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Revisiting human right in occupation: the European Court of Human Rights in Cyprus

Abstract: This paper presents some developments in the case law of the European Court of Human Rights concerning the application of the European Convention on Human Rights in occupied Cyprus. It examines the role of the Court on the property issue and identifies grey areas in the recent jurisprudence. The paper argues that the Court has been inconsistent with public international law in its recent cases. This inconsistency challenges its own legacy, the rights of the victims as well as the peace process in Cyprus.

Keywords: European Convention on Human Rights, European Court of Human Rights, International Humanitarian Law, Belligerent Occupation, Pilot Judgment Procedure, Restitutio in integrum

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Plato, Symposium

I. Introduction

The story of the application of the European Convention on Human Rights (hereinafter the Convention) in occupied northern Cyprus has been considered until recently, by the legal scholars, the victims and the Cypriot foreign policy, as a story of great success. Since the first interstate application of Cyprus against Turkey, in 1974, the human rights mechanism of Strasbourg has been preoccupied with several issues of the Cyprus question. A first significant development occurred in 1996, when the Court delivered its landmark judgment in Loizidou v. Turkey case. The legacy of Loizidou was enhanced by the judgment in the interstate case Cyprus v. Turkey, in 2001, and by a series of other individual applications, where the Court has repeatedly called upon the violations of Turkey.

Starting from the Cypriot cases, the ECtHR had positively contributed to the expansion of the applicability of the European Convention on Human Rights to situations of armed conflict and military occupation. It has also influenced the general trend in international justice towards the acceptance of the continuous application of human rights law in armed conflict. Additionally, the Court offered satisfaction to the victims of a prolonged military occupation, where any other legal remedy was unavailable. Finally, it reiterated, in several occasions, the Resolutions of the UN Security Council and the General Assembly, in relation to the illegitimacy of the occupation and to the non recognition of the established puppet state in the north. As a result, the Court’s findings have served as a valuable tool during the negotiation process under the auspices of the UN and endorsed with concrete legal arguments the procedure for a peace agreement.

However, currently, the achievements of the past are at risk. Facing an enormous workload, the Court gradually developed a new strategy in order to deal with the widespread violations in northern Cyprus. This new strategy is mainly focused on the property issue and on the influx of individual applications to Court’s registry after the success of Loizidou. This paper aims to present the new developments in the Court’s jurisprudence, after briefly exposing the contribution of the Court on the property issue. We argue that the current developments tend to jeopardise the rights of the victims and to alienate the Court from the general framework of public international law. We believe that the new jurisprudential policy of the Court has to be assessed with precaution, in order to prevent any further outcome

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3 Cyprus v. Turkey, App. no. 25781/94 (ECtHR, 10 May 2001), paras 91 and 92.
4 Loizidou v. Turkey, App. no. 15318/89 (ECtHR, 18 December 1996), paras 15, 19-23.
which contradicts to the scope and the aim of human rights law and international humanitarian law.

II. **Endorsing the rights of the displaced population in occupation: the contribution of the ECtHR**

Belligerent occupation has been traditionally regulated by customary and conventional rules of international humanitarian law. These rules create a comprehensive legal framework for the protection of the population living under the hostile army, while balancing the interests of the occupier, the displaced government and the occupied people. On the other hand, human rights law, originally created to apply in peacetime does not contain provisions for this situation which, most of the times, is the outcome of an interstate conflict.

The rapid development of international human rights law and the proliferation of its monitoring mechanisms have drastically influenced the laws on occupation. Nowadays, it is generally accepted by the practice and the legal literature that human rights law continues to apply during occupation. The Strasbourg mechanism has primarily contributed to the affirmation of the applicability of human rights in occupation, by accepting its competence to adjudicate cases revealing Turkey’s responsibility in the occupied territory of Cyprus. Hence, the question no longer lies on whether human rights law applies in such context, but on the modalities of this application and its relation with international humanitarian law. So far, in respect to the prolonged military occupation in Cyprus, the ECtHR has applied the Convention without directly referring to the relevant rules of international humanitarian law.

One very interesting aspect of the Court’s case law is related to the property issue. The Court, lying on the early reports of the European Commission on Human Rights, found Turkey repeatedly responsible for violations of Article 1 of the 1st Protocol of the Convention and in some cases of Article 8, ECHR (right to property and right to private life). In the Loizidou judgment, the Court endorsed the rights of the legal owner and granted compensation to the victim for loss of use of her property. Moreover, the Court stressed, the continuity of the violation, which took place since the invasion and it was not convinced by

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8 Ibid, p. 2.
the arguments of Turkey that stressed the political character of the property issue and the necessity to house displaced Turkish Cypriots.

The same legal reasoning was presented by the Court in the judgement of the interstate case. The Court addressed the general problem of the property rights of 200,000 displaced Greek Cypriots and again underlined the continuous nature of the violations, caused by the refusal of Turkey to allow the displaced to return, use and enjoy their property. The same position was adopted by the Court in Demades v. Turkey, and Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey and other cases that raised identical violations.

The importance of the findings in the aforementioned cases lies primarily on the affirmation that private immovable property is inviolable during military occupation. This approach coincides with international humanitarian law and does not create different standards between the Convention and the specialized laws of occupation. The rights of the legal owners cannot be disregarded in any case, not even in order to safeguard the needs of secondary occupants, who, in the case of Cyprus are mainly displaced Turkish Cypriots. Moreover, the Court condemned the efforts of property expropriation and ownership transfer, introduced by the “Constitution” of the “TRNC”. This condemnation has a particular application to the policy of systematic population transfer of Turkish settlers, implemented in northern Cyprus since 1974. In any case, transferring civilian population in occupied territories, in order to forcibly modify the demographics and achieve political goals, constitutes a grave breach of international humanitarian law.

So far, the above findings had a great impact on the victims, who after years of living in the oblivion, received recognition of the violations and monetary compensations. Plus, the politicians and the institutions of the Republic of Cyprus have welcomed the judgments, pronouncing that the Court supports the objectives of the Republic of Cyprus. The findings have been used in the political discourse, in foreign policy and mainly before the Committee of Ministers of the CoE, believing that they reinforce the legal aims of the Greek Cypriots, which were seen as compatible with international and European law.

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16 Cyprus v. Turkey, App. no. 25781/94 (ECtHR, 10/05/2001).
17 Application no. 16219/90 (ECtHR, 31/07/2003).
18 Application no. 16163/90 (ECtHR, 31/07/2003).
20 Sassòli, p. 76.
21 Loizidou v. Turkey (Merits) Application no. 15318/89, (ECtHR, 18/12/1996), paras 42–44.
22 See e.g., the Recommendation 1608 of the Parliamentary Assembly of the Council of Europe, available in http://assembly.coe.int/documents/adoptedtext/TA03/ERECD1608.htm
III. Current developments under the pilot judgment procedure

In light of the above, a large number of displaced Greek Cypriots lodged complaints before the Strasbourg Court, alleging similar violations. In 2005, the Court delivered a new judgment in the case Xenides Arestis v Turkey (merits), where it initiated a pilot judgment procedure, in order to deal with almost 1400 repetitive applications that had arrived at the Court’s registry, raising the property issue in Cyprus. In Xenides-Arestis, the Court underlined the lack of progress by the respondent government, the continuity of the violations and the non creation of an adequate remedy which could guaranty effective reparation of the violations.

Following this ruling, Turkey established the “Immovable Property Commission” (IPC) under Law no. 67/2005. The Commission started examining claims for compensation, exchange or restitution of displaced Greek Cypriots in 2006. It was the “Parliament” of “TRNC” that passed the law enacting the IPC. Under the provisions of that law, all natural or legal persons claiming property rights in the north can lodge an application before the Commission by 21 December 2013. So far, the IPC has examined 358 applications, out of 4898. In the majority of the cases, the IPC awarded compensation, while it has offered exchange and restitution in no more than 8 cases in total. The law specifies that restitution can be awarded in cases where the ownership or the use of the property has not been transferred to other persons apart from the “state” and when the restitution “shall not endanger national security and public order and that such property is not allocated for public interest reasons and that the immovable property is outside the military areas or military installation”. When the Commission orders compensation or exchange, the applicants lose the ownership title of the compensated property.

In the judgment Xenides Arestis v. Turkey (just satisfaction) the Court found that the respondent Government took all necessary measures in complying with the Court’s judgment. In 2010, in Demopoulos v. Turkey case, the Court declared inadmissible a group of repetitive applications and asked the applicants to address their claims before the IPC. In other words, for the first time since Loizidou, the Court rejected applications for not having previously exhaust the local remedies. This was considered as a setback in the Court’s approach to the property issue. The Greek Cypriots had expressed their deep disappointment, while the Turkish side saw the case as its first success, after years of continuous condemnation. Moreover, it had a serious impact on the discussions within the special meetings of the Committee of Ministers on the supervision of execution of judgments of the Court.

In Demopoulos, the Court found that the IPC is a legal remedy of Turkey under Article 35 (1) of the Convention. It rejected the applicants’ arguments that the IPC constituted a domestic remedy of an unlawful occupier and thus it does not meet the

26 For more information, see the site of the IPC http://www.tamk.gov.ct.tr/english/index.html.
27 “Law 67/2005 for the compensation, exchange and restitution of immovable properties which are within the scope of subparagraph (b) of paragraph 1 of article 159 of the constitution” available in http://www.tamk.gov.ct.tr/english/yasa.html.
28 Ibid, para 8.1.
29 Xenides-Arestis (just satisfaction), Application no. 46347/99, (ECtHR, 07/12/2006).
31 Article 35(1) states: “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 “.
requirements of Article 35(1), underlining the pivotal principle of subsidiarity in the European human rights machinery. The Court found that the admissibility obligation of the applicants to exhaust domestic remedies was applicable in that case. In fact, the European judges did not relate the obligation to exhaust the local remedies with the legality of the regime. They noted that no exception was applied to “TRNC”, invoking, inter alia, the Namibia Principle of the ICJ.

Concerning the effectiveness and the adequacy of the IPC, the Court found that it constitutes a genuinely effective and available remedy, despite the arguments of the applicants, that it does not offer recognition of the breach and it provides only limited redress. The Court did not consider restitution in intergrum, ie the return of the property to its lawful owner, as the only effective remedy. Invoking the changing political situation, the presence of settlers in the northern part and the passage of time since the invasion, the Court noted that it was not realistic to order Turkey to return all properties back to their owners. In other words, in Demopoulos, the Court was of the opinion that monetary compensations constitute an effective remedy for displaced Greek Cypriots, who seek a redress of their properties.

The ECtHR restated the above argument in the recent case Meleagrou and others v. Turkey, which challenged before the Court the efficiency of IPC. Meleagrou and others constitutes the first case that arrived to Strasbourg after having been previously examined by the IPC. The applicants lodged a complaint only for restitution, which was rejected by the IPC. The Court considered the case inadmissible, for failure to comply with the admissibility requirements, by stating that the applicants have not properly used the available remedy in the “TRNC”. In Meleagrou, the Court clearly repeated that restitution in intergrum has not a primary role in the Strasbourg case law and it cannot be regarded as the only effective remedy for violations of the right to property. Since the respondent States are free to choose the means of redress, the choice not to ask for compensation or exchange burdens the applicants, whose case was considered as manifestly ill-founded.

III. Conclusion: Measuring the distance from “the relevant rules of international law”

The cases presented above articulate a radical change in the Court’s jurisprudence with regard to the protection of human rights in belligerent occupation. By equalising normalcy and emergency, peace and war, the Court disregards the legal principle “ex injuria jus non oritur”. This principle perfectly summarises that in public international law, acts

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32 Demopoulos and others v. Turkey, Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 (ECtHR, 16/04/2010), paras 87-89.
33 Ibid, paras 93-98.
34 Eleni Meleagrou and others, Application no. 14434/09 (ECtHR, 02/04/2013).
36 The Court has however, in other cases underlined the primacy and the importance of restitution in intergrum. See inter alia, Papanicchalopoulos and others v. Greece, (Just Satisfaction), Application no. 14556/89 (ECtHR, 31/10/1995).
37 Supra, note 30.
38 Article 31 (3) (c) of the Vienna Convention on the Law of Treaties stipulates that international treaties should be interpreted, inter alia, in the light of “any relevant rules of international law applicable in the relations between the parties”. Based on this provision, the approach of the systematic interpretation of the ECtHR is gaining attention, in order to reconcile norm conflicts and produce coherent jurisprudence. See e.g. Jean D’Aspremont, ‘Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under the Guise of Conflict of Norms-resolution’, in The Interpretation and Application of the European Convention of Human Rights, Legal and Practical Implications, ed. by M Fitzmaurice and P Merkouris (Leiden: Martinus Nijhoff Publishers, 2013), pp. 3–32.
39 International Law Commission, Draft Articles on State Responsibility, Draft Articles 40 and 41(2).
deriving from a breach of an international obligation are invalid.\textsuperscript{40} Under this principle, the requirement to exhaust a legal remedy established by a non recognised state could eventually lead to recognition of this illegal entity, or to the normalisation of the illegality of a prolonged occupation, which is a product of aggression. \textsuperscript{41}

Furthermore, the stance of the Court is inconsistent with the laws of occupation and with the relevant jurisprudence of other judicial bodies. International humanitarian law safeguards private property and forbids expropriations by the occupier. \textsuperscript{42} Destruction, confiscation or requisition of private property is prohibited by conventional and customary rules, except for reasons of military necessity. \textsuperscript{43} Expropriations during military occupation constitute a violation of international law, even if the occupier compensates the property in question. \textsuperscript{44} This is mainly because expropriations are often used in order to implement policies of discrimination and ethnic cleansing or to prohibit the legitimate right to return of the displaced. In that case, according to Judge Loukis Loucaides, compensation “would be tantamount to accepting that a wrongdoing State may be allowed (...) to purchase the benefits of breaches of rules of international law having a status of jus cogens”. \textsuperscript{45}

The ECtHR by not clarifying the importance of restitution in kind, whose primacy has been endorsed by the ICJ and the ILC, initiated a jurisprudential policy that contradicts with the general scope of the international humanitarian law. It is understandable, that the Court finds itself in a predicament. It faces an enormous workload and for more than a decade is continuously under reform.\textsuperscript{46} It is logic that it would not be possible to examine such a large group of repetitive cases, even if they invoke mass violations. However, completely neglecting the other relevant rules of international law can lead to a misinterpretation of the Convention and provide lower protection to the victims.

In sum up, we argue that the new approach of the Court disorients the negotiation process from the general conduct of international law and creates confusion, as it contradicts with the findings of other judicial bodies and the precedent of the ECtHR itself. \textsuperscript{47} Time has emerged as a decisive element in human rights protection which declines the rights of the victims and eventually allows the aggressor to purchase its legitimacy.

2399 words

\textsuperscript{40} Oppenheim’s International Law, OUP, (9th ed) at para.54, p184.
\textsuperscript{41} For a general perception, see Aeyal M. Gross, ‘Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?’, European Journal of International Law, 18 (2007), 1–35.
\textsuperscript{42} Molango, pp. 73–74.
\textsuperscript{43} Loucaides, p. 135.
\textsuperscript{44} I.G. Farben Trial, in Dinstein, p. 225.
\textsuperscript{45} Loucaides, p. 134.
\textsuperscript{46} Antoine Buyse, ‘Airborne or Bound to Crash? The Rise of Pilot Judgments and Their Appeal as a Tool to Deal with the Aftermath of Conflict’, in Margins of Conflict The ECHR and Transitions to and from Armed Conflict, Series on Transitional Justice, Insertia, 2011, pp. 175–196 (p. 176).
\textsuperscript{47} Mainly see Aposolides v. Orams, C-420/07 (ECJ, 28/04/2009).
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