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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Dispute over the Fenced Varosha in the light of International Law, United Nations Security Council Resolutions and Judgments of European Court of Human Rights

Uluslararası Hukuk, Birleşmiş Milletler Güvenlik Konseyi Kararları ve Avrupa İnsan Hakları Mahkemesi İçtihatları Işığında Kapalı Maraş Uyuşmazlığı

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Abstract

The issue of property in Cyprus, which has been the subject of protracted discussions and negotiations from the Cyprus Peace Operation in 1974 up until now, has taken on a new dimension since the government of the Turkish Republic of Northern Cyprus (TRNC) declared that the fenced area of Varosha would be re-opened to settlement. Re-opening the fenced area of Varosha to settlement would rekindle some international law debates as has been observed in the other regions of the island of Cyprus. In this regard, the objective status and *erga omnes* character of the Founding Treaties inclusive to the Treaty of Establishment and Treaty of Guarantee debates on the legitimacy of intervention on the island and the conformity of this intervention with international law, Resolutions of the United Nations Security Council (UNSC), and the Judgments of the European Court of Human Rights (ECtHR) on the property rights of Greek Cypriots will pave the way for new discussions on the future of Fenced Varosha. What is more, the critical claim by the Administration of Foundations in Cyprus (EVKAF), with respect to the whole area of the fenced area Varosha belonging to the Foundation Land, will lead the debate on the fenced area of Varosha in gaining another dimension. This study will first discuss, from an international law perspective, the debates on the intervention in TRNC covering the fenced area of Varosha, then the status of Varosha in the UNSC Resolutions, and finally the issues of the ownership of property and foundation land in Varosha in the light of Judgments of the ECtHR.

Keywords

Cyprus, Fenced Varosha, International Law, United Nations Security Council, European Court of Human Rights, Property, Foundations

Öz

1974 Kıbrıs Barış Harekatı'ndan günümüze uzun tartışmaların ve müzakerelerin konusu olan Kıbrıs'ta mülkiyet sorunu Kuzey Kıbrıs Türk Cumhuriyeti (KKTC) hükümetince Kapalı Maraş bölgesinin tekrar iskana açılacağının beyan edilmesinden sonra yeni bir boyuta taşındı. Kapalı Maraş'ın yerleşime açılması Kıbrıs Adasının diğer bölgelerinde olduğu gibi, birtakım uluslararası hukuk tartışmalarını yeniden gündeme getirecektir. Dolayısıyla Garantörlük Andlaşması ve Kurucu Andlaşmaların objektif statüsü ve *erga omnes* niteliği ile adaya müdahalenin meşruiyetine ve uluslararası hukuka uygunluğuna dair tartışmalar yeniden gündeme gelecektir. Bu anlamda Birleşmiş Milletler Güvenlik Konseyi (BMGK) kararları ve Avrupa İnsan Hakları Mahkemesi'nin (AİHM) Rum toplumunun mülkiyet haklarına ilişkin kararları Kapalı Maraş için de benzer bir hukuki zemin sunmaktadır. Kapalı Maraş özelinde bu zemini başka bir boyuta taşıyacak önemli bir mesele ise Kıbrıs Vakıflar İdaresi (EVKAF) tarafından ileri sürülen Kapalı Maraş'ın tamamının vakıf arazisi olduğu iddiasıdır. Bu çalışmada; öncelikle Kapalı

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Maraş'ı da kapsayacak şekilde KKTC'ye müdahale hakkındaki tartışmalar, daha sonrasında BMGK kararlarında Kapalı Maraş'ın statüsü ve en sonunda ise AİHM kararları ışığında Kapalı Maraş'ta mülkiyet ve vakıf problemi, uluslararası hukuk perspektifinden, tartışılacaktır.

Anahtar Kelimeler
Kıbrıs, Kapalı Maraş, Uluslararası Hukuk, Birleşmiş Milletler Güvenlik Konseyi, Avrupa İnsan Hakları Mahkemesi, Mülkiyet, Vakıf

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Introduction

The island of Cyprus has been ruled by various civilisations throughout history. Bearing witness today to the geopolitical importance of the island by virtue of the natural resources in its whereabouts, the island of Cyprus has similarly assumed strategic significance because of its location during its history. After having been governed by the Ottoman Empire for longer than 3 centuries, the island of Cyprus was ceded as a protectorate to the United Kingdom under the Cyprus Convention of 1878 for a hundred years in exchange for support promised to the Ottomans against Russia. The island of Cyprus had a critical position for the United Kingdom in ensuring the security of the Suez Canal, paving the way to India. In accordance with the Convention, the island shall remain under the possession and sovereignty of the Ottoman Empire, but its administration shall be handed over to the United Kingdom.[1] The United Kingdom did not appoint a colonial governor but administered the island through a high commissioner since the island was not a colony in a classical sense. In the course of World War I (WWI), which broke out in 1914, the United Kingdom declared its annexation of Cyprus[2] on the ground that the Ottoman empire was at war against Britain, with the Ottomans allying with the Germans. Bora argues that '*it was part of British policy to promise the natives of the colonies their independence so as to convince them to join British military campaigns against Germany in World War I. Cyprus was no exception to this policy, and many Greek Cypriots joined Her Majesty's forces in both World Wars, hoping that Britain would offer them Cyprus and also that they would have the opportunity to unite the island with their motherland of Greece.*'[3] The annexation was recognised by Turkey under Article 20 of the Lausanne Peace Treaty, executed in 1923.[4] This Article lays down that 'Turkey accepts and represents that Cyprus was declared to be annexed by the British Government on November 5, 1914.'[5] That is why Turkey regarded that the issues related to Cyprus fell within the domestic affairs of the United Kingdom between 1923 and 1959. However, after

1 Erhan Bora, 'Cyprus in International Law' (2013) 6(1) Ankara Bar Review 27, 32.

2 Heinz A. Richter, 'The Grand Game and Britain's Acquisition of Cyprus' (2014) 12 Çanakkale Araştırmaları Türk Yıllığı 93.

3 Erhan Bora, (n 1), 32.

4 The Treaty of Lausanne is basically the reconciliation text of a nation that experienced both the WWI and the War of Independence. The reconciliation was aimed to be based on National Pact (Misak-ı Milli). In this sense, the Treaty of Sevres, which had been intended to be entered into force upon ececution, failed to take effect at any time, thereby paving the way for re-negotiation of many issues regarding territory of Turkey. In Lausanne, issues such as borders, islands, minorities, capitulations, Ottoman debts, Turkish Straits, foreign schools and the Patriarchate were discussed and mostly resolved. Of course, some issues such as Mosul and the status of the Turkish Straits came to the fore again later on. For a brief comment on Lausanne Treaty, see: Edgar Turlington, 'The Settlement of Lausanne' (1924) 18(4) American Journal of International Law 696.

5 Treaty of Peace, Lausanne (adopted on 24 July 1923, entered into force on 6 August 1924) 28 LNTS 11, Article 20.

signing the Treaties of Establishment and Guarantee in 1959-1960, Turkey has become one of the key actors in Cyprus issue.

I. Treaty of Guarantee and Intervention by Turkey

In the wake of the decolonisation period, that is, recognition of independence of colonies, the United Kingdom intended to leave the island to Turkish and Greek Cypriots and, to this end, initiated a number of international treaties to be executed with Turkey and Greece as partners. The Treaty of Guarantee, which was signed on August 16, 1960 with a view to protecting both the Constitution of 1960 and the status quo, was established through international treaties in the Republic of Cyprus.[6] Because of the fact that the civil unrest on the island kept escalating and went out of control and that violent actions similarly soared up from 1963 to 1974, Turkey launched a military intervention into Cyprus on July 20, 1974 in reliance upon the Founding Treaties and Article 4 of the Treaty of Guarantee and also on the account of disturbance of the order maintained through the Constitution of 1960. Aksar stressed that the separation of these two communities did not occur as a consequence of Turkish Intervention but instead emerged as a direct result of the operations of UN Peacekeeping Force in Cyprus (UNFICYP),[7] which ended up dividing these communities in 1964.[8]

Article 4 of the Treaty of Guarantee sets down that: '*In the event of a breach of the provisions of the present Treaty, Greece, Turkey, and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty*.'[9]

According to Constantinou, first the Republic of Cyprus and then Turkey acted in contravention of the Treaty of Guarantee. The author is in the opinion that the breach of the Constitutional provisions by the Republic of Cyprus and its attempts to unite with Greece upon the 1974 *coup d'etat* led to subversion of the state of affairs established by the Treaty of Guarantee.[10] However, the author states that the expression

6 Müge Vatansever, 'Kıbrıs Sorununun Tarihi Gelişimi' (2010) 12 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 1487, 1499-1500.

7 To prevent intercommunal violence on the island, UNFICYP was set up under Resolution 186 of UNSC in 1964, however, this force could not prevent the conflict between Turkish and Greek Cypriot communities. See: UNSC Res. 186, (4 March 1964), UN Doc S/RES/186, para.3, art.4.

8 Yusuf Aksar, 'The European Court of Human Rights and The Cyprus Problem' (2001) 50(3) Ankara Üniversitesi Hukuk Fakültesi Dergisi 141,149.

9 See the translated version of the Treaty of Guarantee: Murat Sarıca & Erdoğan Teziç & Özer Eskiyurt, *Kıbrıs Sorunu*, (İstanbul Üniversitesi Hukuk Fakültesi Yayını 1975), 385-386. See the English version: Treaty of Guarantee, (adopted and entered into force 16 August 1960) 382 UNTS 3,art.4.

10 Article 1 of the Treaty of Guarantee explains in general terms what the state of affairs, which needs to be maintained, means: *'The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution. It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island.'*

'*reserves the right to take action*' in Article 4 of the Treaty of Guarantee does not include the use of military power and furthermore relays that this view can be found in legal opinion of Hans Kelsen on the probable UN membership of the Republic of Cyprus. Moreover, the author argues that Turkey also infringed the Treaty of Guarantee with the 1974 intervention.[11] As for MacDonald, who conveys various discussions on the term "action," he emphasizes that it is deduced from the wills and intentions of the Parties concerned that the term was used in a manner to include the use of force as well.[12] In fact, it seems apparent that Makarios, the leader of Greek Cypriot Community, breached the Treaty of Establishment due to his ambitions for Enosis.[13] He also wished to unilaterally terminate the founding treaties but faced strong objection from Turkey and the UK.[14] It can be inferred from the Treaty of Guarantee and Treaty of Alliance[15] that the Treaties forbid and preclude Enosis. What is not found in the views of Constantinou is the fact that Greece contravened the Treaty of Guarantee. As is specified by Şener, after the Greek Government was overthrown by a Junta of Colonels in 1967, Makarios and the then-current Greek Government broke apart, and thereafter, the coup of Sampson was plotted and supported against Makarios in 1974 by the Junta regime, which believed Sampson would realize the idea of Enosis more quickly. As the author relays, Bülent Ecevit, the then-current prime minister of Turkey, firmly asserted in his statement given immediately after the coup of Sampson that the state of affairs established through the Founding Treaties and the Constitution was breached by the military coup and, therefore, Turkey found this contrary to the Treaty of Guarantee.[16] Due to the second part of Article 1 of the Treaty of Guarantee, the Republic of Cyprus '*undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares that any activity likely to promote, directly or indirectly, either union with any other State or partition of the Island is prohibited.*'[17]

In this context, it is still controversial whether the intervention of Turkey in the island was based on a legitimate right granted thereto by the Treaty of Guarantee or whether this intervention was in breach of Article 2/4 of the Charter of the United

11 Costas M. Constantinou, 'Revising the Treaty of Guarantee for a Cyprus Settlement' (2017) Analysis for EJIL Talk, 1. See: <https://www.ejiltalk.org/revising-the-treaty-of-guarantee-for-a-cyprus-settlement/> accessed 22 March 2021.

12 R. ST. J. MacDonald, 'International Law and the Conflict in Cyprus' (1982) 19 The Canadian Yearbook of International Law 3, 5-7.

13 Enosis briefly stands for the helenistic utopian goal of uniting with Greece.

14 Nancy Crawshaw, 'Cyprus: Collapse of the Zurich Agreement' (1964) 20(8) The World Today 338, 341.

15 Treaty of Alliance, (adopted and entered into force 16 August 1960) 397 UNTS 287. Article 2 of the Treaty also prohibits Enosis: '*The High Contracting Parties undertake to resist any attack or aggression, direct or indirect, directed against the independence or the territorial integrity of the Republic of Cyprus'.*

16 Bülent Şener, 'Kıbrıs Barış Harekatı'nın Meşruiyeti ve Uluslararası Hukuk Açısından Bir Değerlendirmesi' in Duygu Türker Çelik (eds), *Uluslararası Boyutlarıyla Kıbrıs Meselesi ve Geleceği Uluslararası Sempozyumu Bildiriler Kitabı*, (Atatürk Araştırma Merkezi Yayınları 2016), 405-406.

17 Treaty of Guarantee (n 9), Article 1/2.

Nations (UN Charter)[18] or not. In the event that the first interpretation is taken into account, it can be maintained that Article 4 of the Treaty of Guarantee involves military intervention and the Republic of Cyprus consented to such an intervention from the very beginning. As is laid down in the draft articles designed by the International Law Commission (ILC) with respect to state responsibility, international customary law counts 'consent' among the reasons that eliminate wrongfulness of acts.[19] In the case this interpretation is accepted, it can be claimed that the Treaty of Establishment, Treaty of Alliance, and Treaty of Guarantee (Founding Treaties) determine an objective status[20] or an objective regime[21] and that other states are expected to show respect to this regime.[22] As discussed below, in light of scholarly opinions, this paper accepts the first interpretation and claims that the Founding Treaties of Cyprus create *erga omnes* obligations for third parties because the establishment of Cyprus is not different from other territorial settlements in accordance with international law.

Although the scope of objective regimes is controversial in international law, it is generally accepted that territorial status treaties, border treaties, treaties regulating the regime of international waterways, and founding treaties of international organisations provide objective regimes. In this sense, the settlement of Antarctic, the neutrality of Belgium and Switzerland, and the status of Kiel Canal[23] can be given as examples of objective regimes. Objective regimes can be arranged regionally in order to keep peace

18 Charter of the United Nations (adopted on 26 June 1945, entered into force on 24 October 1945) 1 UNTS 16.

19 ILC, 'Responsibility of States for Internationally Wrongful Acts', (12 December 2001) A/56/49(Vol. I)/Corr.4, art.20.

20 Treaties providing for objective regimes are sometimes called as 'status-creating', 'dispositive' or 'constitutive' treaties. Bruno Simma, 'The Antarctic Treaty as a Treaty Providing for an Objective Regime' (1986) 19 Cornell International Law Journal 189.

21 Francesco Salerno, 'Treaties Establishing Objective Regimes', in Enzo Cannizzaro, (eds), *The Law of Treaties Beyond the Vienna Convention*, (Oxford University Press 2011), 225.

22 According to Barnes, '*an objective regime may be defined as a situation of law created by the parties to an agreement, which purports to have directly applicable legal effects on third parties*' Richard A. Barnes, 'Objective Regimes Revisited' (2004) 9 Asian Journal of International Law 97. Article 34 of the Vienna Convention on the Law of Treaties (VCLT) which embodies the *pacta tertiis* rule, provides that 'a treaty does not create either obligation or rights for a third State without its consent'. However, VCLT Articles 35-36 discern situations between the treaties providing for obligations for third States in which consent of the third parties is required and the treaties providing for rights for third States in which consent of the third parties is not required. Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331. In this regard the concept of objective regimes was not included in ILC Articles on the ground that the concept occupies a rather ambiguous position within international law. Malgosia A. Fitzmaurice, 'Modifications to the Principles of Consent in Relation to Certain Treaty Obligations' (1997) 2 Austrian Review of International and European Law 275, 294. Do controversy and ambiguity constitute legitimate grounds to exclude concept of objective regimes in the draft articles? Even self-determination, one of the most controversial concepts in international law, is included several binding treaties. Therefore, when included in treaties, controversial character of such concepts does not disappear. Furthermore, article proposed by Waldock would give chance to International Court of Justice (ICJ) to consider nature and scope of objective regimes. Proposed draft article 63(1) states: '*a treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of the sea, sea-bed, or airspace; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.*' Waldock claimed that such arrangements have objective status: '*It may freely be conceded that certain kinds of treaties, e.g. treaties creating territorial settlements or regimes of neutralisation or demilitarisation, treaties of cession and boundary treaties, either have or acquire an objective character*'. Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/167 and Add.1-3, [1964] YILC, vol. II, 26-28.

23 The SS Wimbledon Case, 1930 PCIJ Ser. A, No. 1, 15 at 28.

and security.[24] Focusing just on universal settlements results in the rejection of local territorial settlements as objective regimes. In this regard, the Founding Treaties of Cyprus provide an objective regime or an objective status to which other states must respect (*erga omnes*). In other words, the rights given to Turkey under the Treaty of Establishment and Treaty of Guarantee must be respected by all states. Özersay argues that the Treaty of Guarantee establishes an objective regime and that this regime binds parties to the Treaty, the third states and the Cyprus state itself. In this sense, the attitude of all parties and the UN confirms the conclusion that an objective regime has been established.[25] However, when the negotiation process following the intervention is considered, it is hardly difficult to claim that the objective regime established in 1960 is preserved or can be revived today. Another settlement is possibly needed in the future.

According to Toluner, although the term "objective regimes" seems controversial, the founding treaties of Cyprus, which bring a territorial settlement, are not different from the treaties establishing Bosnia or Belgium. As a matter of fact, even in the Treaty of Guarantee, provisions regarding the status of the country were included, and Cyprus was founded through consensuses on several grounds. In this sense, the first consensus was achieved with the UK, and the transfer of sovereignty was realized on the condition that the UK's military bases were protected. The second consensus, expressed in the Treaty of Guarantee, is the recognition of the three states' right of guarantor (Turkey, Greece, and UK) and intervention in order to prevent the division of the island and to ensure the prevention of Enosis. Thus, a balance of power was achieved between Turkey and Greece. The third consensus is the provisions that enable two communities, which are different from each other in terms of language and ethnicity, to undertake the state administration together. Thus, the state administration would be functionally undertaken by both communities, and Cyprus would be governed with a functionally-shared but unified management approach. Cyprus was a *sui generis* state established as a result of these consensuses envisaged in the founding treaties. Thus, it became a member of the UN and was recognized by other states. However, specifically in 1963 and later, the exclusion of the Turkish community from the state administration and the usurpation of its rights undermined the ground of consensus and triggered the events leading to the 1974 intervention.[26] Toluner underlines the necessity for third states not to infringe but to respect the status established by the Treaty of Guarantee.[27]

24 McNair highlights that: '*when it is remembered that international society has at present no legislature, the treaty is the only instrument available for doing many of the things which an individual State would do by means of its legislature; and the making of rules of law is not the only function of a legislature. It is therefore not surprising that from time to time groups of States should have assumed the responsibility of leadership and used the instrument of a treaty to make certain territorial or other arrangements required, or which they consider to be required, in the interest of this or that particular part of the World'*. Lord McNair, *Law of Treaties* (Clarendon Press 1961), Oxford, 259.

25 Kudret Özersay, *Kıbrıs Sorunu: Hukuksal Bir İnceleme*, ATAUM Araştırma Dizisi, No.32 (Ankara Üniversitesi Basımevi 2009), 19-20.

26 Sevin Toluner, 'Objektif Hukuki Durum Yaratan Andlaşmalar Kavramı Gerekli midir?' (2005) 25(1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 519, 569-570.

27 Sevin Toluner, *Kıbrıs Uyuşmazlığı ve Milletlerarası Hukuk*, (Fakülteler Matbaası 1977), İstanbul, 89.

According to Arsava, the right of the Republic of Cyprus to internal and external self-determination was restricted by not only the Constitution of 1960 but also the Treaties of Alliance and Guarantee with a view in protecting the rights of both communities and reconciling the interests of the guarantor states. The Republic of Cyprus acquired the opportunity for being founded under these conditions. Furthermore, the Treaties of Alliance and Guarantee are in compliance with the right to self-defence, enshrined in Article 51 of UN Charter as well as in Article 53, thereof which allows regional organisations.[28]

In the case the second interpretation is taken into account, it can be asserted that Article 4 of the Treaty of Guarantee does not involve use of military power and that the above-mentioned intervention was against Article 2/4 of UN Charter. Similarly, the UN Security Council (UNSC), which convened an urgent meeting on July 20, 1974, that is, on the intervention day, seems to have adopted this second interpretation.[29] In Resolution 353, the UNSC, being '*equally concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreements,*' '*calls upon all States to respect the sovereignty, independence, and territorial integrity of Cyprus.'* To this end, the UNSC, called upon the relevant parties for an immediate ceasefire and demanded an immediate end to foreign military intervention. Notwithstanding, the UNSC did not designate the intervention of Turkey as an occupation in Resolution 353.[30] In fact, the Treaty of Guarantee does not determine or identify any authorised body which is vested with the power to resolve any disputes likely to arise out of the interpretation of the Treaty. Therefore, it remains unresolved whether the Treaty of Guarantee incorporates military measures or not. In this respect, upon receiving the consent of both parties, the UNSC could have requested an advisory opinion from the International Court of Justice.

Just after the intervention on the island, Turkey abided by the ceasefire as prescribed in Resolution 353 and attended the conference in Geneva to settle the disputes amicably and peacefully. In search for a settlement on the dispute over Cyprus, two separate rounds of interstate meetings were organised in Geneva between July 25-30[31] and August 8-14, respectively. After the Geneva talks resulted in failure, Turkey launched a military landing on the island for the second time on August 14, 1974 and entered Famagusta on August 15, 1974.[32] In fact, international reactions formerly seemed to be in favour of Turkey until the second landing operation, shifting opinions against Turkey. The states,

28 Ayşe Füsun Arsava, 'Kıbrıs Sorununun Uluslararası Hukuk Açısından Değerlendirmesi' (1996) 51(1) Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi 43, 47.

29 Benjamin M. Meier, 'Reunification of Cyprus: The Possibility of Peace in the Wake of Past Failure' (2001) 34 Cornell International Law Journal 455, 465.

30 UNSC Res. 353, (20 July 1974), UN Doc S/RES/353, para.6 and 8.

31 Full lext of the Geneva Declaration of 30 July, 1974 is available in Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law*, (2th edn Oxford University Press 1993) 412, 412-414.

32 Kudret Özersay, (n 25), 225.

the UNGA, and the UNSC, in particular, took a negative stance on the second landing by Turkey.[33] The international community indeed defended the view that Turkey's second intervention was a breach of the ceasefire decision of the UNSC.[34] The 4-year international legal sanction unilaterally imposed on Turkey by the USA in the wake of second intervention embodies the most distinctive example of this negative attitude.[35] Additionally, the proclamation of the Turkish Federated State of Cyprus on February 13, 1975 and the transfer of approximately forty thousand Turkish citizens to the island in an attempt to overcome economic challenges were deemed to be against international law by the international community.[36] What is more, the proclamation of the Turkish Republic of Northern Cyprus (TRNC) as an independent state on November 15, 1983 was rendered null and void pursuant to Resolution 541 of the UNSC on November 18, 1983. According to this Resolution, the declaration of independence contravened the Treaty of Guarantee and Treaty of Establishment of 1960.[37] This situation caused the favourable attitude in the wake of first intervention to turn into the negative attitude, which partly debilitated Turkey in diplomacy. In spite of the rights that Turkey acquired as a guarantor under the relevant Treaty, the Greek Cypriots used the UNSC Resolutions as the most critical diplomatic trump card in negotiations.[38]

II. Varosha in UNSC Resolutions

Varosha actually signifies the surroundings. When Greek Cypriots began to move outside the castle in Famagusta, they called this area Varosha meaning 'surrounding.' On August 15, Turkish armed forces captured Varosha, which is part of Famagusta. Varosha was the most famous holiday resort of the East Mediterranean and used to generate almost half of the tourism revenue of Cyprus.

Varosha has always been a separate subject in negotiations between the two communities by virtue of its strategic and economic significance. The area where mostly Greek Cypriots used to live in Varosha was enclosed with fences by Turkish soldiers and has also been closed to entry-exit, apart from a few exceptions, since

33 UNGA Res. 3212, (1 November 1974), UN A/RES/3212 (XXIX), para.2. UNSC also endorsed UNGA resolution 3212. See: UNSC Res. 365, (13 December 1974), UN Doc S/RES/365, para.1.

34 UNSC Res. 360, (16 August 1974), UN Doc S/RES/360, para.1-2.

35 Mahmut Durmaz, *The U.S. Arms Embargo of 1975-1978 and its Effects on The Development of the Turkish Defense Industry*, (Master of Arts in Security Studies (Civil-Military Relations) from The Naval Postgraduate School) September 2014, 22. < https://apps.dtic.mil/dtic/tr/fulltext/u2/a619498.pdf> accessed 22 March 2021.

36 Christopher M. Goebel, 'A Unified Concept of Population Transfer' (2020) 21 Denver Journal of International Law & Policy 34.

37 UNSC Res. 541, (18 November 1983), UN Doc S/RES/541, para.3-4.

38 *Because UNSC did not consider in its resolutions whether there is right to intervene or not under the Treaty of Guarantee. Rather, simply called for states not to recognize Turkey's actions. Therefore, UNSC resolutions, together with their binding character, were useful for Greek Cpyriots*. For a detailed information on 'duty not to recognise', see: Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' Christian Tomuschat & Jean-Marc Thouvenin (ed.), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes,* (Martinus Nijhoff Publishers 2006) 99.

1974.[39] The fenced area of Varosha, currently resembling a ghost city, which has retained a special place in the proposed solutions spearheaded by Secretaries General of the UN, has also been subjected to a separate evaluation in Resolutions of the UNSC

Resolutions of the UNSC mainly stipulate the hand-over of the fenced area of Varosha to the administration of the UN. In this respect, UNSC Resolution No. 550, passed on May 11, 1984, emphasizes the unacceptability and inadmissibility of the settlement of Varosha by people other than its inhabitants, as well as the necessity of the transfer of the Varosha area to UN Management.[40] Similarly, in its Resolution No. 789, dated November 25, 1992, the UNSC recalled and reiterated the former Resolution 550 and, furthermore, decided to expand the security zone controlled by UN Peacekeeping Force in Cyprus to the extent that it included Varosha.[41] Finally, Resolution No. 2483, dated July 25, 2019, of the UNSC reminded the necessity of implementing and preserving the special status of Varosha as set out in former resolutions.[42]

The Varosha area has continued to be one of the main hottest agenda items of the inter-community negotiations carried out from 1975 up until now, particularly under the leadership of secretaries general of the UN, and has been subject to a separate evaluation.[43] In this context, the first proposal, consisting of 12 articles, was presented in November 1978 to both parties by Kurt Waldheim, the then-current Secretary General of the UN. This proposal prescribed both the resettlement of Greek Cypriots into Varosha under UN observation and the acceptance of the expansion of the UN security zone to the extent that it included Varosha.[44] However, this proposal was declined on the grounds of being found insufficient by the Greek Cypriots in regard to three important subjects, that is, right to property, free movement, and the freedom of settlement.

Denktaş submitted a letter to the Secretary General during the UN General Assembly (UNGA) talks in 1978 to re-demonstrate the position and stance of the Turkish side. This letter, as a matter of good will, proposed reducing the number of Turkish soldiers (16000), making some geographic arrangements in order to resettle a considerable number of Greek Cypriots to the regions under the control of Turkish forces, and also returning 30,000-35,000 former inhabitants to Varosha without any need for an agreement. Later on, in accordance with the Ten-Point Agreement executed in May 19, 1979 between Denktaş, the Turkish Community Leader, and Kiprianu, the Greek Cypriot Community Leader, negotiations would be first opened on the resettlement of Varosha.[45]

39 Any expression of 'Varosha' hereafter used in this text would refer to the Fenced Area of Varosha.

40 UNSC Res. 550, (11 May 1984), UN Doc S/RES/550, para.8/5.

41 UNSC Res. 789, (25 November 1992), UN Doc S/RES/789, para.3/8-c.

42 UNSC Res. 2483, (25 July 2019), UN Doc S/RES/2483, para.11/10.

43 Thomas M. Franck, 'The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture' (1995) 6(3) European Journal of International Law 360, 371.

44 UN Secretariat, Items in Cyprus, Chronological Files, S-0903-0006-09-00001, 12.

45 UN Secretary-General, Ten-Point Agreement of 19 May 1979, S-0903-0006-09-00001, para.5.

UN Secretary General *Pérez de Cuéllar*, presented a plan titled 'working points' to the parties concerned during the negotiations between 1984-1986. As per this plan, Varosha was required to be ceded 'temporarily' to the administration of UN until the resolution of the Cyprus issue, and, in the meantime, the Turkish side was called to refrain from any attempts that might reinforce independence. In accordance with Resolution 550 of the UNSC, UN Secretary General Boutros Boutros-Ghali proposed ceding Varosha to the control of UN during the negotiations lasting between 1990 and 1992. Pursuant to Ghali's Package of Confidence-Building Measures, Varosha would be controlled by UN, claims of Greek Cypriots would be resolved, Varosha would assume a special character in terms of enhancing communication and commerce between the two communities, and members of both communities would be able to freely enter and exit this area. Ghali planned a kind of international administration. Notwithstanding, Denktaş was in the opinion that the sanctions imposed on the Turkish side needed to be lifted in return for transferring a considerable part of Varosha to the administration of the UN as a special area, where inter-community communication and commerce would be enabled. The Varosha area was planned to be ceded to the Greek Cypriots in the Annan Plan, designed and proposed by UN Secretary General Kofi Annan during the negotiations continuing between 2002 and 2004. This plan was put to a referendum in both communities in 2004 but was rejected by the Greek Cypriot community.[46] Although controlled and restricted entrance and exit are currently allowed in the Varosha area, some parts of Varosha still remain closed under the control of Turkish soldiers.[47] Since it is considered that the Varosha region is required to be included within comprehensive solution plans on the Cyprus dispute, UN Resolutions and proposals of UN Secretary Generals have not been duly implemented. On the other hand, some statements made in 2019 and 2020 by the TRNC administration indicate that the Varosha area is planned to be opened to settlement.[48]

No matter how hard UN Secretary General Guterres strove to bring the concerned parties together,[49] TRNC believed that reaching a comprehensive solution within a short period of time seemed improbable as shown by the latest negotiations conducted in Crans Montana in 2017. As a consequence of this conviction, the parties concerned refrained from negotiations for a long while following the Crans Montana talks. However, the leaders of the two communities have been recently gathered again by the

46 Tuğba Hascan, *Kıbrıs Sorununda Çözüm Önerileri: De Cuellar Planı (1984-1986), Ghali Fikirler Dizisi (1990-1992), Annan Planı (2002-2004)*. Yayımlanmamış Yüksek Lisans Tezi, (2016), 68-120. <https://tez.yok.gov.tr/UlusalTezMerkezi/tarama.jsp> accessed 22 March 2021.

47 Aysu Arsoy & Hacer Başarır, 'Post-War Re-Settlements in Varosha: Paradise to Ghetto' (2019) 44(2) Open House International 52, 52.

48 President of the Security Council issued two statements regarding incompatibility of these actions with UNSC resolutions. See: Statement by the President of the Security Council, S/PRST/2020/9, 9 October 2020, para.2. Statement by the President of the Security Council, S/PRST/2021/13, 23 July 2021, para.2.

49 Vincent L. Morelli, 'Cyprus: Reunification Proving Elusive' (2019) Congressional Research Service, Report No. R41136, 25, <https://fas.org/sgp/crs/row/R41136.pdf> accessed 22 March 2021.

UN Secretary-General to discuss new proposals in Geneva.[50] The TRNC thus believed that it was of no avail to postpone opening Varosha anymore. In this context, it would be requisite to analyse UNSC Resolutions in regard to resettlement of Varosha area and to resolve the issue of property accordingly. With a view toward gaining insight into this drawn-out issue of property, it would be essential to skim through the judgments rendered by the European Court of Human Rights (ECtHR) with regard to the issue of property in Cyprus.

III. Issue of Property and Charitable Foundations in Varosha

The issue of property actually arose after the creation of bizonality and homogeneous communities in Cyprus. On August 2, 1975, representatives of both communities entered into various rounds of talks under the auspices of the UN and reached an agreement on Population Exchange.[51] As a result of the Population Exchange Agreement, implemented with the assistance of the UN Peacekeeping Force, approximately 120 thousand Greek Cypriots moved from north to south whereas almost 65 thousand of Turks (Turkish Cypriots) proceeded north from the southern part of the island. The buffer zone between the two sides is still under control of the UN Peacekeeping Force in Cyprus. The immovable properties left behind by members of both communities during the exchange of populations have resulted in the long-standing issue of property on the island. In this regard, the Varosha area confronts the similar property issues as seen in other regions. As is seen below, the ECtHR does not assess the Varosha area separately from other regions.

Another matter making the issue of property more complicated is the possessions of charitable foundations. According to the archival research by the Administration of Foundations in Cyprus (Evkaf), the whole Varosha area is designated as foundation land and its ownership belongs to the following 3 foundations: the Lala Mustafa Pasha Foundation, the Abdullah Pasha Foundation, and the Hacı Bilal Ağa Foundation.[52] The Administration of Foundations asserts that the foundations were also been recognized in the Treaty of Lausanne.[53] Nevertheless, the status of Foundation Possessions was unlawfully changed, and these possessions were distributed to Greek Cypriots and Churches by the British administration.[54]

50 This time TRNC advocates two-state solution but Greek Cypriot Administration of Southern Cyprus (GCASC-also known as Republic of Cyprus)seems to refuse it. Therefore, it is likely that inter-communal talks fail again.

51 Text of the Press Communique On The Cyprus Talks Issued in Vienna On 2 August 1975, S/11789 (5 August 1975), 1.

52 Kıbrıs Vakıflarını Araştırma ve Değerlendirme Projesi, Sunum, 10. <http://www.evkaf.org/site/dokuman/KIVABIS.pdf> accessed 22 March 2021.

53 In terms of property rights, Lausanne recognised the then-current *status quo* and made an assessment on the situation taking into account either the results of the Balkan Wars or de facto situation observed in 1914.

54 Kapalı Maraş ve Vakıflar, Genel Bilgi Broşürü, 2. <http://www.evkaf.org/site/dokuman/Kapal%C4%B1MarasKonusu.pdf> accessed 22 March 2021.

British domination over Cyprus was recognised in Lausanne, as in Sevres. However, as examined below, the provisions of Article 60 of Lausanne regarding the recognition of the property of foundations have been the subject of discussion. Indeed, Article 60/1-2 of the Treaty of Lausanne points out the recognition of foundation possessions as follows:

'*The states in favour of which territory was or is detached from the Ottoman Empire after the Balkan wars or by the present Treaty shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein. It is understood that the property and possessions of which the transfer from the Civil List to the State was laid down by the Irades of the 26th August, 1324 (8th September, I908) and the 20th April, 1325 (2nd May, I909), and also those which, on the 30th October, 1918, were administered by the Civil List for the benefit of a public service, are included among the property and possessions referred to in the preceding paragraph, the aforesaid States being subrogated to the Ottoman Empire in regard to the property and possessions in question. The Wakfs created on such property shall be maintained.*'[55]

Likewise, the 1960 Constitution of the Republic of Cyprus recognizes the foundations in Article 110/2 as follows:

'*The institution of Vakf and the Principles and Laws of, and relating to, Vakfs are recognised by this Constitution. All matters relating to or in any way affecting the institution or foundation of Vakf or the vakfs or any vakf properties, including properties belonging to Mosques and any other Moslem religious institution, shall be governed solely by and under the Laws and Principles of Vakfs (ahkamul evkaf) and the laws and regulations enacted or made by the Turkish Communal Chamber, and no legislative, executive or other act whatsoever shall contravene or override or interfere with such Laws or Principles of Vakfs and with such laws and regulations of the Turkish Communal Chamber.*'[56]

In fact, it was suggested that the 1878 treaty was terminated right after the Ottoman and the British Empires took part in the WWI and, as a consequence, that the island of Cyprus should be returned to the Ottoman Empire as of 1914 because the 1878 treaty is an alliance treaty and when the parties to the treaty wage war against each other, it should be accepted that the alliance is broken, thus terminating the treaty.[57] Nevertheless, under the Lausanne Treaty of 1923, sovereignty of the British Empire over the island of Cyprus was accepted by Turkey. However, it is worth noting that this acceptance is conditional because Article 60/1-2 of the Treaty of Lausanne regulates the protection of foundations established on certain lands. In this sense, as the British Empire is also a party to the Lausanne Treaty, the provisions of the Lausanne Treaty are also binding on the British Empire. The transfer of foundation properties by British Empire to Greek Cypriots in the period between 1923 and 1960 violated

55 Treaty of Lausanne, art 60/1-2.

56 Kıbrıs Cumhuriyeti Anayasası, 1960, m.110. TBMM Tutanakları 387, 152. <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d01/c034/mm__01034039ss0387.pdf> accessed 22 March 2021.

57 Bernhard Hofstötter, 'Cyprus under British Rule: An International Law Analysis of Certain Land Surveys and Land Assignments Between 1878 and 1955' (2008) 7 Chinese Journal of International Law 159, 185.

Article 60/1 of the Treaty of Lausanne. During the given period, Turkey could have asserted the Empire's responsibility for the violation of the Lausanne treaty, but no such responsibility was claimed because Turkey considered the Cyprus issue as an internal affair of the British Empire. Although the VCLT was not in force at the then-current time, the provisions of the VCLT reflect the customary rules of international law. In this respect, the conditions set in the Article 60 of the VCLT regarding breaches of treaties have been met. It is possible that the British Empire might be legally held responsible for the abovementioned period. On the other hand, as an important matter, the status of the foundations was incorporated into Article 110/2 of the Constitution of Cyprus. After the 1960s, foundation lands in Cyprus continued to be distributed to Greeks. Therefore, it is possible to talk about a constant infringement of the property rights of foundations. The Cyprus Administration was responsible for the period from 1960 to 1974. As a result of the task carried out by the TRNC, it seems possible to redefine the status of the foundation lands, which had been previously distributed to Greek Cypriots in the fenced area of Varosha, in order to end the continuing property infringement. Although the losses suffered by individuals arising as a result of the actions of states must be compensated, the continuing infringement of the property rights of the foundations must also be ended. As can be inferred from both the Lausanne Treaty and the Constitution of Cyprus, the inviolability of the properties belonging to the foundations has been accepted by the states.

The claim that the fenced area of Varosha belongs to foundations has also been cited in some Judgments of the ECtHR. In the event that the pending case of *K.V. Mediterranean Tours Limited v. Turkey*[58] currently heard by the ECtHR is concluded, the ECtHR can render a final judgment on property ownership of the foundations and the involvement, in the relevant cases, of the Administration of Foundations in Cyprus as the third person. In 2005, the Famagusta District Court rendered a decision recognising the Foundation properties in the fenced area of Varosha. In 2012, the Immovable Property Commission (IPC) accepted the intervention of the Administration of Foundations in Cyprus as a third party in the *K.V. Mediterranean Tours Limited v. Turkey* case. This case was later appealed to the high courts of the TRNC, which upheld that the Administration of Foundations in Cyprus could intervene in the given case as the third party. In this context, the K.V. Mediterranean Tours company presented this outcome to the ECtHR as a development to its disadvantage.[59] It is thus probable for the ECtHR to deal with the Foundation claims broadly in its prospective judgment. Under current circumstances, it would be primarily necessary to explain, within the specific scope of 5 separate Judgments, the approach of ECtHR to the issue of property including the fenced area of Varosha.

58 *K.V. Mediterranean Tours Limited v. Turkey*, App. No. 41120/17, (ECHR, lodged on 25.05.2017). Turkey has been notified of the case which still pending to be heard.

59 *K.V. Mediterranean Tours Limited v. Turkey*, Statement of Facts, Communicated on 19 March 2019.

In fact, the Republic of Cyprus, shortly after being founded, became a party to the European Convention on Human Rights on October 6, 1962. Despite that, the ECtHR holds Turkey accountable and directs enquiries to Turkey for human rights violations taking place in TRNC territory. While inter-communal negotiations were ongoing, the ECtHR became involved in a political issue which has not been settled yet. Türkmen and Öktem argue that all landmark ECtHR judgments on the Cyprus issue have included highly political considerations alongside with legal analysis and described this complexity as both the politicisation of the judiciary and the judicialisation of politics at the same time.[60] The most critical landmark Judgment of the ECtHR, upon which this case-law is predicated, is the1996 Judgment on *Loizidou v. Turkey*. Loizidou lodged an application with the Court with the claim of the unlawful expropriation of real estate properties and demanded compensation in return. Turkey asserted as a response that this action was performed by the authorities of the TRNC under Article 159[61] of the Constitution of the TRNC and what is more, that this action took place even before the date when Turkey accepted the jurisdiction of the Court and therefore, Turkey could not be held responsible. However, the Court found that TRNC could not be recognized as a state under the international law, that Greek Cypriot Administration of Southern Cyprus (GCASC) was the sole legitimate representative of the island of Cyprus and therefore, that the claimed action of the TRNC could not be taken into account. Furthermore, according to the Court, the infringement of property rights still persisted. In this context, the Court recalled and made citations from Resolutions 541 and 550 of the UNSC.[62]

According to the Court, international law principles with respect to state responsibility require the areas under effective control of a state to be subject to jurisdiction of that state. The Court was not interested in whether the intervention was against international law or not, and found it sufficient to only specify that Turkey had effective control in the given region and that the TRNC was not recognized by the international community. Therefore, the infringement of property rights could be attributed to Turkey.[63] The Court did not go into analyses of the Treaty of Establishment or the Treaty of Guarantee and expressed that it did not concern itself with the legitimacy of the intervention by Turkey in the island. However, as understood from the references made to the Resolutions of the UNSC, the Court shared similar views with the UNSC, specifically about recognition of the TRNC. As a consequence, through the Judgment on *Loizidou*, the ECtHR paved the way for Greek Cypriots to file applications against Turkey. [64]

60 Füsun Türkmen & Emre Öktem, 'Major rulings of the European Court of Human Rights on Cyprus: the impact of politics' (2016) 22(2) Mediterranean Politics 278, 281.

61 Article 159 which formerly changed the status of the deserted properties within the borders of TRNC was amended in the ensuing years, thereby granting the opportunity to the claimants for compensation.

62 *Loizidou v. Turkey*, App. No. 15318/89, (ECHR 18.12.1996), [GC]-Judgment, para.19-20.

63 *Loizidou v. Turkey*, para.52-57.

64 Halil Rahman Başaran, 'The Cyprus Question, International Law and European Law: An Assessment' (2018) 28(1) Transnational Law & Contemporary Problems 1, 18-20.

The second important stage regarding the issue of property is the judgment on *Cyprus v. Turkey*, passed in 2001 upon the application of a state. The Republic of Cyprus lodged an application with the Court on the grounds that Turkey was responsible for various violations of human rights. The Court highlighted Turkey's response to a similar case before the European Commission of Human Rights. In this regard, Turkey, as the Court asserted, "*maintained before the Commission that the question of the Varosha district of Famagusta along with the issues of freedom of movement, freedom of settlement, and the right of property could only be resolved within the framework of the inter-communal talks and on the basis of the principles agreed on by both sides for the conduct of the talks. Until an overall solution to the Cyprus question, acceptable to both sides, was found, and having regard to security considerations, there could be no question of a right of the displaced persons to return. The respondent Government further submitted that the regulation of property abandoned by displaced persons, as with restrictions on cross-border movement, fell within the exclusive jurisdiction of the 'TRNC' authorities."*[65] However, citing the Judgment on *Namibia*[66] by the International Court of Justice, the Court specified in its Judgment the necessity of creating domestic remedies to the benefit of individuals' rights, even in de facto governments. According to the Court, basic records like birth, death, title deeds, or marriage are actually kept and retained by the administration of the relevant regions. Although this does not mean the legitimisation of the TRNC, the Court finds that ignoring the decisions of the judicial bodies established in the TRNC would be to the disadvantage and detriment of individuals living in the regions concerned.[67] The Court thus pointed out the need of domestic remedies to be created by the TRNC.

As an endorsement of the Judgment on *Cyprus v. Turkey*, the issue of domestic remedies was similarly brought forward in the application of *Xenides-Arestis v. Turkey.* On June 30, 2003, the IPC was set up in the TRNC under the Law No. 49/2003, and the Court raised some enquiries to Turkey as to whether domestic remedies had been exhausted or not.[68] Nevertheless, in the Decision on Admissibility, given in 2005, the Court ruled that the Immovable Property Commission could not be regarded as an effective and sufficient domestic remedy. The Court predicated its decision on the grounds that, firstly, the relevant Law did not involve any regulations or arrangements pertaining to the applications to be made under Articles 8 and 14 of the Convention, secondly, that it was ambiguous whether the Law covered the disputes that had arisen before its effective date, and thirdly, that the members of the Commission set up under the Law resided in the real estate formerly abandoned by Greek Cypriots, resulting

65 *Cyprus v. Turkey*, App. No. 25781/94, (ECHR 10.05.2001), [GC]-Judgment, para.29.

66 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, ICJ Reports 1971, 16.

67 *Cyprus v. Turkey*, para.90-98.

68 Özde Dereboylular & Perçem Arman, 'Avrupa İnsan Hakları Mahkemesinin Kıbrısla İlgili Verdiği Kararların KKTC ve Türkiye'ye Etkisi' (2018) 136 TBB Dergisi 293, 313.

in a situation that would evoke doubts about the impartiality of the members. It was additionally found inadequate that the Commission could rule only for compensation and was not capable of ruling for restitution or compensation for non-pecuniary damages.[69]

Conversely, since the immovable properties of Xenides-Arestis mentioned in the application were located in the fenced region of Varosha, Turkey claimed that these immovable properties were actually foundation lands and registered in the name of the Evkaf Administration and that, therefore, these immovable properties were unlawfully acquired. Despite that, the Court observed that the applicant submitted the relevant documents indicating his ownership, thereby proving that he was the owner of property, and on this account, the Court found the claim of Turkey as groundless.[70] This claim on foundation land was brought forward in different cases, too. For instance, in the case of *Kyriakou v. Turkey,* Turkey maintained that the Varosha area belonged to such foundations as the Abdullah Pasha Foundation or the Lala Mustafa Pasha Foundation and therefore, immovable properties could not be acquired by real persons.

The Court noted that such an objection fell within the scope of incompatibility *ratione materiae*, in substance, and should have been raised before the application was declared admissible or, at the latest, when the parties presented their observations on the merits. In this regard, the Court emphasized that Turkey did not raise its objection about the title of ownership of the other party within the prescribed period of time.[71]

Likewise, in the cases of *Zavou v. Turkey*[72] and *Lordos v. Turkey,*[73] Turkey maintained that the Varosha area belonged to the foundations and could not be acquired by the real persons. Based on the same grounds expressed in the Judgment on *Kyriakou*, the Court stated that this claim was not put forward during the relevant stages and within the prescribed period of time. However, in the case of *Lordos v. Turkey*, the request of the Evkaf Administration for intervening in the case as the third party was refused on the grounds that it would be of no avail to the interests of the proper and duly administration of justice.[74] Turkish judge Işıl Karakaş, in the justification of her partly dissenting opinion, put an emphasis on the fact that the question of property belonging to the foundations constituted a difficult issue on account of its legal and factual aspects and for that reason, the third-party

69 *Myra Xenides-Arestis v. Turkey*, App. No. 46347/99, Decision on Admissibility, (ECtHR 14.03.2005), 45. Murat Metin Hakkı, 'Property Wars in Cyprus: The Turkish Position according to International Law' (2010) 15(16) The International Journal of Human Rights 847, 849-850.

70 *Myra Xenides-Arestis v. Turkey*, 18-19.

71 *Kyriakou v. Turkey*, App. No. 18407/91, (ECHR 27.01.2009), Judgment (Just Satisfaction), para.56.

72 *Zavou ve Others v. Turkey*, App. No. 16654/90, (ECHR 22.09.2009), Judgment (Just Satisfaction), para.58.

73 *Lordos ve Others v. Turkey*, App. No. 15973/90, (ECHR 02.11.2010), Judgment (Merits) para.116.

74 *Lordos ve Others v. Turkey*, para.9.

intervention requested by the Evkaf Administration could have been granted for the purpose of clarifying the situation.[75]

Following the delivery of Judgments on *Xenides-Arestis,* various amendments and arrangements were made in the legislation of the TRNC with a view toward enhancing the effectiveness and adequacy of the IPC, thereby eliminating the insufficient points identified by the ECtHR. As a matter of fact, in the Judgment on *Demopoulos v. Turkey,* the Court found and noted that the Immovable Property Commission became an effective domestic remedy, thereby being required to be initially exhausted, and, as a consequence, held that the application was inadmissible on the account that the applicant did not exhaust this domestic remedy.[76] After having examined thoroughly the structure and powers of the Immovable Property Commission, which were rearranged under the Law 67/2005 after 2006, the Court observed and determined that the deficiencies of the Commission had been eliminated and rectified.[77] Katselli Proukaki argues that the ECtHR was influenced by political realism and that the latter should not have accepted the IPC as an effective remedy because the IPC is a product of an illegal situation whose function is to legitimise the *status quo*.[78] However, the ECtHR, which is governed as per the principle subsidiarity,[79] asserted the importance of local remedies in previous cases on the Cyprus issue, such as *Cyprus v. Turkey*.

It should be noted that the Court has always regarded the Immovable Property Commission as a domestic remedy of Turkey even though it was set up in the TRNC. Notwithstanding, in the Judgment on *Joannou v. Turkey*, adopted in 2017, the applicant initiated a discussion with the allegation that the Immovable Property Commission became ineffective. In this context, the Court reiterated that the Immovable Property Commission was actually an effective domestic remedy but did not declare the application inadmissible since the Court observed that the Commission drew out the process too long and dragged on the proceedings in this particular case. The Court holds the view that effectiveness is ascertained from scratch for each and every concrete case. It would not be requisite to exhaust an ineffective domestic remedy.[80] It is perfectly possible that a remedy generally found to be effective might operate inappropriately in the circumstances of a particular

75 *Lordos ve Others v. Turkey*, Judge Işıl Karakaş, partly dissenting opinion, 34-35.

76 *Demopoulos ve Others v. Turkey*, App. No. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, , (ECHR 01.03.2010), [GC]-Decision on Admissibility, para.103. Meliz Erdem & Steven Greer, Human Rights, 'The Cyprus Problem and The Immovable Property Commission' (2018) 67 International and Comparative Law Quarterly 721, 725.

77 *Demopoulos ve Others v. Turkey,* para.127.

78 Elena Katselli Proukaki, 'The Right of Displaced Persons to Property and to Return Home after Demopoulos' (2014) 14(4) Human Rights Law Review 701, 730.

79 Marisa Iglesias Vila, 'Subsidiarity, Margin of Appreciation and International Adjudication Within a Cooperative Conception of Human Rights' (2017) 15(2) International Journal of Constitutional Law 393, 401.

80 *Joannou v. Turkey*, App. No. 53240/14, (ECHR 12.12.2017), Judgment, para.63-64.

case.[81] Hadjigeorgiou argues that the ECtHR missed two opportunities in Joannou case. First, the Court could have provided greater guidance on the effectiveness of the IPC. Second, it could have raised the high standard of proof used by the IPC as a potential problem for applicants.[82]

Conclusion

The Cyprus dispute, which has remained as one of the main agenda items of the foreign policy of Turkey over the last sixty years, has come to the forefront on the recent agenda because of the preparatory works conducted for the resettlement of the fenced area of Varosha Although the founding treaties, including the Treaty of Guarantee, laid the basis for the intervention of Turkey from the perspective of international law, the events taking place, especially after the second military landing and the attitude adopted by the international community in response thereto, have caused obstacles to the resolution of the Cyprus dispute in many aspects. The biggest hurdles to the settlement of the Cyprus dispute through the means of international law stem from the approaches of the UNSC and the ECtHR to the position of Turkey on the island. Both international organs have preferred focusing on the *de facto* existence of Turkey on the island and rendering it illegitimate rather than examining and interpreting the founding treaties. Nevertheless, there is such an overlooked point that the UNSC, which is actually in charge of the maintenance of peace and security around the world, has ignored the fact that the long-protracted conflict between the communities on the island was halted after the intervention of Turkey and that both communities have been living in security for forty-five years. In the event that the UNSC fails to perform its duty, ways that would be resorted to in compliance with international law principles have been widely discussed. In this regard, Turkey implemented its intervention based on the founding treaties which have the character of *erga omnes*, rather than relying on political doctrines. Ongoing discussions particularly focus on such issues as whether the Treaty of Guarantee covers military intervention or not and whether Turkey has maintained an effective control on the island after the second intervention or not. The UNSC did not ask for any opinion from any judicial body on this matter while the ECtHR directly referred to the UNSC Resolutions without assessing the Treaties through means of interpretation. On the other hand, never-ending negotiations between the communities on the island have been perpetually conducted under the leadership of UN Secretaries General, thereby seeking a political solution to the *de facto* situation.

The fenced area of Varosha has always been regarded as a separate matter of disagreement. The international legal issues generally confronted in the resolution of

81 *Joannou v. Turkey*, para.86.

82 Nasia Hadjigeorgiou, 'Joannou v. Turkey: An Important Legal Development and a Missed Opportunity' (2018) 168(2) European Human Rights Law Review 168, 174.

the Cyprus dispute also remain valid for the fenced area of Varosha. Notwithstanding, the efforts put in to enable the resettlement of the fenced area of Varosha have brought about the primary issues of property when the Varosha dispute is concerned. The fact that the Varosha region used to be mostly inhabited by the Greek Cypriot Community has also been acknowledged by the leaders of the Turkish Community during various negotiations. In the case of property issues, applications to the above-cited IPC and then individual applications to the ECtHR are also valid means of remedies for the properties located in the Varosha region. The main argument for keeping separate the property issues in Varosha from those in many other regions arises out of the claim that the whole Varosha territory belongs to the Foundation. Similarly, the foundation lands have become among the items of agenda in many other regions, like Nicosia, too. The activities performed by the EVKAF with the intention of substantiating its claim that Varosha area belongs to three foundations will pave the way for the IPC to take into account the foundation properties while resolving property disputes. The ECtHR has not dealt with these foundation claims in a comprehensive manner yet. In this context, as long as the IPC takes decisions concerning the foundations and Turkey submits the relevant objections about foundations, with required documentation, to the Court within the prescribed periods of time, the ECtHR will have to carry out an examination on these foundations. In this respect, without detailed legal analyses based on documents, it would be difficult to envision a resolution of the property issue in Varosha. Therefore, the Judgments that are supposed to be rendered by the ECtHR in the near future would be of high significance. It is a requisite for the EVKAF, in particular, to be allowed to intervene as a party in the cases heard by the ECtHR. The ECtHR can provide a roadmap for resolution of the issue of the foundations as in the case of structure of the IPC, in which the Court formerly stimulated changes through the objections it raised. Both UNSC Resolutions about Varosha and the remarks uttered about the fenced area of Varosha during the negotiations between both communities would be at the very core of many debates. In this regard, it seems imperative for the government of the TRNC and Turkey to develop policies in advance for such miscellaneous probabilities. Re-opening the fenced area of Varosha to settlement would rekindle some international law debates as has been observed in the other regions of the island of Cyprus. The *Erga omnes* character of the Founding Treaties, which includes the Treaty of Establishment, Treaty of Alliance, and Treaty of Guarantee, the debates on the legitimacy of the intervention on the island and the conformity of this intervention with international law, the Resolutions of the UNSC, and the Judgments of the ECtHR on property rights of Greek Cypriots will pave the way for new discussions in future on the fenced area of Varosha.

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