PROTECTING INTERNALLY DISPLACED PERSONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER COUNCIL OF EUROPE STANDARDS

A HANDBOOK

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Access

The Advocacy Centre on Council of Europe Standards (ACCESS) is a Strasbourg-based human rights NGO committed to promoting the European human rights system in the Council of Europe member states. With the mission of facilitating the access of national civil society organisations to the Council of Europe (CoE), ACCESS works with grassroots NGOs and civil society networks to increase the long-term capacity of civil society organisations to strategically engage with the CoE. ACCESS increases technical knowledge on CoE standards and monitoring mechanisms and helps build bridges between civil society and the Council of Europe by carrying out trainings, facilitating exchange between the CoE and NGOs, assisting national NGO partners in report drafting and submissions and developing publications and manuals on the Council of Europe.

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ACRONYMS

ACHR	American Convention of Human Rights
ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CoE	Council of Europe
CoM	Committee of Ministers
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECommHR	European Commission of Human Rights
ECSR	European Committee of Social Rights
ESC	European Social Charter
ESC(r)	European Social Charter revised
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally displaced person
OSCE	Organisation for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations

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I. INTRODUCTION

Internally displaced persons (IDPs) are people who have been forced or obliged to flee from their home or habitual residence to another part of their own country.[1] They leave either as a result, or in anticipation of, among others, armed conflict, ethnic violence, human rights violations or natural disasters and should be distinguished from people who voluntarily leave their homes to improve their social or economic position. The involuntary nature of their departure and the fact that they remain in their own country are the two main defining characteristics of IDPs.

IDPs should not be confused with refugees as these are two distinct categories under international law. Refugees, unlike IDPs, flee across international borders. According to the 1951 Convention on the Status of Refugees, a "refugee" is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[2]

1 In accordance with the CoE CM Recommendation 2006(6) and the UN Guiding Principles on Internal Displacement, internally displaced persons are defined as "… persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border".

2 1951 Convention on the Status of Refugees, Article 1, A(2).

Persons displaced from their homes who cannot or choose not to cross a border, are not considered refugees even if they share many of the same circumstances and challenges as refugees. Most IDPs are citizens of the country in which they continue residing, and for this category of IDPs, they continue to hold the same rights as other citizens in their countries At the same time, their substantial and often overwhelming need for specialised protection draws international attention to their plight, while the country in which the displacement takes place is primarily responsible for protecting IDPs.

1. Overview of internal displacement in the member states of the CoE

A UN report *Global Trends* found that in 2015, there were approximately 41 million IDPs throughout the world, four times more than a decade earlier in 2005 and the highest number since records have been kept of IDPs numbers. The report found that while displacement as a result of conflicts, persecution and disasters had been on the rise since the mid-1990s, the numbers had especially increased since 2010.[3] Three reasons identified are that (1) conflicts that cause large refugee outflows, such as Somalia and Afghanistan are lasting longer; (2) dramatic new or reignited conflicts and situations of insecurity are occurring more frequently; and (3) the rate at which solutions are being found have slowed down leaving more in situations of protracted displacement.[4]

According to PACE estimates, in early 20145 some 2.5 to 2.8 million Europeans were internally displaced in 11 of the 47 member states of the CoE: Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Cyprus, Georgia, Moldova, Russian Federation, "the former Yugoslav Republic of Macedonia", Serbia and Turkey.6 In a 2009 Recommendation, PACE noted that the vast majority of displaced persons were forced

3 UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, http://www.unhcr.org/en-us/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html

4 UNHCR, "Global forced displacement hits record high", 20 June 2016, http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.htm

5 PACE Resolution 2026 (2014), Alternatives to Europe's substandard IDP and refugee collective centres, 18 November 2014.

6 See also PACE, Doc. 11942 Report, Europe's forgotten people: protecting the human rights of long-term displaced persons, 8 June 2009, p. 8, para. 2

to leave their homes "some 15 to 35 years ago as a result of armed conflicts or human rights violations, and are living in situations of protracted displacement".7 In addition, these numbers do not include the approximately 1.8 million IDPs registered in Ukraine by the Ministry of Social Policy since the annexation of Crimea and the outbreak of armed conflict in eastern Ukraine in April 2014.8

Such figures can only provide an estimate of the numbers of IDPs given the difficulties in recording IDPs and the absence of data collection systems across all relevant CoE member states. Nonetheless, the rise in the numbers of IDPs has been described as "considerably alarming" by PACE, because, among others, many IDPs are housed in collective centres under, what have been described, "deplorable conditions".[9]

Internal displacement in Europe, excluding the recent conflict in Ukraine, has continued unabated "with only about a quarter of the overall number of IDPs in Europe having found a durable solution to displacement, mostly in the Balkan region".[10] It is noted that the key to ensuring full enjoyment of human rights by IDPs in Europe lies in combined and reinvigorated efforts by the local, national and international actors in terms of finding political solutions to protracted conflicts, improved legal and normative frameworks and increased will and capacity of all relevant actors to implement such frameworks.[11] However, real solutions are difficult to achieve for IDPs as long as the underlying causes of displacement such as protracted conflicts and ethnic divisions are not addressed. The governments of some CoE member states still do not exercise effective control over their entire territory because of ongoing and/or unresolved conflicts.[12] The ability of IDPs to exercise their rights has been limited and their return has been obstructed due to stalled peace negotiations, or even backtracking from existing peacekeeping and peace-building mechanisms, the absence of organised reconciliation mechanisms and continued insecurity.[13]

7 PACE Recommendation 1877(2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009.
8 CoE Project "Strengthening the Human Rights Protection of Internally Displaced Persons in Ukraine" Under the Framework of the CoE Action Plan for Ukraine 2015-2017, June 2016, p. 4.
9 PACE Resolution 2026 (2014), Alternatives to Europe's substandard IDP and refugee collective centres, 18 November 2014, para. 7.
10 PACE Doc. 11942 Report, *Europe's forgotten people: protecting the human rights of long-term displaced persons*, 8 June 2009, p. 8.
11 *Ibid*., para. 6.
12 PACE Recommendation 1877 (2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009, paras. 7-8.
13 *Ibid*., para. 7.

2. Purpose of the handbook

The Council of Europe, as the only European inter-governmental organisation whose mandate regards human rights, rule of law and democracy, has developed a rich regional framework of human rights standards. Having specifically established that persons who are "internally displaced have specific needs by virtue of their displacement"[14], the Council of Europe makes a significant contribution to the protection of IDPs via its standard-setting, monitoring and cooperation activities, which apply to the 47 member states across Europe.

As a single compilation of applicable Council of Europe standards on the protection of Internally Displaced Persons, this handbook reflects the important regional contribution to the development of international standards on internal displacement. By raising awareness of these standards, the handbook aims to contribute to the implementation of a rights-based approach to internal displacement in Council of Europe member states and beyond.

While focus is also placed on the *UN Guiding Principles on Internal Displacement* (the *Guiding Principles*), as the first instrument to address exclusively the situation of IDPs, the handbook examines, in particular, the CoE's response concerning IDPs since the adoption of the *Guiding Principles* by the international community. It provides an overview of the standards developed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, and refers to other relevant monitoring bodies including the European Committee on Social Rights. Due to the central place occupied by the ECHR in the European legal order, extensive reference is made to the relevant case-law of the ECtHR concerning alleged violations which arise as a result of internal displacement.

This handbook can be used as a tool to train all relevant actors in respect of the human rights of IDPs and of the role of various participants in protecting those rights. It can be also applied as an advocacy tool to inform national authorities of the member states of the CoE of their obligations towards IDPs and underline any gaps in the relevant legal and regulatory frameworks.

It aims to assist and guide legal practitioners, law and policy makers, representatives of national and local authorities, representatives

14 CoE, Committee of Ministers, Recommendation 2006(6) on internally displaced persons, 5 April 2006.

of civil society, and IDPs themselves in better understanding the human rights of IDPs in Europe, and set out the available tools in securing the protection of their rights.

3. UN Guiding Principles on Internal Displacement and the Pinheiro principles

The main global human rights instrument that addresses the issues of displacement is the *Guiding Principles*,[15] setting out minimum standards for the protection of IDPs. The principles are not legally binding but they derive from international human rights treaties and humanitarian law and have been endorsed as an "important international framework for the protection of internally displaced persons" by key international fora.[16] They constitute important tools and standards for dealing with situations of internal displacement and have gained increasing acceptance throughout the international community.[17] It has been argued, that although the Guiding Principles are not legally binding, they do have legal significance.[18]

The Guiding Principles provide a description of IDPs as: "… persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border".[19] The CoE, has also adopted this definition whilst urging its member states to observe and incorporate the Guiding Principles in their domestic law.[20]

The definition of IDPs under the Guiding Principles focuses mainly on two aspects. First it focuses on the aspect of the coercive or involuntary nature of internal displacement, providing only a indicative list

15 UN, Guiding Principles on Internal Displacement, UN doc. E/CN.4/1998/53/Add.2 (1998).
16 2005 World Summit Outcome, U.N. Doc. A/60/L.1, para. 132; Human Rights Council Resolution 6/32 (2007), para. 5; General Assembly Resolution 62/153 (2008), para. 10.
17 PACE Recommendation 1631(2003), Internal displacement in Europe, 25 November 2003, para. 9.
18 Kälin, W., "How Hard is Soft Law?", Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement, Brookings–CUNY Project on Internal Displacement, April 2002.
19 *Guiding Principles on Internal Displacement*, Introduction, para. 2.
20 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006, and the CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)35 Addendum, 5 April 2006.

of the possible causes of displacement as these can be diverse. Second, it focuses on the territorial element of internal displacement, indicating that it takes place within national borders. IDPs have been forced from their homes for many of the same reasons as refugees, but have not crossed an international border. According to the Annotations to the Guiding Principles, the territorial requirement could also be met even by people passing through the territory of a neighbouring state in order to access a safe part of their own country, but who are later unable to return to their place of origin. The territorial requirement may also apply to people who voluntarily moved to another part of their country but are unable to return to their homes due to events that occurred in their absence which makes their return impossible.[21]

The *Guiding Principles* provide guidance on both the guarantees that should be made available in order to prevent, alleviate and end internal displacement, and on the standards that are relevant to the delivery of humanitarian assistance.[22] Principle 5 of the Guiding Principles provides as follows: "All authorities and international actors shall respect and ensure respect of their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons".

The *Guiding Principles* prohibit arbitrary displacement, that occurs, *among others,* in situations of armed conflict; in the context of "ethnic cleansing" or similar practises; in cases of natural disasters (excluding cases where the safety and health of affected persons requires such displacement); and when displacement is used as a collective punishment.[23] Under Principle 6.3, a displacement should not last longer than required by the circumstances. The *Guiding Principles* also urge states to examine whether other "feasible alternatives" exist to avoid displacement, and if displacement is unavoidable, to take all measures in order to minimize displacement and its consequences. States are also urged to provide displaced persons with proper accommodation "to the greatest practicable extent".[24] Moreover, displacement cannot be executed in ways which breach the rights to life, liberty and security of IDPs,[25] while the authorities concerned bear the obligation of protecting "against the

21 Kälin, W., "How Hard is Soft Law?", Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement, Brookings–CUNY Project on Internal Displacement, April 2002, pp. 4-5.
22 The Brookings Institution, *"Protecting Internally Displaced Persons: A Manual for Law and Policymakers",* Brookings-Bern Project on Internal Displacement, October 2008, p. 4.
23 Guiding Principles on Internal Displacement, Principle 6.1 and 2.
24 *Ibid.*, Principle 7.2.
25 *Ibid*., Principle 8.

displacement of indigenous peoples, minorities […] and other groups with a special dependency on and attachment on their land".[26]

Other relevant instruments for the protection of IDPs are the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons,*[27] known as the "*Pinheiro Principles*", which set out standards and provide guidance relating to the loss of property and homes in the context of displacement. In the words of the ECtHR, these are "the most complete standards on the issue".[28]

4. CoE standards and ECHR case law on internal displacement

The CoE has increasingly taken an interest in the issue of IDPs as a large number of citizens in its member states are denied the full protection of their human rights as a consequence of having been forced or obliged to leave their homes or places of habitual residence, without crossing an internationally recognised state border.

PACE has adopted various recommendations and resolutions on issues concerning IDPs. It has consistently called on governments to seek durable solutions for the return, local integration or integration elsewhere in the home countries of the displaced and to guarantee the protection of their rights under the provisions of relevant CoE instruments while remaining in line with the Guiding Principles.

In 2006, the Committee of Ministers of the Council of Europe adopted its Recommendation CM/Rec (2006)6 in which it agreed on a set of 13 recommendations regarding IDPs, building on the Guiding Principles and underlining the binding obligations undertaken by CoE member states.[29]

Rather than simply integrating the *Guiding Principles* into the European context, this Recommendation, goes further by emphasising the binding obligations already undertaken by CoE member states that surpass the level of commitment reflected in the Guiding Principles. Although the adoption of a Recommendation does not create new

26 *Ibid*., Principle 9.
27 UN Sub-Commission on Promotion and Protection of Human Rights, Resolution 2005/21, "Principles on Housing and Property Restitution for Refugees and Displaced Persons," adopted on 11 August 2005 (Pinheiro Principles).
28 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para.96; *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 98.
29 CoE, Committee of Ministers, Recommendation 2006(6) on internally displaced persons, 5 April 2006.

legal obligation for states, the process of drafting and adopting the Recommendations, which concludes with their adoption by consensus, indicates that member states are already in agreement about the need to work towards improvement in the area concerned and may even be in a state of preliminary preparedness for responding to suggestions.

IDPs in member states of the CoE enjoy the additional protection of their fundamental rights through the ECHR, which remains undoubtedly the most effective tool of protection for the IDPs in Europe. The ECtHR has described the ECHR as "a constitutional instrument of European public order (*ordre public*)" in the field of human rights.[30] Since all CoE member states have acceded to the ECHR, each individual IDP who is under the jurisdiction of a CoE member state is entitled to the protection of all the rights and freedoms of the ECHR as provided by Article 1 and has the right to apply to the ECtHR in Strasbourg. As discussed in this handbook, the ECtHR has delivered a series of landmark decisions finding numerous violations of the human rights of IDPs, directly caused by their displacement.

The ECtHR initially dealt with cases concerning property and housing rights of persons who became displaced as a result of an international armed conflict in the context of the occupation of northern Cyprus. In its most recent cases concerning IDPs, i.e. *Sargsyan v. Azerbaijan*[31] and *Chiragov and Others v. Armenia,*[32] the ECtHR specifically noted that it examined for the first time the rights of displaced persons to respect for their homes and property in the case of *Loizidou v. Turkey*.[33] As a result of the occupation of northern Cyprus by Turkish military troops, a significant number of legal issues which are directly related to IDPs were initially raised before the ECtHR in the applications submitted by the Republic of Cyprus[34] and individual Greek Cypriots against Turkey (see for example, extraterritorial application of the ECHR, exhaustion of domestic remedies, right to property, right to home, missing persons etc.). Therefore, because a number of landmark judgments of the ECtHR related to displacement concern Cyprus, it has been necessary to rely and make systematic reference to the Cyprus cases throughout this handbook.

30 *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995, para. 75.
31 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 177.
32 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 129.
33 *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996.
34 See for example the intestate cases which were submitted before the European Commission of Human Rights, *Cyprus v. Turkey,* Nos. 6780/74 and 6950/75 [ECommHR. dec.] 26/05/1975 and *Cyprus v. Turkey,* No. 8007/77 [ECommHR. dec.], 10/07/1978.

Besides the ECHR, there are other CoE instruments that are binding on member states,[35] and there are a number of CoE mechanisms to monitor countries' obligations under these instruments. Of particular importance is the protection mechanism provided by the European Social Charter and the revised Social Charter. The European Committee of Social Rights (ESCR) oversees country compliance with the ESC and the ESC(r) through a periodic reporting procedure and a collective complaints procedure. With the latter, international NGOs which are listed as having standing with the ECSR, as well as certain national NGOs, trade unions and employer organisations can submit collective complaints. One such complaint dealing with internal displacement was the 2010 decision, *Centre on Housing Rights and Evictions v. Croatia (COHRE), Collective Complaint No. 52/2008*.[36]

There is also a number of CoE thematic instruments and monitoring mechanisms relevant to the special needs, vulnerabilities and potential rights violations of IDPs, such as the following:

- European Charter for Regional or Minority Languages
- Framework Convention for the Protection of National Minorities
- Convention on Action against Trafficking in Human Beings
- Convention on Preventing and Combating Violence against Women and Domestic Violence
- European Commission against Racism and Intolerance

These standards will all be explored in the thematic chapters of this handbook.

5. State responsibility for IDPs

Unlike refugees who are protected by the 1951 Geneva Convention relating to the Status of Refugees, IDPs do not enjoy the protection of a specific international legally binding instrument.[37]

35 These include, for example, the European Convention for the Protection of National Minorities, the Revised Social Charter, the European Convention on the Exercise of Children's Rights and the European Convention on Action against Trafficking in Human Beings.

36 European Committee of Social Rights, Decision on the merits: Centre on Housing Rights and Evictions v. Croatia (COHRE), Collective Complaint No. 52/2008, 22 June 2010.

37 PACE Recommendation 1631(2003), Internal displacement in Europe, 25 November 2003, para. 3.

As a result, the effective protection of IDPs is very much dependent on their own state and therefore the issue of IDPs is often regarded as an internal matter of the country concerned, attracting much less attention from the international community than the issues of refugees. IDPs can easily become marginalised in their own country, living in precarious conditions, with an uncertain legal status, poorly defined rights in domestic law, and inadequate specific protection of legal, social, economic and political rights.[38] Not only do IDPs have to suffer the catastrophic effects of loss of homes, property and livelihoods, but as victims of long-term displacement, they also suffer the indignity and vulnerability of dependence on the assistance of state authorities.

IDPs have special needs: Displacement breaks up families and severs community ties; it leads to unemployment and restricts access to land, education, food and shelter; IDPs are also particularly vulnerable to violence and exploitation. Deprived of shelter and their habitual sources of food, water, medicine and money, IDPs inevitably have serious, and urgent, material needs. Therefore, a common feature among IDPs is that they are vulnerable, dependent on state aid and in need of targeted assistance.[39]

The question of who qualifies as an IDP, is mostly an internal matter for the country concerned.[40] Nonetheless, a definition of IDP in the national legal order is of paramount importance in identifying the people who are to be considered as IDPs within that country. The main purpose of legally defining IDPs, is not to offer them privileged status but instead to identify and secure their unique needs. Granting legal recognition to IDPs automatically means that they are separated from the mass population, their needs are identified, and greater pressure can be exerted on states to assume responsibility for dealing with IDPs and their special plight. States ought, however, to be careful when drafting a definition of IDPs so as to avoid creating a system whereby the registration, or granting of a legal status to IDPs, would be essential for the enjoyment of their rights. As already explained, displacement is a factual state with legal consequences.[41]

38 *Ibid*., para. 3.
39 PACE Recommendation 1877(2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009, para. 4.
40 PACE Recommendation 1631(2003), Internal displacement in Europe, 25 November 2003, para. 3.
41 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers*", Brookings-Bern Project on Internal Displacement. October 2008, p. 17.

Sometimes, however, the states concerned refuse to recognise the vulnerability and specific needs of displaced persons and often fail to undertake necessary measures to address their hardship. Nevertheless, IDPs within the CoE's member states must be able to exercise the rights and freedoms defined in the ECHR, in accordance with Article 1 of the ECHR,[42] otherwise member states are faced with the possibility of a finding of violation of the human rights of IDPs by the ECtHR.

6. Recognition of IDP status: registration, issuance and replacement of civil documents, and data collection

Principle 20 of the Guiding Principles provides as follows:

1. Every human being has the right to recognition everywhere as a person before the law.

2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.

3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

Furthermore, Article 50.2 of the Geneva Convention IV, with reference to occupied territories in international armed conflict, places an obliga-

42 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006.

tion on the "occupying state" to take all steps necessary to assist with the identification of children and the registration of their parentage.[43]

It is often the case that registration of IDPs is used as means to identify IDPs and it can be necessary to allow states to identify their specific needs and plan accordingly a response with the requisite action. Registration can assist states to identify the number, location and main demographic characteristics of IDPs; prevent fraudulent access to limited humanitarian assistance and facilitate the issuance and replacement of civil documents.[44] Registration should be targeted, should not be overly bureaucratic and should not hinder the access of IDPs to genuinely needed benefits.[45] Failure to register would not however deprive IDPs their rights under international humanitarian law and other relevant instruments.

The importance of ensuring the recognition of IDP status by issuing or replacing all necessary documents providing them access to their human rights, including social rights has been emphasised by the CoE's Recommendations, stressing that such documents should be issued "as soon as possible following their displacement and without unreasonable conditions being imposed".[46] According to the CoE Explanatory Memorandum to the Recommendation on Internally Displaced Persons, the lack of such documentation can restrict or even entirely remove access to social services, formal employment, banks and education to even hindering the ability of IDP's to vote.[47]

Very often IDPs lack documents such as birth certificates, identity cards, passports, marriage certificates or other civil documents, as these may be lost or destroyed while they leave their homes. The Explanatory Memorandum explains that, with a view to implementing Principle 20 of the Guiding Principles, "it is useful to recognise de facto addresses for the issuing of documents or to waive the cost of documents, if this is what prevents effective access to them".[48] The Committee of Ministers further recommends the creation of specific institutions to facilitate the issuing of such documents.[49]

43 Geneva Convention IV, Article 50.2.
44 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers*", Brookings-Bern Project on Internal Displacement. October 2008, p. 13.
45 *Ibid*., p. 14.
46 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006.
47 *Ibid.*
48 *Ibid*.
49 *Ibid*.

Collecting data on IDPs such as their number, location, conditions or specific needs and vulnerability, and perhaps further categorising such data according to age, gender and other demographics, is instrumental in effectively addressing the needs of IDPs by creating and implementing legislation and policies targeted to their specific needs It is essential that such data is updated in order to record the changes in the needs of IDPs. Data collection should begin at the moment of displacement and continue until material solutions have been sustainably achieved.[50] States are expected to try and collect information on IDPs, even those in territories no longer under their control.[51] Although the collection of information on IDPs is not explicitly mentioned in the *Guiding Principles*, it has been considered as "instrumental to operationalizing the Guiding Principles".[52]

7. Training on IDPs rights and raising awareness

As confirmed both by the Guiding Principles and the CoM Recommendation on Internal Displacement, national authorities in which internal displacement takes place, are principally responsible for the protection and assistance of IDPs.[53] While neither the UN Guiding Principles nor the CoM's Recommendations directly mention the need for training on the rights of IDPs or raising awareness, such activities must be considered essential in combatting the effects of internal displacement.[54]

The provision of training on the rights of IDPs and related displacement issues is a key element of the responsibility imposed on the states in addressing internal displacement. It is not enough that states enact legislation and implement policies on IDPs. It is crucial that officials responsible for applying such instruments understand:

(a) the particular risks and vulnerabilities of IDPs which may prevent them from exercising their rights;

50 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers"*, Brookings-Bern Project on Internal Displacement. October 2008, p. 25.
51 CoE Project "Strengthening the Human Rights Protection of Internally Displaced Persons in Ukraine" Under the Framework of the CoE Action Plan for Ukraine 2015-2017, June 2016, p. 34.
52 *Ibid*., p. 34.
53 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006 and Guiding Principles, Principle 5.
54 CoE Project *"Strengthening the Human Rights Protection of Internally Displaced Persons in Ukraine"* Under the Framework of the CoE Action Plan for Ukraine 2015-2017, June 2016, p. 115.

(b) how to execute their duties with regards to IDPs;

(c) the difference between their ordinary course of action in normal circumstances and new practices and procedures regarding IDPs.[55]

Beyond the training of state officials responsible for implementing laws and practises regarding IDPs, it is also vital that the Government first acknowledges the existence of the problem of internal displacement and then raises national awareness around the issue with a view to building national consensus and promoting national solidarity, essential, among others, to combat the stigma associated with displacement.[56]

55 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers*", Brookings-Bern Project on Internal Displacement. October 2008, p. 26.

56 CoE Project *"Strengthening the Human Rights Protection of Internally Displaced Persons in Ukraine"* Under the Framework of the CoE Action Plan for Ukraine 2015-2017, June 2016, pp. 115-116.

II. RIGHT TO ENJOYMENT OF POSSESSIONS

1. Introduction

Displacement, as a result of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, inevitably entails the forced abandonment of property, both movable and immovable, and the loss of homes as large numbers of people flee. In the context of violent conflict and destruction of property, violations of the right to property and the right to home are common.

In the European context, the right to property is guaranteed under Article 1 of Protocol No. 1 of the ECHR which provides as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The right to respect for home is protected under Article 8 of the ECHR which provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Both these rights are also guaranteed in international and regional human rights instruments as well as in the constitutions of states throughout the world.

In international law, the right to property is provided for in Article 17 of the Universal Declaration of Human Rights (UDHR) which states that "(1) [e]everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property".

Article 21 on the American Convention of Human Rights (ACHR) and Article 14 of the African Charter on Human and Peoples' Rights (ACHPR), also provide for the right to property. Articles 16 and 23 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) guarantee the equal right of women to own and dispose of property and Article 5(d)(v) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) provides for the right to own property without discrimination on the basis of race.

The right to respect of one's home is protected under Article 12 of the UDHR which provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence." Both Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 of the ACHR provides for the right to freedom from interference with the home.

In the absence of a specific and binding international instrument safeguarding the rights of IDPs, the *Guiding Principles* and the *Pinheiro Principles* set out standards and provide guidance relating to the loss of property and homes in the context of displacement. The *Pinheiro Principles* do not apply exclusively to IDPs but focus in detail on the rights

of displaced persons (and refugees) to the peaceful enjoyment of their possessions and homes and to the restitution (and compensation for) of property and homes lost or abandoned as a result of displacement.

Significantly, the ECtHR noted in its recent judgments in *Sargsyan v. Azerbaijan* and *Chiragov v. Armenia* that:

> The "Principles on Housing and Property Restitution for Refugees and Displaced Persons" … are the most complete standards on the issue. They are also known as the Pinheiro principles. The aim of these principles, which are grounded within existing international human rights and humanitarian law, is to provide international standards and practical guidelines to States, UN agencies and the broader international community on how best to address the complex legal and technical issues surrounding housing and property restitution.[57]

The CoE has increasingly taken notice of the plight of displaced persons and its bodies have issued reports, recommendations[58] and resolutions addressing, amongst other, the violations of the rights to property and homes of displaced persons and recommending the appropriate measures that member states should introduce to prevent and remedy such violations.

The ECtHR has applied its well-established jurisprudence on Article 1 Protocol No. 1 and Article 8 to the violations of these rights in the context of internal displacement. It has accordingly developed its case-law to safeguard and promote the property and home rights of IDPs.

2. Right to property under Article 1 Protocol No.1 to the ECHR

In its landmark decision in *Marckx v. Belgium*,[59] the ECtHR stated that "[by] recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the

57 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para.96; *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 98.

58 The recommendations of PACE include, for example: PACE Recommendation 1901(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010; PACE Recommendation 1877(2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009; PACE Recommendation 1652(2004), Education of refugees and internally displaced persons, 2 March 2004; PACE Recommendation 1631(2003), Internal displacement in Europe, 25 November 2003; PACE Recommendation 1588 (2003) on population displacement in South-Eastern Europe: trends, problems, solutions, 27 January 2003.

59 *Marckx v. Belgium,* No. 6833/74, 13/06/1979, para. 63.

right of property". In *Sporrong and Lönnroth v. Sweden*,[60] the ECtHR set out the three principles covered by Article 1 Protocol No. 1:

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

In *James v. the United Kingdom*,[61] the ECtHR described the relationship between the three rules: "The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule".

The ECtHR has often reiterated that before "inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable".[62] Following *Sporrong*, in which it was established that the first rule of Article 1 Protocol No. 1 provides a distinct basis for regulating interferences with the right to property, the ECtHR has applied this rule in a number of other cases which neither involve deprivation nor control of property.[63] In particular, the ECtHR has examined cases under the first rule in which "the complexity of the factual and legal position prevents it from being classified in a precise legal category".[64]

In order for the ECtHR to examine allegations of interference with the enjoyment of property, the applicant must demonstrate that there is a "possession" which is protected by Article 1 Protocol No. 1. In the ECtHR's jurisprudence "possession" is an autonomous concept which "is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision".[65]

60 *Sporrong and Lönnroth v. Sweden*, Nos. 7151/75 & 7152/75, 23/09/1982, para. 61.
61 *James and Others v. the United Kingdom*, No. 8793/79, 21/02/1986, para. 37.
62 *Sporrong and Lönnroth v. Sweden*, Nos. 7151/75 & 7152/75, 23/09/1982, para. 61.
63 See for example: *Stran Greek Refineries and Stratis Andreadis v. Greece*, No. 13427/87, 09/12/1994; *Loizidou v. Turkey*, No. 15318/89 (merits), 18/12/1996; *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001; *Iatridis v. Greece,* No. 31107/96, 25/03/1999.
64 *Beyeler v. Italy*, No. 33202/96 [GC], 05/01/2000, para. 106.
65 *Iatridis v. Greece,* No. 31107/96, 25/03/1999, para. 54; *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, No. 15375/89, 23/02/1995, para. 53.

Article 1 Protocol No. 1 permits state interference with the peaceful enjoyment of possessions which is shown to be: "in the public interest", "subject to the conditions provided for by law and by the general principles of international law" and must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Furthermore, the issue of whether a fair balance has been struck "becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary".[66]

In considering the legality of any interference with the right to property under Article 1 Protocol No. 1, the ECtHR has consistently held that the terms "law" or "lawful" in the ECHR "[do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law".[67]

In *Hentrich v. France*,[68] the ECtHR ruled that an interference with the applicant's right to property under Article 1 Protocol No. 1, was unlawful because "… it operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards … and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention …". In *Carbonara and Ventura v. Italy*,[69] the ECtHR reiterated that, "the requirement of lawfulness means that rules of domestic law must be sufficiently accessible, precise and foreseeable".

Thus, an interference with the right to property is lawful only if "adequately accessible and sufficiently precise domestic legal provisions"[70] are in place, so that in law and in practice, domestic laws "provide a measure of legal protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention".[71]

66 *Carbonara and Ventura v. Italy,* No. 24638/94, 30/05/2000, para. 62; *Sporrong and Lönnroth v. Sweden*, Nos. 7151/75 & 7152/75, 23/09/1982, para. 69; *Iatridis v. Greece,* No. 31107/96, 25/03/1999, para. 58; *Beyeler v. Italy*, No. 33202/96 [GC], 05/01/2000, para. 107.

67 *James and Others v. the United Kingdom*, No. 8793/79, 21/02/1986, para. 67; *Malone v. the United Kingdom*, No. 8691/79, 02/08/1984, para. 67.

68 *Hentrich v. France*, No. 13616/88, 22/09/1994, para. 42.

69 *Carbonara and Ventura v. Italy,* No. 24638/94, 30/05/2000, para. 64.

70 *Lithgow and Others v. the United Kingdom*, Nos. 9006/80 & 9262/81 & 9263/81 & 9265/81 & 9266/81 & 9313/81 & 9405/81, 08/07/1986, para. 47.

71 *Vontas and Others v. Greece,* No. 43588/06, 05/02/2009, para. 35; *Hasan and Chaush v. Bulgaria*, No. 30985/96 [GC], 26/10/2000, para. 84.

Interference with rights under the ECHR does not only have to satisfy the requirements of lawfulness but must also serve a legitimate aim and be proportionate. The principle of proportionality is inherent in the whole of the ECHR and underlies the "search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[72] In the case of *Handyside v. the United Kingdom*,[73] the ECtHR emphasized that interference or restrictions of rights are only justifiable if "proportionate to the legitimate aim pursued". When inquiring into the interference with the right to peaceful enjoyment of possessions the ECtHR has stated:

> [the] concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.[74]

The ECtHR applied the "fair balance" test in *Sporrong* to determine whether "a fair balance had been struck between the demands of the general interest of the community and the requirements of the protection" of individual rights and concluded that the facts of that case upset the fair balance so that the individual applicants "bore an individual and excessive burden".[75] Moreover, in *James*, the ECtHR emphasised that it is not enough for a measure depriving an individual of his property to pursue a legitimate aim; but the state must show that there is "also a reasonable relationship between the means employed and the aim sought to be realised …" adding that "the requisite balance will not be found if the person concerned has had to bear an individual and excessive burden".[76] In *Immobiliare Saffi v. Italy,* the ECtHR ruled that the inflexibility of the Italian system in that case "imposed an excessive burden on the applicant company and accordingly upset the balance that must be struck between the protection of the right of property and the requirements of the general interest".[77]

72 *Soering v. the United Kingdom*, No. 14038/88, 07/07/1989, para. 89.
73 *Handyside v. the United Kingdom*, No. 5493/72, 07/12/1976, para. 49.
74 *Pressos Compania Naviera S.A. and Others v. Belgium*, No. 17849/91, 20/11/1995, para. 38.
75 *Sporrong and Lönnroth v. Sweden*, Nos. 7151/75 & 7152/75, 23/09/1982, para. 73.
76 *James and Others v. the United Kingdom*, No. 8793/79, 21/02/1986, para. 50.
77 *Immobiliare Saffi v. Italy*, No. 22774/93, 28/07/1999, para. 59.

Whilst allowing states a wide margin of appreciation in assessing the proportionality of an interference with property rights,[78] the ECtHR has repeatedly emphasised that the in order to strike a fair balance between the community interest and the individual's rights, it is necessary to demonstrate that the individual does not bear an excessive and disproportionate burden

3. Right of IDPs to the peaceful enjoyment of their possessions

The loss of homes, properties, ancestral graves, lands and monuments, all that constitute a person's way of life, are the immediate and inevitable consequences of displacement of large numbers of people. For IDPs, who are in effect "refugees within their own homeland" the trauma of loss is often accentuated by adverse living conditions, deprivations, material and emotional suffering. Consequently, international instruments such as the *Guiding Principles* and the *Pinheiro Principles* in particular, as well as the standards adopted by the organs of the CoE contribute towards the development of clearer guidelines to assist states in both preventing and remedying the violation of IDPs' right to property and home under international human rights law.

The *Guiding Principles*[79] provide that "no one shall be arbitrarily deprived of property and possessions",[80] and that the property and possessions of IDPs shall be protected against "destruction and arbitrary and illegal appropriation, occupation or use".[81] Under Section V –Principles Relating to Return, Resettlement and Reintegration, the competent authorities are instructed to establish the necessary conditions for the voluntary return of displaced persons "in safety and dignity" to their homes, or to resettle and reintegrate them elsewhere.[82] Principle 29 provides for the recovery/restitution of property left behind by IDPs, who return, and where return is not possible, for compensation or other reparation.

78 *Chassagnou and Others v. France*, Nos. 25088/94 & 28331/95 & 28443/95, 29/04/1999, para. 75.
79 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006, adopted the *Guiding Principles*, and recommended in its first paragraph that CoE member states apply them in every context of displacement; see also CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, Explanatory Memorandum, General Considerations.
80 *Guiding Principles on Internal Displacement*, Principle 21.2.
81 *Ibid.*, Principle 21.3.
82 *Ibid.*, Principle 28.1.

The *Pinheiro Principles,* provide more detailed guidance on the issues of return and restitution for refugees and displaced persons. At the very core of these principles is Principle 2, "The right to housing and property restitution," which provides as follows:

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent and impartial tribunal.

2.2 States shall demonstrably prioritise the rights to restitution as the preferred remedy for displacement and as a key element to restorative justice. The right to restitution exists as a distinct right and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing.[83]

Principles 6 and 7 provide for the right to respect for home and peaceful enjoyment of possessions respectively and principle 9 provides for the right to freedom of movement. Section V of the *Pinheiro Principle, "*Legal Policy, Procedural and Institutional Implementation Mechanisms", encompassing Principles 11 to 22 provides guidance regarding the main aspects of land and property restitution procedures in accordance with human rights and humanitarian law. By Resolution 1708 (2010), *Solving Property issues of refugees and internally displaced persons,*[84] PACE, adopted the *Pinheiro Principles,* calling on member states to resolve property and housing rights of refugees and IDPs in accordance with these Principles.

This section examines the ECtHR's developing jurisprudence regarding the protection of the property rights of IDPs with reference to both the *Pinheiro Principles* and the relevant instruments adopted by the organs of the CoE. Both the ECtHR's jurisprudence and the resolutions and recommendations of the CoE increasingly reflect the *Guiding Principles* and the *Pinheiro Principles*, regarding restitution as the optimal remedy for the violation of the right to property.

The ECtHR examined for the first time the rights of displaced persons to respect for their homes and property in the case of *Loizidou v. Turkey*.[85] In its three *Loizidou* judgments,[86] in *Cyprus v. Turkey*,[87] and in a number

83 *Ibid.*, Principle 2.1-2.2
84 PACE Resolution 1708(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010, para. 9.
85 *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996.
86 *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995; *Loizidou v. Turkey,* No. 15318/89 (Merits), 18/12/1996; *Loizidou v. Turkey*, No. 15318/89 (just Satisfaction), 28/07/1998.
87 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001.

of other cases against Turkey[88] (and more recently against Armenia, Azerbaijan, Georgia), the ECtHR examined and ruled on critical issues relating to internal displacement and loss of property and homes. Such issues include the issue of extraterritorial jurisdiction, (or the presumption of jurisdiction in some cases), the continuing nature of the violations, the establishment of the applicants' "possession" on the basis of prima facie evidence, as well as the right to an effective remedy under article 13 of the ECHR.

4. Extraterritorial jurisdiction

Since IDPs remain within their own country, they are entitled to full protection of their human rights under national law and international treaties to which their countries are signatories. However, displacement of persons as a result of internal conflict or conflict between neighboring countries over borders and between ethnic minorities, often has an extraterritorial character and/or raises issues regarding control over disputed territory. Consequently, in its jurisprudence on the rights of displaced persons, the ECtHR has developed exceptions to the principle of territorial jurisdiction under Article 1 of the ECHR. It has also clarified the circumstances in which a member state may be considered to retain jurisdiction even where there is a dispute regarding who has effective control of an area within its territory.

The ECtHR first developed such an exception to territorial jurisdiction in the case of *Loizidou v. Turkey* (Preliminary Objections)[89]. It was the first case to reach its docket following the 1974 Turkish invasion of Cyprus, occupation of the northern part of the island and the resulting displacement of approximately 200,000 Cypriots from their homes and properties. In *Loizidou*, the ECtHR found that the responsibility of a Contracting Party is engaged when as a consequence of lawful or unlawful military action, it exercises effective control of an area outside its national territory. Such control, whether directly through military presence or indirectly through a subordinate local administration, gives rise to the obligation to secure, in such an area, the rights and freedoms set out in the Convention.[90]

88 See, for example, *Kakoulli and Others v. Turkey,* No. 38595/97 (dec.), 04/09/2001; *Adali v. Turkey,* No. 38187/97 (dec.), 31/01/2002; *Xenides-Arestis v. Turkey,* No. 46347/99 (dec.), 14/03/2005.

89 *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995, paras. 62.

90 *Loizidou v. Turkey*, No. 15318/89 (prel. Obj.), 23/03/1995, paras. 62; *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 76; *Banković v. Belgium and Others,* No. 52207/99 [GC], 12/12/2001, para. 70; *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 [GC], 08/07/2004, paras. 314-316.

In its judgment on the merits in *Loizidou*,[91] the ECtHR addressed the issue of imputability to Turkey of the acts complained of by the applicant alleging violations of the ECHR. It concluded that Turkey's effective control over northern Cyprus, both by its military presence and through the policies of its subordinate administration extends Turkey's jurisdiction to that part of the island.

The ECtHR affirmed this position in the inter-state case of *Cyprus v. Turkey*,[92] and all the subsequent Cyprus cases,[93] reiterating that the controlling State, Turkey, has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. Turkey will therefore be held liable for any violations of those rights.[94]

The Nagorno-Karabakh[95] conflict of the early 1990s resulted in hundreds of thousands of displaced persons and refugees and like the Cyprus conflict has remained unresolved and "frozen" for decades. Consequently, thousands of applications against either Armenia or Azerbaijan, claiming continuing violations of Article 1 Protocol No. 1 and Article 8, amongst other, are pending before the ECtHR by applicants on both sides of the conflict.

In its recent judgment in *Chiragov and Others v. Armenia*,[96] in which the applicants, Azerbaijani Kurds had fled their home and land in the Lachin region, situated in a contested area adjoining Nagorno-Karabkh, and lived as IDPs elsewhere in Azerbaijan, the ECtHR applied the principles of extraterritorial jurisdiction[97] to find that Armenia had

91 *Loizidou v. Turkey,* No. 15318/89, (Merits) 18/12/1996, paras. 52-57.

92 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 77.

93 See for example: *Alexandrou v. Turkey*, No. 16162/90, 20/01/2009, para. 20; *Solomonides v. Turkey*, No. 16161/90, 20/01/2009, para. 24; *Orphanides v. Turkey,* No. 36705/97, 20/01/2009, para. 23; In its *Xenides -Aresti* admissibility decision, the Court dismissed Turkey's objections on the grounds of lack of jurisdiction *ratione temporis* and *ratione loci and* observed that: "…no change has occurred since the adoption of the above-mentioned judgments by the Court which would justify a departure from its conclusions as to Turkey's jurisdiction… that the respondent Government continue to exercise overall military control over northern Cyprus and have not been able to show that there has been any change in this respect. In the light of the above, the Court considers that the Government's pleas on inadmissibility on the must be dismissed".

94 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, paras. 76-77.

95 Under the Soviet Union, Nagorno-Karabakh was an autonomous province of the Azerbaijan Soviet Socialist Republic with a populations consisting of 75 % ethnic Armenians and 25 % ethnic Azeris. Armed hostilities started in 1988, coinciding with an Armenian demand for the incorporation of the province into Armenia. Azerbaijan became independent in 1991. In September 1991 the Nagorno-Karabakh Soviet announced the establishment of the "Nagorno-Karabakh Republic" (the "NKR") and in January 1992 the "NKR" parliament declared independence from Azerbaijan. The conflict gradually escalated into full-scale war before a ceasefire was agreed to in 1994. Despite negotiations for a peaceful resolution under the auspices of the Organization for Security and Co-operation in Europe (OSCE) and the Minsk Group, no political settlement of the conflict has been reached. The self-proclaimed independence of the "NKR" has not been recognised by any State or international organisation. See ECtHR Press Unit, Factsheet – Armed Conflicts, http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf, updated September 2016, accessed online December 2016.

96 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015.

97 *Ibid.*, para. 168.

jurisdiction over the contested area. In its analysis of jurisdiction, the ECtHR referred to the principles established in its case-law under Article 1, underlining that the exercise of a state's jurisdiction is primarily territorial,[98] and presumed to be exercised normally throughout the state's territory;[99] such exercise of jurisdiction is a necessary condition for a state to be held responsible for infringements of rights protected under the ECHR. However, the ECtHR has recognized in its jurisprudence a number of exceptions to the above principles, one of which is applicable in the *Chiragov* case.[100]

From the early days of the Nagorno-Karabakh conflict, the Republic of Armenia has had a significant and decisive influence over the Nagorno-Karabakh Republic ("NKR"),[101] the two entities are highly integrated in virtually all important matters and this persists to this day. The "NKR" and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin.[102] Due to the military, political, financial, and other support given by Armenia to the "NKR" it exercises effective control over Nagorno-Karabakh and the surrounding area from where the applicants had fled. Consequently, the ECtHR found that Armenia is responsible for the violations of the ECHR suffered by the applicants.

In the case of *Sargsyan v. Azerbaijan*,[103] the applicants, ethnic Armenians, were forced to flee from their village of Gullistan because of heavy bombing by Azerbaijani forces, and subsequently resettled as refugees in Armenia. This was the first case in which the ECtHR had ruled that a state continued to exercise jurisdiction over a part of its territory over which it claimed to have lost control. The Grand Chamber concluded that as the village from which the applicants had fled is situated in the internationally recognized territory of Azerbaijan, the presumption

98 *Banković v. Belgium and Others,* No. 52207/99 [GC], 12/12/2001, para. 61; *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 [GC], 08/07/2004, para. 131; *Al-Skeini and Others v. the United Kingdom* [GC], No. 55721/07, 07/07/2011, paras. 130-131.

99 *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 [GC], 08/07/2004, para. 312; *Assanidze v. Georgia*, No. 71503/01 [GC], 08/04/2004, para. 139.

100 See, for example, *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 76; *Banković v. Belgium and Others,* No. 52207/99 [GC], 12/12/2001, para. 70; *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 [GC], 08/07/2004, paras. 314-316; *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996, para. 52; *Al-Skeini and Others v. the United Kingdom* [GC], No. 55721/07, 07/07/2011, paras. 130-131, para. 138.

101 «NKR" refers to the Nagorno-Karabakh Republic, as proclaimed by itself. It is unrecognized by the United Nations as independent from Azerbaijan.

102 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 186.

103 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015.

of jurisdiction applied.[104] Unlike Moldova, in *Ilaşcu and Others,* which did not exercise authority over part of its territory because it was under the effective control of the separatist regime of the Moldovan Republic of Transdniestria ("MRT"), no other regime or state had effective control over Gullistan. Adopting its analysis in *Assanidze v. Georgia,*[105] in the case of *Sargsyan v. Azerbaijan*, the ECtHR held that for the purposes of Article 1, Azerbaijan had jurisdiction over the disputed area despite any difficulties in exercising state authority at a practical level.[106] Consequently, Azerbaijan was responsible for the violation of the rights suffered by the applicants.

5. Possessions – Substantiating claims under Article 1 Protocol No. 1

In the cases of *Chiragov*[107] and *Sargsyan*,[108] the ECtHR reviewed and reaffirmed its jurisprudence using identical language with regard to the flexibility with which it considers evidence of ownership of property or residence provided by displaced persons who fled international or internal armed conflict. When forced to flee their homes and lands, people are frequently unable to take with them documents and titles of ownership. Whereas often their claims to property had never been officially registered, and/or were undocumented, their rights may nevertheless have been recognized as *de facto* for generations. At the same time, the ECtHR employs its analysis of the concept of "possessions" as an autonomous concept for the purpose of Article 1 Protocol No. 1, in order to circumnavigate difficulties regarding proof of ownership when examining objections from Respondent Governments that the displaced claimants have failed to establish victim status under Article 1 Protocol No. 1.

In the context of the occupation of northern Cyprus, in *Loizidou v. Turkey*, [109] the ECtHR examined for the first time the rights of displaced persons to respect of their homes and property. The Court ruled that the applicant could not be deemed to have lost title to her property

104 *Ilaşcu and Others v. Moldova and Russia*, No. 48787/99 [GC], 08/07/2004, para. 312.
105 *Assanidze v. Georgia*, No. 71503/01 [GC], 08/04/2004.
106 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 150.
107 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, paras. 127-136.
108 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, paras. 176-184.
109 *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996.

as a result of a provision in the constitution of a regime which lacked international recognition.[110] The Turkish Government did not dispute the validity of the applicant's title. In a number of other cases relating to the same conflict, the ECtHR ruled that the applicants had "possession" within the meaning of Article 1 Protocol No.1 on the basis of *prima facie* evidence, such as copies of their original titles, or certificates of ownership issued by the Republic of Cyprus.

The preliminary objection of the Government of Turkey that the properties at issue in the case of *Xenides-Arestis v. Turkey*[111] were otherwise registered was rejected by the ECtHR, noting that:

> […] the applicant has provided the Court with official certificates of ownership from the Department of Lands and Surveys of the Republic of Cyprus proving that she is indeed the owner of the relevant property. It points out that the respondent Government have not substantiated their arguments disputing the applicant's victim status.

In the case of *Ioannou v. Turkey*,[112] the ECtHR rejected Turkey's objection that the applicant's documents were not acceptable because they had been issued by the "Greek administration". The ECtHR further stated that:

> […] the documents submitted by the applicant provide *prima facie* evidence that he had a title of ownership over the properties at issue. As the respondent Government failed to produce convincing evidence in rebuttal, the Court considers that the applicant had a "possession" within the meaning of Article 1 of Protocol No. 1.

In the case of *Solomonides v. Turkey*[113] the applicant had fled his home and property at the time of the Turkish military invasion and could not take his title deeds with him. However he had "certificates of affirmation of title" issued by the Republic of Cyprus following reconstruction of the Land Books which were considered sufficient evi-

110 *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996, paras. 44-46: "… the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus - itself, bound to respect international standards in the field of the protection of human and minority rights. Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely. 46. Accordingly, the applicant cannot be deemed to have lost title to her property as a result of Article 159 of the 1985 Constitution of the "TRNC 47. It follows that the applicant, for the purposes of Article 1 of Protocol No. 1 (P1-1) and Article 8 of the Convention (art. 8), must still be regarded to be the legal owner of the land. The objection *ratione temporis* therefore fails".

111 *Xenides-Arestis v. Turkey,* No. 46347/99 (dec.), 14/03/2005.

112 *Ioannou v. Turkey*, No. 18364/91, 27/01/2009, para. 26.

113 *Solomonides v. Turkey*, No. 16161/90, 20/01/2009, paras. 31-33.

dence under the circumstances.[114] The ECtHR made the same observations in *Alexandrou v. Turkey*[115] *and in Economou v. Turkey*[116] stating that "the documents submitted by the applicant … provide *prima facie* evidence that she had a title of ownership over the properties at issue".

The ECtHR took a similar approach in several cases against Russia. In the case of *Kerimova and Others v. Russia*,[117] it considered that certificates of residence and housing inventory documents issued after an aerial attack that destroyed the houses and properties of the applicants was sufficient evidence of ownership. In other cases,[118] the ECtHR considered that extracts from land or tax registers, plans, documents from local administration, maintenance receipt, witness statements constituted prima facie evidence of ownership of or residence at a property.

The ECtHR pointed out that its own flexible approach mirrored that of Principle 15.7 of the *Pinheiro Principles* which calls on states to:

> […] adopt a conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims. [119]

In the cases of *Chiragov*[120] and *Sargsyan*,[121] the ECtHR then ruled that the "technical passports" submitted by the applicants, which under national law were issued to property owners, and/or contained details of the property, constitute "*prima facie* evidence of title to the house and land". Furthermore, in the case of *Sargsyan,* the ECtHR considered that an additional passport and marriage certificate along with the applicant's detailed written statements provided further support that the claimants were indeed owners of the properties.

114 See also *Saveriades v. Turkey,* No. 16160/90, 22/09/2009, para. 22.
115 *Alexandrou v. Turkey*, No. 16162/90, 20/01/2009, para. 31.
116 *Economou v. Turkey*, No. 18405/91, 27/01/2009, para. 22.
117 *Kerimova and Others v. Russia,* Nos. 17170/04 & 20792/04 & 22448/04 & 23360/04 & 5681/05 & 5684/05, 03/05/2011, para. 293.
118 See for example: *Prokopovich v. Russia*, No. 58255/00, 18/11/2004*; Elsanova v. Russia*, No. 57952/00 (dec.), 15/11/2005.
119 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para.136; *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 184.
120 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 141.
121 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 192.

6. Autonomous meaning of the concept of "possessions"

In the case law of the ECtHR, the notion of "possessions" under Article 1 Protocol No. 1 is not limited to ownership of physical goods but has an autonomous meaning. Moreover, other rights and interests constituting assets may be regarded as property rights and therefore "possessions"[122] within the meaning of Article 1 Protocol No. 1. In the case of *Öneryıldız v. Turkey*,[123] the ECtHR explained further that the meaning of "possessions", for the purposes of Article 1 Protocol No. 1, is not limited by the formal classification in national law. The concept of "possessions" extend beyond existing possessions to include a "legitimate expectation" for the future enjoyment of a property right. Whether the applicant has possession (and therefore is entitled to claim an infringement of his rights to property), will be determined by considering whether the circumstances of the case as a whole "have conferred on the applicant title to a substantive interest protected by that provision".[124]

The ECtHR applied the above jurisprudence to the displaced applicants in the case of *Doğan and Others v. Turkey*.[125] The case related to the eviction of the applicants from their village of Boydaş in southeast Turkey during the state of emergency of the 1990s. The ECtHR referred to the autonomous meaning of "possessions" in response to the Government's argument that the applicants had failed to show they had title to property and, therefore, could not properly be considered to be victims of an infringement of Article 1 Protocol No. 1. The ECtHR considered that the absence of title deeds was not the issue. The Court considered that it was not required to decide whether in the absence of title deeds the applicants have rights of property under Turkish law. Instead it defined the issue as whether the "overall economic activities carried out by the applicants constituted "possessions". The ECtHR answered this question in the affirmative finding that although the applicants did not have registered property, they lived on ancestral lands and had rights over arable land and pasture in their village all of which were economic resources from which they derived revenue

122 *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, No. 15375/89, 23/02/1995, para. 53; *Matos e Silva, Lda., and Others v. Portugal*, No. 15777/89, 16/09/1996, para. 75.
123 *Öneryıldız v. Turkey*, No. 48939/99, 30/11/2004, para. 124.
124 *Ibid.*, para. 124.
125 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004.

and, therefore, qualify as "possessions" for the purposes of Article 1 Protocol No. 1.[126]

Furthermore, the ECtHR dealt with a number of cases against Azerbaijan by claimants whose flats were occupied by IDPs and where the Government had failed to take measures to find alternative accommodation for the IDPs whilst delaying the enforcement of judgments in the claimants' favour. In all these cases the ECtHR found violations of the claimants' right to property.

In the case of *Akimova v. Azerbaijan*,[127] the ECtHR applied the above jurisprudence regarding the autonomous meaning of the concept of "possessions" under Article 1 Protocol No. 1. It ruled that the applicant's occupancy voucher in respect of her apartment, constituted a "possession" falling under Article 1 Protocol No. 1, because under applicable regulations, on the basis of the voucher the applicant would have had a right to possess and make use of the apartment with the possibility of ownership transferred to her under privatisation legislation. In this case, the ECtHR also rejected the Government's argument that because the applicant's apartment was occupied by IDPs in accordance with the "IDP Settlement Regulations" the interference with her property rights was justified. The ECtHR concluded that the relevant legal framework for the resettlement of IDPs did not allow for such an interference and, therefore, the interference in question was in breach of Azerbaijani law, unlawful and in violation of the applicant's right to the peaceful enjoyment of her possessions.[128]

In *Gulmammadova v. Azerbaijan*,[129] recalling that a "claim" can constitute a "possession" within the meaning of Article 1 Protocol No. 1,[130] the ECtHR ruled that the applicant who had an enforceable claim to an occupancy right based on a valid occupancy voucher, had a "possession" within the meaning of Article 1 Protocol No. 1. In finding a breach of the applicant's right to respect for property, the ECtHR pointed out that Azerbaijan had failed to strike a fair balance between the applicant's right and those of the IDPs who were occupying her flat to be provided with accommodation. The Government had failed to take specific measures to provide the IDPs with alternative accommodation and there was excessive delay in enforcing the judgment

126 *Ibid.*, para. 139.
127 *Akimova v. Azerbaijan*, No. 19853/03, 27/09/2007, paras. 39-41.
128 *Ibid.,* para.50.
129 *Gulmammadova v. Azerbaijan,* No. 38798/07, 22/04/2010, paras. 43-44.
130 *Stran Greek Refineries and Stratis Andreadis v. Greece*, No. 13427/87, 09/12/1994, para. 59.

in the applicant's favour. As a result, the applicant "was forced to bear an excessive individual burden", which in the absence of any compensation, amounted to a violation of the applicant's right to property protected under Article 1 Protocol No. 1.[131]

In *Jafarov v. Azerbaijan*,[132] the applicant had tenancy rights to his flat pursuant to the occupancy voucher issued by the local executive authority which constituted a "possession" under Article 1 of Protocol No. 1 and an enforceable judgment for the eviction of the IDP occupying his flat. Whilst acknowledging that the Government faced difficulties in executing the judgment because of the large numbers of IDPs,[133] however, the ECtHR ruled that "the impossibility for the applicant to obtain the execution of this judgment for more than six years constituted an interference with his right to peaceful enjoyment of his possessions, as set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1".[134]

In *Soltanov and Others v. Azerbaijan*,[135] the ECtHR again acknowledged the difficulties in respect of the large number of IDPs, but reiterated that the domestic authorities had failed to comply with their duty to balance the applicants' rights to peaceful enjoyment of their possessions against the IDPs' right to be provided with accommodation. The applicants had secured judgments for the eviction of the IDP and the failure of the authorities to execute them for over 6 years "resulted in a situation where the applicants were forced to bear an excessive individual burden". The ECtHR concluded that in the absence of any compensation for having this excessive individual burden being borne by the applicants, the authorities failed to strike the requisite fair balance between the general interest of the community in providing the IDPs with temporary housing and the protection of the applicants' right to peaceful enjoyment of their possessions.

It is noted that in the above cases, the rights of IDPs do not override the rights of the rightful owners of the properties where the Government acted unlawfully and without justification and/or failed to comply with the ECHR requirement of balancing the rights of the claimants against the rights of the general public, in this case the right of IDPs to alternative accommodation.

131 *Gulmammaldova v. Azerbaijan,* No. 38798/07, 22/04/2010, paras. 48-50.
132 *Jafarov v. Azerbaijan*, No. 17276/07, 11/02/2010.
133 *Ibid.*, para. 36.
134 *Ibid.*, para. 41; see also *Radanović v. Croatia*, No. 9056/02, 21/12/2006, paras. 48-50.
135 *Soltanov and Others v. Azerbaijan,* Nos. 41177/08 & 41224/08 & 41226/08 & 41245/08 & 41393/08 & 41408/08 & 41424/08 & 41688/08 & 41690/08 & 43635/08, 13/01/2011, paras.18-19.

However, in the case of *Saghinadze v. Georgia*,[136] relating to IDPs, who had fled (along with 300,000 others mostly ethnic Georgians) from Abkazia as a result of the 1992-1993 armed conflict, the ECtHR ruled that the eviction of the applicants from the home where they had been resettled was unlawful and a violation of both their right to property and to home.[137] The ECtHR relying on its settled jurisprudence on the autonomous meaning of "possessions," stated that "possessions" may cover assets and claims "in respect of which the applicant can argue that he or she has at least a reasonable and "legitimate expectation"[138] of obtaining effective enjoyment of a property right … and an expectation is legitimate if it is based on either a legislative provision or a legal act bearing on the property interest in question".[139]

The applicants had settled there after the relevant authorities had offered them the house and continued living there with their extended families, in good faith for over ten years. The state never objected to "the socio-economic and family environment"[140] and had adopted several legal acts the most important of which was the IDPs Act, which recognised that an IDP's possession of a dwelling in good faith constituted a right of a pecuniary nature. The ECtHR concluded that the first applicant in the case had the right to use the dwelling and that there was a pecuniary aspect to it which brought it within the ambit of Article 1 Protocol No. 1 as "possession."

7. Right to possession

PACE Resolution 1708(2010),[141] "Solving property issues of refugees and internally displaced persons" which called on member states to take into account the *Pinheiro Principles* in order to resolve post-conflict housing land and property issues of refugees and dis-

136 *Saghinadze and Others v. Georgia,* No. 18768/05, 27/05/2010.
137 *Ibid.*, para.103.
138 *Prince Hans-Adam II of Liechtenstein v. Germany*, No. 42527/98 [GC], 12/07/2001, para.83.
139 *Kopecký v. Slovakia*, No. 44912/98 [GC], 28/09/2004, paras.45-52.
140 *Öneryıldız v. Turkey*, No. 48939/99, 30/11/2004, paras.105-106, 127; *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004, para.139; *Matos e Silva, Lda., and Others v. Portugal*, No. 15777/89, 16/09/1996, para.72.
141 PACE Resolution 1708(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010.

placed persons,[142] addresses the issues of possessory rights in the context of displacement and war. Specifically, it calls on member states to:

- Ensure that refugees and displaced persons who did not hold formally recognized rights before their displacement, but instead enjoyed property rights *de facto* are granted "equal and effective access to legal remedies and redress for their dispossession".[143]
- Ensure that occupancy and tenancy rights in formerly communist regimes are recognized and protected as homes and possessions under Articles 8 and Article 1 Protocol No. 1 respectively.[144] Ensure that the absence of occupancy and tenancy rights holders who were forced to abandon their homes is considered justified until they can return voluntarily in safety and dignity.[145]

Furthermore, PACE Recommendation 1901(2010)[146] recommends that the CoE's Committee of Ministers instruct the relevant body to undertake a study that would provide detailed guidelines to the member states regarding all aspects of redress for loss of property and rights to housing for refugees and IDPs. Amongst other guidelines, the study should provide guidelines on the modalities of providing redress for loss of *de facto* possessions and occupancy and tenancy rights.[147] This recommendation reflects Principle 16 of the *Pinheiro Principles,* regarding the recognition of tenancy and occupancy rights of refugees and displaced persons within restitution programs.[148]

In the 2010 explanatory memorandum of the the PACE Committee on Migration, Refugees and Population report "Solving property issues of refugees and internally displaced persons,"[149] Rapporteur Mr. Jorgen Poulsen elaborates further on the points mentioned above. The rapporteur makes the general recommendation[150] that the CoE should endorse the *Pinheiro Principles* and develop guidelines for their implementation in the European context. According to the Rapporteur, this

142 *Ibid.,* para. 9.
143 *Ibid.,* para. 10.3.
144 *Ibid.,* para. 10.4.
145 *Ibid.,* para. 10.5.
146 PACE Recommendation 1901(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010.
147 *Ibid.*, paras. 3.1.2, 3,1.3.
148 *Pinheiro Principles,* Principle 16, "The rights of tenants and other non-owners".
149 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons,* 8 January 2010.
150 Ibid., para. 28.

would follow up on the CoM Recommendation on IDPs,[151] which endorsed the *Guiding Principles* and its central tenet that "IDPs are entitled to the enjoyment of their property and possessions in accordance with human rights law".[152]

Regarding possessory rights in the context of displacement, the Rapporteur refers to Principle 16 of the *Pinheiro Principles* which calls upon states to "ensure that the rights of tenants, social occupancy rights holders and other legitimate occupiers or users of housing, land and property are recognized within restitution programs … and are able to return and repossess" their properties in the same way as those with "formal ownership rights".[153] The Rapporteur points out that such rights for displaced minorities are protected under Article 16 of the Framework Convention for the Protection of National Minorities[154] and that the ECtHR's jurisprudence on "possessions" has brought such rights within the ambit of Article 1 Protocol No. 1.[155]

The rapporteur further offers a brief explanation of the nature and origin of occupancy and tenancy rights[156] and states that these rights constitute possessions under the ECHR even where there is no right to eventual privatization. A court judgment within the framework of the Dayton Peace Accords, ruled[157] that occupancy rights constituted "possessions" within the meaning of Article 1 Protocol No. 1, a finding that facilitated the restitution of such rights in Bosnia and Herzegovina and Kosovo. It is further noted that the failure to remedy violations of occupancy and tenancy rights is an obstacle to resolving the protracted displacement situation in Europe.[158]

Regarding evidence that displaced persons need to produce,[159] the Rapporteur states that the lack of documentary evidence and absence

151 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006.
152 *Ibid*., principle 8.
153 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons*, 8 January 2010, para.45.
154 See also CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, para. 8.
155 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons*, 8 January 2010, para. 47.
156 *Ibid*., paras 48-50.
157 E.g. Human Rights Chamber for Bosnia and Herzegovina, *Keresevic v. the Federation of Bosnia and Herzegovina*, 10/09/1998, (CASeNo. CH/97/46).
158 See PACE Doc. 11942 Report, *Europe's forgotten people: protecting the human rights of long-term displaced persons*, 8 June 2009; see also PACE Recommendation 1877(2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009, para.15.3.6.
159 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons*, 8 January 2010, para. 15.

of property records should not prevent their restitution claims. Instead there should be a flexible evidentiary approach. In addition, state authorities must ensure that changes to the cadastral records regarding properties of refugees and IDPs is of no legal effect, and where possible ensure that the titles and cadastral records should be preserved during the period of conflict. This approach reflects Principle 15 of the *Pinheiro Principles*[160] regarding state responsibility to ensure that registration of property rights of refugees and internally displaced persons is an integral part of any restitution program, that existing registration systems are preserved during a conflict, and that where mass displacement has taken place with people fleeing from their homes and property in conflict areas, "authorities may independently establish the facts related to undocumented restitution claims".[161]

8. Violation of Article 1 Protocol No. 1 to the ECHR

The principles applied by the ECtHR in finding a violation of the right to property and home as set out above have been applied to claims brought by displaced persons regarding deprivation of their homes and land in post-conflict situations. The ECtHR first addressed the claims of displaced persons to their land and homes in the context of the post-conflict situation in Cyprus and the establishment of the self-proclaimed "Turkish Republic of Northern Cyprus" or the "TRNC" in the northern part of the divided island.

In the Cyprus cases, the ECtHR ruled that Turkey was responsible for the continuing violations of their rights to property and homes under Article 1 Protocol No. 1 and Article 8 of the ECHR respectively, as a result of their displacement following the war and occupation of their land.

In its *Loizidou*[162] judgment the ECtHR held that, having been refused access to her land since 1974, the applicant "has effectively lost all control over, as well as all possibilities to use and enjoy, her property;" such continuous denial is an interference with the applicant's rights under Article 1 of Protocol No. 1. The interference, the ECtHR further ruled, was neither a deprivation nor control of use of property within the

160 *Pinheiro Principles*, Principle 15, "Housing, land and property records and documentation".
161 *Ibid.,* Principle 15.7.
162 *Loizidou v. Turkey,* No. 15318/89 (merits), 18/12/1996, paras.63-64.

meaning of the first two paragraphs of Article 1 Protocol No. 1; but it "falls within the meaning of the first sentence of that provision (P1-1) as an interference with the peaceful enjoyment of possessions. In this respect the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment".[163] The ECtHR was not persuaded by the argument proffered by the respondent state that the interference with the applicant's right was justified by the need to rehouse displaced Turkish Cypriots from the south, and similarly rejected the argument relating to ongoing intercommunal negotiations regarding property rights as irrelevant. "In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1 (P1-1)".[164]

The ECtHR confirmed the above conclusion in *Cyprus v. Turkey*,[165] regarding all displaced Greek Cypriots who "are unable to have access to their property in northern Cyprus by reason of the restrictions placed by the "TRNC" authorities on their physical access to that property. The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1". It further noted that no compensation had been paid for "the purported expropriation" for the continuing interference with the displaced persons' property rights. The ECtHR then concluded that there was a continuing violation of Article 1 Protocol No. 1 as a result of Turkey's denial of access to, control and enjoyment of property by the displaced Greek Cypriots.

The ECtHR reiterated the above findings in *Demades v. Turkey*,[166] and in *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*[167]. In*Xenides-Arestis v. Turkey*,[168] the ECtHR concluded as follows:

> The Court sees no reason in the instant case to depart from the conclusions which it reached in the *Loizidou* and *Cyprus v. Turkey* cases [...] Accordingly, it concludes that there has been and continues to be a violation of Article 1 of Protocol No. 1 to the Convention by virtue of the fact that the applicant is denied access to and con-

163 *Airey v. Ireland,* No. 6289/73, 09/10/1979, para.25.
164 *Loizidou v. Turkey,* No. 15318/89, (Merits) 18/12/1996, para.64.
165 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, paras.187-189.
166 *Demades v. Turkey*, No. 16219/90, 31/07/2003, para. 46.
167 *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, No. 16163/90, 31/07/2003, para. 31.
168 *Xenides-Arestis v. Turkey*, No. 46347/99, 22/12/2005, para. 32, referring to *Demades* and *Tymvios* the ECtHR stated: "In the light of the above the Court sees no reason in the instant case to depart from the conclusions which it reached in the above cases".

trol, use and enjoyment of his property as well as any compensation for the interference with his property rights.

Similarly in later Cyprus judgments such as *Solomonides v. Turkey*,[169] *Orphanides v. Turkey*,[170] *Alexandrou v. Turkey*,[171] *and Gavriel v. Turkey*,[172] *Nicola v. Turkey*,[173] *Nicolaides v. Turkey,*[174] *Sophia Andreou v. Turkey*,[175] *Ioannou v. Turkey*,[176] *Economou v. Turkey*,[177] and concluding in *Evagorou Christou v. Turkey*[178] the ECtHR held that it sees no reason

> […] to depart from the conclusions which it reached in the *Loizidou* and *Cyprus v. Turkey* cases … it concludes that there has been and continues to be a violation of Article 1 of Protocol No. 1 by virtue of the fact that the applicant is denied access to and control, use and enjoyment of his property as well as any compensation for the interference with his property rights.

In the case of *Doğan and Others v. Turkey*,[179] the ECtHR pointed out that, as in many other cases[180] Turkish security forces had destroyed the applicants' homes and property and forced them to leave the state of emergency region; the denial of access to the applicants' village constitutes an interference with their right to peaceful enjoyment of their possessions. The ECtHR found, as with the Cyprus cases, that the interference the applicants complained of fell under the first sentence of the first paragraph of Article 1 Protocol No. 1[181] and in considering the proportionality of the interference concluded that the Government had failed to strike the required fair balance between the protection of the rights of the applicants and the general interest; the Government had failed to facilitate return to their village and had not provided them with alternative accommodation, as a result the "applicants have had to bear an individual and

169 *Solomonides v. Turkey*, No. 16161/90, 20/01/2009, para. 39.
170 *Orphanides v. Turkey,* No. 36705/97, 20/01/2009, para. 34.
171 *Alexandrou v. Turkey*, No. 16162/90, 20/01/2009, para. 34.
172 *Gavriel v. Turkey*, No. 41355/98, 20/01/2009, para. 39.
173 *Nicola v. Turkey*, No. 18404/91, 27/01/2009, paras. 27-28.
174 *Nicolaides v. Turkey*, No. 18406/91, 27/01/2009, paras. 27-28.
175 *Sophia Andreou v. Turkey*, No. 18360/91, 27/01/2009, paras. 27-28.
176 *Ioannou v. Turkey*, No. 18364/91, 27/01/2009, paras. 29-30.
177 *Economou v. Turkey*, No. 18405/91, 27/01/2009, paras. 25-26.
178 *Evagorou Christou v. Turkey*, No. 18403/91, 27/01/2009, paras. 25-26.
179 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004, para.143.
180 *Akdivar and Others v. Turkey*, No. 21893/93, 16/09/1996, para.88: "The Court is of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions. No justification for these interferences having been proffered by the respondent Government - which have confined their response to denying involvement of the security forces in the incident -, the Court must conclude that there has been a violation of both Article 8 of the Convention (art. 8) and Article 1 of Protocol No. 1 (P1-1)".
181 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004*,* para.146.

excessive burden".[182] The ECtHR pointed out that under Principles 18 and 28 of *The Guiding Principles,* the Government had a duty and responsibility to establish such conditions, which would allow the displaced persons to return to their homes voluntarily in safety and dignity.

The ECtHR ruled that there had been unlawful or disproportionate interferences with the right to property in the context of the occupancy and tenancy rights of displaced persons in violation of ECHR or Article 1 of Protocol No. 1. In the case of *Saghinadze v. Georgia,* the ECtHR noted that the eviction and dispossession of the first applicant, a lawfully resettled IDP, was not based on any court decision and, therefore, the interference with the peaceful enjoyment of his possessions was unlawful.[183]

In all the cases examined in this section, the ECtHR's application of its jurisprudence under Article 1 Protocol No. 1 to IDPs whose homes and properties were occupied or destroyed by the governments concerned, resulted in findings of violations of Article 1 Protocol No. 1 and in many cases also of Article 8 of the ECHR.

In its recent judgments in the context of the Nagorno-Karabkh "frozen conflict" *Sargsyan v. Azerbaijan* and *Chiragov v. Armenia,* the ECtHR upheld the complaints dealing with the loss of home and properties and found continuing violations of their rights under both Article 1 Protocol No. 1 and Article 8.

In the case of *Chiragov,* the ECtHR observed that there were no effective remedy either in Armenia or in the "NKR", for the applicants to seek compensation or "more importantly … to gain physical access to the … property and homes they left behind".[184] In addition, it appeared that the applicants' properties along with that of many other IDPs had been allocated to other users by the "NKR" and registered as such in the land registry. The interference with the applicants' rights, as in the *Loizidou* case, was one of continuous denial of access resulting in the loss of control and of possibility to use and enjoy the property and homes.[185] Furthermore, the interference was not justified by the fact that there were ongoing negotiations within the OSCE Minsk Group to settle issues relating to IDPs,[186] and there was no indication

182 *Ibid.*, para.155.
183 *Saghinadze and Others v. Georgia,* No. 18768/05, 27/05/2010, paras. 112-117; see also *Khamidov v. Russia,* No. 72118/01, 15/11/2007, paras.144-146, unlawfulness of interference with the applicant's estate by virtue of its occupation by police forces due to vagueness of legal provisions relating to anti-terrorism operations.
184 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 194.
185 *Ibid.*, para. 196.
186 *Ibid.*, para. 198.

of a legitimate aim to justify the denial of access and lack of compensation. In conclusion, the ECtHR found that Armenia had breached the applicants' rights under Article 1 Protocol No. 1 of the ECHR.[187]

The ECtHR distinguished the case of *Sargsyan v. Azerbaijan* from the Cyprus cases and *Chiragov,* because the circumstances of the case did not involve occupation and denial of access by another state but related to the acts or omissions of the state itself, albeit within an area over which it had lost control as a result of ethnic conflict.[188] The ECtHR examined the nature of the interference by inquiring into the compliance of the government with its positive obligations and determining whether a fair balance had been struck between the demands of the public interest and the applicants' right to property. The ECtHR considered that the government's participation in peace talks and the fact that as a result of the conflict the government had to make provision for large numbers of its own IDPs, did not exempt it from taking measures to protect the rights of the Armenian IDPs as well, especially as the state of affairs had remained the same for a very long time.[189] Consequently, the ECtHR found that the applicant was forced to bear an excessive burden in breach of his right to property under Article 1 Protocol No.1

9. Remedies for violation of property rights

In general, if the ECtHR finds a violation of the ECHR, in compliance with Article 46 of the ECHR, the respondent state has the duty to put an end to the violation, to adopt general measures to end similar and/or prevent future violations, and to make reparations to the affected parties in order to restore to the extent possible the situation in place before the breach (*restitutio in integrum*).[190] In implementing the ECtHR judgment, the obligation of the respondent state is not limited to the payment of damages.[191]

187 *Ibid.*, para. 201.
188 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, paras. 223-224.
189 *Ibid.*, para. 240.
190 Lambert-Abdelgawad, E., "The Execution of Judgments of the ECtHR", 2nd Edition, Human Rights, Files No. 19, (Strasbourg: CoE Publishing, 2008) p. 10. See also CoE, Committee of Ministers Recommendation CM/Rec(2008)2, Efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, 6 February 2008.
191 See e.g. *Scozzari and Giunta v. Italy*, Nos. 39221/98 & 41963/98 [GC], 13/07/2000, para. 249: "A judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay to those concerned the sums awarded by way of just satisfaction, but also to chose, subject to the supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put a end to the violation found by the Court and to redress so far as possible the effects".

Whenever *restitutio in integrum* is either *de jure* or *de facto* impossible, the respondent state can only provide partial reparation under Article 46, and it is for the ECtHR to afford the applicant just satisfaction under Article 41 of the ECHR. The latter may include monetary compensation for moral and pecuniary damages as well as costs and expenses. Reparation under Article 41 is intended to put the applicant as closely as possible to the position he would have been in, had the alleged violation not occurred.[192]

In *Guiso-Galliani v. Italy*,[193] the Grand Chamber reiterated its position on Article 41 as follows:

> If the nature of the violation allows for *restitutio in integrum* it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, however, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.[194]

Applying the above principles, the ECtHR has required states to take such measures as to achieve *restitutio in integrum*, mostly in cases where it has found violation of the applicants' property rights.

In the case of *Papamichalopoulos v. Greece*, which concerned an unlawful expropriation of the applicant's land and buildings over a very long period of time,[195] the ECtHR reiterated that a finding of a violation "imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".[196] Under Article 41, *restitutio in integrum* is only required insofar as it is possible under the domestic law of the respondent state.[197] In its judgment[198] for the first time the ECtHR offered the state an alternative: either to make

192 *Piersack v. Belgium,* No. 8692/79, 26/10/1984, paras. 15-16.

193 The judgment in this case marks a departure from the case-law regarding just satisfaction under Article 41 in connection with Article 1 Protocol 1 as pointed out in Judge Spielman's dissenting opinion.

194 *Guiso-Gallisay v. Italy,* No. 58858/00, [GC], 22/12/2009, para. 90.

195 *Papamichalopoulos v. Greece*, No. 14556/89, 31/10/1995, para. 36. The act of the Greek Government which the ECtHR held to be contrary to the ECHR was not an expropriation that would have been legitimate but for the failure to pay fair compensation; it was a taking by the State of land belonging to private individuals, which has lasted twenty-eight years, the authorities ignoring the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime.

196 *Papamichalopoulos and Others v. Greece*, No. 14556/89, 31/10/1995, para. 34.

197 *Ibid.*, para. 34.

198 *Ibid.*, para. 38: "Consequently, the Court considers that the return of the land in issue, an area of 104,018 sq. m - as defined in 1983 by the Athens second Expropriation Board - would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (P1-1); the award of the existing buildings would then fully compensate them for the consequences of the alleged loss of enjoyment".

restitutio in integrum, by returning the land and buildings or to pay compensation for the pecuniary damage, within six months.[199]

- In *Papamichalopoulos,* the ECtHR cited[200] approvingly the judgment of the Permanent Court of Justice in the case *Factory at Chorzow*[201] that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear…".[202]

- Subsequently, in a number of property related cases, ECtHR has held that the respondent state was obliged either to return to the applicant the relevant property or pay damages that reflected the current value of the property. In *Brumarescu v. Romania*,[203] the ECtHR ruled that:

> [the] return of the property in issue, as ordered in the final judgment of the Bucharest Court of First Instance of 9 December 1993, would put the applicant as far as possible in the situation equivalent to the one in which he would have been if there had not been a breach of Article 1 of Protocol No. 1…. Failing such restitution by the respondent State within six months of the delivery of this judgment, the Court holds that the Respondent State is to pay the applicant pecuniary damage, the current value of the house.[204]

- The ECtHR made a similar ruling in *Dacia S.R.L. v. Moldova*,[205] concerning the annulment of the privatization and sale of a hotel

199 *Ibid.*, para. 39.

200 And in many other cases e.g. *Salduz v. Turkey,* No. 36391/02, 27/11/2008, Joint Concurring Opinion of Judges Rozakis, Spielman, Ziemele, and Lazarova Trajkovska, para*5*. "The principle of restitutio in integrum has its origin in the judgment of 13 September 1928 of the Permanent Court of International Justice (PCIJ) in the case concerning the Factory at Chorzów…".

201 C.P.J.I., 13 September 1928, *Case concerning the Factory at Chorzów, (Claim for Indemnity) (merits),* Series A No. 17. The right to reparation for loss of property as a result of the construction of the wall was similarly upheld by the ICJ in its *Advisory Opinion on the Legal Consequences of the Constrution of the Wall in Occupied Palestinian Territory of July 9 2004.*

202 The right to reparation for human rights violations in post conflict situations is international law relates to state responsibility, "its is a principle of international law that any breach of an engagement involves an obligation to make reparation," Article 31 of the *Articles on Responsibility of States for international wrongful acts,* in UN Doc A/56/10, *Report of the International Law Commission on the work of its Fifty-third session,* Official Records of the General Assembly, November 2001, pp.43-59; Restitution is considered the preferred form (others are compensation and satisfaction), intended to restore the situation *ex ante.* The *UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims gross violations of International Human Rights Law and Serious violations of International Humanitarian Law,* adopted by the United Nations on 21 March 2006, (UN Doc. /RES/60/147) enshrine the principle that states must provide legal remedies to individual victims. In the context of post conflict reparation for property violations, return of property is one type of restitution, (Principle No. IX).

203 *Brumarescu v. Romania*, No. 28342/95, 23/01/2001.

204 *Ibid.*, paras. 22-23.

205 *Dacia S.R.L. v. Moldova,* No. 3052/04, 24/02/2009.

to the applicant company; having found that this constituted an unlawful deprivation under Article 1 Protocol No. 1, the ECtHR ruled that "the most appropriate form of *restitutio in integrum*... is for the hotel and underlying land to be returned to the applicant company…"[206] or if that proved impossible, for the state to pay the compensation in an amount "representing its current value."[207]

- Finally, in the case of *Saghinadze v. Georgia,* the ECtHR considered again that the most appropriate form of relief under the IDPs Act would be for the government to return to the applicant the cottage in which he had been lawfully residing in for over a decade until such time as conditions would allow his return in safety and dignity to his home in Abkazia. The ECtHR then added that if that were not possible the government should find alternative accommodation for such an IDP and if that also could not be done, to award him compensation for the loss of the cottage.[208] In its subsequent judgment on just satisfaction[209] the ECtHR approved the government's offer of the transfer or ownership of two apartments and an amount in damages payable to the applicants.

- Therefore, according to the ECtHR's jurisprudence the preferred remedy for a violation of the right to property is *restitutio in integrum,*[210] or the return of the property. At the same time, the Court almost *always allows an alternative for* the state, and failing restitution, a fixed sum in respect of pecuniary damage must be paid.[211]

- As noted above, when the ECtHR finds a violation of the ECHR, it is for the member state to choose the means by which it will discharge its obligations under Article 46, as long as those are compatible with the ECHR; thus the ECtHR's judgments have traditionally been "declaratory"[212] rather than prescriptive regarding what individual and/or general measures the respondent state should take to remedy the violation found. States retain a "wide discretion

206 *Ibid.,* para. 40.
207 *Ibid.*, para. 55.
208 *Saghinadze and Others v. Georgia*, No. 18768/05, 27/05/2010, para.160.
209 *Ibid.*, para.15.
210 Article 35 of the *Articles on Responsibility of States for international wrongful acts,* provides that a state "is under an obligation to make restitution … provided that restitution is not 'materially impossible" and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".
211 See for example *Raicu v. Romania,* No. 28104/03, 19/10/2006, para. 38: The ECtHR ordered Romania to return the flat or in the alternative to pay the applicant a specific sum of money.
212 *Marckx v. Belgium,* No.6833/74, 13/06/1979, para. 58; also see e.g. *Silver v. The United Kingdom,* No. 5947/72 & 6205/73 & 7052/75 & 7061/75 & 7107/75 & 7113/75 & 7136/75, 25/03/1983, para. 113(d); *Oleksandr Volkov v. Ukraine*, No. 21722/11, 09/01/2013, para. 194.

in the choice of means to be used"[213] in their implementation of the ECtHR's judgments. This approach follows from the doctrine of state sovereignty in international law and the related principle of subsidiarity, one of the main principles underpinning the ECtHR's deferential attitude to member states, in its judgments.

Nonetheless, gradually over the last decade or so, on several occasions the ECtHR has given indications regarding general and/or individual measures, relying mostly on Article 46, thus assuming more responsibility for the execution of its own judgments. The property related cases discussed above reflect this exception to the rule of declaratory judgments in that the ECtHR issued specific directions in respect of the execution of those judgments underlining the appropriateness of *restitutio in integrum*.

The main category of judgments in which the ECtHR has indicated general and/or individual measures is that of pilot judgments[214] in which the ECtHR identifies in the domestic legal order of the state concerned "structural or systemic problems" which generate numerous similar cases – also called repetitive cases. While examining the pilot case, the Court adjourns pending similar cases.[215] In the case of *Broniowski v. Poland*, which was the first pilot judgment, the ECtHR found a violation of Article 1 Protocol No. 1 as a result of the failure to compensate the applicant for property left behind when forced to move to Poland after World War II. The ECtHR also found that the individual violation "originated in a widespread problem" which was systemic and affected a large number of applicants. The ECtHR then indicated that "general measures should either remove any hindrance to the implementation of numerous persons affected by the situation found to have been in breach of the ECHR or provide equivalent redress in lieu".[216]

The ECtHR's clear indications of measures in these cases is designed to facilitate the implementation of its judgment by the respondent state while easing the ECtHR's backlog of cases. Moreover, pilot judgments promote more effective CoM supervision over cases which raise structural issues and thus prevent and/or adjourn multiple similar applications.

213 *Sedjovic v. Italy,* No. 56581/00, 01/03/2006, para. 127.
214 The pilot judgment procedure was put in place following the adoption of CoE, Committee of Ministers Resolution Res(2004)3, On judgments revealing an underlying systemic problem, 12 May 2004.
215 *Broniowski v. Poland,* No.31443/96 [GC], 22/06/2004.
216 *Ibid.*, para. 194.

10. Application of the ECtHR's jurisprudence in the context of displacement

In considering the main judgments involving IDPs where the ECtHR found continuing violations of Article 1 Protocol No. 1, the ECtHR's approach at the stage of just satisfaction is as follows:

a. The Cyprus cases

- In the early case of Loizidou v Turkey,[217] the ECtHR reiterated that the applicant remained the legal owner of her property and that because of the denial of access to it, she had lost all control over and any possibility to use and enjoy the property. The applicant had only claimed for the loss of use of the land and the ECtHR ruled that she was "entitled to a measure of compensation in respect of losses directly related to this violation of her rights as from the date of Turkey's acceptance of the compulsory jurisdiction of the Court, namely 22 January 1990, until the present time".[218] The ECtHR also awarded the applicant non-pecuniary damages "in respect of the anguish and feelings of helplessness and frustration" experienced by the applicant over a long period of time.[219] However, the ECtHR added that the case concerned the individual applicant and not the property rights of all displaced Greek Cypriots.[220]
- In addition to the inter-state case of Cyprus v. Turkey, almost 1400 applications were submitted by displaced Greek Cypriots claiming violations of Article 1 Protocol No. 1 and Article 8, by 2004, the so called "post-Loizidou cases". The ECtHR issued judgments in the case of Demades v. Turkey, and in the case of Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey on 31October 2003, finding continuing violations of Article 1 Protocol No.1. (and in the case of Demades of Article 8 as well). The ECtHR had declared admissible, in the late 1990s and early 2000s, approximately another 40 similar cases. Judgments finding violations of the right to property, and in most the right to home as well, were issued in 2009-2010 as were judgments of just satisfaction, awarding the applicants both pecuniary damages for loss of use and non-pecuniary damages for feelings of anguish and helplessness as in the Loizidou case.

217 *Loizidou v Turkey,* No. 15318/89 (just satisfaction), 28/07/1998.
218 *Ibid.*, para. 31.
219 *Ibid.*, para. 39.
220 *Ibid.*, para. 40.

- In the pilot judgment of Xenides-Arestis v. Turkey,[221] one of the later post-Loizidou cases, involving denial of access to property and home as a result of displacement, the ECtHR, reiterated its position regarding the responsibility of states to take measures to remedy violations.[222] The ECtHR held that Turkey must introduce a remedy which would secure genuine effective relief in respect of violations under both Article 8 and Article 1 Protocol No. 1 not only for the applicant Xenides-Arestis, but also for all other similar pending applications.[223] In its admissibility decision in the same case,[224] the ECtHR rejected the existing compensation mechanism offered by Turkey as an effective remedy for a number of reasons but "most importantly […because] the terms of compensation do not allow for the possibility of restitution of the property withheld". Following this judgment Turkey introduced within the northern part of Cyprus, the "TRNC", a "new compensation and restitution mechanism", which "in principle had followed the indications of the ECtHR in the admissibility decision" but because the parties had failed to reach a friendly settlement,[225] the ECtHR was not in a position to examine its effectiveness in detail.[226] The ECtHR awarded the applicant both pecuniary and non-pecuniary damages as it did in Loizidou and also did so in the post-Loizidou cases that it did consider, issuing judgments on the merits and on just satisfaction, almost 20 years after they were first submitted.
- In its admissibility decision in the eight test cases of Demopoulos and Others v. Turkey,[227] the ECtHR tested the new mechanism and found that it provided "an accessible and effective framework of redress" respecting claims of violation of the right to property by Greek Cypriots so that applicants need to exhaust

221 *Xenides-Arestis v. Turkey,* No. 46347/99 (merits), 22/12/2005.

222 *Ibid.*, para. 39: "It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers of the Council of Europe. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment …".

223 *Xenides-Arestis v. Turkey,* No. 46347/99, 22/12/2005, para. 40.

224 *Xenides-Arestis v. Turkey,* No. 46347/99 (dec.), 14/03/2005.

225 The Court points out that the parties failed to reach an agreement on the issue of just satisfaction where, like in the case of *Broniowski v. Poland*, No. 31443/96 (friendly settlement) [GC], 28/09/2005.

226 *Xenides-Arestis v. Turkey,* No. 46347/99, 07/12/2006, para. 37.

227 *Demopoulos and Others v. Turkey,* Nos. 46113/99 & 3843/02 & 13751/02 & 13466/03 & 10200/04 & 14163/04 & 19993/04 & 21819/04 (dec.), 01/03/2010.

this remedy before bringing an application before the ECtHR. The ECtHR observed that the Cyprus cases result from a long-standing political problem which the parties are responsible for resolving and that the passage of time[228] has to be taken into consideration when determining the possible remedies that the respondent government is required to provide. In that respect "…it would be unrealistic to expect that […] the Court should or could directly order the Turkish Government to ensure that these applicants obtain access to, and full of possession of their properties, irrespective of who is now living there or whether the property is allegedly in a military sensitive zone or used for vital public purposes".[229]

- Relying on its existing jurisprudence on state responsibility to redress the violation, and pointing out that even in the context of unlawful expropriation, the state has the freedom to choose the means to comply with the judgment, the ECtHR concluded, "[…] 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 […] has imposed the alternative requirement on the Contracting State to pay compensation for the value of the property […] it does not perceive any difference of principle where the illegality is on an international level".[230]

- The ECtHR ruled the case inadmissible and the rest of the Cypriot cases were struck-out for non-exhaustion of domestic remedies. The Immovable Property Commission that was set up to consider claims of Greek Cypriot property owners in the north has been operating for almost ten years at the time of the publication of this handbook, and resolved a small percentage of applications. In these applications, it has awarded compensation as a matter of practice with restitution being the exception.[231]

b. Cases concerning destruction of property in South Eastern Turkey

- In Doğan and Others v. Turkey,[232] the ECtHR noted that the respondent government had already introduced a compensation law to redress the grievances of persons who had been denied

228 *Ibid.*, para. 84.
229 *Ibid.*, paras. 111-113.
230 *Ibid.*, para. 114.
231 See statistics provided by the Immovable Property Commission at http://www.tamk.gov.ct.tr/dokuman/Bitenler.pdf
232 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02 (just satisfaction), 13/07/2006.

access to their possessions and villages. The ECtHR had examined this compensation mechanism in the test case of İçyer v. Turkey[233] and found that Turkey had addressed the systemic problem and introduced an effective remedy. Consequently 1500 applications were rejected for non-exhaustion of domestic remedies. In the case of Doğan, which had been examined by the ECtHR earlier, the ECtHR stated that the return of the applicants to their village and compensation for loss for the period during which they were denied access "would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 and Article 8 of the Convention".[234] However, the applicants no longer wished to return. Therefore, the ECtHR awarded them pecuniary damage for damage to their property for some of the applicants concerned and the loss of earnings.

- The earlier case of Akdivar and Others v. Turkey,[235] involved applicants who had fled following the burning of their village, the ECtHR awarded them pecuniary damages for the loss of their houses and loss of income from their cultivated and arable land and loss of their livestock, as well as expenses for alternative rented accommodation.

- The judgment of the ECtHR the similar case of Selçuk and Asker v. Turkey,[236] was in line with the cases described above, awarding the applicants pecuniary damages for the loss of their houses, loss of income and alternative accommodation.

c. Recent ECtHR cases

- The ECtHR has awarded compensation to a number of claimants in cases brought against Azerbaijan for the loss of income as a result of lack of access to property and loss of income therefrom as well as non-pecuniary damages.[237]

- In Chiragov and Others v. Armenia and Sargsyan v. Azerbaijan, the most recent cases concerning loss of property and homes

233 *İçyer v. Turkey*, No. 18888/02 (dec.), 12/01/2006.
234 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02 (just satisfaction), 13/07/2006, para. 48
235 *Akdivar and Others v. Turkey*, No. 21893/93 (just satisfaction), 01/04/1998.
236 *Selçuk and Asker v. Turkey*, Nos. 23184/94 & 23185/94, 24/04/1998.
237 See for example: *Soltanov v. Azerbaijan,* Nos. 41177/08 & 41224/08 & 41226/08 & 41245/08 & 41393/08 & 41408/08 & 41424/08 & 41688/08 & 41690/08 & 43635/08, 13/01/2011, paras. 24-29; *Isgandarov and Others v. Azerbaijan,* Nos. 50711/07 & 50793/07 & 50848/07 & 50894/07 & 50924/07, 08/07/2010, paras. 39-42; *Jafarov v. Azerbaijan*, No. 17276/07, 11/02/2010, paras. 47-50.

by displaced applicants, the ECtHR referred extensively[238] to the relevant UN and CoE standards which provide guidance regarding "legal and technical issues surrounding housing and property restitution".[239] The ECtHR quoted in full the relevant Pinheiro Principles[240] and PACE Resolution 1708(2010), Solving Property issues of refugees and displaced persons. The ECtHR then urged the respondent governments to obtain guidance from these standards[241] in order to protect the applicants' property rights and that

> […] pending a comprehensive peace agreement, it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.

- Furthermore, the ECtHR stressed that the ongoing peace negotiations within the OSCE Minsk Group "do not absolve the Government from taking other measures especially when negotiations have been pending for such a long time".[242] Moreover, the ECtHR referred to PACE Resolution 1708(2010), which urges member states to "guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts of the status of a particular territory".

11. Restitution and Compensation

The CoM Recommendation Rec (2006)6[243] on internal displacement recommends that member states follow the *Guiding Principles*

238 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 96; *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 98.

239 *Ibid.*

240 I.e. Principles 2, "The rights to housing and property restitution", Principle 3, "the right to non-discrimination", Principle 12, "National procedures, institutions and mechanisms", Principle 13, "Accessibility of restitution claims procedures", Principle 15, "Housing, land and property records and documentation", Principle 21 "Compensation".

241 *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 238; *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 199.

242 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 198; see also *Demades v. Turkey*, No. 16219/90, 31/07/2003, paras. 29-37 & 44-46; and *Eugenia Michaelidou Developments Ltd and Michael Tymvios v. Turkey*, No. 16163/90, 31/07/2003, paras 28-31.

243 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006.

when addressing issues of internal displacement. It recognises that IDPs are entitled to the enjoyment of their property and possession and asserts their right "to repossess the property left behind following their displacement";[244] in the event of deprivation of property, IDPs are entitled to "adequate compensation".[245] The Recommendation further instructs member states to develop preventive measures to be implemented where internal displacement occurs,[246] and emphasises the right of IDPs "to return voluntarily, in safety and dignity to their homes or places of habitual residence or resettle in another part of the country in accordance with the ECHR".[247]

Expressly referring to the ECtHR's case-law, the Explanatory Memorandum to the Recommendation[248] states that victims of interference with property rights should be compensated with an amount reasonably related to the value of the property, otherwise the interference will be disproportionate.[249] At the same time, the refusal to pay any compensation at all is justifiable only in exceptional cases.[250] In terms of preventive measures that states should implement to limit the effects of displacement, the Memorandum suggests setting up a system of property registration so that IDPs can securely claim their properties back upon return.[251] The Memorandum further explains that the right of IDPs to return voluntarily and in dignity is protected under Article 2 of Protocol 4 to the ECHR, and makes suggestions regarding the measures to be taken by the authorities to ensure the reintegration of returnees.[252]

PACE Resolution 1708(2010), *Solving Property issues of refugees and displaced persons*[253] to which the ECtHR referred extensively in the cases of *Chiragov and Sargsyan,* calls on member states to be guided by the *Pinheiro Principles*, in addressing post-conflict displacement

244 *Ibid.*, para. 8.
245 *Ibid.*, para. 8.
246 *Ibid.*, para. 10.
247 *Ibid.*, para. 12.
248 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006.
249 See, for example, *Gladysheva v. Russia*, No.7097/10, 06/12/2011, para. 67; "In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1 of Protocol No. 1. This provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate "public interest" objectives may call for reimbursement of less than the full market value".
250 *The Holy Monasteries v. Greece,* Nos. 13092/87 & 13984/88, 09/12/1994, para. 71.
251 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, Explanatory Memorandum, para. 10.
252 *Ibid.*, para. 12.
253 PACE Resolution 1708(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010, para. 9.

and especially property and housing issues of IDPs. In particular, the Resolution calls on member states to:

- guarantee IDPs timely and effective redress for loss of access and right to property and housing irrespective of pending negotiations.[254]
- ensure that redress takes the form of "restitution in the form of confirmation of the legal rights of refugees and displaced persons to their property and restoration of their safe physical access to and possession of such property";[255] where restitution is "not possible" states must provide "adequate compensation" which has a reasonable relationship to the market value of the lost property.[256]
- provide accessible and effective procedures for claiming redress, and in the case of systematic displacement set up "special adjudicatory bodies" applying expedited procedures and relaxed evidentiary standards.[257]
- secure the independence and impartiality of adjudicatory bodies, by regulating its composition and providing adequate funding.[258]
- ensure the effectiveness of available remedies through restitution and compensation by providing compensation for non-pecuniary damage, loss of income and expenses incurred, wrongful destruction of property, damage/loss to movable property as well as by implementing measures to facilitate reintegration by providing the necessary infrastructure and social and economic support for IDPs who either return or resettle elsewhere.[259]

According to the Explanatory Memorandum[260], both the *Guiding Principles* and the *Pinheiro Principles*[261] consider restitution as the preferred from of redress and states that "post-conflict property restitution is now viewed as an emerging right in itself."

254 *Ibid.*, para. 10.1.
255 *Ibid.*, para. 10.2.
256 *Ibid.*, para. 10.2.
257 *Ibid.*, para. 10.6.
258 *Ibid.*, para. 10.7.
259 *Ibid.*, para. 10.8.
260 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons,* 8 January 2010, para. 5.1.
261 *Guiding Principles on Internal Displacement,* Principle 29.2; *Pinheiro Principles,* Principle 2.1.

The Memorandum makes references to the *Pinheiro Principles* in order to illustrate the importance that instrument attaches to the restitution of the property of displaced persons and refugees as opposed to compensation alone:

- Pinheiro Principle 21 states that IDPs and refugees are entitled to "full and effective compensation as an integral component of the restitution process".[262] However, the Principle makes it clear that such compensation should "only be used when the remedy of restitution is not factually possible", as determined by an impartial tribunal, or when the IDPs accept compensation instead of restitution or the remedy is determined in the context of an agreed peace settlement.
- Moreover, Pinheiro Principle 21.2 states that restitution is factually impossible only exceptionally, for example when the property in question has been destroyed or no longer exists.
- Pinheiro Principle 17 on "secondary occupants" states that such occupancy is relevant in determining the meaning and reach of "factual impossibility" of Principle 21.
- Furthermore, Pinheiro Principle 17 makes it clear that secondary occupants should be evicted if original owners return,[263] and though "safeguards of due process" should be in place to protect secondary occupants during justified evictions, these "do not prejudice the rights of legitimate owners, tenants and other right holders to repossess the housing, land and property in question in a just and timely manner".
- Even where third parties have in good faith acquired property from secondary occupants, whom the state would compensate when restitution occurs, "the egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property preempting the formation of *bona fide* property interests in such cases."[264]

262 *Pinheiro Principles*, Principle 21.1

263 But see *Demopoulos and Others v. Turkey*, Nos. 46113/99 & 3843/02 & 13751/02 & 13466/03 & 10200/04 & 14163/04 & 19993/04 & 21819/04 (dec.), 01/03/2010, para. 116: "The Court must also remark that some thirty-five years after the applicants, or their predecessors in title, left their property, it would risk being arbitrary and injudicious for it to attempt to impose an obligation on the respondent State to effect restitution in all cases, or even in all cases save those in which there is material impossibility… It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention" and para. 117: "Thus, there is no precedent in the Court's case-law to support the proposition that a Contracting State must pursue a blanket policy of restoring property to owners without taking into account the current use or occupation of the property in question…".

264 *Pinheiro Principles*, Principle 17.4.

Moreover, the rapporteur of the Explanatory Memorandum of PACE Resolution 1708(2010) briefly refers to the ECtHR's decision in *Xenides-Aresti v. Turkey*,[265] and specifically that the existing compensation mechanism was not an effective remedy because it did not allow for restitution at all. Based on this case and certain judgments in property-related cases, the rapporteur seems to conclude that the ECtHR has shown "an increasing tendency"[266] in favour of restitution over compensation.

The Explanatory Memorandum discusses the obligation of states to provide redress irrespective of ongoing negotiations[267] and the need to establish "rapid, accessible and effective procedures"[268] to expedite restitution claims in accordance with Principle 12 of the *Pinheiro Principles*. Principle 12 provides that states should take all necessary measures to promote flexible restitution procedures. If unable to do so because of a breakdown in the rule of law, states should request technical assistance from relevant international agencies.

265 *Xenides-Arestis v. Turkey,* No. 46347/99 (dec.), 14/03/2005, "Most importantly, however, the terms of compensation do not allow for the possibility of restitution of the property withheld. Thus, although compensation is foreseen, this cannot in the opinion of the Court be considered as a complete system of redress regulating the basic aspect of the interferences complained…". See also *Demopoulos and Others v. Turkey,* Nos. 46113/99 & 3843/02 & 13751/02 & 13466/03 & 10200/04 & 14163/04 & 19993/04 & 21819/04 (dec.), 01/03/2010, para. 111, on the effect that the passage of time has on restitution as a remedy for loss of properties by IDPs in the northern part of Cyprus.

266 PACE Doc. 12106 Report, *Solving property issues of refugees and internally displaced persons,* 8 January 2010, paras. 5.1-5.2.

267 *Ibid*., para. 5.3.

268 *Ibid*., para. 5.6.

III. RIGHT TO HOME UNDER THE ECHR

Under Article 8.1 of the ECHR "everyone has the right to respect for his private and family life, his home and his correspondence". Through its case-law, the ECtHR has interpreted these different interests in a flexible and dynamic way so as to widen the scope of protection to reflect societal and technological developments. By acknowledging that the ECHR is a "living instrument",[269] the ECtHR emphasizes that the ECHR must, therefore, "move with the times". The ECtHR has, thus, emphasised that these are autonomous concepts and incrementally, in its recent case-law, it has extended the protection afforded by Article 8 to a wide area of interests under private and family life, home and correspondence.

The ECtHR's case-law on the meaning of "home" under the ECHR, whilst not extensive, has established certain factors as determinative in deciding whether a house, is the applicant's home. These factors include "sufficient continuing links",[270] legal or proprietary interest,[271] presence or absence of an alternative home, a place treated by the "applicant and his family as a home",[272] or where private and family

269 *Tyrer v. the United Kingdom*, No. 5856/72, 25/04/1978, para. 30.

270 *Gillow v. the United Kingdom*, No. 9063/80, 24/11/1986.

271 Commission decisions in *Wiggins v. the United Kingdom*, No.7456/76 [ECommHR. dec.], 08/02/1978; *S v. the United Kingdom*, No.16757/90 [ECommHR. dec.], 21/10/1992; see *Chapman v. the United Kingdom*, No. 27238/95 [GC], 18/01/2001.

272 *Giacomelli v. Italy*, No. 59909/00, 02/11/2006; *Khatun and 180 Others v. the United Kingdom*, No. 38387/97 (dec.), 01/07/1998. With reference to Cyprus cases see for example *Demades v. Turkey*, No. 16219/90, 31/07/2003, para. 31; *Ioannou v. Turkey*, No. 18364/91, 27/01/2009, para. 35; *Kyriakou v. Turkey*, No. 18407/91, 27/01/2009, para. 31; *Michael v. Turkey*, No. 18361/91, 27/01/2009, para. 30; *Nicola v. Turkey*, No. 18404/91, 27/01/2009, para. 32.

life develops,[273] intention to remain and continuity. The ECtHR has balanced these different factors, the positive and negative, to reach its finding in each case without developing an exact definition. This approach has led to an extremely wide variety of interests that qualify for protection under Article 8, bringing into its ambit secondary homes,[274] businesses,[275] tenancies,[276] caravan sites,[277] and sometimes even temporary accommodation.

In *Gillow v. the United Kingdom*, the ECtHR reiterated that when claiming that a place constitutes his home, the applicant "must show that they enjoy concrete and persisting links with the property concerned"[278] identifying as the most significant element in the determination of the existence of a "home" to be "the nature of the ongoing or recent occupation of a particular property." In this case, the ECtHR found that despite the lengthy absence of the applicants from their home, they had retained such sufficient and continuing links with it, for it to be considered their "home" for the purposes of Article 8.[279]

The concept of home is an autonomous one under the ECtHR's jurisprudence and not dependent on classifications under domestic law.[280] Therefore, the criterion of "sufficient and continuous links" was developed and applied by the ECtHR to rule that a house is a home in a number of subsequent cases. At the same time, the legality of the occupation is not always relevant for the purposes of engaging Article 8.1. Therefore, in *Khatun and 180 Others v. the United Kingdom*,[281] the ECommHR decided that there were sufficient and continuing links in the case of all the applicants for their residences to qualify as "home", whether they had a "proprietary interest" in the land or were occupiers such as the children of the owners.

273 *Moreno Gomez v. Spain*, No. 4143/02, 16/11/2004.
274 *Demades v. Turkey*, No. 16219/90, 31/07/2003; *Diogenous and Tseriotis v. Turkey*, No. 16259/90, 22/09/2009.
275 *Niemitz v Germany*, No. 13710/88 [ECommHR. dec.], 29/05/1991.
276 *Prokopovich v. Russia*, No. 58255/00, 18/11/2004; *Blecic v. Croatia*, No. 59532/00, 29/07/2004.
277 *Buckley v. the United Kingdom*, No. 20348/92, 25/09/1996.
278 See e.g. *Gillow v. the United Kingdom*, No. 9063/80, 24/11/1986, para. 46.
279 *Gillow v. the United Kingdom*, No. 9063/80, 24/11/1986, para. 48.
280 In *Prokopovich* the ECtHR confirmed this analysis: "The Court recalls the Convention organs' case-law that the concept of "home" within the meaning of Article 8 is not limited to those which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place". See also *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 253; *Chiragov and Others v. Armenia*, No. 13216/05 [GC], 16/06/2015, para. 206.
281 *Khatun and 180 Others v. the United Kingdom*, No. 38387/97 [ECommHR. dec.), 01/07/1998.

The ECtHR has applied the continuous and sufficient link test in a number of cases against the United Kingdom concerning members of the Roma community.[282] In so doing, it ruled that the caravans in which the applicants had lived continuously and for a long period of time constituted "homes" protected under Article 8 of the ECHR. Similarly, in a number of tenancy cases, applicants were also found to have sufficient and continuing links with their flats, at the relevant time. For example, the flat in which the applicant lived with her partner, and used for her mailing address, qualified as a home.[283] In another case, despite frequent absences by the applicant from the flat where he was not registered, the applicant "retained sufficient continuing links" so as to enjoy the protection of the right to home under the ECHR.[284]

In *Blecic v. Croatia*[285] Article 8 was engaged following the termination by the authorities of the applicant's specially protected tenancy. The facts of the case indicated the applicant's intention to return to her flat, which could reasonably be regarded as her home, "at the material time, for the purposes of Article 8 of the Convention".[286] Specifically, the Court pointed out that:

> the applicant continuously lived in her flat in Zadar from 1953 until 26 July 1991, when she departed for Rome … the applicant left all the furniture in the flat as well as her personal belongings. She did not rent the flat to any other person; she locked it and asked her neighbour to take care of it during her absence.

In *Khamidov v. Russia*, the ECtHR held that the house of the applicant's brother as well as his own attracted the protection of Article 8.1, despite the fact that the applicant had legal title only to his home. The ECtHR stated in this regard that "[…] whilst there may be a significant overlap between the concept of 'home' and that of 'property' under Article 1 of Protocol No. 1, a home may be found to exist even where the applicant has no right or interest in real property". It must be noted that in *Khamidov*, the ECtHR reached this conclusion by attributing greater weight to the close family connections evidenced by the circumstances and in particular, by the closeness of the brothers' dwellings.[287]

282 *Buckley v. the United Kingdom*, No. 20348/92, 25/09/1996; *Chapman v. the United Kingdom*, No. 27238/95 [GC], 18/01/2001, para. 78.
283 *Prokopovich v. Russia*, No. 58255/00, 18/11/2004, para. 37.
284 *McKay-Kopecka v. Poland*, No. 45320/99 (dec.), 19/09/2006.
285 *Blecic v. Croatia*, No. 59532/00, 29/07/2004.
286 *Ibid.*, paras. 51-52.
287 *Khamidov v. Russia,* No. 72118/01, 15/11/2007, para. 129.

Ownership of the home by the applicant has been considered a positive factor in the ECtHR's assessment of the factual circumstances of each case though not determinative in reaching its conclusion. The ECtHR has repeatedly found that applicants, with "sufficient and continuous links" were entitled to the protection of Article 8 even where they had no legal interest in the flats or caravans or extended family habitations where they lived over long periods of time.

1. Right of IDPs to respect for family life and home

a.The concept of "home" in the context of displacement

It has already been noted that when examining claims by IDPs, the ECtHR has often found violations of both the right to property and the right to home under the ECHR. Inevitably, in the context of conflict, destruction of properties, occupation and forceful displacement of people from their homes, the relevant state violated both the right to home as well as the right to the enjoyment of property. In relation to the forceful eviction from established homes and ancestral lands in war zones, the ECtHR does not, in general, apply the continuing and sufficient links criterion in order to determine that the claimant had a home within the meaning of Article 8 of the ECHR.

In a number of cases against Turkey, the ECtHR applied its criteria of sufficient links and legal interest in a flexible, modified fashion, in the context of post-conflict displacement, and ruled that the applicants could claim that they had "homes" for the purpose of Article 8.

In *Menteş and Others v. Turkey*,[288] which related to the destruction of the applicants' homes by the Turkish security forces during its campaign against the PKK in south eastern Turkey, the ECtHR found that all the applicants, including one who did not own her house, were "within the scope of the protection guaranteed by Article 8 of the Convention".[289] The applicant had a "home" because of her "strong family connection" and the fact that she regularly spent considerable periods of time there. In the absence of a legal interest, a home is found where the applicant lives with the permission of the owner.

288 *Menteş and Others v. Turkey*, No. 23186/94, 28/11/1997.
289 *Ibid.*, para. 73.

In the fourth interstate case of *Cyprus v. Turkey* the ECommHR concluded unanimously, that during the period under consideration, there had been a continuing violation of Article 8 of the ECHR by the authorities' refusal to allow any Greek Cypriot displaced persons to return to their homes in northern Cyprus.[290] In its judgment in the case of *Cyprus v. Turkey*,[291] the ECtHR concluded that the complete denial of the right of any of the 200,000 Greek-Cypriot displaced persons to respect for their homes in northern Cyprus since 1974 constituted a continuing violation of Article 8 of the ECHR. It was not necessary for the ECtHR to determine whether the displaced Greek Cypriots had homes in the occupied north by a strict application of the criteria developed in its case-law. It was undisputed that such IDPs were living in residences where their furniture and possessions were kept and where their family life developed,[292] with the clear intention of remaining there.

Following this judgment, the ECtHR has often reiterated its conclusion regarding the continuing violation of Article 8 of the ECHR[293] that Greek Cypriot displaced persons remained subject to. In *Demades v. Turkey*[294] and *Diogenous and Tseriotis v. Turkey*,[295] the ECtHR found that a secondary/holiday house can be a home within the meaning of Article 8 of the ECHR. It specifically declared that

> […] a person may divide his time between two houses or form strong emotional ties with a second house, treating it as his home. Therefore, a narrow interpretation of the word "home" could give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of "private life", by excluding persons who find themselves in the above situations.[296]

b. Violation of the right of IDPs under Article 8 of the ECHR

In the case of *Zavou v. Turkey*,[297] where the applicants were Greek-Cypriot displaced persons, the ECtHR rejected the government's argument that the applicants' properties did not fall within the notion of home under Article 8. The Court stated clearly "they would have constituted a home […] which they had been obliged to leave". The ECtHR did not, in this judgment, consider the

290 *Cyprus v. Turkey*, No. 25781/94 (Comm.), 04/06/1999, para. 272.
291 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, paras. 172-175.
292 *Moreno Gomez v. Spain*, No. 4143/02, 16/11/2004.
293 See e.g. *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, paras.174-175; *Demades v. Turkey*, No. 16219/90, 31/07/2003, para.37; *Xenides-Arestis v. Turkey,* No. 46347/99 (merits), 22/12/2005, para.22; *Gavriel v. Turkey*, No. 41355/98, 20/01/2009, para.49; *Olymbiou v. Turkey*, No. 16091/90, 27/10/2009, para.62.
294 *Demades v. Turkey*, No. 16219/90, 31/07/2003.
295 *Diogenous and Tseriotis v. Turkey*, No. 16259/90, 22/09/2009.
296 *Demades v. Turkey*, No. 16219/90, 31/07/2003, para. 32.
297 *Zavou and Others v. Turkey*, No. 16654/90 (dec.), 26/09/2002.

applicants' enforced absence over the previous three decades to have severed the required connection with their homes so as to deprive them of the protection of Article 8.1. The ECtHR underlined the point by distinguishing the applicants' position from that of the applicant in *Loizidou*[298] who was the owner of property but had not established a home in the north of Cyprus.

In *Dogan v. Turkey*[299] the applicants, as in *Menteş*, were displaced persons evicted from their village and homes as a result of the conflict in south-eastern Turkey. When determining whether the applicants had a "possession" within the meaning of Article 1 Protocol No.1 the ECtHR noted that

> […] it is undisputed that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter […].[300]

Consequently, the ECtHR "was in no doubt" that the refusal of the authorities to allow applicants to return to their homes "in addition to giving rise to a violation of Article 1 of Protocol No. 1, constitutes at the same time a serious and unjustified interference with the right to respect for family lives and homes".[301] This conclusion was applied to all the applicants including those who were not owners of their homes but lived in their fathers' homes. The ECtHR reached the same conclusion in *Saghinadze v. Georgia*[302] finding a violation of Article 8 as well as Article 1 Protocol No.1, stating that the taking of "the cottage, which had been the first applicant's home for more than ten years" was an interference with both his right to respect for home and to the enjoyment of his possessions.[303]

In all the above cases against Turkey, the ECtHR declared the right of all IDPs to return to their homes and held that there was a continuing violation of Article 8 In the large majority of the post-*Loizidou* cases,[304]

298 *Loizidou v. Turkey,* No. 15318/89, (Merits) 18/12/1996, para. 66.
299 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004.
300 *Ibid.*, para. 139.
301 *Ibid.*, para. 159.
302 *Saghinadze and Others v. Georgia*, No. 18768/05, 27/05/2010, para. 122.
303 *Khamidov v. Russia,* No. 72118/01, 15/11/2007, paras. 119-146.
304 See, for example, *Orphanides v. Turkey*, No. 36705/97, 20/01/2009, para. 39; *Gavriel v. Turkey*, No. 41355/98, 20/01/2009, para. 44; *Ioannou v. Turkey*, No. 18364/91, 27/01/2009, para. 35; *Evagorou Christou v. Turkey*, No. 18403/91, 27/01/2009, para. 31; *Michael v. Turkey*, No. 18361/91, 27/01/2009, para. 30; *Nicola v. Turkey*, No. 18404/91, 27/01/2009, para. 32; *Hadjiprocopiou and Others v. Turkey*, No. 37395/97, 22/09/2009, para. 33; *Kyriakou v. Turkey*, No. 18407/91, 27/01/2009, para. 31; *Hapeshis and Hapeshi-Michaelidou v. Turkey*, No. 35214/97, 22/09/2009, para. 33; *Hadjithomas and Others v. Turkey*, No. 39970/98, 22/09/2009, para. 40; *Saveriades v. Turkey*, No. 16160/90, 22/09/2009, para. 25. "the house where the applicant was living qualified as a home within the meaning of Article 8 of the Convention, at the time when the acts complained of took place."

the ECtHR found continuing violations of both Article 1 Protocol No.1 and Article 8 of the ECHR. In respect of the latter provision, the Court reiterated that "the house the applicant was living in qualified as a 'home' within the meaning of Article 8 of the ECHR, at the time when the acts complained of took place". In rejecting the respondent government's refusal to acknowledge that the applicants' homes were where they regularly resided at the time of their displacement, the ECtHR reiterated that "… this house was treated by [the applicant] and his family as a home".[305]

The "factual circumstances" at "the time of the events" included wartime conditions, destruction of villages and burning of homes, enforced evictions, and well-established family connections. These were so serious that the lengthy enforced absences of the applicants, the establishment of alternative homes, and the absence of direct legal interest by some, could not be held to break the links to the applicants' homes and deprive them of the protection of Article 8. In addition, the concept of "home" under Article 8 has been logically interpreted by the ECtHR to include family life so that all family members residing under the same roof could consider it to be their home, regardless of whether they hold any present proprietary or legal interest. Family life is undoubtedly one of the "continuing and sufficient" links to a place of residence that qualifies it as a home for all those living there.

However, in the inadmissibility decisions of several post-*Loizidou* cases, such as *Demopoulos and Others v. Turkey*, in deciding whether the applicants' residence qualified as a home, the ECtHR, has to a certain extent shifted its position regarding the importance of ownership and the effect of the passage of time. Thus, it has held that because the applicants[306] were not the owners of the house where they were "allegedly residing at the time of the Turkish invasion", the ECtHR "is not convinced that a separate issue may arise under Article 8 of the Convention".[307] The houses where the applicants lived were their family homes and were owned by their husband or wife.

In *Demopoulos,* in the context of examining the effectiveness of the compensation and restitution mechanism set up by Turkey in the northern Cyprus, the ECtHR stated that where there "has never

305 See e.g. *Orphanides v. Turkey*, No. 36705/97, 20/01/2009, para. 39; *Gavriel v. Turkey*, No. 41355/98, 20/01/2009, para.44; *Kyriakou v. Turkey*, No. 18407/91, 27/01/2009, para. 31; *Hadjithomas and Others v. Turkey*, No. 39970/98, 22/09/2009, para. 40.

306 *Andreou Papi v. Turkey*, No. 16094/90, 22/09/2009, para. 54; *Loizou and Others v. Turkey*, No. 16682/90, 22/09/2009, para. 83; *Vrahimi v. Turkey*, No. 16078/90, 22/09/2009, para. 60.

307 *Andreou Papi v. Turkey*, No. 16094/90, 22/09/2009, para. 54.

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". In the absence of legal rights to occupation, "such time has elapsed that there can be no realistic expectation of taking up, or resuming, occupation in the absence of such rights".[308] In both cases the passage of time has weakened the link to property/home to such an extent that the right itself resembles an empty shell[309] - the title is "empty" the home is "from the past".[310]

In two inadmissibility decisions, *Papayianni and Other v. Turkey* and *Fieros and Others v. Turkey*,[311] shortly after *Demopoulos,* joining a number of cases with Article 8 claims, the ECtHR went beyond its judgment in *Demopoulos,* rejecting outright the claims of all applicants to the protection of Article 8, except that of the title holder. Some were found to be too young, with "no concrete ties in existence at this moment in time", and the rest, older and in some cases having lived for decades in the family home before 1974, did not have title to the property. These joined applications concern family members, all claiming violations of the right to respect for home since 1974, which is the situation of the vast majority of all Greek-Cypriot IDPs in that they are members of displaced families who had been sharing the family home.

As already discussed, its recent judgments of *Chiragov v. Armenia* and *Sargsyan v. Azerbaijan,* the ECtHR found continuing violations of the right to respect for the applicants' home as well as their right under Article 1 Protocol No. 1 of the ECHR. In relation to the right under Article 8, the ECtHR reiterated that the concept of "home", "private life" and "family life" are autonomous concepts,[312] and found the claims that the applicants had established homes in the areas from where they were forced to flee, were supported by the circumstances of their case. They worked and lived for a long period of time in houses they had built in the same area, and the graves of their relatives were found in the village cemetery, supported by witness statements. The forced

308 *Demopoulos and Others v. Turkey,* Nos. 46113/99 & 3843/02 & 13751/02 & 13466/03 & 10200/04 & 14163/04 & 19993/04 & 21819/04 (dec.), 01/03/2010, para. 136.

309 *Ibid.*, para.111: "The title is emptied", para. 137: "the links to that property are so attenuated as to cease to raise any, or any separate, issue under Article 8".

310 *Ibid.*, para. 136.

311 *Papayianni and Others v. Turkey*, Nos. 479/07 & 4607/10 & 10715/10 (dec.), 06/07/2010. See also *Fieros and Others v. Turkey*, Nos. 53432/99 & 54086/00 & 57899/00 & 58378/00 & 63518/00 & 66141/01 & 77752/01 & 10192/02 & 25057/02 & 35846/02 (dec.), 05/10/2010.

312 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, para. 206; *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, para. 253.

displacement and involuntary and lengthy absence from their "homes" cannot be considered to have broken the continuous link with their place of residence.[313] The ECtHR thus found a continuous breach of the applicants' rights under Article 8 of the ECHR.

2. Remedies for the violation of the right to home

As a general rule, the ECtHR will award non-pecuniary damages when there is a finding of violation of the right to home under Article 8. As discussed above, it will also do so in the case of a violation of the right to property under Article 1 Protocol No.1, as well as when there are violations under both provisions.

In its just satisfaction judgments in the cases where it has found unjustified interference with the right to respect of home, the ECtHR will typically consider remedies under Article 41 of the ECHR[314] which provides as follows: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." Under the ECtHR's well-established jurisprudence, Article 41 will come into play whenever *restitutio in integrum* is either *de jure or de facto* impossible, so that the respondent state can only provide partial reparation under Article 46. In those circumstance the ECtHR steps in to afford the applicant just satisfaction under Article 41 of the ECHR.

It is notable then that the ECtHR awards non-pecuniary damages to successful claimants under Article 8. The assumption is that it cannot order the respondent state to reinstate the applicant to his or her home and land. Moreover, in general, the ECtHR will not order a respondent state to effect restitution when there is a violation under Article 1 Protocol No.1.

In its just satisfaction judgment in the early case of *Gillow v. the United Kingdom*,[315] the ECtHR responded to the applicants' demand

313 *Chiragov and Others v. Armenia,* No. 13216/05 [GC], 16/06/2015, paras.206-207; *Sargsyan v. Azerbaijan*, No. 40167/06 [GC], 16/06/2015, paras. 256-261.

314 Previously Article 50: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

315 *Gillow v. the United Kingdom*, No. 9063/80 (just satisfaction), 14/09/1987.

that it directs an order to the government to reinstate their "residence qualification" was that it was not "empowered under the Convention to make an order of this kind".[316] Instead, the ECtHR awarded the applicants "moral damages," under Article 50 of the ECHR (now Article 41) because the damage they had "sustained could not be compensated solely by the finding of a violation. For one year, they lived with a feeling of insecurity, prompted by uncertainty as to whether they would finally be permitted to stay in their home or be expelled from it".[317]

In *Menteş and Others v Turkey,*[318] the ECtHR rejected the government's contention that the finding of violations constituted adequate just satisfaction and ruled that an award for non-pecuniary damages should be made under Article 50 (now Article 41) of the ECHR. The violations found under Article 8 and 13 of the ECHR were of such seriousness that the mere finding of the violation was insufficient.[319] In *Prokopovich v. Russia,* the ECtHR awarded the applicant non-pecuniary damages for the violation of her right to respect of her home because she "undoubtedly sustained significant non-pecuniary damage which cannot be compensated solely by the finding of a violation".[320]

In *Saghinadze v. Georgia*, one of the exceptional cases in which the ECtHR has indicated to the respondent government a specific measure to achieve *restitutio in integrum*, ruling under Article 41 "that the most appropriate form of redress would be *restitutio in integrum* under the IDPs Act, that is, to have the cottage restored to the first applicant's possession".[321] In the subsequent just satisfaction judgment, the ECtHR found that the return of the applicant's cottage, his home, was not feasible but considered that the government's offer to transfer ownership to the applicant of equivalent dwellings, was appropriate reparation for the "pecuniary loss suffered by the applicant as a result of a breach of his rights under Article 8 of the Convention and Article 1 of Protocol No. 1".[322]

The just satisfaction judgment in the case of *Doğan and Others v. Turkey* [323] bears some similarity to *Saghinadze,* in that the respondent government had already introduced measures to remedy the systemic problem and provide an effective remedy.[324] Consequently, the

316 *Ibid.*, para. 9.
317 *Ibid.*, para. 13.
318 *Menteş and Others v. Turkey*, No. 23186/94 (just satisfaction), 24/07/1998.
319 *Ibid.*.
320 *Prokopovich v. Russia*, No. 58255/00, 18/11/2004, para. 118.
321 *Saghinadze and Others v. Georgia*, No. 18768/05, 27/05/2010, para. 160
322 *Saghinadze v. Georgia*, No. 18768/05 (just satisfaction), 13/01/2015, para. 16.
323 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02 (just satisfaction), 13/07/2006, para. 48.
324 *Ibid.*, para. 6.

ECtHR considered that the principal judgment, following which the respondent government introduced measures facilitating the return of the applicants, as well as other displaced persons in a similar situation, to their village "constitutes sufficient just satisfaction for any non-pecuniary damage arising from the violations established of Articles 8 and 13 of the Convention and Article 1 of Protocol No. 1."[325]

In *Khamidov v Russia*[326] the ECtHR ruled that the occupation of and damage to the applicant's property which resulted in the infringement of his rights under Article 8 and Article 1 Protocol No. 1, caused him "anguish and distress" which cannot be compensated by the finding of the violation alone. Consequently, it awarded the applicant non-pecuniary damages under Article 41 of the ECHR.

3. Cyprus cases

In all the cases that came after *Loizidou* in which that the ECtHR considered and found violations of Article 8, alone or in addition to a violation of Article 1 Protocol No.1, it awarded non-pecuniary damages as just satisfaction under Article 41 of the ECHR. Thus in *Xenides-Arestis v. Turkey*,[327] the ECtHR ruled that it

> […] is of the opinion that an award should be made under this head in respect of the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use her property as she saw fit and to enjoy her home. Making an equitable assessment, the Court awards the applicant EUR 50,000 under this head.

Similarly in the just satisfaction judgment in *Demades v. Turkey*,[328] in almost the exact same language, the ECtHR stated that it

> […] is of the opinion that an award should be made under this head [non-pecuniary damages] in respect of the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use his property as he saw fit and to enjoy his home. Making an equitable assessment and tak-

325 *Ibid.*, para. 61.
326 *Khamidov v. Russia,* No. 72118/01, 15/11/2007, para. 201.
327 *Xenides-Arestis v. Turkey,* No. 46347/99 (just satisfaction), 07/12/2006, para. 47.
328 *Demades v. Turkey*, No. 16219/90 (just satisfaction), 22/04/2008, para. 29.

ing into account that the house was the applicant's secondary home […] the Court awards EUR 45,000 under this head.

In all the Cyprus cases where there were findings of continuing violations of both Article 1 Protocol No.1 and Article 8, the ECtHR awarded non-pecuniary damages as well as pecuniary damages, the same language is used as above.[329]

4. CoE standards: the right of IDPs to return to their homes

The various instruments adopted by the organs of the CoE in respect of IDPs, emphasise the right of IDPs to return voluntarily to their homes and places of habitual residence in addition to their right to repossess the properties from where they were arbitrarily and forcefully evicted. These instruments through generally referring to restitution in relation to possessory rights, do not distinguish between possessions and homes in setting standards and providing guidelines for remedying the violations of IDPs' rights, preferably by restoring their properties and homes.

Both the *Guiding Principles* and the *Pinheiro Principles* which have been endorsed by the CoE in the various instruments discussed in this handbook, as well as the ECtHR in several of its judgments also referred in this publication, provide for the protection of the homes of IDPs and their right to return following forceful displacement:

- Principle 28 of the *Guiding Principles* provides that "Competent authorities have the primary duty and responsibility to establish conditions as well as provide the means which allow internally displaced persons to return voluntarily to their homes […]".
- Principle 6 of the *Pinheiro Principles* provides that "Everyone has the right to be protected against arbitrary or unlawful interference with his or her privacy and home" and "States shall ensure

329 See for example: *Diogenous and Tseriotis v. Turkey,* No. 16259/90 (just satisfaction), 26/10/2010, para. 36; *Zavou and Others v. Turkey,* No. No. 16654/90 (just satisfaction), 26/10/2010, para. 43; *Saveriadis v. Turkey,* No. 16160/90 (just satisfaction), 26/10/2010, para. 39; *Epiphaniou and Others v. Turkey,* No. 19900/92 (just satisfaction), 26/10/2010, para. 45; *Ramon v. Turkey,* No. 29092/95 (just satisfaction), 26/10/2010, para. 35; *Orphanides v. Turkey,* No. 36705/97 (just satisfaction), 22/06/2010, para. 41; *Gavriel v. Turkey,* No. 41355/98 (just satisfaction), 22/06/2010, para. 39 (In these cases the ECtHR took into account in its final calculation of the awards, the offers for "loss of use" made by the compensation and restitution mechanism set up in the northern part of Cyprus following the judgment in *Xenides-Arestis).*

that everyone is provided with safeguards of due process against arbitrary or unlawful interference with his or her privacy and his or her home."

- Section IV of the *Pinheiro Principles,* entitled "The right to Voluntary Return in Safety and Dignity", sets out the right of all IDPs and refugees to return voluntarily to their former homes and residences in safety and dignity and calls on states not to impede such return or force or coerce anyone to do so.

CoM Recommendation Rec(2006)6 on internally displaced persons,[330] which recommended the implementation of the *Guiding Principles* in the member states of the CoE,[331] provides that IDPs have "the right to return voluntarily and in dignity to their homes or places of habitual residence or to resettle in another part of the country in accordance with the European Convention of Human Rights". This enshrines both the right to respect for home under article 8 of the ECHR as well as the right to free movement guaranteed by Article 2 of Protocol 4 to the ECHR.[332]

PACE Resolution 1708 (2010), *Solving Property issues of refugees and internally displaced persons*[333] recalls that the ECHR includes amongst other guarantees that of Article 8 of the ECHR and draws attention to the *Pinheiro Principles* for guidance on the issues of redress for the loss of property in the context of displacement.[334] It calls on member states to ensure timely and effective redress for loss of access to and rights to housing and property abandoned by IDPs;[335] to ensure that all forms of home ownership, including occupancy and tenancy rights existing in former communist systems in eastern Europe, are recognised and afforded the protection of Article 8 of the ECHR.[336] Further, it calls on member states to ensure that absence from such accommodations "shall be deemed justified until the conditions that allow for voluntary return in safety and dignity are restored";[337]to provide for effective, expedited, accessible procedures for claiming redress,[338] ensure the effectiveness of redress through restitution, and provide non pecuniary damage for long term displacement and dispossession.[339]

330 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006, para. 12; *Guiding Principles on Internal Displacement*, Principle 29.
331 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, General Considerations.
332 *Ibid*.
333 PACE Resolution 1708(2010), Solving property issues of refugees and internally displaced persons, 28 January 2010.
334 *Ibid*., paras.5-6.
335 *Ibid*., paras.10.1-10.2.
336 *Ibid*., para.10.4.
337 *Ibid*., para.5.
338 *Ibid*., para.10.6.
339 *Ibid*., para.10.8.

IV. FAMILY LIFE AND MISSING PERSONS

One of the most harrowing aspects of war and displacement is the break-up of the family unit, the loss and often the dispersal of its members and the lack of information regarding their fate and whereabouts especially where there is prolonged and/or indefinite disappearance of family members.

Article 8 of the ECHR guarantees separately the right to respect for family life as do a number of other international law instruments.[340] In addition, issues regarding forced disappearances and missing persons engage Article 2 of the ECHR which protects the right to life and imposes positive obligations on states to take measures to prevent unlawful killings and to investigate properly and in a timely fashion any such killings or disappearances. Article 3 of the ECHR, which prohibits torture, inhuman or degrading treatment or punishment, is also relevant in respect of the pain and suffering endured by the relatives of missing persons.

Article 16 of the European Social Charter, the right of the family to social, legal and economic protection, describes the family as a fundamental social unit, which must be protected and promoted. Article 17 guarantees the right of children and young persons to social, legal and economic protection.

340 See, for example, European Social Charter (Revised) 3.V.1996- Article 16.

Family reunification is addressed specifically by Principle 17 of the *Guiding Principles*, which guarantees the right of every human being to respect of his or her family life,[341]. This principle states that family members who wish to remain together shall be allowed to do so,[342] and where families have been separated by displacement, requires that all efforts should be made to reunite them as soon as possible.[343]

Principle 16 of the *Guiding Principles* further provides that IDPs have the right to know the fate and whereabouts of missing relatives,[344] and authorities should try to establish the fate and whereabouts of missing IDPs and cooperate with relevant international organisations pursuing such matters.[345] The next of kin of missing persons must be kept informed of the progress of the investigation into their missing relatives at all stages.

In the CoM Recommendation Rec(2006)6,[346] endorsing the *Guiding*, member states are reminded of their positive obligations under Article 8 of the ECHR and are directed to take the necessary measures to:

> facilitate the reunification of families which are separated by internal displacement. Such measures may include locating missing family members, notably those that have been taken hostage. Competent authorities should convey to relatives of an internally displaced person […] any information they may have on his/her whereabouts.[347]

The Explanatory Memorandum to Recommendation Rec(2006)6 emphasises the right of the members of a displaced family to remain together and underlines both the negative obligation of the member states not to hinder the development of family ties as well as the positive obligation to take steps to reunite families dispersed during displacement.[348]

In *Varnava and Others v. Turkey*,[349] a case concerning nine Greek-Cypriots who disappeared during the 1974 military conflict in Cyprus,

341 Guiding Principles on Internal Displacement, Principle 17.1.
342 *Ibid.*, Principle 17.2.
343 *Ibid.*, Principle 17.3.
344 *Ibid.*, Principle 16.1.
345 *Ibid.*, Principle 16.2.
346 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006; see also CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, General Considerations.
347 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006s, para.6.
348 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, para. 6.
349 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, paras. 89-92.

the ECtHR made extensive references to the following international law documents condemning and prohibiting such enforced disappearances:

- *The United Nations Declaration on the Protection of All Persons from Enforced Disappearance*,[350] which describes an act of enforced disappearance as a continuing offence, as long as the fate and whereabouts of the missing persons remain unknown.[351] It considers such an act "an offence to human dignity" and condemns it as "a grave and flagrant violation of the human rights […] proclaimed in the Universal Declaration of Human Rights."[352] It calls on states to take all necessary measures to prevent and terminate acts of enforced disappearance[353] and provide the victims and their family with redress and "the right to adequate compensation".[354]

- *The International Convention for the Protection of All Persons from Enforced Disappearance* of 20 December 2006[355] prohibits all acts of enforced disappearance allowing for no exceptions whatsoever.[356] It provides a definition for enforced disappearance as

> […] the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons […] acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Further, Articles 3 and 4 of the Convention calls on states to take all measures to investigate acts of enforced disappearance and to ensure that it is a criminal offence.

- *The Inter-American Convention on Forced Disappearance of Persons* of 1994 calls on states neither to practice nor tolerate forced disappearance of persons under any circumstances and punish

350 United Nations Declaration on the Protection of all Persons from Enforced Disappearance (1/Res/47/133, 18 December 1992).
351 *Ibid*., Article 17.1.
352 *Ibid*., Article 1.1.
353 *Ibid*., Article 3.
354 *Ibid*., Article 19.
355 The International Convention for the Protection of All Persons from Enforced Disappearance entered into force on 23 December 2010.
356 *Ibid*., Article 1.2 "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

those who commit such a crime; it calls on states to take all necessary legislative measures defining forced disappearance as an offence punishable in ways that reflect "its extreme gravity".

In the later case of *Palić v. Bosnia and Herzegovina*,[357] the ECtHR draws a distinction between missing persons on the one hand and enforced disappearances on the other, pointing out that the latter, as defined in the International Convention for the Protection of All Persons from Enforced Disappearance, is a much narrower concept than the former. In *Palić,* the ECtHR referred to Articles 32-34 of the Additional Protocol to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, in order to emphasise the right of families to be informed of the fate of missing relatives; the obligation of all parties to a conflict to search for persons reported missing and to facilitate the establishment of contact with the dispersed family members and the drawing up of lists of graves and details of the dead buried therein. In addition, the ECtHR drew attention to Article 7 of the Rome Statute of the International Criminal Court of 17 July 1998, which considers the widespread or systematic practice of enforced disappearance to be a crime against humanity.[358]

In a recent report on *Missing persons and victims of enforced disappearance in Europe*,[359] published by the CoE Commissioner for Human Rights, there are tens of thousands of missing persons/victims of enforced disappearance reported in areas of conflict and displacement within the CoE.. The Nagorno-Karabakh, Abkhazia and South Ossetia conflicts are responsible for 7,538 missing persons. As a result of the conflict in the Western Balkans of the 1990s, 10,824 missing persons are still not accounted for. Moreover, the 1974 Cyprus war and previous inter communal conflict resulted in 1,508 Greek Cypriot and 493 Turkish Cypriot missing persons. In addition, there are still 5,000 persons missing in the Chechen Republic and Turkey's military campaign against the PKK in Eastern Anatolia has resulted in hundreds of enforced disappearances estimated to be 1,350 for the years 1980–2103.

357 Palić v. Bosnia and Herzegovina, No. 4704/04, 15/02/2011, paras.32-34.
358 *Ibid*., paras.32-34.
359 *Missing persons and victims of enforced disappearance in Europe,* Issue paper published by the CoE Commissioner of Human Rights, March 2016.

This section deals briefly with the ECtHR's jurisprudence on the right to respect for family life and the guarantees under Article 2 and 3 of the ECHR in relation to enforced disappearances and missing persons, with a particular emphasis on violations of these rights in the context of displacement.

1. Family life under the ECtHR's jurisprudence

The concept of family life, as with the other concepts under Article 8, is a developing one in the jurisprudence of the ECtHR, interpreted in a dynamic way to take into account the evolving attitudes of European national laws towards "family life". In *Kroon and Others v. the Netherlands*,[360] the ECtHR reiterated its flexible approach to the meaning of "family life" by stating that the "the notion of 'family life' in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* 'family ties' where parties are living together outside marriage…".[361] Similarly, in the case of *Marckx v. Belgium*,[362] the ECtHR considered that Article 8 applies equally to the "legitimate" and the "illegitimate" children. The ECtHR stated further that "family life" under Article 8, includes at the very least "ties between near relatives, for instance those between grandparents and grandchildren".[363]

The ECtHR has a case by case approach in this area, but in general, the applicable principle is that the Court finds that there is "family life" where close ties between those concerned are shown to exist. Member states are prohibited from interfering with "family life" except where such interference is as prescribed by Article 8.2 "in accordance with the law" and "necessary to a democratic society".[364] Furthermore, member states are also bound by positive obligations to respect and preserve "family life" under Article 8 of the ECHR as illustrated in the ECtHR's extensive case-law in respect of the relations between parents and children.

In the context of displacement, the ECtHR's approach to "family life" is particularly relevant as the families of IDPs are often extended ones,

360 *Kroon and Others v. the Netherlands*, No. 18535/91, 27/10/1994, para.30.
361 See also *Keegan v. Ireland*, No. 16969/90, 26/05/1994, para.44.
362 *Marckx v. Belgium*, No. 6833/74, 13/06/1979, para.31.
363 *Ibid.*, para.45.
364 In order for the interference not to infringe Article 8 see for example *Silver and Others v. the United Kingdom*, Nos. 5947/72 & 6205/73 & 7052/75 & 7061/75 & 7107/75 & 7113/75 & 7136/75, 25/03/1983, paras.88-89; *James and Others v. the United Kingdom*, No. 8793/79, 21/01/1986, para.67.

composed of different generations where close ties and interdependencies are the cultural norm. The central importance of family life has been addressed by the ECtHR in its case-law on Article 8 in respect of the right to home, where applicants had no legal interest or did not own the house where they lived but had strong family ties with those who owned the property.

In *Menteş and Others v. Turkey*,[365] the ECtHR found that all the applicants, including one who did not own her house, were "within the scope of the protection guaranteed by Article 8 of the Convention".[366] The applicant had a home because of her "strong family connection". Similarly, in *Khamidov v. Russia*,[367] where the ECtHR held that the house of the applicant's brother as well as his own attracted the protection of Article 8.1,[368] despite the fact that the applicant had legal title only to his home. The ECtHR reached this conclusion by attributing greater weight to the close family connections evidenced by the circumstances and in particular the closeness of the brothers' dwellings.[369]

2. Missing persons and violations of Articles 2, 3, 5 and 13 of the ECHR

a. Procedural requirement for an effective investigation under Article 2

The ECtHR underlined the central importance of Article 2 in *McCaan and Others v. the United Kingdom*[370]*:*

as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe […].

365 *Menteş and Others v. Turkey*, No. 23186/94, 28/11/1997.
366 *Ibid.*, para. 73.
367 *Khamidov v. Russia,* No. 72118/01, 15/11/2007.
368 *Ibid.*, para. 129: "…the house of the applicant's brother, and not only his own house, may be regarded as the applicant's "home" within the meaning of Article 8 of the Convention".
369 *Ibid.*, para. 129.
370 *McCaan and Others v. the United Kingdom,* No. 18984/91, 27/09/1995, para. 147; *Kaya v. Turkey*, No. 22729/93, 19/02/1998, para. 86.

In *McCaan* the ECtHR enunciated clearly for the first time the positive obligation implied under Article 2.1 to carry out an effective investigation in all cases of unlawful killings.[371]

The obligation to protect the right to life under this provision, read in conjunction with the state's general duty under Article 1 of the ECHR to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *among others*, agents of the state.[372]

The duty of states to carry out an effective investigation into unlawful killings otherwise referred to as "the procedural requirement" of Article 2, is quite distinct from the "substantive requirement" prohibiting the deprivation of life unless certain conditions as set out in the article are satisfied. Violation of one requirement does not automatically entail violation of the other.

Following *McCaan,* in a series of cases relating to the situation in South-East Turkey, the ECtHR reiterated that the "obligation [to investigate] is not confined to cases where it is apparent that the killing was caused by an agent of the State"[373] but the state must investigate all fatalities it becomes aware of even where its agents are not involved. The first sentence of Article 2.1 imposes a positive obligation on the State to protect the right to life by law, implying in the event of an unlawful killing some form of official effective investigation must be conducted.[374]

The ECtHR has applied and developed further the above jurisprudence when examining applications against member states where, because of a military conflict and related persecution, people have disappeared and have either never been found and/or have been declared or presumed dead in suspicious circumstances. In the numerous cases against Turkey, where security forces were involved in abductions

371 *Osmanoğlu v. Turkey,* No. 48804/99, 24/01/2008, para. 71: "According to the established case-law of the Court, the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction …".

372 *Kaya v. Turkey*, No. 22729/93, 19/02/1998, para. 86.

373 *Çelikbilek v. Turkey*, No. 27693/95, 31/05/2005, para. 82; *Salman v. Turkey*, No. 21986/93 [GC], 27/06/2000, para. 105.

374 *Ergi v. Turkey*, No. 23818/94, 28/07/1998, para. 82; *Yaşa v. Turkey*, No. 22495/93, 02/09/1998, para. 100: "… contrary to what is asserted by the government, the obligation is not confined to cases where it has been established that the killing was caused by an agent of the state; *Tanrikulu v. Turkey*, No. 23763/94 [GC], 08/07/1999, para. 103: "… In that connection, the Court points out that the obligation mentioned above is not confined to cases where it has been established that the killing was caused by an agent of the State".

and/or unlawful killings of Turkish citizens of Kurdish origin, during the anti-terrorist operations against the PKK, the ECtHR has found violations of both the substantive and the procedural limbs of Article 2, of Article 3 regarding the relatives of the victims and almost always of Article 5,[375] with enforced disappearance being considered as an aggravated form of arbitrary detention. In most of these cases there is also a finding of a violation of Article 13.

- In examining claims by the relatives of disappeared persons of Kurdish origin, the ECtHR has reiterated the state's positive obligations to take "preventive operational measures to protect"[376] the life of the disappeared person; to carry out an effective investigation when individuals have been killed whether by agents of the state or otherwise;[377] and that the obligation to carry out an investigation is one of means and not result,[378] requiring promptness and reasonable expedition.[379]

- In many of these cases, the ECtHR has also found violations of Article 3 in respect of the applicants/relatives of the disappeared or murdered persons where the failure of the authorities to conduct an effective investigation amounted to treatment contrary to Article 3;[380] certain factors have to be present for the ECtHR to find a violation of Article 3[381] and "the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention".[382]

- The ECtHR has found violations of the ECHR, regarding enforced disappearances,[383] in approximately 200 judgments against Russia in connection with the conflict in Chechnya.[384] In most of these judgments the ECtHR has found violations of Article2, substantive and procedural, Article 3 in respect of the applicants, Article 5 and Article

375 See for example *Orhan v. Turkey,* No. 25656/94, 18/06/2002; *Meryem Çelik and Others v. Turkey,* No. 3598/03, 16/04/2013.
376 *Osmanoğlu v. Turkey,* No. 48804/99, 24/01/2008, para. 72; *Koku v. Turkey*, No. 27305/95, 31/05/2005, para. 131.
377 *Salman v. Turkey*, No. 21986/93 [GC], 27/06/2000, para. 105.
378 *Toğcu v. Turkey,* No. 27601/95, 31/05/2005, paras. 109-112.
379 *Yaşa v. Turkey*, No. 22495/93, 02/09/1998, paras. 102-104.
380 *Toğcu v. Turkey,* No. 27601/95, 31/05/2005, para. 126.
381 *Tahsin Acar v. Turkey,* No. 26307/95 [GC], 08/04/2004, paras. 237-239.
382 *Toğcu v. Turkey,* No. 27601/95, 31/05/2005, para. 127.
383 PACE Doc. 10679 Report, Enforced disappearances, 19 September 2005, The Chechen Republic of the Russian Federation has been described as the "most affected by the scourge of enforced disappearances".
384 See Overview of the Court's judgments concerning enforced disappearances in the North Caucasus, Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, 20 August 2015.

13.[385] In *Aslakhanova and Others v. Russia*,[386] concerning the complaints brought by 16 applicants, the ECtHR found that the failure to investigate disappearances that occurred between 1999 and 2006 in Russia's North Caucasus was a systemic problem, for which there was no effective remedy in the domestic legal order. In its judgment, the ECtHR gave clear indications regarding the measures that the respondent state must adopt to put an end to the continuing violations under Articles 2, 3 and 5.

- The ECtHR has examined claims in respect of missing persons and enforced disappearances in the context of displacement in Cyprus and Bosnia and Herzegovina, which amongst other also raised issues regarding the ECtHR's temporal jurisdiction and admissibility under Article 35 of the ECHR.

b. Cyprus cases

- In the fourth interstate case of *Cyprus v. Turkey*,[387] addressing the issue of Greek Cypriots who went missing during Turkish military operations in July and August 1974, the ECtHR ruled that the procedural obligation to carry out an effective investigation also "arises upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening". Based on evidence considered to be sound by both the ECommHR and the ECtHR, it was foundthat the missing Greek Cypriots had been detained by Turkish or Turkish Cypriot forces at the time of a military operation during which there were many arrests and killings so that undoubtedly the circumstances of their disappearance were life threatening.

- The ECtHR pointed out that Turkey had never undertaken an investigation into the fate of the missing persons despite the claims made by their relatives that they had disappeared after having been detained in wartime conditions. Consequently, the ECtHR found that there was a continuing violation of Article 2 because of Turkey's failure

385 See, for example, *Bazorkina v. Russia,* No. 69481/01, 27/07/2006*; Imakayeva v. Russia*, No. 7615/02, 09/11/2006; *Baysayeva v. Russia,* No. 74237/01, 05/04/2007; *Akhmadova and Sadulayeva v. Russia*, No. 40464/02, 10/05/2007; *Alikhadzhiyeva v. Russia*, No. 68007/01, 05/07/2007; *Khamila Isayeva v. Russia*, No. 6846/02, 15/11/2007.

386 *Aslakhanova and Others v. Russia,* Nos. 2944/06 & 332/08 & 42509/10 & 50184/07 & 8300/07, 18/12/2012, para. 217: "Accordingly, the Court finds that the situation in the present case must be characterised as resulting from systemic problems at the national level, for which there is no effective domestic remedy. It affects core human rights and requires the prompt implementation of comprehensive and complex measures."

387 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 132.

to carry out an effective investigation into the fate and whereabouts of the Greek Cypriots who went missing in life threatening circumstances.[388]

The ECtHR found a continuing violation of Article 3 in respect of the relatives of the missing Greek Cypriots.[389] The failure of the respondent state to carry out an investigation into the circumstances of the disappearance of the missing Greek Cypriots condemned their relatives to "live in a prolonged state of anxiety" regarding their fate, especially as these disappearances occurred in the context of displacement and "enforced separation of families", with large numbers of Greek Cypriots having been forced to live in the south and unable to seek information in the Turkish controlled north where their relatives were originally detained. Under the circumstances, "the silence of the authorities of the respondent state in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3".[390]

The ECtHR also found a continuing violation of the procedural requirement of Article 5 because of the failure of Turkey to (i) take any measures to protect the missing persons against disappearance, once there were arguable claims that they went missing, having been taken into custody and (ii) to conduct an investigation into their whereabouts. The ECtHR stressed that "… unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of the person contained in Article 5 of the Convention and a most grave violation of that Article".[391]

In its just satisfaction judgment in the interstate case of *Cyprus v. Turkey*,[392] the ECtHR awarded the relatives of the missing persons €30,000,000 in non-pecuniary damages.

Subsequently, the ECtHR applied the same reasoning in the case of *Varnava and Others v. Turkey*,[393] concerning the disappearance of nine Greek Cypriots in life-threatening circumstances in the area under Turkey's exclusive control. The ECtHR ruled that Turkey had an obligation under Article 2 to conduct an effective investigation to clarify

388 *Ibid*., para. 136.
389 *Ibid*., para.158.
390 *Ibid*., para.157.
391 *Ibid*., paras.147-150.
392 *Cyprus v. Turley,* No. 25781/94 [GC] (just satisfaction), 12/05/2014, para. 58
393 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, para. 194.

their fate. Consequently, Turkey's failure to undertake such an investigation resulted in a finding of a continuing violation of Article 2.

In *Varnava and Others v. Turkey,* the ECtHR reiterated that state responsibility under the procedural requirement of Article 2, for unlawful deaths or disappearances in threatening circumstances, is not limited to cases where state agents were involved in the death or disappearance.[394] Whilst acknowledging that there may be difficulties in conducting an investigation into disappearances that occurred many years ago, the ECtHR was emphatic regarding the crucial role of an investigation required under Article 2 in cases of disappearance in securing "the effective implementation of the domestic laws which protect the right to life",[395] and in promoting a culture of accountability in the event that state agents are involved. Such an investigation must be reasonably prompt, "independent, and accessible to the victim's family" and capable of determining whether the death was caused unlawfully and who was responsible for it.[396]

c. Jurisdiction ratione temporis

In *Varnava*, the ECtHR examined whether it had temporal jurisdiction (jurisdiction "*ratione temporis*") to consider the applicants' complaint that Turkey had breached the procedural guarantee of Article 2 to carry out an effective investigation into the disappearance of their relatives.

Under international law[397] the ECHR is binding on contracting states from the date of its entry into force with respect to that state.[398] Turkey accepted the right of individual petition on 28 January 1987, and the jurisdiction of the old Court on 22 January 1990. Once the old Court ceased to function in 1998, the ECtHR's jurisdiction became obligatory for all contracting states from the date of their acceptance of the right of individual petition, which in the case of Turkey was from 28 January 1987.[399]

Though the events that the claimants complained of, specifically the disappearance of their relatives, occurred in 1974, the ECtHR had tem-

394 *Ibid.*, para. 136.
395 *Ibid.*, para. 191.
396 For a comprehensive summary of the essential requirements of an effective investigation into an unlawful killing see *Kelly and Others v. the United Kingdom*, No. 30054/96, 04/05/2001, paras. 94-98.
397 Article 28 Of the Vienna Convention on the Law of Treaties, 23 May 1969.
398 For a review of the ECtHR's jurisprudence regarding the limits of its jurisdiction *"ratione temporis"* see *Blečić v. Croatia,* No. 59532/00 [GC], 08/03/2006 and *Šilih v. Slovenia,* No. 71463/01 [GC], 09/04/2009.
399 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, paras. 130-133.

poral jurisdiction to examine Turkey's procedural obligation under Article 2 because the obligation to investigate a disappearance will "persist as long as the fate of the person is unaccounted for. The ongoing failure to provide the requisite investigation will be regarded as a continuing violation".[400] The discovery of a body or the presumption of death does not negate the obligation to investigate the circumstances surrounding the events of death[401] or disappearance. Therefore, although 34 years had elapsed without news regarding those missing in *Varnava,* there is a presumption of death and there also remains a procedural obligation to investigate under Article 2 of the ECHR.[402]

The ECtHR further pointed out that there is a difference between the obligation to investigate a death and the obligation to investigate a disappearance. The latter is characterised by a continuous situation of uncertainty and lack of information, "prolonging the torment of the victim's relatives"[403]. The procedural obligation persists as long as the fate of the missing person remains unknown and the failure to comply with this positive obligation constitutes a continuing violation of Article 2.

d. Six-month rule under Article 35.1 of the ECHR

In *Varnava,* the ECtHR also considered the application of the six-months rule[404] to the continuing situation of disappearance and the latest point in time that the relatives of the missing person could reasonably be expected to submit an application to the ECtHR. The six months start running from the date of the final decision at the domestic level. In the case of deaths[405] or disappearances,[406] applicants are expected to follow the investigation if any and apply to the ECtHR within six months from the time that they became aware or should have become aware that there was lack of investigation or the investigation was ineffective.

400 *Ibid.*, para. 148.

401 On the procedural obligation to carry out an investigation into deaths under Article 2, see *Šilih v. Slovenia,* No. 71463/01 [GC], 09/04/2009, paras. 159: "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent 'interference' within the meaning of the Blečić judgment [...] In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date".

402 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, para. 145.

403 *Ibid.*, para. 148.

404 Article 35.1 of the ECHR provides as follows: "The Court may only deal with 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".

405 *Bulut and Yavuz v. Turkey*, No. 73065/01 (dec.), 28/05/2002 and *Bayram and Yıldırım v. Turkey*, No. 38587/97 (dec.), 29/01/2002.

406 *Eren and Others v. Turkey*, No. 42428/98 (dec.), 04/07/2002 and *Üçak and Kargili and Others v. Turkey*, Nos. 75527/01 and 11837/02 (dec.), 28/03/2006.

In the case of continuing situations of breach, the "time-limit in effect starts afresh every day"[407] and it is not until the ongoing situation comes to an end that the six-months period starts running. However, the ECtHR explained that by the very nature of an ongoing situation of disappearance, the passage of time is critical, so that domestic authorities are required to launch an investigation at the earliest possible time and the relatives of the victims to submit their complaints about the lack or ineffectiveness of the investigation without "undue delay".[408] In cases of disappearance, in contrast to those of unlawful deaths, characterised by uncertainly and lack of information, if not also by, the relatives are in a much more difficult position regarding the existence and/or progress of the required investigation. Nonetheless the ECtHR held that applications can be rejected as out of time where there has been an "excessive or unexplained delay" on the part of applicants who were aware or should have been aware that there was lack of investigation or that it had lapsed or become ineffective.

The ECtHR applied the above principles in *Varnava* and ruled that the context in which the Greek Cypriots went missing, was complex, concerned an international conflict and there was a lack of investigation or any information about the fate of their relatives. As the government of Cyprus and the United Nations had initiated certain procedures to establish the fate of the missing, it was reasonable for the applicants to wait for a possible outcome. At the time of their application in 1990,[409] it was evident that the fate of their missing relatives would not be determined by these ongoing initiatives and, thus, it was reasonable for the applicants to submit their complaints to the ECtHR then. It was held that they had acted "with reasonable expedition for the purposes of Article 35.1 of the Convention".[410]

The ECtHR found a continuing violation of Article 3 in respect of the applicants for the same reasons as in the fourth interstate case of *Cyprus v. Turkey* stating that "… the length of time over which the ordeal of the relatives has been dragged out and the attitude of offi-

407 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, para. 159.

408 *Ibid.*, paras. 159-161.

409 The ECtHR subsequently rejected applications by the relatives of missing Greek Cypriots submitted after 1990, considering that as the cut-off point after which there were no investigative procedures that could have reasonably delayed the submission of applications; see, for example, *Karefyllides and Others v. Turkey*, No. 45503/99 (dec.), 01/12/2009; *Charalambous and Others v Turkey*, No. 46744/07 (dec.), 01/06/2010.

410 *Varnava and Others v. Turkey*, Nos. 16064/90 & 16065/90 & 16066/90 & 16068/90 & 16069/90 & 16070/90 & 16071/90 & 16072/90 & 16073/90 [GC], 18/09/2009, para. 170.

cial indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity".[411] Furthermore, it found a continuing violation of Article 5 in respect of two of the missing persons for whom there was evidence that they had been detained by state agents. The ECtHR awarded the applicants €12,000 each in non-pecuniary damages.

e. Palić v. Bosnia and Herzegovina

The case of *Palić v Bosnia and Herzegovina* concerned a military commander who went missing after being detained by opposing Serbian forces, during the 1992-1995 conflict in Bosnia and Herzegovina. As a result of that conflict 100,000 people were killed, 2 million people were displaced and 30,000 went missing of which one third remains unaccounted for.[412]

Applying the same principles as in *Varnava,* the ECtHR found that it had temporal jurisdiction to hear the case although Mr Palić had disappeared and died before the ratification of the ECHR by Bosnia and Herzegovina. The Court, thereby, reiterated that the procedural obligation to carry out an investigation into the disappearance is continuing as long as the fate of the victim has not been accounted for. Similarly, it applied its findings regarding the six-month rule taking into account the fact that both international bodies and domestic authorities, initiated procedures and put in place mechanisms, following the cessation of hostilities, in order to investigate and resolve disappearances that occurred within the territory of Bosnia and Herzegovina. Consequently, the applicant's submission of the complaint in 2004, was considered to have been in accordance with the six-month rule as it was reasonable to expect that ongoing investigations may prove to be effective in determining the fate of the victim.

In *Palić* the ECtHR found no violation of Article 2 because it considered that under the difficult circumstances of the post-conflict situation in Bosnia and Herzegovina, the domestic authorities had carried out an effective investigation, into the disappearance and death of Mr Palić. The investigation satisfied the requirements of promptness, independence and public scrutiny. Likewise, there were no violations of Article 3 in respect of the applicant and no violation of Article 5.

411 *Ibid.*, para. 202.
412 Palić v. Bosnia and Herzegovina, No. 4704/04, 15/02/2011, para. 6.

3. PACE and CoM documents on enforced disappearances

The organs of the CoE have issued a number of resolutions, recommendations and reports over the last decade condemning enforced disappearances within the area of the CoE and calling on member states to act so that the phenomenon is eradicated. Although these documents address the issues in respect of missing persons in general, there are specific references to the judgments of the ECtHR discussed above regarding missing persons in the context of displacement.

In its earliest Recommendation on the issue of missing persons in Cyprus, Recommendation 1056(1987)[413] on national refugees and missing persons in Cyprus, PACE urged the Committee of Minsters to "continue its efforts to secure the repatriation or integration of displaced persons and national refugees in Cyprus, while trying to find a solution to the problem of compensation for these people [...] support every effort made to cast light on the fate of missing persons".

In Resolution 1463(2005), *Enforced Disappearances*,[414] PACE recalled its previous Resolutions and Recommendations on the subject of missing persons,[415] welcomed the UN General Assembly's 1992 Declaration on the Protection of All Persons from Enforced Disappearances and made a number of recommendations regarding the content of the draft UN Convention on that matter.

In the *Guidelines on Eradicating impunity for serious human rights violations* adopted by the CoM,[416] enforced disappearances are considered to be a serious human rights violation and states are urged to carry out an effective investigation under Article 2, and to provide information to the extent possible to the family of the victim regarding his or her fate.

413 PACE Recommendation 1056(1987), On national refugees and missing persons in Cyprus, 5 May 1987.
414 PACE Resolution 1463(2005), *Enforced Disappearances*, 3 October 2005.
415 PACE Resolution 1403 (2004), The human rights situation in the Chechen Republic, 7 October 2004 and PACE Recommendation 1679 (2004), The human rights situation in the Chechen Republic, 7 October 2004, PACE Resolution 1371(2004), Disappeared persons in Belarus, 28 April 2004 and PACE Recommendation 1657(2004), Disappeared persons in Belarus, 28 April 2004 and PACE Recommendation 1056(1987), On national refugees and missing persons in Cyprus, 5 May 1987.
416 Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. These guidelines deal with impunity for acts or omissions that amount to serious human rights violations and which occur within the jurisdiction of the state concerned.

The entry into force of the UN Convention for the Protection of all Persons from Enforced Disappearance was welcomed by PACE Resolution 1868 (2012).[417] The Resolution nonetheless noted that it failed to underline the responsibility of the state and establish the element of intent as part of the crime of enforced disappearance. Moreover, it did not limit amnesties or immunities and restricted the temporal jurisdiction of the Committee on Enforced Disappearances. The Resolution further welcomed the judgments of the ECtHR establishing that the failure to investigate enforced disappearances constitutes a continuing violation so as to underline that the ECtHR has temporal jurisdiction to examine claims even where the events took place before the entry into force of the ECHR for the respondent state. It also welcomed the adoption by the Committee of Ministers of the Guidelines on Eradicating impunity for serious human rights violations.

In Recommendation 1995(2012), *the International Convention for the Protection of all Persons from Enforced Disappearance*,[418] PACE invited the CoM to "consider launching the process of preparing the negotiation, in the framework of the Council of Europe, of a European convention for the protection of all persons from enforced disappearance".

Finally PACE Resolution 1956 (2013), *Missing Persons from Europe's conflicts: the long road to finding humanitarian answers,*[419] reminds member states of their obligations under human rights and humanitarian law to clarify the whereabouts and fate of missing persons as required under relevant conventions and Articles 2 and 3 of the ECHR. It welcomes the judgments of the ECtHR regarding missing persons in Cyprus, the former Yugoslavia and the Chechen Republic emphasising the responsibilities and obligations of member states to trace and account for missing persons through a proper investigation and it sets out a number of priorities for member states in dealing with the issues of missing persons.[420]

417 PACE Resolution 1868 (2012), *The International Convention for the Protection of al Persons from Enforced Disappearance,* 9 March 2012.
418 PACE Recommendation 1995 (2012), *The International Convention for the Protection of all Persons from Enforced Disappearance*, 9 March 2012.
419 PACE Resolution 1956 (2013), *Missing Persons from Europe's conflicts: the long road to finding humanitarian answers*, 3 October 2013.
420 *Ibid.*, para. 7.

V. FREEDOM OF MOVEMENT

The right of IDPs to a free and informed choice regarding their return to their property and home, or resettlement elsewhere within the country is recognised by the Guiding Principles[421] and the *Pinheiro Principles*[422] both of which provide for freedom of movement for IDPs and the right to choose one's residence, following displacement.

1. Protocol No. 4 Article 2 to the ECHR

The preamble to Recommendation Rec(2006)6,[423] recalls that the prohibition of arbitrary displacement can be inferred from Article 2 of Protocol No. 4 and Articles 3 and 8[424] of the ECHR. Protocol No. 4 Article 2 to the ECHR guarantees the freedom of movement stating that: "Everyone lawfully within the territory of a state shall, within that territory have the right to liberty of movement and freedom to choose his residence".

Restrictions to the freedom of movement are allowed if they comply with the provisions of Articles 2.3 and 2.4 of Protocol No. 4, namely

421 Principle 14.1, "Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence". See also Principle 15.
422 Principle 9, "The right to freedom of movement".
423 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006.
424 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006.

they "are in accordance with the law and are necessary in a democratic society" for the maintenance of public order and "prevention of crime, for the protections of health and or morals, or for the protection of the rights and freedoms of others."

- In the context of displacement, the right to restitution of property, i.e. the right to return to the place of origin, reflects, and is predicated on, the principle of free movement as enshrined in Protocol No. 4. Thus, the right to property under Article 1 Protocol No. 1, and the right to respect for home under Article 8, taken together with the right to free movement under Article 2 of Protocol No. 4 can be construed as prioritising restitution over compensation as a remedy to the violation of the rights to property and home.

- The ECtHR has previously found violations of the right to free movement under Article 2 of Protocol No. 4 in judgments against Russia because the interference with the applicants' right was not "in accordance with the law" as required under Article 2.3 of Protocol No. 4. The prohibition to pass from one area to another lacked a proper legal basis[425] and the refusal to allow the applicant to register her residence at her chosen address was not "in accordance with the law".[426]

- In *Timishev v. Russia*,[427] the applicant was not permitted to re-enter the Republic of Kabardino-Balkaria on the basis of instructions not to admit people of Chechen ethnic origin. The ECtHR found a violation of Article 2 of Protocol No. 4 as the restriction on the applicant's liberty of movement was not considered to be in accordance with the law.[428] The ECtHR also unanimously found a violation of Article 14 of the ECHR taken in conjunction with Article 2 of Protocol No. 4, as the applicant's liberty of movement was restricted solely on the ground of his ethnic origin.[429]

- In respect of IDP rights, the ECtHR has found violations of the right to free movement and the right under Article 3 not to be subjected to degrading treatment in cases relating to displaced and enclaved persons in Cyprus following the 1974 Turkish invasion and division of the island.

425 *Timishev v. Russia*, Nos. 55762/00 & 55974/00, 13/12/2005, para. 49.
426 *Tatishvili v. Russia,* No. 1509/02, 22/02/2007, para.54.
427 *Timishev v. Russia*, Nos. 55762/00 & 55974/00, 13/12/2005, para. 49.
428 *Ibid.,* paras. 45- 49.
429 *Ibid.*, para. 59.

- In the case of *Denizci and others v. Cyprus,*[430] the Turkish Cypriot applicants were expelled to the northern part of Cyprus and when within the territory of the Republic of Cyprus were subjected to police surveillance, intimidation and restrictions to their movements. Cyprus was found to have violated Article 2 of Protocol No. 4. because restrictions to the applicants' movements constituted an interference with the freedom of movement protected by Article 2 of Protocol No. 4. In addition, no lawful basis for these restrictions had been advanced by the government, which moreover did not claim that the measure was necessary in a democratic society to achieve one of the legitimate aims set forth in paragraphs 3 and 4 of Article 2 of Protocol No. 4.

- In the interstate case of *Cyprus v Turkey*,[431] the ECtHR found a violation of Article 3 of the ECHR because of the discriminatory treatment by the Turkish authorities of the Karpas Greek Cypriots, who were isolated and restricted in their movements within the area under Turkish control in the north of the island. The Court found this so severe as to amount to degrading treatment: "[…] the conditions under which the population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members".[432]

430 *Denizci and Others v. Cyprus,* Nos. 25316-25321/94 & 27207/95, 22/05/2001.
431 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001.
432 *Ibid.,* para. 309.

VI. ELECTORAL RIGHTS OF IDPS

Electoral rights are the basis of democratic legitimacy and representativeness of the political process.[433] The right to political participation continues to apply in situations of internal displacement. The principle of universal and equal suffrage, guaranteeing that every person who has the right to vote is able to exercise this right without distinction of any kind, by definition extends to persons who are internally displaced. In other words, all IDPs who are otherwise eligible to vote and to stand for election continue to be entitled to these rights upon displacement. It is crucial for IDPs, to take part in the public affairs of their country and thereby to have a say in the political decisions that affect their lives. Therefore, member states of the CoE have a central role and responsibility to ensure that IDPs are able to fully and freely exercise their rights to political participation.

IDPs have the right to political participation, including the right to vote and to be elected as well as to participate in governmental and public affairs. This right is expressly affirmed in the *Guiding Principles on Internal Displacement*. Guiding Principle 22.1(d) specifies that:

> Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of […the] right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right.

433 PACE Resolution 1459 (2005), Abolition of restrictions on the right to vote, 24 June 2005.

In practice, however, IDPs often face obstacles which impede their exercise and enjoyment of their rights to political participation and may even lead to their exclusion from the political process and public affairs. Normally, voter eligibility is intrinsically linked to a residency requirement. In cases in which IDPs are displaced outside of their usual electoral district, they will probably face challenges participating in elections, whether voting by absentee ballot for their usual district or re-registering in the electoral district to which they were displaced. Voter registration requirements, in particular, the need to supply identity documents, which may have been lost during displacement, can be another significant challenge. During displacement, getting these documents (re)issued can be difficult, due to legal or administrative obstacles, cost, or distance.

In the case of *Kurić v. Slovenia*, the ECtHR considered eight applications alleging, among others, violations of Article 8 of the ECHR due to the alleged arbitrary deprivation of the applicants' permanent resident status after Slovenia declared independence.[434] Prior to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the applicants had been citizens of various SFRY republics and permanent residents of the republic of Slovenia.

After Slovenia declared independence, it enacted new citizenship legislation providing, among others, that citizens of former SFRY republics who failed to apply in a timely manner for Slovenian citizenship would become aliens. Once the citizenship deadline passed, the Slovenian government issued instructions stating that the legal status of persons who had not applied for citizenship must be "regulate[d]" and that records would need to be cleared out. Individuals whose names were subsequently removed from the Register of Permanent Residents received no notice and no official documents. As a result of these steps, 18,305 individuals, including 5,360 minors, lost their permanent status and became known as "the erased."

The erased became "aliens or stateless persons illegally residing in Slovenia." They had difficulty finding employment, obtaining driving licenses, and securing pensions. They could not leave the country, as they would not be allowed to re-enter without valid papers. Families were thus divided, with some members effectively trapped in Slovenia and other members residing in other former SFRY republics. The ECtHR held that there had been a violation of Article 8 of the ECHR. Several judges of the Court noted that Slovenia's citizenship

434 *Kurić v. Slovenia*, No. 26828/06, 26/06/2012.

policies constituted a "legalistic attempt at ethnic cleansing," designed to keep citizens of other SFRY republics out of Slovenia.

1. Article 3 of Protocol No. 1 to the ECHR

Article 3 of Protocol No. 1 to the ECHR states that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature."

The ECtHR has described this article as being "of prime importance in the Convention system" as it enshrines a characteristic principle of democracy.[435] Article 3 of Protocol No. 1 differs from the other substantive provisions of the ECHR and the Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work in respect of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the ECHR as a whole, the ECtHR has established that this provision also implies individual rights, comprising the right to vote, the "active" aspect, and to stand for election, the "passive" aspect.[436]

The rights guaranteed under Article 3 of Protocol No. 1 are not absolute. According to the case-law of the ECtHR, there is room for "implied limitations", and Contracting States must be given a wide margin of appreciation in this sphere.[437]

It is, however, for the ECtHR to determine in the last resort whether the state has complied with the requirements of Article 3 of Protocol No. 1. The Court has to satisfy itself that the conditions imposed on the right to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness, that such conditions are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate.[438]

435 *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, 02/03/1987, para. 47.
436 *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, 02/03/1987, paras. 48-51, *Ždanoka v. Latvia*, No. 58278/00 [GC], 16/03/2006, para. 102.
437 See, for example, *Labita v. Italy*, No. 26772/95, 06/04/2000, para.201; *Podkolzina v. Latvia*, No. 46726/99, 09/04/2002, para. 33.
438 *Ždanoka v. Latvia*, No. 58278/00 [GC], 16/03/2006, para.104; *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, 02/03/1987, para. 52.

a. Active aspect: the right to vote

In relation to the cases concerning the right to vote, that is, the "active" aspect of the rights under Article 3 of Protocol No. 1, the ECtHR has considered that the exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1.[439]

In the case of *Aziz v. Cyprus*,[440] the applicant complained that he was refused permission to be registered on the electoral roll, in order to vote in the parliamentary elections, because he was a member of the Turkish-Cypriot community. The ECtHR noted that Article 63 of the Cypriot Constitution, which entered into force in August 1960, provided for separate electoral lists for the Greek-Cypriot and Turkish-Cypriot communities. Nonetheless, the participation of Turkish-Cypriot members of parliament was suspended from 1963, from which time the relevant articles of the Constitution providing for the parliamentary representation of the Turkish-Cypriot community and the quotas to be adhered to by the two communities became impossible to implement in practice.

The ECtHR noted that the situation in Cyprus deteriorated following the occupation of northern Cyprus by Turkish troops. It further observed that although the relevant constitutional provisions had been rendered ineffective, there was a notable lack of legislation to resolve the resulting problems. Consequently, the applicant, as a member of the Turkish-Cypriot community living in the Government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the house of representatives of the country of which he was a national and where he had always lived. Accordingly, the ECtHR held that there had been a violation of Article 3 of Protocol No. 1 to the ECHR.

b. Passive aspect: the right to stand for election

Like the "active" aspect, the "passive" aspect, namely the right to stand as a candidate for election, has been developed in the case-law. The ECtHR has, thus, stated that the right to stand for election is "inherent in the concept of a truly democratic regime".[441] It has been even more cautious in its assessment of restrictions under this aspect of Article 3 of Protocol No. 1 than when it has been called upon to examine restrictions on the right to vote; the proportionality test is more limited. Therefore, the states enjoy a broader margin of appreciation in respect of the "passive" aspect.[442]

439 *Aziz v. Cyprus*, No. 69949/01, 22/06/2004, para. 28.
440 *Ibid*.
441 *Podkolzina v. Latvia*, No. 46726/99, 09/04/2002, para. 35.
442 *Etxeberria and Others v. Spain*, Nos. 35579/03 & 35613/03 & 35626/03 & 35634/03, 30/06/2009, para. 50.

However, the prohibition of discrimination, under Article 14 of the ECHR, is equally applicable. In this context, even though the margin of appreciation usually afforded to States regarding the right to stand for election is a broad one, where a difference in treatment is based on race, colour or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.[443]

In *Sejdić and Finci v. Bosnia and Herzegovina*, the ECtHR examined an exclusion rule to the effect that only persons declaring affiliation with a "constituent people" were entitled to stand for election to the House of Peoples, the second chamber of the State Parliament. Potential candidates who refused to declare such an affiliation could not, therefore, stand. The ECtHR noted that this exclusion rule pursued at least one aim which was broadly compatible with the general objectives of the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place, a very fragile ceasefire was in effect on the ground and they were designed to end a brutal conflict marked by genocide and ethnic cleansing. The nature of the conflict was such that the approval of the "constituent peoples" (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities, such as local Roma and Jewish communities, at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. However, there had been significant positive developments in Bosnia and Herzegovina since the Dayton Agreement. Therefore, the Court concluded that the applicants' continued ineligibility, being of Roma or Jewish origin, to stand for election lacked an objective and reasonable justification and breached Article 14 in conjunction with Article 3 of Protocol No. 1.

In the case of *Zornić v. Bosnia and Herzegovina* the ECtHR found, for the same reasons, a violation of Article 3 of Protocol No. 1 as regards the applicant's ineligibility, for the same reason, to stand for election to the House of Peoples and to the Presidency. Observing that there had been excessive delay in executing its judgment in *Sejdić and Finci v. Bosnia and Herzegovina* and that the violation complained of was the direct result of that delay, the ECtHR made a ruling under Article 46 of the ECHR. It found that, eighteen years after the tragic conflict in Bosnia and Herzegovina, the time had come to adopt a political system capable of affording all citizens

443 *Sejdić and Finci v. Bosnia* Herzegovina, Nos. 27996/06 & 34836/06 [GC], 22/12/2009, para. 44.

of that country the right to stand for election to the House of Peoples and to the presidency without any distinction as to ethnic origin.[444]

In the case of *Tănase v. Moldova*, the ECtHR ruled on the question of dual nationality, albeit under Article 3 of Protocol No. 1 alone.[445] The case concerned the introduction of a prohibition on Moldovan nationals holding other nationalities who had not started a procedure to renounce those nationalities taking their seats as members of Parliament following their election. The applicant was a Moldovan and Romanian national, who had been elected as a member of Parliament in the legislative elections in 2009. The ECtHR found that there was a consensus that where multiple nationalities were permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as an MP, even where the population is ethnically diverse and the number of MPs with multiple nationalities may be high.[446] The ECtHR also reiterated that no restriction on electoral rights should have the effect of excluding groups of persons from participating in the political life of the country.[447]

2. CoE Recommendations

The importance of ensuring rights to political participation specifically in the context of internal displacement also has been expressly affirmed in normative statements by CoE bodies. The CoM in its Recommendation Rec(2006)6, has underscored that "[m]ember states should take appropriate legal and practical measures to enable internally displaced persons to exercise their right to vote in national, regional or local elections and to ensure that this right is not infringed by obstacles of a practical nature."[448] It should be also noted that the OSCE has emphasised that "it should be a matter of special scrutiny whether IDPs can freely exercise their right to vote".[449]

PACE Recommendation 1877(2009), calls upon the relevant member states to work out, together with IDPs, durable solutions in order to ensure "that IDPs can exercise their right to participate

444 *Zornić v. Bosnia and Herzegovina*, No. 3681/06, 15/07/2014, para. 43.
445 *Tănase v. Moldova*, No. 7/08 [GC], 27/04/2010.
446 *Ibid.*, para. 172.
447 *Ibid.*, para. 178.
448 CoE, Recommendation Rec(2006)6 adopted by the Committee of Ministers on 5 April 2006, para. 9.
449 OSCE, Final Report, Supplementary Human Dimension Meeting on Migration and Internal Displacement, Vienna, Austria, 25 September 2000, p. 5.

in public affairs at all levels, including their right to vote or stand for election, which may require special measures such as IDP voter registration drives, or absentee ballots".[450]

Of particular relevance to the right to vote of IDPs is PACE Resolution 1459(2005), Abolition of restrictions on the right to vote, particularly paragraph 11.b, which requires member states to "grant electoral rights to all their citizens (nationals), without imposing residency requirements".[451] Although this Resolution primarily addresses resident non-nationals and expatriates wishing to vote from abroad, its aim to grant the right to vote to the highest number of voters possible, in fact covers the problems the IDPs may face due to possible requirements for local residency and timely registration. Furthermore, as the same resolution stresses in the case of other marginalized groups, it is important to enable and encourage IDPs to exercise their right to stand as a candidate and represent their community in the elected bodies.

The difficulties of registering IDPs as voters are addressed indirectly in PACE Resolution 1897(2012) Ensuring greater democracy in elections. The relevant authorities of the member states are encouraged to "[draw] up electoral registers in such a way as to ensure that as many voters as possible register. First-time registration should be automatic, electoral registers should be permanent and recourse to supplementary lists exceptional."[452] As regards the right to vote of IDPs, local authorities should, therefore, ensure their prompt registration for any upcoming elections.

Lastly, with respect to the problem of local registration and the right to vote of displaced persons, the Venice Commission of the Council of Europe suggested a different approach in its 2002 Code of Good Practice in Electoral Matters. It concluded that "if persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence".[453] However, sustaining an active and passive electoral right in a place of former residence is rather unattainable in cases of armed conflict where IDPs have been displaced from their usual electoral district and this area is no longer under the effective control of the government.

450 PACE Recommendation 1877(2009), Europe's forgotten people: protecting the human rights of long-term displaced persons, 24 June 2009, para. 15.3.12.
451 PACE Resolution 1459(2005), Abolition of restrictions on the right to vote, 24 June 2005.
452 PACE Resolution 1897(2012), Ensuring greater democracy in elections, 3 October 2012, para. 8.1.1.
453 Venice Commission, 2002, Code of Good Practice in Electoral Matters, p. 15.

VII. PROTECTION AGAINST DISCRIMINATION

With regard to non-discrimination, paragraph 2 of the CoM Recommendation (2006)6 on internally displaced persons provides as follows:

> Internally displaced persons shall not be discriminated against because of their displacement. Member states should take adequate and effective measures to ensure equal treatment among internally displaced persons and between them and other citizens. This may entail the obligation to consider specific treatment tailored to meet internally displaced persons' needs.[454]

The above recommendation, beyond the general principle of prohibition of discrimination, highlights the need to protect IDPs against discrimination which arises solely from the fact of their displacement, or their "displaced" status. This recommendation flows from principles of international law contained in the Guiding Principles and other relevant international instruments of human rights or international humanitarian law which apply also to IDPs.[455]

Principle 1.1 of the Guiding Principles prohibits any discrimination on the enjoyment of any rights and freedoms of IDPs on the sole ground of their displacement. At the same time, Principle 1.1 states that IDPs

454 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006.
455 CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)36 Addendum, 8 March 2006, para. 2.

are entitled to the enjoyment of the same rights and freedoms as other persons in their country and to the same extend.[456] Principle 1.1 applies to IDPs throughout their displacement, whether this be short or long-term, and it applies even after the return of IDPs to their home or habitual place of residence.[457]

Under the ECHR, IDPs who remain under the protection of their own country are entitled to the same rights as any other citizens. As previously explained, in accordance with Article 1 of the ECHR, they must be able to exercise the rights and freedoms defined in the ECHR. It follows, therefore, that IDPs should be able to enjoy such rights and freedoms in the same way as any other person residing in a member state of the CoE.

1. Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR

Article 14 of the ECHR prohibits discrimination of the enjoyment of the rights and freedoms set forth in the ECHR, and provides as follows:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It is well settled in the case-law of the ECtHR that Article 14 does not provide for an independent right, but is taken in conjunction with of the rights guaranteed by the ECHR.[458] It cannot, therefore, be applied unless the facts of the case fall within the ambit of another provision of the ECHR.[459] However, it is not necessary to establish that there has been a violation of another ECHR right.

456 *Guiding Principles on Internal Displacement*, Introduction, para. 2.
457 *Guiding Principles on Internal Displacement*, Principle 29.1.
458 See among others *Inze v. Austria,* No. 8695/79, 28/10/1987, para. 36: "According to the Court's established case-law, Article 14 (art. 14) complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 (art. 14) does not presuppose a breach of one or more of such provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter".
459 See, for example, *Inze v. Austria,* No. 8695/79, 28/10/1987, para. 36.

Unlike Article 14 of the ECHR, Article 1 of Protocol No. 12 to the ECHR prohibits discrimination for the "enjoyment of any right set forth by law".[460] Article 1 of Protocol No. 12 removes the limitation of Article 14, has an independent existence and guarantees that no one shall be discriminated against, on any ground, by any public authority.

In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*,[461] the ECtHR held that "[t]he notion of discrimination within the meaning of Article 14 (art. 14) includes in general, cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention". Article 14,therefore, imposes on member states negative obligations in a sense that it prohibits discrimination in the enjoyment of the rights and freedoms set forth in the ECHR, without proper justification.

In *Šekerović and Pašalić v. Bosnia and Herzegovina*,[462] the ECtHR held that discrimination means "treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[463] In the *Šekerović and Pašalić* case, the ECtHR unanimously found a breach of Article 14 of the ECHR read in conjunction with Article 1 of Protocol No. 1 in that, as a pensioner returning from Republika Srpska after the war, the second applicant had, without objective and reasonable justification, been treated differently from pensioners who had stayed in the Federation during the war. The ECtHR found that the applicant continued to be discriminated against solely on account of her status as a formerly internally displaced person.[464]

The ECHR imposes on member states positive obligations so that member states are expected to take measures in order to protect the rights of people who are in a different situation to others. The ECtHR has stated that states violate the right not to be discriminated against if they fail, without an objective and reasonable justifi-

460 Protocol No. 12 to the ECHR was adopted on 4 November 2000 and came into force on 1 April 2005.
461 *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* Nos. 9214/80 & 9473/81 & 9474/81, 28/05/1985, para.82.
462 *Šekerović and Pašalić v. Bosnia and Herzegovina*, Nos. 5920/04 & 67396/09, 15/09/2011.
463 *Ibid.*, para.36.
464 *Ibid.*, para.37.

cation, to treat people whose situations are significantly different to others, in a different way.[465] Therefore, the member states are under a duty to take special measures, tailored to meet the needs of certain people.[466] Even though this may result in differential treatment, such measures when necessary and responding to genuine vulnerabilities are not considered to be discriminatory; instead they are required on the basis that "what is different must be treated differently".[467]

Member states "enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law".[468] However, the ECtHR has ruled that "very weighty reasons would have to be put forward before [it]could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".[469]

According to the Recommendation on internally displaced persons,[470] particular attention ought to be paid to the protection of persons belonging to national minorities and vulnerable groups among IDPs themselves. The principles of non-discrimination which apply in respect of IDPs as distinct from the rest of the population also apply with regard to the protection of groups and/or individuals within the IDP population.

One such example, can be seen in the case of *Vrountou v. Cyprus*,[471] regarding discrimination of IDPs on the ground of gender. In *Vrountou*, the ECtHR found that the respondent state's practice of granting refugee cards - and thus a range of benefits flowing from this documentation, such as housing assistance - only to children of displaced men and not to children of displaced women constituted a breach of Article 14 in conjunction with Article 1 Protocol No. 1 of the ECHR on the basis of sex. The ECtHR held that the respondent government had not shown an objective and reasonable justification for the difference in treatment.

465 *Thlimmenos v. Greece,* No. 34369/97, 06/04/2000, para.44.
466 CoE, Recommendation Rec(2006)6 adopted by the Committee of Ministers on 5 April 2006; CoE, Committee of Ministers, Explanatory Memorandum to the Recommendation (2006)6, CM(2006)35 Addendum, 5 April 2006, para.2.
467 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers",* Brookings-Bern Project on Internal Displacement. October 2008, p. 17.
468 *Lithgow and Others v. the United Kingdom*, 9006/80 & 9262/81 & 9263/81 & 9265/81 & 9266/81 & 9313/81 9405/81, 08/07/1986, para. 177.
469 *Gaygusuz v. Austria*, No. 17371/90, 16/09/1996, para.42; *Koua Poirrez v. France*, No. 40892/98, 30/09/2003, para. 46.
470 CoE, Committee of Ministers, Recommendation (2006)6 on internally displaced persons, 5 April 2006.
471 *Vrountou v. Cyprus,* No. 33631/06, 13/10/2015.

The Framework Convention for the Protection of National Minorities (Framework Convention) has been ratified by 39 Member States of the CoE. It guarantees to persons belonging to national minorities, often as a result of migration to and within Europe spurred by political and economic upheavals,[472] the right to equality before the law and of equal protection of the law. Measures adopted in order to promote equality of persons belonging to a national minority with persons belonging to the majority are not, under the Framework Convention, considered to be discriminatory.[473] In addition, the Framework Convention also urges state parties to take all necessary steps to maintain and develop the culture of national minorities and preserve their "religion, language, traditions and cultural heritage", which are considered to be vital elements of their identity.[474]

Furthermore, the ESC (r) places special emphasis on measures to be taken in support of disabled persons, children and young persons, elderly persons and women.

472 Framework Convention for the Protection of National Minorities, Secretariat, "FCNM Factsheet", www.coe.int/en/web/minorities/fcnm-factsheet, updated October 2016, accessed online December 2016.
473 CoE, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157, Article 4.2.
474 *Ibid.*, Article 5.

VIII. SOCIAL PROTECTION OF IDPS

IDP's, are mainly dependent on state assistance or international/regional humanitarian organisations for the provision of minimum subsistence needs such as housing, healthcare, food and water. IDP's are also in need of employment and access to education, without which they remain dependent indefinitely on state assistance.

The ECHR does not include guarantees for socio-economic rights as such. Nonetheless, there have been several cases in which in interpreting ECHR rights, such as those guaranteed by Articles 2, 3, and 8, the ECtHR explored the possibility of extending ECHR protection to certain socio-economic rights as well.

In *Stec and Others v. the United Kingdom*,[475] the ECtHR set out its approach to the relationship between political and civil rights on one hand and social and economic rights on the other as follows:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.

Though the ECtHR's jurisprudence regarding these matters so far does not concern IDPs, it is reasonable to assume that given

475 *Stec and Others v. the United* Kingdom, Nos. 65731/01 & 65900/01 [GC], 06/07/2005, para. 52.

the extremes of deprivation suffered by people in the context of displacement, the same reasoning will be applicable if relevant cases reach the ECtHR's docket.

1. Basic shelter and adequate housing

Displacement to a large extent entails the loss of homes/shelter and possessions. Without shelter, IDPs are exposed to natural hazards, risks to their health and various crimes which further increases the uncertainly surrounding their lives and future. In this vein, Principle 18 of the *UN Guiding Principles on Displacement* focuses on the right of IDPs to an adequate standard of living.[476] It is the responsibility of states, regardless of the circumstances and without discrimination, to provide IDPs safe access to basic shelter and housing.[477]

IDPs are generally offered basic shelter, often in the form of "settlements" or collective centres, because states are not prepared to deal immediately and adequately with displacement, when it arises. Although the *Guiding Principles on Displacement* provides for a continuous obligation for states to take all necessary and available steps to provide "adequate housing",[478] the adequacy of such housing will depend on the circumstances of each state and the resources available to them.

Although there is no express right to "adequate housing" or "basic shelter and housing", the ECtHR case-law indicates that "housing" is viewed as a "legally protected interest" under the ECHR. Thus, in *James and Others v. the United Kingdom*,[479] the ECtHR noted that "[e]liminating what are judged to be social injustices is an example of the functions of a democratic legislature. Moreover, modern societies consider housing to be a prime social need, the regulation of which cannot be left entirely to the play of market forces".[480]

476 *Guiding Principles on Internal Displacement,* Principle 18.1.
477 *Guiding Principles on Internal Displacement,* Principle 18.2 (b).
478 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers",* Brookings-Bern Project on Internal Displacement, October 2008, p.130.
479 *James and Others v. the United Kingdom,* No. 8793/79, 21/02/1986.
480 *Ibid*., para. 47.

In *Dogan and others v. Turkey,*[481] the ECtHR referred to Principles 18 and 28 of the *Guiding Principles* reiterating that the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which will allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.[482]

In the case of *Saghinadze and Others v. Georgia,*[483] in concurrence with the *Guiding Principles*, the ECtHR underlined the importance of legal security of tenure, asserting that IDPs should be afforded protection against forced evictions. The Court found that "[…] it was not possible to evict an IDP against his or her will from an occupied dwelling without offering in exchange either similar accommodation or appropriate monetary compensation".[484] However, in the case of *Bah v. the United Kingdom*,[485] and in the context of Article 8 of the ECHR, concerning the refusal of authorities to grant the immigrant applicant priority for the allocation of social housing, the ECtHR held that states have a relatively wide margin of appreciation in the provision of housing to people in need, given that this is predominantly socio-economic in nature.

In *Yordanova and Others v. Bulgaria*,[486] the ECtHR held that an obligation to secure shelter for particularly vulnerable individuals may flow from Article 8 of the ECHR in exceptional cases.[487] In discussing the issue of incompatibility *ratione materiae* in the inadmissibility decision in *Budina v. Russia,* the ECtHR noted

> that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation. There is no water-tight division separating that sphere from the field of civil and political rights covered by the Convention [...]

In that respect if a pension or social benefits are shown to be "wholly insufficient" it may give rise to an issue under Article 3 of the ECHR which prohibits inhuman or degrading treatment.[488]

481 *Doğan and Others v. Turkey,* Nos. 8803/02-8811/02 & 8813/02 & 8815/02-8819/02, 29/06/2004.
482 *Ibid*., para. 154.
483 *Saghinadze and Others v. Georgia,* No. 18768/05, 27/05/2010.
484 *Ibid*., para. 107.
485 *Bah v. the United Kingdom,* No. 56328/07, 27/09/2011.
486 *Yordanova and Others v. Bulgaria*, No. 25446/06, 24/04/2012.
487 *Ibid.*, para. 130.
488 *Budina v. Russia,* No. 45603/05 (dec.), 18/06/2009; see also *Larioshina v. Russia,* No. 56869/00 (dec.) 23/04/2002, "the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment".

In the case of *M.S.S v. Belgium and Greece*,[489] where an asylum seeker ended up living on the streets as a consequence of the authorities' inaction, with no resources, access to sanitary facilities or means of providing for his basic needs, the ECtHR held that the applicant's living conditions had aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. The ECtHR reiterated that "Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home […] Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living […]".[490] Nonetheless, given the fact that the applicant had been in this extreme situation for a prolonged period, and given the lack of prospects of any improvement, the ECtHR found a violation of Article 3.[491]

The PACE Report (Doc. 13507), on "Alternatives to Europe's substandard IDP and refugee collective centres" explains that collective centres first set up in the 1990s to provide temporary shelter as a response to the conflicts in the Balkans and the Caucasus. These collective centres are still used to house IDPs and are incompatible with the fundamental rights of IDPs, such as "the right to adequate housing" as guaranteed under Article 31 of the ESC (r).[492]

Article 31 of the ESC (r), provides that in order to ensure the effective exercise of the right to housing, the parties to the European Social Charter agree to take measures "to promote access to housing of an adequate standard; prevent and reduce homelessness with a view to its gradual elimination; make the price of housing accessible to those without adequate resources".[493] The lack of adequate housing, including the lack of guarantees of security of tenure and legal protection against eviction, creates insecurity "which is detrimental to the fulfilment of sustainable solutions for displaced persons".[494]

489 *M.S.S v. Belgium and Greece,* No. 30696/09 [GC], 21/01/2011.
490 *Ibid.*, para. 249.
491 *Ibid.*, para. 263.
492 PACE Doc. 13507 Report, *Alternatives to Europe's substandard IDP and refugee collective centres,* 5 May 2014, para. 13.
493 European Social Charter (Revised) 3.V.1996, Part II, Article 31.
494 PACE Doc. 13507 Report, *Alternatives to Europe's substandard IDP and refugee collective centres,* 5 May 2014, para. 7.

2. Access to healthcare

Principle 19 of the *Guiding Principles* sets out in more detail than Principle 18, what safe access to medical services entails. Wounded, sick IDPs and IDPs with disabilities shall receive, without distinction, all necessary medical care and attention including psychological and social services; healthcare providers should be available for reproductive health services; and counselling and services should be made available for survivors of sexual violence and other abuse.

Clause 3 of Principle 19 addresses the reality that during displacement the nature of shelters or settlements in which IDPs reside, especially when these are densely populated, with no privacy nor adequate sanitation, may expose IDPs to risks of attacks, sexual assault or the spread of diseases.[495] The states, therefore, are responsible for preventing violence and the spread of contagious and infectious diseases among IDPs. States bear such responsibilities "to the fullest extent practicable", meaning that it is not always possible or easy to provide the expected care.

The issue of access to healthcare has been invoked by applicants to the ECtHR mainly in relation to Articles 2 and 8 of the ECHR. There is a growing number of cases where the ECtHR is called upon to decide whether Article 2 of the ECHR could entail positive obligations for states to provide medical facilities and services. In the case of *L.C.B. v. the United Kingdom*,[496] the ECtHR emphasized that the state is not only required to refrain from the intentional or unlawful taking of life, but it is also required to take all appropriate steps to protect the lives of people within their jurisdiction.[497]

Moreover, in *Cavelli and Ciglio v. Italy*,[498] the applicants claimed that there had been a violation of their rights under Articles 2 and 6.1 of the ECHR, since due to procedural delays, it had been impossible to prosecute the doctor responsible for the death of their child due to the operation of a statutory limitation period. The ECtHR did not find a violation of Article 2. However, with respect to the scope of states' positive obligation to provide adequate healthcare to patients, rather

495 The Brookings Institution, *"Protecting Internally Displaced Persons: A Manual for Law and Policymakers"*, Brookings-Bern Project on Internal Displacement, October 2008, p. 148.
496 *L.C.B. v. the United Kingdom*, No. 23413/94, 09/06/1998.
497 *Ibid.*, para. 36.
498 *Cavelli and Ciglio v. Italy*, No. 32967/96 [GC], 17/01/2002.

than in general, the ECtHR indicated that states are required to "make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patient's lives".[499]

- In the fourth inter-state case of *Cyprus v. Turkey*, the ECtHR noted that an "[…] issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".[500]

- The government of Cyprus had claimed before the ECtHR that Greek-Cypriots residing in the northern part of Cyprus, were not allowed to access medical services in the southern part of Cyprus, while facilities in the north part were allegedly inadequate. The ECtHR took note of the general practises in the north, finding, among others, that it could not be established that there was deliberate obstruction of Greek Cypriots seeking medical treatment. In this case, the ECtHR declined to consider the extent to which Article 2 may impose an obligation on member states to provide a certain standard of healthcare,[501] leaving this issue open for a later date.

- Recently, the ECtHR found a violation of Article 2 where a failure to provide basic medical care lead to the death of a pregnant woman. The case of *Mehmet Sentürk and Bekir Sentürk v. Turkey*,[502] concerned the failure to provide medical treatment to Mrs Şentürk because the deceased woman and her husband did not have the necessary financial resources.[503] In finding a violation of the substantive limb of Article 2, the ECtHR held that the deceased woman was a victim of a serious malfunction of the hospital, which deprived her of the possibility of access to appropriate emergency care.[504] It appears, therefore, that the ECtHR is willing to extend protection to the right to healthcare by relying on the guarantees of Article 2, protecting the right to life.

- As regards violations of Article 8 of the ECHR, arising in the context of healthcare, the ECtHR stated, in *Cyprus v. Turkey*[505] that:

> […]the specific complaints invoked by the applicant Government regarding impediments to access to medical treatment […] are

499 *Ibid.,* para. 49.
500 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 219.
501 *Ibid.*, para. 219.
502 *Mehmet Sentürk and Bekir Sentürk v. Turkey,* No. 13423/09, 09/04/2013.
503 *Ibid.*, para. 84.
504 *Ibid.*, para. 97.
505 *Cyprus v. Turkey,* No. 25781/94 [GC], 10/05/2001, para. 219.

elements which fall to be considered in the context of an overall analysis of the living conditions of the population concerned from the angle of their impact on the right of its members to respect for private or family life.

Moreover, Article 11 of the European Social Charter (revised) deals directly with the issue of healthcare:

> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia*: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

It has been argued that Article 11 of the European Social Charter (revised) complements Articles 2 and 3 of the ECHR through the positive obligations imposed thereby and designed to ensure the effective exercise of those rights.[506]

3. Access to food and water

The *Guiding Principles* directly refer to the right of "safe access" to food and water,[507] without discrimination and regardless of circumstances. Access to food and water, including drinking water, is considered to be a necessary precondition for the exercise of all other human rights.[508] This right to food is satisfied when all IDPs have physical and economic access to food, in the sense that the cost of food should not hinder access to it or other basic needs, or means for its procurement, at all times;[509] the right to water is satisfied when all IDPs enjoy secure access to sufficient and safe drinking water for both personal and domestic use, without discrimination.[510]

506 Information document prepared by the secretariat of the ESC, "The right to health and the European Social Charter", (March 2009), p. 2.
507 *Guiding Principles on Internal Displacement,* Principle 18.2 (a).
508 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers",* Brookings-Bern Project on Internal Displacement, October 2008, pp. 105-117.
509 *Ibid.*, p. 105.
510 *Ibid.*, p. 117.

As food and water are vital for the survival of every human being, they are inextricably linked to the enjoyment of basic human rights, such as the right to life, the prohibition of inhuman or degrading treatment or even the right to family life. Although the right of access to food and water are not expressly provided for in the ECHR, their deprivation may lead to the breach of basic rights of the ECHR.

For example, in the case of *Nencheva and Others v. Bulgaria*,[511] the ECtHR found a violation of Article 2 of the ECHR in conditions of economic crisis where fifteen children with disabilities and young adults placed in care had died, during the winter of 1996-1997, for lack of food, heating and basic care.[512] The applicants alleged, *inter alia*, that the state had failed to fulfil its positive obligations to protect the lives of vulnerable persons in its care, in circumstances which threatened their lives and well-being. In *Budina v. Russia*, the ECtHR did not exclude the possibility that state responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on state support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.[513] Significantly, in the case of *M.S.S v. Belgium and Greece*,[514] in finding a violation of Article 3, the ECtHR also took into account the fact that the applicant not only lacked adequate housing, but he spent his days looking for food and had no access to sanitary facilities.

Article 8 of the ECHR has also been relied on in connection with the importance of drinking water for the enjoyment of private and family life. In *Dubetska and others v. Ukraine*,[515] the applicants complained that the state authorities had failed to protect their Article 8 rights from excessive pollution generated by two state-owned industrial facilities. The polluted ground water was also considered to be one of the factors that had affected the applicants' health and their ability to enjoy their rights under Article 8 of the ECHR to their right to respect for home, private and family life. In its assessment, the ECtHR took into account the fact that a number of different natural factors affected the quality of water and caused soil subsidence in the applicants' case and that the issue of accessing fresh water appeared to have been resolved at the time of the examination of the case. Nonetheless, the ECtHR

511 *Nencheva and Others v. Bulgaria*, No. 48609/06, 18/06/2013.
512 *Ibid.*, para.117.
513 *Budina v. Russia*, No. 45603/05 (dec.), 18/06/2009.
514 *M.S.S v. Belgium and Greece,* No. 30696/09 [GC], 21/01/2011.
515 *Dubetska and others v. Ukraine,* No. 30499/03, 10/02/2011.

considered that the operation of the mine and the factory had contributed to the problems faced by the applicants for several years, to an extent which the ECtHR found not to be at all negligible.[516]

Similarly, in *Dzemyuk v. Ukraine*,[517] the construction and use of a cemetery very close to the applicant's house had caused the contamination of the applicant's water supply, both for drinking and other purposes. Having affected the applicant's quality of life, this constituted an interference with his rights under Article 8.[518]

4. Access to education and vocational training

As a result of their displacement, IDPs lose access to education. Even after their return to their homes, IDPs may still not have access to education as their schools may have been destroyed or may not be in service for various reasons. Access to education, however, is fundamental for the development of IDPs and specifically, internally displaced children, as it provides the necessary foundation for employment later on in life and for avoiding future economic or sexual exploitation.[519] Education, is also vital for the integration of IDPs in society, enabling them to gain civic awareness and reducing their dependence on the state.[520]

Principle 23 of the *Guiding Principles* recognises the right of IDPs to education. It provides that competent authorities must ensure that IDPs, especially children, receive education during their displacement. According to Principle 23.2, such education shall be free and compulsory at the primary level, always respecting cultural identity, language and religion. Principle 23.3 pays particular attention to the participation of women and girls in educational programmes. States must, therefore, ensure access to education for all, without discrimination of any kind and where women and girls previously had no access to education because of gender, states are expected to take temporary

516 *Ibid.*, para. 113.
517 *Dzemyuk v. Ukraine*, No. 42488/02, 04/09/2014.
518 *Ibid.*, para. 83.
519 The Brookings Institution, "*Protecting Internally Displaced Persons: A Manual for Law and Policymakers*", Brookings-Bern Project on Internal Displacement, October 2008, p.226.
520 PACE Recommendation 1652 (2004), *Education of refugees and internally displaced persons,* 2 March 2004.

measures to ensure in substance equality in access to education.[521] Lastly, under Principle 23.4, education and training facilities shall be made available to IDPs, in particular adolescents, whether or not living in camps, as soon as conditions permit.

With regards to the right of education under the ECHR, Article 2 of Protocol No. 1 provides as follows:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In the inter-state case of *Cyprus v. Turkey*, the applicant Government claimed that the children of Greek Cypriots living in northern Cyprus were denied secondary-education facilities and that Greek-Cypriot parents of children of secondary-school age were in consequence denied the right to ensure their children's education in conformity with their religious and philosophical convictions.[522] In finding a violation of Article 2 of Protocol No. 1, the ECtHR took note of the fact that the children of Greek-Cypriot parents in northern Cyprus, who wished to be taught in the Greek language, were obliged to transfer to schools in South Cyprus due to the decision of the "TRNC" to abolish this facility which had previously been available.[523]

In *Catan and Others v. Moldova and Russia*,[524] the ECtHR considered the issue of the language of instruction in schools. The events of the case took place in the aftermath of the 1991-1992 Transdniestrian conflict and the establishment of the separatist "Moldovan Republic of Transdniestria" ("MRT"), under the control of the Russian Federation, within the territory of Moldova. Following the proclamation of the "MRT", the authorities prohibited by law the use of the Latin alphabet and closed all schools, which taught the Moldovan language in the Latin alphabet. As a result, the schools were forced to relocate to new premises that were less well equipped and less conveniently situated. In addition, children were verbally abused on their way to school and stopped and searched by the "MRT" police and border guards, who

521 The Brookings Institution, *"Protecting Internally Displaced Persons: A Manual for Law and Policymakers"*, Brookings-Bern Project on Internal Displacement, October 2008, p. 224.
522 *Cyprus v. Turkey*, No. 25781/94 [GC], 10/05/2001, para. 273.
523 *Ibid.*, para. 277.
524 *Catan and Others v. Moldova and Russia*, Nos. 43370/04 & 18454/06 & 8252/05 [GC], 19/10/2012.

confiscated any Latin script books. The ECtHR held that the forced closure of the schools coupled with the measures of harassment constituted interferences with the applicant pupils' right of access to educational institutions and the right to be educated in their national language. In addition, the ECtHR also considered that these measures amounted to an interference with the applicant parents' rights to ensure their children's education and teaching in accordance with their philosophical convictions.[525]

The ESC(r) requires that in order to ensure that children grow up in an environment which encourages the full development of their personality, physical and mental capacities, state parties to the ESC(r) should ensure that children and young persons, have, among others, the education and training they need, by establishing or maintaining institutions and services suitable for this purpose. This shall be in accordance with the rights and duties of their parents.[526] State parties to the ESC(r) are also required to provide children and young persons a free primary and secondary education.[527] To secure further the right to education, the ESC provides that employment is only allowed from 15 years of age to the extent that it does not interfere with the right to free education.[528] The ESC(r) also provides for the right to vocational training. For the effective exercise of this right, the ESC requires the abolition or reduction of tuition fees and, where appropriate, the provision of financial assistance for such training.[529]

PACE pays special attention to the importance of education for IDPs in its Recommendation 1652 (2004) on the "Education of Refugees and Internally Displaced Persons". The recommendation promotes respect for the existing obligations for the provision of education for IDPs within the human rights framework and calls on CoE member states to "facilitate the provision of further education and vocational training for refugees and IDPs so as to reduce their dependence and to enable them to lead a normal life".[530]

525 *Ibid.*, paras. 141-150.
526 European Social Charter (Revised) 3.V.1996, Article 17, para. 1a.
527 *Ibid.*, Article 17, para 2.
528 *Ibid.*, Article 7.
529 *Ibid.*, Article 10, para. 5.
530 PACE Recommendation 1652 (2004), *Education of refugees and internally displaced persons,* 2 March 2004

5. Access to employment and social protection

IDP access to employment and social protection is central to the process of reintegration and promotion of self-sufficiency for IDPs. Employment opportunities and social protection measures enable IDPs to maintain their livelihood, avoiding impoverishment and complete dependence on state or humanitarian assistance for survival.

The *Guiding Principles,* and specifically Principle 22(b) provides for the right of IDPs to "seek freely opportunities for employment and to participate in economic activities", without discrimination. The *Guiding Principles* also provide for access to social services even after displacement.[531]

The importance of access to employment and social protection for IDP's is highlighted in PACE Recommendation 1877 (2009)[532] whereby member states are called to:

> […] make income-generating activities available to IDPs to facilitate their social and economic reintegration and, in particular, to ensure full and non-discriminatory access to jobs offered by private or public employers; to develop social welfare systems that can benefit IDPs in need of assistance, in particular social housing schemes; where relevant, to transfer social security and pension rights.[533]

The ESC (r) (r), calls on state parties to ensure the effective exercise of the right to work[534] under just,[535] safe and healthy working conditions.[536] It also elaborates on the provision of fair remuneration so that workers and their families retain a decent standard of living. The ESC (r) also specifically mentions the rights to social security[537] and social and medical assistance.[538] Furthermore, it secures the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex. This includes, ensuring access to employment, vocational guidance, training and re-

531 *Guiding Principles on Internal Displacement,* Principles 19 and 21.
532 PACE Recommendation 1877(2009), "*Europe's forgotten people: protecting the human rights of long-term displaced persons*", 24 June 2009.
533 *Ibid.*, para. 15.3.8.
534 European Social Charter (Revised) 3.V.1996, Part II, Article 1.
535 *Ibid.*, Part II, Article 2.
536 *Ibid.*, Part II, Article 3.
537 *Ibid.*, Part II, Article 12
538 *Ibid.*, Part II, Article 13.

habilitation, career development and the terms of employment and working conditions.[539]

In its very recent judgment in *Vrountou v. Cyprus*,[540] the ECtHR examined the application of a scheme of aid for displaced persons and war victims in Cyprus and held that the exclusion of children of displaced women from that scheme, which entailed a range of benefits including housing assistance, was discriminatory and in breach of Article 14 in conjunction with Article 1 of Protocol No. 1 to the ECHR. In short, after the 1974 events in Cyprus, the Council of Ministers of the Republic of Cyprus introduced a scheme of aid for IDPs, under which displaced people were entitled to refugee cards which were linked with various benefits. The refugee card was a necessary precondition for access to such benefits. However, while children of displaced men were eligible for such cards, no relevant provision was included for children of displaced women, ultimately excluding the applicant, who was the child of a displaced woman, and all children of displaced women from access to a refugee cards and the benefits which flowed from it. The applicant, who wished to obtain housing assistance, applied for a refugee card but her request was rejected. The ECtHR held that the difference in treatment on the grounds of sex was in breach of Article 14 in conjunction with Article 1 of Protocol No.1.

With reference to other issues of social protection, the ECtHR has held that Article 1 of Protocol No. 1, as a general rule, applies also in the case of pensions. This conclusion was also applied in cases of IDPs, such as *Grudić v. Serbia*.[541] The case concerned a violation of the two applicants' right to peaceful enjoyment of their possessions in view of the fact that the payment of their pensions earned in Kosovo was suspended by the Serbian Pensions and Disability Insurance Fund for more than a decade, in breach of relevant domestic law. The ECtHR held that the applicant's existing pension entitlements, constituted a possession within the meaning of Article 1 of Protocol No. 1 and the suspension of their payment constituted an interference with that right, while the decision for the suspension had not been in accordance with the relevant domestic law.

Similarly, in *Pichkur v. Ukraine*,[542] concerning a retirement pension, the respondent state terminated pension payments to the applicant

539 *Ibid.*, Part II, Article 20.
540 *Vrountou v. Cyprus,* No. 33631/06, 13/10/2015.
541 *Grudić v Serbia,* No. 31925/08, 17/04/2012.
542 *Pichkur v. Ukraine,* No. 10441/06, 07/11/2013.

on the ground that he had moved abroad. The applicant claimed that his rights under Article 14 and Article 1 of Protocol No. 1 of the ECHR had been violated on the basis of his place of residence. The ECtHR upheld the applicant's claims, finding that the applicant who had worked in Ukraine for several years and was deprived of his pension, although he had contributed to the pension scheme throughout his employment, on the sole ground of his settlement abroad, constituted a breach of his rights under the ECHR. The reasoning of the ECtHR may be used in cases of IDPs in analogy.

In *Stec and Others v. the United Kingdom*,[543] a case concerning the decrease of earnings allowances once the applicants reached their pensionable age, which was different for men and women, considered that the applicant's interests fell within the scope of Article 1 of Protocol No. 1. as follows:

> In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.[544]

6. Access to justice

Access to justice plays a crucial part in the ability of IDPs to have proper access to shelter, home, health services, food and water described the previous sections, since such rights may not always be readily available and must be fought for. Effective access to justice is also an essential tool for redress for all the wrongs suffered by IDPs, including their displacement. It is also the means by which perpetrators of international crimes can be held accountable for their actions.

According to the PACE Report Doc.11942, on "Europe's forgotten people protecting the human rights of long term displaced persons",

543 *Stec and Others v. the United* Kingdom, Nos. 65731/01 & 65900/01 [GC], 06/07/2005.
544 *Ibid*., para. 51.

one characteristic of protracted internal displacement in Europe is that many IDPs are not able to access justice for violations they had suffered:[545]

> [p]erpetrators of human rights violations and crimes committed during the armed conflicts mostly remain at large, court decisions are disproportionately not in favour of IDPs of certain ethnicities, or their implementation is stalled, and many IDPs continue to seek information on the fate and whereabouts of their disappeared relatives.[546]

- Access to justice, involves due process and an independent and impartial judiciary, as well as availability, accessibility, adequacy and adaptability. The ECHR does not provide for a free of charge and unconditional right of access to justice under Article 6.1 in the determination of civil rights and obligations.[547] Nonetheless, states may have an obligation to provide free legal assistance to those most in need, in certain circumstances, and especially when that is indispensable for effective access to the courts.[548] For example, where people, such as IDPs, who are in an economically difficult or vulnerable position are prevented from accessing justice by various financial obstacles, such as excessive court fees, Article 6 may come into play.[549]

- Access to justice may involve issues such as legal aid, court fees, alternative dispute resolution and even the proportionality of compensation awarded by the courts.[550] In order to ensure effective access to justice for people of little or no means such as the IDPs, it is essential to address the underlying socioeconomic inequities and ensure that they are provided with the necessary structural and educational support to be in a position to benefit from the legal remedies available.

545 PACE, Doc. 11942 Report, *Europe's forgotten people: protecting the human rights of long-term displaced persons*, 8 June 2009.
546 *Ibid*.
547 *Kreuz v. Poland*, No. 28249/95, 19/6/2001, para. 59.
548 *Airey v. Ireland,* No. 6289/73, 09/10/1979; *see also Laskowska v. Poland,* No. 77765/01, 13/03/2007, paras. 50-54, confirming the principle in *Airey* and providing an overview of the requirements.
549 *Bakan v. Turkey,* No. 50939/99, 12/06/2007, paras. 66; *Mehmet and Suna Yigit v. Turkey,* No.53658/99, 17/07/2007 where the ECtHR in para. 38 held that a requirement that the applicants had to pay court fees which amounted up to four times the minimum monthly wage was a disproportionate restriction to their right of access to court, especially since the applicants had no income; and *Stankov v. Bulgaria,* No. 68490/01, 12/7/2007.
550 CoE, "Implementing the European Convention on Human Rights in times of economic crisis", Dialogue between judges, European Court of Human Rights, January 2013, page. 9.

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ЗАХИСТ ВНУТРІШНЬО ПЕРЕМІЩЕНИХ ОСІБ ВІДПОВІДНО ДО ЄВРОПЕЙСЬКОЇ КОНВЕНЦІЇ З ПРАВ ЛЮДИНИ ТА ІНШИХ СТАНДАРТІВ РАДИ ЄВРОПИ

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