The Status of the 'TRNC' through the Prism of Recent Legal Developments: Towards Furtive Recognition?

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Abstract

Using the Cyprus-specific jurisprudence of the Court of Justice, the European Court of Human Rights and the English courts as a starting point, we examine selected legal developments over the last six years that point to or may result in a change in the approach of the international community to the self-proclaimed 'Turkish Republic of Northern Cyprus'. These developments highlight the risks of the perpetuation of Cyprus's de facto partition for the chances of an eventual re-unification of the island. They also suggest that, unless the prospects of achieving a negotiated settlement to the Cyprus dispute were to improve considerably in the near future, a resetting of the objectives of the side to the negotiations that stands to lose the most from an eventual partition of the island would be advisable so that the consequences of a possible recognition by the international community of the status quo in the areas outside the effective control of the Government of the Republic of Cyprus can be mitigated.

Keywords: Cyprus dispute, 'TRNC', recognition, Court of Justice, Orams litigation, European Court of Human Rights, Demopoulos ruling

Introduction

The Cyprus problem is amongst the longest-standing international disputes in recent history, accounting for the most protracted peacekeeping mission since the creation of the United Nations ('UN'). Despite its notoriety and the several efforts made to broker a negotiated settlement to it, the hallmark of the last three and a half decades of the history of the Cyprus dispute, starting with the Turkish military intervention of 20 July 1974 and ending with the failure of the simultaneously held Annan Plan referenda of 24 April 2004, has been stagnation, both in terms of the actual situation on the ground and, no less importantly for our present purposes, in terms of the international community's approach to the 'TRNC'.[1] Spearheaded by the UN Security Council, the international community has, until now, firmly denied recognition to the breakaway, self-

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1 The only notable exception has been the opening on 23 April 2003, for the first time in three decades, of two crossing points along the Green Line, accessible to the public.

proclaimed 'Turkish Republic of Northern Cyprus' ('TRNC'), treating its creation as illegal and refusing to entertain economic, political or any other relations with it. The international community's recognition of the Republic of Cyprus ('RoC') as the sole *de jure* sovereign over the whole island – including in the areas outside the effective control of its Government (the 'Areas') – was to find its most conspicuous expression on 1 May 2004 when, after years of negotiations, Cyprus joined the European Union ('EU') as a single entity, but with the effect of the *acquis* suspended temporarily in the Areas pending a viable, comprehensive settlement to the dispute.[2]

With negotiations failing to break the deadlock, national, supranational or international judicial authorities had, until recently, and subject to very few (and, mostly, short-lived) exceptions only, thrown their weight behind the international community's well established stance in the matter of the Cyprus dispute. Indeed, for the best part of the last thirty-six years the legal front has been one of the precious few where any notable developments have been registered in the matter of the Cyprus dispute and where the RoC's efforts to resist Turkey's longer-term geo-political aspirations in Cyprus have met with any success. The RoC's accession to the EU, despite the non-settlement of the Cyprus problem, was, in many ways, the pinnacle of those legal battles fought and won; but there have been many others that played out before national courts (in particular, those in the UK, the 'third country' jurisdiction that is, historically, the most closely connected to the dispute), the European Court of Justice ('ECJ') and the European Court of Human Rights ('ECtHR'), both prior to and subsequent to the 1 May 2004 watershed. It is precisely those juridical successes that have helped preserve the fiction of the continuity of the RoC and of its pre-invasion legal order, frustrating Turkey's efforts to legitimise the territorial and political gains of its military intervention. The 'TRNC' was systematically shunned, no less so in 2004 than in February 1975 (at the time of the declaration of the 'Turkish Federated State of Cyprus' ('TFSC'), the precursor of the 'TRNC') or in November 1983 (at the time of the 'TRNC''s unilateral declaration of independence ('UDI')) or in March 1995 (when the EU General Affairs and External Relations Council announced the opening of accession negotiations with the RoC).

If international law and the pronouncements of national and supranational courts have, throughout the course of the pre-April 2004 period, been among the RoC's strongest allies in its fight against the *faits accomplis* brought about by Turkey's military intervention, the period that has elapsed since the rejection of the Annan Plan has seen a number of notable *legal* developments that do not fit into the pattern of the three decades preceding that period. These developments appear to reflect (or could result in) a shift in the international community's approach to the Cyprus dispute and, more specifically, in the legal assessment of the situation on the ground, with an emphasis on the treatment of the claim of the 'TRNC' to a place in the international scene, commensurate with the realities brought about by Turkey's military intervention. If confirmed, this apparent shift is apt to usher in, sooner or later, fundamental changes to the *status quo*, even

2 See Protocol No. 10 attached to the Treaty of Accession of Cyprus of 16 April 2003, (OJ.L 236, 23.9.2003, 955).

absent a comprehensive settlement of the Cyprus dispute, risking to wipe out, somewhat unceremoniously, the gains of the legal battles fought and won over the first three decades and to reshuffle the cards in favour of those claiming that the effects of Turkey's military intervention and the hitherto failure to undo them through a negotiated settlement have, over time, become too firmly entrenched to be altogether ignored.

The purpose of this paper is to briefly examine the role that court rulings and legal arguments have played in informing or reflecting the international community's approach to the Cyprus dispute – to the advantage, until not so long ago, of the negotiating position and strategic aspirations of the RoC – and their recent diversion into potent weapons in the hands of the 'TRNC', supporting, instead of frustrating, its ambitions for the achievement of statehood or of some form of international recognition falling short of statehood, *even outside* the framework of a negotiated solution to the Cyprus dispute.[3] The end-objective of our analysis is not to provide an overview of the Cyprus-specific case-law of the ECJ or the ECtHR nor an assessment of some of the legal considerations surrounding the international community's and, more specifically, the EU's stance in the matter of the Cyprus dispute. Our end-objective rather is to draw attention to specific legal developments pointing to an increase in the international community's tolerance *vis-à-vis* the 'TRNC', which, if corroborated, should lead, before long, to a reassessment of the negotiating line of one, at least, of the sides to the Cyprus problem; and second, to highlight the risks inherent in pursuing an unduly legal (or, perhaps, 'legalistic') route to resolving the Cyprus dispute with the ill-considered fervour and the unquestioned devotion of yesteryear.

The Cyprus Dispute: The First Thirty Years through the Prism of the Jurisprudence of the ECJ, the ECtHR and the English Courts

The Turkish Cypriot Community's isolation predates the forceful partition of the island in 1974. It is telling that it was the RoC Government's approval only (to the exclusion of that of the Turkish Cypriot leadership) that the UN sought before deploying the first peace-keeping force on the island, in 1964.[4] The persistent refusal of the international community to recognise the 'TRNC' – most famously reflected in the two Security Council Resolutions of 1983 and 1984[5] – is premised on mainly three considerations: first, that the 'TRNC' was established through the illegal use of force; second, that its establishment was in violation of the Treaty of Guarantee of 1960,

3 If no settlement can be found, it is arguable that the process referred to in the context of the Cyprus dispute as 'Taiwanisation' will inevitably gain momentum, consolidating partition to the disadvantage of both Communities.

4 See UNSCR 186 (1964).

5 The reference is to UNSCR 541 (1983) and 550 (1984). The stance of the EC, as it then was, coincided with that of the UN (see the declarations of 16 and 17 November 1983, whereby the European Parliament, the Commission and the Council rejected the 'TRNC' 's UDI, expressing their continued recognition of the Government of the RoC as the legitimate administration over the whole of Cyprus).

which prohibited the island's partition; and third, that, whatever the self-determination rights of the Turkish Cypriot Community, these do not amount to a right to independent statehood.[6]

Despite the fact that the events giving rise to the division of Cyprus date back to the mid-1970s, the international community continues recognising the RoC's exclusive sovereignty over the whole of the island of Cyprus, refusing to entertain any direct, formal relations with the 'TRNC''s *de facto* authorities. No event in the recent history of the Cyprus dispute reflects better the international community's disapproval of the secessionist ambitions of the Turkish Cypriot leadership than the RoC's accession to the EU, after the successful conclusion of negotiations conducted without the participation of the 'TRNC''s *de facto* authorities. This is all the more so, considering the clear preference of the Member States for the achievement of a political settlement, initially as a condition precedent to Cyprus's EU membership,[7] and Turkey's opposition to the RoC's EU accession, premised on the contention that this violated both the Treaty of Guarantee of 1960 and the Constitution of 16 August 1960.[8] The island's European integration process was to be completed soon thereafter, with the accession of Cyprus to the Euro Area, on 1 January 2008, an event that was to bring the RoC within the fold of Economic and Monetary Union, making it part of the select group of EU Member States participating in "one of the most important growth areas of European integration".[9]

In spite of the international community's unambiguous position in the matter of the Cyprus dispute, some attempts have been made in the course of the last three decades, in order for a measure of recognition to be attributed to the 'TRNC' or, more precisely, to some of its *de facto* authorities. These attempts were, until recently, foiled through recourse to *legal* arguments, several of which found their way in the pronouncements of the competent domestic, supranational or

6 For a general account, see Dugard (1987), pp. 108-111. For a more nuanced view see Necatigil (1993), especially p. 110 et post; Dodd (1998), especially pp. 78-82; and Ronen (2007), fn. 72.

7 It was only at the time of the Helsinki Summit of 10 and 11 December 1999 that the issue of the RoC's accession to the EU was for the first time dissociated from that of the resolution of the Cyprus dispute (see Helsinki Summit, Presidency Conclusions, §§9 (a) and (b)).

8 Under Articles I and II of the Treaty of Guarantee, the RoC could not participate in any political or economic union of which Turkey was also not a part. Several of the provisions of the Constitution of 1960 had also become inoperative after the Turkish Cypriot Vice-President, the 15 delegates to the House of Representatives and all Turkish Cypriot civil servants abandoned their posts, in the aftermath of the first inter-communal disturbances in 1963, casting doubts on the legitimacy of the Government of the RoC to represent the interests of both Communities on the island (Yilmaz (2010), pp. 131-134; Arslan and Güven (2007), pp. 6-7; cf. Hoffmeister (2006), pp. 90-96). Since the landmark ruling of the Supreme Constitutional Court of Cyprus in *Attorney General of the Republic v. Mustafa Ibrahim* [1964] CLR 195, the Government of the RoC has successfully claimed to be deriving its legitimacy from the 'doctrine of necessity', invoked to validate acts falling outside the purview of the constitution (but which are necessary to preserve political stability and state continuity). For a critical assessment of the application of the 'doctrine of necessity' in Cyprus, see Hoffmeister (2006), pp. 25-31; Özersay (2004); Mendelson (1997 and 2001); and Crawford, Hafner and Pellet (1997 and 2001 [reprinted 2002a and 2002b]).

9 Thym (2005), p. 1733.

international courts before which cases of relevance to the Cyprus dispute were brought. The effect of the resulting *corpus* of jurisprudence has been to uphold the exclusive rights of the Government of the RoC to represent the interests of the people of Cyprus, on both sides of the Green Line, and to deny recognition to the 'TRNC', whether direct or indirect. What follows is a brief overview of the relevant jurisprudence and of the insights that this provides into the international community's perception of the Cyprus dispute.

ECJ Jurisprudence

The earliest attempt to see a measure of recognition attributed to the *de facto* authorities of the 'TRNC' provided the backdrop for the ECJ's decision in *Anastasiou I*,[10] a reference for a preliminary ruling on the interpretation of the Association Agreement of 19 December 1972 between the RoC and the Community and its Protocol.[11] The system of tariff preferences accorded to Cypriot agricultural products under the terms of the Association Agreement was conditional on the production of certificates of origin to prove that these originated in Cyprus. A number of Member States, including the UK, allowed imports of citrus fruit and potatoes from the Areas on the basis of certificates issued by the 'TRNC''s *de facto* authorities. The UK's practice of accepting such certificates was challenged by the plaintiffs – agricultural product producers and exporters from the RoC – before the High Court of Justice, Queen's Bench Division. In its preliminary reference, the High Court invited the ECJ to determine whether the practice in question was consistent with the Association Agreement and its Protocol. Avoiding to dwell on the political situation on the island, the ECJ linked the issue of the production of appropriate certificates to the "principle of mutual reliance and cooperation between the competent authorities of the exporting and the importing State",[12] concluding that the 'TRNC''s non-recognition by the Community or any of the Member States excluded the possibility of such mutual reliance or cooperation.[13] Accordingly, the ECJ ruled that the Protocol was to be interpreted strictly, as precluding the

10 Case C-432/92 *R. v. Minister of Agriculture, Fisheries and Food, ex. p. Anastasiou (Pisouri) Ltd and Ors* [1994] E.C.R. I-3087. For a detailed account of the ECJ ruling and some opposing perceptions of its rationale and effects see Emiliou (1995); Talmon (2001), especially pp. 733-737; Koutrakos (2003); and Laulhé Shaelou (2007), especially pp. 624-628.

11 See Council Regulation (EEC) No 1246/73 on the conclusion of an agreement establishing an association between the European Economic Community and the Republic of Cyprus (OJ.L 133, 21.5.1973, 1) as last amended by Council Regulation (EEC) No 4165/87 on the application of Decision No 1/87 of the EEC-Cyprus Association Council again amending Articles 6 and 17 of the Protocol concerning the definition of the concept of 'originating products' and methods of administrative cooperation (OJ.L 397, 31.12.1987, 5), to which the text of the Association Agreement is annexed. Notwithstanding the supervening *de facto* partition of the island of Cyprus, the 1987 amendment suggests that the Association Agreement was considered to be applicable to the whole of Cyprus.

12 *Anastasiou I, supra*, fn. 10, paras 37-38.

13 *Ibid.*, paras 36-41 and 47.

acceptance by the Member State authorities of certificates issued by authorities other than those of the RoC. While the ECJ was to later qualify its ruling in *Anastasiou I* by accepting that Member States were allowed to import agricultural products originating in a non-member country (in the case at hand, the 'TRNC') – provided that these were accompanied by certificates issued by the authorities of the *third* country through which they had been imported in the EU (in the case at hand, Turkey)[14] – the Court was to effectively reiterate its original position in *Anastasiou III*,[15] limiting the 'TRNC''s trading options at a time when the Turkish Cypriots' status as future EU citizens was certain, no doubt in order to avoid "an 'upgrade' of the status of the regime in the North".[16]

The rationale underlying the ECJ's ruling in *Anastasiou I* (with an emphasis on the 'mutual recognition' condition to which the ECJ drew attention in its ruling in that case) was to be confirmed several years later, in the Court's landmark decision in *Meletios Apostolides v. David Charles Orams and Linda Elizabeth Orams*,[17] a reference for a preliminary ruling from the Court of Appeal (CA), arising from a dispute between the dispossessed owner of land situate in the Areas and the holders of 'title-deeds' over the same land, issued by the 'TRNC''s *de facto* authorities. Steering clear from any assessment of the complex political situation on the ground, the ECJ held that the suspension of the *acquis* in the Areas did *not* preclude the application of the Judgments Regulation[18] to a judgment issued by a competent (*rationae loci et materiae*) court sitting in the RoC, despite the fact that the land to which it related lay in the Areas.[19] The ECJ also held that the RoC's lack of effective control over the land in question was of no relevance to the recognition of the judgment of a competent court sitting in the RoC in any *other* EU Member State, where no practical obstacles stood in the way of its enforcement.[20] By reaffirming the key principle underlying the system of "full faith and credit"[21] established under the Judgments Regulation – namely, that recognition of the judgments delivered by competent courts or tribunals in other Member States is *automatic*, subject to the fulfilment of the conditions laid down in the

14 Case C-219/98 *R. v. Minister of Agriculture, Fisheries and Food, ex. p. Anastasiou (Pisouri) Ltd and Ors* [2000] E.C.R. I-5241(*Anastasiou II*).

15 Case C-140/02, *R. v. Minister of Agriculture, Fisheries and Food, ex. p. Anastasiou (Pisouri) Ltd and Ors* [2003] ECR-I-10635 (*Anastasiou III*).

16 Skoutaris (2008), p. 743. For a different reading of the relationship between the Court's rulings in Anastasiou I and Anastasiou III, see Laulhé Shaelou (2007), pp. 635-637.

17 Case C-420/07, Judgment of 28 April 2009, [2009] ECR I-0000. For a detailed account of the ECJ ruling see Athanassiou (2009), especially pp. 424-427; and Lavranos (2009).

18 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial, [2001] OJ L12, as amended.

19 Case C-420/07, *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams* Judgment of 28 April 2009, paras 37-38 and 51-52 respectively.

20 *Ibid.*, paras 66-70. The ECJ opted for a functional approach to the implementation of the Judgments Regulation, motivated by the desire to guarantee its *effet utile*.

21 Bartlett (1975).

Judgments Regulation – the ECJ not only rendered obligatory the recognition of judgments issued by the courts in the RoC[22] but, what is more, negated the possibility of the enforcement in any of the Member States of judgments issued by the courts or tribunals sitting in the 'TRNC', thereby denying them any recognition.

It follows that, without taking a position, as such, on the Cyprus dispute and demonstrating an unusual reluctance to depart from the literal interpretation of the legal rules before it, the ECJ has, through its Cyprus dispute-related rulings, toed the line of the international community, withholding any judicial recognition to the authorities of the 'TRNC' (whether it is phytosanitary, judicial or other authorities) and upholding, by the same token, the legitimacy of the RoC and its institutions. The ECJ's desire to avoid being drawn into politically sensitive appreciations has hitherto been clothed in strict juridical terms, with the ECJ's decisions being examples of the impassionate application of Community law more so than the fruit of a cautious, neutrality preservation exercise.

ECtHR Jurisprudence

The ECJ's refusal to recognise any of the *de facto* authorities of the 'TRNC' was, until very recently, matched by the corresponding reluctance of the ECtHR to extend any form of recognition thereto, as reflected in its two flagship, pre-April 2004, judgments in the matter of the Cyprus dispute: *Loizidou v. Turkey*[23] and *Cyprus v. Turkey*.[24] Both cases involved complaints against the deprivation of the claimants' rights to the peaceful enjoyment of their property, in violation of the European Convention of Human Rights (the 'ECHR' or 'the Convention') as a result of the continuing division of Cyprus caused by the military occupation of the Areas. At stake before the ECtHR in its preliminary objections (admissibility) ruling in the first of the aforementioned cases[25] was the question of Turkey's international responsibility for the violation of the human rights of the evicted Greek Cypriot owners of property situate in the Areas. Turkey denied jurisdiction, arguing that, to the extent that there had been any such violations, these were directly imputable to the 'TRNC' and its 'authorities'. Rejecting Turkey's objection to its responsibility

22 This reading of the kernel of the ECJ's ruling in *Orams* is consistent with paragraphs 31 and 32 of the Opinion of Advocate General Kokott who, in rejecting the argument that the suspension of the application of the *acquis* in the Areas precluded the recognition and enforcement of a judgment relating to claims to the ownership of land situated therein, clearly stated that, "... the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus cannot be based on the regulation. Nor does it appear possible, under the regulation, for a judgment of a court situated in that area of Cyprus to be recognised and enforced in another Member State. However, the dispute before the Court of Appeal does not involve either of those situations ...".

23 Application no. 15318/89, Judgment of 18 December 1996, (1997) EHRR 513.

24 Application no. 25781/94, Judgment of 10 May 2001, (2002) EHHR 30.

25 *Loizidou v. Turkey (preliminary objections)*, Application no. 15318/89, Judgment of 23 March 1995 Series A No. 310.

under the Convention, the ECtHR noted in *Loizidou v. Turkey* (preliminary objections) that the concept of 'jurisdiction' under Article 1 of the ECHR was not restricted to the national territory of the High Contracting Parties and that responsibility may also arise when, as a consequence of military action, whether lawful or unlawful, a Contracting Party exercises effective control of an area outside its national territory; as it was not disputed that it was *Turkish* troops that prevented the applicant from gaining access to her properties, the Court concluded that the facts alleged by her were capable of falling within Turkey's 'jurisdiction'.[26] Reiterating much the same arguments in its judgment in *Cyprus v. Turkey*, the ECtHR based its finding that the respondent state (as opposed to the 'TRNC') was internationally responsible for violations of the claimants' rights on the reasoning that, given the circumstances on the ground and, in particular, the 'TRNC''s non-recognition by the international community,

> "... any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violations of their rights in proceedings before the Court"[27]

By rejecting Turkey's objections to its jurisdiction over human rights violations committed in the 'TRNC', the ECtHR had, in its pre-April 2004 jurisprudence, thrown its weight behind the international community's denial to recognise the 'TRNC', leaving Turkey as the only eligible candidate to assume responsibility for the continuing interference with the claimants' property and other human rights guaranteed by the Convention.[28] At the same time, it is only fair to recall that, despite having consistently treated the 'TRNC''s "administration" in the Areas as Turkey's "subordinate local administration" that, "survived by virtue of Turkish military and other support",[29] the ECtHR's pre-April 2004 Cyprus-specific jurisprudence was never directly concerned with the issue of the legitimacy, or otherwise, of the military occupation of the Areas (as one, at least, of the two sides to the dispute may have surmised from the ECtHR rulings in *Loizidou v. Turkey* and *Cyprus v. Turkey*). The focus of that jurisprudence was on the property rights of the evicted holders of title deeds and, more specifically, on the protection of their peaceful enjoyment, which Turkey's military presence on the island interfered with. What is more, several *dicta* (i.e. judicial opinions expressed on points that are only incidental to the court's decision) in both *Loizidou v. Turkey* and *Cyprus v. Turkey* helped prepare the ground for some of the more recent Cyprus-related jurisprudence of the ECtHR, in a way that, with hindsight, should, perhaps,

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26 *Ibid.*, paras 56-64 of the judgment and point 2 of the operative provisions.

27 *Cyprus v. Turkey*, supra, fn. 24, para. 78.

28 For a critical review of the pre-April 2004 jurisprudence of the ECtHR see Aksar (2001), especially pp. 169-173.

29 *Cyprus v. Turkey*, supra, fn. 24, para. 77. This helps explain its declaration of the 'TRNC' 's expropriation 'legislation', including Article 159 of the 1985 'TRNC' 'Constitution', as invalid and of no effect on the legal title of the evicted Greek Cypriot owners of property under the 'TRNC' 's *de facto* control.

have put those acting for the RoC on inquiry.[30] It is this apparent misunderstanding of the purport of the pre-April 2004 jurisprudence of the ECtHR, in conjunction with the *qualified* nature of the right to the enjoyment of property,[31] that could, perhaps, explain some of the disillusionment experienced by one of the sides to the dispute on account of the more recent Cyprus-specific case-law of the ECtHR (discussed in more detail later in this paper).

The English Courts' Jurisprudence

The Cyprus-specific case-law of the English courts is largely consistent (if somewhat more nuanced) with the international community's stance in the matter of the Cyprus dispute. The few cases where courts in England *have* attributed validity to (some of) the acts of the *de facto* authorities of the 'TRNC' (or otherwise acknowledged their existence) can be distinguished on their facts and do not represent notable departures from the international community's position on the Cyprus problem.

It is undisputed law in England that courts will not take cognizance of the acts of entities that Her Majesty's Government has not recognised, *de jure* or *de facto*.[32] English courts have, by and large, applied that principle also in their Cyprus dispute-related jurisprudence. In *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.*,[33] an action in tort for conspiracy in England to procure trespass to land and chattels situate in the Areas, Lord Denning MR attempted unsuccessfully to read a public policy-based qualification into the 'one-voice principle'. Invoking, *inter alia*, the rule in *Phillips v. Eyre*,[34] his Lordship asserted that, "... the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised ...: at any rate, in regard to the laws which regulate the day-to-day affairs of the

30 The reference is, in particular, to para. 45 of *Loizidou (merits)*, where, referring to the so-called 'Namibia exception' (see ICJ, Namibia, Advisory Opinion of 21 June 1971, ICJ Reports 1971), the ECtHR noted that "international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' "; and to para. 102 of *Cyprus v Turkey*, where the ECtHR concluded that, for the purposes of former Article 26 of the Convention, remedies available in the 'TRNC' may be regarded as Turkey's "domestic remedies" and that the question of their effectiveness was to be considered in the specific circumstances where it would arise.

31 In this regard, see the text to fn. 83.

32 *Luther v. Sagor* [1921] 3 KB 532. The rationale of the so-called 'one-voice principle' is that the judiciary and the executive branch should present a united front, avoiding the risk that courts may, through their pronouncements, frustrate the decision of the executive branch to withhold recognition.

33 [1978] 1QB 205.

34 The reference is to *Phillips v. Eyre* (1870-71) LR 6 QB 1, which is authority for the proposition that a right of action does not lie in England where the acts complained of were lawful in the country where they took place.

people, such as their marriages, their divorces, their leases, their occupations, and so forth".[35] The actual decision of the CA – whose ground was unrelated to Lord Denning MR's *obiter dicta* – was, in part, upheld by the House of Lords, which declined to decide whether or not the 'TRNC' ought to be recognised as a legal entity.[36] The English courts' policy of avoiding to attribute binding effects to the acts of unrecognised foreign entities was very recently reaffirmed through their decisions in two landmark cases arising from the Cyprus dispute: *Kibris Turk Hava Yollari and Anor v. The Secretary of State for Transport*[37] and *Meletios Apostolides v. David Charles Orams and Linda Elizabeth Orams*.[38] In the first of the aforementioned cases, the High Court declined to quash the defendant's decision *not* to grant the aviation permits sought by the applicants for direct flights between the UK and the 'TRNC''s Ercan 'airport', asserting that, to do so, would be to, "... completely undermine the express statements from the United Kingdom Government to the effect that it does not recognise the 'TRNC".[39] In the second of the aforementioned cases (marking the culmination of the UK leg of the *Orams* litigation) the CA not only overturned the earlier decision of the High Court[40] but, what is more, rejected the submissions of counsel for the respondents that 'international public policy' precluded the recognition and enforcement, in the UK, of the appellant's Cypriot court judgment, by recalling that the UN's consistent calls for the respect of the RoC's territorial integrity under one sovereignty, "... must include respect for the [RoC's] courts as the judicial arm of the sovereign state".[41] By throwing its weight behind the RoC's

35 *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd, supra*, fn. 33, per Lord Denning MR at 218. Lord Denning's reasoning is not without parallels to the opinion of the International Court of Justice (ICJ) in its Namibia opinion (supra, fn. 30), to which his Lordship did not explicitly refer in his speech.

36 "... it is not necessary to enter upon the questions raised by the respondent's counsel as to the degree of notice (if any) which the courts should take of the situation in Cyprus and of 'laws' passed ..." (*Hesperides Hotels Ltd. and Anor v. Muftizade* [1979] AC 508, per Lord Wilberforce at 537 H); "[A] number of interesting questions were fully argued; in particular whether the courts of this country should and can have regard to legislation of the Turkish Federated State of Cyprus ... But it is not necessary to reach a conclusion on them" (*ibid.*, per Viscount Dilhorne, at 540 A-B).

37 [2009] EWHC 1918 (Admin).

38 *Orams v. Apostolides* [2010] EWCA Civ 9; 2010 WL 19916.

39 *Ibid.*, para. 79. The learned judge added that, "I do not see how it would be open to this Court to view the grant of permits as anything other than a complete contradiction of the United Kingdom's Government's stated position on recognition" (*ibid.*, para. 82).

40 Case No: QB/2005/PTA/0897, *David Charles Orams and Linda Elizabeth Orams v. Meletios Apostolides*, judgment of 6 September 2006, High Court of Justice, Queen's Bench Division, [2006] EWHC 2226 (QB). The High Court's refusal to enforce the Nicosia District Court against the judgment debtors was motivated as follows: because Protocol No. 10 suspended the application of the *acquis* in the Areas (which included the land involved in the proceedings before the High Court), the Judgments Regulation could not be relied on by the respondent as a valid legal basis for the enforcement, in the UK, of that judgment, as the Regulation was part and parcel of the *acquis* and, therefore, of no effect in relation to matters concerning the Areas.

41 *Ibid.*, para. 61.

claim of jurisdiction over the Areas, the CA thus signalled its readiness to comply with the UK Government's and the international community's disapproval of the 'TRNC''s attempted secession, in violation of international law.

To date, there have been only two precedents where an English court has recognised the validity of (some of) the acts of the *de facto* authorities of the 'TRNC' or otherwise appeared to (indirectly) acknowledge its existence. The most famous is *Emin v. Yeldag*.[42] At issue before the High Court was the impact of the Crown's non-recognition of the 'TRNC' on the validity of a divorce decree granted by its *de facto* 'authorities'. Both the Attorney-General and the Foreign Office drew the Court's attention to the Crown's diplomatic stance *vis-à-vis* the 'TRNC', inviting it, nevertheless, to respect divorce decrees, to the extent that these affected private rights only. Despite the fact that the High Court *did* recognise the divorce decree in question, its decision is to be approached cautiously, for a number of reasons. The *first* is that the High Court expressly limited the scope of the qualification that it was prepared to read into the non-recognition rule *beyond* divorce decrees issued by the 'TRNC' (echoing the scope of the ICJ's 'Namibia exception', supra, fn. 30);[43] the *second* is that the High Court explicitly conditioned the validity of the decisions of a court of an unrecognised entity to their consistency with the foreign policy or diplomatic stance of Her Majesty's Government;[44] last but not least, the High Court associated recognition of the divorce decree before it to the RoC's treatment as *one* country but with *two* territories, within the meaning of s. 46(1) of the Family Law Act, which made no distinction between recognised or unrecognised countries or territories.[45] Strict legal considerations aside, the risk of injustice to a single mother of two minors, in a situation where no obvious UK public policy interests were at stake from the recognition of her divorce decree, is also likely to have played a role in tipping the balance in favour of (rather than against) recognition.[46] The second of the aforementioned precedents is said to be implicit in the CA ruling in *Polly Peck International PLC v. Asil Nadir and Ors*,[47] a dispute arising from the collapse of Polly Peck International, after

42 [2002] 1FLR 956.

43 *Ibid.*, para. 62.

44 *Ibid.*, para. 65.

45 *Ibid.*, paras 73-77. The clear implication is that, if it were not for the statutory interpretation 'escape route', the divorce-decree may never have been upheld. The mutually exclusive 'duality' of the High Court's reasoning in *Emin v. Yeldag* (i.e. the High Court's reliance both on the exception to non-recognition and on the statutory interpretation 'escape route') has been criticised in Ronen (2004).

46 Public policy, in its 'justice-to-the-parties' dimension, had contributed to the pendulum swinging in the opposite direction in the earlier authority of *B v. B (Divorce: Northern Cyprus)* [2002] 2 FLR 707, where the Court decided not to recognise a divorce-decree issued by a court in the 'TRNC', expressly justifying its decision by reference to the 'TRNC' 's non-recognition by Her Majesty's Government. That decision must also have been based on considerations of justice to the petitioner, who would otherwise have been deprived of the custody of her two young children and of her right to financial support under a divorce issued in England.

47 [1992] 4 All England Reports 769; [1992] 2 Lloyds Law Reports 238.

Asil Nadir, its chairman and CEO, was thought to have fraudulently misappropriated and transferred into private accounts in the 'TRNC' and Turkey a substantial part of the company's funds. At stake before the CA was a *Mareva* injunction obtained by Polly Peck International's administrators against the 'Central Bank of the 'TRNC'', in its capacity as constructive trustee for part of the misappropriated funds. Those who treat the CA's ruling as evidence of the English courts' acknowledgement of the existence of an effectual and autonomous administration in the 'TRNC' (and there are some)[48] point to the CA's recognition of the 'Central Bank of the 'TRNC'' as a regular credit institution that could sue or be sued before a court of law. This view does not however appear to be in line either with the *ratio* of the CA decision or with the subject matter of the proceedings before that Court. Far from being concerned with the recognition (or otherwise) of the 'TRNC', the emphasis of that ruling was on the assessment of the circumstances under which an English court will decide to impose a constructive trust and, more specifically, on the level of knowledge to be attributed to a party and on the limits of its liability as a constructive trustee in terms of the state of its 'commercial conscience'. What is more, the judge sitting for the CA clearly stated, already at the outset of his speech, that Her Majesty's Government did not recognise the 'TRNC', despite the effective control that its *de facto* authorities exercised over the Areas since 1974. As the Special Commissioners aptly observed in *Caglar v. Billingham (Inspector of Taxes)*,[49] "[T]he Polly Peck decision confirms the view ... that courts are willing to look at the facts where commercial issues between individuals are concerned".[50] It follows that, to read into the *Polly Peck* ruling an implicit recognition either of the 'Central Bank of the 'TRNC'' or of the 'TRNC' itself would be to jump to unwarranted conclusions that are also not borne out by the later jurisprudence of the English courts, including *Kibris Turk Hava Yollari and Anor v. The Secretary of State for Transport* and *Meletios Apostolides v. David Charles Orams and Linda Elizabeth Orams*.

The Direct Trade Regulation, and the ECtHR Rulings in the Xenides-Arestis, the Demopoulos and Ors and the Asproftas and Petrakidou Cases: The Shape of Things to Come?

The post-April 2004 phase of the Cyprus dispute has seen no less than two sets of legal developments pointing to a possible change of perception in certain quarters that neither side to the ongoing negotiations for a lasting settlement can afford (or would be advised) to ignore. These consist in (i) the European Commission's stance *vis-à-vis* the 'TRNC', most notably reflected in its proposal for a Direct Trade Regulation, shelved for several years but recently revived by the European Commission and (ii) some of the more recent decisions of the ECtHR in the matter of

48 See, for instance, Necatigil (1999); and Turkey's submissions in the *Loizidou* case.
49 [1996] STC (SCD) 150, [1996] 1 LRC 526.
50 *Ibid.*, para. 118.

the Cyprus dispute, with an emphasis on its judgments in the *Xenides-Arestis* and, more importantly, in the *Demopoulos* and the *Asproftas* and *Petrakidou* cases. The remainder of this paper examines these developments, with a view to understanding their concrete legal implications and assessing what their impact should or is likely to be, at the present juncture, on the negotiating strategy and positions of the two sides to the Cyprus dispute.

The European Commission's Stance in the Aftermath of the Annan Plan Referenda and the Direct Trade Regulation

As a commentator has aptly observed, "... Cyprus entered the EU in inauspicious circumstances",[51] with certain EU leaders, including the then Commissioner for Enlargement, publicly expressing their irritation at the RoC's political leadership for being seen to take advantage of the dissociation between the accession of Cyprus to the EU and the negotiation of a lasting settlement to the Cyprus dispute in order to campaign for (and secure) a 'No' vote from the Greek Cypriot electorate in the April 2004 referenda. The EU was to immediately express regret over the Greek Cypriot Community's rejection of the Annan Plan and to congratulate the Turkish Cypriots for their 'Yes' vote, promising to "put an end to the isolation of the Turkish Cypriot Community and to facilitate the re-unification of Cyprus by encouraging the economic development of the Turkish Cypriot Community".[52] With these objectives in mind, the European Commission swiftly tabled no less than three proposals for a Green Line Regulation,[53] a Financial Aid Regulation[54] and a Direct Trade Regulation.[55] Due to the RoC's opposition, only the Green Line Regulation and, thereafter, the Financial Aid Regulation were approved; the former defines the terms under which EU law applies to the movement of persons, goods and services across the line dividing the Areas from the rest of the RoC, while the latter envisages the transfer of €259 million of financial aid to the 'TRNC'. The RoC's staunch opposition to the proposed Direct Trade Regulation revolved

51 Nugent (2006), p. 1.

52 See the Statement of the General Affairs Council of 26 April 2004. In his Report on his mission of good offices in Cyprus, of 28 May 2004 (S/2004/437), the UN Secretary General was to also call for the lifting of the Turkish Cypriot Community's isolation (see §§ 87-90), regretting that what was rejected by the Greek Cypriots was "... the solution itself, rather than a mere blueprint" (see § 83).

53 Council Regulation (EC) No 866/2004 of 29.4.2004 on a regime under Article 2 of Protocol No. 10 of the Act of Accession, OJ L 161, 30.4.2004, p. 128, as last amended by Council Regulation (EC) No 587/2008 (OJ L 163, 24.6.2008, p. 1).

54 Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction, OJ L 65, 7.3.2006, p. 5. The RoC agreed to the grant of financial aid to the 'TRNC' if that were to be administered by its Government.

55 Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, Brussels 7.7.2004, COM (2004) 466 final, 2004/0148 (ACC).

around its legal basis and the political aims that this was deemed to promote, both of which were deemed to be objectionable.[56] It is, perhaps, telling that the RoC was not alone in its negative assessment of the proposed Direct Trade Regulation: the Council's Legal Service shared the opinion of the Government of the RoC that the European Commission proposal was inconsistent both with international and with EU law and that its legal basis was erroneous.[57] The shelving of the proposed Regulation disappointed the 'TRNC' and attracted criticism from Turkey, which accused the EU of breaking its April 2004 promises to the Turkish Cypriot Community and of backtracking on its commitment to encourage their economic development.

The Direct Trade Regulation, which was still pending at the time of writing, was unexpectedly revived in December 2009 and, along with it, so was the EU's April 2004 promise to end the Turkish Cypriot Community's isolation. Given that EU legal acts adopted on the basis of Article 207 TFEU (formerly, Article 133 EC) are only subject to qualified majority voting within the Council (already prior to the entry into force of the Lisbon Treaty)[58] and that the proposed Regulation appeared, at the time of writing, likely to pass the hurdle of the European Parliament (which, in accordance with the Lisbon Treaty's 'common legislative procedure', is responsible, jointly with the Council, for adopting the measures defining the framework for implementing the common commercial policy), the likelihood of the Direct Trade Regulation becoming law is substantial. The re-emergence of the Direct Trade Regulation, with the same legal basis,[59] no doubt confirms the assessment made by a commentator that, "[T]he initial negativity towards the Republic still resonates".[60] Perhaps more importantly, it suggests that the EU Institutions are unwilling to wait indefinitely for the parties involved in the Cyprus dispute to barter a solution before it acts to ensure that the Turkish Cypriots are no longer penalised by the chronic failure of the parties to the dispute to come to an understanding on how best to resolve it.

Whether the revival of the proposed Direct Trade Regulation, with the same legal basis as the one originally envisaged, is part of a strategy intended to help attribute a certain measure of recognition to the 'TRNC' can only be the subject matter of uninformed speculation, despite the fact that, for instance, in the *Orams* litigation, the European Commission had intervened in a

56 The proposed use of (former) Article 133 EC (now, Article 207 TFEU) as the legal basis of the Direct Trade Regulation exemplified its divisive nature, since that particular Treaty provision provides for trade with *third countries*, thereby hinting to the 'TRNC' 's possible recognition as an external trade partner enjoying the status of a state. Article 1(2) of Protocol No. 10 providing for the withdrawal (including only a partial one) of the suspension of the *acquis*, would appear to be the appropriate legal basis for the Direct Trade Regulation.

57 Brussels, 25 August 2004, Doc. No. 11874/04.

58 The Lisbon Treaty has seen an increase in the number of policy areas where decisions are to be taken by qualified majority voting at the Council, instead of unanimity. Subject to some notable exceptions, where unanimity will continue to be required (e.g. defence, social security and taxation), qualified majority voting is to become the norm.

59 In this regard, see Skoutaris (2008), *supra*, fn. 16, 751, explaining the European Commission's choice of Article 133 EC by arguing that this, "... would allow the Union to adopt such measure through a QMV procedure".

60 Nugent, *supra*, fn. 51, 61.

manner consistent with the interests of the occupants of the applicant's property.[61] Although there is no credible evidence, for the time being, of any official change of policy at the level of the EU *vis-à-vis* the 'TRNC', the *practical* effects of the possible adoption of the proposed Regulation would be hardly any different from those feared by the Government of the RoC. One would expect the legitimate concerns of the Greek Cypriot side at the unexpected re-surfacing of the proposed Direct Trade Regulation to inform its future steps, having an impact both on its assessment of the urgency of coming to a negotiated settlement to the Cyprus dispute before external developments pre-empt its hitherto efforts and make nonsense of the political capital invested in them and on the importance of devising a 'plan B' in the event that the on-going discussions for a lasting settlement should fail to produce any results, leaving the international community with few other options but to consider alternatives to a perpetuation of the untenable *status quo*. As only some of these alternatives are likely to match the Greek Cypriot leadership's expectations for a re-unified Cyprus, one would hope that its elite will carefully assess what reasonable compromises and concessions a majority within the Greek Cypriot Community is capable of subscribing to and, depending on the outcome of its inquiries, readjust its negotiating position with a view to reaching, sooner rather than later, a settlement that matches the genuine desires of the Greek Cypriots.

The ECtHR's More Recent Jurisprudence in the Matter of the Cyprus Dispute: The Xenides-Arestis *and* the Demopoulos, Asproftas and Petrakidou *Rulings*

Of the ECtHR's post-April 2004 Cyprus-related jurisprudence, two cases stand out the most, namely *Xenides-Arestis v. Turkey*[62] and, no less importantly, *Demopoulos and Ors v. Turkey*.[63] While the Court's rulings in those cases are open to different interpretations, one of them is that what these point to, however indirectly, is the *sui generis* judicial recognition of the *status quo* in the Areas, an unprecedented development that is likely to have far-reaching implications on the international community's approach to and degree of toleration of the 'TRNC'.

The factual background to the first of the aforementioned two cases was similar to the one in *Loizidou*. The applicant had been prevented, since August 1974, on account of the Turkish military occupation of the Areas and of the resulting division of Cyprus, from enjoying property

61 In its intervention in the *Orams* litigation, the Commission took the view that, in deciding on whether and how to apply the Judgments Regulation to the ruling at stake in the proceedings before the ECJ, regard had to be had to the 'Immovable Property Commission' established by Turkey in order to address the claims of the evicted Greek Cypriot owners of land in the Areas. In *Xenides Arestis III* the ECtHR had found the IPC to be consistent, in principle, with the ECHR's requirements. The Commission's view left both Advocate General Kokott and the ECJ unimpressed.

62 *Xenides-Arestis v. Turkey* (admissibility) Application no. 46347/99, Judgment of 14 March 2005, unpublished; *Xenides-Arestis v. Turkey II* (merits) 22 December 2005 [2005] ECHR 919; and *Xenides-Arestis v. Turkey III* (just satisfaction) 7 December 2006 [2006] ECHR 0000.

63 *Demopoulos and Ors v. Turkey* (admissibility) Applications nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04, 21819/04, Judgment of 1 March 2010, unpublished.

that she owned and had made use of in the Areas. She brought a compensation claim against Turkey pursuant to Article 8 of the ECHR and to Article 1 to the First Protocol to the ECHR. To avoid a judgment against it, Turkey had established, in July 2003, an 'Immovable Property Determination, Evaluation and Compensation Commission' ('IPC'), which was intended to provide a domestic remedy for similar complaints.[64] As the IPC only provided for compensation but not restitution and as there were doubts about its impartiality, the ECtHR found that, in the circumstances prevailing in the 'TRNC' at the time of the delivery of its admissibility ruling, the IPC did not provide an effective and adequate domestic remedy that applicants should exhaust prior to filing an application to the ECtHR, in accordance with Article 35 § 1 of the Convention.[65] The ECtHR's assessment prompted Turkey to introduce changes to the IPC that were already in place at the time of the issuance by the Court of its third ruling (on just satisfaction).[66] Rejecting Turkey's argument that the applicant should be required, at that particular stage of the proceedings (i.e. after a judgment on the merits had already been issued), to apply for compensation to the new IPC, the Court concluded that the deprivation of the applicant's rights to enjoy her property constituted a violation of the ECHR, ordering Turkey to pay her compensation.[67] Notwithstanding its consistency with the earlier judgments of the ECtHR (including *Loizidou*), by far the most significant aspect of the ECtHR's decision in *Xenides-Arestis* was the fact that the Court not only viewed favourably the establishment of an accessible and impartial IPC but, in principle, also endorsed it, inviting Turkey to address systematically, through it, the issue of the deprivation of the property rights of all similarly-situated applicants.[68] That aspect of the ECtHR ruling in *Xenides-Arestis* was to become of particular relevance closer to the time of the writing of this paper. It is also an aspect of that ruling that appears to have been partly ignored, at least by one of the sides to the Cyprus dispute, despite the unequivocal terms in which the ECtHR

64 The legal basis for the establishment of the original IPC was 'Law 49/2003', which entered into force on 30 June 2003.

65 *Xenides-Arestis v. Turkey*, 43-45. Article 35 § 1 of the Convention provides that, "[T]he 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".

66 The reference is to 'Law 67/2005', which came into effect on 22 December 2005 and which was intended to address the lack of the provision for restitution, to which the Court drew attention in *Xenides-Arestis*.

67 *Xenides-Arestis v. Turkey III*, paras 37-38.

68 "It is inherent in the Court's findings that the violation of the applicant's rights ... originates in a widespread problem affecting large numbers of people. ... Moreover, the Court cannot ignore the fact that there are already approximately 1,400 property cases pending before the Court brought primarily by Greek-Cypriots against Turkey. ... The Court considers that the respondent State must introduce a remedy, which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before the Court, in accordance with the principles for the protection of the rights laid down in Article 8. ... Such a remedy should be available within three months from the date on which the present judgment will be delivered and the redress should occur three months thereafter (*Xenides-Arestis v. Turkey II*, para. 38)".

welcomed Turkey's steps to provide adequate domestic redress in respect of all similar applications and the clear message sent by the Court that an adequate, effective and accessible compensation and restitution mechanism would pass human rights muster and meet the ECtHR's requirements.[69]

More recently, in its landmark ruling in *Demopoulos v. Turkey*, the ECtHR's Grand Chamber declared inadmissible the complaints of eight Greek Cypriot applicants against Turkey over the deprivation of the enjoyment of their possessions in the Areas as a result of Turkey's continuing military occupation thereof. The Court found that, since Turkey had, in its view, established, through the 'revamped' IPC, an accessible and effective mechanism for the redress of complaints similar to those of the applicants before it, their applications should be rejected for non-exhaustion of domestic remedies, in contravention of Article 35 § 1 of the Convention. This judgment is of very considerable significance, not only because there were some 1,600 similar applications pending before the Court at the time of its delivery but, most of all, because of the reasons that the ECtHR furnished for it. Specifically, the Court dismissed the applicants' claim that any recourse to the IPC would be tantamount to a recognition of the existence of the 'TRNC'. In the Court's view, for the applicants to avail of the IPC, established in the aftermath of and in accordance with the ECtHR's rulings in the *Xenides-Arestis* line of jurisprudence, was not for them to legitimise Cyprus's illegal occupation but, rather, to make use of a mechanism intended to bring Turkey in line with its obligations under the Convention, guaranteeing the protection of their rights.[70] The ECtHR also rejected the applicants' submission that the IPC did not provide a real and effective remedy.[71] The Court was of the opinion that the IPC amounted, *prima facie*, to a reasonable and fair redress mechanism (whose awards were subject to a right of appeal before the 'TRNC''s 'courts') and that no evidence had been adduced to show that it was ineffective or discriminatory;[72] finally, that material compensation instead of restitution was the IPC's favoured means of settling claims was not, in the Court's view, fatal to its efficacy as a redress mechanism, as restitution may well be the preferred but it is not the only conceivable form of redress, where the circumstances render it impracticable or impossible.[73] Significantly, the Court stressed that thirty-

69 *Xenides-Arestis v. Turkey II*, para. 40.

70 "... As has been consistently emphasised, this conclusion does not in any way put in doubt the view adopted by the international community regarding the establishment of the 'TRNC' or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus ... The Court maintains its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law" (*Demopoulos and Ors v. Turkey*, supra, fn. 63, para. 96).

71 In support of their claims, the applicants invoked the IPC's bias against Greek Cypriots, the fact that it only rarely ordered the restitution of property and the contention that the compensation awarded by the IPC was only a fraction of the disputed property's value.

72 In this regard see *Demopoulos and Ors v. Turkey*, supra, fn. 63, paras 104-126.

73 "The Court's case-law indicates that 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, the Court, as a matter of constant

five years had already elapsed since the occurrence of the events giving rise to proceedings before it and that to attempt to settle disputes on the basis of a 'snapshot' of the parties' human rights, as they stood in August 1974, would be to risk causing injustice to the *de facto* long-term occupants of the applicants' properties, whose non-proprietary rights may outweigh the applicants' sentiments and, with greater reason, those of their descendants[74] (many of whom had never made use of the disputed properties).[75] Specifically on the issue of the evicted applicants' proprietary rights, one of the major bones of contention in the ongoing negotiations for a settlement to the Cyprus dispute and amongst the main reasons (alongside security concerns)[76] for the rejection of the Annan Plan by the Greek Cypriot Community,[77] the ECtHR observed that,

> "The Court can only conclude that the attenuation over time of the link between the holding of title and the possession and use of the property in question must have consequences on the nature of the redress that can be regarded as fulfilling the requirements of Article 35 § 1 of the Convention"[78]

Closer to the time of publication of this paper, the ECtHR was to issue two more rulings, unfavourable to the interests of the displaced owners of properties in the 'TRNC'. The cases in question (which, in their material respects, were identical) are *Asproftas v. Turkey* and *Petrakidou v. Turkey*.[79] The applicants, both of whom were driven from their family homes in August 1974, at the age of 11, were arrested by the authorities of the 'TRNC' while taking part in a demonstration in Nicosia, in July 1989. Invoking, *inter alia*, Article 8 of the Convention, the

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practice, has imposed the alternative requirement on the Contracting State to pay compensation for the value of the property ..." (*Demopoulos and Ors v. Turkey,* supra, fn. 63, para. 114).

74 "In the present applications, some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers 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" (*Demopoulos and Ors v. Turkey,* supra, fn. 63, para. 84).

75 "It is not enough for an applicant to claim that a particular place or property is a 'home'; he or she must show that they enjoy concrete and persisting links with the property concerned. The nature of the ongoing or recent occupation of a particular property is usually the most significant element in the determination of the existence of a 'home' in cases before the Court. However, where 'home' is claimed in respect of property in which there has never been any, or hardly any, occupation by the applicant or where there has been no occupation for some considerable time, it may be that the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8" (*Demopoulos and Ors v. Turkey,* supra, fn. 63, para. 136).

76 For a short but thought-provoking account of the security angle to the two Communities stance in the matter of the Cyprus dispute, see Tank (2005).

77 In this regard, see Palley (2005), pp. 228-229.

78 *Ibid.,* para. 113.

79 *Asproftas v. Turkey* Application no. 16079/90, Judgment of 27 May 2010, unpublished; and *Petrakidou v. Turkey* Application no. 16081/90, Judgment of 27 May 2010, unpublished.

applicants complained of being unable to return to and enjoy their homes, situated in the area under the control of the 'TRNC'. Drawing heavily on *Demopoulos*, the ECtHR decided that, as children of Greek Cypriot refugees, with no concrete legal rights over the properties in question, the applicants, who had in any event not been in occupation thereof for a very considerable period of time and had no realistic expectation of ever taking up or resuming occupation thereof in the absence of such concrete legal rights (except by way of inheritance), had no right to appeal for them.[80] Accordingly, the Court ruled that the facts of the case did not disclose any present interference with their right in respect of their home and dismissed their claims.

There are two ways to approach the judgment of the Court in *Demopoulos v. Turkey* (of which the ECtHR rulings in the *Asproftas* and *Petrakidou* cases are, in most material respects, the logical conclusion). One is to see in it nothing more but the logical consequence of the ECtHR's judgment in *Xenides-Arestis*: the Court had expressly invited Turkey to establish a forum for the satisfaction of the rights of the Greek Cypriot owners of property situate in the Areas; Turkey did precisely that, which is why the Court was bound by its earlier judgments to uphold Turkey's steps (to the extent that it found them to be to its satisfaction), staying true to its earlier jurisprudence. Another way, no less legitimate, to approach the *Demopoulos* judgment is by focusing on its *implications* and on the *message* that this inevitably sends, irrespective of the Court's intentions: even if the ECtHR has never, to date, in its Cyprus-specific jurisprudence, directly concerned itself with the issue of the legitimacy of the military occupation of the Areas or with the international law status of the 'TRNC'[81] and even if it has consistently treated, also in *Demopoulos*, the 'TRNC''s 'administration' as subordinate to and dependent from Turkey, the ECtHR declaration of the IPC as a legitimate forum for the redress of legal claims is tantamount, at least indirectly, to the attribution of a measure of legitimacy to the 'TRNC' that is at variance with the hitherto

80 "In this respect, it is to be recalled that the Grand Chamber has recently held that it is not enough for an applicant to claim that a particular place or property is a 'home'; he or she must show that they enjoy concrete and persisting links with the property concerned. The nature of the ongoing or recent occupation of a particular property is usually the most significant element in the determination of the existence of a 'home' in cases before this Court. However, where 'home' is claimed in respect of property in which there has never been any, or hardly any, occupation by the applicant or where there has been no occupation for some considerable time, it may be that the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8. Furthermore, while an applicant does not necessarily have to be the owner of the 'home' for the purposes of Article 8, it may nonetheless be relevant in such cases of claims to 'homes' from the past that he or she can make no claim to any legal rights of occupation or that such time has elapsed that there can be no realistic expectation of taking up, or resuming, occupation in the absence of such rights. Nor can the term 'home' be interpreted as synonymous with the notion of 'family roots', which is a vague and emotive concept (see *Demopoulos and Others* ...)": (*Asproftas v. Turkey and Petrakidou v. Turkey*, supra, fn. 79, paras 44 and 43, respectively).

81 The Court did acknowledge in *Demopoulos* that it, "... would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power" (at para. 112) and that, "... it goes without saying that Turkey is regarded by the international community as being in illegal occupation of the northern part of Cyprus" (at para. 114).

stance of the international community in the matter of the Cyprus dispute. This is all the more so, considering that, alongside the IPC, it is also the legislative, executive and judicial branches of the 'TRNC' whose existence and efficacy have been recognised, at least indirectly, by the Court as it is the 'TRNC''s 'Parliament', its 'President' and its 'courts' that are involved in its establishment, in the appointment and dismissal of its members and in the hearing of appeals against its awards. It follows that the Greek Cypriot side's concerns at this unprecedented development are understandable, not least on account of the possible impact of the *Demopoulos* ruling on other legal precedents, favourable to the RoC.[82] An obvious question is what use the RoC's political elite will now make of these concerns: will it see in them the proof (or, at least, *some* evidence) that time is running out for a negotiated settlement to the Cyprus dispute to be hammered out and will it appreciate the urgency of reflecting on further concessions while, in parallel, working on a 'plan B' if the ongoing discussions for a lasting settlement were to fail, for whatever reason? Or will it see in *Demopoulos* no more than an erroneous legal decision that it can afford to disregard on account of the, seemingly, contradictory reasoning[83] that lies at its heart?

To approach the fallout of the *Demopoulos* ruling through purely legal lenses and to seek to challenge, on legal grounds, the validity of the Court's reasoning would, in our view, be inapposite (however strong the urge to do so may be) for two reasons no less: *first*, because doing so is unlikely to bring anything to the Greek Cypriot side and *second* because it is not entirely clear that any such challenge would be robust enough to itself withstand refutation. More specifically, to attack the rationale of the Court's ruling through recourse to legal arguments (however plausible those may be) or to attempt to explain it away by reference to the Court's concern at the rising number of applications brought by Greek Cypriots against Turkey or as a reaction to its fear that human rights law may be used, indefinitely, as an instrument for the pursuit of objectives going beyond the satisfaction of legal claims[84] would, in all likelihood, bring the Greek Cypriot side no more benefits

82 In this regard, see fn. 61 and Advocate General Kokott's rejection, in paragraph 68 of her opinion in the *Orams* case, of the Commission's view that, in applying the Judgments Regulation, regard should be had to the IPC, "[T]he Xenides-Arestis III judgment, in which the European Court of Human Rights took a positive view of the compatibility of the compensation regime with the ECHR, gives no indication that the legislation in question validly excludes the prosecution of civil claims under the law of the Republic of Cyprus. On the contrary, the European Court of Human Rights expressly rejected the argument that the applicant was obliged to bring the matter of compensation before the Immovable Property Commission, and instead itself awarded her compensation".

83 The contradiction resides in the tension between the Court's judgment in *Demopoulos* and the *ex injuria ius non oritur* principle. As if to pre-empt that criticism, the Court stated that, "... from a Convention perspective, property is a material commodity which can be valued and compensated for in monetary terms. If compensation is paid in accordance with the Court's case-law, there is in general no unfair balance between the parties" (*Demopoulos and Ors v. Turkey*, supra, fn. 63, para.115).

84 The ECtHR's concerns are, *inter alia*, reflected in the following excerpt from its judgment in Demopoulos, "... individuals claiming to own property in the north may, in theory, come to the Court periodically and indefinitely to claim loss of rents until a political solution to the Cyprus problem is reached" (at para. 111).

than similar attacks or challenges have brought the 'TRNC' or Turkey in connection with precedents that Turkey and the 'TRNC' objected to. Leaving aside the fact that no right of appeal lies against the ECtHR's admissibility decisions, to want to challenge the rationale of limitations that the Court spelled out in the *Demopoulos* ruling for the ownership rights of the evicted Greek Cypriots would be to lose sight of the inherently *qualified* nature of property rights and of the restrictions to which these are subject, as a result.[85] Seen in this light, the limitations that the ECtHR spelled out for the applicants' property rights in *Demopoulos* could be understood as incidental to the very nature of property rights rather than as indications of the judicial recognition of a new legal situation in the Areas, commensurate with the realities on the ground. At the same time, to assert that human rights law invariably gives priority to the dispossessed owners of property over its current occupants (including illegal ones) may be to misunderstand the link between property and occupancy and to exaggerate the relative weight of one over the other, disregarding the need for a balancing act before a decision to prefer the dispossessed owners of property over its long-term occupants is made.[86] Besides, it is worth recalling that the Annan Plan – which, despite its rejection, provides invaluable guidance as to the international community's perception of what an acceptable compromise would look like in the context of the Cyprus dispute – gave priority to the long-term occupants of land over their evicted owners in a number of situations,[87] suggesting that, while the right to ownership is, no doubt, protected, it is not an absolute right nor is occupancy and the (mostly non-proprietary) rights that go along with it, to be entirely discarded. After all, the Court's ambition to ensure that individual rights and freedoms are effectively protected at the domestic level and that aggrieved parties only have recourse to the Court as a last resort is, fundamentally, a legitimate one that one would have difficulties to challenge (however much its application in the context of the Cyprus dispute would appear to be less than straightforward, given the unrecognised status of the 'TRNC' and its authorities).[88]

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85 Article 1 to the First Protocol to the ECHR (which was only added to the Convention in 1952) recognises a *qualified* right to property, one that is *inter alia* subject to the power of the contracting states to restrict its enjoyment to the extent necessary to secure the payment of taxes, other contributions or penalties. It is, perhaps, telling that the Universal Declaration of Human Rights (Art.17), the American Convention of Human Rights (Art.21), American Declaration of the Rights and Duties of Man (Art. 23) and the African Charter on Human and Peoples' Rights (Art.14) also recognise *qualified* (as opposed to absolute) rights to private property.

86 For a detailed and thought-provoking account of the mechanisms in place for the balancing of conflicting proprietary and non-proprietary rights over real property in factual situations similar to those of the Cyprus dispute, see Ronen (2007).

87 See, for instance, Annan Plan, Foundation Agreement, Annex VII, Articles 12 (1)-(2), 14 and 16 (3).

88 For an account of the 'pilot judgment procedure' developed by the ECtHR under Protocol No.14 to the ECHR in an attempt to address similar cases arising from the lack of relevant structures and procedures, allowing individual citizens to vindicate their rights and assert their freedoms under the Convention before the competent domestic courts see Paraskeva (2003).

An urgent rethink of the strategy of the side to the Cyprus dispute that stands to lose the most from the further consolidation of the island's partition[89] would appear to be a more appropriate reaction to the ECtHR ruling in *Demopoulos* and to the realities brought about by the Court's ruling so that further unpleasant surprises can be pre-empted and that developments can be steered in the direction that best serves the longer-term interests of both Communities on the island, however dissatisfied their individual members may be with the balance to be struck, as a *sine qua non* precondition for the resolution of the Cyprus conflict, between the rights of the dispossessed and those of the long-term occupants of their property.

Concluding Remarks

Given the circumstances in which the 'TRNC' was established and the illegal use of force that preceded and facilitated its creation, in violation of international and human rights law, the international community has hitherto refused to recognise it, treating the Government of the RoC as the only legitimate partner on the island. However ironically, it would seem that the Law, a former ally and the very source of the RoC's meagre successes in its struggle against Turkey over the 'TRNC', may slowly be in the process of setting the tone for its future misfortunes. As those of the recent legal developments highlighted in this paper would seem to suggest the juridical route to resolving the Cyprus dispute entails risks, with yesterday's successes being apt to bear the seeds of tomorrow's calamities, as in the case of the *Xenides-Arestis* ruling. To pursue blindly the legal route is perilous, not least in the context of the Cyprus dispute that is, first and foremost, of a *political* rather than of a *legal* nature, meaning that no viable solution to it can ever be arrived at otherwise, than through negotiations.

If, as the recent developments highlighted earlier in this paper would seem to suggest, a consensus is gradually emerging outside Cyprus to the effect that a return to the *status quo ante* is increasingly becoming an unrealistic option, given the decades-long period that has elapsed since Turkey's military intervention, it is high time for those interested in the island's re-unification to come to terms with the inevitability of the slow drift towards partition, unless additional painful compromises and concessions are made, and to seriously examine what these compromises and concessions could be before introducing them at the negotiating table. If no such compromises or concessions would appear to be politically feasible or if those that the majority of the members of the two Communities would be willing to subscribe to would not suffice for Cyprus' division to be overcome, the obvious way forward would be for the side to the Cyprus dispute that stands to

89 For the Greek Cypriots, the 'Taiwanisation' (or outright recognition) of the 'TRNC' would entail loss of significant territorial gains, the permanent stationing of Turkish troops on the island and the arrival of more Turkish settlers, as well as the acceleration of the exploitation of the Greek Cypriot-owned properties; for the Turkish Cypriots it would entail slower development and the loss of some of their rights as EU citizens. While both sides to the dispute would lose out, it is more or less clear which side would stand to lose out the most.

lose the most from the island's partition to try to secure whatever gains, territorial or other, it can before the partition is further consolidated or formalised. As time is not working in favour of the interests of those willing to see the island of Cyprus re-unified, it is only if the side to the dispute that stands to lose the most from the island's partition is prepared to see the writing on the wall that it can take the steps necessary in order to either readjust its position, so as to attain the settlement that it holds itself out as striving to attain or, alternatively, to minimise the potential effects of the one development that now, more than ever before, looms in the distance if no settlement can be achieved in the near future: the furtive recognition of the 'TRNC'. The adverse consequences of such a development should, by now, be clear to all parties to the Cyprus problem and should be avoided at any reasonable cost.

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