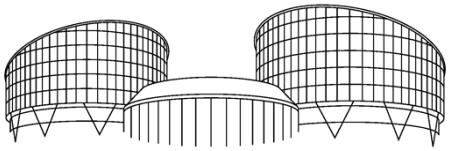

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CYPRUS v. TURKEY

(Application no. 25781/94)

JUDGMENT
(Just satisfaction)

STRASBOURG

12 May 2014

In the case of Cyprus v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Josep Casadevall, *President*,
Françoise Tulkens,
Guido Raimondi,
Nina Vajić,
Mark Villiger,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Davíd Thór Björgvinsson,
George Nicolaou,
András Sajó,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Ann Power-Forde,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 14 March 2012, 10 April 2013, 27 June 2013 and 12 March 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the Government of the Republic of Cyprus ("the applicant Government") on 30 August 1999 and by the European Commission of Human Rights on 11 September 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. In the course of the proceedings on the merits of the case, on 27 October 1999, the President of the Court met the Agent of the applicant Government and the Agent of the Government of the Republic of Turkey ("the respondent Government") with a view to discussing some preliminary procedural issues in the case. The Agents accepted that, if the Court were to find a violation, a separate procedure would be required for dealing with claims under Article 41 of the Convention.

3. By a letter of 29 November 1999, the Court instructed both parties as follows:

> "The applicant Government are not required to submit any claim for just satisfaction under Article 41 of the Convention at this stage of the proceedings. A further procedure on this matter will be organised depending on the Court's conclusions on the merits of the complaints."

4. In a judgment delivered on 10 May 2001 (*Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV – "the principal judgment"), the Court (Grand Chamber) found numerous violations of the Convention by Turkey arising out of the Turkish military operations in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus" (the "TRNC"). Concerning just satisfaction, the Court held unanimously that the issue of the possible application of Article 41 of the Convention was not ready for decision and adjourned consideration thereof.

5. The case concerning the execution of the principal judgment is currently pending before the Committee of Ministers of the Council of Europe.

6. On 31 August 2007 the applicant Government informed the Court that they intended to submit an "application to the Grand Chamber to resume its consideration of the possible application of Article 41 of the Convention". On 11 March 2010 the applicant Government submitted to the Court their claims for just satisfaction concerning missing persons in respect of whom the Court had found a violation of Articles 2, 3 and 5 of the Convention (see Part II, points 2, 4 and 7 of the operative provisions of the principal judgment and the corresponding paragraphs to which they refer). They declared that the just-satisfaction issue with respect to the remaining violations, in particular those relating to homes and property of Greek Cypriots, remained reserved, and that they would possibly come back to this issue later. Both the applicant and the respondent Governments subsequently filed observations.

7. On 7 April 2011 the President of the Court fixed the composition of the Grand Chamber for the purposes of ruling on the application of Article 41 of the Convention, by drawing lots (Rules 24 and 75 § 2 of the Rules of Court). Lots were subsequently drawn by the President of the Court to complete the composition (Rule 24 § 2 (e)).

8. On 25 November 2011 the applicant Government sent to the Court a request entitled "Application for just satisfaction (Article 41) on behalf of the Republic of Cyprus", targeting the enforcement procedure of the principal judgment by the Committee of Ministers of the Council of Europe and requesting the Court to take certain steps in order to facilitate the enforcement of the principal judgment.

9. By a letter of 21 March 2012, following the deliberations of 14 March 2012, the Court invited the applicant Government to respond to some

further questions, and to submit a final version of their claims for just satisfaction. In response, on 18 June 2012 the applicant Government amended their initial claims under Article 41 of the Convention concerning missing persons, and raised new just-satisfaction claims in respect of the violations of human rights (more precisely, Articles 3, 8, 9, 10 and 13 of the Convention and Article 2 of Protocol No. 1) of the enclaved Greek-Cypriot residents of the Karpas peninsula (see Part IV, points 4, 6, 11, 12, 15 and 19 of the operative provisions of the principal judgment and the corresponding paragraphs to which they refer). On 26 October 2012 the respondent Government submitted their observations on these claims.

THE LAW

10. Article 41 of the Convention provides:

"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."

11. The relevant parts of Article 46 of the Convention read as follows:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

12. Rule 60 of the Rules of Court states:

"1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.

2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.

3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.

4. The applicant's claims shall be transmitted to the respondent Contracting Party for comment."

I. THE APPLICANT GOVERNMENT'S CLAIMS FOR JUST SATISFACTION

A. Admissibility

1. Whether the applicant Government's just-satisfaction claims are out of time

(a) The parties' submissions

(i) The Cypriot Government

13. The Cypriot Government recognised that their just-satisfaction claims were filed only on 11 March 2010, that is, almost nine years after the delivery of the principal judgment. However, they considered that their inaction between 2001 and 2010 was fully justified. Firstly, in the judgment on the merits, the Court had adjourned *sine die* the issue of the possible application of Article 41 of the Convention, leaving this question open. Both before and after the judgment, the applicant Government had simply waited for further instructions from the Court, which was supposed to fix the further procedure pursuant to its own Rules. Secondly, after the delivery of the principal judgment, Cyprus had hoped *bona fide* that it would be properly enforced through the usual mechanism of the Committee of Ministers of the Council of Europe. Only several years later, when it had become obvious that Turkey was unwilling to solve the issue by political means (that is, through the adoption of general and specific measures), had the Cypriot Government realised that it had no other option than to turn to the Court again, in order to ensure proper execution of the judgment by means of awarding just satisfaction. In particular, there was an impasse resulting from different interpretations of the decision in *Demopoulos and Others v. Turkey* ((dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, ECHR 2010); unlike Turkey, the Cypriot Government did not consider that it could be interpreted as a finding that Turkey had satisfied its obligations in order to comply with the principal judgment. Moreover, it appeared from the relevant findings of the Committee of Ministers that the investigative measures required by the judgment have not been taken.

14. Aware that a number of individual applications overlapping with the inter-State case were pending before the Court, the applicant Government considered that such individual claims had to be granted priority. However, in the light of the "newly reformulated time-limits" in *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009), they had to make this claim in order not to lose their rights under Article 41.

15. As to whether the time factor precludes the Court from examining the claims for just satisfaction, the Cypriot Government considered that there were six relevant principles of international law, that is to say: extinctive prescription, waiver and acquiescence, estoppel, *res judicata*, duty to maintain the *status quo*, and good faith. None of these justifies dismissal of the case based on time considerations. The applicant Government invoked the following basic arguments under the six principles quoted above. First of all, in the principal judgment, the Court had clearly stated that the matter had simply been adjourned – therefore it had been expressly left open indefinitely. Furthermore, a waiver of a right must be clear and unequivocal; it cannot be presumed. Cyprus had neither made an express or implied statement nor behaved in a way to show that it had renounced or waived its right to claim just satisfaction. On the contrary, in 2007 it had expressly asserted this right before the Court, and nobody had objected to that. It is rather Turkey which is now estopped from invoking an estoppel since it did not do so in 2007.

16. According to the Cypriot Government, the passage of time had not caused any evidential disadvantage to the Turkish Government, because the facts had not changed; they were basically the same as in 2001. Moreover, Turkey could not have reasonably expected that the claim for just satisfaction would no longer be pursued. Finally, in 2001 it had been decided by the Court that the parties would await a final decision on the matter of just satisfaction, and the principle of good faith obliged them to maintain the existing situation as far as possible so that that final decision would not be prejudiced. It would undermine the principle of effectiveness if Turkey were permitted, through its failure to abide by the judgment, to frustrate the taking of that final decision.

17. The Cypriot Government also invoked the legitimate expectations of the individual victims. They cited Article 55 of the Convention, by which the Contracting Parties have agreed "not [to] avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of [the] Convention to a means of settlement other than those provided for in [the] Convention". It would be contrary to the principle of legitimate expectation to deny an adequate remedy in cases between two States, both of which have specifically agreed to confer jurisdiction on the Court and to exclude any other form of settlement.

(ii) The Turkish Government

18. The respondent Government considered that the applicant Government's claims for just satisfaction were belated. Nothing, or very little, had happened between 2001 and 2010, apart from the letter sent to the Court in August 2007. Even assuming that Article 41 of the Convention applies in inter-State cases, the applicant Government remains bound by a

minimal-diligence requirement according to Rule 60 of the Rules of Court, which requires that there should be no undue delay in the claims for just satisfaction under Article 41. In the present case the applicant Government had caused such an unacceptable delay.

19. The Turkish Government observed that the Cypriot Government had not submitted any claims for just satisfaction in the course of the procedure on the merits of the case. In their written submissions of 22 November 1994, the applicant Government had not asked for just satisfaction, declaring instead that the inter-State application had been lodged "without prejudice to individual applications against Turkey under Article 25 [now Article 34] of the Convention which have already been made or which will be made in future". This meant that Cyprus had indeed chosen to give precedence to the supervisory function of the Committee of Ministers and not to apply to the Court for just satisfaction. This was their choice at the time, but they could also have chosen otherwise: in fact, Articles 41 and 46 of the Convention have different purposes, and nothing prevented the Cypriot Government from presenting timely just-satisfaction claims concurrently with the supervisory proceedings before the Committee of Ministers. Anyway, it was up to the applicant Government to put the process in motion soon after the principal judgment and not to expect the Court to fix the procedure on its own motion. Having failed to do so, the applicant Government had not done everything they could reasonably have done to maintain and pursue their claim, and their behaviour had to be interpreted as implicitly dropping the claims for just satisfaction in the present case.

20. The respondent Government also pointed to the fact that the just-satisfaction claims had been addressed to the Court only after the Grand Chamber had delivered its judgment in *Varnava and Others*, cited above, concerning a series of individual applications made under Article 34, and the sums initially claimed by the Cypriot Government amounted to 12,000 euros (EUR) in every case, which was exactly the sum granted to each of the individual applicants in *Varnava and Others*. This means that the Court's judgment in *Varnava and Others*, which had limited the chances of success for individual applicants, had sounded an alarm bell for the applicant Government and prompted them to come back before the Court. However, according to the Turkish Government, both the principle of good faith and respect for the rule of *res judicata* should make it impossible for the Cypriot Government to revive this matter now; any claims for just satisfaction should be made in such individual applications (like *Varnava and Others*) rather than in the present inter-State case.

21. According to the Turkish Government, the application of Article 41 would be unjustified, as the United Nations Committee on Missing Persons has evolved considerably since the delivery of the principal judgment. Contrary to the Cypriot Government's allegations, there has been

considerable progress in locating and identifying the victims' remains – and this had been expressly recognised by the Court (see *Charalambous and Others v. Turkey* (dec.), nos. 46744/07 and others, 3 April 2012). Therefore, the "missing persons" issue gradually becomes a "dead persons" issue and, according to the Court's judgment in *Brecknell v. the United Kingdom* (no. 32457/04, 27 November 2007), this creates substantively new procedural obligations with new time-limits. Thus, on the one hand, the supervisory proceedings before the Committee of Ministers remain effective and, on the other hand, the relatives of the missing persons should now await for the revival of the procedural obligation according to the *Brecknell* rule in order to protect their legitimate interests.

22. The Turkish Government insisted that the specific temporal provisions of the Convention (as interpreted in *Varnava and Others*) should have precedence over the general principles of international law. More precisely, it is not possible to present claims in an inter-State application which would have been time-barred had they been raised in an individual application under Article 34. It would cause an immense prejudice to Turkey if individual claims which are time-barred could be revived in an application for just satisfaction submitted nearly nine years after the judgment on the merits.

(b) The Court's assessment

23. The Court reiterates that the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 (the "Vienna Convention"). As a matter of fact, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see, among many others, *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008, and Article 31 § 3 (c) of the Vienna Convention).

24. The Court acknowledges that general international law does, in principle, recognise the obligation of an applicant government in an inter-State dispute to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State. Thus, in the case of *Certain Phosphate Lands in Nauru*

(*Nauru v. Australia* (preliminary objections), *ICJ Reports* 1992, p. 240), the International Court of Justice held:

> "32. The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.
>
> ...
>
> 36. ... The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."

25. First and foremost, the Court observes that the present application was introduced in 1994, before the former European Commission of Human Rights, under the system previous to the entry into force of Protocol No. 11 (see paragraph 1 above). Under the Rules of Procedure of the Commission then in force, neither an applicant Government in an inter-State case nor an individual applicant had to make a general indication of their just-satisfaction claims in their application form. The Court further reiterates that in its letter of 29 November 1999 sent to both Governments it had expressly instructed the applicant Government not to submit any claim for just satisfaction under Article 41 of the Convention at the merits stage (see paragraph 3 above); it is thus understandable that they did not do so. It also notes that in its judgment of 10 May 2001 it held "that the issue of the possible application of Article 41 of the Convention was not ready for decision and adjourn[ed] consideration thereof" (Part VIII of the operative provisions). No time-limits were fixed for the parties to submit their just-satisfaction claims (see paragraphs 2-4 above). The Court must ascertain whether, in spite of this absence of time-limits, the fact that the Cypriot Government did not submit their claims for just satisfaction until 11 March 2010 has nevertheless rendered these claims inadmissible according to the basic criteria defined in the *Nauru* case.

26. The Court considers that this is not the case. In the first place, unlike in the *Nauru* case examined by the International Court of Justice, the impugned delay did not occur before the filing of the inter-State application but between the judgment of this Court on the merits of the case and the continued supervision of the enforcement of this judgment by the Committee of Ministers. During this phase of the case both Governments were entitled to believe that the issue relating to a possible award of just satisfaction was in abeyance pending further developments. Moreover, the just-satisfaction issue was repeatedly mentioned in the course of the

proceedings on the merits of the case (see paragraphs 2-3 above). In the principal judgment the issue of a possible award of just satisfaction was adjourned, which clearly and unambiguously meant that the Court had not excluded the possibility of resuming the examination of this issue at some appropriate point in the future. Neither of the parties could therefore reasonably expect that this matter would be left unaddressed, or that it would be extinguished or nullified by the passage of time. Lastly, as the Cypriot Government have rightly pointed out, they had never made an express or implied statement showing that they had renounced or waived their right to claim just satisfaction; on the contrary, their letter of 31 August 2007 should be seen as a clear and unequivocal reassertion of this right. In these circumstances the respondent Government are not justified in claiming that the resumption of the examination of the applicant Government's claims would be prejudicial to their legitimate interests, as they should have reasonably expected this matter to come back before the Court at some point. In the light of the *Nauru* judgment, cited above, the Court considers that in this context, the "prejudice" element is first and foremost related to the procedural interests of the respondent Government ("the establishment of the facts and the determination of the content of the applicable law"), and that it was for the respondent Government to prove convincingly the imminence or the likelihood of such a prejudice. However, the Court sees no such proof in the present case.

27. In so far as the Turkish Government have referred to the supervisory proceedings before the Committee of Ministers, the Court reiterates that findings of a violation in its judgments are essentially declaratory and that, by Article 46 of the Convention, 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 (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 61, ECHR 2009). In this respect, one should not confuse, on the one hand, proceedings before the Court, which is competent to find violations of the Convention in final judgments which are binding on the States Parties (Article 19, in conjunction with Article 46 § 1) and to afford just satisfaction (Article 41) where relevant, and, on the other hand, the mechanism for supervising the execution of judgments, which is under the Committee of Ministers' responsibility (Article 46 § 2). Under Article 46, the State Party is under an obligation not just to pay those concerned the sums awarded by the Court by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (ibid., § 85). Albeit connected with each other, the obligation to take individual and/or general measures and the payment of just satisfaction

are two distinct forms of redress, and the former in no way precludes the latter.

28. As to the developments between 2001 and 2010 in the course of or in connection with the supervisory proceedings before the Committee of Ministers, the Court considers that these developments are undoubtedly relevant when assessing the substance of the applicant Government's just-satisfaction claim; however, they do not preclude the Court from examining this claim.

29. In the light of the foregoing, the Court sees no valid reason to consider the Cypriot Government's claims for just satisfaction as belated and to declare them inadmissible. The Turkish Government's objection must therefore be dismissed.

30. The Court also reiterates that on 14 March 2012 it had invited the applicant Government to submit a "final" version of their just-satisfaction claims, and that their resulting submissions of 18 June 2012 have to be seen, indeed, as final. Consequently the Court considers that the present judgment concludes the consideration of the matter.

2. Applicability of Article 41 of the Convention to the present case

(a) The parties' submissions

(i) The Cypriot Government

31. The applicant Government argued that Article 41 of the Convention is applicable in inter-State cases in general and in the present case in particular. First of all, they pointed to the fact that the very text of Article 41 makes no distinction between individual cases and inter-State cases, the latter not being expressly excluded from the scope of the just-satisfaction rule. They also referred to the principle of the effectiveness of individual rights protected by the Convention. The applicant Government proposed that this norm should be viewed in the light of two other principles defined by the Court's case-law: on the one hand, the status of the Convention as an instrument of public international law which has to be interpreted in accordance with the rules and principles codified in the 1969 Vienna Convention on the Law of Treaties and, on the other hand, the specific object and purpose of the Convention as an international human rights treaty. According to the Cypriot Government, these principles are particularly pertinent to the Court's ability to award just satisfaction under Article 41 of the Convention, which ensures that there is an effective means of enforcing the Convention and encouraging the Contracting Parties not to ignore the Court's rulings. In other words, Article 41 must be interpreted as an important tool at the Court's disposal with a view to achieving compliance with its own judgments, both in individual cases under Article 34 and in inter-State cases under Article 33.

32. The applicant Government also referred to Article 32 § 1 of the Convention, according to which "[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47". In their view, these four Articles must be seen as part of a unique structured system together with Article 32 § 1: Articles 33, 34, 46 and 47 establish different routes by which a case may come before the Court, but they do not establish distinct spheres or types of jurisdiction for the Court. No matter how an application against a State comes before the Court, the jurisdiction of the latter remains the same and includes the competence to grant just satisfaction. There is no good reason to think otherwise, since the human rights at stake are the same and possibly even more serious than in an individual case; in addition, the authors of the Convention did not put a restriction on the ability to grant just satisfaction expressly in the text of Article 41; and finally, there is no indication that there is an implied restriction resulting from the very logic of this provision (or of Article 33). Therefore it cannot be said that the Court has fewer powers in respect of cases that come before it by means of an inter-State application than it has in respect of cases brought by way of an individual application.

33. According to the Cypriot Government, the Court itself has always implicitly regarded Article 41 as applicable in inter-State cases, and this is reflected both in the Rules of Court and in the Court's case-law. In this respect, they quoted Rule 46 (e), according to which the applicant Government in an inter-State case has to submit an application setting out "a general indication of any claims for just satisfaction made under Article 41 of the Convention on behalf of the alleged injured party or parties" as well as Rules 60 and 75 § 1, which do not distinguish between individual and inter-State applications.

34. As to the Court's case-law, the Cypriot Government considered that the Court had itself recognised implicitly, but quite clearly, that the just-satisfaction rule does apply in inter-State cases. Thus, in *Ireland v. the United Kingdom* (18 January 1978, §§ 244-46, Series A no. 25) the Court, instead of declaring former Article 50 inapplicable, had simply considered that it was "not necessary to apply it". Likewise, in the present case the Court merely adjourned the consideration of the issue of just satisfaction, instead of dismissing it.

35. Finally, the applicant Government pointed out that the Court has discretionary power under Article 41. Both the case-law of the Court and legal scholars have always emphasised that, when the Court awards just satisfaction, the application of Article 41 is a matter entirely within the Court's discretion in any given case, including an inter-State application. In the present case, the Cypriot Government's claim for just satisfaction is not a claim for pecuniary damages directly caused to Cyprus as a State, but

rather a claim for the awarding of just satisfaction to the individual injured parties, its nationals, in respect of violations already determined to have taken place.

(ii) The Turkish Government

36. The Turkish Government considered that, as a general rule, Article 41 does not apply to inter-State cases. In the first place, the operative provisions of the principal judgment cannot be construed as a recognition, albeit implicit, of the applicability of the just-satisfaction rule in inter-State cases. In the judgment, the Court spoke merely of a "possible" application of Article 41. The Turkish Government also argued that the Grand Chamber judgment in *Varnava and Others* (cited above, § 118) had to be interpreted as recognising the lack of jurisdiction of the Court to afford just satisfaction in an inter-State case. Furthermore, the respondent Government proposed to examine Article 41 of the Convention in the general context of the law of international responsibility, the law of diplomatic protection and the principles of the international protection of human rights. While Article 33 basically corresponds to the classical logic of diplomatic protection (a direct State-to-State liability), Article 34 constitutes a derogation from this logic: individuals may, through individual applications, act directly against the allegedly wrongdoing State and request just satisfaction without having to solicit the diplomatic protection of their national State. For the Turkish Government, this description justifies the conclusion that Article 41 of the Convention does not apply to inter-State proceedings except, perhaps, where the violation has caused a direct injury to the complaining State Party. In other words, the scope of Article 41 as such is limited in principle to the mechanism of individual applications.

37. Another argument used by the respondent Government in favour of the non-applicability of Article 41 to inter-State cases is that such cases are not motivated by the applicant's self-interest. In this respect, the Turkish Government referred to the case-law of the European Commission of Human Rights, according to which the applicant State in an inter-State case does not enforce its own rights, or the rights of its nationals, but rather vindicates the public order of Europe (see *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, Yearbook 6, p. 116). Indeed, inter-State applications aim at complaining about a pattern of official conduct giving rise to continuing breaches of the Convention. Inter-State complaints should by definition be broader than individual complaints; they should relate to systemic failures rather than to individual violations. In this context, the finding of a violation in itself achieves the purpose of an inter-State litigation. On the other hand, every individual applicant has the opportunity to lodge his or her own application with the Court according to Article 34 of the Convention, and to obtain just satisfaction; therefore it

would be wrong to confuse these procedures which have such different purposes.

38. Referring to the Court's case-law, the respondent Government considered that just satisfaction under Article 41 of the Convention was meant to include physical or psychological trauma, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, etc. These factors exclusively pertain to the suffering of an individual applicant, that is to say, of a natural person, and have no meaning in an inter-State case. As to the Rules of Court, the respondent Government argued that the use of the animate personal pronouns "his" or "her" (instead of "its") in Rule 60 § 1 showed that this rule concerns only individuals, and not States.

(b) The Court's assessment

39. The Court observes that until now, the only case where it has had to deal with the applicability of the just-satisfaction rule in an inter-State case was the judgment in *Ireland v. the United Kingdom*, cited above. In that case, the Court found that it was not necessary to apply this rule (former Article 50 of the Convention) as the applicant Government had expressly declared that they "[did] not invite the Court to afford just satisfaction ..., of the nature of monetary compensation, to any individual victim of a breach of the Convention" (ibid., §§ 245-46).

40. The Court further reiterates that the general logic of the just-satisfaction rule (Article 41, or former Article 50 of the Convention), as intended by its drafters, is directly derived from the principles of public international law relating to State liability, and has to be construed in this context. This is confirmed by the *travaux préparatoires* to the Convention, according to which,

> "... [t]his provision is in accordance with the actual international law relating to the violation of an obligation by a State. In this respect, jurisprudence of the European Court will never, therefore, introduce any new element or one contrary to existing international law ..." (Report presented by the committee of experts to the Committee of Ministers of the Council of Europe on 16 March 1950 (Doc. CM/WP 1(50)15)).

41. The most important principle of international law relating to the violation, by a State, of a treaty obligation is "that the breach of an engagement involves an obligation to make reparation in an adequate form" (see the judgment of the Permanent Court of International Justice in the case of the *Factory at Chorzów* (jurisdiction), Judgment No. 8, 1927, PCIJ, Series A, no. 9, p. 21). Despite the specific character of the Convention, the overall logic of Article 41 is not substantially different from the logic of reparations in public international law, according to which "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (see the judgment of the

International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *ICJ Reports* 1997, p. 81, § 152). It is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered (see the judgment of the International Court of Justice in the *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)* (merits), *ICJ Reports* 1974, pp. 203-05, §§ 71-76).

42. In these circumstances, bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law, the Court cannot interpret this provision in such a narrow and restrictive way as to exclude inter-State applications from its scope. On the contrary, such an interpretation is confirmed by the wording of Article 41 which provides for "afford[ing] just satisfaction to the injured party" (in French – "à la partie lésée"); a "party" (with a lower-case "p") has to be understood as one of the actual parties to the proceedings before the Court. The respondent Government's reference to the current wording of Rule 60 § 1 of the Rules of Court (paragraphs 12 and 38 above) cannot be deemed convincing in this respect. In fact, this norm, of a lower hierarchical value compared to the Convention itself, only reflects the obvious reality that in practice all the awards made by the Court under this provision until now have been directly granted to individual applicants.

43. The Court therefore considers that Article 41 of the Convention does, as such, apply to inter-State cases. However, the question whether granting just satisfaction to an applicant State is justified has to be assessed and decided by the Court on a case-by-case basis, taking into account, *inter alia*, the type of complaint made by the applicant Government, whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings in so far as this can be discerned from the initial application to the Court. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. In such cases each complaint has to be addressed separately in order to determine whether awarding just satisfaction in respect of it would be justified.

44. Thus, for example, an applicant Contracting Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another Contracting Party. In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention. In these circumstances it may not be appropriate to make an award of just satisfaction under Article 41 even if the applicant Government were to make such a claim.

45. There is also another category of inter-State complaint where the applicant State denounces violations by another Contracting Party of the

basic human rights of its nationals (or other victims). In fact such claims are substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection, that is, "invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (Article 1 of the International Law Commission Draft Articles on Diplomatic Protection, 2006, see *Official Records of the General Assembly*, Sixty-first Session, *Supplement No. 10* (A/61/10), as well as the judgment of the International Court of Justice in the case of *Diallo (Guinea v. Democratic Republic of the Congo)* (preliminary objections), *ICJ Reports* 2007, p. 599, § 39). If the Court upholds this type of complaint and finds a violation of the Convention, an award of just satisfaction may be appropriate having regard to the particular circumstances of the case and the criteria set out in paragraph 43 above.

46. However, it must always be kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims. In this respect, the Court notes that Article 19 of the above-mentioned Articles on Diplomatic Protection recommends "transfer[ring] to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions". Moreover, in the above-mentioned *Diallo* case the International Court of Justice expressly indicated that "the sum awarded to [the applicant State] in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter's injury" (see *Diallo (Guinea v. Democratic Republic of the Congo)* (compensation), *ICJ Reports* 2012, p. 344, § 57).

47. In the present case the Court finds that the Cypriot Government has submitted just-satisfaction claims in respect of violations of the Convention rights of two sufficiently precise and objectively identifiable groups of people, that is, 1,456 missing persons and the enclaved Greek-Cypriot residents of the Karpas peninsula. In other words, just satisfaction is not sought with a view to compensating the State for a violation of its rights but for the benefit of individual victims, as described in paragraph 45 above. In these circumstances, and in so far as the missing persons and the Karpas residents are concerned, the Court considers that the applicant Government are entitled to make a claim under Article 41 of the Convention, and that granting just satisfaction in the present case would be justified.

B. Just satisfaction claims of the Cypriot Government

1. The parties' submissions

(a) Claims concerning missing persons

(i) The Cypriot Government

48. The Cypriot Government declared that, in view of the outcome of the cases of *Varnava and Others*, cited above, and *Karefyllides and Others v. Turkey* ((dec.), no. 45503/99, 1 December 2009), "it now appear[ed] that individual claimants in respect of continuing violations concerning disappearances of family members, [could] not (unless there [was] new evidence or information giving rise to fresh obligations for the authorities to take further investigative measures) bring claims to the Court because of the new admissibility rulings". The applicant Government recognised that out of 1,485 missing persons mentioned in paragraph 119 of the principal judgment, some should be excluded. Firstly, nine missing persons were already covered by individual applications in the *Varnava and Others* case. Secondly, the remains of twenty-eight persons had been exhumed and identified, but it had not been established that they had died as a consequence of Turkey's action; therefore no claim could be made in respect of these people. On the other hand, the applicant Government insisted on the factual accuracy of the existing list of missing persons, the Turkish party never having challenged the validity of that list. Therefore, just satisfaction is sought for 1,456 persons.

49. In their initial observations the Cypriot Government requested EUR 12,000 per missing person, this sum corresponding to the amount awarded by the Court in *Varnava and Others*, but in the final version of their observations they abandoned this claim and instead requested the Court to award just satisfaction "at a standard rate in accordance with equitable principles". In this respect, the Cypriot Government considered that the sum of EUR 12,000 per person awarded in *Varnava and Others* did not correspond to the considerably higher amounts awarded in other recent and legally similar cases. The just-satisfaction amounts should be granted by the Court to the Cypriot Government, which would then distribute them among individual victims, that is, among family members of the missing persons.

(ii) The Turkish Government

50. The Turkish Government argued that the Court had not made any specific finding as to the number of missing persons in the judgment on the merits. Therefore the applicant Government was not justified in making hypothetical claims on behalf of unidentified beneficiaries. The relatives of the missing persons should now wait for the revival of the procedural

obligation according to the principles enshrined in *Brecknell*, cited above. Due to the passage of time, the number of possible beneficiaries may have varied; the legal interests of some may have disappeared, etc. Moreover, it is difficult to ensure a precise calculation of damages. This situation has been aggravated by the absence of action for nearly nine years since the judgment on the merits, which is not imputable to Turkey.

(b) Claims concerning residents of the Karpas peninsula

(i) The Cypriot Government

51. In their observations of 18 June 2012, the Cypriot Government claimed just satisfaction not only in respect of the missing persons, but also in respect of the violations of human rights of the Greek Cypriots of the Karpas peninsula, as found by the Grand Chamber. More precisely, these new claims concerned the violations of Articles 3, 8, 9, 10 and 13 of the Convention and Article 2 of Protocol No. 1 found by the Court. The Cypriot Government emphasised that these new claims did not concern the violation-of-property rights under Article 1 of Protocol No. 1.

52. In this respect, the Cypriot Government requested the following:

> "Taking into account the fact that the Karpas residents were not victims of just a single and isolated violation (as in the cases referred to above) but were victims of multiple state endorsed and racially motivated violations over many years, the above yardsticks would suggest a modest award of non-pecuniary losses of no less than 50,000 [pounds sterling (GBP)] per individual. It is to be recalled that the Court held that Turkey's acts debased and violated the very notion of respect for the dignity of the members of the Karpas community.
>
> (1) The Court should direct Turkey to pay to Cyprus an amount of [GBP] 50,000 per Greek Cypriot resident of the Karpas peninsula between July 1974 and the date of the Grand Chamber's judgment in May 2001 (Cyprus will then distribute the sums to victims or their heirs ...);
>
> (2) The number of such residents is to be agreed between the parties within 6 months of the Court's order and, in the absence of agreement, to be resolved by the President of the Court on the basis of written evidence and submissions as to the number and location of residents and their heirs."

(ii) The Turkish Government

53. The Turkish Government emphasised at the outset that it took the Cypriot Government over eleven years after the delivery of the principal judgment to make their claims. Moreover, they had made no effort to identify the number of possible beneficiaries. Finally, the applicant Government's assertions concerned facts going back to 1974, whereas the former Commission had ruled in its report that it could only examine allegations of violations allegedly committed within a six-month period preceding the date of the application.

54. The Turkish Government further explained that the living conditions in Karpas had improved, and that there existed a functioning court system in the "TRNC" which is open to Greek Cypriots living in the North.

55. According to the Turkish Government, Article 41 does not create any *entitlement* to just satisfaction, and there is an element of discretion in the very text of this provision. In the context of the present case, the Court has to take into account the ongoing enforcement process before the Committee of Ministers. Finally, the Convention does not guarantee a right to punitive damages; the Court has consistently rejected such claims. In the present case, the respondent Government considered that the Court should decide that the finding of a violation in the judgment on the merits offers sufficient satisfaction.

2. The Court's assessment

56. The Court would reiterate its general statement made in the case of *Varnava and Others*, cited above, and which is also pertinent to any award of damages in an inter-State case:

> "224. The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity ... and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right ... In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned."

The Court also emphasised that "the applicants [in that case] ha[d] endured decades of not knowing, which must have marked them profoundly" (ibid., § 225).

57. To this, the Court can only add that there is no doubt about the protracted feelings of helplessness, distress and anxiety of the Karpas residents whose rights under Articles 3, 8, 9, 10 and 13 of the Convention and Article 2 of Protocol No. 1 were found in the principal judgment to have been violated.

58. In view of all the relevant circumstances of the case, and making its assessment on an equitable basis, the Court considers it reasonable to award the Cypriot Government aggregate sums of EUR 30,000,000 for non-pecuniary damage suffered by the surviving relatives of the missing persons, and EUR 60,000,000 for non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula, plus any tax that may be chargeable on these amounts. The aforementioned sums are to be distributed by the applicant Government to the individual victims of the violations found in the principal judgment under these two heads (see, *mutatis mutandis*, the judgment of the International Court of Justice in the case of *Diallo* (compensation), cited above).

59. The Court further reiterates that according to Article 46 § 2 of the Convention it falls to the Committee of Ministers to supervise the execution of the Court's judgments. In the particular circumstances of the case the Court considers that it must be left to the Cypriot Government, under the supervision of the Committee of Ministers, to set up an effective mechanism to distribute the above-mentioned sums to the individual victims. This distribution must be carried out within eighteen months from the date of the payment by the respondent Government or within any other period considered appropriate by the Committee of Ministers.

C. Default interest

60. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

II. THE CYPRIOT GOVERNMENT'S APPLICATION FOR A "DECLARATORY JUDGMENT"

61. In their application of 25 November 2011, the Cypriot Government requested the Court to adopt a "declaratory judgment" stating:

> "(i) that Turkey is required by Article 46 to abide by the judgment in *Cyprus v. Turkey* by abstaining from permitting, participating or acquiescing or being otherwise complicit in, the unlawful sale and exploitation of Greek Cypriot homes and property in the northern part of Cyprus;
>
> (ii) that this obligation arising under Article 46 is not discharged by the Court's admissibility decision in *Demopoulos and Others*."

62. The Court observes that the respondent State is bound by Article 46 and thus by its international obligations to comply with the principal judgment. It reaffirms the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under the above-mentioned provision, and that the supervision of

the execution of the Court's judgments is the responsibility of the Committee of Ministers.

63. The Court considers that it is not necessary to examine the question whether it has the competence under the Convention to make a "declaratory judgment" in the manner requested by the applicant Government since it is clear that the respondent Government is, in any event, formally bound by the relevant terms of the main judgment. It is recalled in this connection that the Court has held that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property, as well as any compensation for the interference with their property rights (Part III, point 4 of the operative provisions of the principal judgment). It thus falls to the Committee of Ministers to ensure that this conclusion, which is binding in accordance with the Convention, and which has not yet been complied with, is given full effect by the respondent Government. Such compliance could not, in the Court's opinion, be consistent with any possible permission, participation, acquiescence or other form of complicity in any unlawful sale or exploitation of Greek-Cypriot homes and property in the northern part of Cyprus. Furthermore, the Court's decision in the case of *Demopoulos and Others*, cited above, to the effect that cases presented by individuals concerning violation-of-property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, taken on its own, to dispose of the question of Turkey's compliance with Part III of the operative provisions of the principal judgment in the inter-State case.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that the passage of time since the delivery of the principal judgment on 10 May 2001 has not rendered the applicant Government's just-satisfaction claims inadmissible;

2. *Holds*, by sixteen votes to one, that Article 41 applies to the present case in so far as the missing persons are concerned;

3. *Holds*, by fifteen votes to two, that Article 41 applies to the present case in so far as the enclaved Greek-Cypriot residents of the Karpas peninsula are concerned;

4. *Holds*, by fifteen votes to two,
   (a) that the respondent Government is to pay the applicant Government, within three months, EUR 30,000,000 (thirty million euros), plus any

tax that may be chargeable, in respect of non-pecuniary damage suffered by the relatives of the missing persons;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

(c) that the above amount shall be distributed by the applicant Government to the individual victims under the supervision of the Committee of Ministers within eighteen months from the date of the payment or within any other period considered appropriate by the Committee of Ministers;

5. *Holds*, by fifteen votes to two,

(a) that the respondent Government is to pay the applicant Government, within three months, EUR 60,000,000 (sixty million euros), plus any tax that may be chargeable, in respect of non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

(c) that the above amount shall be distributed by the applicant Government to the individual victims under the supervision of the Committee of Ministers within eighteen months from the date of the payment or within any other period considered appropriate by the Committee of Ministers.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 12 May 2014.

Michael O'Boyle	Josep Casadevall
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Zupančič, Gyulumyan, Davíd Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto de Albuquerque;

(b) concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić;

(c) partly concurring opinion of Judges Tulkens, Vajić, Raimondi and Bianku, joined by Judge Karakaş;

(d) partly concurring and partly dissenting opinion of Judge Casadevall;
(e) dissenting opinion of Judge Karakaş.

J.C.M
M.O'B

JOINT CONCURRING OPINION OF JUDGES ZUPANČIČ, GYULUMYAN, DAVÍD THÓR BJÖRGVINSSON, NICOLAOU, SAJÓ, LAZAROVA TRAJKOVSKA, POWER-FORDE, VUČINIĆ AND PINTO DE ALBUQUERQUE

The present judgment heralds a new era in the enforcement of human rights upheld by the Court and marks an important step in ensuring respect for the rule of law in Europe. It is the first time in the Court's history that the Court has made a specific judicial statement as to the import and effect of one of its judgments in the context of execution.

The Court's statement, couched in strong and clear terms, is directed to a particular aspect of the execution process still pending before the Committee of Ministers. It is rendered all the more powerful, in what it signifies, by reason of the view expressed by the Court that, in the circumstances, such a statement does, of itself, obviate the need to examine whether a formal declaratory judgment for the purposes of Article 46 of the Convention might be issued under Article 41. The Court has spoken: it remains for it to be heard.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE, JOINED BY JUDGE VUČINIĆ

1. The *Cyprus v. Turkey* (just satisfaction) case is the most important contribution to peace in Europe in the history of the European Court of Human Rights ("the Court"). The Court has not only acknowledged the applicability of Article 41 of the European Convention on Human Rights ("the Convention") to inter-State applications and established criteria for the assessment of the time-limit for these just-satisfaction claims, but has awarded punitive damages to the claimant State[1]. The message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of which they are nationals have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.

In view of the historical importance of this judgment and the parsimonious and sometimes equivocal reasoning of the judgment, I feel that I have a duty to state the reasons why I concur with the findings of the Court. Hence, this opinion will deal with the following issues: the Court's power to award compensation in inter-State cases, the time-limit for inter-State just-satisfaction claims, the punitive nature of the damages awarded under the Convention in general and in the circumstances of this case, and the Court's power to deliver a declaratory judgment on the cessation of ongoing violations[2].

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1. "Punitive damages" is the preferred expression in the United States, Canada and continental Europe, while the term "exemplary damages" is used in other Commonwealth countries; however, they both refer to the same concept. Punitive or exemplary damages are understood as being established with the purpose of atoning for the deeds of the wrongdoer and preventing repetition of the wrongful act by the offender or emulation by third parties, without being limited to mere compensation for the pecuniary and non-pecuniary losses caused to the claimant, including loss of profit.

2. In my view, the question of the Court's power to award compensation in inter-State cases should have been dealt with prior to the question of the time-limit for the civil claim. The Court had first to decide whether it had the power to deal with the claim and only in that case should it have decided whether the claim was time-barred. Jurisdiction *ratione materiae* must be ascertained before jurisdiction *ratione temporis*. It is a simple question of logic.

The Court's power to award just satisfaction in inter-State cases

2. Article 41 of the Convention does not preclude the award of just satisfaction in inter-State claims. Moreover, Rule 46 of the Rules of Court establishes this possibility of claiming damages in inter-State cases in absolutely clear terms. The fact that Rule 60 refers to "his or her" and not to "its" Convention rights is not decisive, since this provision is evidently secondary to Rule 46, which sets forth the contents of an inter-State application, and in any case to the Convention itself.

3. During the previous stages of this case, the Court explicitly admitted this interpretation of the Convention by acknowledging, in three different formal statements, that the question of just satisfaction could be put by the claimant State in a separate procedure after the judgment on the merits. These statements can be found in (a) the briefing note of the President of the Court of 10 November 1999, according to which "[o]ne hearing should be devoted to the admissibility and the merits of the application leading to one judgment. This is without prejudice to the need to organise a separate procedure for Article 41 claims should the Court find a breach(es) of the Convention on the merits"[3]; (b) the instructions of the Court to the parties of 29 November 1999, which state that "[t]he applicant Government are not required to submit any claim for just satisfaction under Article 41 of the Convention at this stage of the proceedings. A further procedure on this matter will be organised depending on the Court's conclusions on the merits of the complaints"; and (c) the judgment of the Grand Chamber of 10 May 2001 itself, according to which the Court "[h]olds unanimously that the issue of the possible application of Article 41 of the Convention is not ready for decision and adjourns consideration thereof"[4]. With regard to the specific non-pecuniary damage suffered by the Karpas residents, it was the Grand Chamber that invited the claimant Government to present a "final version" of their claims for just satisfaction. Nothing prevented the claimant State from referring to new civil claims in their response to the Court's invitation, as long as these related to violations recognised in the Grand Chamber judgment of 2001. The civil claim in respect of the Karpas residents refers to violations recognised in the Grand Chamber's judgment, and thus is within the remit of the Grand Chamber.

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3. In fact, the Agent of Turkey had accepted, in a meeting of 27 October 1999 with the Agent of Cyprus and the President of the Court, that "if the Court were to find a violation(s), a separate procedure would be required for dealing with claims under Article 41 of the Convention".

4. This statement was in line with the Court's position in *Ireland v. the United Kingdom* on just satisfaction, where it said that it "was not necessary to apply [it]". In that case, the Irish Government did not seek compensation for any individual (see *Ireland v. the United Kingdom*, 18 January 1978, § 245, Series A no. 25).

4. The respondent State's main argument against the admissibility of the present claim was that the Convention system did not, as a matter of principle, allow individual claims under Article 41 to be grafted onto an inter-State application. This view is wrong. The Court's statement of principle as to the admissibility of compensation in inter-State cases is in accordance with the traditional meaning of former Article 50 of the Convention, as a norm establishing only inter-State obligations[5], and with the right to diplomatic protection, according to which any State may assume the position of claimant in respect of damage suffered by its nationals[6]. The fact that individuals may nowadays, through individual applications, act against the wrongdoing State without having to solicit the diplomatic protection of their national State does not mean that diplomatic protection is no longer available or even that it has lost its former importance. One legal avenue does not exclude the other. Article 33 claims are not exclusively aimed at upholding the European public order, but may also simultaneously seek to protect and satisfy the interests of one or more nationals of the applicant State[7]. In fact, the rights at stake in an Article 41 claim are the same as those in an Article 33 claim, and the decision to use the latter only reflects the greater scale of the alleged violations, which in turn justifies greater, not lesser, powers on the part of the Court.

5. Finally, the Court would be deprived of a crucial instrument for the attainment of its human rights protection mission were it not empowered to determine damages in inter-State cases. Thus, awarding damages in such cases can be taken, if not as an explicit power, at least as an implied power of the Court[8]. In conclusion, the teleological interpretation of the Convention reinforces the conclusion already imposed by the textual, historical and systemic construction of both the Convention and the Rules of Court, the Court's practice and the relevant principles of public international law as established in the Vienna Convention on the Law of Treaties and further developed in the Draft Articles on Diplomatic Protection and the Draft Articles on Responsibility of States for Internationally Wrongful Acts, and in the international case-law.

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5. See the report of the committee of experts presented to the Committee of Ministers on 16 March 1950, in *Travaux Préparatoires* of the European Convention on Human Rights, vol. IV, 1979, p. 44.

6. Article 19 (c) of the Draft Articles on Diplomatic Protection (2006) and Article 48 (2) (b) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), which incorporate the principle already set out in the *Mavrommatis Palestine Concessions* case (PCIJ, Series A No. 2, p. 12), and recently confirmed in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)* (compensation), *ICJ Reports* 2012, p. 344, § 57).

7. *Denmark v. Turkey* (dec.), no. 34382/97, 8 June 1999.

8. See, on the implied powers of international courts, my separate opinion in *Fabris v. France* [GC], no. 16574/08, ECHR 2013.

The time-limit for inter-State just-satisfaction claims

6. As a general principle, the right of a State to invoke the responsibility of another State may be forfeited in two cases: waiver or acquiescence. Just as a State may explicitly waive the right to invoke responsibility, it may acquiesce, by reason of its conduct, in the lapse of a claim. Such conduct may include an unreasonable delay between the time when the facts grounding its claim occurred, or the time when they came to its knowledge, and the time of presentation of the claim.

7. At the time the case was first lodged with the former Commission, that is to say, in 1994, neither the Convention nor the Rules of Court established an obligation to present a just-satisfaction claim. Moreover, international law in general did not at that time, and still does not today, set a specific time-limit for just-satisfaction claims. The relevant precedent in international law is *Nauru v. Australia*, where two conclusions were reached: firstly, that the passage of time does have a bearing on the question of the admissibility of inter-State just satisfaction claims; and secondly, that a delay of twenty-one years between the time when the applicant is in a position to present the compensation claim and the time of presentation of the claim does not make the claim inadmissible[9]. But it is doubtful whether *Nauru* applies to a delay in judicial proceedings that are already pending[10]. It can also legitimately be argued that *Nauru* does not apply in the case of claims based on situations of continuing violations like enforced disappearances and the continuing violations of the Convention rights of the Karpas residents[11]. Even if *Nauru* were applicable to the present case, the present claim would be admissible. In *Nauru*, the relevant period of time was twenty-one years, whereas in *Cyprus v. Turkey* the period is much shorter. In *Nauru*, twenty-one years elapsed between the time when the applicant was in a position to present the compensation claim (1968) and the time of formal presentation of the claim (1989)[12]. In *Cyprus v. Turkey*, there were nine years between the Court's judgment in 2001 and the

9. *Certain Phosphate lands in Nauru*, *ICJ Reports* 1992, §§ 32 and 36.

10. For the same reason, *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009) does not apply to the present case. *Varnava and Others* does not apply to a delay in filing just-satisfaction claims after the merits have been decided. Moreover, in the present case, the claimant State did not make any claim in respect of the nine applicants who were awarded compensation for non-pecuniary damage in *Varnava and Others*.

11. Furthermore, the United Nations has set an international standard, according to which civil claims related to enforced disappearances are not subject to the statute of limitations (General Comment on Article 19 of the United Nations Declaration on the Protection of all Persons from Enforced Disappearance).

12. The claim had been raised, but not settled, prior to Nauru's independence in 1968. It is also relevant that in 1983 the President of Nauru wrote to the Prime Minister of Australia requesting a reconsideration of the issue, and prior to that initiative had already raised the question on two occasions with the competent Australian authorities.

presentation of the just-satisfaction claim regarding the missing persons (2010) and only six years between the date of the judgment in 2001 and the date of the announcement that that claim would be submitted (2007)[13]. With regard to the Karpas residents, the period of time that elapsed between the Grand Chamber's judgment of 2001 and the application of 21 June 2012 was eleven years, but the situation had already been brought to the attention of the Court two years before[14], giving a total delay of nine years[15].

8. What is more, there is a plausible reason for the time it took the Cypriot Government to come forward with the present compensation claim, and that reason is, to put it plainly, the Turkish Government's unwillingness to respond to the Committee of Ministers' efforts to resolve the issue. The impasse in the Committee of Ministers is obvious in view of the position taken by the respondent State in recent years, especially but not exclusively after the *Demopoulos and Others* decision[16]. The claimant State waited six years for the Committee of Ministers to fulfil its task, which it failed to do. After realising the situation, the claimant State turned to the Court. The claimant State cannot be criticised for having relied on the system of implementation of the Convention as it should have worked but did not.

9. The respondent State argued that allowing nine years to elapse before submitting a just-satisfaction claim was excessive, but at the same time maintained that new exhumations called for new applications by the relatives of the persons acknowledged to be dead. The missing-persons issue, in their view, should evolve into one concerning dead persons, with new investigations being carried out into the circumstances of the deaths[17].

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13. See the letter of the Cypriot Government to the Court of 31 August 2007. This letter interrupted the running of time on the claimant's part, just as the statements of the President of Nauru did.

14. See the letter of the Cypriot Government of 25 February 2010.

15. *Nauru* is not the sole precedent. In *LaGrand*, German consular officials became aware of the LaGrands' cases in 1992, but the German Government did not express concern or protest to the United States authorities for some six and a half years. The United States objected that the belated action was not admissible. Yet the International Court of Justice (ICJ) accepted the application (*LaGrand (Germany v. United States of America)*, judgment, *ICJ Reports* 2001, §§ 53 and 57). In the *Tagliaferro* arbitration case, Umpire Ralston held that, despite the delay of thirty-one years, the claim was admissible, as it had been notified immediately after the injury had occurred (*United Nations Reports of International Arbitration Awards* (UNRIAA), vol. X, p. 592). See also Umpire Plumley's similar decision in the *Stevenson* case (UNRIAA, vol. IX, p. 385). If the ICJ considered that *Nauru* and *LaGrand* were admissible, *Cyprus v. Turkey* is *a fortiori* admissible. The arbitration cases quoted reinforce this conclusion.

16. *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, ECHR 2010. The Committee of Ministers' Resolutions of 7 June 2005 and 4 April 2007 did not result in any positive developments. The point will be expanded upon later in this opinion.

17. The respondent State invoked *Brecknell v. the United Kingdom*, no. 32457/04, 27 November 2007. This case-law cannot be applied to the very distinct situation of the Karpas residents. Furthermore, the extraordinary length of the procedure proposed by the

This line of argumentation is contradictory: on the one hand, the Turkish Government criticise the claim for its belatedness, but on the other hand they argue that new claims should be presented in the future on the basis of the same facts. *Allegans contraria non est audiendus*[18]. It is not the claimant State that is late in claiming compensation and asking for the cessation of the ongoing human rights violations. It is the respondent State that is late in complying fully with the Grand Chamber judgment of 2001 and repairing the human rights violations established therein. Turkey has flouted the Grand Chamber's judgment for thirteen years and this conduct cannot be condoned. Were the Court to condone it, there would be no rule of law in Europe, and the Court's authority would be deprived of any practical meaning, in this instance for the families of those who disappeared and for those Greek Cypriots of the Karpas region whose rights under Articles 3, 8, 9, 10 and 13 have been violated. The process of supervision of the execution of the Grand Chamber's judgment by the Committee of Ministers was thwarted by various means and proved inefficient. The Court cannot add denial of justice to the Committee of Ministers' impotence.

10. The respondent State also argued, without much conviction, that the right to compensation had been waived, if not explicitly then at least tacitly, in view of the inertia of the victims and the claimant State[19]. But this line of argument is to no avail. The claimant State has relentlessly sought year after year – hitherto without success – to secure redress for the human rights violations resulting from the invasion of Cyprus in various international *fora*, including the Committee of Ministers, and never expressed an intention to abandon that quest. Moreover, the Cypriot Government could not waive the rights of the individual victims they represent without the latter's consent. And neither the victims themselves nor their families have ever expressed their acceptance of the failure to afford redress for the human rights violations they suffered for so long.

11. Finally, there are no alternative domestic remedies for the claims in this case. *Demopoulos and Others* does not apply to this case, since it refers only to compensation claims under Article 1 of Protocol No. 1 in individual cases[20] and the present case does not refer to such claims. Moreover, it has to be reiterated that the rule of exhaustion of domestic remedies is not applicable to just-satisfaction claims at all[21].

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respondent State would scarcely be in keeping with effective protection of the human rights of the missing persons' families. Such a requirement would lead to a situation incompatible with the very purpose of the Convention.

18. One cannot affirm a point at one time and deny it at another time. This is a principle of good faith (Article 26 of the Vienna Convention on the Law of Treaties).

19. Article 45 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

20. *Demopoulos and Others*, cited above, § 127.

21. *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14. Thus, the respondent State's argument that the exercise of diplomatic protection by

The punitive nature of just satisfaction under the Convention

12. According to the claimant State, just satisfaction should be provided to the lawful heirs of 1,456 missing persons[22] and to all the Greek Cypriots living in the Karpas region between 1974 and the date of the Grand Chamber judgment on the merits in May 2001[23]. The respondent State disputed these figures as merely "hypothetical", maintaining that the number of missing persons may have varied over time, some of them might have left no lawful heirs and it was simply impossible to identify all the residents of the Karpas region since 1974. The Grand Chamber found that it was not necessary to establish the exact number of individual victims of human rights violations, and fixed two lump sums for the benefit of each of these groups of persons, with the obligation for the claimant State to distribute the monetary amounts to the victims or their lawful heirs. In fact, the number of missing persons has decreased in view of the exhumations carried out in recent years, and the victims in the Karpas region are neither identified nor identifiable solely on the basis of the evidence in the file. The Court did not even require, as the claimant State had proposed, that the number of Karpas residents be agreed between the parties or, in the absence of agreement, established by the President of the Court "on the basis of written evidence and submissions as to the number and location of residents and their heirs". Furthermore, the Court did not establish any criteria, practical arrangements or rates governing the distribution of the compensation among the victims or their lawful heirs according to their individually differing circumstances (for example, wives, mothers, children), and most importantly it did not impose any condition regarding the devolution of the compensation in cases where the victims and their

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the claimant State requires the exhaustion of domestic remedies by the individual does not apply to just-satisfaction claims.

22. This number results from the list of 1,493 names published in the Official Gazette of Cyprus on 10 July 2000, minus 28 persons who were identified after 2000 as Greek Cypriots who had been exhumed in territory under the control of the government of Cyprus and 9 missing persons whose cases were examined in *Varnava and Others* (cited above). The number had previously been submitted to the Commission on 7 July 1998 and to the Court on 30 March 2000. The tripartite Committee on Missing Persons (a Greek Cypriot, a Turkish Cypriot and a member of the ICRC appointed by the United Nations Secretary General) also adopted the list of 1,493 missing persons. The Grand Chamber did not explicitly accept this number, which is not referred to either in paragraph 58 in the Court's assessment part of the judgment or in its operative provisions. Paragraph 47 in the admissibility part of the judgment simply refers to the submissions of the claimant State, without any endorsement by the Court.

23. For this purpose, the claimant State refers to the Report of the United Nations Secretary-General on the number of enclaved Greek and Maronite Cypriots in the occupied areas, which was presented to the Commission for the first time on 1 June 1998. This report states that in August 1974 20,000 Greek Cypriots lived in the enclaved region. The Court did not endorse this number, or any other.

lawful heirs are not found. In this eventuality, the claimant State will be the final beneficiary of the amounts paid by the respondent State.

13. The punitive nature of this compensation is flagrant[24]. In spite of the fact that the identity of the victims of the respondent State's actions and omissions and the ensuing massive and gross human rights violations committed in the Karpas enclave could not be established, that the missing-persons claims would have been time-barred if lodged individually by their respective families[25] and that there can be no certainty that the indemnities obtained will devolve on the individuals concerned, the Court punished the respondent State for its unlawful actions and omissions and their harmful consequences. There is nothing new about this procedure. In fact, the practice of the Court shows that punitive damages have been applied in seven types of cases[26]. Firstly, the Court has ordered compensation without any claim for just satisfaction being lodged by the applicant at all. On the basis of the "absolute character" of the violated right[27], the "particularly serious character of the violations"[28], the "gravity of the violations"[29], or the "fundamental importance of that right"[30], the Court has shown itself willing to order compensation for violations of Articles 3 and 5 without any claim being made for specific damages. In other cases the applicant asks the Court to be compensated but does not specify the amount, and the Court orders what it finds to be fair in the particular case[31]. There are also cases where the applicant makes a claim for just satisfaction specifying a particular

24. The respondent Government were perfectly aware of this possible result, which they considered "speculative" (see paragraph 84 of their observations of 26 October 2012).

25. *Varnava and Others*, cited above, § 170, and *Costas & Thomas Orphanou v. Turkey* (dec.), no. 43422/04, 1 December 2009. According to *Varnava and Others*, it would not be possible to bring individual complaints after the end of 1990 concerning the obligation under the procedural limb of Article 2 of the Convention. The Cypriot Government have explicitly acknowledged that in the light of the "newly reformulated time-limits" in *Varnava and Others*, they had to make this inter-State claim in order not to lose their rights under Article 41. Since the inter-State compensation claim is based on a case already decided on the merits, the six-month rule does not apply (see footnote 10 above).

26. See my opinion in *Trévalec v. Belgium* (just satisfaction), no. 30812/07, 25 June 2013. As I stated therein, paragraph 9 of the Court's Practice Direction of 28 March 2007 is no longer up to date.

27. *Chember v. Russia*, no. 7188/03, § 77, 3 July 2008 (10,000 euros); *X v. Croatia*, no. 11223/04, § 63, 17 July 2008 (8,000 euros); *Igor Ivanov v. Russia*, no. 34000/02, § 50, 7 June 2007 (5,000 euros); *Mayzit v. Russia*, no. 63378/00, §§ 87-88, 20 January 2005 (3,000 euros); and *Nazarenko v. Ukraine*, no. 39483/98, § 172, 29 April 2003 (2,000 euros).

28. *Bursuc v. Romania*, no. 42066/98, § 124, 12 October 2004 (10,000 euros).

29. *Gorodnitchev v. Russia*, no. 52058/99, § 143, 24 May 2007 (10,000 euros).

30. *Rusu v. Austria*, no. 34082/02, § 62, 2 October 2008 (3,000 euros); *Crabtree v. the Czech Republic*, no. 41116/04, § 60, 25 February 2010 (2,000 euros); and *Khudyakova v. Russia*, no. 13476/04, § 107, 8 January 2009 (5,000 euros).

31. For example, *Celik and Yıldız v. Turkey*, no. 51479/99, §§ 30-31, 10 November 2005, and *Davtian v. Georgia*, no. 73241/01, § 70, 27 July 2006.

amount for non-pecuniary damage, but where the Court awards a higher amount[32]. When the Court awards compensation in an amount higher than the alleged damage or even independently of any allegation of damage, the nature of the just satisfaction is no longer compensatory but punitive. The inherent purpose of that remedy is not to place the injured party in the position in which he or she would have been had the violation found not taken place, since the injured party does not even claim to have sustained any damage or claims to have suffered lesser damage. The fundamental purpose of that remedy is hence to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention. Secondly, the Court has in some cases established a "symbolic" or "token indemnity"[33], with the obvious purpose of blaming and shaming the respondent State, thus making the punishment an example for other States. Thirdly, the Court has also awarded just satisfaction in cases where the applicant complained about the domestic law without indicating any personal specific damage other than the distress caused by the existence of the law itself[34]. It is clear that the just satisfaction award is then an exemplary punishment of the respondent State for having legislated in a way incompatible with the Convention. Fourthly, the Court has ordered just-satisfaction for a "potential violation" of the Convention[35]. Here again the purpose of just satisfaction is to censure and punish the respondent State's conduct rather than to compensate for damage which has not yet occurred. Fifthly, the Court has even not excluded the possibility that the applicant suffered, as a result of the "potential effects of the violation found", a loss of real opportunities of which account must be taken, "notwithstanding the fact that the prospects of realisation would have been questionable"[36]. In these particular cases, just satisfaction does not even remedy a virtual harm done to the applicant, since it is doubtful that it would ever materialise. It is the fault-based conduct of the respondent State that the Court wants to punish. Sixthly, the Court

32. For instance, *Stradovnik v. Slovenia*, no. 24784/02, §§ 23-25, 13 April 2006, where the Court awarded 6,400 euros for the excessive length of the proceedings, when the applicant had asked for 5,000 euros.

33. For example, *Engel and Others v. the Netherlands* (Article 50), 23 November 1976, § 10, Series A no. 22 (100 Dutch guilders), and *Vaney v. France*, no. 53946/00, § 57, 30 November 2004 (one euro).

34. For instance, in *S.L. v. Austria*, no. 45330/99, § 52, ECHR 2003-I, the Court made an award for non-pecuniary damage, even though the impugned provision of the Austrian Criminal Code had already been repealed and the applicant had therefore "achieved in part the objective of his application".

35. For example, *Mokrani v. France*, no. 52206/99, § 43, 15 July 2003, and *Gürbüz v. Turkey*, no. 26050/04, § 75, 10 November 2005 (see the critical opinion of Judges Caflisch and Türmen).

36. *Sporrong and Lönnroth v. Sweden* (Article 50), 18 December 1984, § 25, Series A no. 88; *Bönisch v. Austria* (Article 50), 2 June 1986, § 11, Series A no. 103; and *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 59, 5 July 2007.

sometimes even awards compensation in spite of the lack of supporting documents and contradictions in the statements made by the applicants regarding the losses claimed[37]. When no evidence of the alleged damage is produced, the award of damages lies entirely at the discretion of the Court. In these circumstances of total lack of evidence and discretionary award of damages, just satisfaction has an inherent element of punishment, since it does not remedy a proven damage, which remains speculative, but instead punishes the respondent State's wrongful conduct. Seventhly, in cases of general interest, the Court determines just satisfaction taking into account its exemplary effect[38].

14. Thus, the existence of punitive or exemplary damages under the Convention is a fact in the Court's practice. Since just satisfaction is only to be awarded when the domestic legal order has not provided full reparation, Article 41 excludes any compensation exceeding full reparation, but "full" reparation can only be achieved if and when the need for prevention and punishment in the specific circumstances of the case has also been satisfied. Only then is satisfaction "just". Compensation for quantifiable losses may not be sufficient and the obligation of full reparation may include punitive damages that go beyond remedying the pecuniary and non-pecuniary damage caused to identified persons.

15. Punitive damages are also acknowledged in international practice and law, such as in diplomatic practice[39], arbitration proceedings[40],

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37. For example, *Barberà, Messegué and Jabardo v. Spain* (Article 50), 13 June 1994, §§ 18-20, Series A no. 285-C, despite the fact that the decisions of the Spanish courts subsequent to the principal judgment had already afforded the applicants reparation for non-pecuniary damage.

38. For example, *Xenides-Arestis v. Turkey* (just satisfaction), no. 46347/99, 7 December 2006, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012.

39. See the references in the Second Report on State responsibility by Mr Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/425 & Corr.1 and Add.1 & Corr.1, pp. 35-40, with a special reference to the *Rainbow Warrior* case and to the ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX, pp. 197 et seq.).

40. See *Laura M. B. Janes et al. (USA) v. United Mexican States*, 16 November 1925, UNRIAA, vol. IV, pp. 82-98; the *Naulilaa* case (*Portugal v. Germany*), 31 July 1928 and 30 June 1930, UNRIAA, vol. II, pp. 1011-77; *S.S. "I'm alone"* case *(Canada v. United States)*, 30 June 1933 and 5 January 1935, UNRIAA, vol. III, pp. 1609-18; and the *Lighthouses Case (France v. Greece)*, 24-27 July 1956, UNRIAA, vol. XII, pp. 161-269. Thus, it is not decisive that the Draft Articles on State Responsibility indicate that the purpose and scope of reparation are limited to remedial measures, excluding punitive damages (Commentary to Articles 36 and 37). This point of view still follows the conservative opinion expressed in the outdated *Lusitania* cases, according to which: "The remedy should be commensurate with the loss, so that the injured party may be made whole" (Opinion in the *Lusitania Cases*, 1 November 1923, UNRIAA, vol. VII, pp. 32-44). Some modern model bilateral investment treaties specifically reject punitive damages (see Article 34 § 3 of the 2012 US Model BIT, and Article 44 § 3 of the 2004 Canadian Model BIT), which by implication shows that they would have been applied if they were not excluded. That is the case in most of these treaties.

international labour practice[41], and particularly in private international law, European Union law and international human rights law. In the field of private international law, neither the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, with 149 Contracting Parties, nor the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1 February 1971, with only 5 Contracting Parties, makes reference to punitive damages as a ground for refusing recognition and enforcement of an arbitral award or a foreign judgment. On the other hand, Article 29 of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999, with 105 Contracting Parties, provides that punitive damages shall not be recoverable. Article 11 § 1 of the Hague Convention on Choice of Court Agreements of 30 June 2005 provides that recognition or enforcement of a judgment may be refused if, and to the extent that, it awards punitive damages, but this Convention has been signed only by the European Union, the United States of America and Mexico, and has not come into force yet. Moreover, this provision is not linked to the *ordre public* clause contained in Article 9 (e), which prohibits the use of this clause to deny recognition of punitive damages awards. Article 74 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, with 80 Contracting Parties, also provides that damages for breach of contract by one party may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract[42].

16. Within the European Union, there has been an acknowledgment of the extra-compensatory purposes of civil liability and consequently of the legitimacy of punitive damages when they are not excessive. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) states that "[t]he application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum". Yet it is relevant to note that the

41. In the *Bluske v. WIPO* judgment of 13 July 1994, the International Labour Organisation Administrative Tribunal ordered the respondent organisation to pay the complainant an amount of 10,000 Swiss francs "by way of penalty for each further month of delay" in discharging its obligations.

42. Nonetheless, the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, p. 346, affirms that "[d]omestic law may also apply to issues such as punitive damages. In one case a court seemingly accepted the validity of a claim for punitive damages in the context of a CISG damages claim, although the determination of the amount of damages was left open".

provision of Article 24 of the proposal for the Rome II Regulation (COM (2003) 427) stated that "application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy". With the new wording, proportionate punitive damages were incorporated into European Union law[43]. In addition, neither Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters nor Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility refers to punitive damages as a ground for refusing recognition and enforcement of a foreign judgment.

17. In the Council of Europe, the Committee of Ministers noted that "the setting up of a merely compensatory or acceleratory remedy may not suffice to ensure rapid and full compliance with obligations under the Convention, and ... further avenues must be explored, e.g. through the combined pressure of various domestic remedies (punitive damages, default interest, adequate possibility of seizure of state assets, etc.), provided that their accessibility, sufficiency and effectiveness in practice are convincingly established"[44]. This clear stance in favour of punitive damages taken by the highest political body of the Council of Europe was not an isolated case[45]. In the Inter-American human rights protection system opinions are still divided. While the Inter-American Commission expressed itself in favour of punitive damages or at least of a punitive aim to compensation, the Inter-American

43. In some legal areas of the Union, like the regulation of the agricultural and the securities markets, there has been a policy of clearly punitive civil claims, such as in Article 18 of Regulation no. 1768/95 (referring to "special civil-law claims") or in Article 28 of Directive 2004/109/EC (referring to "civil and/or administrative penalties"). This trend has been endorsed by the Court of Justice in both *Von Colson and Kamann v. Land Nordrhein Westfalen*, Case C-14/83, and *Harz v. Deutsche Tradax GmbH*, Case C-79/83, where the Court of Justice considered that compensation must be sufficient to act as a deterrent against sex discrimination in employment. In *Manfredi v. Lloyd Adriatico Assicurazioni SpA and others*, joined cases C-295/04 to C-298/04, the Court of Justice went even further, establishing that, in accordance with the principle of equivalence, national courts could award punitive damages for breaches of European Union competition law if and when such damages were also available for breaches of national law. The Commission has expressed a favourable view on this case-law, for example in its White Paper on damages actions for breach of the European Union antitrust rules, 2008, § 2.5.

44. Interim Resolution CM/ResDH(2008)1 of 6 March 2008.

45. For example, the Explanatory Report to the Civil Law Convention on Corruption (ETS no. 174, § 36) notes that States Parties whose domestic law provides for punitive damages are not required to exclude their application in addition to full compensation. In the field of social rights, the European Committee of Social Rights monitors the requirement for the damages awarded in practice to be sufficiently dissuasive to prevent future infringements (Second Report submitted by the government of Hungary, covering the period from 1 January 2007 until 31 December 2010, p. 83).

Court initially had a more reserved position[46]. More recently, in the *Myrna Mack Chang* case, the Inter-American Court came close to the Commission's position by ordering the payment of aggravated damages based on the extreme seriousness of the respondent State agents' conduct[47].

18. Summing up, the Court has been at the forefront of an international trend, using just satisfaction to prevent further violations of human rights and punish wrongdoing governments. The acknowledgment of punitive or exemplary damages under the Convention is essential in at least three cases: (1) gross violations of human rights protected by the Convention or the additional Protocols, especially when there are multiple violations at the same time, repeated violations over a significant period of time or a single continuing violation over a significant period of time[48]; (2) prolonged, deliberate non-compliance with a judgment of the Court delivered with regard to the recalcitrant Contracting Party[49]; and (3) the severe curtailment, or threat thereof, of the applicant's human rights with the purpose of avoiding, impairing or restricting his or her access to the Court as well as the Court's access to the applicant[50]. In all these three cases, the underlying premise for punitive damages is not only causality between the wrongful conduct and the harm, but also intention or recklessness (gross negligence) by the wrongdoing State, that is to say, by its organs and agents. Hence, the Court's legal and moral authority and the practical solvency of the entire European human rights protection system are particularly at stake here. The gravity of such breaches engages the interests of all Contracting Parties to the Convention, the Council of Europe as an institution and Europe as a whole. The principle of State sovereignty cannot, in the light of Article 26 of the Vienna Convention on the Law of Treaties, be invoked to justify such gross wrongdoing[51]. Whereas between sovereign nations the question of the

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46. *Velasquez Rodriguez v. Honduras* (reparations and costs), judgment of 21 July 1989, § 38; *Godinez Cruz v. Honduras* (reparations and costs), judgment of 21 July 1989, § 36; and *Garrido and Baigorria v. Argentina* (reparations and costs), judgment of 27 August 1998, §§ 43-44.

47. *Myrna Mack Chang v. Guatemala* (merits, reparations and costs), judgment of 25 November 2003, §§ 246-86, and especially the separate opinion of Judge Cançado Trindade.

48. For example, the killing of a political opponent or the silencing of a critical television channel could justify such punitive damages.

49. For example, the prolonged indifference of a State Party to a judgment of the Court which had found it in breach of the Convention, in spite of repeated efforts of the Committee of Ministers and the injured party to have the judgment complied with. Punitive damages can be awarded in proceedings initiated by the Committee of Ministers itself under its new powers set out in Article 46 of the Convention or in non-compliance proceedings initiated by the injured party (see my separate opinion in *Fabris*, cited above).

50. The gravity of some tactics used to silence the applicant, like directly or indirectly threatening his life or that of his loved ones or initiating arbitrary criminal proceedings against the applicant, may call for punitive damages. This principle was established in *Oferta Plus S.R.L. v. Moldova* (just satisfaction), no. 14385/04, § 76, 12 February 2008.

power to impose penalties is political rather than legal in nature, the conclusion is different between nations bound by a human rights treaty, such as the Convention, which confers rights on natural and legal persons and imposes negative and positive obligations on the Contracting Parties enforceable by an international court through binding judgments. Within this framework, just satisfaction by means of punitive damages does not entail a sanction applied by one State against another, but instead corresponds to an authoritative and indispensable response by an international court to the wrongdoing State. The Court speaks then on behalf of all the Contracting Parties, acting as the ultimate defender of a Europe rooted in the rule of law and faithful to human rights. To overlook the need for such a response would in turn encourage States, especially the most powerful ones, to assume that human rights violations can easily be made good by mere pecuniary compensation. Moreover, in determining punitive damages the Court acts within the boundaries established by the principle of proportionality and with full regard to such factors as the objective gravity of the wrongful conduct, the degree of reprehensibility of the intention or recklessness of the wrongdoer, the extent of the harm caused to the applicant and third parties, the consequential gains obtained by the wrongdoer and third parties and the probability of non-enforcement of the breached right.

19. Therefore, punitive damages are an appropriate and necessary instrument for fulfilling the Court's mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols thereto (Article 19 of the Convention). This conclusion applies with even greater force in the case at hand, where the respondent State not only committed a multitude of gross human rights violations over a significant period of time in northern Cyprus, and did not investigate the most significant of these violations adequately and in a timely manner, but also deliberately failed year after year to comply with the Grand Chamber's judgment on the merits delivered a long time ago with regard to these specific violations.

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51. H. Lauterpacht, "Règles générales du droit de la paix", in *Recueil des cours*, 1937-IV, vol. 62, p. 350: "A violation of international law may be such that it needs, in the interest of justice, an expression of disapproval that goes beyond material reparation. To place limits on liability within the State to *restitutio in integrum* would be to abolish the criminal law and a major part of the law of torts. To abolish these aspects of liability between States would be to adopt, on the grounds of sovereignty, a principle that is repugnant to justice and carries with it an encouragement to wrongfulness."

The Court's power to deliver a declaratory judgment on the cessation of ongoing violations

20. The claimant State, in a submission of 25 November 2011, requested the Court to issue a declaratory judgment on the cessation (it used the words "abstaining from") of ongoing human rights violations after the Grand Chamber judgment of 2001 and on the irrelevance of the *Demopoulos and Others* decision for the discharge of the obligation arising under Article 46[52]. The claimant State's request thus has a double meaning: while cessation of the wrongful act relates to future performance of an international obligation deriving from the judgment on the merits in *Cyprus v. Turkey*, the interpretation of the *Demopoulos and Others* decision relates to the fulfilment of that same legal obligation in the past. The Court found that it had competence to address and grant this request, but it did not find it necessary to give reasons as to why it was competent. There are very compelling reasons to justify this competence, both in principle and in the particular circumstances of this case[53].

21. As a matter of principle, any State entitled to invoke responsibility may claim from the responsible State the cessation of the internationally wrongful act[54]. Thus, the claimant State may request, under Article 41 of the Convention, a declaratory judgment stating that an ongoing violation must cease, especially but not exclusively when the ongoing violation of human rights infringes judgments of the Court which are already *res judicata*. Just satisfaction is then provided by way of appropriate declaratory relief to clarify the effects of the Court's judgments in the light of a continuing unlawful practice. The teleological interpretation of Article 41 of the Convention imposes such powers. The power to declare the cessation of an ongoing human rights violation is implied logically in the power to establish the existence of the human rights violation itself and to order compensation for it. The provision of compensation as a remedy for a human rights violation is not to be confused with the duty of States not to commit and to

52. This question was raised already in the letter of the Cypriot Government to the Court of 31 August 2007, where they stated that it would become necessary to apply Article 41 if the process of supervision of the execution of the Grand Chamber judgment of 2001 by the Committee of Ministers were thwarted. That message was repeated in the letter of the same Government to the Court of 25 February 2010. In its submissions of 25 November 2011, the claimant State explained that it required that "in response to the Court's finding of a continuing State policy and practice in the present case", Turkey had to abide fully by the judgment on the merits and bring to an end the conduct found to be in breach of the Convention and avoid further repetition.

53. The Court's power to interpret its own judgments is indisputable, even at the request of the injured party (see my separate opinion in *Fabris*, cited above). In the present inter-State case, the Court goes a step further, and accepts its competence to interpret its *Demopoulos and Others* decision at the request of the State of the victims' nationality.

54. Article 48 (2) (a) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

put an end to violations of the Convention. Were it otherwise, the European human rights protection system would be flawed, because States could commit violations with impunity so long as they provided compensation to the victims of the violations after having committed unlawful acts. As the Commission stated in a number of cases, "the State [cannot] escape from its obligations merely by paying compensation"[55]. Such an interpretation would fraudulently deprive the Convention of its *effet utile*.

22. Moreover, the declaratory judgment is much needed in the particular circumstances of this case. The request deals with an ongoing infringement of the Grand Chamber judgment of 2001 until at least November 2011 and therefore lies within the remit of this Grand Chamber. The claimant State's request is based on undisputed facts. It is not contested that the Council of Ministers of the "TRNC" was disposing of land and property belonging to Greek Cypriots until at least November 2011[56]. As a matter of fact, these ongoing violations did not come to an end by virtue of the enactment of "TRNC" Law 67/2005[57], since the unlawful sale and exploitation of Greek-Cypriot property and homes in the occupied part of Cyprus, with the active encouragement of Turkey, continued after the entry into force of that law, creating a situation which will be difficult, if not impossible, to remedy *ex post facto*. Furthermore, neither the Immovable Property Commission nor the courts in the "TRNC" have the power to put an end to this continuing unlawful practice[58]. Faced with this grave situation, the Committee of Ministers was hitherto unable to reach a common position. Indeed, it could not even obtain the information that it asked for several times on the ongoing misconduct of Turkey in northern Cyprus. To aggravate the situation, the Committee of Ministers was paralysed by a serious deadlock regarding the meaning and impact of the *Demopoulos and*

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55. For example, *Andersen v. Denmark*, no. 12860/87, Commission decision of 3 May 1988, unreported, and *Frederiksen and Others v. Denmark*, no. 12719/87, Commission decision of 3 May 1988, Decisions and Reports 56.

56. See the official documents of the "TRNC" authorities in annex C to the application of Cyprus of 25 November 2011, and the items from the Turkish Cypriot and Turkish press in annex D, as well as the reports on illegal developments and construction in the occupied area of Cyprus in annexes A and B.

57. Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended by Law nos. 59/2006 and 85/2007 (hereinafter "Law 67/2005").

58. According to section 8 of "TRNC" Law 67/2005, the Commission may restitute immovable property to Greek Cypriots if ownership or use of that property has not been transferred to any natural or legal person other than the State. But this restitution is made conditional on the fact that it shall not endanger "national security and public order", is not allocated for "public-interest reasons" and is outside the military areas or military installations. Other immovable property may be restituted on condition that it has not been allocated for "public-interest or social-justice purposes". It is obvious that with such a limited *ex post facto* remit, the Commission by itself is not capable of preventing any sale of property or its exploitation, let alone of putting an end to an ongoing violation.

Others decision with regard to the issue of the possessions of displaced Greek Cypriots in northern Cyprus and other additional claims. The Directorate General of Human Rights and Legal Affairs declared in September 2010 as follows: "It flows from the findings of the Grand Chamber in its *Demopoulos and Others* decision that no further measure is required for the execution of the cases under consideration, concerning first, the home and other possessions of the displaced Greek Cypriots, and second the existence of an effective remedy in this respect."[59] This position was not followed by the Committee of Ministers, since the implementation of the Court's judgment of 2001 on the merits was, and still is, very far from complete in this regard. Worse still, Turkey withdrew all cooperation from the process of supervision by the Committee of Ministers of the Grand Chamber judgment of 2001 "concerning all Cyprus related cases" until the Committee ceased to supervise the execution of the Court's findings relating to violations of property and homes[60]. Thus, the Turkish Government are using the *Demopoulos and Others* decision to block the execution *in totum* of the *Cyprus v. Turkey* Grand Chamber judgment of 2001, including with regard to claims not related to violations of property and homes.

23. The Court had to intervene for the sake of legal certainty and to safeguard its own authority. The Court, and only the Court, has the last word about the interpretation of its *Demopoulos and Others* decision, hence settling this dispute in a manner that lessens the likelihood of future conflicts between the parties while upholding the rule of law and ensuring full execution of the judgment on the merits in *Cyprus v. Turkey*. The Court's answer to the claimant State's request is crystal clear: the Court did not decide in *Demopoulos and Others* that Turkey's obligations under Article 46 to execute the Grand Chamber judgment of 2001 had been fulfilled, nor did the Court hold that the ongoing violations found by the Grand Chamber in its judgment on the merits had come to an end by virtue of the enactment of Law 67/2005, and this for the simple, but obvious, reason that *Demopoulos and Others* concerned only domestic remedies in respect of violations of Article 1 of Protocol No. 1 in individual cases. To put it unambiguously, the *Demopoulos and Others* decision did not interfere

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59. CM/inf/DH (2010)36. As explained in the text, this position was based on legal and factual errors. The confusion between the domestic-remedies rule under Article 35 of the Convention and the States' obligation to abide by and implement judgments under Article 46 prejudiced the statement. Moreover, the facts on the ground showed that serious violations of Greek Cypriots' property rights continued to be committed in the occupied area.

60. "Therefore, pending those decisions of closure, the Turkish Delegation will not take part in any discussion, procedural or substantive, concerning all Cyprus related cases." This statement was made in a letter from the Turkish Government to the Committee of Ministers of 12 September 2011, to which the Cypriot Government reacted by its letter to the Chairman of the Minister's Deputies of 2 December 2011.

with the claimant State's right to full implementation of the Grand Chamber judgment of 2001, including the immediate cessation of the continuing unlawful disposal (including sale, lease, use or any other means of exploitation) of the land and property of Greek Cypriots in northern Cyprus by the "TRNC" authorities with the complicity of the Turkish State. This is not a mere statement on the interpretation of a previous judgment of the Court. The Court's intention goes much further. This is also an acknowledgment of the existence of a situation of non-implementation of the Grand Chamber's judgment of 2001, and therefore of a violation by the respondent State of its obligations under Article 46 of the Convention, to which the Court seeks to put an end[61].

Conclusion

24. After all, there is punishment for unjust war and its tragic consequences in Europe. That punishment can be applied in inter-State cases before the Court, which is competent to determine punitive damages in particularly serious cases of human rights violations. That was the case here. The respondent State is responsible for the protracted search for the missing persons and the prolonged suffering and humiliation of Greek Cypriots ever since the invasion of northern Cyprus, and it has been deaf to the Committee of Ministers' repeated calls for full implementation of the Court's judgment concerning those violations. As Blackstone once put it, punitive damages are most needed in those cases where creators of grave nuisance do not remove that nuisance after the initial verdict against them[62].

61. In my view, the Court's declaration should have been included in the operative part of the judgment, for the sake of legal certainty and the clarity of the judgment. In any case, the legal strength of the Court's declaratory judgment is not at stake. The present judgment cannot be legitimately interpreted in such a way as to defraud the Court's clear intention to make an authoritative declaration on the effects of *Demopoulos and Others*, as requested by the claimant State. In so-called "quasi-pilot judgments", the reasoning contains directives which are not subsequently mentioned in the operative part. Nonetheless, those directives are binding. That method was used in the present judgment also.

62. *Commentaries on the Laws of England*, 1768, Book 3, Chapter 13.

PARTLY CONCURRING OPINION OF JUDGES TULKENS, VAJIĆ, RAIMONDI AND BIANKU, JOINED BY JUDGE KARAKAŞ

(Translation)

1. We voted with the majority and are thus in agreement with all points of the operative provisions of this important judgment[1].

2. The reason we feel compelled to express a separate opinion is solely due to one specific aspect, namely the remarks – which we cannot endorse – contained in the final sentence of paragraph 63 of the judgment. This paragraph concerns the request made by the Cypriot Government on 25 November 2011 in the course of the proceedings which, although entitled "Application for just satisfaction (Article 41)", actually relates to the procedure for execution of the principal judgment by the Committee of Ministers of the Council of Europe and requests the Court to take certain steps in order to facilitate the execution of that judgment (see paragraph 8 of the present judgment).

3. In paragraph 63 of the judgment the Court outlines some principles concerning the execution of its judgments to which we fully subscribe. It states in particular that "the respondent Government is, in any event, formally bound by the relevant terms of the main judgment" and, accordingly, that "it is not necessary to examine the question whether [the Court] has the competence under the Convention to make a 'declaratory judgment' in the manner requested by the applicant Government...". It "observe[s] in this connection that the Court has held that there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property, as well as any compensation for the interference with their property rights (section III, point 4 of the operative provisions of the principal judgment)". The Court accordingly concludes that "[i]t ... falls to the Committee of Ministers to ensure that this conclusion, which is binding in accordance with the Convention, and which has not yet been complied with, is given full effect by the respondent Government".

4. The Court's subsequent statement, according to which "[s]uch compliance could not ... be consistent with any possible permission, participation, acquiescence or other form of complicity in any unlawful sale or exploitation of Greek-Cypriot homes and property in the northern part of Cyprus", and which basically does no more than reiterate the dictum of the principal judgment on this issue, does not give rise to any particular

1. With the exception of Judge Karakaş, who joins us in this opinion.

difficulties, although this repetition might be said to be entirely superfluous in the light of the purpose of the Article 41 judgment.

5. The sentence we have difficulty with is the following: "Furthermore, the Court's decision in the case of *Demopoulos and Others* ... to the effect that cases presented by individuals concerning violation-of-property complaints were to be rejected for non-exhaustion of domestic remedies, cannot be considered, taken on its own, to dispose of the question of Turkey's compliance with Part III of the operative provisions of the principal judgment in the inter-State case."

6. In our view, such a statement – even if it is not contained in the operative provisions – seeks to extend the powers of the Court and runs counter to Article 46 § 2 of the Convention by encroaching on the powers of the Committee of Ministers of the Council of Europe, to which the Convention has entrusted the task of supervising execution of the Court's judgments.

7. The Court does not have jurisdiction to verify whether a Contracting Party has complied with the obligations imposed on it by one of the Court's judgments (see *Oberschlick v. Austria*, nos. 19255/92 and 21655/93, Commission decision of 16 May 1995, Decisions and Reports 81-A, p. 5, and *Mehemi v. France (no. 2)*, no. 53470/99, § 43, ECHR 2003-IV).

8. It is true that the current version of Article 46 of the Convention, as amended by Protocol No. 14, allows the Committee of Ministers to refer a matter to the Court in two sets of circumstances: firstly, where the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, in order for the Court to give a ruling on the question of interpretation (§ 3); and, secondly, where the Committee of Ministers considers that a High Contracting Party is refusing to abide by a final judgment in a case to which it is a party (§ 4). However, in both cases the Committee of Ministers must have taken the referral decision by a qualified majority of two thirds of the representatives entitled to sit on the Committee.

9. It is not open to a High Contracting Party to refer a matter under paragraphs 3 and 4 of Article 46 of the Convention directly to the Court without going through the procedure laid down in those provisions. Allowing such a possibility, as the judgment appears to do, runs the risk of creating an imbalance in the distribution of powers between the two institutions that was envisaged by the authors of the Convention.

10. Of course, as the Court held for example in its judgment in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* ([GC], no. 32772/02, § 67, ECHR 2009), it cannot be said that the powers assigned to the Committee of Ministers by Article 46 are being encroached on where the Court has to deal with relevant new information in the context of a fresh application, especially where the Committee of Ministers has ended its

supervision of the execution of the Court's judgment by means of a final resolution.

11. Nevertheless, it is clear that this is not the case here, which explains why we cannot subscribe to the final sentence of paragraph 63 of the judgment.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE CASADEVALL

(Translation)

1. "[B]earing in mind the specific nature of Article 41 as *lex specialis* in relation to the ... rules and principles of international law" as the majority puts it (see paragraph 42 of the judgment), I am of the view that, *in principle*, the just-satisfaction rule should not apply to inter-State cases. One could also argue the opposite and say that, *in principle*, it is applicable, and then proceed, taking into account the specific circumstances of the case and in particular the identification of the *injured party* (the individual rather than the State), to determine the relevance of just satisfaction on a case-by-case basis. To date, as far as I am aware, the Court has never expressly stated that the just-satisfaction rule applies to inter-State cases. On the other hand, it has not stated that it does not.

2. Albeit with great hesitation, in view of the various factors which arose in this case between 10 May 2001 (the date of delivery of the judgment on the merits) and 18 June 2012 (the date of the last observations submitted by the applicant Government), and without entering into the procedural details, I voted with the majority in finding Article 41 to be applicable as regards the missing persons identified by name. However, I voted against the applicability of this provision as regards the enclaved residents of the Karpas peninsula who have not been identified. In inter-State cases a distinction needs to be made between two completely different situations, both of which are present in this case.

3. The first situation is where the applicant State complains of a violation of certain fundamental rights of one or more of its nationals – individuals who are identified and named – by another Contracting Party (see the cases of *Austria v. Italy*, no. 788/60, Commission decision of 11 January 1961, Yearbook 6, and *Denmark v. Turkey*, no. 34382/97, 5 April 2000). In the present case these are the 1,456 missing persons who were named by the applicant Government at the very outset of the case. Here, we are very close to the classic scenario and it seems reasonable to say that the aim is first and foremost to defend the individual rights and legitimate interests of the persons concerned. Accordingly, we can conclude that the just-satisfaction rule is applicable, while bearing in mind that the sums awarded should go to the individuals directly or indirectly harmed and primarily "injured" by the violation of their rights (the victims) and not to the State which represents them (see paragraph 46 of the judgment).

4. The second situation (see paragraph 44 of the judgment) is where the applicant State complains, essentially and in general terms, about systemic problems and shortcomings or administrative practices in another

Contracting Party, and where the aim is primarily to uphold the European public order, even though the State in question may also be pursuing its own clear political interests (see "The Greek case", nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12). In the present case this means the enclaved residents of the Karpas peninsula who are defined in an abstract manner by the applicant Government, individuals who have to be identified and listed *ex post facto* eleven years after the delivery of the judgment on the merits. In paragraph 43 of the judgment reference is made to the question "whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings in so far as this can be discerned from the initial application to the Court". In this second situation, to my mind, the conclusion should be that Article 41 is not applicable.

5. Having voted in favour of finding the just-satisfaction rule to be applicable to the 1,456 missing persons, and looking beyond the practical difficulties of accurately identifying the beneficiaries (children, parents, heirs), a task which falls to the applicant Government, I believe it would have been appropriate to award an individual sum – on a per capita basis – to each of the victims (along the lines of the judgment in *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009) rather than awarding a lump sum to the Cypriot State without indicating any criteria for distribution. The reality is that in practice all the awards made by the Court to date by way of just satisfaction have been granted directly to individual applicants (see paragraph 42 *in fine* of the judgment).

6. Having voted against finding Article 41 to be applicable in so far as the enclaved residents of the Karpas peninsula are concerned, I also voted against the lump sum awarded by the majority. If numerous difficulties are likely to be encountered in providing compensation (within eighteen months) to the heirs of the 1,456 missing persons, I dread to think of the complications that are bound to arise in identifying and listing the thousands of displaced persons. Supervising the execution of this judgment will be no easy task.

7. To conclude, I would stress that I share the point of view expressed by my colleagues in their concurring opinion annexed to the present judgment as regards the last sentence of paragraph 63 of the judgment.

DISSENTING OPINION OF JUDGE KARAKAŞ

(Translation)

I am unable to agree with the majority concerning:

(a) the finding that the passage of time since the delivery of the principal judgment on 10 May 2001 has not rendered the applicant Government's just satisfaction claims inadmissible;

(b) the applicability of Article 41 *in the present case* as regards the missing persons;

(c) the applicability of Article 41 *in the present case* in so far as the enclaved Greek-Cypriot residents of the Karpas peninsula are concerned, and

(d) the sums awarded by way of just satisfaction.

A. The time factor

The Grand Chamber judgment on the merits in *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV) was delivered on 10 May 2001. In the operative provisions of that judgment the Court held unanimously that "the issue of the possible application of Article 41 of the Convention is not ready for decision and adjourns consideration thereof". The issue is raised only in the operative provisions; no reference is made to it in the body of the judgment, unlike in the case of *Ireland v. the United Kingdom* (18 January 1978, Series A no. 25), where the Court explained clearly why it had not applied Article 50 (in that case, the Irish Government had not sought compensation for any individual).

In all cases before it, the Court may reserve/adjourn the issue of just satisfaction if, and only if, a request to that effect has been made by the parties within the time allowed.

In the instant case the Cypriot Government did not lodge a claim for just satisfaction within the time-limit set down by Rule 60 § 1 of the Rules of Court in the 1998 version, which was in force at the relevant time:

"Any claim which the applicant Contracting Party or the applicant may wish to make for just satisfaction under Article 41 of the Convention shall, unless the President of the Chamber directs otherwise, be set out *in the written observations on the merits* or, *if no such written observations are filed*, in a special document filed *no later than two months after the decision declaring the application admissible*."

According to this wording, any applicant, whether a State or a natural or legal person, had normally speaking to submit quantified claims within the time allowed for the submission of written observations on the merits. It is thus quite clear that, *unless the President directed otherwise*, those

time-limits were binding; moreover, this is the case in all successive versions of the Rules of Court. It follows that, in the present case, the only option remaining to the Cypriot Government, since they did not submit their claims together with their observations on the merits, was to submit them no later than two months after the decision declaring the application admissible.

In its letter of 29 November 1999 the Court did not require the applicant Government to submit any claim for just satisfaction "*at this stage of the proceedings*". At no point in the proceedings did the Cypriot Government submit such a claim, either in their initial application or during the hearing of 20 September 2000.

Nothing, or virtually nothing, happened between 2001 and 2010, with the exception of the letter of intention sent to the Court on 31 August 2007.

On that date, that is, seven years later, the Cypriot Government suddenly sent a letter informing the Court of their intention to lodge a separate application for the purposes of applying Article 41. How should the Court have responded to this letter? In any event, the applicant Government decided to submit claims for just satisfaction on 11 March 2010, that is, almost three years after that letter, and in relation only to the missing persons. Subsequently, on 18 June 2012, at the invitation of the Court, the Cypriot Government extended their claims to include the enclaved Greek-Cypriot residents of the Karpas peninsula. Accordingly, this new version of the claim became "*final*" (see paragraph 30 of the judgment to this effect).

In the instant case, contrary to Rule 60 of the Rules of Court, which required claims for just satisfaction under Article 41 to be submitted without undue delay, the applicant Government remained silent and inactive for almost ten years.

It should be pointed out in this regard that, according to Rule 46 of the Rules of Court, just-satisfaction claims under Article 41 are the responsibility of the applicant State, and that the Court could certainly not have acted of its own motion to remedy the failings in this connection. The reasonable-time requirement applies both to individual applicants and to applicant States, and any failure to satisfy that requirement will fall foul of the limitation rule.

In *Varnava and Others v. Turkey* ([GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECHR 2009), the Court articulated the following principle concerning the application of the six-month time-limit to continuing situations, especially in disappearance cases:

> "165. Nonetheless, the Court considers that applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are

> initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case."

Similarly, the case-law of the International Court of Justice (ICJ) generally recognises the obligation for applicant States to act within a reasonable time. The leading judgment on this issue is the judgment of 26 June 1992 in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*[1].

In that case the government of the Republic of Nauru had filed an application in 1989 instituting proceedings against Australia in respect of a dispute over the rehabilitation of certain phosphate lands (mines and quarries) worked out before Nauruan independence, during the time of the Australian Mandate. In its application, Nauru alleged that Australia had failed in its trusteeship obligations under Article 76 of the United Nations Charter and the Trusteeship Agreement of 1 November 1947. Australia lodged a series of preliminary objections, one of which argued that the application had been submitted out of time. According to the Australian government, Nauru had achieved independence on 31 January 1968 and, as regards rehabilitation of the lands, had not formally "raised [its position] with Australia and the other former Administering Powers" until December 1988. The Australian government argued that the delay in making the claim was all the more prejudicial to Australia because most of the documentation relating to the Mandate and the Trusteeship could have been lost or dispersed in the interval, and because developments in the law during the interval rendered it more difficult to determine the legal obligations incumbent on the respondent State at the time of the alleged breaches of those obligations. Australia therefore contended that Nauru's application was inadmissible on the ground that it had not been submitted within a reasonable time. The ICJ rejected this preliminary objection, but nevertheless held:

> "32. The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.

1. Preliminary objections, *ICJ Reports* 1992, p. 240.

> 33. In the present case, it was well known, at the time when Nauru gained its independence, that the question of rehabilitation of the phosphate lands had not been settled. ...
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> 36. The Court, in these circumstances, takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."

The *Nauru* case was eventually concluded by a friendly settlement. The interest of this case lies, however, in the fact that the ICJ clearly recognised an obligation on the part of the applicant State to act within a reasonable time. In other words, although no specific time-limits are laid down in general international law, the international court concerned must assess the relevant circumstances in order to determine whether the passage of time has rendered the application inadmissible, taking all the relevant factors into account (including the rights and legitimate interests of the respondent State, especially where these are at risk of being damaged).

In the spirit of the *Nauru* judgment, and contrary to the opinion of the majority, the Cypriot Government provided no convincing reasons for the lengthy period of inactivity between the delivery of the judgment on the merits (2001) and the claim for just satisfaction (2010).

It further transpires that the reasonable-time requirement as applied by the Court in *Varnava and Others* was compatible with the general rule of public international law established by the ICJ in the *Nauru* judgment and should therefore in principle also be applied in relation to a separate application lodged under Article 41 in the context of an inter-State case such as the present one.

Accordingly, I believe that the time factor described above renders the Cypriot Government's application inadmissible.

B. Applicability of Article 41 in the present case as regards the missing persons

Article 33 of the Convention provides that "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party", it being understood that "any ... breach" refers to allegations concerning both the substantive and procedural provisions. That said, it should be stressed at

the outset that when a State intends to lodge an inter-State application, the admissibility requirements are not the same as those for individual applications. Under Article 35 of the Convention, inter-State cases are not required to comply with the rule of exhaustion of domestic remedies or the six-month rule. We are thus led to conclude that no confusion can be allowed between the procedure governing inter-State cases and that governing individual applications, as otherwise Article 33 of the Convention could easily be circumvented by States in order to assert individual claims for the purposes of Article 34 and disregard the express requirements of Article 35 §§ 2 to 4.

That being so, I would observe that inter-State cases before the Court can be divided into three categories.

1. First, there are those cases where the Contracting Parties are acting purely as guardians of the European public order. One example would be the case of *Denmark, Norway, Sweden and the Netherlands v. Greece* ("The Greek case", nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12). One might also cite the case of *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (nos. 9940-9944/82, Commission decision of 6 December 1983, Decisions and Reports 35). This category is not relevant for understanding the context in the present case.

2. The second category, on the other hand, is relevant for the purposes of comparison. These are cases in which a Contracting State expressly seeks redress for violations of the rights of its nationals. This category is illustrated by the case of *Denmark v. Turkey* (no. 34382/97, ECHR 2000-IV), concerning treatment contrary to Article 3 to which a Danish citizen, Mr Koç, was subjected by Turkish police officers. The subject of the dispute in that case was the treatment inflicted on Mr Koç by way of interrogation techniques. I believe this is the only case in which the doctrine of "*diplomatic protection*" as recognised in international law has been applied in the context of an individual who was identifiable from the time of lodging of the application. It is true that, in that case, Turkey paid a sum of money to the Danish government; however, this was under the terms of a friendly settlement rather than under Article 41 of the Convention. These two points should be borne in mind in order to better understand the present case, which actually falls into the third category, in which there was no identifiable victim at the time of the lodging of the application.

3. This third category involves the specific interests which a Contracting State seeks to assert in so far as it represents or is closely linked to individuals alleged to be victims of acts occurring in the context of a political dispute between two countries. In this category, leaving aside the two *Greece v. the United Kingdom* inter-State cases from 1956 (no. 176/56, Committee of Ministers Resolution of 20 April 1959) and 1957 (no. 299/57, Committee of Ministers Resolution of 14 December 1959), and the case of

Austria v. Italy (no. 788/60, Commission decision of 11 January 1961, Yearbook 6), we might first cite the case of *Ireland v. the United Kingdom* concerning the five interrogation techniques used by the security forces against detainees who were members of the Irish Republican Army but who were not identified; they were referred to as "persons" or "men" and designated by the abbreviations T1, T2, T3, etc. In that case the Court found, *inter alia*, a violation of Article 3 of the Convention. However, as the Irish Government had stated that they were not seeking "[to obtain] compensation for any individual person", former Article 50 of the Convention (new Article 41) did not apply.

The *travaux préparatoires* to the Convention and the general principles of public international law concerning diplomatic protection and reparation lead to the conclusion that the just-satisfaction rule enshrined in Article 41 is applicable, as a matter of principle, in inter-State cases brought under Article 33 of the Convention. In that regard I agree with the view of the majority (see paragraph 43 of the judgment).

Article 33 draws on the notion of diplomatic protection (see, for instance, the ICJ judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* of 19 June 2012[2]), as recognised in public international law. The Court could therefore award just satisfaction in inter-State cases which, by their nature, are more akin to typical cases of diplomatic protection in public international law, in other words where the application was lodged in the place of and on behalf of certain identifiable individuals (see, for instance, *Denmark v. Turkey*, cited above).

In the light of these principles it is not possible, to my mind, to apply Article 41 in the present case and to award any satisfaction under that head.

As stressed in the *Cyprus v. Turkey* judgment of 10 May 2001, it was not until the hearing on admissibility of 20 September 2000 that the Cypriot Government stated that the number of missing Greek Cypriots was 1,485 (see paragraph 119 of the judgment on the merits). At that stage none of the victims was identifiable. However, the Court agreed to proceed on the assumption that those missing persons were still alive and found a continuing violation of Article 2 on account of Turkey's failure to carry out an effective investigation designed to shed light on the fate of the missing Greek Cypriots.

I would draw attention to the general scope of this finding, which does not relate to individual Greek-Cypriot citizens but finds fault with an ongoing situation. The violations in question were not found in respect of individual victims, but with regard to a factual and legal situation.

It should be stressed that the sole beneficiary of Article 41 is "*the injured party*". In the present case the term "*party*" indisputably refers to "*the Contracting Party*" which lodged the application, namely Cyprus. Any

2. Compensation, *ICJ Reports* 2012, p. 324.

attempt to rely on the approach adopted in *Diallo* (cited above) – which is a good example of the exercise of diplomatic protection by the State – in order to justify an award of just satisfaction is therefore unfounded, and even in contradiction with the legal and factual reality of the present case.

Unlike the majority, I am of the view that the "*doctrine of diplomatic protection*" does not come into play in the present case. This case concerns only the presumed situation of a group of persons which was not identifiable at the time when the Court found the violations of the Convention.

Hence, even assuming that the application was not lodged out of time, the Cypriot Government could only claim an award of satisfaction with regard to the violation found in Part II, point 2 of the operative provisions of the principal judgment[3].

According to the principles of public international law on reparation for non-pecuniary damage in cases not concerning diplomatic protection, the violation found in the judgment on the merits should constitute sufficient just satisfaction, without it being necessary to award aggregate, not to say speculative, sums such as those claimed by the Cypriot Government in respect of "*non-pecuniary damage*" on behalf of a vague and unidentifiable number of persons purported to be still alive.

In my view, a group of persons of this kind cannot constitute an "*injured party*" for the purposes of Article 41 in an inter-State case. In the present case the injured party is indeed the applicant State and, according to the logic of the Convention, non-pecuniary damage must *per se* be individual.

Thus, all monetary claims in respect of non-pecuniary damage should be dismissed, given that in international law reparation under this head may take the form of recognition by a court of a violation of the right of one State by another State, provided that only the State's moral or political interests have been infringed. That was the situation in the *Corfu Channel Case*, in which the ICJ held that "by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that *this declaration by the Court constitutes in itself appropriate satisfaction*" (emphasis added)[4].

The same was true in the arbitration ruling of 30 April 1990 in the case concerning the *Rainbow Warrior* affair. The Arbitral Tribunal, having publicly made "four declarations of material breach of its obligations by France", held that this "*constitutes in the circumstances appropriate*

3. "... that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances" (§ 136).
4. *Reports* 1949, p. 36.

satisfaction for the legal and moral damage caused to New Zealand" (emphasis added)[5].

More recently, in the *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the ICJ held that "*the findings ... reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo*" (emphasis added)[6].

In international law, therefore, a judicial finding of violation constitutes a sufficient form of satisfaction. This is true also in the context of the review of lawfulness in inter-State cases before our Court.

In the context of the Convention system, for satisfaction to be awarded under Article 41, the "injured" party must always be the individual (see paragraph 46 of the judgment). Hence, even in an inter-State case, the compensation awarded to the applicant State must be aimed at redressing the damage suffered by a clearly defined person or persons.

In the instant case, awarding an aggregate sum to the applicant State for it to distribute, as it sees fit, to individuals whose existence and number were alleged only at the hearing would be contrary to the very spirit of Article 41.

In circumstances such as those which were the subject of the principal judgment, any approach which sits uneasily with the *raison d'être* of Articles 33, 34, 35 and 41 of the Convention will raise serious issues as regards the effectiveness not just of the implementation of the just-satisfaction remedy by an Article 41 judgment, but also of the execution by the States of such a judgment and the supervision of its execution by the Committee of Ministers.

The majority of the Grand Chamber decided to make an award to Greek Cypriots who are missing but presumed alive, on account of the suffering which the applicant State is now expressing on their behalf. Following this line of reasoning allow me therefore, as a working hypothesis, to consider these persons as individual applicants, on the understanding that they may not be granted more favourable treatment than any other applicant having undergone a comparable experience.

This hypothesis demonstrates that the majority has in fact indirectly granted monetary compensation to certain individuals to which the latter would not have been entitled on the basis of individual applications (see, to this effect, *Varnava and Others*, cited above, §§ 151-72), for which the requirements as to admissibility and the merits are most certainly not the same.

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5. Point 8 of the operative provisions of the arbitral award of 30 April 1990, *United Nations Reports of International Arbitration Awards*, vol. XX, p. 273.

6. 14 February 2002, § 75. See also the ICJ judgment in *LaGrand (Germany v. United States of America)* of 27 June 2001, § 116.

C. Applicability of Article 41 in the present case as regards the residents of the Karpas peninsula

It should also be noted that, starting with this case, the Court is henceforth supposed to accept the applicability of Article 41 in inter-State cases, by referring to diplomatic protection and relying on the possibility of identifying the victims of violations on the basis of the information emerging from the initial application. To that end the Court has stated that it will examine each complaint separately in order to determine whether or not to award just satisfaction (see paragraph 43 of the judgment).

However, the judgment does not explain anywhere on what factual basis the majority awarded sums to the enclaved Greek-Cypriot residents of the Karpas peninsula, who form a group defined in an abstract manner.

In this context the Cypriot Government stated that "*[t]he number of such residents is to be agreed between the parties within 6 months of the Court's order and, in the absence of agreement, to be resolved by the President of the Court on the basis of written evidence and submissions as to the number and location of residents and their heirs*". Here we can see clearly the fundamental difference between the complaints concerning the missing persons and those concerning the Karpas residents. As regards the latter, the Cypriot Government wanted to try identifying and listing them *ex post facto* eleven years after the delivery of the judgment on the merits! One wonders how it can be that this did not pose the slightest problem for the majority, which did not comment on this request and awarded a grandiose lump sum without having any idea of the number of persons concerned.

I therefore fail to understand the legal logic behind the view of the majority set forth in paragraphs 43 to 46 of the judgment, in which it decides to apply Article 41 even to the abstract and general inter-State complaints.

Against such a background, any reference to the above-cited *Diallo* judgment remains irrelevant and unfounded, not to say misleading.

D. Some factual inaccuracies

Under this heading I will simply reiterate some of the facts and address a number of issues of a factual nature.

(1) *What of the true number of missing persons* (in view of all the acts complained of to date and re-examined by the Grand Chamber)?

Application no. 8007/77 referred to approximately 2,000 missing Greek Cypriots. In their written submissions of 22 November 1994 in the course of the procedure on the merits, the applicant Government referred to 1,619 persons. Six years later, at the hearing of 20 September 2000, that number dropped to 1,485. Now, the Government's final figure is 1,456. According to the statistics issued in February 2014 by the United Nations Committee

on Missing Persons, 358 bodies – presumed to be those of missing Greek Cypriots – had been discovered in the meantime[7]. One might therefore have expected that the number of victims would no longer be 1,456. However, the first official list (as published in the Official Gazette of Cyprus) accompanying the just-satisfaction claim lodged in 2010 refers to 1,493 persons.

In view of the foregoing, can the majority claim to know the true number of missing persons? Is the majority convinced that the missing persons who have already been the subject of around eighty applications examined by the Court have not been counted a second time in the figures provided in the instant case? If the answer is in the negative, how does the majority envisage establishing the sum to be awarded in respect of non-pecuniary damage?

Updating this list was of vital importance in order to distinguish those persons who are still missing from those whose bodies have been discovered, bearing in mind that the claims concerning the latter should certainly be dismissed as "*premature*" in accordance with the decision in *Charalambous and Others v. Turkey* (no. 46744/07, 3 April 2012); see also the Court's decisions in *Papayianni v. Turkey* (no. 479/07, 2 April 2013); *Ioannou Iacovou and Others v. Turkey* (no. 24506/08, 5 October 2010); and *Efthymiou and Others v. Turkey* (no. 40997/02, 7 May 2013).

Opting to omit this point, the majority decided to award an amount of thirty million euros as a so-called aggregate sum calculated by multiplying 20,000 euros by 1,456. It should further be pointed out that this assessment was based on the mistaken application of the theory of diplomatic protection and on ignorance of the actual number of missing persons.

(2) *As to the sixty million euros awarded by the majority to the enclaved Greek-Cypriot residents of the Karpas peninsula*, that decision can on no account be explained by the theory of diplomatic protection.

As regards this part of the claim, the Court knows neither the number nor the identity of the persons concerned; hence, the sum awarded remains completely arbitrary.

(3) *What of the arrangements for execution of a judgment awarding an amount to be distributed by the Cypriot Government?*

Several questions arise regarding the execution of such an operative provision, not just as regards the Contracting Parties but also as regards the Committee of Ministers.

In the instant case the Cypriot Government stated that it would be up to them to distribute to the persons concerned the aggregate sum awarded in this case, on the basis of the aforementioned list of persons.

This statement was accepted by the majority.

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7. See the official website of the Committee on Missing Persons in Cyprus: http://www.cmp-cyprus.org/

(a) It can therefore be inferred from the request of the Cypriot Government that in fact they already have authenticated evidence that each of the persons concerned is indeed the heir or an eligible family member of a missing person.

(b) If this is not the case, the applicant Government will naturally have to require each person who comes forward to prove that he or she is indeed the heir or an eligible family member of the victim. Bearing in mind that each victim will undoubtedly have more than one heir or family member, how many weeks, months or even years will these procedures take? Yet the operative provisions lay down a time-limit, namely eighteen months or any other period considered appropriate by the Committee of Ministers. While each of these procedures is in progress, what will become of the colossal sum already paid, which the applicant Government will be free to dispose of as it wishes?

(c) By the same token, what measures does the applicant Government envisage being able to take in order to deal with abusive or fraudulent claims from individuals with no genuine link to any of the victims?

(d) Assuming that, over time, some of the persons currently presumed alive die, will the applicant Government repay the corresponding amount paid by Turkey, on the understanding that this scenario would come within the ambit of the decision in *Charalambous and Others* (cited above)?

(e) Still greater caution is called for as regards the distribution, under the supervision of the Committee of Ministers, of compensation for non-pecuniary damage to the enclaved Greek-Cypriot residents of the Karpas peninsula in their capacity as "individual victims". After all, the Cypriot Government has not even been able in this regard to submit a list or to give any indication of the number of persons involved; any attempt at an evaluation and any execution measures are bound to prove futile.

These are all issues that will hamper the execution of this judgment.

Lastly, as regards paragraph 63 of the judgment, I join the partly concurring opinion of Judges Tulkens, Vajić, Raimondi and Bianku.