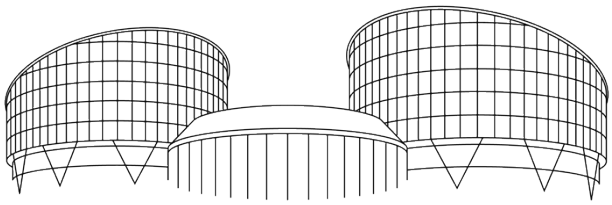

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

GRAND CHAMBER

CASE OF VARNAVA AND OTHERS v. TURKEY

(Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90)

JUDGMENT

STRASBOURG

18 September 2009

In the case of Varnava and Others v. Turkey,

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

Jean-Paul Costa, *President*,
Françoise Tulkens,
Josep Casadevall,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Lech Garlicki,
Dean Spielmann,
Sverre Erik Jebens,
Ineta Ziemele,
Mark Villiger,
Päivi Hirvelä,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Ann Power,
Zdravka Kalaydjieva, *judges*,
Gönül Erönen, ad hoc *judge*,

and Erik Fribergh, *Registrar*,

Having deliberated in private on 19 November 2008 and on 8 July 2009,

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

PROCEDURE

1. The case originated in nine applications (nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Cypriot nationals, Andreas and Giorghoulla Varnava (no. 16064/90), Andreas and Loizos Loizides[1] (no. 16065/90), Philippos Constantinou and Demetris K. Peyiotis (no. 16066/90), Demetris Theocharides and Elli Theocharidou[2] (no. 16068/90), Panicos and Chrysoula Charalambous (no. 16069/90), Eleftherios and Christos Thoma[3] (no. 16070/90), Savvas and Androula Hadjipanteli (no. 16071/90), Savvas and Georghios Apostolides[4]

1. See paragraph 11 below.
2. See paragraph 10 below.
3. See paragraph 9 below.

(no. 16072/90) and Leontis Demetriou and Yianoulla Leonti Sarma (no. 16073/90), on 25 January 1990. Each of the nine applications contained authorities signed by the second applicants in their own names and on behalf of their nine missing relatives named as the first applicants.

2. The applicants were represented by Mr A. Demetriades and Dr K. Chrystomides respectively, lawyers practising in Nicosia. The Turkish Government ("the respondent Government") were represented by their Agent.

3. The applicants alleged that the first applicants in the above applications had disappeared after being detained by Turkish military forces from 1974 and that the Turkish authorities had not accounted for them since. They relied on Articles 2, 3, 4, 5, 6, 8, 10, 12, 13 and 14 of the Convention.

4. The applications were joined by the Commission on 2 July 1991 and declared admissible on 14 April 1998. They were transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The respondent Government accordingly appointed Ms G. Erönen to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicants and the respondent Government each filed observations on the merits (Rule 59 § 1).

7. On 17 February 2000 the Cypriot Government informed the Court that they wished to participate in the proceedings. They submitted observations on the merits (Rule 59 § 1).

8. On 1 November 2003 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

9. On 17 February 2005, the applicants' representative informed the Court that the second applicant, Christos Thoma, father of the first applicant in application no. 16070/90, had died on 12 April 1997 and enclosed letters of authority from his wife, Chrystalleni Thoma, and his daughter, Maria Chrystalleni Thoma, who stated their intention of continuing the application.

10. On 13 November 2006, the applicants' representative informed the Court that the second applicant, Elli Theocharidou, mother of the first-named applicant in application no. 16068/90, had died on 1 April 2005 and

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4. See paragraph 10 below.

that the latter's heirs (Ourania Symeou, Kaiti Constantinou, Yiannoulla Kari, Eleni Papayianni, Andreas G. Theocharides, Dimitris G. Theocharides and Marios G. Theocharides) wished to continue the application. On the same date, it was communicated that the second applicant, Georghios Apostolides, father of the first applicant in application no. 16072/90 had died on 14 April 1998 and that the latter's heirs (Panayiota Chrysou, Chrystalla Antoniadou, Aggela Georgiou, Avgi Nicolaou and Kostas Apostolides) intended to continue the application.

11. On 11 January 2007, the applicants' representative informed the Court that the second applicant, Loizos Loizides, father of the first-named applicant in application no. 16065/90 had died on 14 September 2001 and that his granddaughter, Athina Hava, intended to continue with the application on behalf of all the heirs of the deceased (Markos Loizou, Despo Demetriou, Anna-Maria Loizou, Elena Loizidou and Loizos Loizides).

12. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). It found that the heirs of the deceased applicants had the requisite interest and standing to continue the applications. In its judgment of 10 January 2008 ("the Chamber judgment"), the Chamber held unanimously that there had been violations of Articles 2, 3 and 5 of the Convention and that no separate issues arose under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention. It also held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

13. On 28 March 2008 the respondent Government requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

14. On 7 July 2008 a panel of the Grand Chamber decided to accept the request for a referral (Rule 73).

15. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

16. On 11 August 2008, the Cypriot Government ("the intervening Government") informed the Court that they wished to participate in the proceedings. They submitted observations on the merits (Rule 59 § 1).

17. On 18 September 2008, the President granted leave to Redress, an international non-governmental organisation, to submit written observations, which were received on 2 October 2008 (Article 36 § 2 of the Convention and Rule 44 § 2).

18. The applicants, the respondent Government and the intervening Government each filed a memorial.

19. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 November 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*
Mr Z. NECATIGIL, *Agent*,
Prof. Dr. J.A. FROWEIN,
Mrs S. KARABACAK,
Mr T. BILGIÇ,
Mrs D. AKÇAY,
Mrs A. ÖZDEMIR, *Advisers*;

(b) *for the applicants*
Mr A. DEMETRIADES, Barrister,
Mr L. CHRISTODOULOU, Advocate,
Mr I. BROWNLIE QC, *Counsel*,
Mr L. ARAKELIAN,
Mr C. PARASKEVA, *Advisers*;

(c) *for the intervening Government*
Mr P. CLERIDES, Attorney-General, *Agent*,
Mr A.V.R. LOWE, Barrister-at-Law, Professor of Law,
Mrs F. HAMPSON, Barrister-at-Law, Professor of Law,
Mrs S.M. JOANNIDES, Barrister-at-Law, *Advisers*.

The Court heard addresses by Mr Brownlie and Mr Demetriades for the applicants, by Prof. Frowein for the respondent Government and by Mr Lowe for the intervening Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. General context

20. The complaints raised in this application arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus. These events gave rise to four applications by the Government of Cyprus against the respondent State, which have led to various findings of violations of the Convention. The history is set out in the Court's judgment in *Cyprus v. Turkey* ([GC],

no. 25781/94, §§ 13-18, ECHR 2001-IV; hereinafter "the fourth inter-State case") and the Court sees no reason for repetition.

B. The facts of these cases

21. The facts are disputed by the parties. The Court notes that the summary of their versions of events given in the Chamber judgment have not been; these are in large part reproduced below, with the addition of some new information submitted by the parties and identified as such in the text.

1. The applicants' submissions on the facts

(a) Application no. 16064/90: Andreas Varnava

22. The first applicant, an ironmonger, was born in 1947; he has been considered missing since 1974. His wife, the second applicant, was born in 1949 and resided in Lymbia.

23. In July 1974 the first applicant, responding to the declared general mobilisation, enlisted as a reservist in the 305 Reservists Battalion which had its headquarters in Dhali village. On 8 to 9 August 1974 the reserve soldiers of the 305 Reservists Battalion, among them the applicant, took up the manning of Cypriot outposts along the front line opposite the Turkish military forces which extended between Mia Milia and Koutsovendis.

24. On the morning of 14 August 1974, Turkish military forces, supported by tanks and air cover, launched an attack against the Cypriot area where the applicant and his battalion were serving. The Cypriot line of defence was broken and the Turkish military forces began advancing towards the area of Mia Milia; the Cypriot forces began retreating and dispersed in all directions. After a while the area was captured by the Turkish military forces and the applicant was trapped within. There has been no trace of the applicant since.

25. Mr Christakis Ioannou of Pano Dhikomo and now of Stavros Refugee Camp Strovolos, who had been a prisoner of the Turkish military forces and/or the Turkish authorities, stated that at Adana Prison in Turkey, where he had been taken on 31 August 1974, there were another forty persons in the same room for three to four days. Among them was the applicant. After the said period they were split up and he had not seen the applicant since.

(b) Application no. 16065/90: Andreas Loizides

26. The first applicant, a student, was born in 1954; he has been considered missing since 1974. His father, the second applicant, was born in 1907 and resided in Nicosia.

27. In July 1974 the first applicant was serving as a second lieutenant in the 1st Company of the 256 Infantry Battalion stationed at Xeros. On about

30 July 1974 the battalion moved to the Lapithos area. The soldiers were split up into various groups; the applicant's group, consisting of ten men, was ordered to take up positions on the Lapithos heights.

28. On 5 August 1974 Turkish forces launched a strong attack from all sides against the Cypriot forces' positions while other Turkish troops managed to encircle Lapithos. Owing to the Turkish superiority in men and weapons the Cypriot forces were ordered to retreat towards the centre of the village to the company base. The applicant arrived there with his men and was informed by the inhabitants that Lapithos was surrounded by Turkish troops. They hid their weapons in an orchard and put on civilian clothing. The same afternoon the applicant and others attempted unsuccessfully to break through the Turkish lines. They then returned to Lapithos where they spent the night. At about 9 a.m. on 6 August 1974 Turkish troops entered Lapithos and started extensive house-to-house searches. The applicant and his comrades were warned by the villagers and they dispersed in order to avoid capture. Since then, none of the members of the group has seen the applicant.

29. Nicos Th. Tampas of the 256 Infantry Battalion, also on the Lapithos heights on 5 August 1974, mentioned in a statement that at approximately 9 p.m. on 6 August 1974 he entered a warehouse in the village where he found the applicant looking after a wounded man. After talking with the applicant, he left. That was the last time that he saw the applicant. He was himself arrested by the Turks on 9 August 1974 in Lapithos, detained in various prisons in Cyprus and Turkey and released on 22 October 1974.

30. Christodoulos Panyi of Vatyli, now of Strovolos, in his statement declared that while he was a prisoner in Adana Prison he saw and recognised the applicant, whom he had previously met.

(c) Application no. 16066/90: Philippos Constantinou

31. The first applicant, a student, was born in 1954; he has been considered missing since 1974. His father, the second applicant, was born in 1929 and resided in Nicosia.

32. In July 1973 the first applicant enlisted to do his national service. He was posted to the 70 Engineers Battalion. On 5 August 1974, a section of the battalion, including the applicant, was sent on a mission in the Lapithos and Karavas area (Kyrenia district). The men spent the night at Lapithos and intended to complete the mission the following morning.

33. At about 4.30 a.m. on 6 August 1974 the Turkish Army launched a full-scale attack from all sides in the Karavas and Lapithos area. The applicant's group leader ordered his men to split up into three groups and to withdraw towards Vasilia (also in the Kyrenia district). The applicant was in one of the groups which intended to withdraw by following a route along the coast.

34. The men first reached the main Nicosia-Kyrenia road near the "Airkotissa" restaurant. While resting, they heard shouting and the group

leader sent the applicant and another soldier to investigate. As they had not returned after about fifteen minutes the remainder of the group left for Panagra (also in the Kyrenia district). On their way, they were ambushed by Turkish soldiers and the remaining group dispersed.

35. Costas A. Sophocleous, of Nicosia, stated that, when he was a prisoner in Turkey from 30 July until 28 October 1974, he had met the applicant. They were in the same prison in Turkey and were subsequently transferred to Cyprus, at which point he had been released but not the applicant.

36. Alexandros Papamichael, of Limassol, stated that he recognised the first applicant from a photograph that was shown to him by the second applicant and he had been with him in Adana Prison.

37. Finally, the second applicant mentioned in a signed statement that he identified his missing son in a photograph published in *Athinaiki*, a Greek newspaper, on 28 September 1974. In this photograph Greek Cypriot prisoners were shown on a boat en route to Turkey.

(d) Application no. 16068/90: Demetris Theocharides

38. The first applicant, a photographer, was born in 1953; he has been considered missing since 1974. His mother, the second applicant, was born in 1914 and resided in Nicosia.

39. On 20 July 1974 the first applicant enlisted as a reservist. He was posted to the 1st Company of the 301 Infantry Battalion. On 22 July the whole battalion was ordered to move on the following day to the area of Ayios Ermolaos. The 1st Company took up defensive positions at a height called "Kalambaki", near the Turkish Cypriot village of Pileri.

40. At about 4.30 a.m. on 26 July 1974 the 1st Company came under attack from the Turkish Cypriot villages of Krini-Pileri. The Turkish military forces consisted of a paratroop battalion, twenty tanks and high-angle guns. They succeeded in breaking through the Cypriot lines and infiltrated the right flank of the 1st Company in order to encircle it. The commander ordered the company to regroup at the village of Sysklepos; from there they were ordered to regroup at Kontemenos, where they arrived at about 3 p.m. After a roll call they found out that six soldiers of the 1st Company were absent, including the applicant. The area in which the 1st Company had been initially stationed was captured by the Turkish military forces.

41. Mr Nicos Nicolaou of Strovolos, who was a prisoner at Adana in September 1974, stated that one day he heard a Turk calling the applicant's name. He also saw the applicant whom he happened to know previously and noticed that he was lame in one leg. On 11 September 1974 Mr Nicolaou was taken to Antiyama Prison in Turkey and he had not seen the applicant since.

(e) Application no. 16069/90: Panicos Charalambous

42. The first applicant, a student, was born in 1955; he has been considered missing since 1974. His mother, the second applicant, was born in 1935 and resided in Limassol.

43. In 1972 the first applicant enlisted in the National Guard to do his military service.

44. On 23 July 1974 the applicant's father was informed by Andreas Komodromos that the applicant had left Synchari with the men of the Headquarters Company and had gone to Aglandjia.

45. On 24 July 1974 Nikiforos Kominis with seventeen soldiers, including the applicant, set out from Aglandjia in two vehicles to reconnoitre the ground of the Koutsovendis-Vounos area. Three buses were seen driving along a street from the direction of Vounos village. An officer by the name of Votas ordered three or four soldiers to search the buses. The buses were full of Turkish soldiers who started firing at the Greek Cypriot men. The applicant was wounded in the right hand and on the left side of his ribs. Mr Andreas Komodromos cleaned his wounds with water, loaded his gun and told him to go back. After that the applicant was not seen again by his unit.

46. According to the statement of Yiannis Melissis, who had been a prisoner of the Turks at Adana and Amasia in September 1974, he happened to meet the applicant during his captivity. They both stayed with others in cell no. 9 until 18 September. They had chatted together every day and became friends. On 18 September Yiannis Melissis was brought back to Cyprus and was released on 21 September 1974. The applicant had given him a letter to pass on to his father but he left it in his pocket when he changed his clothes. All the clothes belonging to the prisoners were burned.

47. The second applicant in her statement mentioned that she had recognised her son in a photograph that was published in the Greek newspaper *Athinaiki* on 28 September 1974 and showed Cypriot prisoners being transported to Turkey on a Turkish destroyer in July 1974.

(f) Application no. 16070/90: Eleftherios Thoma

48. The first applicant, a car mechanic, was born in 1951; he has been considered missing since 1974. His father, the second applicant, was born in 1921 and resided in Strovolos.

49. In July 1974, in response to the general mobilisation, the first applicant enlisted as a reserve sergeant in the Headquarters Company of the 251 Infantry Battalion.

50. On 20 July 1974, all the men of the Headquarters Company, including the applicant, were trying to prevent the Turkish landing which was taking place in the area of "Pikro Nero", Kyrenia. At around 12 noon on 21 July the Turkish military forces which had landed, supported by tanks and air cover, attacked the Cypriot forces that were defending the area. Owing to the superiority of the Turkish military forces in men and weapons the

251 Infantry Battalion was ordered to retreat towards Trimithi village. The applicant was present during the regrouping of the battalion. Two hours after the regrouping the commander of the battalion led his men out of Trimithi village, reaching a ravine between the villages of Ayios Georghios and Templos where they took up battle positions. A number of commandos of the 33rd Battalion arrived in the same ravine. At around 3 p.m. on 22 July 1974, Turkish military forces surrounded the Cypriot forces in the ravine and opened fire. The commander ordered a counter-attack intending to break the Turkish military forces' lines and retreat towards Kyrenia. No trace of the applicant was found during the counter-attack and retreat.

51. On 4 September 1974 the *Special News Bulletin* – a daily communication by the Turkish Cypriot administration – published a photograph of Greek Cypriot prisoners of war under the caption "Greek Cypriot prisoners of war having their lunch. Yesterday they were visited by a representative of the Turkish Red Crescent". In that photograph the first applicant was identified by the second applicant.

52. A former prisoner, Mr Efstathios Selefcou, of Elio, now at Eylenja, in a signed statement to the Cypriot police said that during his transportation from Cyprus to Turkey he saw and talked to the first applicant, whom he knew very well since they had attended the same secondary school.

(g) Application no. 16071/90: Savvas Hadjipanteli

53. The first applicant, a bank employee, was born in 1938 and lived at Yialousa; he has been considered missing since 1974. His wife, the second applicant, was born in 1938 and resided in Nicosia.

54. On 18 August 1974 about three or four saloon cars, a bus and two tanks, all full of Turkish and Turkish Cypriot soldiers, turned up at Yialousa and stopped near the police station. The soldiers got out and ordered everyone to assemble at the nearby coffee house. About thirty-five persons gathered there. A Turkish officer told them that from that time they would be under Turkish administration and ordered them to make a census of the Greek Cypriot inhabitants of the village from the age of 7 to 70 and that he would be back on the following day to collect the lists. On the following day, the same civilian and military vehicles (tanks) returned. A number of Turks got out, marched to the coffee house and asked for the lists. Another group of Turkish soldiers was carrying out a house-to-house search. They imposed a curfew and, having taken the lists, they took with them for questioning nine persons, including the first applicant. They put them on a bus and drove them outside the village in the direction of Famagusta.

55. On the same day, Yialousa was visited by United Nations men to whom the arrest of the nine Greek Cypriots was reported by their co-villagers.

56. According to the applicants, representatives of the International Committee of the Red Cross ("the ICRC") in Cyprus visited Pavlides Garage in the Turkish-occupied sector of Nicosia and on 28 August 1974 recorded

the names of twenty Greek Cypriots held there, including the nine persons from Yialousa (they cited document EZY284D)[1]. Costas M. Kaniou, Sofronios Mantis and Ioannis D. Constantis also saw the said detainees at the Pavlides Garage, during the same period that they were detained there; they were released later.

57. On 27 August 1974 a group of Turkish Cypriot civilians came to Yialousa looking for Pentelis Pantelides, Loizos Pallaris, Michael Sergides and Christakis Panayides. Having found them, they led them to the Savings Bank. After having emptied two safes they ordered that the third one should be opened, but they were told that the keys were with the applicant. Subsequently they left, having shut and sealed the outside door. After ten to twelve days the same group looked for the same persons and went again to the bank building. They had the two keys for the safe, which the applicant always carried with him. Loizos Pallaris opened the safe. The keys were in a leather case which the applicant used to carry, but his personal keys had been removed. The Turkish Cypriots took the contents of the safe, sealed the gate and left.

(h) Application no. 16072/90: Savvas Apostolides

58. The first applicant, a moulder, was born in 1955; he has been considered missing since 1974. His father, the second applicant, was born in 1928 and resided in Strovolos.

59. In 1974 the first applicant was doing his national service in the 70 Engineers Battalion stationed in Nicosia. On 5 August 1974 a section of the battalion, including the applicant, was sent on a mission in the Karavas and Lapithos area. The men spent the night at Lapithos and intended to complete their mission the following morning. At about 4.30 a.m. on 6 August 1974 the Turkish military forces launched a full-scale attack from all sides in the area of Karavas and Lapithos. The commander ordered his men to split up into three groups, withdraw towards Vasilia and meet there. On their way they were ambushed by the Turkish military forces and in the confusion dispersed.

60. Later Mr Costas Themistocleous of Omorphita, now of Nicosia, who was a prisoner at Adana Prison, saw there the applicant, whom he had known from his childhood; this was on or about 17 October 1974, while he was about to return to Cyprus. They did not speak to each other but waved.

1. The document provided by the applicants listed twenty names, including that of Savvas Kalli which was the name under which this applicant had been recorded (see paragraph 80 below).

(i) Application no. 16073/90: Leontis Demetriou Sarma

61. The first applicant was born in 1947; he has been considered missing since 1974. His wife, the second applicant, was born in 1949 and resided in Limassol.

62. On 20 July 1974, following the general mobilisation, the first applicant enlisted as a reservist in the 399 Infantry Battalion. He was put in the Support Company. On 22 July the battalion moved to the Mia Milia area to reinforce the Greek Cypriot forces and to man outposts on the front line.

63. On the morning of 14 August 1974 Turkish military forces, supported by tanks and air cover, launched a heavy attack against the Greek Cypriot forces in the area, where the applicant was with his battalion. Owing to the superiority of the Turkish military forces the Greek Cypriot defence line was broken, the Turkish military forces advanced towards the Mia Milia area, and the Greek Cypriot forces began to retreat. The area was, in a short period of time, occupied by the Turkish military forces and the applicant was trapped within. No trace of the applicant has been found since.

64. An ex-prisoner of war, Mr Costas Mena of Palaekythro, now at Korakou, stated that during his detention at Antiyama Prison in Turkey he had seen the applicant, who was detained in cell no. 9. On 18 October 1974 all the prisoners at Antiyama Prison were taken to Adana Prison. There they were all lined up in four rows. A Turkish military officer picked out some of the prisoners, including the applicant, who were taken away. Mr Mena had not seen the applicant since.

2. The respondent Government's submissions on the facts

65. The respondent Government disputed that the applicants had been taken into captivity by the Turkish army during the military action in Cyprus in 1974. They considered that the inevitable conclusion from the information provided in the application forms was that all the alleged "missing persons", except Savvas Hadjipanteli, were military personnel who died in action during the period July to August 1974.

66. The respondent Government noted that, since the introduction of these applications, files relating to the same "missing persons" had been submitted by the Government of Cyprus to the United Nations Committee on Missing Persons ("the CMP") in Cyprus during 1994 and 1995. In these files there were no assertions that these people had been seen in any of the prisons in Turkey. The names of the alleged witnesses listed in applications nos. 16064/90 (Christakis Ioannou), 16065/90 (Christodoulos Panyi), 16066/90 (Costas A. Sophocleous), 16068/90 (Nicos Nicolaou), 16069/90 (Yiannis Melissis), 16070/90 (Efstathios Selefcou), 16072/90 (Costas Themistocleous) and 16073/90 (Costas Mena) were not cited in support. The alleged sightings were therefore without foundation.

67. As regards Savvas Hadjipanteli (no. 16071/90), who was a civilian, the respondent Government noted that the ICRC had visited the Pavlides Garage where he had allegedly been held but his name, contrary to the applicants' assertion, did not appear in the list of Greek Cypriots held. In any event, it was a transit centre where people were not held for more than a few days before being released or moved elsewhere. In the file submitted to the CMP, there was only a reference to witnesses seeing the key case which he was alleged to always carry on his person. The materials of the ICRC, who paid regular visits to prisoners and internees in Turkey, also showed that none of the alleged missing persons had been brought to Turkey or detained. All prisoners that had been taken to Turkey were repatriated between 16 September 1974 and 28 October 1974 and lists of those concerned had been handed over to the Greek Cypriot authorities.

68. As concerned the alleged identification of the missing persons in photographs, the Government pointed out that a scientific investigation of certain published photographs and documentary film had been carried out by Professor Pierre A. Margot of the Institute of Forensic Science and Criminology of the Law Faculty of the University of Lausanne at the request of the third member of the CMP. This had shown that it was extremely dubious that anyone could be identified from these documents and that any alleged identification by relatives was unreliable given the quality of the material and their emotional feelings.

3. The submissions of the intervening Government

69. The Government of Cyprus submitted that the first applicants went missing in areas under the control of the Turkish forces.

(a) Varnava, no. 16064/90 and Sarma, no. 16073/90

70. These two applicants had been brought with their units to the area of Mia Milia to man Cypriot outposts along the front line. On 14 August 1974 Turkish armed forces launched the attack which gained them control over the whole of northern and eastern Cyprus by 16 August 1974. When the Turkish forces broke through the Cypriot line of defence and advanced on Mia Milia, the Cypriot forces retreated and dispersed in all directions. The Turkish forces rapidly gained control of the entire surrounding area. Many Greek Cypriot soldiers, including the two applicants, were hemmed in and completely surrounded. They could not have escaped as the intervening Government would have known of their fate.

(b) Loizides, no. 16065/90

71. This applicant was in charge of the soldiers who were defending Lapithos. After the Turkish forces encircled Lapithos, the Greek Cypriot forces were ordered to retreat. The applicant's group put on civilian clothing

and unsuccessfully tried to break out of the village. When the Turkish forces entered the village the next morning, the applicant's group dispersed to avoid capture. At about 9 p.m. on 6 August 1974, the applicant was seen by Nicos Th. Tampas in a warehouse tending a soldier with a head injury. Mr Tampas was later captured and detained. His was the last reported sighting of the first applicant. It was most likely that the first applicant had remained with the injured man and was taken into detention by the Turkish forces who were in control of the entire area. Only one man was known to have escaped from the village and he, unlike the first applicant, had local knowledge of the terrain.

(c) Constantinou, no. 16066/90

72. Under attack from the Turkish army, the first applicant's unit was ordered to split into three groups and withdraw westwards. The applicant's group reached the Nicosia-Kyrenia road, 200 metres from the "Airkotissa" restaurant. The applicant and another man were sent to investigate shouting coming from the restaurant. After fifteen minutes when they did not return, the group left for Panagra. At the time that the applicant and the other soldier were sent to the restaurant, there were Turkish forces in the area. The most plausible explanation for the two men not returning, in the absence of any sound of fighting or shooting, was that they had been detained, either to prevent them giving away the Turkish positions, for information or as prisoners of war.

(d) Theocharides, no. 16068/90

73. On 26 July 1974 the first applicant was discovered to be missing from his unit at roll call after they had broken through encircling Turkish forces. The area in which his unit had been stationed was captured by Turkish forces. Whatever happened to the applicant afterwards occurred in an area controlled by the Turkish forces.

(e) Charalambous, no. 16069/90

74. This applicant was seen wounded in his right hand and on the left side of his ribcage after a clash between Greek Cypriot forces and three buses full of Turkish soldiers coming from Vounos village. His wounds were cleaned by a witness named Komodromos and he was told to make his way uphill with two other men, one of whom was also injured, to the monastery where the Greek Cypriot forces were. The other two men were discovered dead two days later when the Turkish forces withdrew. It was clear that the applicant had either been found dead by the Turkish forces or, as was more likely, found and detained in an injured condition.

(f) Thoma, no. 16070/90

75. This applicant was among those attempting to prevent the invasion of Kyrenia. Some individuals were identified as killed in the operation; the applicant was not among them. The intervening Government had no evidence that this applicant was dead. It had to be assumed that the applicant had been detained alive.

76. This was further corroborated by the photograph published in the *Special News Bulletin*, issued daily by the Turkish Cypriot administration, on 4 September 1974, of Greek Cypriot prisoners of war having their lunch. The first applicant was identified at the time by his father, the second applicant.

77. In their observations before the Grand Chamber, the intervening Government provided a copy of a statement dated 31 July 1976 by Efstathios Selefcou taken by a police officer which stated that while being carried as a prisoner on a ship from Cyprus to Turkey he had seen and spoken briefly to Eleftherios Thoma, whom he knew from school. They also provided a copy of the ICRC Central Tracing Agency sheet (ref. no. EZG 14023/2) according to which Thoma had been sighted in a Turkish army hospital in Mintzeli in mid-October 1974. The intervening Government explained that they had not provided this information to the CMP as it had no mandate to investigate outside the territory of Cyprus and a policy decision had been taken when submitting documents to the CMP on 7 June 1994 not to antagonise Turkey whose cooperation was necessary if the CMP was to begin effective operation.

(g) Hadjipanteli, no. 16071/90

78. By 16 August 1974 Turkish forces were in control of northern and eastern Cyprus, including the Karpas peninsula where the first applicant worked as general cashier in the Savings Bank in Yialousa. On 18 August Turkish and Turkish Cypriot soldiers arrived in the village and a Turkish officer ordered a census of the Greek Cypriots between 7 and 70 years of age. The next day, the lists were handed over and Turkish soldiers carried out searches. They left, taking with them on a bus, nine individuals, including the first applicant. This was reported by fellow villagers.

79. Turkish Cypriots came to the village in the circumstances reported by the applicants (see paragraphs 54-57 above). They had the two keys for a safe, which the first applicant always carried with him. It was highly probable that the Turkish Cypriots had obtained the keys by informing those holding the first applicant, showing that he was alive and in detention for at least nine days. There was some evidence that he was detained after those nine days, at least until 28 August 1974, at Pavlides Garage.

80. The list of persons seen by the ICRC detained at Pavlides Garage on 28 August 1974 included Savvis Kalli, which was the name under which this first applicant had been recorded (the first name being misspelled and

the surname of his father (Kallis), as appearing on the first applicant's identity card, also being misspelled).

81. An affidavit dated 6 November 2007 by Lakis N. Christolou, a lawyer of the firm representing the applicants in this application, was submitted to the Grand Chamber. It stated that the son of the missing man, Mr Georgios Hadjipanteli, recounted that at the end of 2005 he had met a Turkish Cypriot writer who had informed him that, while investigating disappearances, she had discovered evidence indicating that the nine missing persons from Yialousa had been buried near the Turkish Cypriot village of Galatia. When the son conveyed this information to the CMP he was informed that the inhabitants of Galatia had already given information to the CMP about the execution and burial of Greek Cypriot prisoners near their village.

(h) Apostolides, no. 16072/90

82. This first applicant withdrew with his section from Lapithos towards Vasilia. They were ambushed by Turkish military forces and dispersed. There has been no news of the applicant since. The intervening Government had no knowledge of the first applicant, which meant that he had not escaped. Nor was there any evidence that he was killed in the ambush. It was more than likely that he had been detained by the Turkish armed forces.

4. Recent developments

83. In 2007, in the context of the activity of the CMP (see paragraphs 86-88 below), human remains were exhumed from a mass grave near the Turkish Cypriot village of Galatia in the Karpas area. After anthropological and genetic analyses, the remains of Savvas Hadjipanteli (named as the first applicant in application no. 16071/90) were identified, along with the remains of the other eight missing persons from Yialousa village and two other missing Greek Cypriots. The bodies of the nine missing persons from Yialousa were lined up next to each other in the grave, with two other bodies on top close to the ground surface. The forensic report dated 13 November 2007 detailed the process of exhumation and noted that it appeared to be a primary and synchronous burial site as the condition of the bodies indicated that they were buried while soft tissue was still present and placed in direct contact with each other. According to the report, the main object of the analysis of the human remains was their identification.

84. Several bullets from firearms were found in the grave. In regard to Savvas Hadjipanteli, the medical certificate for the cause of death, signed by a doctor on 12 July 2007, indicated bullet wounds to the skull and right arm and a wound to the right thigh. His family was notified and a religious funeral took place on 14 July 2007.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations Committee on Missing Persons ("the CMP")

1. Background

85. The CMP was officially set up in 1981. The following paragraphs are taken from the Commission's Report in the fourth inter-State case (paragraphs 181-91):

> "181. ... According to its terms of reference, it 'shall only look into cases of persons reported missing in the intercommunal fighting as well as in the events of July 1974 and afterwards'. Its tasks have been circumscribed as follows: 'to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are alive or dead, and in the latter case approximate time of the deaths'. It was further specified that 'the committee will not attempt to attribute responsibility for the deaths of any missing persons or make findings as to the cause of such deaths' and that 'no disinterment will take place under the aegis of this committee. The committee may refer requests for disinterment to the ICRC for processing under its customary procedures'. 'All parties concerned' are required to cooperate with the committee to ensure access throughout the island for its investigative work. Nothing is provided as regards investigations in mainland Turkey or concerning the Turkish armed forces in Cyprus.
>
> 182. The CMP consists of three members, one 'humanitarian person' being appointed by the Greek Cypriot side and one by the Turkish Cypriot side and the third member being an 'official selected by the ICRC ... with the agreement of both sides and appointed by the Secretary-General of the United Nations'.
>
> 183. The CMP has no permanent chairman, the presidency rotating on a monthly basis between all three members. Decisions are to be taken by consensus to the extent possible. According to the procedural rules agreed upon in 1984, the procedure is to be conducted as follows:
>
> '1. Individual or collective cases will be presented to the CMP with all possible information. The CMP will refer each case to the side on whose territory the missing person disappeared; this side will undertake a complete research and present to the CMP a written report. It is the duty of the CMP members appointed by each side, or their assistants, to follow the enquiries undertaken on the territory of their side; the third member and/or his assistants will be fully admitted to participate in the enquiries.
>
> 2. The CMP will make case decisions on the basis of the elements furnished by both sides and by the Central Tracing Agency of the ICRC: presumed alive, dead, disappeared without visible or other traceable signs.
>
> 3. If the CMP is unable to reach a conclusion on the basis of the information presented, a supplementary investigation will be undertaken at the request of a CMP member. The third CMP member and/or his assistants will participate in each

supplementary investigation, or, as the case may be, investigators recruited by the CMP with the agreement of both sides.'

184. The 1984 rules state as 'guiding principles' that 'investigations will be conducted in the sole interest of the families concerned and must therefore convince them. Every possible means will be used to trace the fate of the missing persons'. The families of missing persons may address communications to the committee which will be passed on to its appropriate member. That member will eventually provide the family with 'final information as to the fate of a particular missing person', but no interim information must be given by any member of the committee to the family of a missing person during the discussion of a particular case.

185. The committee's entire proceedings and findings are strictly confidential, but it can issue public statements or reports without prejudice to this rule. According to the 1984 procedural rules, a press release will be issued at the close of a meeting or series of meetings and occasional progress reports will also be published. Individual members may make additional statements to the press or the media, provided they comply with the rule of confidentiality, avoid criticism or contradiction to the joint statement and any kind of propaganda.

186. Due to the strict confidentiality of the CMP's procedure, no detailed information about the progress and results of its work is available. However, from the relevant sections of the regular progress reports on the UN Operation in Cyprus submitted by the UN Secretary-General to the Security Council it appears that the committee's work started in May 1984 with a limited, equal number of cases on both sides (Doc. S/16596, of 1.6.1984, para. 51); that by 1986 an advanced stage had been reached in the investigation of the initial 168 individual cases, supplementary investigations being started in 40 cases in which reports had been submitted (Doc. S/18102/Add. 1, of 11 June 1986, para. 15); and that, while no difficulties were encountered as regards the organisation of interviews or visits in the field, real difficulties then arose by the lapse of time and, even more importantly, lack of cooperation by the witnesses.

187. This prompted the committee to issue a lengthy press release on 11 April 1990 (Doc. S/21340/Annex). There the committee stated that it considered the cooperation of the witnesses as absolutely fundamental, but that the witnesses were often reluctant, unwilling or unable to give full information as to their knowledge about the disappearance of a missing person. However, the committee could not compel a witness to talk. The explanation of the witnesses' reluctance to testify was that they were afraid of incriminating themselves or others in disappearances, and this despite the witnesses being told by the committee that the information given would be kept strictly confidential and being reassured that they would 'not be subject to any form of police or judicial prosecution'. The committee appealed to the parties concerned to encourage the witnesses to give the very fullest information in their knowledge. It further stated:

'In order to further allay the fears of the witnesses, the committee, so as to give the strongest guarantees to the witnesses, is examining measures that could be taken to ensure that they would be immune from possible judicial and/or police proceedings solely in connection with the issue of missing persons and for any statement, written or oral, made for the committee in the pursuit of activities within its mandate.'

188. In the same press release, the committee pointed out that it considered as legitimate the desire of the families to obtain identifiable remains of missing persons. However, despite systematic enquiries on burial places of missing persons, on both sides, it had not been successful in this respect. It recalled that according to its terms of reference it could not itself order disinterments. Moreover, while there was access to all evidence available, the committee had not reached the stage of finding a common denominator for the appreciation of the value of this evidence. Finally, the committee stated that it was considering the possibility of requesting that the two sides furnish it with basic information concerning the files of all missing persons, so as to allow it to have a global view of the whole problem.

189. In December 1990, the UN Secretary-General wrote a letter to the leaders of both sides observing that so far the committee had been given details on only about 15% of the cases and urging them to submit all cases. He further emphasised the importance of reaching consensus on the criteria that both sides would be ready to apply in their respective investigations. Moreover, the committee should consider modalities for sharing with affected families any meaningful information available (Doc. S/24050, of 31 May 1992, para. 38). On 4 October 1993, in a further letter to the leaders of both communities the UN Secretary-General noted that no improvement had been made and that the international community would not understand that the committee, nine years after it had become operational, remained unable to function effectively. Only 210 cases had been submitted by the Greek Cypriot side and only 318 by the Turkish Cypriot side. He again urged both sides to submit all cases without further delay and the committee to reach a consensus on the criteria for concluding its investigations (Doc. S/26777, of 22 November 1993, paras. 88-90).

190. On 17 May 1995 the UN Secretary-General, on the basis of a report of the CMP's third member and proposals by both sides, put forward compromise proposals on criteria for concluding the investigations (Doc. S/1995/488, of 15 June 1995, para. 47), which were subsequently accepted by both sides (Doc. S/1995/1020, of 10 December 1995, para. 33). By December 1995, the Greek Cypriot side submitted all their case files (1493). However, the committee's third member withdrew in March 1996 and the UN Secretary-General made it a condition for appointing a new one that certain outstanding questions, including classification of cases, sequence of investigations, priorities and expeditious collection of information on cases without known witnesses, be settled beforehand (Doc. S/1996/411, of 7 June 1996, para. 31). After being repeatedly urged to resolve these issues (Doc. S/1997/437, of 5 June 1997, paras. 24-25), both parties eventually came to an agreement on 31 July 1997 on the exchange of information on the location of graves of missing persons and return of their remains. They also requested the appointment of a new third member of the CMP (Doc. S/1997/962, of 4 December 1997, paras. 21 and 29-31). However, by June 1998, no progress had been made towards the implementation of this agreement. The UN Secretary-General noted in this context that the Turkish Cypriot side had claimed that victims of the *coup d'état* against Archbishop Makarios in 1974 were among the persons listed as missing and that this position deviated from the agreement (Doc. S/1998/488, of 10 June 1998, para. 23).

191. A new third member of the CMP had, by the time of the Commission's report, been appointed (ibid. para. 24). The committee has not completed its investigations and accordingly the families of the missing persons have not been informed of the latter's fate."

2. Exhumations and identification of remains

86. From August 2006 the CMP began a substantial exhumation project on identified burial sites with a view to identifying the remains of bodies and ensuring their return to their families. A special unit to provide information to families was also set up.

87. According to the information provided by the respondent Government, 430 sets of remains had been located; 275 remains had been submitted for analysis and identification by the anthropological laboratory; since June 2007, 105 bodies had been identified (76 Greek Cypriots, 29 Turkish Cypriots); by 13 March 2008, 84 files of missing persons had been closed; by the date of the hearing, 5% of missing persons had been identified and their remains returned to their relatives for burial; by 10 September 2008, 180 sites had been visited by bi-communal teams (155 in the north, 25 in the south)[1].

3. Decision of the Committee of Ministers of the Council of Europe of 19 March 2009

88. In the ongoing monitoring process concerning *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV), the Committee of Ministers looked at the question of missing persons and, *inter alia*:

> "2. considered that it was crucial that the current work of the CMP be carried out under the best possible conditions and without delay;
>
> 3. in consequence, while reaffirming that the execution of the judgment requires effective investigations, notes that these should not jeopardise the CMP's mission;
>
> 4. considered that the sequence of measures to be taken within the framework of the effective investigations, and carrying out of the work of the CMP should take into consideration these two essential aims;
>
> 5. underlined in any event the urgent need for Turkish authorities to take concrete measures having in mind the effective investigations required by the judgment, in particular relating to the CMP's access to all relevant information and places;
>
> 6. in that context, underlined, moreover the importance of preserving all the information obtained during the Programme of Exhumation and Identification carried out by the CMP; ..."

1. The first group of remains identified consisted of thirteen Turkish Cypriots at Aleminyo; subsequent identifications were made of twenty-two Greek Cypriots at Kazaphani, Livadhia and Sandallaris, and six Turkish Cypriots in the Famagusta district. Their names have since been removed from the list of missing persons.

B. International law documents on enforced disappearances

1. United Nations Declaration on the Protection of all Persons from Enforced Disappearance (1/Res/47/133, 18 December 1992)

89. The Declaration provides, *inter alia*:

Article 1

"1. An act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life."

Article 2

"1. No State shall practise, permit or tolerate enforced disappearances.

2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance."

Article 3

"Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction."

Article 17

"1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remained unclarified.

2. When the remedies provided for in Article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

3. Statutes of limitations, where they exist, relating to acts of disappearance shall be substantial and commensurate with the extreme seriousness of the offence."

Article 19

"The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation."

90. The United Nations Working Group on Enforced or Involuntary Disappearance has issued, *inter alia*, the following General Comments on the above Declaration:

"General Comment on Article 17 of the Declaration (E/CN.4/2001/68/18 December 2000)

...

27. Article 17 establishes fundamental principles intended to clarify the nature of enforced disappearances and their criminal consequences. The sense and general purpose of the Article is to ensure conditions such that those responsible for acts constituting enforced disappearance are brought to justice within a restrictive approach to statutory limitations. ...

28. The definition of 'continuing offence' (para. 1) is of crucial importance for establishing the responsibilities of the State authorities. Moreover, this Article imposes very restrictive conditions. The Article is intended to prevent perpetrators of those criminal acts from taking advantage of statutes of limitations. ..."

"General Comment on Article 19 of the Declaration (5/CN.4/1998/43, 12 January 1998)

72. Article 19 also explicitly mentions the right of victims and their family to 'adequate compensation'. States are, therefore, under an obligation to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies empowered to grant compensation. In addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of disappearance and in the event of the death of the victim, his or her dependants are entitled to compensation.

73. Compensation shall be 'adequate' i.e. proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family. Monetary compensation shall be granted for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance. Civil claims for compensation shall not be limited by amnesty laws, made subject to statutes of limitation or made dependent on penal sanctions imposed on the perpetrators.

74. The right to adequate compensation for acts of enforced disappearance under Article 19 shall be distinguished from the right to compensation for arbitrary executions. In other words, the right of compensation in relation to an act of enforced disappearance shall not be made conditional on the death of the victim. 'In the event of the death of the victim as a result of an act of enforced disappearance', the dependants are, however, entitled to additional compensation by virtue of the last sentence of Article 19. If the death of the victim cannot be established by means of exhumation or similar forms of evidence, States have an obligation to provide for appropriate legal procedures leading to the presumption of death or a similar legal status of the victim which entitles the dependants to exercise their right to compensation. ... As a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family."

2. *International Convention for the Protection of All Persons from Enforced Disappearance (2006)*[1]

91. This Convention provides, *inter alia*:

Article 1

"1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

Article 2

"For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

Article 3

"Each State Party shall take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice."

Article 4

"Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law."

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1. This Convention was opened for signature in February 2007. It will enter into force "on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession". Only five States have ratified the Convention (Albania, Argentina, France, Honduras and Mexico).

Article 5

"The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."

Article 8

"Without prejudice to Article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(a) Is of long duration and is proportionate to the extreme seriousness of this offence;

(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation."

3. Inter-American Convention on Forced Disappearance of Persons (1994)

92. This Convention provides, *inter alia*:

Article 1

"The States Parties to this Convention undertake:

a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;

b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;

c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;

d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

Article 2

"For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorisation, support, or acquiescence of the State, followed by an absence of

information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

Article 3

"The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined ..."

C. Case-law concerning *ratione temporis* jurisdiction in disappearance cases before other international bodies

1. The Inter-American Court of Human Rights ("the IACHR")

93. The IACHR has established that procedural obligations arise in respect of killings and disappearances under several provisions of the American Convention on Human Rights ("the American Convention"). In many cases, in particular those where the substantive limb of Article 4 (right to life) had not been breached, the IACHR has examined such procedural complaints autonomously under Article 8, which, unlike the Convention, guarantees the right to a fair trial for determination of rights and obligations of any nature, and Article 25, which protects the right to judicial protection, taken in conjunction with Article 1 § 1 (obligation to respect rights). The IACHR has followed the latter approach in cases where the killing or disappearance took place before the recognition of its jurisdiction by a respondent State.

94. In *Blake v. Guatemala*, the IACHR had to deal with the *ratione temporis* exception raised by the government in that case, since the disappearance itself had taken place before the critical date (acceptance of the compulsory jurisdiction in 1987). The court considered that forced disappearances implied the violation of various human rights and that the effects of such infringements – even though some may have been completed – "may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established" (see *Blake*, 2 July 1996, preliminary objections, § 39).

95. Mr Blake's fate or whereabouts were not known to his family until 14 June 1992, after the date on which Guatemala accepted the jurisdiction of the court. This led to the IACHR declaring itself competent *ratione temporis* to examine the "effects and actions" subsequent to the critical date. However, it accepted the government's preliminary objection as regards the deprivation of Mr Blake's liberty and his murder, which had been

completed before the critical date and could not be considered *per se* to be continuous.

96. In its judgment on the merits (24 January 1998, p. 54), the IACHR considered the disappearance as marking the beginning of a "continuing situation". It proceeded to examine the complaint under Article 8 in relation to Article 1 § 1 and declared that Guatemala had violated the right of Mr Blake's relatives to have his disappearance and death effectively investigated, to have those responsible prosecuted and punished where appropriate, and to be compensated, notwithstanding the lack of temporal competence to deal with the substantive complaints.

97. The IACHR came to a similar conclusion in cases of disappearances in which the victim's whereabouts had never been established. In *Serrano-Cruz Sisters v. El Salvador* (judgment of 23 November 2004, preliminary objections), the court found that it had no competence to examine, under Articles 4, 5 and 7 (right to personal liberty), the disappearances of the sisters as such, since they had allegedly taken place thirteen years before El Salvador had accepted the contentious jurisdiction of the court. It came to the same conclusion as regards the procedural violations invoked under Article 4 by the Inter-American Commission, since they were linked to the alleged forced disappearance (§ 95). However, the IACHR considered that all the facts that occurred following the critical date and which referred to Articles 8 and 25 of the Convention (filing of a petition for *habeas corpus*, criminal proceedings), were not excluded by the temporal limitation established by the State, since they constituted "independent facts" or "specific and autonomous violations concerning denial of justice" (§ 85). On the merits, it declared that the State had violated Articles 8 and 25 of the Convention, to the detriment of both sisters and their next of kin (judgment of 1 March 2005).

98. In a more recent judgment, *Heliodoro Portugal v. Panama* of 12 August 2008, the San José Court made a clear distinction between forced disappearances and extrajudicial killings for the purposes of its jurisdiction *ratione temporis*. The case concerned the forced disappearance in 1970 (twenty years before Panama accepted the compulsory jurisdiction of the court) of Heliodoro Portugal, whose remains were found in 2000. It considered that the victim should be presumed dead before the date of acceptance of the court's jurisdiction (9 May 1990), with regard to the fact that twenty years had elapsed since his disappearance. It characterised the extrajudicial killing as an instantaneous act and accepted the government's preliminary exception as regards the right to life (Article 4). However, with regard to the forced disappearance as such, it applied its previous case-law and found that it was a permanent or continuous violation, since it had been prolonged after the critical date until the victim's remains were found in 2000. It was competent to examine the following violations arising out of the disappearance: the deprivation of liberty of the victim (Article 7), the

violation of the relatives' right to humane treatment (Article 5), the non-compliance with the obligation to investigate into the alleged disappearance, the failure to incriminate forced disappearances and tortures in domestic law and the failure to investigate and punish acts of torture[1]. On the merits, the IACHR went on to find a violation of the right to liberty (Article 7) and a violation of Articles 1 and 2 of the Inter-American Convention on Forced Disappearance of Persons with regard to the deceased. It further found a breach of Articles 5 (right to humane treatment), 8 and 25 in respect of his relatives.

2. The United Nations Human Rights Committee ("the HRC")

99. As regards forced disappearances, the HRC recognised "the degree of suffering involved in being held indefinitely without contact with the outside world" and held that they constituted "cruel and inhuman treatment" contrary to Article 7 of the International Covenant on Civil and Political Rights ("the Covenant") with regard to the disappeared[2]. Disappearances often resulted in breaches of the right to life, embodied in Article 6 of the Covenant. In General Comment No. 6 on the right to life, the HRC stated:

> "States Parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."[3]

100. In a number of cases, the HRC has found that a breach of Article 6 of the Covenant has occurred, but has been unable to make a final decision in that regard in the absence of confirmation of death[4]. Disappearances may also lead to violations of Articles 9 (right to liberty and security of person), 10 (right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person) and 7 with regard to the relatives of the disappeared, in view of the stress, anguish and uncertainty caused by the disappearance[5].

101. The positive obligation to investigate disappearances (mentioned in the General Comment on the right to life) may also be breached in this type of case; in these situations there may be a breach of Article 2 § 3 (which

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1. The last two obligations are not only derived from the Inter-American Convention, but also from the Inter-American Convention on Forced Disappearance of Persons (1994) and the Inter-American Convention to Prevent and Punish Torture (1985), which may be invoked before the Court pursuant to Article 29 (d) of the Inter-American Convention.
2. See *Sarma v. Sri Lanka*, 16 July 2003, § 9.5. See also *Edriss El Hassy v. the Libyan Arab Jamahiriya*, 24 October 2007, § 6.8.
3. General Comment No. 6 (1982), § 4.
4. See *Bleier v. Uruguay*, 29 March 1982, § 14.
5. See *Edriss El Hassy v. the Libyan Arab Jamahiriya*, § 7.

enshrines the right to an effective remedy) in conjunction with Article 6. The HRC, in General Comment No. 31 on Article 2 §§ 2 and 3 of the Covenant, emphasised that the failure to investigate in respect of grave violations such as enforced disappearances or torture, as well as the failure to bring to justice perpetrators of such violations, could give rise to a separate breach of the Covenant. The Committee was thus empowered to find a violation of Articles 6, 7 and 9 read in conjunction with Article 2 § 3 of the Covenant[1].

102. However, when the disappearance occurred before the date that the Covenant or the Optional Protocol entered into force for a State, the approach of the HRC to whether it has temporal jurisdiction has evolved over recent years.

103. In the cases of missing persons in Argentina (*S.E. v. Argentina*, 4 April 1990), the Committee had found that Article 2 § 3 of the Covenant could not be violated by a State Party in the absence of jurisdiction over a substantive violation. In *Maria Otilia Vargas v. Chile*, 26 July 1999, the HRC declared the communication inadmissible *ratione temporis* in respect of the author's son, whose body had never been recovered since his death in 1973. The Committee held that the Supreme Court's judgment of 1995 rejecting the author's complaint as regards the application of the 1978 amnesty decree could not be regarded as a new event that could affect the rights of a person who was killed in 1973, prior to the international entry into force of the Covenant and the entry into force of the Optional Protocol for Chile.

104. In *Sarma v. Sri Lanka*, 16 July 2003, the author alleged that his son had been removed by members of the military in June 1990 and was last seen in October 1991. Sri Lanka became a party to the Optional Protocol in October 1997 with a declaration limiting the Committee's competence to facts arising after this date. The Committee found that although the initial abduction occurred outside their temporal jurisdiction "the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol"[2]. The Committee went on to find a violation of Articles 7 and 9 with regard to the son and Article 7 with regard to the author and his wife due to their anguish and stress at not knowing their son's whereabouts. The HRC also emphasised that the State had a duty under Article 2 § 3 "to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son ..."[3] which implied that the State might have an obligation to investigate

1. See *Mr. Farag Mohammed El Alwani v. Libya*, 11 July 2006. The HRC found a violation of Article 2 § 3 in conjunction with Articles 6, 7 and 9 with regard to the disappeared person and of Article 2 § 3 in conjunction with Article 7 with regard to the relative.
2. See § 6.2.

matters which had occurred before the entry into force of the Optional Protocol. Finally, it refrained from finding a violation of Article 6, since the author had not abandoned hope for his son's reappearance.

105. However, in *Yurich v. Chile*, 2 November 2005, the Committee, although describing enforced disappearance as a continuing act, noted that the original acts of arrest and abduction, as well as the refusal to give information about the deprivation of freedom, had occurred before the entry into force of the Covenant for Chile. The HRC further considered that the author had made no reference to any action of the State after the crucial date (entry into force of the Optional Protocol) that would constitute "a confirmation of the enforced disappearance". For these reasons, it declared the application inadmissible.

106. More recently in *Mariam Sankara et al. v. Burkina Faso*, 28 March 2006 (see Appendix III, p. 52), the HRC applied this act of confirmation approach, and also changed its analysis in considering a failure to investigate a death which had taken place prior to the critical date. Although it found that it had no jurisdiction *ratione temporis* over the death of Mr Sankara, it went on to consider the subsequent proceedings and failure to correct his death warrant (which stated the cause of death as natural) and their effect on Mr Sankara's wife and two children. It found that there had been a failure to conduct an inquiry into Mr Sankara's death, to prosecute those responsible and to conclude legal proceedings begun by the author to remedy this situation. It concluded that the proceedings had been prolonged at the fault of the authorities, the delay continuing after the entry into force of the Covenant and Optional Protocol. The authors were therefore affected by the authorities' failures after this entry into force, and that gave the Committee with jurisdiction *ratione temporis* over the Article 7 claim.

107. On the merits, the Committee went on to find that "the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms. Sankara and her sons, in breach of Article 7 of the Covenant"[1].

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3. See § 11.
1. See § 12.2.

THE LAW

I. THE STATUS OF THE MISSING MEN AS NAMED FIRST APPLICANTS

A. Submissions to the Court

108. The respondent Government submitted that the established case-law on disappearances showed that after a certain lapse of time there was a presumption of death (see, for example, *Timurtaş v. Turkey*, no. 23531/94, § 83, ECHR 2000-VI – presumption of death after six and a half years). Given the situation of armed conflict at the time, the absence of any credible evidence that the missing persons had been seen after the end of hostilities and the lapse of time, a presumption of death accorded with the Court's constant case-law, as well as national practice, in which context Cypriot law provided that a person could be declared dead if there had been no news of them for ten years.

109. The applicants submitted that there was no basis for presuming that the missing men were dead, or had died in 1974. Cypriot domestic law only permitted the finding of a presumption of death on the application of persons with requisite standing, while in the Strasbourg cases cited by the respondent Government the applicants themselves had asked the Court to make findings of presumption of death in order to support allegations of substantive violations.

110. The intervening Cypriot Government refuted the assertion that the missing men should be presumed dead. Such a presumption could only be made at the request of the applicants.

B. The Court's findings

111. The Court observes that the parties' submissions on whether the missing men may be presumed dead were made in the context of its competence *ratione temporis* but notes that they also have relevance to the issue of the standing of the first applicants. According to the Court's practice, and consonant with Article 34 of the Convention, applications can only be introduced by, or in the name of, individuals who are alive. Where a person dies after introduction of an application, his or her heirs may seek to continue the application without the name of the application changing. If the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with requisite legal interest as next of kin to introduce an application raising complaints related to the

death; however, the application is registered in the relative's own name (see, concerning standing to introduce applications, *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI). The Court notes that in its previous judgments concerning disappearances the practice has been to name only the relatives of the disappeared person as applicants.

112. As regards the missing men in these applications, it must, firstly, be noted that the remains of Savvas Hadjipanteli were discovered in 2007 in a mass grave near Galatia within the area of the "Turkish Republic of Northern Cyprus". No indication of the approximate date and time of death has been included in the forensic or medical certificates, although the few details given support the hypothesis of an extrajudicial execution of prisoners at or about the time of hostilities in 1974. Secondly, there has been no sighting or news of the other eight missing men since late 1974. The Court does not however consider it necessary to rule on whether the missing men should or should not be admitted to the status of applicants since, in any event, there is no question but that the close relatives of the missing men may introduce applications raising complaints concerning their disappearance, to the extent that such complaints fall within the Court's competence (see, for example, *Kurt v. Turkey*, 25 May 1998, *Reports of Judgments and Decisions* 1998-III, and *Imakayeva v. Russia*, no. 7615/02, 9 November 2006).

113. The Court is satisfied that it can continue to examine these applications on the basis that the relatives of the missing persons, who introduced these complaints, are the applicants for the purposes of Article 34 of the Convention.

II. THE RESPONDENT GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Lack of legal interest

114. The respondent Government submitted at the hearing that there was no legal interest in determining these applications. Pointing out that the disappearances of all the missing Greek Cypriots had been subject to examination and findings of violations in the fourth inter-State case, they referred to Article 35 § 2 (b) which barred examination of applications which were "substantially the same". They also referred to Article 37 § 1 (c) which allowed the Court to strike a case from the list where "for any other reason the Court finds it no longer justified to pursue the examination of the application".

115. The applicants replied that the inter-State case had not subsumed their claims which were individual and distinct and that there was no basis for applying Article 37 § 1 (c).

116. The intervening Government considered that the cause, object and parties were not identical and that there was no basis for rejecting the applications on these grounds.

117. The Court notes that in its decision on admissibility in these applications the Commission left open the general question whether it was precluded under the former Article 27 § 1 (b) from examining in the context of an individual application a "matter" which had already been examined in an inter-State case (see *Varnava and Others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Commission decision of 14 April 1998, Decisions and Reports (DR) 93-A, p. 5, referring to *Donnelly and Others v. the United Kingdom*, nos. 5577/72-5583/72, Commission decision of 5 April 1973, Yearbook 16, p. 212). It considered in any event that it had not been established that its previous findings in the third inter-State application concerned the missing men in the present applications and that as the examination of the merits remained to be carried out in the pending fourth inter-State application, the matter could not be regarded as having already been examined in that context either.

118. A judgment has since been delivered in the fourth inter-State case (*Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV) and it is true that this included findings of violations under Articles 2, 3 and 5 of the Convention concerning missing Greek Cypriots and their families. However, for an application to be substantially the same as another which has already been examined by the Court or other procedure of international investigation or settlement for the purposes of Article 34 § 2 (b), it must concern substantially not only the same facts and complaints but be introduced by the same persons (see *Folgerø and Others v. Norway* (dec.), no. 15472/02, 14 February 2006, and *Malsagova and Others v. Russia* (dec.), no. 27244/03, 6 March 2008). It is therefore not the case that by introducing an inter-State application an applicant Government thereby deprives individual applicants of the possibility of introducing, or pursuing, their own claims.

119. In so far as the respondent Government have, at a very late stage, challenged the applicants' legal interest in pursuing this application and relied on Article 37 § 1 (c), the Court would note that the findings in the fourth inter-State case did not specify in respect of which individual missing persons they were made (see *Cyprus v. Turkey*, cited above, § 133, where the evidence was found to bear out the assertion that "many persons now missing" had been detained by the respondent Government or forces for which they were responsible). That judgment cannot therefore be regarded as determining the issues and claims arising in the present applications. In that regard, it should also be noted that in individual applications the Court has the competence to issue just satisfaction awards for pecuniary and non-pecuniary damage suffered by individual applicants and to give indications

under Article 46 as to any general or individual measures that might be taken. It cannot be said therefore that the present applications are incapable of giving rise to issues or outcomes different to those of the fourth inter-State case, or that the individual applicants' interests have somehow been subsumed by the judgment in that case such that it is no longer justified to continue the examination of their applications. The Court is accordingly satisfied that a legal interest remains in pursuing the examination of these applications.

120. These objections are therefore rejected.

B. Objection *ratione temporis*

1. The Chamber judgment

121. The Chamber excluded from its examination any allegations of violations based on facts occurring before the crucial date of ratification of the right of individual petition by Turkey on 28 January 1987. It noted that the Grand Chamber in the fourth inter-State case had found that the disappearance of some 1,485 Greek Cypriots disclosed a situation of continuing violation under Article 2 in so far as the authorities of the respondent State had failed to conduct an effective investigation aimed at clarifying the whereabouts and fate of the persons who had gone missing in life-threatening circumstances. It found no reason to differ as concerned the nine missing men in this case and concluded that to the extent that there was a continuing obligation under Article 2 it had competence *ratione temporis*.

2. Submissions to the Court

(a) The respondent Government

122. The respondent Government submitted that temporal jurisdiction was a vital precondition to the examination of these cases. They argued that the Chamber had failed to apply the principles laid down in the Grand Chamber judgment in *Blečić v. Croatia* ([GC], no. 59532/00, ECHR 2006-III) with due regard to international practice. They stated that the assertion of a continuing situation was not sufficient or decisive, since the determining question was whether an obligation bound the State at the moment of the facts giving rise to the dispute. Issues of continuing situation or violation only came into play after the establishment of a norm binding the State from that moment and for the future, as shown by the terms of Article 6 of Protocol No. 11 itself. Turkey had only recognised the competence of the Commission to receive individual petitions as from 28 January 1987; this only concerned matters raised in respect of facts which occurred subsequent to the Turkish declaration.

123. Thus, in the present cases, the respondent Government stressed that the allegations of disappearances rested on facts occurring during the period July to August 1974; none of the purported sightings of the missing men had occurred after October 1974. The respondent Government, however, had only recognised the right of individual petition on 28 January 1987 as concerned complaints about facts arising after that date. Thus, the Court had no temporal jurisdiction over the events in issue. While the Chamber judgment purported to apply the approach of the fourth inter-State case to this issue, the respondent Government pointed out that temporal jurisdiction was not in issue in that case, the Chamber confusing this aspect with issues on the merits concerning the existence of a continuing situation. Further, neither *Blečić* nor the Turkish declaration made any exception concerning continuing situations. They noted that the *Blečić* judgment referred to *Moldovan and Others and Rostaş and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01, 13 March 2001) which found, as regarded complaints under Article 2 about ineffective investigations into killings, that there was no temporal jurisdiction where the killings had taken place before ratification. This showed that the consequences flowing from the initial facts could not be examined either, excluding so-called continuing situations, as shown by subsequent cases such as *Kholodovy v. Russia* ((dec.), no. 30651/05, 14 September 2006) in which the Court had found that the subsequent failure of remedies aimed at redressing an earlier interference could not bring the matter within temporal jurisdiction (the respondent Government also cited *Dinchev v. Bulgaria* (dec.), no. 23057/03, 6 March 2007; *Meriakri v. Moldova* (dec.), no. 53487/99, 16 January 2001; *Mrkić v. Croatia* (dec.), no. 7118/03, 8 June 2006; and *Cakir v. Cyprus* (dec.), no. 7864/06, 11 January 2008, where complaints about a killing in 1974 were rejected due to a temporal bar). The Chamber should therefore not only have refrained from examining the facts in 1974 but also the procedures and facts which flowed from or were linked with those facts. Its contrary approach was inconsistent with constant practice. Rejecting the preliminary objection on the basis of a finding of the existence of a continuing obligation effectively prejudged the merits.

124. In so far as the applicants argued that the obligation to investigate was autonomous, this issue had been settled in *Blečić* which made it clear that procedures which concerned the failure to provide a remedy did not affect temporal jurisdiction for events and facts before ratification. There could be no freestanding procedural obligation, divorced from the factual origin of the complaints. The respondent Government further argued that the procedural obligation to investigate under Articles 2 and 3 was recent and could not be regarded as binding the States retrospectively. They relied in this respect on the Court's judgments in *Markovic and Others v. Italy* ([GC], no. 1398/03, § 111, ECHR 2006-XIV) and *Korbely v. Hungary* ([GC], no. 9174/02, § 84, ECHR 2008).

125. As concerned the alleged continuing situation, the respondent Government submitted that the Chamber had omitted to take into account the established case-law on disappearances, which showed that after a certain lapse of time there was a presumption of death (see also their argument set out at paragraph 108 above). These applicants must therefore be presumed to have died before temporal jurisdiction came into play.

(b) The applicants

126. The applicants submitted that the Court had jurisdiction to examine continuing violations which, although tracing their historical starting-point to a moment in the past, continued on or after Turkey's recognition of the right of individual petition (they cited *Loizidou v. Turkey* (merits), 18 December 1996, §§ 41 and 47, *Reports* 1996-VI). Although the first applicants did disappear in 1974, the violations arising from and/or in connection with these disappearances had continued since then. They denied that their complaints were based on instantaneous acts in 1974 but argued that they concerned violations of a continuing nature which survived any temporal restriction and carried on to the present day. They relied on the Court's reasoning as regards the continuing nature of the violations arising out of disappearances in 1974 set out in the fourth inter-State case which was, in their view, correctly followed in the Chamber judgment.

127. The applicants submitted that there was no basis for presuming that the missing men were dead, or had died in 1974. The reference to Cypriot domestic law was of no relevance since this only permitted the finding of a presumption of death where the Attorney-General or a person with legal standing (claiming rights that flowed from the death of the missing person) made such application. Nor was the Court's case-law on Article 2 relevant, since these were cases in which the applicants themselves had asked the Court to make findings of presumption of death in order to support allegations of substantive violations. Allowing the Government to have the missing men presumed dead might also be regarded as tantamount to a *de jure* violation or execution contrary to Article 2.

(c) The Government of Cyprus

128. The intervening Government submitted that the present applications did not concern Turkey's responsibility for acts or omissions which took place at a time when Turkey had not accepted the Convention. Turkey had adhered to the Convention in 1954 and could have been subject from that time to proceedings initiated by other Contracting Parties. The cases relied on by the respondent Government, such as *Blečić*, did not assist since the violations had occurred before the respondent State ratified the Convention while the present complaints concerned continuing violations occurring more than fifty years after Turkey became bound by the substantive provisions of the Convention. The present claims were also

based upon the facts concerning Turkey's conduct after 28 January 1987 in failing to provide an investigation into the disappearances. This failure was not an aspect of any unlawful killing or detention or a consequence of a violation of Articles 2 or 5 but triggered separately. The temporal objection was thus misconceived.

129. The intervening Government rejected the assertion that the missing men should be presumed dead. Such a presumption could only be made at the request of the applicants and in any event did not put an end to any obligation to investigate, which obligation was not limited to the question of whether the person was dead but also covered the circumstances in which they died and, in the case of unlawful killing, the identification and prosecution of any perpetrator.

3. The Court's assessment

(a) General principles

130. It is beyond dispute that in accordance with the general rules of international law (see, in particular Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969) the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party (see *Blečić*, cited above, § 70, and *Šilih v. Slovenia* [GC], no. 71463/01, § 140, 9 April 2009). Furthermore, where there are proceedings instituted by an applicant to obtain redress for an act, omission or decision alleged to violate the Convention and which occur or continue after the entry into force of the Convention, these procedures cannot be regarded as part of the facts constitutive of the alleged violation and do not bring the case within the Court's temporal jurisdiction (see *Blečić*, cited above, §§ 77-79).

131. In order to establish the Court's temporal jurisdiction it is therefore essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (ibid., § 82).

(b) Application in the present case

132. Turkey ratified the Convention on 18 May 1954; it accepted the right of individual petition on 28 January 1987 and the jurisdiction of the old Court on 22 January 1990. Protocol No. 11, which brought the new Court into existence, came into force on 11 January 1998.

133. Turkey was accordingly bound by the provisions of the Convention from 18 May 1954. However, its acceptance of the right of individual petition was limited to facts taking place after the date of the declaration to

that effect on 28 January 1987. When the old Court ceased to function in 1998, this Court's jurisdiction became obligatory and ran from the acceptance by a Contracting State of the right of individual petition. It follows that the Court is not competent to examine any complaints raised by these applicants against Turkey in so far as the alleged violations are based on facts having occurred before 28 January 1987 (see *Cankoçak v. Turkey*, nos. 25182/94 and 26956/95, § 26, 20 February 2001, and *Demades v. Turkey* (just satisfaction), no. 16219/90, § 21, 22 April 2008).

134. On that basis, any complaints by the applicants asserting the responsibility of the Contracting State for factual events in 1974 are outside the Court's temporal jurisdiction. In so far as any complaints are raised concerning acts or omissions of the Contracting State after 28 January 1987, the Court may take cognisance of them. It notes in this respect that the applicants specified that their claims related only to the situation pertaining after January 1987, namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation.

135. The Court notes that the respondent Government raised two principal strands of argument against the applicants' claims that a procedural obligation could exist after the critical date. The first concerns the nature of the procedural obligation under Article 2 and the second relies on a presumption that the missing men in fact died in or about 1974. The Court will also consider, lastly, the nature and scope of the procedural obligation to investigate disappearances in particular.

(i) Temporal jurisdiction and the procedural obligation under Article 2

(α) Procedures linked to facts outside temporal jurisdiction

136. The respondent Government argued, relying on *Blečić*, that complaints concerning such investigations, or lack of them, fell foul of the principle that procedures aimed at redressing violations do not affect the lack of temporal jurisdiction for facts occurring beforehand. However, this argument fails since the procedural obligation to investigate under Article 2 is not a procedure of redress within the meaning of Article 35 § 1. The lack of an effective investigation itself is the heart of the alleged violation. It has its own distinct scope of application which can operate independently from the substantive limb of Article 2, which is concerned with State responsibility for any unlawful death or life-threatening disappearance, as shown by the numerous cases decided by the Court where a procedural violation has been found in the absence of any finding that State agents were responsible for the use of lethal force (see, among many examples, *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII). Indeed, the procedural obligation to provide some form of effective official investigation arises when individuals have gone missing in life-threatening circumstances and is not confined to cases where it is apparent that the

disappearance was caused by an agent of the State (see *Osmanoğlu v. Turkey*, no. 48804/99, § 87, 24 January 2008).

137. For these reasons, therefore, the respondent Government's reliance on the reasoning in *Blečić* concerning procedures for redress is misconceived.

(β) Reliance on earlier Court decisions rejecting procedural complaints as incompatible *ratione temporis*

138. In so far as the respondent Government relied on cases such as *Moldovan and Others and Rostaş and Others* and *Kholodovy* (see paragraph 123 above), the Court notes that these did not concern disappearances but killings. The Court has recently delivered its judgment in *Šilih* (cited above), which reviewed the jurisprudence on the question whether a procedural violation could be found where a death occurred before the date of acceptance of the right of individual petition and the alleged deficiencies or omissions in investigative measures took place afterwards (§§ 148-52). The Grand Chamber judgment set out in detail international law materials, in particular from the Inter-American Court of Human Rights ("the IACHR") and the United Nations Human Rights Committee ("the HRC"), which indicated that these bodies accepted jurisdiction *ratione temporis* over the procedural complaints concerning investigations into deaths even where the lethal acts had taken place before the critical date (ibid., §§ 111-18 and 160). It then proceeded to clarify that the procedural obligation to carry out an investigation into deaths under Article 2 had evolved in its own case-law into a separate and autonomous duty; it could be considered to be a "detachable obligation" capable of binding the State even when the death took place before the entry into force of the Convention (ibid., §§ 153-63).

139. The precedents relied on by the respondent Government are therefore not of any assistance as regards killings. Nor did they have any bearing on the phenomenon of disappearances, the continuing nature of which has implications for the *ratione temporis* jurisdiction of the Court, as examined below.

(γ) Purported retrospective application of the procedural obligation

140. In so far as the respondent Government also argued that the procedural obligation under Article 2 could not apply at the time of their acceptance of the right of individual petition as it was only developed in the Court's case-law at a later date, the Court would note that the references relied on in *Markovic and Others* and *Korbely* (cited above) related respectively to whether a right had existed in domestic law at the relevant time for the purposes of Article 6 and to the principles set out in Article 7 against the retroactive imposition of criminal penalties. Neither has any relevance to the way in which the Court itself interprets the content of the obligations binding Contracting States under the Convention, which

interpretation cannot be equated to a retroactive imposition of liability. The Court would observe that case-law is a means of clarifying pre-existing texts to which the principle of non-retroactivity does not apply in the same manner as to legislative enactments.

(ii) Presumption of death

141. The respondent Government asserted that the missing men had to be presumed dead long before any temporal jurisdiction arose in 1987; thus, there was no "disappearance" to be investigated after that date.

142. Domestically, as pointed out by the applicants and intervening Government, it is commonplace that after a period of some years (seven to ten on average) the relatives of the missing person or a designated State official may take proceedings to establish a presumption of death. This has the purpose of promoting legal certainty and allowing those affected by the disappearance to deal with matters of property and family status. It benefits the next of kin or those with due legal standing. The fact that there is a ten-year threshold which may be invoked by the relatives of missing persons in the Cyprus legal system does not, however, render that provision applicable by analogy in the proceedings before this Court.

143. In Convention case-law, as pointed out by the respondent Government, the Court has on numerous occasions made findings of fact to the effect that a missing person can be presumed dead (see, among many judgments, *Lyanova and Aliyeva v. Russia*, nos. 12713/02 and 28440/03, §§ 94-95, 2 October 2008). Generally, this finding of fact has been reached in response to claims made by the respondent Government that the person is still alive or has not been shown to have died at the hands of State agents. This presumption of death is not automatic and is only reached on examination of the circumstances of the case, in which the lapse of time since the person was seen alive or heard from is a relevant element (see, for example, *Vagapova and Zubirayev v. Russia*, no. 21080/05, §§ 85-86, 26 February 2009, concerning a presumption of death reached where a young man, who disappeared in life-threatening circumstances, had been missing for over four years).

144. The Court would here distinguish between the making of a factual presumption and the legal consequences that may flow from such a presumption. Even if there was an evidential basis which might justify finding that the nine missing men died in or closely after the events in 1974, this would not dispose of the applicants' complaints concerning the lack of an effective investigation.

145. The Court would note that the procedural obligation to investigate under Article 2 where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death. Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an

end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.

146. The Court therefore concludes that even though a lapse of over thirty-four years without any news of the missing persons may provide strong circumstantial evidence that they have died meanwhile, this does not remove the procedural obligation to investigate.

(iii) The nature of the procedura1 obligation to investigate disappearances

147. The Court would emphasise that, as found in *Šilih* (cited above) concerning the procedural obligation under Article 2 to investigate unlawful or suspicious deaths, the procedural obligation under Article 2 arising from disappearances operates independently of the substantive obligation. It notes that the IACHR, and to some extent the HRC, apply the same approach to the procedural aspect of disappearances (see paragraphs 93-107 above), examining allegations of denial of justice or judicial protection even where the disappearance occurred before recognition of its jurisdiction.

148. There is, however, an important distinction to be drawn in the Court's case-law between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance. A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred (see also the definitions of disappearance set out above in part II B. "International law documents on enforced disappearances"). This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (see *Cyprus v. Turkey*, cited above, § 136). This is so, even where death may, eventually, be presumed.

149. It may be noted that the approach applied in *Šilih* (cited above, § 163) concerning the requirement of proximity of the death and investigative steps to the date of entry into force of the Convention applies only in the context of killings or suspicious deaths, where the anchoring factual element, the loss of life of the victim, is known for a certainty, even if the exact cause or ultimate responsibility is not. The procedural obligation in that context is not of a continuing nature in the sense described above.

(iv) Conclusion

150. The Court rejects the respondent Government's objections as to lack of temporal jurisdiction. Nevertheless, the question whether there was a continuing procedural obligation to investigate the fate and whereabouts of the missing men at the time of the introduction of these applications remains to be examined.

C. Six-month rule (Article 35 § 1 of the Convention)

1. The Chamber judgment

151. The Chamber considered that, even in continuing situations there might arise a time, having regard to the purpose of legal certainty enshrined in the six-month rule and considerations of the practical and effective functioning of the Convention mechanism, when it could reasonably be expected that an applicant should not wait any longer in bringing an application to Strasbourg. Thus, applicants in disappearance cases could be required to show reasonable expedition in lodging complaints. In these applications however, introduced some three years after the ratification by Turkey of the right of individual petition and some three days after Turkey's acceptance of the jurisdiction of the old Court, against a background of consecutive inter-State applications the results of which had still not been made public, there had been no unreasonable delay by these applicants in introducing their complaints.

2. Submissions to the Court

(a) The respondent Government

152. The respondent Government submitted that there was inexplicable inconsistency between the approach taken in *Karabardak and Others v. Cyprus* and *Baybora and Others v. Cyprus* ((decs.), nos. 76575/01 and 77116/01, 22 October 2002) and the Chamber judgment in the present case. In the former, the Court had found that the lapse of time between the facts and the introduction of the applications by Turkish Cypriot applicants was too long, without mention of any apparent continuing violation. On that basis, the present applications should also have been rejected as out of time. The fact that the applications were introduced three years after ratification in this particular case, while thirteen years had elapsed in the cases against Cyprus, had no logical bearing on the different approaches applied in regard to the six-month rule. Furthermore, in *Baybora and Others* and *Karabardak and Others* the applicants were seemingly reproached for not taking their cases to the United Nations Committee on Missing Persons ("the CMP")

although that had already been found by the Court to be an ineffective remedy.

153. The respondent Government concluded that if the CMP was indeed an ineffective remedy as claimed by the present applicants they should have brought their applications to the Commission at the latest six months after the date of ratification on 28 January 1987. They noted that the decisions in *Baybora and Others* and *Karabardak and Others* were completely silent on when time began to run. This difference in treatment between applicants in Turkish Cypriot and Greek Cypriot cases, which concerned the same allegations in the same historical and geographical context, aggravated the suffering of the Turkish Cypriot applicants.

(b) The applicants

154. The applicants submitted that the six-month rule did not apply to continuing violations. As concerned the *Baybora and Others* and *Karabardak and Others* cases, they considered that these could be distinguished from their own applications as, firstly, Turkey had been notified about their missing relatives by the end of September 1974 and the nine men had also been included in the group of missing persons listed by the Cypriot Government in the four inter-State cases between 1974 and 1994; secondly, their applications had been lodged on 25 January 1990, three days after Turkey's acceptance of the Court's jurisdiction (whereas the Turkish Cypriot applications had been lodged over a decade later); and the Turkish Cypriot applications had been introduced in the absence of any effort by the families to exhaust domestic remedies available since 1964 in the domestic system of Cyprus whereas Greek Cypriots had had no access to any domestic remedy in Turkey.

(c) The intervening Government

155. The Cypriot Government submitted that there had been no inordinate delay by the applicants in lodging their complaints; this distinguished their cases from the Turkish Cypriot cases where the applicants had not acted for over twenty years after the investigation into the disappearances had been terminated by the International Committee of the Red Cross ("the ICRC") and United Nations civilian police in 1968 and thirteen years after Cyprus had accepted the right of individual petition.

3. The Court's assessment

(a) General principles

156. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are

not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, among other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

157. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Nor can Article 35 § 1 be interpreted in a manner which would require an applicant to seise the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

158. Consequently, where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002, and *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III). The same principles have been applied, *mutatis mutandis*, to disappearance cases (see *Eren and Others v. Turkey* (dec.), no. 42428/98, 4 July 2002, and *Üçak and Kargili and Others v. Turkey* (dec.), nos. 75527/01 and 11837/02, 28 March 2006).

159. Nonetheless, it has been said that the six-month time-limit does not apply as such to continuing situations (see, for example, *Agrotexim Hellas S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1992, DR 72, p. 148, and *Cone v. Romania*, no. 35935/02, § 22, 24 June 2008); this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end. In the fourth inter-State case, where it was implicit that a similar approach was applicable to a continuing practice – and in that case it was a continuous failure to comply with the obligation to investigate disappearances – the Court notes that the issue of the six-month rule had been joined to the merits by the Commission and neither Government had since made any submissions on the point (see *Cyprus v. Turkey*, cited above, §§ 103-04). The issue was thus

not addressed expressly by the Court in that judgment. It therefore falls to the Court to resolve the point in the present case.

(b) Applicability of time constraints to procedural obligations under Article 2 of the Convention

160. The Court cannot emphasise enough that the Convention is a system for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on respondent Governments, but also has effects on the position of applicants. For example, while it is essential for the efficacy of the system that Contracting States comply with their obligation not to hinder the applicant in the exercise of the right of individual petition, individuals nonetheless bear the responsibility of cooperating with procedures flowing from the introduction of their complaints, assisting in clarifying any factual issues where such lie within their knowledge and in maintaining and supporting the applications introduced on their behalf (see *Kapan v. Turkey*, no. 22057/93, Commission decision of 13 January 1997, DR 88-A, p. 17). On the same basis, where time is of the essence in resolving the issues in a case, there is a burden on the applicant to ensure that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved.

161. In that context, the Court would confirm the approach adopted by the Chamber in the present applications. Not all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake. In cases of disappearances, just as it is imperative that the relevant domestic authorities launch an investigation and take measures as soon as a person has disappeared in life-threatening circumstances, it is indispensable that the applicants, who are the relatives of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay. What this involves is examined below.

(c) Undue delay in disappearance cases

162. The Court would comment, firstly, that a distinction must be drawn with cases of unlawful or violent death. In those cases, there is generally a precise point in time at which death is known to have occurred and some basic facts are in the public domain. The lack of progress or ineffectiveness of an investigation will generally be more readily apparent. Accordingly, the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months, or at most, depending on the circumstances, a very few years after events. In disappearance cases, where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, the situation is less clear cut. It is more difficult for the relatives of the missing to assess what is happening, or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance.

163. Secondly, the Court would take cognisance of the international materials on enforced disappearances. The International Convention for the Protection of All Persons from Enforced Disappearance stipulates that any time-limit on the prosecution of disappearance offences should be of long duration proportionate to the seriousness of the offence, while the Rome Statute of the International Criminal Court excludes any statute of limitations as regards the prosecution of international crimes against humanity, which includes enforced disappearances. Bearing in mind therefore the consensus that it should be possible to prosecute the perpetrators of such crimes even many years after the events, the Court considers that the serious nature of disappearances is such that the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection.

164. Thirdly, in line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.

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.

166. In a complex disappearance situation such as the present, arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident. If there is an investigation of sorts, even if sporadic and plagued by problems, the relatives may reasonably wait some years longer until hope of progress being made has effectively evaporated. Where more than ten years have elapsed, the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. Stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities.

(d) Application in the present case

167. These applicants introduced their applications on 25 January 1990, some fifteen years after their relatives went missing in 1974. The Court notes that the disappearances were brought to the attention of the respondent Government in or about 1974 by the intervening Government and the ICRC. The intervening Government also introduced a series of applications from 1974 which brought complaints arising out of the events, including the missing persons problem, before the Commission in Strasbourg. Throughout the 1980s, there were ongoing procedures on these issues. However, only the fourth inter-State case, lodged much later in 1994, was able to be brought before this Court, after Turkey accepted the Court's jurisdiction; the previous three applications which were before the Commission ended in reports which went to the Committee of Ministers, none of which were made available publicly before 1992, many years after their adoption (see *Cyprus v. Turkey*, cited above, § 17).

168. The post-conflict situation in Cyprus meanwhile fell under the competence of the United Nations which took over supervision of the Buffer Zone between the two opposing sides. From the beginning, efforts were also made to set up a mechanism to deal with the problem of disappearances, leading in 1981 to the setting up of the CMP. The Court notes that the functioning of the CMP was plagued from inception by disagreements of the parties, lack of cooperation and obstruction. However, information about the progress of the CMP's work was limited due to the

strict confidentiality of its procedure. It is apparent that actual work on cases started in 1984 and concrete investigative steps were being taken in the following years. In April 1990 the CMP issued a lengthy press release highlighting fundamental difficulties with hearing witnesses, locating bodies and obtaining disinterments. This was followed by further efforts by the United Nations Secretary-General to revitalise the CMP. It was not until 2006 that, finally, the CMP launched exhumations and began to locate and identify remains.

169. Against that background, the question arises at what point the applicants should have come to Strasbourg. It would not have been possible prior to 1987. The respondent Government submitted that they should have brought their applications within six months of the date of acceptance of the right of individual petition on 28 January 1987; in their view, 25 January 1990 was too late.

170. The Court considers that the applicants, who were among a large group of persons affected by the disappearances, could, in the exceptional situation of international conflict where no normal investigative procedures were available, reasonably await the outcome of the initiatives taken by their government and the United Nations. These procedures could have resulted in steps being taken to investigate known sites of mass graves and provided the basis for further measures. The Court is satisfied, however, that by the end of 1990 it must have become apparent that the problematic, non-binding, confidential nature of these processes no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of their relatives in the near future. Accordingly, by applying to the Court in January 1990, these applicants acted, in the special circumstances of their cases, with reasonable expedition for the purposes of Article 35 § 1 of the Convention.

171. The Court has, in reaching this conclusion, given careful consideration to the respondent Government's submissions concerning the applications introduced by the families of Turkish Cypriots who went missing during inter-communal strife in the 1960s (see *Baybora and Others* and *Karabardak and Others*, both cited above). It is particularly sensitive to any appearance that differing, and inconsistent, approaches have been taken in these cases. Nonetheless, it is not persuaded that this is so. The Chamber decisions in the above-mentioned cases are very concise; and in the absence of arguments from the parties, there is no explanatory reasoning. Their conclusion, however, that the applications were introduced out of time is in line with the principles and case-law outlined above. It is not disputed that the applicants' relatives disappeared or were killed in 1964, that there was no ongoing process of exhaustion of domestic remedies or other relevant procedures in the following years and that the matter was eventually brought before the CMP in 1989. However, in accordance with the Court's approach above, it must have been apparent by the end of 1990 that this

body could not realistically be expected to bring about any positive results in the near future. By waiting therefore until 2001, a further period of eleven years, during which there were no intervening events capable of suspending the running of time, the applicants in those cases had unduly delayed in introducing their complaints before the Court.

172. The Court rejects the preliminary objection under this head.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

173. Article 2 of the Convention provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The Chamber judgment

174. The Chamber found no reason to differ from the conclusion of the Grand Chamber in the fourth inter-State case, holding that the nine men had disappeared against the same life-threatening background and that while there might not have been an evidential basis to substantiate that all nine men had been last seen in the custody of agents of the respondent State, there was an obligation under Article 2 to take due measures to protect the lives of the wounded, prisoners of war or civilians in zones of international conflict and this extended to providing an effective investigation for those who disappeared in such circumstances. No effective investigation had been provided by the CMP or other body.

B. Submissions to the Court

1. The applicants

175. The applicants submitted that the Chamber had correctly applied the findings of the fourth inter-State case in their own applications. There had been a pressing obligation on the respondent Government to conduct a

prompt, independent, effective and thorough investigation into the fate of the missing men who had disappeared in life-threatening circumstances during the military operations in which they were last seen and which had been initiated by the respondent Government. They did not consider that any recent developments as regards the CMP were relevant, since the exhumations had not concerned them, save very recently in one case, and there was still no possibility of the CMP investigating effectively the circumstances of any death or disappearance. In so far as the remains of Savvas Hadjipanteli (application no. 16071/90) had been discovered, they maintained their arguments that there had been a violation.

2. The respondent Government

176. The respondent Government submitted that it had not been established that the applicants had been detained by Turkish authorities and that no liability arose under Article 2. They argued that inter-State applications should be distinguished from individual applications, being based on different Convention provisions. In the latter, the notion of victim status was essential, whereas in the former, the applicant State did not have to establish a prima facie case. The respondent Government considered that the Chamber had failed to apply the burden of proof applicable in individual cases, that of proof beyond reasonable doubt, but erred in relying on the findings in an inter-State case. The Commission in its decision on admissibility in these cases had expressed doubt that the first applicants were covered by the findings in the inter-State case.

177. Even if Article 2 was applicable, the respondent Government considered that they had not failed to comply with its requirements. They emphasised that the CMP had evolved considerably since the findings in the inter-State case. It stressed the importance of the project on the exhumation and return of remains, which was giving concrete results, with financial and practical assistance from both sides, international non-governmental organisations and the international community. They pointed out that, given the Chamber's reliance on the international context of the conflict as relevant to the nature of the obligations arising under Article 2, it was only logical that the CMP be regarded as an appropriate remedy against such a historical and political background. It should not be forgotten, in their view, that Turkish Cypriots had already disappeared in 1963 and the international community had considered the CMP as the appropriate response to the complex, sensitive and painful situation. This had the advantage of treating the families on both sides in an equal manner.

3. The intervening Government

178. The Cypriot Government submitted that the burden of proof was the same in inter-State and individual applications but merely appeared

different due to the context. The applicants had provided sufficient evidence that the missing men were last seen in territory which at the time or immediately afterwards was under the *de facto* control of the invading Turkish forces or forces for whom they were responsible. At a time of international armed conflict, this meant that those men were in a life-threatening situation and it was the responsibility of the government in charge of those forces to determine what happened to them. Such responsibility was also imposed by international humanitarian law, which could be used to clarify the scope of existing Convention obligations. Given that the men did not make it back to their own lines, they were wounded, sick, dead or detained. The respondent Government had been under the obligation to seek them out, provide treatment if sick or, in the case of the dead, to bury them; and in all cases, to provide information about their fate.

179. While they welcomed any improvement in the functioning of the CMP, the limitations on its terms of reference, mandate and authority were unchanged; in particular the exclusion of jurisdiction to make findings on cause of death and responsibility, the confinement of territorial jurisdiction to Cyprus with the exclusion of Turkey, the promises of impunity to persons who might be responsible and the doubt whether it would investigate Turkish army or official actions on Cypriot territory.

C. The Court's assessment

180. The Court observes that in the fourth inter-State case the Grand Chamber had to address the issue of the missing Greek Cypriots as a whole. It found as follows:

> "132. The Court recalls that there is no proof that any of the missing persons have been unlawfully killed. However, in its opinion, and of relevance to the instant case, the above-mentioned procedural obligation also arises upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening.
>
> 133. Against this background, the Court observes that the evidence bears out the applicant Government's claim that many persons now missing were detained either by Turkish or Turkish Cypriot forces. Their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. The Commission correctly described the situation as life-threatening. The above-mentioned broadcast statement of Mr Denktaş and the later report of Professor Küçük, if not conclusive of the respondent State's liability for the death of missing persons are, at the very least, clear indications of the climate of risk and fear obtaining at the material time and of the real dangers to which detainees were exposed."

1. The burden of proof

181. The Court notes that the procedural obligation was stated as arising where individuals, last seen in the custody of agents of the State,

subsequently disappeared in a life-threatening context. In the context of the inter-State case it was not necessary to specify which individuals were included in the "many persons" shown by the evidence to have been detained by Turkish or Turkish Cypriot forces at the time of their disappearance. There is no basis on which it can be assumed that the missing men in the present case were included in the Court's findings. It must therefore be determined in this case whether the conditions for a procedural obligation arose.

182. In response to the respondent Government's argument about the burden of proof, the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt – though this also applies equally in inter-State cases (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). The burden of proof may be easier to satisfy in practical terms in the inter-State context where the facts of many incidents and numerous events may be taken into account. But, even in individual cases, the Court's case-law has identified situations in which the rigour of this rule may be mitigated.

183. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (loc. cit.). Thus, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries, death or disappearances occurring during such detention. The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21896/93, § 100, ECHR 2000-VII, and *Akdeniz and Others v. Turkey*, no. 23954/94, §§ 85-89, 31 May 2001); see also cases short of custody, where it is possible to establish that an individual entered a place under those authorities' control and has not been seen since, in which circumstances, the onus is on the Government to provide a plausible explanation of what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty (see, for example, *Taniş and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005-VIII, and *Yusupova and Zaurbekov v. Russia*, no. 22057/02, §§ 50-55, 9 October 2008).

184. As a logical development of this approach, in the situation where persons are found injured or dead, or who have disappeared, in an area within the exclusive control of the authorities of the State and there is prima facie evidence that the State may be involved, the burden of proof may also shift to the Government since the events in issue may lie wholly, or in large part, within the exclusive knowledge of the authorities. If they then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn (see *Akkum and Others v. Turkey*, no. 21894/93,

§ 211, ECHR 2005-II; and, among many cases concerning the situation in Chechnya, *Goygova v. Russia*, no. 74240/01, §§ 88-96, 4 October 2007, and *Magomed Musayev and Others v. Russia*, no. 8979/02, §§ 85-86, 23 October 2008).

185. Turning to the present case, the Court would note that the respondent Government did not accept that the missing men had been taken into custody under their responsibility. Nor is it for the Court to seek to establish what occurred in 1974, which is outside its temporal jurisdiction. However, it is satisfied that there is a strongly arguable case that two men were last seen in circumstances falling within the control of the Turkish or Turkish Cypriots forces, namely, Eleftherios Thoma and Savvas Hadjipanteli who were included on an ICRC list as detainees (see paragraphs 77 and 80 above). As concerns the other seven men, no such documentary evidence of actual detention has been forthcoming. There is nonetheless an arguable case that the other seven men were last seen in an area under, or about to come under, the control of the Turkish armed forces. Whether they died, in the fighting or of their wounds, or whether they were captured as prisoners, they must still be accounted for. Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict[1] (see *Loizidou*, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.

186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive

1. See the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revised in 1949); the Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949); the Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949); and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949), together with three additional amendment protocols, Protocol I (1977), Protocol II (1977) and Protocol III (2005).

control. In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted.

2. Compliance with the procedural obligation

187. The Court notes that in the fourth inter-State case the Grand Chamber found as follows:

> "134. ... The Court cannot but note that the authorities of the respondent State have never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare. It must be noted in this connection that there was no official follow-up to Mr Denktaş's alarming statement. No attempt was made to identify the names of the persons who were reportedly released from Turkish custody into the hands of Turkish Cypriot paramilitaries or to inquire into the whereabouts of the places where the bodies were disposed of. It does not appear either that any official inquiry was made into the claim that Greek Cypriot prisoners were transferred to Turkey.
>
> 135. The Court agrees with the applicant Government that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes that, although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations (see paragraph 27 above).
>
> 136. Having regard to the above considerations, the Court concludes 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."

188. The respondent Government's arguments effectively invited the Court to reconsider the above finding as to the ineffectiveness of the CMP in providing a proper investigation into the fate of the missing men. They asserted that due account should be taken of the extremely sensitive and painful context in which the international community have considered it appropriate to provide for a bi-communal mechanism. They also argued that the terms of reference of the CMP should not be regarded as decisive but that the spectacular reactivation of its activities and its recent achievements in locating and identifying remains should be given overriding weight.

189. The Court considers, firstly, that the Grand Chamber in the fourth inter-State case was fully aware of the background and sensitivity of the situation when it found the CMP's procedures did not meet the standard of

investigation required by Article 2. As concerns the second strand of the argument, it fully acknowledges the importance of the CMP's ongoing exhumations and identifications of remains and gives full credit to the work being done in providing information and returning remains to relatives (see also the Committee of Ministers' decision at paragraph 88 above). But important though these measures are as a first step in the investigative process, they do not exhaust the obligation under Article 2.

190. From the materials provided as regards Savvas Hadjipanteli, it appears that on identification of remains the procedure is to issue a medical certificate of death, which in brief terms indicates the injuries noted as causing death – in his case the presence of various bullet wounds. There is however no report analysing the circumstances or even the dating of death. Nor have any investigative measures been taken to locate or question any witnesses in the area who could give information as to how Savvas Hadjipanteli and the others found with him in the mass grave came to meet their end and at whose hands. Thus, even though the location of the body of Savvas Hadjipanteli has been established it cannot be said, putting supposition and speculation aside, that any clear light has been shed as to how he met his fate.

191. The Court does not doubt that many years after the events there would be considerable difficulty in assembling eyewitness evidence or in identifying and mounting a case against any alleged perpetrators. However, the Court's case-law on the ambit of the procedural obligation is unambiguous. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Even where there may be obstacles which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *McKerr v. the United Kingdom*, no. 28883/95, §§ 111 and 114, ECHR 2001-III, and *Brecknell v. the United Kingdom*, no. 32457/04, § 65, 27 November 2007). Besides being independent, accessible to the victim's family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], no. 21594/93, § 88, ECHR 1999-III; *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, 4 May 2001; and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

192. The Court finds no indication that the CMP is going beyond its limited terms of reference to play any role in determining the facts

surrounding the deaths of the missing persons who have been identified or in collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution. Nor is any other body or authority taking on that role. It may be that investigations would prove inconclusive, or insufficient evidence would be available. However, that outcome is not inevitable even at this late stage and the respondent Government cannot be absolved from making the requisite efforts. By way of example, the Court notes that in the context of Northern Ireland the authorities have provided for investigative bodies (variously, the Serious Crimes Review Team and Historical Enquiry Team) to review the files on past sectarian murders and unsolved killings and to assess the availability of any new evidence and the feasibility of further investigative measures; in cases before the Court, these measures were found, given the time that had elapsed, to have been adequate in the particular circumstances (see *Brecknell*, cited above, §§ 71, 75 and 79-81). It cannot therefore be said that there is nothing further that could be done.

193. It may be that both sides in this conflict prefer not to attempt to bring out to the light of day the reprisals, extrajudicial killings and massacres that took place or to identify those among their own forces and citizens who were implicated. It may be that they prefer a "politically sensitive" approach to the missing persons problem and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the United Nations. That can have no bearing on the application of the provisions of the Convention.

194. The Court concludes that there has been a continuing violation of Article 2 on account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

195. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The Chamber judgment

196. Referring to the fourth inter-State case, the Chamber found also a violation of Article 3 as regards the inhuman treatment suffered by the applicant relatives due to the years of silence concerning the missing men.

B. Submissions to the Court

1. The applicants

197. The applicants adopted the reasoning of the Chamber, emphasising that the second applicants had been without news of their loved ones for thirty-four years, suffering daily anguish and distress, exacerbated by recent newspaper reports that some missing persons had been used as guinea pigs in Turkish army biochemical laboratories.

2. The respondent Government

198. The respondent Government submitted that none of the missing men had been subjected to forcible detention and that no issue arose.

3. The Government of Cyprus

199. The Cypriot Government submitted that the applicants had been victims of continuing inhuman treatment. They had all been wives or parents of the missing men; in three cases, following the death of the parent, the sister or brother of the missing person had taken over the application. They had never given up trying to find out what had happened and their anguish was worsened by the fact that there were people with information who were not revealing what they knew.

C. The Court's assessment

200. The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court's case-law recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3. The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention (see, among many authorities, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva*, cited above, § 164). Other relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, and the involvement of the family member in the attempts to obtain information about the disappeared person (see *Tanış and Others*, cited above, § 219). The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance (see *Osmanoğlu*, cited above, § 96) but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their

way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person.

201. The Court notes that in the fourth inter-State case the Grand Chamber found that in the context of the disappearances in 1974, where the military operation resulted in considerable loss of life, large-scale arrests and detentions and enforced separations of families, the relatives of the missing men had suffered the agony of not knowing whether their family member had been killed in the conflict or had been taken into detention and, due to the continuing division of Cyprus, had been faced with very serious obstacles in their search for information. The silence of the authorities of the respondent State in face of the real concerns of the relatives could only be categorised as inhuman treatment (see *Cyprus v. Turkey*, cited above, § 157).

202. The Court finds no basis on which it can differ from this finding in the present case. The length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity. There has, accordingly, been a breach of Article 3 in respect of the applicants.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

203. Article 5 of the Convention provides, as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The Chamber judgment

204. The Chamber, citing the fourth inter-State case, found a breach of Article 5 by virtue of the failure of the authorities to provide an effective investigation into the whereabouts of the nine missing men in respect of whom there was an arguable claim that they had been deprived of their liberty at the time of their disappearance.

B. Submissions to the Court

205. The applicants claimed that a procedural violation arose as all the missing men were last seen alive in an area which, upon their disappearance, or immediately thereafter, came under the control of the respondent Government. A presumption had been created that the men had been detained or come under the control of the Turkish army or forces for which they were responsible, rendering the respondent Government responsible for their fate and putting them under an obligation to account for them and carry out a prompt, effective, independent and thorough investigation.

206. The respondent Government submitted that none of the missing men had been taken or remained in custody, and that the allegations of the applicants were purely hypothetical. There was nothing to suggest, and it was extremely illogical to assume, that any missing Greek Cypriot was still detained by Turkish or Turkish Cypriot authorities.

207. The Cypriot Government contended that there was proof beyond reasonable doubt that two of the missing men, Thoma and Hadjipanteli, were detained by Turkey. The Turkish authorities had, however, failed to provide a credible and convincing account of what had happened to them; there had been no proper official records or system in place for such, nor any prompt or effective investigation. This disclosed numerous continuing violations of Article 5; and in their submission the failure of the Turkish authorities to acknowledge the detention rendered them in breach of Article 5 notwithstanding the inability of any applicant to raise the issue before the Court.

C. The Court's assessment

208. The Court notes that it has found above that there was a prima facie or arguable case that two of the men were last seen in circumstances falling within the control of the Turkish or Turkish Cypriot forces, namely, Eleftherios Thoma and Savvas Hadjipanteli who were included on ICRC lists as detainees (see paragraphs 77 and 80 above). They have not been seen since. However, the Turkish authorities have not acknowledged their detention; they have not provided any documentary evidence giving official trace of their movements. The Court notes the patent disregard of the procedural safeguards applicable to the detention of persons. While there is no evidence that any of the missing persons were still in detention in the period under the Court's consideration, it remains incumbent on the Turkish Government to show that they have since carried out an effective investigation into the arguable claim that the two missing men had been taken into custody and not seen subsequently (see, among many authorities, *Kurt*, cited above, § 124). The Court's findings above in relation to Article 2 leave no doubt that the authorities have also failed to conduct the requisite investigation in that regard. This discloses a continuing violation of Article 5.

209. No sufficient evidential basis arising in respect of the other seven missing men, no violation of Article 5 is disclosed in that connection.

VI. ALLEGED VIOLATION OF ARTICLES 4, 6, 8, 10, 12, 13 AND 14 OF THE CONVENTION

210. The applicants originally relied on Articles 4 (prohibition of slavery and forced labour), 6 (right to fair trial), 8 (right to respect for family and private life), 10 (freedom of expression), 12 (the right to marry and found a family), 13 (effective remedy for arguable Convention breaches) and 14 (prohibition of discrimination in enjoyment of Convention rights). In their most recent submissions, they have maintained their complaints on the above, save for Article 4.

211. Having regard to the facts of the case, the submissions of the parties and its findings under Articles 2, 3 and 5 of the Convention, the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the applicants' remaining complaints.

VII. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

212. Article 46 provides:

"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."

213. Article 41 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."

A. Damage

1. The Chamber judgment

214. The Chamber found no basis for an award of pecuniary damage. It declined to grant the applicants' very high claims in respect of non-pecuniary damage, emphasising that Article 41 did not provide for imposing punitive sanctions on respondent Governments. It gave weight to the context in which some 1,400 Greek Cypriots and 500 Turkish Cypriots had gone missing and to the fact that the Committee of Ministers was in the process of monitoring the execution of the judgment in the fourth inter-State case, in which respect the crucial element would be the provision, finally, of measures to cast light on the fate of as many of the missing men, women and children as possible. It concluded that in these unique circumstances it would be neither appropriate nor constructive, nor even just, to make additional specific awards or recommendations in regard to individual applicants. The finding of violations was thus considered to constitute in itself sufficient just satisfaction.

2. Submissions to the Court

(a) The applicants' claims

215. The applicants submitted that Turkey's continued unwillingness to abide by its obligations was in breach of Article 46; this affected hundreds of Greek Cypriot families and threatened the effectiveness of the Convention system; they urged the Court to direct the respondent Government to conform with their legal obligations under Articles 2, 3, 5, 8, 10, 13 and 14 of the Convention towards the applicants by conducting a prompt and effective investigation into the fate and whereabouts of the missing men, publicising the results, immediately and unconditionally releasing and repatriating any still in Turkish custody and returning the remains of those who were proved to be dead. In default of such steps, as

incentive, the respondent Government should pay each applicant 24 Cypriot pounds (CYP) per day, such rate doubling for every twelve-month period that elapsed.

216. For non-pecuniary damage, the applicants claimed under this head 407,550 euros (EUR) in respect of the violations suffered by each of the missing men, such sums to be held by the applicants on their behalf and the behalf of their heirs, and EUR 543,400 for each of the applicants or their successors (namely EUR 6,175 for every year of violation between 1987 and 2009 in respect of each violation). Such compensation was essential, in their submission, as the violations were numerous and grave, had continued for over thirty-four years, were massive and systemic and were aggravated by blatant disregard of the findings of the Convention organs. The Chamber, in not making an award, was, they respectfully submitted, in error, and acting in a discriminatory manner inconsistent with the Court's practice.

(b) The respondent Government's response

217. Concerning non-pecuniary damage, the respondent Government considered that it was inappropriate to make any award as the allegations were basically presumptive, there being no corroboration in the United Nations Committee on Missing Persons in Cyprus ("the CMP") files that the men were taken into custody and all but one of them had gone missing in a situation of conflict which inevitably entailed a certain risk to life. They also submitted that there had been substantial progress in the activities of the CMP and that as the issue of disappearances concerned both communities, awards to Greek Cypriot families would deepen the wounds of Turkish Cypriot families with missing relatives and not help in the process of conciliation. Further, the damages claimed were excessively and unprecedentedly high.

(c) The intervening Government's comments

218. The intervening Government argued that the Court should identify the measures to be taken to put an end to the continuing violations, which goal could not be met merely by reparation. Reparation should be made available in the form of compensation. In not awarding such damages, the Chamber had departed from constant practice in disappearance cases. The fourth inter-State case was not relevant as it was not known if compensation could, or would, be awarded. Awards should take into account previous awards and the length of time over which the violations have lasted.

219. They requested that the Court require the Turkish Government to conduct an effective investigation into the fate of the missing persons, specifying what was required, and to take measures to prevent the occurrence of disappearances and threats to the right to life contrary to Articles 2 and 5.

(d) Submissions by Redress

220. Redress, an international non-governmental organisation, submitted that as a matter of general public international law the finding of a breach gives rise to an obligation to make reparation. In disappearance cases, the goal was *restitutio in integrum* and, where that was not possible, compensation and other adequate and appropriate forms of reparation were considered. Compensation should be proportional to the gravity of the violation and the circumstances of the case. They also submitted that, in line with this Court's case-law, an effective remedy required an effective investigation into the matter, while the International Convention for the Protection of All Persons from Enforced Disappearance provided that measures be taken to enable victims to know the truth regarding the circumstances of the disappearance. In disappearance cases, the Inter-American Court of Human Rights had ordered the exhumation and return of the body, as well as damages for moral suffering, an investigation into the circumstances and publication of the facts of the case. The right to know the truth was also recognised by the United Nations Human Rights Committee. A number of treaty texts and judgments referred to the need for special steps to end ongoing and continuing violations and to guarantee against non-recurrence.

221. They noted that the Court had awarded compensation in most, if not all, disappearance cases and had held under Article 13 that in the case of breaches of Articles 2 and 3 compensation should in principle be available. The duration of breaches was relevant to assessing damages. The prospect of general measures being ordered did not remove the obligation to give individual reparation. It was also open to the Court in an individual case to specify additional forms of just satisfaction to put an end to existing violations and prevent recurrence.

3. The Court's assessment

(a) Article 46 of the Convention

222. As regards the applicants' views concerning the provision of an effective investigation, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Andrejeva v. Latvia* [GC], no. 55707/00, § 110, ECHR 2009). Consequently, it considers that in these applications it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance (see, *mutatis mutandis*, *Akdivar and Others v.*

Turkey (Article 50), 1 April 1998, § 47, *Reports of Judgments and Decisions* 1998-II).

223. In so far as the applicants suggested that daily fines be imposed on the respondent Government until they finally comply with the Court's judgments, the Court has consistently rejected claims for punitive damages (see *Akdivar and Others*, cited above, § 38, and *Orhan v. Turkey*, no. 25656/94, § 448, 18 June 2002). It considers there to be little, if any, scope under the Convention for directing governments to pay penalties to applicants which are unconnected with damage shown to be actually incurred in respect of past violations of the Convention; in so far as such sums would purport to compensate for future suffering of the applicants, this would be speculative in the extreme.

(b) Article 41 of the Convention

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 (see, for example, *Elsholz v. Germany* [GC], no. 25735/94, § 70, ECHR 2000-VIII; *Selmouni v. France* [GC], no. 25803/94, § 123, ECHR 1999-V; and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 12, ECHR 2000-IX) 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 (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002-VI; *Saadi v. Italy* [GC], no. 37201/06, § 188, ECHR 2008; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, ECHR 2008). 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.

225. It is therefore not the case that there are specific scales of damages that should be awarded in disappearance cases as the applicants have sought to deduce from the past cases involving disappearances in Russia and Turkey. Neither can the Court agree that the Chamber erred in taking into account the background of the case and the ongoing executions process before the Committee of Ministers. As the applicants' own submissions make plain, their principal concern is for the uncertainty to be brought to an end by the provision of information about what happened to their relatives so long ago. That said, the applicants have endured decades of not knowing, which must have marked them profoundly. Given the grievous nature of the case and making an assessment on an equitable basis, the Court awards the sum of EUR 12,000 for non-pecuniary damage to each of the nine applicants, to be held by the heirs where the applicant has deceased.

B. Costs and expenses

1. The parties' submissions

226. The representatives for the applicants Andreas and Giorghoulla Varnava (no. 16064/90), Demetris Theocharides and the heirs of Elli Theocharidou (no. 16068/90), Eleftherios and the heirs of Christos Thoma (no. 16070/90), Savvas and Georghios Apostolides (no. 16072/90) and Leontis Demetriou and Yianoulla Leonti Sarma (no. 16073/90) claimed CYP 5,778.41 inclusive of value-added tax (VAT) for each of the applications for costs and expenses prior to referral to the Grand Chamber, plus EUR 6,299.58, inclusive of VAT for costs before the Grand Chamber. This made a total per application of EUR 16,172.58.

227. The representatives for Andreas Loizides and the heirs of Loizos Loizides (no. 16065/90), Philippos Constantinou and Demetris K. Peyiotis (no. 16066/90) Panicos and Chrysoula Charalambous (no. 16069/90) and Savvas and Androula Hadjipanteli (no. 16071/90) provided bills of costs in the amounts of CYP 5,186.16 inclusive of VAT per application for costs and expenses prior to referral to the Grand Chamber and EUR 6,299.58 inclusive of VAT per application for costs before the Grand Chamber. This made a total per application of EUR 14,960.66.

228. The respondent Government stated that these claims were exaggerated and excessive. The applications were all of a similar nature and the submissions contained profuse citations and reproduction of earlier material.

2. The Court's award

229. The Court notes that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

230. Noting that the applicants' submissions were almost entirely identical and that not all the claimed violations were upheld, but taking into account the length of time over which the applications have been pending before the Convention organs and the multiple rounds of written submissions, the Court awards EUR 8,000 per application for costs and expenses, plus any tax that may be chargeable to the applicants on such amount.

C. Default interest

231. 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.

FOR THESE REASONS, THE COURT

1. *Dismisses* by sixteen votes to one the respondent Government's preliminary objections as to lack of legal interest;

2. *Dismisses* by sixteen votes to one the respondent Government's preliminary objection as to lack of temporal jurisdiction;

3. *Dismisses* by fifteen votes to two the respondent Government's preliminary objection as to the six-month rule;

4. *Holds* by sixteen votes to one that there has been a continuing violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances;

5. *Holds* by sixteen votes to one that there has been a continuing violation of Article 3 of the Convention in respect of the applicants;

6. *Holds* by sixteen votes to one that there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of Eleftherios Thoma and Savvas Hadjipanteli;

7. *Holds* unanimously that there has been no continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the other seven missing men;

8. *Holds* unanimously that it is not necessary to examine the complaints under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention;

9. *Holds* by sixteen votes to one
(a) that the respondent State is to pay, within three months, the following amounts:
(i) EUR 12,000 (twelve thousand euros) per application, plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 8,000 (eight thousand euros) per application, plus any tax that may be chargeable to the applicants or their heirs, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 September 2009.

Erik Fribergh
Registrar

Jean-Paul Costa
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) concurring opinion of Judge Spielmann joined by Judges Ziemele and Kalaydjieva;
(b) joint concurring opinion of Judges Spielmann and Power;
(c) concurring opinion of Judge Ziemele;

(d) concurring opinion of Judge Villiger;
(e) dissenting opinion of Judge Erönen.

J.-P.C.
E.F.

CONCURRING OPINION OF JUDGE SPIELMANN JOINED BY JUDGES ZIEMELE AND KALAYDJIEVA

1. The Court has decided that there has been a continuing violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances. I regret that in the judgment and the operative part the Court declined to indicate explicitly that the respondent State should conduct an effective investigation.

2. It is in my view regrettable that the Court decided that it falls to the Committee of Ministers to indicate what may be required in practical terms by way of compliance.

3. In consistency with the principle of *restitutio in integrum*, spelled out eloquently in the submissions by Redress (paragraph 220 of the judgment), and by emphasising the obligation, for the State found in breach of the Convention, to re-establish the situation which existed before the wrongful act was committed, the Court should have indicated, in the reasoning and the operative part of the judgment, that an effective investigation into the matter should be held. Accountability for the fate of the missing men includes carrying out an investigation into the events and those responsible and offering the possibility of claiming redress to the victims and the relatives.

4. In paragraph 191 of the judgment, the Court emphasises that the Court's case-law on the ambit of the procedural obligation is unambiguous and that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This general principle, drawn from the Court's case-law, should have been reflected in paragraph 222 and in the operative part of the judgment.

5. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers' task in discharging these functions.

6. Indeed, the Court has held in the past that a violation of Article 2 cannot be remedied exclusively through an award of damages to the relatives of the victim (see *Kaya v. Turkey*, 19 February 1998, § 105, *Reports of Judgments and Decisions* 1998-I). As Redress eloquently emphasised in its observations, given the fundamental importance of the right to protection of life, in addition to any compensatory award, there is an obligation on States to carry out a thorough and effective investigation likely to lead to those responsible being identified and punished, and in which the complainant has effective access to the investigation proceedings

(see *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 112-13, ECHR 1999-IV). An effective remedy entails the duty to conduct an effective official investigation into the incident(s), which must be, *inter alia*, "thorough, impartial and careful" (see *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI).

7. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also indicate to the State concerned in the reasoning under Article 46 of the Convention and in the operative provisions, if the circumstances of the case so require, the measures it considers most appropriate in order to secure redress for the violation.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN AND POWER

1. We share the opinion of the majority that there has been a continuing violation of Article 2 of the Convention on account of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances. However, we would like to express our disagreement as to the reasoning concerning the question of the six-month rule. We agree in this respect with the analysis presented by Judge Ziemele and, in particular, the reference to the general principles of international law as set out in Article 14 § 2 of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts.

2. Admittedly, it is quite understandable that the Court wants to uphold some legal certainty when it comes to the time frames within which complaints can be lodged. Even though we agree as a matter of principle that "where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg" and that they "must make proof of a certain amount of diligence and initiative and introduce their complaints without delay" (paragraph 161 of the judgment), we should still not forget that we are dealing with a continuing violation of an international obligation and that the respondent State has never accounted for the fate of the missing men, carried out an investigation into the events and those responsible and offered the possibility of claiming redress to the victims and the relatives. As the Court rightly points out in paragraph 148:

> "... the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (see *Cyprus v. Turkey*, cited above, § 136)."

3. To justify the reasoning as to the six-month rule, the majority relies heavily on the fact that the United Nations Committee on Missing Persons ("the CMP") was not effective. We are unable to accept the consequences of that ineffectiveness as regards the application of the six-month rule. In this respect we agree with Judge Ziemele's observations concerning the limited mandate of the CMP and we share her view that the fact that the CMP was not effective is only one of a number of criteria (and far from the most relevant one) in deciding on the application or not of the six-month rule in the proceedings before the Court.

4. We would like to add the following. As the Grand Chamber is not bound by the precedents of *Baybora and Others v. Cyprus* and *Karabardak and Others v. Cyprus* ((decs.), nos. 77116/01 and 76575/01, 22 October 2002), we fail to see why the majority felt obliged to distinguish the present case from the ones decided in 2002 by saying that the applicants in those two cases "had unduly delayed in introducing their complaints before the

Court". We believe that it was unnecessary to elaborate a specific reasoning emphasising distinguishing features of the *Baybora and Others* and *Karabardak and Others* cases, which concerned applications introduced by the families of Turkish Cypriots who had gone missing during inter-communal strife in the 1960s. In paragraph 171, the majority concedes that "[t]he Chamber decisions in the above-mentioned cases are very concise; and in the absence of arguments from the parties, there is no explanatory reasoning". In such circumstances, we are unable to subscribe to the finding that in *Baybora and Others* and *Karabardak and Others* the applicants "had unduly delayed in introducing their complaints before the Court".

5. In the absence of detailed arguments submitted by the parties, we regret that the *Baybora and Others* and *Karabardak and Others* applications were rejected under Article 35 for being introduced out of time and that the Court held in those two cases that "even assuming that the applicants had no effective remedies as alleged, they must be considered to have been aware of this long before 30 October 2001, the date on which they introduced their application". We cannot agree to the justification of those two inadmissibility decisions set out in paragraph 171 by taking as the critical moment "the end of 1990". In this respect, we are convinced – even if we come to a different conclusion – by the reasoning of Judge Erönen that "[*l*]*egally* there is no difference between the delays of the *Karabardak and Others* applicants and the present applicants in their applications to the Court and the Commission respectively".

6. A continuing violation such as occurs when a State fails to investigate or account for enforced disappearances does not cease by the passage of time to be a continuing violation. In our view, Judge Ziemele is correct in observing that the non-application of the six-month rule to breaches of international obligations that have a continuing character, such as in the context of enforced disappearance, serves the important purpose of preventing the perpetrators from enjoying impunity for such acts.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I agree with all the Court's findings in this case. However, there are a few questions that the Court leaves open in its reasoning or where I take a different line of reasoning. The first concerns the standing of the missing men in the proceedings before the Court (paragraphs 111 to 113 of the judgment). The second concerns the presumption of death (paragraphs 142 to 146 of the judgment). The third and last is the question of the application of the six-month rule to continuing violations, especially where enforced disappearances are concerned. It should be stated at the beginning that all these questions are interlinked. I shall now accordingly address the three issues.

The status of the missing men

2. With reference to the existing case-law the Court points out that normally the relatives of the disappeared person are named as applicants in cases before the Court (see paragraph 111 of the judgment). In the instant case the applications are lodged in the name of the disappeared persons and their relatives and *there is an explicit refusal of the relatives to accept that a presumption of death may apply* to the disappeared persons. Furthermore, the applicants do not allege a violation of the substantive aspect of Article 2 of the Convention (see, *a contrario*, the case-law regarding disappearances in Chechnya (Russia)).

3. In its judgment, the Court establishes that the obligation to account for the fate of the missing men and bring to justice the person or persons responsible is of a continuing character (see, for example, paragraph 148 of the judgment). In my view, from that it follows that for as long as the fate of the missing men is not known it would be contrary to the very nature of a particular continuing obligation if the Court were to accept that they could be presumed dead, in which case the relevant legal consequences would include their lack of standing before the Court.

4. Moreover, enforced disappearances are a particular phenomenon which can only be fully addressed if it is recognised that it violates at the same time several human rights (for definition of the phenomenon, see, for example, the United Nations Declaration on the Protection of all Persons from Enforced Disappearance, paragraph 89 of the judgment). These rights are perhaps not all specifically spelled out in the Convention but they may be implied in other concepts contained therein. Among the rights violated in situations of enforced disappearances is the right to be recognised as a person before the law. By not accepting the applicant status of the missing men, the Court itself may appear to refuse to recognise these individuals as persons before the law and to limit their right of access to justice. It is clear to me that the Court should not only have left the question of the standing of

missing men open but it should have clearly recognised them as applicants in the case.

Presumption of death

5. It is also important to note that international recognition of the acts of enforced disappearance as a continuing offence for as long as the perpetrators continue to conceal the fate and whereabouts of the missing persons is aimed at deterring States from engaging in such practices. Within this broader aim it has been recognised at the United Nations level that the presumption of death cannot be applied over the objections of the family (paragraph 90 of the judgment). History shows that missing persons are being found decades after international conflicts and that the families have continued to hope and search for their loved ones.

6. It has to be noted that in the instant case, unlike the position in many cases arising from the conflict in Chechnya (Russia) and that the Court uses as the main source for the principles to be applied in the instant case, the relatives have not asked either domestic authorities or the Court to rule one way or another on whether the missing men are dead (for comparison, see *Askharova v. Russia*, no. 13566/02, § 59, 4 December 2008, and *Magomadova v. Russia*, no. 2393/05, 18 June 2009). It is the respondent Government, again unlike the position in the Russian cases, who invoke the presumption of death so as to argue that the events fall outside the scope of the Court's temporal jurisdiction. The Russian cases very clearly differ from the instant case in that even the date of the presumed death falls within the temporal jurisdiction of the Court and the question of a substantive violation of Article 2 arises. Typically in these cases there is relatively much more, and more recent, evidence as to the actual event of abduction.

7. I therefore do not share the Court's reasoning in the instant case that the lapse of over thirty-four years may provide strong circumstantial evidence that the missing men have died in the meantime (paragraph 146 of the judgment). Certainly the Russian case-law does not constitute authority for such a statement of principle. In our case, the applicants refuse to accept any presumption of death while the respondent Government invokes this argument. At the same time, the applicants do not raise the claim under the substantive aspect of Article 2 in the context of which, in my view, this disagreement is more logically situated. The language of paragraph 146 may give a wrong idea of the Court's approach regarding long-term enforced disappearances typically associated with complex international conflicts. The Court arrived at the conclusion that, even though the missing men may be presumed dead, a continuing obligation to investigate their fate and account for their whereabouts persists. I find it difficult to see how one can meaningfully separate the obligation from those in whom the right is vested, i.e. the missing men. Therefore, given what enforced disappearances

represent on the day of lodging the application with the Court, the missing men could not be presumed dead since there were no national decisions or relatives' requests to that effect. The missing men are the applicants and there are rights under the Convention owed to them by the respondent State.

Six-month rule

8. Lastly, I should address the question of the six-month rule. It is quite understandable that the Court wants to uphold some legal certainty when it comes to the time frames within which complaints can be lodged. Cut-off dates serve their legitimate purpose in judicial proceedings. However, the question in our case is whether the same approach applies where a continuing violation of an international obligation is concerned. For the purposes of this question, it is important to remind ourselves of the very character of a continuing violation of an international obligation. Article 14 § 2 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts defines the phenomenon as follows:

> "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

9. In our case, the respondent State has not to date accounted for the fate of the missing men, conducted an investigation into the events and those responsible and offered the possibility of claiming redress to the victims and the relatives. The fact that the United Nations Committee on Missing Persons ("the CMP") was not effective is only one, and far from the most relevant, criterion for the decision whether or not to apply the six-month rule in the current proceedings before the Court. The CMP's mandate is limited to ascertaining whether the disappeared persons are dead or alive. It cannot attribute responsibility or state the cause of death (paragraph 85 of the judgment). In other words, it is not the CMP which will discharge the full scope of Turkish obligations with respect to the missing persons. This was a known fact when the CMP was set up. It was confirmed in the fourth inter-State case (paragraph 187 of the judgment).

10. The Court took a false route in its reasoning on the six-month rule when it stated that from the moment when it became clear that the CMP would not offer hope for progress (paragraph 170 of the judgment) the sixth-month count should have begun for the individuals concerned for the purposes of lodging a complaint with the Court. As the judgment shows (see the submissions of the parties under Article 2), and in view of the findings of the Court with respect to a continuing breach of a procedural obligation by Turkey under Article 2 (paragraphs 191 to 194 of the judgment), we are still in the presence of an ongoing breach of a Convention obligation. The

Court should therefore have followed its own case-law on non-application of the six-month rule to continuing situations (paragraph 159 of the judgment). Non-application of the six-month rule to breaches of international obligations having a continuing character, especially when we deal with such crimes as enforced disappearance, serves the important purpose of preventing the perpetrators from enjoying impunity for such acts.

11. However, the non-applicability presumption is a rebuttable one. The Court will in any case examine each situation, as indeed the Court states in paragraph 165. As noted by the International Court of Justice in the *Certain Phosphate Lands in Nauru Case*, "[i]t 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" (*Phosphate Lands in Nauru Case*, *ICJ Reports* 1992, § 32). The test for the application of the six-month rule to continuing situations is therefore different from what is set out in the reasoning in paragraphs 166 to 171. It should be asked instead whether there was any event or act which could be seen as triggering the running of time for the submission of the complaint, because for as long as there are no meaningful actions taken to address the problem of disappearances the problem persists, and the right to complain about it accordingly also persists. In other words, the issue is not whether there is an event suspending the running of time (see, *a contrario*, paragraph 171 of the judgment); it is whether there is an event which triggers the start of the six-month period. If the CMP was intended to be a proper remedy in the disappearance cases, it indeed could be properly examined in the light of the six-month rule. But this is clearly not the case.

CONCURRING OPINION OF JUDGE VILLIGER

I voted with the majority in finding violations of Articles 2, 3 and 5 of the Convention.

Nevertheless, I disagree with the majority's conclusion in which the respondent Government's preliminary objection as to the application of the six-month rule under Article 35 § 1 of the Convention is rejected (paragraph 172 of the judgment).

There can be no doubt that the disappearances amounted to a continuing situation. However, the relatives of the missing persons claiming to suffer from the continuing violation cannot wait indefinitely until they undertake a particular form of action. At some stage, the continuing situation will come to an end, and the six-month rule has to be applied. The question arises as to when this moment will be.

In the present case, this moment arose when the relatives of the missing persons had remedies at their disposal and employed them, or failed to employ them as they realised that the remedies were ineffective. The institution providing for the remedy, if I may call it this, would have been the United Nations Committee on Missing Persons ("the CMP"). It raised high hopes in 1981 when it was set up. But after a certain time, it could be seen by everyone that it was not effective, and the relatives could no longer have been expected to apply to it.

Thus, by 1984 delays had become apparent, in particular as it was only then, i.e. three years after the CMP was set up, that the rules of procedure were prepared. In the years that followed, the relatives should have realised, if necessary assisted by competent legal advice, that the CMP was not at all a body which could afford relief and which they could be expected to seise.

For me the cut-off date of the continuing period falls in the year 1987. This view, therefore, coincides with the respondent Government's objection that the six-month rule started running in the year when Turkey accepted the right of individual application before the former European Human Rights Commission.

As the relatives failed to raise their complaints then, they have not, in my view, complied with the six-month rule according to Article 35 § 1 of the Convention.

DISSENTING OPINION OF JUDGE ERÖNEN

1. Following the decision of the Grand Chamber in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009), the majority in the present case set out to establish a consistency of jurisprudence in matters relating to *ratione temporis* and the six-month rule in relation to disappearance cases, granting jurisdiction over the matter to the Court in order to end the anomalies present in the variety of rulings on the matter to date.

I have been unable to agree with the majority decision that the Court has jurisdiction to decide in the present case for the reasons I will expound on below and because I found no reason to change my views on the matter which I gave in the Chamber's judgment. On the whole I have found that, rather than clarifying the situation and the case-law on the subject as I believe was intended, the case-law precedents on the issue have become even more untenable and confusing as a result of the majority decision in this case, so that there is now a jurisprudence which is relatively prejudicial to the efficacy and consistency expected of the European Court of Human Rights.

This I found to be so in both the majority's assessment of *ratione temporis* in disappearance cases and to the application of the six-month rule, both of which I feel have been eroded and dispensed with as a result of this decision. I will devote my opinion to these two aspects of the decision and to related issues. Since I do not agree that the Court has jurisdiction in this case I do not consider it ethical or correct to voice any opinion on any of the substantive issues involved in the alleged violations of the Convention.

2. I voted against the finding of the majority rejecting the respondent Government's two preliminary objections that the Court did not have jurisdiction *ratione temporis* to entertain the case and that the application had been filed out of time under the six-month rule. It is my view that the Court does not have competence to adjudicate on the merits of the present case. I shall expand further on this opinion below. I also voted against the majority judgment to the effect that a legal interest remains in pursuing the examination of these applications for the very reason that the majority in this judgment (paragraphs 185, 186, 201, 202 and 208) have concluded that the first-named applicants in each application were among those who went missing in 1974. I do not feel it necessary to go into further detail on the lack of legal interest issue in consideration of the fact that I do not find that the Court has jurisdiction to entertain the case in view of the other two preliminary objections.

3. In conformity with my opinion that the Court does not have temporal jurisdiction, I voted against the finding that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct effective investigations into the fate of the nine missing men, who disappeared in life-threatening circumstances. As a

result, I again do not feel it correct or ethical to express any comments on the merits of these allegations or on the majority view stated in the judgment.

4. It follows therefore that for the very same reason I did not consider it in accordance with my opinion on the lack of competence *ratione temporis* and the six-month rule to commit myself to voicing any views on or making findings of a continuing violation under Article 3 in respect of the applicants, and of a continuing violation of Article 5, by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of Eleftherios Thoma and Savvas Hadjipanteli.

5. I voted with my colleagues with regard to the alleged violation of Article 5, to the effect that there has been no continuing violation by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the seven missing men, for the sake of consistency. I do not deem this to contradict in any way my opinion on the preliminary objections.

6. Similarly, the reason I voted with my colleagues (despite my opinion that the Court does not have temporal jurisdiction to deal with the merits of this application) in finding that it was not necessary to examine the complaints relating to alleged violations under Articles 4, 6, 8, 10, 12, 13 and 14 of the Convention, was simply because the Court found no reason to adjudicate on the complaints and not because I concur with the majority findings of violations under Articles 2, 3 and 5 (paragraph 211 of the judgment).

7. For the same reason, in view of my opinion that the Court does not have temporal jurisdiction and since I do not find that there is a continuing obligation, I voted against any conclusion relating to the question whether an award should be made in respect of non-pecuniary damage.

8. I voted with my colleagues with regard to the remainder of the applicants' claim for just satisfaction, with the same motive and belief as stated in point 5 above.

At this stage, I would reiterate the observations I made in the case before the Chamber. Any view I may express in this opinion is made with a view to expanding on and confirming the observations I made at that stage of the proceedings. The Grand Chamber decision in *Šilih* has not altered my views. I will also express my humble views on why I could not agree with the majority views in this particular case.

The majority accepts that under general principles applied to this case it does not have competence to examine factual events in 1974, considering them outside the Court's temporal jurisdiction.

However, the majority view notes (a) that the duty to provide an effective investigation is itself an independent violation operating separately from the substantive limb of Article 2; (b) that even if a presumption of death could be found, this would not remove the procedural obligation to investigate;

and (c) that disappearances are an "instantaneous act" which nevertheless gives rise to a continuing obligation to investigate, and that the Court therefore has jurisdiction to try the case *ratione temporis*.

While deciding on the *ratione temporis* principle I found some confusion in the assessment of the two recent cases on *ratione temporis*, *Blečić* (*v. Croatia* [GC], no. 59532/00, ECHR 2006-III) and *Šilih*.

As noted by the majority, the principles in *Blečić* state, *inter alia*:

> "77. ... the Court's temporal jurisdiction is to be determined in relation to the *facts constitutive of the alleged interference*. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction." (emphasis added)

The Court, further clarifying the principle in the *Blečić* judgment, emphasised as follows:

> "81. In conclusion, while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the Convention (see *Yağcı and Sargın v. Turkey*, 8 June 1995, § 40, Series A no. 319-A), the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX). Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility.
>
> 82. In order to establish the Court's temporal jurisdiction it is therefore essential to identify, *in each specific case, the exact time of the alleged interference*. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated." (emphasis added)

In *Šilih*, the approach on whether a procedural obligation under Article 2 exists involved the question of the detachability of the procedural obligation. For there to be a procedural duty existing under Article 2, *Šilih* states as follows (§§ 162-63):

> "... where death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
>
> ... there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
>
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account (see [*Vo v. France*], § 89) – will have been or ought to have been carried out after the critical date.
>
> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

While it is true that Turkey ratified the Convention in May 1954, it only recognised the right of individual petition regarding events occurring after 22 January 1987 and the Court's jurisdiction only in 1990. In order for *Šilih* to apply, it is also not established in the majority's decision what the "genuine connection between the death and entry into force of the Convention" is for Turkey.

In my respectful opinion, while Turkey could be bound by the Convention from 1954, the Court does not have the competence to examine any facts that occurred prior to 1987 even where the procedural obligation under Article 2 is "detachable", since according to *Šilih* (cited above) such jurisdiction to examine did not arise from any kind of *procedural acts and/or omissions occurring after the "critical date" of 1987*, which the majority has already accepted as being the operative date. Article 6 of Protocol No. 11 confirms this view. In other words the Court only has jurisdiction to examine a continuing procedural obligation occurring after 1987, since the continuing obligation would move *forwards* after the critical date, not *backwards*. Article 6 of Protocol No. 11 did not change Turkey's restrictions regarding acceptance of the Court's compulsory jurisdiction over any of its acts or omissions before 1987.

Protocol No. 11 entered into force on 1 November 1998. Article 6 of Protocol No. 11 provides:

> "Where a High Contracting Party has made a declaration recognising the competence of the Commission or the jurisdiction of the Court under former Article 25 or 46 of the Convention with respect to matters arising after or based on facts occurring subsequent to any such declaration, this limitation shall remain valid for the jurisdiction of the Court under this Protocol."

Article 6 of Protocol No. 11 in effect clearly states that the present-day Court is only competent to examine "matters arising after or based on facts occurring subsequent to" any declaration recognising the competence of the Court. Hence, in line with my views on the *ratione temporis* question, Article 6 of Protocol No. 11 clearly prohibits the Court from entertaining any case which relates to any facts occurring prior to the "critical date" of 1987.

In this respect I found the majority judgment confusing in that despite Article 6 of Protocol No. 11 binding Turkey in respect of violations occurring after 1987, the majority prefers to take 1954 as the operative date for its temporal competence to examine the alleged violations when in fact Turkey did not agree to be compulsorily bound by them or be accountable for them until the critical date of 1987. In effect, the majority accepts that while the Court does not have jurisdiction to examine complaints raised in so far as the alleged violations are based on facts having occurred before that "critical date" (paragraphs 133 to 134 of the judgment), that is before 1987, it nonetheless proceeds from its finding that Turkey was bound by the provisions of the Convention from its date of ratification of the Convention,

18 May 1954. As a result, I find that it mistakenly brings the events of 1974 and the disappearances and subsequent deaths during that time within its jurisdiction.

This is hard to reconcile with the *Xenides-Arestis v. Turkey* case ((just satisfaction), no. 46347/99, 7 December 2006), as regards *ratione temporis*, where the Court, in assessing compensation in its judgment on just satisfaction, took the operative date as the date when Turkey recognised the compulsory jurisdiction of the Court in 1990, ruling as follows (§ 38):

> "The Court will therefore proceed to determine the compensation the applicant is entitled to in respect of losses emanating from the denial of access and loss of control, use, and enjoyment of her property between 22 January 1990, the date of Turkey's acceptance of the compulsory jurisdiction of the Court, and the present time (*Loizidou* (Article 50), judgment of 29 July 1998, cited above, p. 1817, § 31)."

In my view, the majority judgment adds even more confusion to already complex *ratione temporis* issues as my comments below will further elaborate.

Presumption of death

My views in relation to this aspect remain the same as in the Chamber judgment (*Varnava and Others v. Turkey*, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 10 January 2008), in that:

> " ... I perceive no justifiable reason why a presumption of death (in the light of the most recent development in the Court's case-law), unless for reasons of sensitivity on the issue, could not have been adjudicated and acted upon accordingly. The *Blečić* principle as applied to the present case, relieves, to a certain extent, the findings on the presumption of being alive and continuing violation as expressed in the *Cyprus v. Turkey* decision on missing persons, thereby excluding the presence of an obligation of a continuing nature. I find that the disappearances and the presumption of the applicants' being dead existed as a fact before Turkey recognised the right of individual application to the Commission. That is to say, the facts constitutive of the alleged interference, and as proven, had taken place before ratification and therefore this Court is not competent *ratione temporis* to examine the effective investigation issue or any other issues pertinent to the actual *merits* of this case.
>
> In short, I feel that there is no violation of a 'continuing nature', and hence no obligation of a continuing nature. The findings of the *Cyprus v. Turkey* judgment with regard to a 'continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation' need to be interpreted in line with recent case-law, which necessitates that such a 'continuing obligation' and all consequent requirements of such an obligation, if an obligation does exist, *only exist* if the case falls within the competence of this Court *ratione temporis* – and, in my view, the present case does not.
>
> Given that the facts constitutive of the alleged interference (disappearance and subsequent presumed deaths) occurred before 28 January 1987, I do not feel that the

> Court can examine the complaints concerning the ineffectiveness of the investigation into the disappearance of the Greek Cypriots, for lack of jurisdiction *ratione temporis*."

It is not clear whether the majority decision in the present case is presuming the death of the missing persons or not, though it does appear to make obscure assumptions on this issue. Further, while the presumption of death is "not automatic" the majority notes that there is a possibility that the missing are dead and it also does this through examples of case-law where such presumptions of death were actually made (paragraph 143 of the judgment),

> "[e]ven if there was an evidential basis which might justify finding that the nine missing men died in or closely after the events in 1974 ..." (paragraph 144).

In paragraph 146 of the majority decision the Court therefore concludes:

> "... that even though a lapse of over thirty-four years without any news of the missing persons may provide strong circumstantial evidence that they have died meanwhile, this does not remove the procedural obligation to investigate."

There appears to be a contradiction when, having made a finding based on "strong circumstantial evidence" that the men may in fact be dead, the Court states in paragraph 148:

> "A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred ..."

I agree with the majority findings in the present case in paragraph 146 and with paragraph 147 to the following effect:

> "... as found in *Šilih* concerning the procedural obligation under Article 2 to investigate unlawful or suspicious deaths, the procedural obligation under Article 2 arising from disappearances operates independently of the substantive obligation."

Yet, while it is sought to distinguish the approach of *Šilih* – to the effect that the requirement of proximity of the death and investigative steps to the date of entry into force of the Convention – "*applies only in the context of killings or suspicious deaths, where the anchoring factual element, the loss of life of the victim, is known for a certainty, even if the exact cause or ultimate responsibility is not*" from the continuing nature of the procedural obligation as found in the phenomenon of disappearance cases (paragraphs 148 to 149 of the judgment), the majority have nonetheless implicitly accepted that the men are more than likely *dead*. I consider that the majority in presenting their views should have arrived at and expounded a more concrete and explicit finding on the fate of the "missing" rather than simply implicitly doing so.

Bearing the principles set out in *Šilih* in mind, even if the distinct procedural obligation, "operating independently from the substantive limb", is of a continuing nature, it is related to the facts occurring prior to the

critical date and such an obligation cannot be "detached" from the events which occurred prior to it. Conversely, even if detachable, the obligation is a part of events occurring before the critical date, and is therefore not within the Court's temporal jurisdiction.

Therefore, I feel that the observations found in paragraphs 147 to 149 in effect eliminate the reliance placed by the majority on *Šilih* and *Blečić* when arriving at its conclusions.

In line with my views that a presumption of death should be made, I also agree therefore with the majority that there is "strong circumstantial evidence that they have died" and that this itself does not prevent a procedural obligation from arising. However, where I differ is that this duty's existence depends on whether the Court does have temporal jurisdiction regarding the procedural obligation in the first place, which in line with the principles set down in the recent Grand Chamber judgment of *Šilih*, it does not.

I also concur wholeheartedly with the reasoning of Judges Bratza and Türmen in the *Šilih* case, looking beyond the "detachable" obligations of Article 2's procedural aspect:

> "Divorcing the procedural obligation from the death which gave rise to it in this manner would, in our view, be tantamount to giving retroactive effect to the Convention and rendering nugatory the State's declaration recognising the Court's competence to receive individual applications."

Even if noted (in paragraph 134) that "the applicants specified that their claims related only to the situation pertaining after January 1987, namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation", in the present case the obligation to carry out investigative measures was not triggered by "relevant new evidence or information" before this Court, since the majority position on this issue is, as I see it, still based on the fourth inter-State case findings.

Again, to reiterate, I hold the belief that, following the reasoning in *Šilih*, if a duty existed it also existed *before* January 1987. This being so, and since the duty to investigate existed *long before* the date of recognition of the jurisdiction of both the Commission and the Court (at least thirteen years), then according to Article 6 of Protocol No. 11 the obligation to investigate said to exist cannot be detached from the events prior to 1987. Even where such an obligation is accepted as "detachable", it is still outside this Court's temporal jurisdiction.

If the duty to investigate existed, it existed from 1974 and continued until and after the critical date. The *Šilih* conditions are therefore not satisfied. It is equally true that such facts are not separate or "detachable" from the events that occurred prior to 1987. Hence, in both respects, the Court has no jurisdiction to try this case.

This is what the *principle of legal certainty* requires. Difficulties and anomalies existing behind the judicial reasoning (paragraphs 132 to 150 of

the judgment) found in the present applications, result in what I consider to be an effort to bring the procedural obligation of an investigation within the jurisdiction of this Court.

I could not help but ask myself the question whether one is to assume therefore that disappearance cases like the case before us, where a presumption of death is a natural consequence of the facts before the Court, do not have a place within or are excluded from the fundamental principle of the Convention found in the *ratione temporis* rule. Another question: does the finding of the majority in paragraphs 147 to 149 mean that the *ratione temporis* principle is no longer applicable to disappearance cases?

The *ratione temporis* principle is, as is the procedural aspect of Article 2, enshrined in the Convention. It is not one that can be overridden and the findings of the majority again leave the Court open to *inconsistency in jurisprudence*. This judgment raises serious issues of legal certainty and creates further uncertainties, if the Court's temporal jurisdiction concerning compliance with the procedural obligation of Article 2 in respect of deaths that occurred before the critical date were to be regarded as open-ended. As such, these inconsistencies will not be easily remedied if, in an effort to resolve the differences between various Court decisions on this issue as concerns the Court's jurisdiction *ratione temporis* over procedural complaints under Article 2, one does not remain true to the principles and aspects of "detachability" enunciated in *Šilih* (§§ 153-63, and especially §§ 161-65).

That means, in conclusion, that the majority approach in the present case is, in my opinion "*tantamount to giving retroactive effect to the Convention and rendering nugatory the State's declaration recognising the Court's competence to receive individual applications*" (see the separate opinion of Judges Bratza and Türmen in *Šilih*).

In view of the above and Article 6 of Protocol No. 11, I find that the alleged interference referred to in this case, whether procedural or substantive, does not fall within the Court's temporal jurisdiction and that it is therefore not competent to examine these applications.

The six-month rule

As regards whether there was a "procedural obligation to investigate the fate and whereabouts of the missing men at the time of the introduction of these applications" the majority concurs with the Chamber judgment that there was no "unreasonable delay by these applicants in introducing their complaints".

In my view, here too in reality the six-month rule becomes eroded by bringing to the rule a different interpretation from the one which is already clear cut. While I accept the majority's interpretation of "reasonable expedition" this is entirely a relative issue pertaining to the present case and

has no bearing on the *Baybora and Others* (*v. Cyprus* (dec.), no. 77116/01, 22 October 2002) applications. While accepting that there were difficulties for the applicants in realising the ineffectiveness of the United Nations Committee on Missing Persons ("the CMP"), the Court appears to disregard the possibly even more serious difficulties and "special circumstances" occurring during the intervening years for the Turkish Cypriot applicants on account of "the uncertainty and confusion which frequently mark the aftermath of a disappearance" (paragraphs 162 to 166 of the judgment). No allowances appear to have been made for Turkish Cypriot "*disappearance cases, where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities,* [and where] *the situation is less clear cut*."

Whereas a date is given – "the end of 1990" – when the applicants were bound to know that the CMP was ineffective, the majority fail, with all due respect to my colleagues, to give the same understanding to Turkish Cypriot applicants, who in fact waited for an official confirmation through the Court judgment, that is the judgment of 10 May 2001 in the fourth inter-State case. Here I find it necessary to reiterate my opinion in the Chamber judgment on this issue:

> "(a) The intervening Government of Cyprus recognised the right to individual petition to the Commission on 1 January 1989. The Turkish Cypriot applicants could not have applied earlier for redress in respect of their claims. Similarly Greek Cypriot applicants could not have applied, until Turkey's ratification in 1987, to the Commission and, in January 1990, to the Court.
>
> (b) The applicants in the present case, as well as those in the *Karabardak and Others* case, could not have known of the decisions taken in the inter-State cases. The first, second or third inter-State cases did not really deal with the issues of continuing violation. It was in 2001, in the fourth inter-State case, that the notion of continuing violation in disappearance cases was first expounded. In any event, no applicant could have applied until 1989 or 1990, respectively. The present applicants lodged their application in 1990. The *Karabardak* applicants made their application in 2001, probably after obtaining legal advice on the issue. The legal positions, in both cases, are the same.
>
> (c) As pointed out in the *Akdivar* case (*Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1210) prevailing 'special circumstances' need to be taken into account when considering whether remedies are actually available. Considering the climate in Cyprus in both 1963-4 and 1974, one cannot say with certainty that such redress was readily available to trace the disappearances (see also *Cyprus v. Turkey*, § 99).
>
> (d) The CMP did not start functioning until 1981. The CMP was concerned with collecting files on both Greek and Turkish missing persons' families, so reliance was probably placed on the outcome of the CMP investigations and no other redress claimed. Understandably, such families of missing persons were not aware of the mandate of the CMP as it stood at the time and perhaps only became aware of its

functions and views on its work following the fourth inter-State judgment in May 2001. It follows then that the fact that the applicants in the present case applied to the Commission three days after Turkey recognised the Court's jurisdiction is, with all due respect to my colleagues, immaterial. *Legally* there is no difference between the delays of the *Karabardak* applicants and the present applicants in their applications to the Court and the Commission respectively. If the *Karabardak* and *Baybora* applications were rejected for being introduced out of time under Article 35, so too should the present applications have been. The fact that the events they complained of took place during the inter-communal strife of the 1960s and not in 1974 makes no difference to the *legal* situation."

While the majority claim to have given "careful consideration" to the families of the Turkish Cypriots missing in inter-communal strife in the 1960s, stating, in paragraph 171:

"[The Court] is particularly sensitive to any appearance that differing, and inconsistent, approaches have been taken in these cases. Nonetheless, it is not persuaded that this is so. The Chamber decisions in the above-mentioned cases are very concise; and in the absence of arguments from the parties, there is no explanatory reasoning. Their conclusion, however, that the applications were introduced out of time is in line with the principles and case-law outlined above."

I do not have the impression that this is so. I consider that there is a clear contradiction in adding that the conclusion "is in line with the principles and case-law". Either there is no "explanatory reasoning" or the "conclusion is in line with the principles and case-law". It cannot be both since the *Baybora and Others* decisions are described as "concise". In effect, therefore, the majority's assessment here of the *Baybora and Others* case (paragraph 171 of the judgment) sadly closes the door on Turkish Cypriot applications.

For the sake of clarity and conformity of case-law, the date of the fourth inter-State judgment of this Court, when the CMP's ineffectiveness was actually discussed and addressed, would have been the more appropriate date, not "the end of 1990".

The six-month rule is a principle of law, *a legal fact*, and to be abided by whether three years or thirteen years have passed. It makes no difference. If there is "undue delay" in three years, then there is also "undue delay" in thirteen years. The reasoning given by the majority to justify both the present application and the *Baybora and Others* rulings is in my opinion not in conformity with *Šilih*, since as was found in *Baybora and Others*, so too the present applications should have been lodged within the six-month period. Or, taken vice versa, a decision should have been given in *Baybora and Others* in conformity with the present views.

As stated above, the *Šilih* judgment (cited above, § 165) attaches *importance* (a) *to the fact that the events giving rise to the procedural obligation had occurred a short time before the critical date of ratification and* (b) *to the fact that the investigations had begun after ratification.* In this respect, in *Šilih* the Court notes that the death of the applicants' son had

occurred "only a little more than a year before the entry into force of the Convention in respect of Slovenia" and also to the fact that all investigations had begun within a *short time* after the critical date. Therefore, since the procedural duty to investigate occurred *shortly after* ratification by Slovenia, the Court there found it had jurisdiction. It should be noted that unlike the respondent Government in the present case, Slovenia had recognised the compulsory jurisdiction of the European Human Rights Commission and the European Court of Human Rights from the date when it deposited the instrument of ratification of the Convention, that is on 28 June 1994.

For the reasons I have stated, the present applications were not filed in conformity with the six-month rule. Regrettably therefore, I cannot agree with the majority view, and conclude that the judgment on this issue also creates a serious contradiction in European Convention law and precedents by stating:

> "Accordingly, by applying to the Court in January 1990, these applicants acted, in the special circumstances of their cases, with reasonable expedition for the purposes of Article 35 § 1 of the Convention." (paragraph 170)

Without committing myself to comments on the merits of this case and without prejudice to my above views, I find it important to make some reference to the views expressed with regard to the CMP and the burden of proof.

The United Nations Committee on Missing Persons

In my view, relevant information regarding the functions of the United Nations Committee on Missing Persons ("the CMP") which was not available to the Grand Chamber in the inter-State case has been presented in these applications. Yet a simple reference (paragraph 85 of the judgment), perfectly understandable for establishing exactly what the CMP is and noting its functions, is merely taken from the inter-State case judgment delivered in 2001 and is insufficient to note the important developments since that date (paragraphs 86 to 87 of the judgment). It does an injustice to the large quantity of information provided by the respondent Government since that judgment was delivered.

Even if the CMP is still considered ineffective to meet the purposes of Article 2, I find it is inconceivable that there is nothing more to say about it in the light of all the material provided since the 2001 decision. The majority judgment itself makes no *new finding* on any aspect of its work. I do not find that the development of the CMP's functions and its relevance as part of an "effective investigation", even after the receipt of new information and evidence, have been sufficiently reassessed. This is made more evident by the fact that while the Court has made extensive use of facts, information and case-law, etc. relating to *ratione temporis* jurisdiction in disappearance cases before other international bodies especially

(paragraphs 88 to 102 of the judgment), it has not done the same with regard to the CMP information provided.

My views are supported by the recent important developments which have shown the role and activities of the CMP as an imperative and indispensable factor towards the implementation of effective investigations as required by Article 2. This fact was emphasised in a decision taken at the 1051st human rights meeting of the Committee of Ministers on 19 March 2009 (see paragraph 88 above).

The Committee of Ministers, supervising the execution of the judgment in the fourth inter-State case, noted that the "sequence of measures within the framework of the effective investigations" necessitated that any other form of effective investigation should not jeopardise the CMP's mission and considered it crucial that the current work of the CMP be carried out under the best possible conditions and without further delay. In doing so it especially underlined the importance of preserving all information obtained during the Programme of Exhumation and Identification. It noted, in effect, that the CMP's mission is *part of* and *not separate* from any other required investigation and must take precedence over any other "effective investigation". In my understanding, the Committee of Ministers' decision emphasises that the CMP's work on the missing would need to be completed before any other kind of additional investigation can be initiated.

The burden of proof

I would like to comment briefly too on the references to the burden of proof in the present applications:

The majority have found that "the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt – though this also applies equally in inter-State cases" (paragraph 182 of the judgment).

However, I consider that this view fails to give a reasoning as to why this is so, resulting in a situation where any differences between the two degrees of proof are not dealt with, and therefore fails to comment on whether the burden of proof has been discharged in these particular individual cases.

In inter-State cases, States do not have to prove grievance or injury. In individual cases however, such issues have to be proved. Equating individual applications with inter-State applications on the same level is, I feel, an *error in law* which has in effect eliminated the *standard of proof* necessary to establish a violation in individual applications.

As to the shifting of the burden of proof (paragraph 184 of the judgment), in individual applications the burden of proof only shifts to the respondent Government if the applicants have, in the first place, discharged their burden and initially *proven* the facts relied upon to establish their claim for redress. This, in my opinion, is not the case in the present applications.

In effect the inter-State case findings have been taken as part and parcel of the proof of these applications and have been applied without separately examining and making separate findings of fact in these individual applications.

While stating that "[t]here is no basis on which it can be assumed that the missing men in the present case were included in the Court's [inter-State case] findings" (paragraph 181), the judgment then goes on to say:

> "In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case ..." (paragraph 186)

This is a discrepancy clearly showing that the burden of proof incumbent on the applicants in the present case has not been assessed, the Court having merely adopted the inter-State case judgment on this issue. In this part of the majority judgment (paragraphs 181-86), and especially in paragraph 185, there is an indirect finding of fact as regards what occurred in 1974, which the majority have already accepted as being outside its temporal jurisdiction. With respect, this I sense is due to the fact that while it is sought to establish a "detachable" obligation under the procedural aspect of Article 2, the judgment nonetheless relies on facts *outside* of the Court's temporal jurisdiction, considering them already established as existing, when this is not so.

Damages and costs

On a final note, I have found the respondent Government justified in their preliminary objections and that this Court lacks jurisdiction, *ratione temporis*, to entertain this case. Therefore, I do not see any purpose in giving my opinion as to whether an "impact of the violation ... regarded as being of a nature and degree as to have impinged so significantly on the moral well-being" of the second applicants can be attributable to acts or omissions of the respondent Government in violation of the Convention.

Since I do not concur with the findings that the facts of the applications can be a subject for assessment by the Court, I cannot possibly agree with the majority's assessment under Article 41 on the issue of just satisfaction claims, whether in whole or in part.

In consideration of all of the above, I find also that there should be no award as to costs since this Court lacks jurisdiction and the applications are time-barred by the six-month rule.