule of P1-1 normally requires the transfer of ownership of the property.

In general, deprivation will bring about a transfer of ownership and thus the rights of the owner are extinguished.³⁵ In this respect, it should also be taken into account that there may be some cases in which illegal deprivation of property occurs in the form of *de facto* expropriation. In such cases, the status of ownership and the rights of an owner in property do not change and an owner retains the legal ownership of that property. What is remarkable here is that, in this situation, there is still a *de facto* expropriation. Formal expropriation and *de facto* expropriation fall into the same class when taking into consideration their effect. The common feature of *de facto* expropriation and formal expropriation is they both transfer property. The difference, on the other hand, is that *de facto* expropriation is not based on legal procedure as it is in formal expropriation.³⁶

Within the issue of expropriation, it is important to understand what *de facto* expropriation is. A clear example that reflects the issue of *de facto* expropriation is the

³⁴ Rook (n 33), p. 94.

³⁵ *James v. UK* (1986) 8 EHRR 123; *Lithgow v. UK* (1986) 8 EHRR 329.

³⁶ Laurent Sermet, 'The European Convention on Human Rights and Property Rights', *Human Rights Files*, vol. 11 (revised edition), Strasbourg: Council of Europe Publishing (1990) p.24; Rook (n 33) p. 63; *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35.

case of *Papamichalopoulos v. Greece*,³⁷ which concerned the unlawful occupation of the applicants' land by the Navy Fund since 1967. This is the case in which the term '*de facto* expropriation' was used for the first time in the history of the ECtHR case law. In examining this case, the underlying reasons behind using the term *de facto* expropriation were contained in the Court's assessment. The Court maintained that 'the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it; Mr Petros Papamichalopoulos [...] was even refused access to it.' The Court's analysis and its coining of the term may have flowed from the fact that there had been no attempt to regularise the Greek procedure, which prevented the owners from considering any remedies and had left them without redress for twenty-eight years.³⁸

Another clear example to illustrate the Court's position in this regard is the case of *Sporrong and Lönnroth v. Sweden*.³⁹ In this case, the main question at issue was whether the applicants were formally deprived of their possession or not. The Court examined the applicability of the second and third rules before determining the applicability of the first rule to the case. The applicants complained about the length of the period over which the expropriation permits and prohibitions on construction affecting the applicants' property had been in force. According to the applicants, the length of the time-limits for the fixing of compensation for expropriation constituted an unlawful interference with the peaceful enjoyment of their possession, which constituted a violation of P1-1. In its examination of the case under the second and third rules, the Court maintained that the Swedish authorities did not proceed to an expropriation of the applicants' properties. Therefore there was no formal deprivation of applicants' properties. This determination was established on the basis of the fact that the applicants were entitled to use, sell, devise, donate or mortgage their properties although it became difficult to utilise the properties in question.⁴⁰

The expropriation permits were not intended to limit or control use since they were an initial step in a procedure leading to deprivation of possession. Therefore they did not fall within the ambit of the second paragraph. The Strasbourg Court held that they must be

³⁷ *Papamichalopoulos v Greece* (1993) 16 EHRR 440, para.43.

³⁸ Sermet, (n 36) p. 24; *Papamichalopoulos v Greece* (1993) 16 EHRR 440, para.43.

³⁹ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35.

⁴⁰ *ibid*, para. 62.

examined under the first sentence of the first paragraph. Their right in question lost some of its substance as a result of limitations, but it did not disappear.⁴¹ Therefore this new type of interference with property was introduced by this judgment. As to the case law of the Court, if interference does not transfer the property to public authorities, nor does the interference aim to control the use of the property, then it constitutes interference with the substance of the property. Considering the Court's case law, it is reasonable to state that the more flexible the context of the provisions are (the development of the level of interference in correlation with the substance of property), the more differentiated the Court's evaluation on cases can become, even where there is no difference between the facts of these cases.

The Court, in the case of *Sporrong and Lönnroth v Sweden*, adopted a significant approach that has repeatedly been approved in similar subsequent cases that have similar features of *Sporrong and Lönnroth*. Here, the Court further determined that in the case of an absence of a formal deprivation, it must consider the appearances and investigate the realities of the situation complained of. The rationale flows from the objective of the Convention, which is to guarantee the property rights in a practical and effective way. Accordingly, the determination of whether there has been a *de facto* expropriation can be considered by looking at the appearances and investigating the realities of the situation.⁴² After taking these into account, the Court explained that the potential to dispose of the properties was reduced due to limitations imposed on the property rights in question. The core element present in order for the Court to reach this conclusion was the disappearance of the right. Although the right in question lost some of its substance, it did not disappear. On this basis, it was held that the effects of Swedish measures do not constitute a deprivation of possession and the alleged violation did not fall within the ambit of second rule of P1-1.⁴³ This finding of the Court has been established with its case law and has been applied in a large number of property cases.

In summary, there is a crucial difference between 'formal expropriation' and '*de facto* expropriation' in P1-1 to the Convention. The cases that are subject to *de facto* expropriation, in fact, are not common. The examination of whether there has been a *de*

⁴¹ *ibid*, para. 65; Coban, (n 4), p. 187.

⁴² *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 62.

⁴³ *ibid*, para. 63.

facto expropriation is treated cautiously by the Court.⁴⁴ Whether the same level of sensitivity exists in considering the existence of *de facto* expropriation in the Court's case law on Cyprus cases is questionable. Therefore, in order to answer this question, which is crucial in order to determine the position of the displaced persons in Cyprus, an examination and comparison of the Court's stance in particular cases will be made.

As mentioned earlier, the term *de facto* expropriation was first raised in the case of *Papamichalopoulos v. Greece*.⁴⁵ In this case, the possession of the applicants' land was taken over by the Navy Fund in 1967 by means of a law enacted by the military government of that time. A naval base and a holiday resort for officers were established on the land in question. The applicants alleged an unlawful occupation of their land by the Navy Fund since 1967 and complained of a violation of P1-1. After democracy had been restored, the authorities recognised the applicants' title but they recommended exchange of the land for other land of equal value. However, the land given to the applicants for exchange was not able to be used for the proposed purpose. On this basis, the applicants alleged a violation of P1-1. The Court held that the occupation of the land by the Navy Fund constituted an interference with the applicants' rights to the peaceful enjoyment of their possession, guaranteed under P1-1. After an examination was held on the question of whether the interference fell within the ambit of the second paragraph of P1-1 (third rule),⁴⁶ the Court stated that the interference was not intended to control the use of property and thus it did not fall under the third rule. Considering the fact that the relevant domestic law did not transfer ownership of the land in question to the Navy Fund, the Court held that the applicants' properties were not subject to deprivation.

In *Papamichalopoulos*, like in the case of *Loizidou*, the applicants' land had never been formally expropriated and accordingly the applicants remained owners of the land. It was maintained that since possession of the land in question was taken by the Navy Fund, the applicants were unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it. Taking this into account, it was held that the loss of all ability to dispose of the land in question resulted in serious consequences for the applicants who

⁴⁴ Rook, (n 33) p.63.

⁴⁵ *Papamichalopoulos v Greece* (1993) 16 EHRR 440, para. 44.

⁴⁶ *ibid.*

had *de facto* been expropriated.⁴⁷ This constituted a violation of their right to the peaceful enjoyment of their possessions.

In the cases of *Loizidou v. Turkey* and *Cyprus v. Turkey*,⁴⁸ in reaching its decision, that the G/Cypriot applicants could not be regarded as having lost their title to their properties, the Court mainly took into account the unrecognised status of the TRNC Constitution by the international community where by the Constitution purported to expropriate the G/Cypriot land. The Court held that there had been continuing interference with property rights since the G/Cypriots were not allowed to access their properties and had lost all control over them due to the division of the island. In *Loizidou*, unlike the case of *Papamichalopoulos*, although the applicants were regarded as remaining the legal owners of their land, interference with that land was not considered as either expropriation or *de facto* expropriation. The Court did not ‘title’ the interference with property rights over the G/Cypriot properties in question. It was merely determined that interference falls within the general rule of P1-1. Taking the Court’s judgment in *Loizidou* into account, it is questionable whether the absence of entitling the interference in *Loizidou* and subsequent cases brought by G/Cypriot applicants is political.

This argument is grounded on the fact that if the Court had regarded interference with G/Cypriot properties as expropriation or *de facto* expropriation, significant consequences might have occurred at a global level. Two major consequences could arise here. First, if the Court had titled interference with G/Cypriot property rights as expropriation or *de facto* expropriation, this would have created massive political and legal debates in the international arena concerning the unrecognised character of the TRNC and the recognition of its acts stemming from its Constitution. Second, had those cases and those interferences been considered as *de facto* expropriation, the cases would have been out of the jurisdiction of the Court *ratione temporis* due to an instantaneous act.

4.4 Continuing Nature of Alleged Violations

The notion of continuing violation of property rights is another significant issue that needs to be examined in order to clearly understand the context of P1-1 to the Convention. As

⁴⁷ *Papamichalopoulos v Greece* (1993) 16 EHRR 440, paras. 42–46.

⁴⁸ *Loizidou v. Turkey* (1996) 23 EHRR 513; *Cyprus v. Turkey* (2001) 35 EHRR 731.

was indicated above, if a violation occurred before the respondent state's ratification date of the Convention or its Protocols, the Court has no competence to examine the alleged complaints concerning the violations of rights guaranteed under P1-1.⁴⁹ Although the concept of continuing violation is accepted in the Court's case law, its meaning and scope have not explicitly been defined in the Convention. Therefore, the issue of continuing violation can be best understood through the examination of the Court's case law in this respect. It is notable that the continuing violation is subject to controversial debates particularly in cases in which an instantaneous violation with lasting effects appears. In this regard, the Court's rulings on the cases of *Sporrong and Lönnroth*, *Papamichalopoulos* and *Loizidou* represent clear examples. These cases are significant for the understanding of the notion of a continuing violation and require close consideration in order to illustrate the way in which the Court applied the issues of 'continuing violation' and '*de facto* expropriation' to its judgments on Cyprus.

As it will be apparent, the Court followed different approaches in applying these two issues in these three aforementioned judgments. In particular, the concept of continuing violation is of great importance to the displaced G/Cypriot claimants in respect of the *ratione temporis* competence of the ECtHR.⁵⁰ The case of *Loizidou* is the first case in which the issue of continuing violation was discussed within the field of property disputes in Cyprus. In *Loizidou*, this issue had a strong impact on the Court's decision. This is because, if it had been held that the applicant was still the legal owner of the land in question, then this would mean that the alleged violations were continuing in nature and the objection of *ratione temporis* would fail. As a result of this finding concerning the continuing violation of P1-1 in *Loizidou*, thousands of similar applications from displaced G/Cypriots have been lodged before the ECtHR.

The determination of a continuing violation in cases in which the alleged illegality originates from a historical event or situation is a result avoided. This logic flows from the fact that such cases are usually political in nature, so that the Strasbourg Court refrains

⁴⁹ Loukis G. Loucaides, 'Current Legal Developments: Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos* Case?', *Legal Journal of International Law*, vol. 24 (2011) pp. 18–32.

⁵⁰ *ibid.*, p. 18, see footnote 3, "This is the first time in the history of the European Convention that the Court has found a High Contracting party responsible for continuing violations of so many rights affecting such a great number of persons for such a long period of time."

from dealing with it, since the Court's decision on such cases may invite thousands of clone cases deriving from the same problem.⁵¹ At this juncture, as to the Cypriot cases, although the judgment of *Loizidou* was burdened with political and historical complexity flowing from a problem of a historical event, the Court did not examine the nature of the alleged violations in detail.

In reaching its decision in the case of *Loizidou*, the Court mainly took into account four issues: first, Turkey had *de facto* jurisdiction over the northern part of the island due to the existence of Turkish troops in that part of Cyprus; second, the establishment of the TRNC was not legally valid and thus the property regulation under the TRNC Constitution, which purported to expropriate the abandoned G/Cypriot properties, had no legal effect. On this basis, the applicant could not be deemed to have lost the title of the property; third, the applicant had been refused access to her land by Turkish troops since 1974 and thus she had lost control over and the possibility of using and enjoying her property; fourth, the Turkish government's arguments that property rights were subject to inter-communal talks and the taking of property arose as a result of the need to re-house displaced T/Cypriot refugees could not justify the continuing violation of P1-1.

On the basis of these considerations, the Court in its *Loizidou* judgment held that there was and continued to be a breach of P1-1. It also determined that the interference with property rights of the applicant 'clearly'⁵² fell within the meaning of the first sentence of P1-1. It should be emphasised that although the Court noted that it could clearly determine within which rule the violation in question fell, in fact, the Court did not explain *how* the interference fell within the meaning of the first rule of P1-1.

It is reasonable to maintain that it may be difficult to determine within which rule a case falls. This situation occurs when in some cases the Court does not determine under which rule a case is being considered. In the matter of *de facto* takings it is obvious that there was a breach of the Convention since the takings have not been permitted by law.⁵³ In such cases, like *Loizidou*, which is highly political in nature and involves complex historical debates, the character of P1-1, concerning the difficulty of determining the

⁵¹ Loucaides (n 49) p. 32.

⁵² *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 63.

⁵³ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 63.

violated rule, should be set aside. In the case of *Loizidou*, the factual circumstances should have been examined and explained in detail as it was a precedent case for the possible thousands or hundreds of thousands of G/Cypriot cases.

Unlike the *Loizidou* judgment, in the cases of *Sporrong and Lönnroth v. Sweden*⁵⁴ and *Papamichalopoulos v. Greece*⁵⁵ the Court took the position that it has to be ascertained whether the situation complained of by the applicants amounted to a *de facto* expropriation. It has been held that if the property is not formally expropriated, the Court looks behind the appearances and investigates the realities⁵⁶ of the situation complained of. The Court has to identify whether that situation amounted to a *de facto* expropriation on the grounds that the Convention is intended to guarantee rights that are practical and effective.⁵⁷

Examination of the appearances and realities of the situation complained about in cases such as *Loizidou* should be made with prudence. In this regard, although the Court did not elaborate on those factual circumstances in detail, the case involved crucial facts that should have been considered. These facts, which could have had a determinative impact on the Court's decision, were: the failure of the continuing situation of negotiations or proposals aiming to unify Cyprus; the fact that the case was burdened with a political, historical and factual complexity flowing from a historical situation: the absence of a designation of the interference with the property in question; the lack of determination of the starting date of the act which was in continuing nature. Although these were not regarded as factual circumstances behind the appearances and realities of the interference that was complained of, after fourteen years from the date of the *Loizidou* decision, the Court took those aforementioned situations as a basis for reaching its decision in the case of *Demopoulos and Others v. Turkey*.⁵⁸ In its *Demopoulos* judgment in 2010, the Court held that it was faced with cases burdened with a political, historical and factual complexity stemming from a conflict that should have been settled by all parties assuming full responsibility for finding an achievable solution on a political level. The Court held

⁵⁴ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63.

⁵⁵ *Papamichalopoulos v. Greece* (1993) 16 EHRR 440, para. 42.

⁵⁶ *Van Droogenbroeck v. Belgium* (1982) 4 EHRR 443, para. 38.

⁵⁷ *Airey v. Ireland* (1979) 2 EHRR 305, para. 24.

⁵⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 85; this case will be considered within the concept of the issue in question in the following part of this chapter.

that the passage of time and the continuing progress of the political conflict should be considered within the Court's interpretation and application of the Convention. This should be provided in light of the factual circumstances.

Turning to the case of *Loizidou*,⁵⁹ the Court, without giving reasons in detail, held that there was and continued to be breach of P1-1 due to the existence of Turkish troops in the northern part of Cyprus. With the absence of such an explanation, the Court, in essence, left its doors open to thousands of similar cases originating from the same problem that involves complex legal issues. Finally, the case of *Loizidou* resulted in the finding of a continued breach of P1-1 to the Convention. It is of great importance to emphasise that although the Court did not consider the political nature of the case, a case, burdened with highly political and legal dilemmas, must be lengthily and extensively examined, particularly if such a case could affect a large number of people in the same category.

Consequently, although in the absence of a formal transfer of ownership, the existence of *de facto* expropriation is a question of fact and degree,⁶⁰ the Court did examine the possibility of *de facto* expropriation in its *Loizidou* judgment. Bearing all this in mind, although the Strasbourg Court was faced with an exceedingly complex political and legal Gordian knot, with the advent of *Loizidou*, this situation still did not lead the Court to provide an extensive examination concerning the possibility of *de facto* expropriation. With the absence of such consideration, the Court left its doors open to thousands of similar cases involving complex legal matters. In essence, in practical terms, this may affect the way in which the Court deals with potential future cases from other Member States such as Russia, Croatia, Bosnia and Herzegovina.

As to the considerations in *Loizidou*, the applicant was not allowed access to her property and thus lost all control over it due to the division of the island. According to the Court, this situation constituted an interference with the substance of the property and not a *de facto* expropriation.⁶¹ As indicated earlier, interference with the substance of property

⁵⁹ *Loizidou v. Turkey* (1996) 23 EHRR 513.

⁶⁰ Monika Carss Frisk, 'The Right to Property, A Guide to Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights', *Human Rights Handbooks*, no.4 (2003) Strasbourg: Council of Europe, p.23, < http://www.coe.int/t/dgi/publications/hrhandbooks/index_handbooks_en.asp>, accessed: 17 September 2013.

⁶¹ Sermet (n 36) p.24.

was developed in the Court's case law, which was first raised in the case of *Sporrong and Lönnroth v. Sweden*.⁶² This type of interference falls under the first rule of P1-1. It is clear from its wording that the first sentence of P1-1, which provides the right to peaceful enjoyment of one's possessions, has a broad meaning. Since it is indeterminate in scope, it paved the way for numerous disputes. As to the case of *Sporrong and Lönnroth*, the Court maintained that in the case of interference with the substance of property, this type of interference did not completely prevent the applicants from using and disposing of it freely. However, it put restrictions on the applicants' property. Accordingly, it held that this type of interference does not deprive an owner of his property. This system was to be applied in cases in the circumstances whereby applicants' property was left in a prolonged and unacceptable state of uncertainty.⁶³

In the case of *Sporrong and Lönnroth*, the expropriation permits in question remained in force for a long time. All the complaints that were raised stemmed from the reduction of the possibility of disposing of the properties concerned. The Court took into account information that proved some sales of the properties were affected by such permits and held that the effects of the measures could not fall within the context of deprivation of possession. Although the right in question lost some of its substance, it did not disappear. According to the Court, the applicants could continue to utilise their possession. Moreover, considering the sale of some affected properties, it held that although it became more difficult to sell those properties, they were still potentially subject to sale.⁶⁴

Additionally, it was determined that those expropriation permits were not intended to limit or control use since they were an initial step in a procedure leading to the deprivation of possessions. Therefore they did not fall within the ambit of the second paragraph. The Court held that they must be examined under the first sentence of the first paragraph since the right in question lost some of its substance as a result of limitations, but it did not disappear.⁶⁵ Accordingly, in this judgment, interference with the substance of property was determined.

⁶² *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63.

⁶³ Sermet (n 36) p.24; *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63.

⁶⁴ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 63.

⁶⁵ *ibid*, para. 65; Coban (n 4) p.187.

In summary, in accordance with the Court's case law, if interference neither transfers property to public authorities, nor aims to control the use the property, then it constitutes interference with the substance of property. Taking this into account, it is reasonable to state that when the meaning and scope of a provision are not elaborated on or when relevant criteria are not set down, it is more likely that applicants will come up against indefinite approaches of the ECtHR and encounter grey areas within its case law.

4.5 Fair Balance Test

The search for a fair balance is inherent in the whole of the Convention. In consideration of the rule under which an alleged violation falls, if neither the second sentence of the first paragraph nor the second sentence of the second paragraph of P1-1 have been complied with, and the said right is violated, this does not mean that the interference falls within the ambit of the first sentence of the first paragraph. In order to determine whether the first rule has been complied with, the Court applies a 'fair balance' test. The consideration of this balance is reflected in the structure of P1-1. According to this test, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.⁶⁶

In the case of *Sporrong and Lönnroth*, the Court held that there had been a breach of the first rule of P1-1 due to the grant of the expropriation permits not having provided a fair balance between the public interest and private interest. The Court applies the fair balance test to all three rules when deciding under which the case might fall. Unlike *Sporrong and Lönnroth*, the Court in the *Loizidou* judgment did not apply the test after it held that the violation of property rights fell within the first rule of the P1-1. It only maintained that the Turkish government did not explain how the need to re-house displaced T/Cypriot refugees could justify the interference with the property rights of the applicant.⁶⁷

In light of all the above consideration, it is evidently true that *Loizidou* and subsequent cases on property disputes in Cyprus have a unique feature: a complex historical and political development that cannot be separated from the situation of the applicants. The addressee individuals of these judgments are not only Cypriots but also citizens of third

⁶⁶ *Sporrong Lönnroth v. Sweden* (1982) 5 EHRR 35, para. 69.

⁶⁷ *Loizidou v. Turkey* (1996) 23 EHRR 513, para. 64.

countries who purchase properties from disputed lands. It is questionable whether considering such cases without extensive examination of all possibilities within the scope of P1-1 is feasible in terms of the Court's case law.

At this point, it is important to clearly understand why the Court departed from its traditional approach concerning Eastern European cases in examining the case of *Loizidou* and subsequent property cases from Cyprus. Based on this, it is possible to suggest that the Court, perhaps, intended to refrain from becoming a political actor in this unique situation that is burdened with complex political issues. Bearing this in mind, it can be argued that the Court also refrained from considering the possibility of *de facto* expropriation because to act otherwise would result in these cases being classed as outside its jurisdiction.

Another significant aspect that needs to be pointed out is the fact that the Court, in Cypriot property cases, neither titled the act that constituted interference with G/Cypriot properties nor explained the type of interference in which the violation in question fell. In the matter of providing an effective remedy in order to deal with such interference, it is crucial to know on which grounds the public authorities have failed, thus giving rise to the violation of P1-1. In the case of violation, the nature of the remedy differs depending upon the nature of the failure.⁶⁸

It is crucial to note that fourteen years after the decision of *Loizidou*, a major shift in the Court's attitude occurred in the case of *Demopoulos and Others v. Turkey*. In this case, the Court adopted an entirely different approach from its previous Cyprus ruling. The facts in *Loizidou*, on which the Court did not consider it desirable to elaborate, turned into the grounds for its decision in the case of *Demopoulos*. It is questionable whether the reason for this gradual change in the Court's approach towards its Cyprus rulings is the increased caseload of the Court, of cases that concern the same issues. In this respect, it should be noted that from 1959 to the end of September 1998 the Court delivered 837 judgments and adopted 190 decisions in total.⁶⁹ At the time of the *Demopoulos* ruling,

⁶⁸ Coban (n 4) p. 174.

⁶⁹ Council of Europe, 'Activity Reports of European Court of Human Rights' <<http://www.echr.coe.int/ECHR/EN/Header/reports+and+Statistics/Reports/Annual+surveys+of+activity/>> accessed: 17 September 2013; Council of Europe, 'Reform of the European Court of Human Rights'

there were 32 cases before the Court to decide. As of the date of the hearing in November 2009, the number of cases brought before the Immovable Property Commission (IPC), which was considered as a domestic remedy of the TRNC authorities, was 433.⁷⁰ These numbers explain the change in the Court's attitude during the fourteen-year timeline. This change in attitude can be considered as an attempt to secure the efficiency of the Court and the Convention system.

Bearing all this in mind, the Court's decisions in its Cyprus rulings have had significant impact on the developments of the domestic remedies in the northern part of Cyprus and also have influenced the attitude of the parties to these cases. As a result, the fact that Cypriot property cases cannot be separated from complex political debates on the island has brought a new dimension to the Court's cases with the passage of time. Political and legal developments within the fourteen-year timeline were not without consequences. All in all, not only the property regulations in Cyprus were affected by the case law of the Court, but the ECtHR also changed its position because of the effect of property claims from Cyprus. In order to comprehend the mutual interaction between the Court's case law and the issue of property rights in Cyprus, it is necessary to consider the factors that introduce new dimensions within the Court's and Cyprus' case law.

4.6 The Interaction Between the ECtHR Case Law and the Issue of the Cyprus Property Dispute

As mentioned earlier, considerable numbers of Cypriots from both communities were displaced and abandoned their properties due to the civil strife from the beginning of 1960s. Political conflict and everlasting failure to settle the conflicts between the two communities resulted in continuing violation of human rights on the island. In light of the political and legal history of Cyprus, it can be argued that the pertinent feature of these cases is that it is not possible to separate the cases from the political, legal and historical complexity in Cyprus that has been continuing for more than five decades. It is also worth noting that although this feature of Cypriot claims was not acknowledged by the Court

<<http://www.coe.int/web/coe-portal/what-we-do/human-rights/reform-of-the-european-court>> accessed: 17 September 2013.

⁷⁰ International Crisis Group (ICG), '*Cyprus: Bridging the Property Divide*', ICG Europe Report No. 210 (2010) p. 12 see footnote 83.

until the end of 2004, after the failure of the comprehensive settlement plan of the UN, the Court manoeuvred in this respect and started to emphasise the inseparable character of these cases from their political and historical issues.

Considering this, in line with the fact that the Cyprus property cases stemmed from a political and legal complexity, the impact of the consequences of these cases was established on three grounds: political, legal and financial, within the scope of property disputes in Cyprus. In the following part of this chapter, there will be a focus on the mutual interaction between the Court's rulings and the Cypriot property cases within the ambit of the right to property as a human right.

The late realisation and acceptance of the political, legal and historical features of Cypriot cases by the Court could flow from the 'endless' nature of the property conflict and unsuccessful negotiations to resolve the property dispute. Accordingly, it can also be argued that interactions between the ECtHR case law and Cyprus property regulations were unilateral until the failure of the settlement plan. This is based on the fact that, as a result of the ECtHR assessments, Turkish authorities enacted new property regulations such as Law no.49/2003 and Law no. 67/2005.⁷¹ After the unsuccessful attempt to resolve the property dispute through the comprehensive settlement plan of the UN, the interaction turned into a mutual interaction between the Court and the disputed property laws in Cyprus. The mutual interaction can be determined as evidence that Cypriot property cases should be considered while examining the right to property as a human right within the context of the ECHR. In order to comprehend the need to consider the Cyprus property rulings within the Convention system, it will be useful to examine the interaction between the Court's cases law and the property cases on the island.

4.6.1 Legal Impact of the Interaction Between the ECtHR Case Law and Cyprus Property Cases

Although in all Cypriot cases concerning the property conflict in Cyprus the Court reiterated that Article 159 of the TRNC Constitution was not regarded as legally valid, in the case of *Cyprus v. Turkey*⁷² the Court explicitly guided the Turkish government

⁷¹ Property regulations of the Turkish authorities are examined in detail in Chapter 2.

⁷² *Cyprus v. Turkey* (2001) 35 EHRR 731, para. 90.

towards establishing remedies that must serve the claimants in enabling them to secure redress for violations of their Convention rights, benchmarked by reference to the Namibia decision.⁷³ This highlights the fact that, in some situations, the actions of an unrecognised local administration of a state could be legitimate.

The Court's assessment was taken into account by Turkish authorities and accordingly a new property mechanism, the first property commission, to deal with G/Cypriot properties was established. However, remedies provided by this system were found inadequate by virtue of the fact that it did not award non-pecuniary damages or restitution. In the case of *Xenides-Arestis*,⁷⁴ the Court made a request for the formation of another property mechanism by the Turkish government, which could be considered as a domestic remedy for which G/Cypriots could apply in order to reclaim their property rights. As a response to the Court's request, the new IPC was founded under the new Law no. 67/2005 in the northern part of Cyprus. The number of G/Cypriots applying to the IPC for their properties left in the north, as of December 2010, was 784.⁷⁵ The applications of G/Cypriots to the IPC were not welcomed by the Greek government, which discouraged its citizens from applying to it. According to the Greek government, applying to the IPC would give legitimacy to the unrecognised TRNC, 'pseudo-state', and its proceedings.⁷⁶

Although G/Cypriot applications to the IPC were not supported by the Greek government, satisfactory results were provided. For instance, friendly settlement was achieved through the IPC mechanism in the case of *Michael Tymvios v. Turkey*⁷⁷ in April 2008. The settlement involved a payment of USD 1 million and an exchange. This was considered a satisfactory result by the Court on the grounds of respect for human rights as defined in

⁷³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16.

⁷⁴ ECtHR, *Xenides-Arestis v. Turkey* (admissibility decision of 14 March 2005 unpublished); *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

⁷⁵ As of 5 December 2010, 784 applications have been lodged to the IPC and GBP 50,459,000 has been paid to the applicants as compensation and in some cases exchange and compensation was ruled. As of 19 April 2013, this number dramatically increased to 4,809. Friendly settlements have been achieved in 351 of cases and a normal hearing has been provided in 9 of them. The IPC has paid GBP 108,183,423 to the applicants as compensation. It has ruled for exchange and compensation in two cases, for restitution in one case and for restitution and compensation in five cases. It has also delivered a decision for restitution after the settlement of the Cyprus problem and in one case it has ruled for partial restitution. See: <<http://www.tamk.gov.ct.tr/english/index.html>>

⁷⁶ International Crisis Group (n 70) p.11.

⁷⁷ *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey* (2003) 39 EHRR 772.

the Convention and its Protocols.⁷⁸ This was followed with the achievement of another friendly settlement⁷⁹ through the IPC in *Alexandrou v. Turkey*⁸⁰ in 2009, which involved GBP 1.5 million and restitution of a plot of land. Both applications were struck out from the Court's list of cases.

Confirmation of those friendly settlements by the Court was followed with the benchmark case of *Demopoulos and 7 other v. Turkey*⁸¹ in March 2010. This ruling is highly significant⁸² as the Court, for the first time, examined the effectiveness of a remedy that was set down by the TRNC authorities. Due to the fact that the Court departed from its previous approach in its Cyprus rulings with the rise of this case,⁸³ it can be argued that the case of *Demopoulos* represents a step towards a new era for the property conflict in Cyprus.

In the case of *Demopoulos*, the Court held that the IPC mechanism in the north of Cyprus was an accessible and effective domestic remedy under the terms of Article 35 of the Convention.⁸⁴ This means the Court would only consider cases that had previously gone through the IPC. In a case that did not make the use of this mechanism, the applicants' complaints would be rejected for non-exhaustion of domestic remedies. The Court also provided another option for applicants who did not wish to apply to the IPC: to choose to wait for a political solution. It can be maintained that the major shift in the Court's stance in the Cyprus property cases occurred with this case on the basis of the fact that a commission that was established by the TRNC authorities was recognised by the Court.

The case of *Demopoulos* is the most recent case that indicates the Court's latest position towards the property conflict in Cyprus. The consideration of the IPC mechanism as an

⁷⁸ *ibid.*, para. 15.

⁷⁹ The friendly settlement procedure under the ECHR provides the parties with an opportunity to resolve a dispute usually through payment of a specific amount of money to the applicant by the respondent state or through appropriate remedy of the disputed matter, or both. The friendly settlement procedure was set down under Article 38 of the ECHR; see: Ugur Erdal & Hasan Bakirci, *Article 3 of the European Convention on Human Rights, A Practitioner's Handbook*, World Organisation Against Torture (July 2006) <http://www.omct.org/files/2006/11/3633/handbook1_eng_08_part8.pdf>. 12 November 2013.

⁸⁰ *Alexandrou v. Turkey* (just satisfaction-striking out) no. 16162/90, 2009 ECHR 1222.

⁸¹ *Demopoulos and Others v. Turkey* (2010) ECHR 306.

⁸² Loucaides (n 49) pp. 435–465; Rhodri C Williams and Ayla Gürel, *The European Court Of Human Rights and the Cyprus Property Issue: Charting a Way Forward*, Peace Research Institute Oslo, (2011), p.8, see: "Ankara Hopes Greek Cypriots Learn from the IPC Decision" *Today's Zaman*, 8 March 2010.

⁸³ *Demopoulos and Others v. Turkey* (2010) ECHR 306.

⁸⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 127.

effective domestic remedy that needs to be exhausted before applying to the Court can be determined as evidence of the Court's amended attitude in its Cyprus ruling. The judgment raised controversial debates, particularly as to its political nature and the issue of subsidiarity. The Court's decision was interpreted on two dimensions. The judgment was simply determined as 'wrong' and it has also been argued that the decision in *Demopoulos* was taken under the influence of political considerations.⁸⁵ Additionally, for some, the decision was a result of the application of the doctrine of subsidiarity to the Cypriot property cases.⁸⁶

In *Demopoulos*, the Court highlighted the significance of its doctrine of subsidiarity under the Convention system, which ensures the protection of rights at domestic level. Although it is not explicitly stated in the Convention, the principle of subsidiarity was reflected within its provisions. The Court maintained that where domestic remedies are available, an applicant is required to exhaust them before invoking the Court's international supervision on the grounds of the exhaustion of domestic remedies rule provided in Article 35 of the Convention and the obligation to provide effective national remedy under Article 13 of the Convention.⁸⁷ This doctrine is a crucial component and is at the heart of the Convention's system.⁸⁸ The main purpose of this rule is to encourage states to guarantee basic rights and not to simply allow access to the Convention system.⁸⁹

The Court in *Demopoulos* recalled that the principle of subsidiarity is of paramount importance in order to protect rights at domestic level. The main concern in the case of *Demopoulos* was to avoid a vacuum that operated to the detriment of individuals who may allege violation of their rights. Continuing protection of individuals' rights is significant and this should be provided for within the judicial system. The right of individual petition under the Convention mechanism cannot be considered as a substitute for this system. On this basis, the Court held that if there was an effective remedy for the applicants' claims provided by the respondent government, the rule of exhaustion of

⁸⁵ Loukaides (n 49) pp. 441–464.

⁸⁶ Williams and Gürel (n 82) pp. 11–14.

⁸⁷ Alexia Solomou, 'Demopoulos & Others v. Turkey' (2010) vol. 104, No.4, *The American Journal of International Law*, p.631.

⁸⁸ Williams and Gürel (n 82) p.11.

⁸⁹ Bernard Robertson, 'Exhaustion of Local Remedies in international Human Rights Litigation: The Burden of Proof Reconsidered', *International Comparative Law Quarterly*, vol.39, no.1 (1990) pp. 191–196.

domestic remedies should be applied regardless of the fact that the applicants were not living under the control of the TRNC. It was emphasised that this should not be understood as recognition of the TRNC. Accordingly, it was held that the applicant is required to exhaust these remedies before invoking the ECtHR.⁹⁰

The Convention's machinery of protection is subsidiary to the national system for safeguarding human rights.⁹¹ In this regard, it can be argued that this rule has gained a prominent place within the Cyprus rulings after the case of *Loizidou*, when the number of applications before the ECtHR regarding property rights dramatically increased. It should be noted that the growth in the caseload before the Court between the decisions of *Loizidou* and *Demopoulos* was considerable.⁹² While ninety-two pending cases were transmitted to the Grand Chamber at the time of the *Loizidou* decision, this number increased to 160,200 pending cases as of August 2011.⁹³

4.6.2 Social Impact of the Interaction Between the ECtHR Case Law and Cyprus Property Cases

In addition to the establishment of domestic remedies by the respondent state as a legal impact of the ECtHR, another considerable issue that should be noted is the increase in the number of Cypriot applications before the Court. It is notable that, after the failure of the Annan Plan, the explosive growth of the caseload has had an influence on the Court's latter decisions concerning property disputes in Cyprus. In *Demopoulos*, the applicants maintained that the principle of exhaustion of domestic remedies could not be applied to them. However, according to the Court it was more beneficial for the applicants to make use of remedies available at the domestic law level before bringing their cases to the ECtHR. The underlying reason, here, is that an appropriate domestic body, with access to the properties, registries and records, is clearly the more appropriate forum for deciding

⁹⁰ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras. 96–101.

⁹¹ *Akdivar and Others v. Turkey* (1996) 23 EHRR 143, para. 65; *Handyside v. UK* (1976) 1 EHRR 737, para. 48.

⁹² Council of Europe, 'Activity Reports of European Court of Human Rights' <<http://www.echr.coe.int/ECHR/EN/Header/reports+and+Statistics/Reports/Annual+surveys+of+activity/>> accessed: 17 September 2013; Council of Europe, 'Reform of the European Court of Human Rights' <<http://www.coe.int/web/coe-portal/what-we-do/human-rights/reform-of-the-european-court>> accessed: 17 September 2013.

⁹³ Press and Information Office of the RoC, 'Turkish Mass Media Bulletin' (6–8 March 2010) <<http://www.moi.gov.cy/moi/pio/pio.nsf/All/24C351AE3A568355C22576E0004B72DF?OpenDocument>> accessed: 19 September 2013.

on complex matters of property ownership and valuation and assessing financial compensation.⁹⁴ Considering the caseload, the Court does not have the capacity to deal with vast numbers of fact-finding cases requiring access to the States' registries and records.⁹⁵

The correlation between the numbers of cases before the Court and the effectiveness of the Convention is a considerable issue within the Convention mechanism. For instance, in his speech, Sir Nicholas Bratza maintained that a number of decisive steps are being taken to enhance the effectiveness of the Convention system by pointing out the developments on the pilot judgment procedure in response to large numbers of applications from different countries. He addressed the claim that maintained that the Court and its Registry were in some way inefficient, which had established a backlog of significant number of cases. He refuted that suggestion and added that '...what may be considered to be inefficient is the system, which was not designed to cope with the massive case-load with which it is now confronted. Within the means available to it, the Court has done everything it can to rationalise and streamline its processes and with remarkable success, as has been confirmed by a number of outside observers and by a consistent increase in its overall productivity.'⁹⁶

Sir Nicholas Bratza recalled that the Convention is a shared responsibility, which was acknowledged at both the Interlaken and Izmir Conferences. It is not possible for the Court to handle the whole burden of its implementation. The Contracting States are primarily responsible for securing the Convention rights and freedoms that fall on them. If the states perform this seriously, if national courts apply the Convention and its case law convincingly, the Court's task is made considerably easier.⁹⁷ It can be argued that the consideration of this issue was reflected in the examination of the *Demopoulos* case by the Court while examining the matter of exhaustion of domestic remedies and the passage of time as well as its consequences.

⁹⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.97.

⁹⁵ Solomou (n 87) p.632.

⁹⁶ Sir Nicholas Bratza, 'Solemn Hearing of the European Court of Human Rights on the Occasion of the Opening of the Judicial Year', European Court of Human Rights, (27 January 2012) available at: <http://www.echr.coe.int/NR/ronlyres/9F353912-1F71-4ABD-827F4CEBA52EDBD0/0/2012_AUDIENCE_SOLENNELLE_Discours_Bratza_EN.pdf>accessed: 17 September 2013.

⁹⁷ *ibid.*

In comparison with previous Cyprus cases⁹⁸ and *Demopoulos*, it is true to say that the Court's approach has radically changed regarding the evaluation of the facts and circumstances in Cyprus. On this basis, the new standpoint of the Court might stem from the existence of a vast number of cases that impair the Court's effectiveness with a backlog of cases beyond the Court's capacity.

4.7 Legal Impact of Cyprus Property Cases on ECtHR Rulings

One crucial point that needs to be pointed out is the legal impact of the Cyprus property cases on the ECtHR. With the examination of the *Demopoulos* case the Court departed from its previous approach and adopted a new dimension within the scope of its Cyprus ruling. The Court recognised that the passage of time and the continuing evolution of the broader political dispute can weaken the legal title to a property. It was maintained that there has always been a strong legal and factual link between ownership and possession. However, the holding of a title may be lost with the passage of time.⁹⁹ In the matter of property cases from Cyprus the Court emphasised that thirty-six years has passed since the applicants left their property. Considering the passage of time, it would risk being arbitrary and injudicious for it to attempt to impose an obligation on the respondent state to provide restitution in all cases.

It was not considered within the Court's task to order a state to provide restitution in all cases as this was a remedy that would result in forcible eviction and re-housing of potentially large numbers of people despite the aim of vindicating the rights of victims of violations of the Convention.¹⁰⁰ Accordingly, in the matter of examining the existence of practical and effective remedies, the Court highlighted the number of completed applications before the IPC within the short period of time, and considered the redress available via Law no. 67/2005 by emphasising the right of appeal lay to the TRNC High Administrative Court.¹⁰¹

⁹⁸ Cases concerning the property dispute in Cyprus are analysed in detail in Chapter 3.

⁹⁹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras. 85, 111.

¹⁰⁰ *ibid.* para. 116.

¹⁰¹ *ibid.* paras. 75, 104, 105, 126.

In light of this consideration, it is reasonable to state the Court's stance in *Loizidou* has changed with its judgment in *Demopoulos*. The *Demopoulos* case has changed the Court's position concerning the TRNC Constitution and the rights of G/Cypriots.¹⁰² In *Loizidou*, the Court maintained that the international community did not regard the TRNC as a state under international law and thus the RoC remained the sole legitimate government of Cyprus. Accordingly, the Court did not attribute legal validity to Art. 159 of the TRNC Constitution by either examining whether TRNC courts could have provided judicial decisions nor by analysing the lawfulness of the legislative and administrative acts of the TRNC.¹⁰³ Although the Court had attached importance to the protection of property rights of Cypriots at that time, it modified its position after a dramatic increase in the volume of its caseload.¹⁰⁴

In accordance with the Court's request in *Xenides-Arestis*,¹⁰⁵ the Turkish authorities established the IPC as a domestic remedy, relying on the issue of the Court's subsidiary role. After *Xenides-Arestis* was regarded as a pilot case, approximately 1,400 of the same kind of cases before the Court were frozen. The Court determined the requirements of an effective remedy that needed to be established by the Turkish government¹⁰⁶ and accordingly all similar cases were struck out from the Court's list and diverted to the IPC for examination. This was followed by the test of the IPC mechanism as to whether it could be determined as a domestic remedy. Consequently, the Court in *Demopoulos* held that the IPC must be regarded as a domestic remedy.¹⁰⁷

Arguably, the caseload of the Court had an impact on its amended position. This logic flows from the fact that the effectiveness of the Court machinery was under threat with its caseload. Additionally, it can be argued that the political failure between the communities may have had an indirect effect on the Court's change in attitude. The dramatic increase in the Court's docket after the failure of the Annan Plan can be considered as a direct consequence of its failure. The unsuccessful outcome of the

¹⁰² Solomou (n 87) p.632.

¹⁰³ *Loizidou v. Turkey* (1996) 23 EHRR 513, para.44.

¹⁰⁴ At the time of the decision of *Loizidou*, there were 94 pending cases. In August 2011, this number increased to 160,200; Council of Europe, 'Activity Reports of European Court of Human Rights'; Council of Europe, 'Reform of the European Court of Human Rights'.

¹⁰⁵ *Xenides-Arestis v. Turkey* (2005) 44 EHRR SE 185.

¹⁰⁶ *ibid.*, para.40.

¹⁰⁷ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras. 34–38, 90.

comprehensive settlement plan was a total disappointment not only for the international community but also for the Court. The fact that the examination of the *Xenides-Arestis* case was frozen until the result of the Annan Plan may be determined as a proof of the Court's expectation regarding the resolution of the property dispute through the comprehensive settlement plan.

The strong correlation between Cyprus property cases and politics persisted on behalf of the Turkish government after the judgment of *Loizidou*. Although the political nature of these cases was reiterated by some judges in *Loizidou*,¹⁰⁸ it took more than a decade for the Court to determine the character of these cases. In *Loizidou*, the political nature of these cases was highlighted in various ways. As was examined in Chapter 3 of the thesis, in the case of *Loizidou*, Judge Jambrek pointed out the 'political nature' of the case and pointed out the role of the Courts, which was to adjudicate in individual and concrete cases in accordance with prescribed legal standards. Accordingly, the Courts have different roles from the legislative and executive bodies. He also added that courts are 'ill-equipped to deal with large-scale and complex issues'.¹⁰⁹ Additionally, the case that involves the whole problem of the two communities has more to do with 'politics and diplomacy than with European judicial scrutiny'.¹¹⁰ Although these evaluations were held by judges in their dissenting opinions in the case of *Loizidou* and were not reflected in the decision of the Court, in *Demopoulos*, the Court emphasised the context of the case, which involved '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'.¹¹¹

It was added that the cases involved highly political, historical and factual complexity stemming from a problem that should have been resolved by all the parties on a political level. By stating that, with its decision in *Demopoulos*, the Court did not leave the resolution of the property dispute to the parties in the political arena. With the influence of the long-standing unresolved problem of the property dispute and particularly with the

¹⁰⁸ *Loizidou v. Turkey* (1996) 23 EHRR 513.

¹⁰⁹ *Loizidou v. Turkey* (1996) 23 EHRR 513, dissenting opinion of Judge J. Jambrek.

¹¹⁰ *Loizidou v. Turkey* (1996) 23 EHRR 513, dissenting opinion of Judge Pettiti.

¹¹¹ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 83.

effect of the great disappointment of the failure of the Annan Plan, the Court contributed to the process for the settlement of the property problem.

The judgment of *Loizidou* raised a significant issue as to whether an international tribunal should restrain from a new category of cases. In his dissenting opinion Judge Jambrek emphasised that a violation decision on P1-1 might open the door to another one hundred thousand or so similar cases. Undoubtedly, a broad decision about a large-scale issue in the realm of public international law was taken by the Court with its decision in *Loizidou*.¹¹² Considering the threat over the effectiveness of the Convention machinery with this caseload, the Court had two choices: either to leave the resolution of the problem entirely to the political sphere or to deal with the cases.

Considering the fact that the Court held significant findings in the case of *Loizidou*, such as the imputability issue of the alleged violations to Turkey or the legally invalid status of the TRNC Constitution, the Court accepted it would deal with these cases and thus not leave the resolution entirely to the political sphere. By doing so, it highlighted that the refugees' property rights are not negotiable and emphasised that human rights could not be subordinated to considerations of political expediency that stems from the fact that the Member States' obligation to respect human rights is absolute.¹¹³

Fourteen years after the decision of *Loizidou*, the same approach was followed by the Court. In a comparison between the Court's pattern in *Loizidou* and *Demopoulos*, it can be noted that the Court in the latter applied a different method from the former in the matter of examination of whether the remedies are practical and effective. After the failure of the Annan Plan, the Turkish government established the IPC, which was found in principle adequate as a remedy. In *Demopoulos*, the Court in its ruling examined the remedies and the IPC in detail under four criteria. In examination of these matters, the Court for the first time looked at the passing of time by stating that 'with the passage of time the holding of a title may be emptied of any practical consequences'.¹¹⁴ This consideration raises the loss of title by adverse possession which causes loss of title with

¹¹² *Loizidou v. Turkey* (1996) 23 EHRR 513, dissenting opinion of Judge Jambrek.

¹¹³ Bernard H. Oxman and Beate Rudolf, 'Loizidou v. Turkey', *American Journal of International Law*, vol. 9 (1997) p.537; Solomou, (n 87), p.634.

¹¹⁴ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para.111.

the satisfaction of three conditions: ‘not by force, nor stealth, nor licence’ (*Nec vi, nec clam, nec precario*).¹¹⁵ The Court added that this does not mean the applicants have lost their ownership in any formal sense and it ‘would eschew any notion that military occupation should be regarded as a form of adverse possession by which can be legally transferred to the invading power.’¹¹⁶

Ordering Turkey to ensure that the applicants obtain access to and full possession of their properties irrespective of who is now living there was considered as an unrealistic resolution by the Court.¹¹⁷ Accordingly, providing restitution was found to be feasible, the Court emphasising that if the nature of the breach allows restitution, the respondent state should implement it. However, if restitution is not possible, the alternative requirement is imposed: compensation for the value of the property should be paid. On this specific point, the Court departed from its standpoint in previous cases regarding the payment of compensation as a remedy instead of restitution as a mere option.

Bearing all this in mind, it can be argued that as distinct from previous cases, considering compensation as a remedy, the Court considered the interest of current occupants of the disputed properties besides the interests of G/Cypriot owners. With the *Demopoulos* case, the Court evaluated this with the Conventional perspective and highlighted that property is a material commodity that can be valued and compensated for in monetary terms.¹¹⁸ Taking into account the previous Cyprus property cases, it is significant that, with this perspective, the Court opened the door to a new dimension for Cyprus cases. While the mere remedy was ‘*restitutio in integrum*’ in previous cases, after more than a decade compensation has started to be considered a remedy.

At this juncture, my contention is that political and legal changes with the passage of time bring new dimensions to the examination and decision-making of the cases. At the point where political deadlock influences the maintenance of the protection of human rights, the ECtHR contributes to the resolution of the problem by not leaving the resolution

¹¹⁵ Solomou, (n 87), p.635.

¹¹⁶ *Demopoulos and Others v. Turkey* (2010) ECHR 306, paras.111–112.

¹¹⁷ *ibid*, para. 112.

¹¹⁸ *Demopoulos and Others v. Turkey* (2010) ECHR 306, para. 115.

entirely to the political arena. Cyprus property cases are the concrete examples of this situation.

In *Demopoulos*, Law no. 67/2005 was considered an accessible and effective framework of redress concerning interference with property owned by G/Cypriot applicants. Since the applicants did not use the mechanism and exhaust domestic remedies, their complaints under P1-1 were rejected for non-exhaustion of domestic remedies. The Court was satisfied that the Law no. 67/2005 makes ‘realistic provision’ for redress in ‘the current situation of occupation’ that is ‘beyond this Court’s competence’ to resolve. With its decision the Court brings a new dimension to Cyprus property cases. The Court impeded the direct flow of the caseload from Cyprus and diverted it to the IPC as a ‘filter mechanism’ in order to reduce the number of similar applications before the Court. It is reasonable to maintain that not only do changes at the domestic level, such as politics and legal changes, bring a different approach to the ECtHR arena, but external factors may also influence the Court’s jurisprudence.

As of 19 April 2012, 3,155 applications have been lodged with the IPC and this number increased to 4,809 as of 19 April 2013. In 2012, 219 of these applications were concluded through friendly settlements and 7 through formal hearing. In 2013, 351 of them concluded through friendly settlement and 9 through formal hearing.¹¹⁹ Considering these numbers, it can be argued that with its new approach towards Cyprus rulings the Court has avoided a large future caseload of Cyprus property applications.

The Court is concerned that the property rights violations in northern Cyprus are restrained. During the efforts to settle the dispute, it must be highlighted that the Court had a significant impact with its decision on negotiations for the comprehensive settlement. The Court considered its previous decisions concerning Turkey’s responsibility for violations and attempted to establish a redress for them. The Court welcomed the Turkish government’s efforts for the establishment of the IPC. In the meantime, the rejection of the Annan Plan by the majority of G/Cypriots was not

¹¹⁹ Immovable Property Commission of the TRNC, <<http://www.tamk.gov.ct.tr/>> accessed: 17 December 2013.

disregarded. Considering these two contrary situations, the IPC was welcomed by the Court, which might be considered as an attempt to re-establish the balance.¹²⁰

The property dispute is the crux of the unresolved Cyprus problem. It can be argued that with the passage of time this issue is becoming more complex and the legal consequences becoming more unstable. The deadlock of the property dispute constitutes trouble for Cypriots and other nationals who have purchased the abandoned properties of G/Cypriots from the T/Cypriots. The fact that the government of the RoC considered Law no. 67/2005, which was established by the Turkish government to provide redress for the persons claiming rights to immovable or movable properties, as null and void, obviously does not assist there solution of the property conflict. In addition to the rejection of the Annan Plan, the dismissal of legal remedies is not helping either community to resolve the dispute. Therefore, the G/Cypriot leadership should stop discouraging G/Cypriots to apply to the IPC, as closing the doors to every resolution does not carry the continuing efforts any further towards resolving the Cyprus conflict.

Additionally, the impartiality of the IPC is another significant matter that needs to be considered. The government of the RoC maintained that there was a lack of effectiveness of the remedy before the IPC on various grounds such as the lack of independence and impartiality and the inadequacy of the compensation. In order to remove the mistrust of the IPC, Turkish authorities should support the establishment of a new commission that should have an equal number of members from both communities. Moreover, compensation calculations and evaluation details should be provided in detail to reduce the doubts as to calculations and to provide transparency.

Another issue that needs to be reconsidered for the sake of the property dispute is the Guardianship Law that was set down by the government of the RoC to administer abandoned T/Cypriot properties in the south. As was examined the previous Chapter 1 the law prohibited the sale, exchange or transfer of T/Cypriot properties. The point that needs to be highlighted is that the law prohibits any payment to T/Cypriots during the 'unsettled situation'. In 2004, a T/Cypriot living in the UK brought a case before the

¹²⁰ Rhodri C. Williams, 'Introductory Note to the European Court of Human Rights: Demopoulos v. Turkey', *International Legal Materials*, vol. 49, no. 3 (2010) p.817.

ECtHR and pre-empted the judgment of the G/Cypriot government. The G/Cypriot government paid EUR 500,000 for the loss of use of one whole and one half share in two houses in which G/Cypriot displaced persons were living. Therefore, the Court's decision forced the government to amend the law, and the T/Cypriots who reside in government-controlled areas or abroad can claim their property.¹²¹ Although the amendment is an improvement, it cannot be considered as a profitable change since the section prohibits any payment to T/Cypriots while the "unsettled situation" remains in place. For a feasible property settlement, the G/Cypriot government should amend the law to establish new remedies that are more effective and accessible for all T/Cypriots who own abandoned properties in the south and who are residing in the north. This would provide equality between T/Cypriots who live abroad or in government-controlled areas and the ones residing in the north. There is no difference between the rights of these people, apart from their place of residence. It is not justifiable to punish T/Cypriots just because they reside in the north by blocking their way to seek remedy for their abandoned properties.

In the matter of settling the disputes and moving towards the comprehensive settlement and of settling disagreements on specific areas of the property disputes, Turkey should sustain negotiations and adopt a proactive standpoint. It should adopt a stance within the UN parameters and sustain efforts in line with UN plans. This would bring Turkey onto the moral high ground in the international arena as well as boost Turkey's EU membership process.¹²²

Although Turkish authorities established the Law no. 67/2005, which provides restitution, exchange and compensation, the T/Cypriot authorities should provide restitution of property to former owners of abandoned properties in the north as much as possible by considering and protecting the rights of the current users. Equally, the G/Cypriot authorities should accept and sustain the idea that restitution should not be the only redress for the displaced persons and in some circumstances the right to restitution should be restricted.¹²³ Bearing all this in mind, any proposed plan for the final settlement would

¹²¹ *Nezire Ahmet Adnan Sofi v. Cyprus* (18163/04) ECtHR, 14 January 2010; International Crisis Group (ICG), (n 70), p.4.

¹²² Tarik Oguzlu, 'Turkey and the Cyprus Dispute: Pitfalls and Opportunities', vol. 3, no.1, (2010), *Ankara Bar Review*, p.80.

¹²³ International Crisis Group (ICG), (n 70) p.ii.

invoke the Annan Plan. The property dispute in Cyprus departed from the political arena to international courts. People are applying to the international courts to solve property disputes and thus Turkey is ordered to pay huge amounts of penalties. Property is an emotional issue that should be resolved as soon as possible on the grounds of the most efficient settlement plan with flexibility, transparency and equality. It is a well-known fact that the Cyprus problem involves political, historical and factual complications. This should be comprehensively settled by all parties who share the burden of finding a solution on a political level. All parties should be concentrating on the vital points for the settlement and should stop opposing each other in order to prevent or postpone the comprehensive settlement. The continuing factual changes flowing from the passage of time should be considered and the settlement plans should be proposed with the good faith and for the very best of both communities.

Conclusion

The thrust of this chapter was to indicate the significance of the Cypriot property cases and the Court's rulings on Cypriot claims within the issue of the right to property provided by P1-1 to the Convention. The resulting large number of clone cases, concerning the property complaints of displaced persons, which originate from the same problem, perhaps represents the best example of the implications of the right to property within the scope of post-conflict situations and within the field of unresolved disputes whose effects are still continuing.

During the course of the fourteen years in which the Strasbourg Court has been involved with the prolonged property conflict on the island, considerable progress has been achieved in the field of the property complaints of displaced Cypriots. There is no doubt that the ECtHR has had a major role in this progress. To some extent, it achieved what the authorities of the both communities repeatedly failed to achieve by way of the development of local legislation that deals with the ancient property conflict and that is relevant to the majority of Cypriots. The Court's judgments on the cases from Cyprus have gained a more prominent place in the seeking of a settlement of the Cyprus property problem than the representatives of the both communities have managed. In essence, the Strasbourg Court, through the findings and assessments that it provided during its examination of the Cypriot cases, illustrated to the international community and to those

related to and affected by the property conflict in Cyprus, that the issue of property is the major stumbling block to achieving a lasting settlement of the Cyprus question.

Intense, prolonged but unfruitful negotiations surrounding the settlement of the Cyprus problem have not given rise to a solution of the property dispute. Therefore, since the emergence of the property problem on the island, this issue of property has stood at the heart of both the displaced Cypriots and the Cyprus conflict itself. As a result of the continuing failure of politics to reach an agreement sufficient to resolve the Cyprus problem, the property deadlock has become a Gordian Knot of this problem. Although no settlement has been achieved to date, it has to be accepted that learning from past mistakes can help prevent a repeat of those mistakes. The Strasbourg Court has played a principal role in shedding light on reasons as to why a resolution of the property problem has not been achieved. It has done this by examining and determining on specific and major conflicted issues that had never been discussed at the global level before. However, attempts to make progress on the long-lasting Cyprus property dispute have continuously failed to produce any great results. Political development should put its weight behind the property issue, in order to take a further step towards a comprehensive settlement of the Cyprus problem, which would then also bring a permanent solution to the property matters on the island. All in all, although the Strasbourg Court has contributed at times to the confusion and conflict over the issue of property in Cyprus, its recent judgments mean that seeking remedy before the Court for past injustices cannot be considered as a permanent and durable method in the context of Cyprus. Both T/Cypriots and G/Cypriots should accept that both communities have become victims of and have suffered from the past mistakes. Regardless of the period of time during which Cypriots from both communities have been experiencing the consequences of the massive displacement, it should also be recognised that those injuries from the past can never be healed. A mutually recognised and sustainable settlement of the Cyprus problem is possible and achievable if both communities take further steps on the basis of the spirit of compromise and reconciliation. Concluding with a note of caution, those who refuse to learn from past mistakes are bound to repeat them. Therefore, in the case of the property dispute and the Cyprus problem as a whole, a lasting, durable and peaceful solution is achievable with mutual trust, flexibility and understanding.

General Conclusion

The property issue is the Gordian knot of the Cyprus problem, constituting a significant impediment to reaching a comprehensive settlement of the Cyprus dispute. Although it is a highly political issue, its long-standing deadlock feature has transformed this debate into a legal war in the international arena. A significant number of G/Cypriots and T/Cypriots own properties, which are affected by the property conflict in Cyprus. Accordingly, thousands of Cypriots have become warriors and their properties used as weapons in this political and legal battle, which has not been finalised yet.

Inter-communal negotiations to settle the Cyprus dispute between the two communities have been continuing for more than five decades without reaching any final resolution. The failure of politicians to achieve a comprehensive settlement has led individuals to search for a remedy at the international level in order to protect their property rights. Therefore, the ECtHR has become the main actor and its Courtroom has turned into a battlefield for property disputes on the island. It should be stated that the finding of a solution to the property debate will not only remove the fundamental obstacle to reaching a settlement in Cyprus, but will also obviate the Court from becoming an actor and will prevent its mechanism from being impaired by the huge caseload of clone cases.

The significance of the thesis is based on the interaction between Cyprus property cases and the ECtHR protection mechanism of the right to property by highlighting the problems of displaced Cypriots from my own lessons learned from Cyprus. Additionally, its significance is to design an effective and optimal model to improve the strategies for the disputed lands that can help to provide internationally recognised domestic remedies as well as being the study of the efficiency of predictive conditions for the potential mechanism that could assist authorities as well as law-makers.

The thesis aims to provide answers to the questions of: (i) whether cases of property disputes in Cyprus have had an impact on the Court's established case law and to what extent those cases caused the ECtHR to depart from its traditional approach

concerning property rights; (2) whether Cyprus property claims brought before the ECtHR have brought a new aspect to the understanding of the protection of property rights in respect of the Convention system and the application of P1-1 to the Convention; and (3) whether a mutually agreed, effective and sustainable property mechanism is achievable at the domestic level within the context of resolving the Cyprus property dispute.

The examination has been conducted through looking at the underlying reasons as to why the local remedies of disputed properties have been considered legally invalid, at the gradual evolution of these regulations in light of the ECtHR's assessment and the increasing pressure on the local property mechanism to deal with property claims at the national level as well as at the recommendations for the establishment of a future effective property system in Cyprus. In addition, an outline has been made of how Turkish authorities seek to achieve internationally acceptable remedies for the displaced people and have settled regulations to deal with property claims. Furthermore, a solution is sought by comparing the domestic laws and the elements of the protection of the right to property within the Convention mechanism.

Regarding the first question raised in the thesis, whether the property claims from Cyprus have had an impact on the Court's case law or caused the Court to depart from its traditional approach on Cyprus, it has been suggested that the Court's new dimension has been reflected within its own judgments. The examination of the Court's earlier case law involving the Cyprus property cases and its most recent decision in *Demopoulos v. Turkey*¹ in March 2010 have been useful in revealing how the ECtHR moved away from its adopted pattern and broke away its earlier group of judgments concerning the property disputes of Cypriots.

In looking at the Court's decisions in its *Loizidou* judgments² and similar cases,³ it may be seen that those decisions were supporting the G/Cypriot aspect, which was

¹ *Demopoulos and Others v. Turkey*, (2010) ECHR 306.

² *Loizidou v. Turkey* (1995) 20 EHRR 99; *Loizidou v. Turkey* (1997) 23 EHRR 513; *Loizidou v. Turkey* (1996) 23 EHRR 511 GC.

³ The ECtHR cases which have been examined throughout this thesis.

based on the reinstatement of all displaced properties to their original owners. Consequently, according to the G/Cypriot perspective, a remedy for the violation of property rights that stemmed from Turkey's intervention of the island in 1974 should provide a restitution of those properties in question. The only exception for the reinstatement of those properties was where reinstatement was materially impossible. However, this aspect of the G/Cypriot's claim was rejected with the Court's decision in *Demopoulos*⁴ after more than a decade. The Court's traditional approach, which was based on the right to return and the reinstatement of properties, gave way to the Court's new attitude that supports compensation and exchange rather than restitution. For the first time in the history of the T/Cypriot property struggle, an international court approved a measure, namely the Immovable Property Commission (IPC), which was established by the Turkish authorities. Against this background, what is notable here is: it is evident from the approval of the IPC that there is a considerable transition from a purely traditional approach to a brand-new one for the treatment of unrecognised entities in producing effective remedies for the claims of citizens of recognised states at international level.

There is not much doubt that the ECtHR has directly come to play a law-making role in the establishment of domestic regulations in Cyprus. In this regard, it is perhaps worthwhile recalling that the IPC was founded in accordance with the Court's ruling in the case of *Xenides-Arestis v. Turkey*.⁵ In this connection, the efforts of the Turkish authorities, by following the guidance of the ECtHR in order to establish an effective Commission to deal with G/Cypriot property claims, were reciprocated.

As a result, in the case of *Demopoulos*, the Strasbourg Court held that Law 67/2005 setting up the IPC, enacted by the TRNC, provides an accessible and effective framework of redress regarding G/Cypriot property claims. The Court was satisfied, by taking into account the current division of the island and determining

⁴ *Demopoulos and Others v. Turkey*, (2010) ECHR 306; Rhodri C Williams and Ayla Gürel, 'The European Court of Human Rights and the Cyprus Property Issue: Charting a Way Forward' (Peace Research Institute Oslo, 2011) pp.5-6.

⁵ *Xenides-Arestis v. Turkey*, (2005) 44 EHRR SE 185.

that this was beyond its competence to resolve, that Law 67/2005 makes realistic provision for redress.⁶

In this regard, the Court rejected the complaints of the applicants based on non-exhaustion of domestic remedies, since they had not brought such claims prior to the IPC's non-exhaustion of domestic remedies.⁷ The main objective of the IPC was to provide an effective domestic remedy for claims regarding the abandoned G/Cypriot properties in the north. On this basis, it can be stated that applying to the IPC and continuing development of its measures will do much to maintain the dispute resolution within both the legal and political spheres in Cyprus.

Besides the Court's direct impact on domestic laws, it also indirectly became a major actor within the politics of the Cyprus problem through its decision in *Demopoulos*. The decision considering the IPC as an effective domestic remedy raised repercussions.⁸ The ruling would mean that the Court would only consider property claims that had already gone through the IPC. This is of considerable benefit given that the highly political and complex property dispute should be resolved at the domestic level by the negotiators of the communities. Nevertheless, it was not compulsory for the applicants to apply to the IPC, and an option was provided for those who did not want to use the T/Cypriot body, namely to await a political settlement. By propounding the latter option the Court added a political flavour to its decision. There are invisible pressures on the officials to produce a prompt resolution for the property issue.

The rulings in *Demopoulos* were considered negative and as incorrect developments by the government of the RoC. The principal concern was the approval of an illegal commission which was established as a result of Turkey's unlawful acts. This has resulted in many G/Cypriot officials looking pessimistically at the emergence of the IPC as a political decision of a political court. The caseload of the ECtHR was taken into account as the basis of its decision and in order to eliminate those clone cases from Cyprus, the Court made a logistical decision.

⁶ *Demopoulos and Others v. Turkey*, (2010) ECHR 306, pp.127-129.

⁷ *Demopoulos and Others v. Turkey*, (2010) ECHR 306, pp. 128-129.

⁸ See Chapter 3 for the arguments on the approval of the IPC.

Contrary to the G/Cypriot reaction, T/Cypriot officials considered the decision a victory. The judgment was interpreted to mean that the acts of the TRNC were compatible with international law and European standards.

It is perhaps worthwhile recalling that the G/Cypriot aspect of the Court's politically motivated decision raised a contrary remark by one of the commentators who considered the ruling as falling within the context of the law of subsidiarity. As has been said, the IPC as a domestic remedy was conceived of as a strategy of the Court in order that it itself could refrain from dealing with repetitive cases. In the event, this strategy was assessed as a method to deal with the same line of cases under the pilot judgment procedure. In most instances, after the Court finds a violation in a particular case it determines the core of the violation and guides the responsible state to deal with the problem using an effective domestic remedy.

The Court's ruling in the case of *Demopoulos* raised two considerable and controversial contentions: First, the ECtHR 'politicalised'⁹ the property issue in Cyprus and thus its decision was political. Second, the Court applied the principle of subsidiarity in *Demopoulos* and its ruling was a consequence of the application of the subsidiarity procedure.¹⁰ It is perhaps worthwhile considering these two aspects from an objective point of view in order to add a note of caution. Regarding the first view, it may be said that the fundamental mainstay of this perspective, which is the caseload before the ECtHR, is a well-known fact. The docket of the Court at the time of the *Demopoulos* decision contained more than 100,000 cases and the number of repetitive cases from Cyprus was more than 8,000.¹¹ Against this background, it is likely that the Court's decision was a consequence of its backlog of cases. Nevertheless, it is an avoidable fact that the large number of cases was a serious threat to the efficiency of the Court. Furthermore, in respect of the

⁹ Loukis G. Loucaides, 'Current Legal Developments: Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos* Case?' (2011) *Legal Journal of International Law*, Vol. 24.

¹⁰ Rhodri C Williams and Ayla Gürel, 'The European Court Of Human Rights and the Cyprus Property Issue: Charting a Way Forward' (Peace Research Institute Oslo, 2011).

¹¹ Press and Information Office of the RoC, 'Commentaries, Editorials and Analysis' (8 August 2010),

<www.moi.gov.cy/moi/pio/pio.nsf/All/24C351AE3A568355C22576E0004B72DF?OpenDocument> accessed: 19 September 2013.

contention that the decision was political, the root of the alleged violations in these cases may well have a political foundation. Although this feature of the cases was put forward by the Turkish authorities in almost all of the cases, the G/Cypriots raised the political nature of the property issue after the Court's decision in *Demopoulos*, and this was used as a means of their disapproval of the Court.

In respect of the second contention concerning the issue of subsidiarity, the decision in *Demopoulos* was perhaps a result of the method adopted by the Court to deal with clone cases. The principle of subsidiarity is a cornerstone of and a significant concept within the framework of the Convention system. Nevertheless, considering the timeline of the Cyprus property cases, it is conspicuous that the Court did not apply this principle until 2010. Although the domestic remedies provided by the TRNC regulations were neither considered adequate nor effective enough to satisfy the Court, it did not lead the Turkish authorities to establish remedies based on respect for human rights as defined in the Convention or its Protocols until the case of *Xenides-Arestis v. Turkey*.

Turning to the second question of whether the Cyprus property cases have brought a new dimension to the concept of property rights within the Convention mechanism and the application of P1-1, the Court's *Demopoulos* decision could be taken as a fundamental illustration of the new role that was carried to the ECtHR arena. Here, the development process of the ECtHR's case law on Cyprus has seen the Court's major shift from its Cyprus ruling in the March 2010 decision. It is worthwhile recalling that for the first time within the Cyprus property case-line, the Court recognised the passage of time and political developments as factors attenuating legal title to a property. In this respect, the Court took into account the passage of thirty-five years since the displaced people left their properties and the failure of the UN plan for the reunification of the island as a basis in order to prevent the Court being arbitrary and injudicious through imposing restitution in all cases.

In this respect, although restitution mitigates the consequences of violation of the property rights, the Court considered that it may also pave the way for the creation of disproportionate new wrongs. In any event, if restitution is imposed on a

property in which its legal title is weakened by the passage of time, this may raise greater claims by the current T/Cypriot occupants under Article 8 of the Convention. It is crucial to acknowledge that a considerable conflict between Article 8 and P1-1 of the Convention was created in this ruling. The protection of G/Cypriots' rights to their property under P1-1 and the protection of their rights to the home under Article 8 of the Convention are in conflict with the rights of T/Cypriot occupants under Article 8 of the Convention. Although the Court did not directly state its position, it illustrated that the protection of the current occupants' rights to the home under Article 8 of the Convention predominated. It may be said that the determinative factor of the competing rights of claimants of properties and the current occupants of such properties was the creation of 'disproportionate new wrongs' with the implementation of restitution. The overall result is that the Court's position, illustrated by its decision, represents a rejection of the G/Cypriot position that 'in cases of interference with property, restitution should be automatic in the absence of material impossibility'.¹² In this respect, the Court's decision itself explains the G/Cypriot assessment of the decision as 'wrong' or political.¹³

In respect of the third question of whether a mutually agreed property mechanism between the two communities is achievable, it may be said with some conviction that the property issue is the paramount knot in and impediment to the settlement of the Cyprus problem. Although the ECtHR has been tackling and contributing to this debate through its assessments, it is arguably irrefutable that without reaching a comprehensive settlement in the political sphere, property rights as human rights will not be totally achieved in Cyprus. In this respect, a mutually agreed property system is a necessity and should be considered an achievable ambition. This may require an increased focus on the Court's assessment rather than continuing to consider its stance in its Cyprus ruling as 'prejudicing'.

Two points need to be primarily accepted by the two communities in Cyprus. First, the effects of massive displacement have not disappeared, since the displaced people and their offspring still constitute a considerable percentage of the population of the island. Since property is an extremely sensitive and emotional

¹² *Demopoulos and Others v. Turkey*, (2010) ECHR 306, p.59.

¹³ Williams & Gürel (n 10) p.11.

issue, particularly for displaced people, the future settlement proposal should not merely be based on figures of disputed lands. In this respect, although the passage of time and the number of property claims are the main concerns in achieving the property settlement, the future proposals concerning a property dispute should be a compromise.

Second, besides the importance of considering the social impact of displacement, the factual changes that were brought about by the passage of time should be considered such as new generations, the resettlement of displaced people, and the developments over properties. Accordingly, the future settlement plan should provide a balance between the rights of the original owners and the current users the former and latter to achieve the most feasible strategy regarding the issue of property in Cyprus.

The establishment of a bi-communal property commission or a Court would be a monumental development which would deal with property claims by considering the basic facts and by providing a calculation of monetary compensation. The formation of such a domestic body with an equal number of members from both communities may provide a reliable assessment of factual circumstances and decisions by having access to the records and registries of disputed properties at a domestic level. This may well lead to a more efficient mechanism as it would serve a larger audience, and would be less expensive, quicker and an accessible remedy.

Additionally, a new property mechanism should involve restitution, compensation and exchange of property options and provide flexible conditions for the restrictions placed on properties, which current users do not have within the category of displaced people. The physical condition of properties, whether they have been allocated for public interest or whether there have been significant increases in the value of the property due to improvements made on such property, should also be taken into account. Furthermore, the number of properties that have been granted to displaced persons through the system of 'equal value points' should be considered. The current users of disputed properties may be categorised as to whether they are displaced or if they have arrived in the northern part of Cyprus from Turkey as 'settlers'. Accordingly, the reinstatement of property ownership

should, as much as possible, be provided with flexible conditions if the disputed property is not possessed by displaced people.

Although the formation of domestic regulation is an important part of a future settlement plan, the leaders of both communities should discharge their responsibilities in order to achieve a comprehensible solution at a political level. Primarily, the authorities should not discourage people from seeking remedies from domestic bodies and should stop putting pressure on them to reject, exchange or request/obtain compensation for the property as a remedy. Additionally, since the social memory of displacement still exists, the remedies for the offspring of displaced people should not be restricted. In this regard, inter-communal talks should be sustained with the intention of achieving settlement, which requires trust and flexibility.

Finally, my contention is that in the context of the quest for domestic remedy, the adoption of a property mechanism with features that have been mentioned above may represent for many of the displaced Cypriots an important accomplishment in the emergence of a local framework for a mutually agreed property system. A note of caution may be struck here is that, in order to achieve this, neither of the communities will be entirely satisfied with the future property strategy since their expectations stand on extreme points: the reinstatement of the properties to their former owners and the flexibility of compensation or exchange of the disputed properties. This may well lead to the acceptance of a resolution that sustains the very best of the people and provides the most balanced protection mechanism for the rights of displaced people.

The overall impression is that during the fourteen-year time-line, the ECtHR has understood the property dispute in Cyprus by observing and examining the facts, submissions and the attitudes of the parties. The Court may have conceived that this problem is mainly correlated with the politics of Cyprus and decided that the property claims should be dealt with by local bodies. Accordingly, the Court has contributed to the settlement of the property issue at the domestic level by the officials of the two communities. Although there is continuing pressure on the

authorities in Cyprus to provide and develop regional regulations, the existence and progress of these measures will maintain the settlement of property issue.

Turning to the most recent developments, the latest position of the ECtHR was illustrated by its decision in *Demopoulos*, which represents a transition from a purely international approach seeking to produce a remedy for a dispute stemming from a complex problem burdened with historical, political and factual complexity to a position seeking to maintain the establishment and benefit of domestic remedies for a largely domestic audience. In this respect, one has to bear in mind that, although the Court is willing to provide a limited supervisory role and allow domestic law-makers to administer the property claims, it did not close its doors on the property cases of Cypriots. Insofar as the pursuit of domestic remedies is supported by the Court's decisions, this approach may also be beneficial on the legal and political sphere by promoting the most feasible property mechanism for the applicants. Its decision maintained that the courtrooms should not be considered as a settlement arena concerning the property issue, and the solution-producers should be Cypriot negotiators, not the Court, in order to achieve a sustainable property mechanism.

The fact that property is a fundamental, sensitive and emotional subject for human beings means that the controversy over property rights is reflected in every aspect of life in Cyprus. Having said that, there are not enough adequate sources focusing specifically on the property dispute in Cyprus within the context of the Convention mechanism, which impelled me to examine this issue in my thesis. The long-standing nature of property disputes and the Cyprus problem orientates the victims of the property rights' violations towards finding a solution in the international arena. However, temporary remedies for property conflicts through international courts cannot be considered as a permanent solution either for Cypriots or for the achievement of a comprehensive resolution of the Cyprus problem. In light of these conclusions, the thesis has examined, comprehended and put forward the most feasible property regime that may well satisfy and provide a balance between the rights of both communities in Cyprus, not only within the context of property rights but also for a permanent and comprehensive settlement of the Cyprus problem.

Finally, the establishment of the IPC in the north represents a significant milestone within the history of Cypriot case law. Since 2010 the IPC's principal role has been to deal with property claims. In order to achieve good results for both communities, its effective functioning should be sustained and conducted with transparency and consideration of the common interest of Cypriots. The IPC has to take account of the applications with great concern and conclude them in accordance with the ECtHR's jurisprudence and international law. Although the well-known theory maintains that the property dispute can only be resolved through a political settlement, the impact of international authorities should not be disregarded.

In this, the examination of the Annan Plan in detail and the determination of the Cyprus property cases as highly political and historical by the Court in the *Demopoulos* judgment may illustrate the 'late realisation' of the full responsibility of all parties for finding a solution at a political level. The property problem can be entirely settled only with the intention of both sides to resolve it through a political settlement.

Furthermore, the future property proposal is likely to include similar regulations to those provided in the UN Settlement Plan as the Court considered this failed mechanism in great detail in its judgment. This attitude may indicate the Court's indirect affirmation of the property system, which was settled in this plan. The Court's attitude was that, although the plan was not successful, it is not *dead* and thus the Court gave the green light to Cypriot officials to take it as a basis for future proposals for the property settlement.

In terms of the impact of the *Demopoulos* decision on the ECtHR, the backlog of around 1500 cases was sent to local authorities.¹⁴ In this regard, by adopting this attitude, the Court indicated that property disputes between the two communities should be resolved primarily at the political level. This approach of the Court will have a profound effect on the motivation of both sides concerning the Cyprus

¹⁴ At the time of the *Demopoulos* decision some 100,000 cases were pending before the ECtHR. See: <http://www.coe.int/t/dc/files/themes/protocole_14bis/default_EN.asp and as of 14 June 2013, 5031 applications have been lodged with the IPC <<http://www.tamk.gov.ct.tr/>> accessed: 10 August 2013.

settlement. The property problem is a political issue, which can only be resolved with good faith, the intention to resolve the dispute and the realisation of the necessity to provide a balance between people from both communities who are subject to the property dispute.

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