CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

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

10 January 2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Varnava and Others v. Turkey,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Boštjan M. Zupančič, *President,*
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Egbert Myjer,
David Thór Björgvinsson,
Isabelle Berro-Lefèvre, *judges,*
Gönül Başaran Erönen, ad hoc *judge,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 6 December 2007,

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 Cypriot nationals, Andreas and Giorghoulla Varnava no. 16064/90), Andreas and Loizos Loizides[1] (no. 16065/90), Philippos Constantinou and Demetris K. Peyiotis (16066/90), Demetris Theocharides and Elli Theocharidou[2] (no. 16068/90), Panicos and Chrysoula Charalambous (no. 16069/90), Eleftherios and Christos Thoma (no. 16070/90)[3], Savvas and Androula Hadjipanteli (no. 16071/90), Savvas and Georghios Apostolides (no. 16072/90) and Leontis Demetriou and Yianoulla Leonti Sarma (16073/90) on 25 January 1990.

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

3. The applicants alleged that the first applicants in the above applications had been detained by Turkish military forces from 1974 and that the Turkish authorities had not accounted for them since. They invoked 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

[1] See paragraph 11.
[2] See paragraph 10.
[3] See paragraph 9.

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 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 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 applicant in application no. 16068/90, had died on 1 April 2005 and that his 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 his 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 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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. General context

13. 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. At the time of the Court's consideration of the merits of the *Loizidou v. Turkey* case in 1996, there was a Turkish military presence of more than 30,000 personnel throughout the whole of the occupied area of northern Cyprus which was constantly patrolled and had checkpoints on all main lines of communication (*Loizidou v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI).

14. In November 1983 there was the proclamation of the "Turkish Republic of Northern Cyprus" (the "TRNC") and the subsequent enactment of the "TRNC Constitution" on 7 May 1985, which was condemned by the international community. On 18 November 1983 the United Nations Security Council adopted Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus. In November 1983 the Committee of Ministers of the Council of Europe decided that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus and called for respect of the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus.

15. According to the respondent Government, the "TRNC" is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey, and the administration in northern Cyprus has been set up by the Turkish-Cypriot people in the exercise of its right to self-determination and not by Turkey. Notwithstanding this view, it is only the Cypriot government which is recognised internationally as the government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations.

16. United Nations peacekeeping forces ("UNFICYP") maintain a buffer-zone. A number of political initiatives have been taken at the level of the United Nations aimed at settling the Cyprus problem on the basis of institutional arrangements acceptable to both sides.

17. Furthermore, and of relevance to the instant application, in 1981 the United Nations Committee on Missing Persons ("CMP") was set up to "look into cases of persons reported missing in the inter-communal fighting

as well as in the events of July 1974 and afterwards" and "to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are still alive or dead, and in the latter case approximate times of death". The CMP has not yet completed its investigations (see further below paragraph 101).

B. The previous inter-State applications *Cyprus v. Turkey*

18. The events of July and August 1974 and their aftermath gave rise to four previous applications by the applicant Government against the respondent State under former Article 24 of the Convention.

1. and 2. The first (no. 6780/74) and second (no. 6950/75) applications were joined by the Commission and led to the adoption on 10 July 1976 of a report under former Article 31 of the Convention ("the 1976 report") in which the Commission expressed the opinion that the respondent State had violated Articles 2, 3, 5, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1.

3. The third application (no. 8007/77) lodged by the applicant Government was the subject of a further report under former Article 31 adopted by the Commission on 4 October 1983 ("the 1983 report"). In that report the Commission expressed the opinion that the respondent State was in breach of its obligations under Articles 5 and 8 of the Convention and Article 1 of Protocol No. 1. On 2 April 1992 the Committee of Ministers adopted Resolution DH (92) 12 in respect of the Commission's 1983 report. In its resolution the Committee of Ministers limited itself to a decision to make the 1983 report public and stated that its consideration of the case was thereby completed.

4. The fourth application, *Cyprus v. Turkey* [GC] (no. 25781/94, ECHR 2001-IV) concerned four broad categories of complaints: alleged violations of the rights of Greek-Cypriot missing persons and their relatives; alleged violations of the home and property rights of displaced persons; alleged violations of the rights of enclaved Greek Cypriots in northern Cyprus; alleged violations of the rights of Turkish Cypriots and the Gypsy community in northern Cyprus. As regarded the missing persons and their relatives, the Court adopted the findings of fact of the Commission bearing in mind the latter's careful analysis of all material evidence including the findings reached by it in its 1976 and 1983 reports (Comm. Rep., 4 June 1999, annexed to the Court's judgment). Like the Commission, the Court did not consider it appropriate to estimate the number of persons who fell into the category of "missing persons". The Commission's findings had been summarised as follows;

> "25. The Commission found that the evidence submitted to it in the instant case confirmed its earlier findings that certain of the missing persons were last seen in Turkish or Turkish-Cypriot custody. In this connection, the Commission had regard to

the following: a statement of Mr Denktaş, "President of the TRNC", broadcast on 1 March 1996, in which he admitted that forty-two Greek-Cypriot prisoners were handed over to Turkish-Cypriot fighters who killed them and that in order to prevent further such killings prisoners were subsequently transferred to Turkey; the broadcast statement of Mr Yalçin Küçük, a former Turkish officer who had served in the Turkish army at the time and participated in the 1974 military operation in Cyprus, in which he suggested that the Turkish army had engaged in widespread killings of, *inter alia*, civilians in so-called cleaning-up operations; the Dillon Report submitted to the United States Congress in May 1998 indicating, *inter alia*, that Turkish and Turkish-Cypriot soldiers rounded up Greek-Cypriot civilians in the village of Asha on 18 August 1974 and took away males over the age of 15, most of whom were reportedly killed by Turkish-Cypriot fighters; the written statements of witnesses tending to corroborate the Commission's earlier findings that many persons now missing were taken into custody by Turkish soldiers or Turkish-Cypriot paramilitaries.

26. The Commission concluded that, notwithstanding evidence of the killing of Greek-Cypriot prisoners and civilians, there was no proof that any of the missing persons were killed in circumstances for which the respondent State could be held responsible; nor did the Commission find any evidence to the effect that any of the persons taken into custody were still being detained or kept in servitude by the respondent State. On the other hand, the Commission found it established that the facts surrounding the fate of the missing persons had not been clarified by the authorities and brought to the notice of the victims' relatives."

19. The Court held that there had been no breach of Article 2 of the Convention by reason of an alleged violation of a substantive obligation under that Article in respect of any of the missing persons (paragraph 130); that there had 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 whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances (paragraph 136); that no breach of Article 4 of the Convention had been established (paragraph 141); that there had 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 whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance (paragraph 150); that no breach of Article 5 of the Convention had been established by virtue of the alleged actual detention of Greek-Cypriot missing persons (paragraph 151); and that it was not necessary to examine the applicant Government's complaints under Articles 3, 6, 8, 13, 14 and 17 of the Convention in respect of the Greek-Cypriot missing persons (paragraph 153); that there had been a continuing violation of Article 3 of the Convention in respect of the relatives of the Greek-Cypriot missing persons (paragraph 158); and that it was not necessary to examine whether Articles 8 and 10 of the Convention had been violated in respect of the relatives of the Greek-Cypriot missing persons, having regard to the Court's conclusion under Article 3 (paragraph 161).

C. The facts of these cases

20. The facts are disputed by the parties.

1. The applicants' submissions on the facts

a. Application no. 16064/90: Andreas Varnava

21. The first applicant, an ironmonger, was born in 1947; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His wife, the second applicant, was born in 1949 and resided in Lymbia.

22. The applicants were represented by Mr. Achilleas Demetriades, a lawyer practising in Nicosia, under an authority signed by the second applicant in her own name and on behalf of the first applicant.

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. He continued his service at the outposts of Lymbia until 8-9 August 1974. On 8-9 August 1974 all the reserve soldiers of the 305 Reservists Battalion, among them the applicant, were brought to the area of Mia Milia and undertook the manning of Cypriot outposts along the front line with 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 having air cover, launched an attack against the Cypriot area where the applicant and his battalion were serving, in order to capture the area from them. The Cypriot area line of defence was broken through and the Turkish military forces began advancing towards the area of Mia Milia and as a result the Cypriot forces began retreating. During the retreat that followed, the Cypriot forces dispersed in all directions. After a while the area around was captured by the Turkish military forces and the applicant was cut off in it. As a result the trace of the applicant was lost and he is today still considered to be missing.

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 Turkish authorities and was freed, stated that at Adana prison in Turkey, where he had been taken on 31 August 1974 and held, there were another 40 persons in the same room for 3-4 days. Among them was the applicant. After the said period they were split up and ever since then he has not seen the applicant again.

b. Application no. 16065/90: Andreas Loizides

26. The first applicant, a student, was born in 1954; he has been considered missing since 1974, having been taken into captivity by the

Turkish Army during their military action in Cyprus in 1974. His father, the second applicant, was born in 1907 and resided in Nicosia.

27. The applicants are represented by Dr. Kypros Chrysostomides, a lawyer practising in Nicosia, under an authority signed by the second applicant in his own name and on behalf of the first applicant.

28. In July 1974 the first applicant was serving as a Second Lieutenant in the 1st Company of the 256 Infantry Battalion stationed at Xeros, which took part in various operations against the Turkish forces. On about 30 July 1974 the battalion moved up to the Lapithos area in order to support the Greek Cypriot forces there. The soldiers were split up into various groups and the applicant was in charge of one of these. The applicant's group, consisting of ten men in all, including Stelios Christofi Onoufriou and Xenophon Christoforou (both now missing), as well as Nakis Nicolaou and Petros A. Hadjiyianni, was ordered to take up positions on the Lapithos heights. During their stay at Lapithos the Greek Cypriot forces were continuously attacked by the Turkish forces from all sides. The Greek Cypriot forces remained at their posts defending them until 5 August 1974.

29. On 5 August 1974 Turkish forces launched a strong attack from all sides against the Greek Cypriot forces' positions while other Turkish troops managed to encircle Lapithos. Because of Turkish superiority in manpower and armour the Greek Cypriot forces were ordered to retreat towards the centre of the village where the Company base was. The applicant arrived with his comrades at the centre of the village and was informed by the inhabitants that Lapithos was surrounded by Turkish troops. Then they hid their weapons in an orchard and subsequently put on civilian clothes which they found in various houses. In the afternoon of 5 August 1974 the applicant with some comrades attempted to break through the Turkish lines and arrive at the Cypriot Government controlled areas. This attempt was unsuccessful and with the exception of Nakis Nicolaou they all returned to Lapithos again where they spent the night. At about 09.00 hours on 6 August 1974 Turkish troops entered Lapithos and started extensive searches from house to house. The applicant and all his comrades were warned by the inhabitants of the village about the searches and they dispersed in order to avoid capture. Since then none of the members of the group has seen the applicant again.

30. Nicos Th. Tampas of the 256 Infantry Battalion and leader of the first group which was manning the Lapithos heights at about 5 August 1974 in a statement mentioned that at approximately 21.00 hours on 6 August 1974, while he was walking in Lapithos looking for his comrades, he entered a warehouse. In it he found the applicant looking after Georghios Allayiotis who was wounded in the head. After talking for a little while with the applicant he went away leaving him and Georghios Allayiotis there. That was the last time that he saw the applicant. He was arrested by the Turks on 9 August 1974 while he was in Lapithos. He was detained in various prisons in Cyprus and Turkey and was released on 22 October 1974.

31. Christodoulos Panyi of Vatyli, now of Strovolos, in his statement declared that while he was a prisoner in the Adana prison he saw and recognised the applicant whom he had known earlier.

c. Application no. 16066/90: Philipos Constantinos

32. The first applicant, a student, was born in 1954; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His father, the second applicant, was born in 1929 and resided in Nicosia.

33. The applicants are represented by Dr. Kypros Chrysostomides under an authority signed by the second applicant in his own name and on behalf of the first applicant.

34. In July 1973 the first applicant enlisted with the National Guard in order to do his national service. He was posted with the 70 Engineers Battalion which was stationed at the site of the former British Military Hospital (B.M.H.) in Nicosia. On 5 August 1974, a section of the battalion consisting of 48 men, including the applicant, was sent to Lapithos on a specific mission in the Lapithos and Karavas area (Kyrenia district). The mission began at about noon and finished at about 18.00 hours on the same day. After receiving instructions from the group leader the men spent the night at Lapithos and intended to complete the mission the following morning.

35. At about 04.30 hours 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 Kyrenia district) where they would all meet. The soldiers split up into three groups under the respective command of the platoon leaders. The applicant was in one of the groups which intended to withdraw following a route along the coast.

36. The men first reached the main Nicosia-Kyrenia road near the "Airkotissa" restaurant. While they were having a short rest, they heard shouting and the group leader sent the applicant and another soldier to investigate. As they had not returned after about 15 minutes the remainder of the group left for Panagra (also in the Kyrenia district). On their way there, they were ambushed by Turkish soldiers and amidst the fighting and confusion that followed, the remaining group dispersed. Three soldiers from this group, Petros Constantinou (of Morphou, now of Moniatis, Limassol), Panayiotis Alexandrou (of Pera Chorio Nisou, Nicosia) and Manolis Manoli (of Lapithos, now of Engomi, Nicosia), managed to reach their destination. Until that time when the group dispersed, none of its members including the applicant, had been killed, injured or captured by the Turks.

37. Costas A. Sophocleous, of Nicosia, stated that, when he was a prisoner in Turkey from 30 July until 28 October 1974, he met the applicant. They were together in the same prison in Turkey and were subsequently

transferred to Cyprus whereupon the said Costas A. Sophocleous was released but not the applicant.

38. Alexandros Papamichael, of Limassol, who was a prisoner in Adana, Turkey, stated that he recognised the first applicant from a photograph that was shown him by the second applicant and he had been with him in the same prison.

39. 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

40. The first applicant, a photographer, was born in 1953; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His mother, the second applicant, was born in 1914 and resided in Nicosia.

41. The applicants are represented by Mr. Achilleas Demetriades under an authority signed by the second applicant in her own name and on behalf of the first applicant.

42. On 20 July 1974 the first applicant enlisted as a reservist in Nicosia. He was posted in the 1st Company of the 301 Infantry Battalion commanded by Mr. Costas Papacostas. On 21 July he telephoned his mother and told her that he was well and that he was going to be moved to the Kyrenia district. Indeed 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.

43. At about 04.30 hours on 26 July 1974 the 1st Company came under attack from the Turkish Cypriot villages of Krini-Pileri. The Turkish military forces that carried out the attack consisted of a paratroops battalion, twenty tanks, as well as high-angle guns. They succeeded in breaking through the Greek Cypriot lines and infiltrated the right flank of the 1st Company in order to encircle it and enclave its men. The commander ordered the Company to regroup at the Greek Cypriot village of Sysklepos. There they were ordered by their battalion to regroup again at Kontemenos where they arrived at about 15.00 hours. 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.

44. Mr. Nicos Nicolaou of Strovolos, who was a prisoner at Adana prison (Turkey) in September 1974, stated that one day, when the prisoners were in the yard, a Turk was calling their names. Among other names, he heard the name of the applicant. He saw the applicant whom he happened to know previously. As the applicant was going back to his cell Mr. Nicolaou noticed that he was lame in one leg. On 11 September 1974 Mr. Nicolaou was taken

to Antiyiama prison (Turkey) and since then he has not seen the applicant again.

e. Application no. 16069/90: Panicos Charalambous

45. The first applicant, a student, was born in 1955; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His mother, the second applicant, was born in 1935 and resided in Limassol.

46. The applicants are represented by Dr. Kypros Chrysostomides under an authority signed by the second applicant in her own name and on behalf of the first applicant.

47. In 1972 the first applicant enlisted in the National Guard to do his military service. He was subsequently promoted to sergeant.

48. On 14 July 1974 the applicant visited his relations at Polemidhia and told them that he would be demobilised on 20 July. He returned to his unit on the same day. On 19 July 1974 he telephoned his father and told him that he would not be released after all because of the coup that had taken place in the meantime. On 22 July 1974 the applicant's father was informed by Nicos Hadjicosti, a Limassol factory owner, that he had seen his son at the company's headquarters at Synchari and that he was well. On 23 July 1974 the father of the applicant was informed by Andreas Komodromos that the applicant had left Synchari with the men of the Headquarters Company and had gone to Aglandjia.

49. On 24 July 1974 Nikiforos Kominis with 17 soldiers, including the applicant and Efthymios Hadjipetrou, set out from Aglandjia in two vehicles to reconnoitre the ground of the Koutsoventis-Vounos area. Among them were Phaedros Roussi and Yiannis Melissis. After Kominis had marked the Turkish positions on paper, he went at about 12.00 hours to the headquarters of one of the Commando Units in order to relay by telephone the results of the reconnaissance mission. After twenty minutes three buses were seen driving on a street from the direction of Vounos village. At about the same time a Greek officer by the name of Votas accompanied by three other soldiers went near the men of the reconnaissance patrol. The officer ordered three or four soldiers to come down on the street and search the buses. The buses were full of Turkish soldiers who started firing at the Greek-Cypriot men as soon as they became aware of their nationality. 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, which he did. After that the applicant was not seen again by his unit.

50. 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 were chatting 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 the applicant's father which he forgot in his pocket in the clothes that he changed at the Hotel and Catering School in Nicosia. All those clothes belonging to the prisoners were burned.

51. 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. The photograph shows Cypriot prisoners transported to Turkey on a Turkish destroyer in July 1974.

f. Application no. 16070/90: Eleftherios Thoma

52. The first applicant, a car mechanic, was born in 1951; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His father, the second applicant, was born in 1921 and resided in Strovolos.

53. The applicants are represented by Mr. Achilleas Demetriades under an authority signed by the second applicant in his own name and on behalf of the first applicant.

54. 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 stationed at Glykiotissa, Kyrenia, with Captain Michael Polycarpos in charge.

55. On the morning of 20 July 1974 Turkish military forces, supported by naval units and having air cover, succeeded in landing with their armour. All the men of the Headquarters Company, including the applicant, were trying during the whole of the day to prevent the Turkish landing which was taking place in the area of "Pikro Nero", Kyrenia. At around 12.00 hours on 21 July the Turkish military forces which had landed, supported by tanks and having air cover, attacked the Cypriot forces that were defending the area. Owing to the superiority of the Turkish military forces in men as well as in 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 (who went missing with 40-50 other soldiers, including the applicant serving as the commander's driver) 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 15.00 hours on 22 July 1974, Turkish military forces surrounded the Cypriot forces in the ravine (between Ayios Georghios and Templos) and opened fire against them with all their guns. Then the commander ordered a counter-attack intending to break through the Turkish military forces' lines and at the same time to retreat towards Kyrenia. During the counter-attack and the retreat the applicant's trace was lost.

56. On 4 September 1974 the "Special News Bulletin" - a daily issue of 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. He toured all the prisoners-of-war camps in the area of the island under the Turkish control, in order to ascertain the needs of the prisoners." In that photograph four of the prisoners were identified. Among them was the first applicant who was identified by the second applicant.

57. 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 been together at secondary school.

58. All above-mentioned prisoners had been taken to Adana prison and since that time the applicant had been missing.

g. Application no. 16071/90: Savvas Hadjipanteli

59. The first applicant,[1] a bank employee, was born in 1938 and lived at Yialousa; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His wife, the second applicant, was born in 1938 and resided in Nicosia.

60. The applicants are represented by Dr. Kypros Chrysostomides under an authority signed by the second applicant in her own name and on behalf of the first applicant.

61. On 18 August 1974 about three or four saloon cars as well as a bus and two tanks, all full of Turkish and Turkish Cypriot soldiers turned up at Yialousa and stopped near the police station, along the main road. The soldiers got out of their vehicles and ordered all those who were there to gather at the nearby coffee-house of Christos Malakounas. About 35 persons gathered there. Subsequently, 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 starting 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 and parked near the police station. A number of Turks got off, marched to Malakounas coffee-house and asked for the lists. Another group of Turkish soldiers were 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. The said Greek Cypriots were still missing.

---

[1] The body of Savvas Hadjipanteli has recently been found (see paragraph 89). While according to the established practice of the Court a deceased person cannot introduce an application, for the sake of convenience Savvas Hadjipanteli will continue to be referred to as one of the first applicants, and as one of the missing persons, in the text of this judgment.

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

63. According to the applicants, Representatives of the International Red Cross in Cyprus visited Pavlides Garage in the Turkish-occupied sector of Nicosia and on 28 August 1974 recorded the names of 20 Greek Cypriots held there, including the nine persons from Yialousa (citing document EZY284D).[1] Costas M. Kaniou, Sofronios Mantis, 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.

64. 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 in order to search and seal the building. They all entered the building. 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, after having shut and sealed the outside door. After 10-12 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 had, but his personal keys were not included. The Turkish Cypriots took the contents of the safe, sealed the gate and left.

h. Application no. 16072/90: Savvas Apostolides

65. The first applicant, a moulder, was born in 1955; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His father, the second applicant, was born in 1928 and resided in Strovolos.

66. The applicants are represented by Mr. Achilleas Demetriades under an authority signed by the second applicant in his own name and on behalf of the first applicant.

67. In 1974 the first applicant was doing his national service in the 70 Engineers Battalion stationed at the site of the former British Military Hospital (B.M.H.) in Nicosia. On 5 August 1974 a section of the battalion consisting of 48 men, including the applicant, was sent to Lapithos on a specific mission in the Karavas and Lapithos area. The mission began at about noon and was completed at about 18.00 hours the same day. After receiving instructions from the section leader, Efstratios Katsoulotou, the men spent the night at Lapithos and intended to complete their mission the following morning. At about 04.30 hours on 6 August 1974 the Turkish military forces launched a full-scale attack from all sides in the area of

[1] The document provided by the applicants listed 20 names. The name of Savvas Hadjipanteli was not, however, amongst them.

Karavas and Lapithos. The Commander of the Engineers ordered his men to split up into three groups, withdraw towards Vasilia and meet there. The three groups set off intending to reach the prearranged point. On their way they were ambushed by the Turkish military forces. Because of the Turkish military forces' fire and the confusion that followed all the Engineers dispersed. Up to the time of the dispersion no member of the group had been killed, injured or captured by the Turkish military forces.

68. Later on Mr. Costas Themistocleous of Omorphita, now of Nicosia, who was taken as a prisoner to Adana prison in Turkey, saw the applicant there on or about 17 October 1974, while he was about to return to Cyprus. They did not speak to each other but waved. Mr. Themistocleous recognised the applicant since he had known him since they were children.

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

69. The first applicant, a worker, was born in 1947; he has been considered missing since 1974, having been taken into captivity by the Turkish Army during their military action in Cyprus in 1974. His wife, the second applicant, was born in 1949 and resided in Limassol.

70. The applicants are represented by Mr. Achilleas Demetriades under an authority signed by the second applicant in her own name and on behalf of the first applicant.

71. On 20 July 1974, following the general mobilisation, the first applicant enlisted as a reservist in the 399 Infantry Battalion stationed at Bogazi, Famagusta. He was put in the Support Company of the Battalion (B.C.S.C.). On 20 July the battalion captured the Turkish Cypriot village of Chatos. On 22 July the battalion moved to the Mia Milia area to reinforce the Greek Cypriot forces there and to man the Greek-Cypriot outposts on the front line.

72. On the morning of 14 August 1974 Turkish military forces, supported by tanks and having air cover, launched a heavy attack against the Greek-Cypriot forces in the area, where the applicant was with his battalion, intending to occupy the area. Owing to the superiority of the Turkish military forces the Greek-Cypriot defence line was broken, the Turkish military forces began to advance towards the Mia Milia area, and the Greek Cypriot forces began to retreat. The area was, in a short while, occupied by the Turkish military forces and the applicant was enclaved in it. His trace was lost.

73. The ex-prisoner of war, Mr. Costas Mena of Palaekythro, now at Koracou, stated that during his detention at Antiyama, Turkey, he saw the applicant who was detained in cell-block No. 9. On 18 October 1974 all the prisoners at Antiyama were taken to Adana. There they were all lined up in four rows. A Turkish military officer walked in front of the line and picked out some of the prisoners, who were taken away from the line. From the first row the applicant was picked out and taken away. Since then Mr. Mena has not seen the applicant ever again and he has been missing until today.

2. The respondent Government's submissions on the facts

74. 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 for Savvas Hadjipanteli, were military personnel who died in action in July-August 1974.

75. The 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 Committee on Missing Persons (CMP) in Cyprus during 1994 and 1995. In these files there were no assertions that these people had been seen in any of the alleged prisons in Turkey. The names of the alleged witnesses listed in application nos. 16064/90 (Christakis Iannou), 16065/90 (Christodoulos Panayi), 16066/90 (Costa Sophocleous), 16068/90 (Nicos Nicolaou), 16069/90 (Yiannis Melissis), 16070/90 (Efstathios Selefcou), 16073/90 (Costas Themisthocleous) and 16073/90 (Costas Mena) were not cited in support. The alleged sightings were therefore without foundation.

76. As regarded Savvas Hadjipanteli (no. 16071/90), who was a civilian, the Government noted that the International Red Cross 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 is only a reference to witnesses seeing the key case which he was alleged to carry continually 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 were handed over to the Greek-Cypriot authorities.

77. 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

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

a. Varnava 16064/90 and Sarma 16073/90

79. 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 Turkish armed forces launched the attack which gained them control over the whole of northern and eastern Cyprus by 16 August. The attack on Mia Milia involved ground forces supported by tanks and air cover. 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 controlled the entire surrounding area. Many Greek Cypriot soldiers, including the two applicants, were cut off and completely surrounded. They could not have escaped as the intervening Government would have known of their fate. If they were either killed or wounded in the area under Turkish control, the respondent Government was under an obligation to explain what happened to them.

b. Loizides 16065/90

80. This first applicant was in charge of soldiers amongst those defending Lapithos. After the Turkish forces encircled Lapithos, the Greek-Cypriot forces were ordered to retreat. The applicant's group hid their weapons, put on civilian clothing and unsuccessfully tried to break out of the village. When the Turkish forces entered the village next morning, the applicant's group dispersed to avoid capture. At about 21.00 hours on 6 August, the applicant was seen by Nicos Th. Tampas in a warehouse tending a soldier injured in the head (George Allayiotis, also still missing). 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 16066/90

81. Under attack from the Turkish army, the first applicant's unit was ordered to split into three group's and withdraw westwards. The applicant's group reached the Nicosia-Kyrenia road, 200 metres from the Airkotissa restaurant where they had a short rest. The applicant and another man were sent to investigate shouting coming from the restaurant. After 15 minutes when they did not return, the group left for Panagra. They were ambushed en route – six of them managed to escape and the rest were all missing. At

the time that the applicant and the other soldier were sent to the restaurant, there were clearly 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. Theocarides 16068/90

82. On 26 July 1974 the first applicant was discovered to be missing from his unit at roll call after they had broken through an encircling manœuvre by Turkish forces. The area in which his unit had been stationed was captured by Turkish forces. It was not known whether the applicant was injured and detained or injured and died of injuries or killed at once. Whatever happened to him however occurred in an area controlled by the Turkish forces. The respondent Government had been under an obligation to notify the Cypriot Government as to what had happened to him but had not done so.

e. Charalambous 16069/90

83. This applicant was seen wounded in his right hand and the left side of the ribs 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 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 later found by the same man who went to get help. The Greek Cypriot forces could not however reach them due to the presence of Turkish forces. The other two men were discovered dead two days later when the Turkish forces withdrew. It was clear that the applicant was found either dead by the Turkish forces or else found and detained in an injured condition. The latter was more likely. However the respondent Government had not provided information about either the finding of a dead combatant or the detention of a wounded prisoner of war.

f. Thoma 16070/90

84. This applicant was amongst those attempting to prevent the invasion of Kyrenia. Some individuals were identified as killed in the operation; the applicant was not amongst them. The respondent Government had not provided information that the applicant was found dead or otherwise and the intervening Government had no evidence that this applicant was dead. It had to be assumed that the applicant had been detained alive.

85. This was further corroborated by the photograph published in the "Special News Bulletin" issued daily by the Turkish Cypriot administration on 4 September, of Greek Cypriot prisoners-of-war having their lunch. Four prisoners in the photograph had been identified. The first applicant was

identified by his father, the second applicant. This identification took place at the time, not with the benefit of hindsight and no other person has suggested that the photograph was of someone else.

g. Hadjipanteli 16071/90

86. By 16 August Turkish forces were in control of the 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.

87. On 27 August, after the applicant had been detained nine days, Turkish Cypriot civilians came to the village asking for four named individuals, two of whom worked at the Savings Bank. They took the four men to the bank and searched it. They emptied two safes and were told that the applicant had the keys to the third. After 10-12 days the Turkish Cypriots returned, looking for the two bank employees. They had the two keys for the remaining safe which the first applicant had always carried with him: the keys were in a leather case belonging to the applicant although his own personal keys had been removed. The Turkish Cypriots took the contents of the safe. 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, at the Pavlides garage.

h. Apostolides 16072/90

88. This first applicant withdrew with his section from Lapithos towards Vasilia. They were ambushed by Turkish military forces and dispersed on account of the fighting and confusion. There has been no news of the applicant since. The Turkish forces were in sufficient control of the area to undertake a successful ambush. 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 overwhelmingly likely that he had been detained by the Turkish armed forces.

4. Recent developments

89. In 2007, in the context of the activity of the Committee of Missing Persons (see below paragraphs 90-102) 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 applicant, Savvas Hadjipanteli (application no. 16071/90, see paragraphs 59-64, 76, 86-87 above) 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 at a shallower depth. Several bullets from firearms were found in the grave. The medical certificate issued on 12 July 2007 in regard to Savvas Hadjipanteli, indicated a bullet wound to the skull, a bullet wound in the right arm and a wound on the right thigh. His family was notified and a religious funeral took place on 14 July 2007.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

The United Nations Committee on Missing Persons ("CMP")

1. Background

90. The following paragraphs are taken from the Commission's Report in the interstate case (paragraphs 181-190):

91. The CMP was set up in 1981. 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 co-operate 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.

92. 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".

93. 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."

94. 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.

95. 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.

96. 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.

97. 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 co-operation 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."

98. 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.

99. 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).

100. 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, paras. 23).

101. 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. Recent developments

102. In 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 had also been set up. Some 160 sets of bones had been submitted for analysis and identifications of missing persons, including Savvas Hadjipanteli, had been made and were likely to continue.[1]

[1] The first group of remains identified consisted of 13 Turkish Cypriots at Aleminyo; subsequent identifications were made of 22 Greek Cypriots at Kazaphani, Livadhia and

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Objection *ratione temporis*

1. The parties' submissions

a. The respondent Government

103. The Government submitted that Turkey had recognised the competence of the Commission to receive individual petitions as from 28 January 1987. Their recognition of the competence of the Court ran from 22 January 1990 and included a temporal clause limiting it to matters raised in respect of facts which occurred subsequent to the Turkish declaration. They submitted that the complaints in these applications were in essence related to spontaneous acts which had occurred more than 15 years before their acceptance of jurisdiction, in particular the deaths of eight of the nine alleged missing persons in military action in July-August 1974. The ninth applicant, a non-combatant, had unfortunately lost his life as a result of the intercommunal hostilities and reprisals which reached their peak during that period, and in which the Turkey had been in no way involved.

104. The Government submitted that there was no question of a "continuing violation" and it was illogical and unrealistic to base such claims on imaginary suppositions concerning continuing captivity for which there was no concrete proof and in respect of which the applicants' accounts were flagrantly contradictory. Referring in particular to *Blečić v. Croatia* ([GC] no. 59532/00, ECHR 2006-...), they argued that temporal competence could not be derived from the consequences flowing from facts which occurred beforehand, nor from any unsuccessful procedures seeking redress for those facts. Where death occurred prior to the acceptance of the right of individual petition, no procedural obligation could arise subsequently (*Moldovan and Others v. Romania*, nos. 41138/98 and 64320/01, (dec.) 13 March 2001). They argued that the same held true in this case, in particular as there was no reason why the first applicants in this case were not presumed to be dead as in other disappearance cases (e.g. *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001). Further, they pointed out, citing *Markovic and Others v. Italy* ([GC], no. 1398/03, § 111, ECHR 2006-...) that the procedural obligation was first applied in the Court's

---

Sandallaris, and 6 Turkish Cypriots in the Famagusta district. Their names have since been removed from the list of missing persons.

jurisprudence in *McCann and Others v. the United Kingdom* (judgment of 27 September 1995, Series A no. 324) and argued that it should not be retroactively applied to the events in this case.

b. The applicants

105. The applicants disputed that there was any temporal bar. They stated that there was no evidence that the first applicants had died in 1974 or since[1] and accordingly they had to be presumed to be alive. Although the first applicants did disappear in 1974, the violations arising from and/or in connection with these disappearances have continued since then. They refuted the argument that their complaints were based on instantaneous acts in 1974 but were cases of a continuance nature which survived the temporal restrictions. They relied on the Court's reasoning as regarded the disappearances in 1974 in the inter-State case (paragraph 18(4) and (5) above).

c. The Government of Cyprus

106. They submitted that the obligation to carry out a thorough and effective investigation into a complaint of a disappearance while in the custody of security forces continued until an explanation as to what happened to the missing detainees was forthcoming. The respondent Government was under a continuing obligation therefore to clarify what happened to the relatives of the second applicants. This was based on the effective control exercised over the victims by the respondent Government and the need to ensure effective accountability for the exercise of such control and to avoid impunity. The same rationale applied to the obligation to provide an effective investigation under Article 2 as the applicants were clearly in a life-threatening situation. They referred to evidence that the Turkish security forces on occasion killed civilians and detained fighters and that Turkish Cypriot militia tended to kill those prisoners handed over to them (ibid, paragraph 155) or leave the injured to die. The State's obligation to protect the right to life under Article 2 was engaged in these circumstances, and this was also a continuing obligation. Even if there was insufficient evidence to conclude that one or more of the first applicants were detained by the respondent Government that Government were still responsible as they were under the effective control of their forces or forces for which they were responsible and the situation was life-threatening.

107. The second applicants' complaints that they were victims of inhuman treatment was also based on the continuing lack of information as to what happened to their relatives and the continuing lack of co-operation

[1] These submissions were made prior to the discovery of the remains of Savvas Hadjipanteli (see paragraph 89 above).

with investigative mechanisms on the part of the Turkish authorities, including the authorities in northern Cyprus.

2. The Court's assessment

108. The Court recalls that, in declaring these applications admissible on 14 April 1998, the Commission reserved the final determination of the question of whether the applications relate to facts covered by the temporal limitation in the Turkish declaration under former Article 25 of the Convention for a later stage in the proceedings.

109. It would note that the objection to temporal jurisdiction is closely connected with the objection raised as to compliance with the six month rule (see below) and is principally based on the argument that, as the first applicants must be presumed to have died at the time of the hostilities in 1974, at which time they were last seen, the complaints concerned instantaneous acts that occurred long before Turkey ratified the right of individual petition and which therefore are not subject to the Court's temporal jurisdiction. The Court accepts that it is not competent to examine applications alleging violations which are based on facts having occurred before the critical date (*Blečić*, cited above, § 72) and that where killings of persons occur before the date of ratification it had no competence *ratione temporis* to examine those deaths.

110. However the question arises in the present applications whether the alleged violations are of a continuing nature and thus have subsisted, and continue to subsist, since the date of ratification by Turkey of the right of individual petition on 28 January 1987.

111. The Grand Chamber has already had occasion to consider whether complaints raised by Cyprus concerning 1,485 Greek Cypriot missing persons disclosed a continuing violation. In its *Cyprus v. Turkey* judgment (cited above), it found that the evidence bore out the claim that many persons now missing had been detained either by Turkish or Turkish Cypriot forces during the conduct of military operations and in a situation which could be described as life-threatening and that the missing persons had disappeared against that background. It held that the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of the Greek-Cypriot missing persons who disappeared in such life-threatening circumstances (see paragraphs 133-136) disclosed such a continuing violation.

112. The inter-State case concerned the phenomenon of disappearances, which, although linked to a specific point of time when the missing person was last seen and the surrounding circumstances, may be distinguished from conventional cases of use of lethal force or unlawful killings which are dealt with under Article 2. In the latter cases, the fate of the victim is known; the former are characterised by an ongoing situation of uncertainty and, not infrequently, callous inaction, obfuscation and concealment (see, amongst

many examples, *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, §§ 127-128, *Timurtaş v. Turkey*, no. 23531/94, §§ 84,97, ECHR 2000-VI § 84, 97, *Akdeniz and Others v. Turkey*, no. 23954/94, § 93, 31 May 2001, *Taş v. Turkey*, no. 24396/94, §§ 80, 90, 14 November 2000; *Imakeyeva v. Russia*, §§ 150 165, 9 November 2006, *Baysayeva v. Russia*, §§ 119,127 April 2007). The Court is therefore not persuaded that the principles set out in *Blečić* and *Moldovan* exclude its temporal jurisdiction in the present cases or were intended as amending the approach taken in the inter-State case to disappearances. Nor does it find that the respondent Government is assisted by reliance on a passage in the *Markovic* case (cited above) which concerned the existence of a right in domestic or international law for the purposes of the application of Article 6 of the Convention. Further, while it may be true that the procedural obligation under Article 2 was first elucidated in the *McCann* case in 1995 (cited above), it was nonetheless applied in that case to events in 1988. However, even assuming therefore that an interpretation of a Convention provision cannot be retrospective in its application, this argument does not prevent an obligation of a continuing nature from being recognised as existing after that date.

113. Accordingly, on this aspect, the Court finds no reason to differ from the conclusions reached in the inter-State case as concerns the present applications. To the extent therefore that the facts of these cases disclose a continuing obligation under Article 2, it has competence *ratione temporis*. It therefore rejects the respondent Government's preliminary objection on this ground and will examine further the existence of any continuing obligation below.

B. Six months' rule (Article 35 § 1 of the Convention)

1. The parties' submissions

a. The respondent Government

114. Referring in particular to the cases of *Karabardak v. Cyprus* (no. 76575/01, (dec.) 22 October 2002) and *Baybora v. Cyprus* (no. 77116/01, (dec.) 22 October 2002), the respondent Government considered that the applications should be rejected as out of time. In those cases, no issue of a continuing situation arose and the applicants had waited too long before bringing their cases before either the CMP or Strasbourg. These applicants had also delayed too long. They should have brought their applications to Strasbourg within six months of 27 January 1987, but did not do so for some four years.

b. The applicants and the intervening Government

115. They considered that the violations were of a continuing nature to which the six month rule did not apply. They also distinguished the cases relied on by the Government, noting, *inter alia*, that the present allegations had been brought to the attention of the respondent Government from 1974 onwards in the inter-State cases, as well as in lists notified to it by the end of 1974 at the latest, and that in any event the CMP had been largely inoperative until 1990.

2. The Court's assessment

116. The Court notes that the respondent Government's arguments are based on the applications introduced by Turkish Cypriots against the Government of Cyprus claiming that their relatives had disappeared in life-threatening circumstances These cases were rejected as having been submitted out of time. In *Karabardak*, for example, although the first applicant had disappeared in 1964, the matter had not been brought to the attention of the respondent Government until, in 1989, a complaint was lodged with the CMP and then another 12 years elapsed before the application was lodged with the Court. It is true that the Court in reaching this decision, as with the other similar applications, made no mention of a "continuing situation" in its analysis in reaching the conclusion that the case had been introduced out of time.

117. The Court would observe that there are differing types of "continuing situations"; there are cases where an applicant is subject to an ongoing violation, due for example, to a legislative provision which intrudes, continuously, on his private life (see *e.g. Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45); and there are cases, such as disappearances, where the continuing situation flows from a factual situation arising at a particular point in time. In the latter, it cannot be the case that the relatives of a person that has gone missing at a specific point in time can wait indefinitely before bringing the matter either to the attention of the domestic authorities or this Court. As has often been said, 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 (*e.g. Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997–V, at p. 1547, §§ 32-33). It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (*Walker v. the United Kingdom*, (dec.), no. 34979/97, ECHR 2000-I). It is not in the interests of the practical and effective functioning of the Convention system, which is of crucial importance to the protection of the fundamental rights and freedoms, that the Court be called upon to deal with stale complaints. The greater the lapse of time the more

problematic any attempted examination of the facts and issues becomes. The effect on the evidence and the availability of witnesses inevitably risks rendering a belated assessment unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions (see, *mutatis mutandis*, *Finucane v. the United Kingdom*, no. 29178/95, § 89, ECHR 2003-VIII)..

118. The Court therefore considers that applicants, even in disappearance cases, must act with reasonable expedition in bringing their cases before it for examination and have sufficient explanation, consonant with the purpose of Article 35 § 1 of the Convention and the effective implementation of the Convention guarantees, for long periods of delay. In the *Karabardak* and other cases, the delay of over thirty years was not accounted for. In contrast, as concerns the present cases, the Court recalls that they were introduced on 25 January 1990, some three years after the right of individual petition became applicable to Turkey on 27 January 1987. It is evident that, meanwhile, the disappearances had been made known to the relevant authorities from 1974 onwards in the series of inter-State cases brought by Cyprus concerning the missing persons as a whole. The reports of the Commission in these cases, although subject to discussion before the Committee of Ministers, were not made public throughout this period and the relatives of missing persons were unaware of the findings which were being made. The Court notes that it was not until 22 January 1990 that Turkey recognised the jurisdiction of the old Court to examine applications, with the possibility that entailed of a public hearing and a binding judgment in which an award of just satisfaction might be made. The present applications were introduced three days after this. Accordingly, there is, in the Court's opinion, no element of unreasonable delay in bringing these individual applications to Strasbourg in the circumstances. Whether applications introduced at a later date, in particular, long after the Court's inter-State judgment had made public findings on the disappearances as whole, would comply with the requirement for due expedition remains to be decided in such cases as may arise.

119. The Court rejects the respondent Government's preliminary objection under this head.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

120. 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 parties' submissions

1. The applicants

121. The applicants did not accept that any of the first applicants had died (save in the case of Savvas Hadjipanteli), raising no complaint of a substantive violation of Article 2. They submitted that the respondent Government was under a positive obligation to carry out an investigation into their fate since they were threatened with life-threatening circumstances during the military operations in which they were last seen and which were initiated by the respondent Government. Given that the first applicants were taken into custody, there was an additional obligation on Turkey to account for the continued existence of these people. This was a continuous obligation broader than the obligation to investigate. Given the lapse of time and the absence of any information about these missing persons who must be presumed to be alive as there was no evidence to the contrary, the obligation to conduct an effective investigation was even more pressing. They did not consider that any recent developments as regarded 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. Insofar as the remains of Savvas Hadjipanteli (application no. 16071/90) had been discovered, they maintained their arguments that a violation arose.

2. The respondent Government

122. The Government submitted that no issue arose under Article 2 as none of the applicants were detained by the Turkish military or other authorities. The evidence, including the files submitted to the CMP, showed that eight of the first applicants were military personnel who died in action, while the ninth was a civilian in respect of whom there was no evidence that he had been taken into custody. Insofar as recent developments indicated that his body had been exhumed in the Karpas area, they considered that this showed events had taken place outside their responsibility.

123. They further submitted that the procedural obligation under Article 2 did not apply to killings which occurred as a result of acts of war inside fighting zones. There also had to be credible evidence that agents of the State were involved, which was not the case in these applications.

Furthermore, the possibility of obtaining help through an investigating body such as the CMP, which was the most appropriate body for such investigations, could also fulfil the duty to investigate. The Greek and Turkish Cypriots had both agreed to the CMP procedure and it was not practical or logical, if not futile, to expect Turkey to carry out its own independent investigations in addition. No credible investigation could be expected to be carried out unilaterally without the co-operation of the other concerned parties.

124. Concerning recent developments, the Government stated that in the previous two years the CMP had become an effective investigative body, with financial, moral and logistical support, pointing to the progress made in locating and identifying bodies of those who had been missing on both sides.

3. The Government of Cyprus

125. The intervening Government submitted that the respondent Government had been responsible for protecting the right to life of the first applicants as they were under the actual or effective control of the forces of the respondent Government and the situation in which the applicants found themselves was life-threatening. There was, in their view, an obligation to ensure that systems were in place to seek without delay the wounded, sick and dead, to investigate a killing where there was reason to believe it had not occurred during combat and to account for all detainees in the power of their own forces or of other forces over whom they exercised control.

126. Where it was concluded beyond reasonable doubt that a person had been detained (as they considered was the case concerning applicants Thoma and Hadjipanteli) and had been taken to a place of detention in the control of the authorities the State was required to produce the detainee alive or to provide a plausible explanation as to how he met his death, failing which there was a violation of the obligation to protect life. There was no evidence that any of the applicants were killed during the fighting. The evidence showed that all the first applicants were in areas under the actual or effective control of the Turkish security forces or of other forces for whom they were responsible. As these forces and the Turkish Cypriot militia failed to treat the wounded and often killed those who came under their control, there is no doubt that if they were detained the applicants were in a life-threatening situation (see *inter alia* Comm. Rep. § 180, concerning killings by Turkish-Cypriot fighters and the Turkish army during so-called cleaning-up operations). The respondent Government should have ensured operational mechanisms of protection to avoid the risk of unlawful activities and to provide for the proper handling, medical treatment and recording of prisoners of war and civilians, as well as an effective system of investigation to enable military judicial personnel to investigate allegations of unlawful conduct and effective measures, such as court martial

proceedings, to enforce the rules governing treatment of prisoners of war and civilians. The inaction of the respondent Government in the face of serious allegations indicated that such violations occurred as a matter of practice.

127. The Government further submitted that the respondent Government had failed to carry out a thorough and effective investigation into the disappearances of the missing persons in life-threatening circumstances. There was no evidence that any investigation had been undertaken by the Turkish authorities into the fate of the missing applicants *e.g.* no evidence of any questioning of the Turkish-Cypriot militia in the relevant areas at the relevant time. The scope of the UN CMP was too narrow to constitute an investigation for the purposes of Article 2. This failure also disclosed a practice. As regarded the finding of the remains of Savvas Hadjipanteli, they submitted that did not bring to an end the continuing obligation to provide an effective investigation, since the circumstances around the death and the identity of any perpetrators had still not been elucidated.

B. The Court's assessment

128. The fate of the nine missing men, and whether they have been unlawfully killed, is largely unknown. While the remains of Savvas Hadjipanteli have been found very recently, the circumstances surrounding the death remain unclarified. Nonetheless, a procedural obligation 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. The Court recalls that it was established in the inter-State case that the evidence bore out the applicant Government's claim that many persons who went missing in 1974 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. This was found to disclose a life-threatening situation. The clear indications of the climate of risk and fear obtaining at the material time, and of the real dangers to which detainees were exposed, was found to disclose a life-threatening situation.

129. The nine missing persons in the present case disappeared against this same background. The Court notes that the eight combatants were last seen in areas surrounded or about to be overrun by Turkish forces, one of them, Panicos Charalambous, in a wounded condition. Statements from several witnesses attested to seeing the civilian missing person, Savvas Hadjipanteli, taken away by Turkish-Cypriot fighters. Given previous findings and the circumstances of the disappearances at a time and at locations which were, or very shortly thereafter were, under the control of the forces of the respondent State or those acting under their aegis, the Court considers that an obligation arises for the respondent State to account for

their fate (see, *mutatis mutandis*, *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts).

130. While it may be noted that in the context of the individual cases arising out of events in south-east Turkey and the conflict in the Chechen Republic, where there were, at the relevant times, numerous reported instances of forced disappearances, individual applicants have nonetheless been required to give an evidential basis for finding that their relatives were taken into some form of custody by agents of the State (see *e.g. Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 99, *Akdeniz and Others v. Turkey*, no. 23954/94, § 84, 31 May 2001, *Sarli v. Turkey*, 24490/94, 22 May 2001; *Imakayeva v. Russia*, no. 7615/02, § 141, ECHR 2006-... (extracts)), the Court considers that the situation in the present case may be distinguished. A zone of international conflict where two armies are engaged in acts of war *per se* places those present in a situation of danger and threat to life. Circumstances will frequently be such that the events in issue lie wholly, or in large part, within the exclusive knowledge of the military forces in the field, and it would not be realistic to expect applicants to provide more than minimal information placing their relative in the area at risk. International treaties, which have attained the status of customary law, impose obligations on combatant States as regards care of wounded, prisoners of war and civilians[1]; Article 2 of the Convention certainly extends so far as to require Contracting States to take such steps as may be reasonably available to them to protect the lives of those not, or no longer, engaged in hostilities (see, *mutatis mutandis*, *Ertan Özkan v. Turkey*, no. 47311/99, §§ 301, 307-308, 9 October 2003). Disappearances in such circumstances thus attract the protection of that provision.

131. As regards the compliance with the obligation under Article 2 in respect of the disappearances, the Court recalls its previous findings that it cannot be discharged through the respondent State's contribution to the investigatory work of the CMP. Whatever its humanitarian usefulness, the CMP does not provide procedures 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 (*Cyprus v. Turkey*, §§ 134-136). There have been no developments, legal or factual, which change this assessment.

---

[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 revision in 1949, 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), Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949; and 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).

132. While it is true that the remains of Savvas Hadjipanteli have recently been discovered, this does not demonstrate that the CMP has been able to take any meaningful investigative steps beyond the belated location and identification of remains. Nor, given the location of Savvas Hadjipanteli's remains in an area under TRNC control after a lapse of some thirty-two years, has this event displaced the respondent Government's accountability for the investigative process during the intervening period.

133. 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 the nine men who went missing in 1974.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

134. Article 3 provides:

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

A. The parties' submissions

1. The applicants

135. The second applicants submitted that they had been waiting for news of their loved ones for over 25 years which had caused them daily anguish and distress, well above any level of severity required to disclose inhuman and degrading treatment. Particular cruelty was shown in the case of the second applicant in no. 16071/90 who was married with three children and did not marry again because of the uncertainty of her husband's fate.

2. The respondent Government

136. The Government submitted that none of the first applicants had been subjected to forcible detention and no issue arose.

3. The Government of Cyprus

137. All the second applicants had, in their view, been victims of inhuman treatment. Three were wives of the missing men, and six the mothers or fathers (though other relatives have taken over as applicants in some cases). They have all lived with uncertainty and anguish for over 25 years. The wives have never remarried as they do not see themselves as widows. They have never given up trying to find out what happened and their anguish is worsened by the fact that there are people with information

who are not revealing what they know (citing Comm. Rep, § 157, where it was stated that information about former Turkish Cypriot commanders was being concealed) and the lack of co-operation of the Turkish forces with attempts to obtain information (Dillon Commission, p. 18, second para.). This all produced helplessness and frustration in the second applicants. Further, the situation disclosed inhuman treatment inflicted as a matter of practice.

B. The Court's assessment

138. The Court refers to the principles set out and the findings in the inter-State case (cited above, §§ 155-158). No point of distinction arises in the present case. The silence of the authorities of the respondent State in the face of the real concerns of the second applicants, relatives of the nine missing men, attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3. It therefore concludes that, during the period under consideration, there has been a continuing violation of Article 3 of the Convention in this respect.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

139. 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 parties' submissions

1. The applicants

140. All the first applicants were last seen alive in an area which soon thereafter came under the control of the respondent Government. There was therefore a presumption of Turkish responsibility for their fate and the unaccounted disappearance of such detained persons amounted to a grave breach of Article 5. There was an obligation on the Government to conduct a "prompt and effective investigation" in respect of any persons for whom an arguable claim had been brought forward that they were in Turkish detention at the time of their disappearance in 1974. The failure to provide such an investigation disclosed a continuing breach.

141. The applicants, referring to the Commission's report 8007/70, considered that the while the CMP was useful for humanitarian purposes it was not by itself sufficient to meet the standard of an effective investigation due to the narrow scope of its investigations and the delay.

2. The respondent Government

142. The Government submitted that none of the first applicants were 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.

3. The Government of Cyprus

143. They submitted that the first applicants had been detained by Turkish security forces, which detention did not fall within any of the specified grounds in Article 5 § 1; that they had not been brought before a judicial officer as required by Article 5 § 3; and that the refusal to acknowledge the detention rendered nugatory the fundamental safeguards of Article 5 § 2. There was a wide practice of unlawful detention without safeguards against "disappearances" which was an aggravated violation.

144. The evidence established an arguable claim that the first applicants had been detained by or had been within the effective and exclusive control of the Turkish security forces or forces for whom they were responsible, on

the last occasion on which they were seen. Clarification as to what happened to them depended on the respondent Government and persons within their control. They referred to the need for the respondent State to provide a credible and substantiated explanation of what happened to them. There was no evidence of any system of recording those who were detained. (Rep., § 178) or indication that there was even an official or complete list of prisoners (none was provided to the ICRC). Nor has there been any prompt or effective investigation into the fate of the first applicants. The investigation by the CMP did not qualify for reasons given in the Commission Report (§§ 210-211). Further the evidence in the four inter-State cases concerning missing persons established that there was an arguable claim that large numbers of Greek Cypriots had been unlawfully detained and that there was routine failure to record those detentions and total failure to carry out any prompt or effective investigations.

B. The Court's assessment

145. Referring to its findings above and those in the inter-State case (paragraphs 148-151), the Court observes that it has not been established that during the period under consideration in this application the nine missing men were actually being detained by the Turkish or Turkish-Cypriot authorities and no breach has thereby been established in that respect. However, 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 whereabouts and fate of the nine first applicants, in respect of whom there is an arguable claim that they had been deprived of their liberty at the time of their disappearance.

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

146. The applicants originally invoked 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).

147. The Court notes that the applicants have not maintained, or pursued in their recent submissions their complaint under Article 4. Having regard also to the approach adopted in the inter-State case concerning complaints under the above provisions (*Cyprus v. Turkey*, cited above, §§ 141, 153 and 161) and the violations found in the present case, the Court does not consider it necessary to examine these matters further.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

a. The applicants' claims

149. The applicants reserved the right to file a claim for pecuniary damages until such time as the Court issued findings of violations.

150. For non-pecuniary damage, the applicants claimed under this head 341,550 euros (EUR) converted in Cyprus pounds (CYP) for the first applicants, such sums to be held by the second applicants on their behalf and the behalf of their heirs; and EUR 455,400 for the second applicants or their successors (namely EUR 5,692.5 for every year of violation between 1987-2007 in respect of each violation). They also claimed additional damages to reflect the special circumstances of the violations (the grave systematic nature of the breaches and their duration), namely CYP 225,000 to 1,450,000 respectively.

151. They also requested that the Court direct the respondent Government to take specific remedial measures so as to ensure that they conformed to their obligations under the Convention and that the Government be required to pay CYP 24 for every day between the date on which the judgment became final and the implementation of the said remedial measures, such rate doubling every twelve months.

b. The respondent Government's response

152. The respondent Government submitted that it was not appropriate to make any award for pecuniary damage.

153. 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 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 unprecedently high.

c. The intervening Government's comments

154. They submitted that the Court should seek to make an order that ensured compliance by the respondent Government with their obligations and that the continuing nature of the violation should be taken into account in any award.

2. The Court's assessment

155. In light of the breaches of the procedural aspects of Articles 2 and 5, the Court finds no basis for any pecuniary award and declines to adjourn this matter.

156. As concerns non-pecuniary damages for these breaches and that under Article 3 as concerned the second applicants, the amounts claimed are very high. While the Court notes the applicants' concern to induce the respondent Government to take action as promptly as possible under pain of increased damages, it finds no precedent for such an ongoing, indefinite and prospective award in its case-law and perceives no basis of principle on which to embark on such a course in the present case. The Court would also emphasise that Article 41 of the Convention does not provide a mechanism for compensation in a manner comparable to domestic court systems nor for imposing punitive sanctions on respondent Governments (*Orhan v. Turkey*, no. 25656/94, § 448, 18 June 2002). Although the trigger for the Court's jurisdiction under Article 34 of the Convention is that an individual or private body can claim to be a victim of a breach of their rights, the Court serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the Contracting States. The individual interest is subordinate to the latter, as shown by the Court's competence to continue the examination of an application, even if the applicant no longer wishes to pursue his case, where respect for human rights so requires (Article 37 § 1 *in fine*).

157. The issues in this case have already been subject to thorough examination in the inter-State case in which it may be noted that the Grand Chamber adjourned consideration of the issue of the possible application of Article 41. The Court cannot but be sensitive to the fact that the present individual applications derive from a situation in which over 1,400 people were declared missing on the Greek-Cypriot side and some 500 claimed missing on the Turkish-Cypriot side. In the context of the inter-State case it must also take cognisance of the ongoing execution function being performed by the Committee of Ministers (see interim resolution ResDH(2007)25 adopted on 4 April 2007), in which respect the crucial element will be the provision, finally, of measures which enable light to be

shed on the fate of as many of the missing men, women and children as may be possible.

158. In light of the above, the Court does not find it appropriate or constructive, or even just, to make additional specific awards or recommendations in regard to individual applicants.

159. In the unique circumstances of these cases therefore, the Court finds that the finding of violations constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

B. Costs and expenses

1. The parties' submissions

160. The representatives for the applicants Andreas and Giorghulla 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 (16073/90) claimed CYP[1] 4,322. 66 for each of the applications, plus CYP 548.40 for value-added tax (VAT).

161. The representatives for Andreas and the heirs of Loizos Loizides (no. 16065/90), Philippos Constantinou and Demetris K. Peyiotis (16066/90) Panicos and Chrysoula Charalambous (no. 16069/90) and Savvas and Androula Hadjipanteli (no. 16071/90) claimed CYP 4,596.66 for each of the applications plus 589.59 for VAT.

162. 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.

163. The Court observes that the applicants' observations were on each occasion submitted in two batches, from the two separate legal representatives. They were however largely identical and it appears that that there was considerable overlapping and co-ordination of work. Given the lack of any oral procedure but taking into account the varying rounds of written observations, it awards the applicants' representatives EUR 4,000 in respect of each application.

C. Default interest

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

[1] CYP 1 = approx. EUR 1.71.

FOR THESE REASONS, THE COURT

1. *Dismisses* by six votes to one the Government's preliminary objections;

2. *Holds* by six 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 whereabouts and fate of the nine first applicants who disappeared in life-threatening circumstances ;

3. *Holds* by six votes to one that there has been a continuing violation of Article 3 of the Convention in respect of the second applicants, the relatives of the nine missing men;

4. *Holds* by six 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 whereabouts and fate of the nine first applicants in respect of whom there is an arguable claim that they had been deprived of their liberty at the time of their disappearance;

5. *Holds* unanimously that no breach of Article 5 of the Convention has been established by virtue of the alleged detention of the nine first applicants;

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

7. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

8. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) per application in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion of Judge Gönül Başaran Erönen is annexed to this judgment.

B.M.Z.
S.Q.

SEPARATE OPINION OF JUDGE GÖNÜL BAŞARAN ERÖNEN

A. I voted against the finding of the majority in the Chamber rejecting the respondent Government's preliminary objection that the Court did not have jurisdiction *ratione temporis* to entertain the case. Recent judgments and decisions have developed the case-law on jurisdiction *ratione temporis*, especially in disappearance cases. One such case is *Blečić v. Croatia* ([GC], no. 59532/00, ECHR 2006-...), a judgment of the Grand Chamber. Having read the reasoning behind the preference not to apply that precedent to the case before us, I unfortunately found myself unable to agree that it did not apply or could not be followed in the present case, even in spite of the findings in the fourth inter-State case on the issue. As the justifications used by the majority of my colleagues to support their conclusions of continued violations of Articles 2, 3, and 5 can only be valid if the case falls within the temporal jurisdiction of this Court, I do not propose to commit myself to giving an opinion on the merits of the case, since I do not consider that the case falls within the Court's competence. I prefer to follow the recent case-law on the matter before us, and moreover, in the light of recent judgments, I do not agree that the allegations of violations were of a "continuing nature". Additionally under this head, considering the lapse of time from 1974 to the date of the application, the more logical presumption of death, not the illogical "presumption of being alive", should have been adopted in the present case and, that being so, the disappearance could not be considered to be of a continuing nature, creating a continuing obligation under Article 2 to conduct effective investigations. This view is in line with recent Court judgments.

B. Alongside my opinion on the *ratione temporis* objection, I voted against the majority's rejection of the respondent Government's preliminary objection 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.

C. 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 aimed at clarifying the whereabouts and fate of the nine men. As a result, I 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 regarding the other alleged violations.

D. It follows therefore that for the very same reason I did not consider it in accordance with my opinion on a lack of competence *ratione temporis* to

commit myself to voicing any views on the findings of a violation under Article 3 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 whereabouts and fate of the nine applicants, in respect of whom it has been found that there is an arguable claim that they had been deprived of their liberty at the time of their disappearance.

E. I voted with my colleagues with regard to the alleged violation of Article 5, in that there has been no breach by virtue of the alleged detention of the first nine applicants, for the sake of consistency. I do not deem this to contradict in any way my opinion on the preliminary objections.

F. Similarly, in line with the approach adopted in the *Cyprus v. Turkey* decision, 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 matters relating to alleged violations under Articles 4, 6, 8, 10,12,13 and 14 of the Convention, was simply because the applicants did not pursue or maintain these complaints and not because I accept the "violations found in the present case" (paragraph 147).

G. 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 of what does or does not constitute just satisfaction under Article 41 of the Convention.

H. 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 (E) above.

In my view, the best course would have been to declare the application inadmissible under Article 35 of the Convention.

Jurisdiction *ratione temporis*

My colleagues' whole line of reasoning basically follows and is sustained by the Court's findings in the fourth inter-State case on the question of missing persons. I was not persuaded by the argument made in arriving at their rejection of the preliminary objection of the respondent Government as to jurisdiction *ratione temporis*. While it is true that it is not a contradiction to reach a different conclusion in respect of individual applicants from that reached on the collective complaints in the inter-State cases (see *Ireland v. the United Kingdom*, judgment of 18 January 1978,

Series A no. 25), I do not feel that the majority of my learned colleagues have delved as deeply as they should have done into the *proof* of the factual allegations in these individual applications, especially when considering the recent development of pertinent case-law on the *ratione temporis* principle in disappearance cases.

The conclusions drawn on the missing persons issue at the close of the present case seem to stem from the perspective of the inter-State case position. In other words, in line with the reasoning in the fourth inter-State case, in the absence of proof to the contrary, the *presumption of being alive* has been the basis for the Court's hypothesis in the present application (see, in this respect, paragraphs 111 and 113).

Whilst, in paragraph 136 of the *Cyprus v. Turkey* judgment, the Court held that

> "[h]aving regard to the above considerations, ... there ha[d] 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"

it nevertheless refrained from concluding that those persons had to be presumed dead (§§ 127-29).

The Grand Chamber in the *Cyprus v. Turkey* case, in view of the failure by the respondent Government to participate and appear in those proceedings, quite properly "decided to proceed with the hearing, being satisfied that such a course was consistent with the proper administration of justice" (§ 12; see also § 58). In the context of that application, the fact remains that when considering and assessing what facts and evidence on the missing persons' issue was before it at the time, whilst doing all that it could to ensure fairness, the Court was nonetheless faced with one party's absence from the proceedings and oral hearings, albeit by the respondent Government's own choice. In accepting, however, that there was no "equality of arms" the Court noted in paragraph 106 of the *Cyprus v. Turkey* judgment as follows:

> "The Court observes that where it was impossible to guarantee full respect for the principle of equality of arms in the proceedings before the Commission, for example on account of the limited time available to a party to reply fully to the other's submissions, the Commission took this factor into account in its assessment of the evidential value of the material at issue. Although the Court must scrutinise any objections raised by the applicant Government to the Commission's findings of fact and its assessment of the evidence, it notes that, as regards documentary materials, both parties were given a full opportunity to comment on all such materials in their pleadings before the Court, including the above-mentioned aide-mémoire, which was admitted to the file by virtue of a procedural decision taken by the Court on 24 November 1999."

Understandably, the Court in *Cyprus v. Turkey* reached the conclusions it did on the basis of other evidence before it, which included the R*eport of*

the Commission of 4 June 1999. Nevertheless, and with a period of over six years having elapsed since that judgment, I feel that such a situation as the one the Court faced in that case alone made it all the more imperative in the present application today to interpret the decision of the Court in the *Cyprus v. Turkey* case in line with contemporary case-law of a similar value and weight, thereby assisting the Court in expounding and developing the findings and inferences that have been made previously.

I must admit that I am not satisfied as to why recent settled Court precedents were not followed in the present application. While accepting that it is not competent "to examine applications alleging violations which are based on facts having occurred before the critical date (*Blečić*, cited above, § 72) and that where killings of persons occur before the date of ratification it had no competence *ratione temporis* to examine those deaths" (paragraph 109) the question the Court poses is whether the alleged violations in the present application are of a continuing nature, subsisting from ratification to the present date.

My colleagues proceeded from the point of view that the Grand Chamber judgment in *Blečić*, dealing with the altogether different issue of what has been termed an "instantaneous act", could not apply since the *sui generis* position of "disappearances" in Cyprus invoked a situation which was continuing in nature and hence still subsisted – thus effective investigation obligations subsisted and hence a violation or procedural obligation under Article 2 subsisted.

However, I found *Blečić* quite clear in its findings. The Court stated in paragraph 75 of that judgment:

> "In *Moldovan and Others* and *Rostas and Others v. Romania* ((dec.), nos. 41138/98 and 64320/01 (joined), 13 March 2001) the applicants complained *inter alia*, under Article 2 of the Convention, that the Romanian authorities had failed to conduct an effective investigation into the killings of their relatives, which had taken place before ratification. The Court held that the alleged obligation to conduct an effective investigation was derived from the aforementioned killings whose compatibility with the Convention could not be examined. It therefore declared that complaint incompatible with the Convention *ratione temporis*."

The "appropriate test" as enunciated in *Blečić* is stated in paragraph 77:

> "It follows from the above case-law that 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, 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*, judgment of 8 June 1995, Series A no. 319-A, p. 16, § 40), 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)

The Court then went on to apply this "appropriate test" to the *Blečić* facts.

A more recent judgment confirming and implementing the *Blečić* position, where the Court declared an application inadmissible, is that of *Kholodovy v. Russia* ([dec], no. 30651/05, 14 September 2006):

"Admittedly, the investigation into R. Kholodov's death and the trial of putative perpetrators continued long after the ratification of the Convention by the Russian Federation. However, 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 its temporal jurisdiction."

Even leaving aside *Moldovan*, there is the recent *Teren Aksakal v. Turkey* judgment (no. 51967/99, ECHR 2007-... (extracts)) where, in the partly dissenting opinion of Judges Türmen and Mularoni, the *Blečić* principle has been once again been followed:

"It is true that the *Blečić* judgment concerns Article 8 of the Convention. However, in the above-cited paragraphs the Court has established a general principle regarding its temporal jurisdiction that encompasses all the Articles of the Convention including Articles 2 and 3. ...

Therefore, the majority's reasoning in the present case, separating the investigation from the constitutive fact, i.e. the killing of the deceased, and concluding that the investigation remained within the temporal jurisdiction of the Court, is clearly in contradiction with the finding of the Grand Chamber in *Blečić*."

How should the "appropriate test" in *Blečić* have been applied in this present case?

What is the "constitutive element" in this case? The date of the disappearance is the constitutive element. It is the instantaneous act that created the interference. This is so because it is the only fact that has been evidentially proved to exist. In other words this is the factual situation as it stands. We see before us as a fact that since the disappearances of the applicants occurred before the date of ratification the Court has no competence *ratione temporis* to examine either the disappearances or the alleged failure to comply with an obligation to conduct an effective investigation which is derived from those disappearances.

The principle enunciated was not limited to the facts of the *Blečić* case alone but was of general application and was one which I feel could easily have been applied in the present case.

Each case is based and decided upon relative facts pertinent to that case alone. Unless ruled to be otherwise, the principles enunciated can be applied or modified in determining the specific case, but the legal principles enunciated by the Court do not change simply because the facts are different. The law is applied in accordance with all proven facts before the Court in a given case.

Noting that the Grand Chamber in *Silih v. Slovenia* (no. 71463/01) will hopefully soon be giving a decision on the *ratione temporis* principle, my stance on the issue in relation to the present application remains as it is and is what I feel it should be, in accordance with recent case-law.

In order to complete the reasoning in my opinion on jurisdiction *ratione temporis*, I now turn to the judgments of the Court relating to the presumption of death. The Court, in the case of *İpek v. Turkey* (no. 25760/94, § 168, ECHR 2004-II (extracts)), concluded as follows:

> "For the above reasons, and taking into account that no information has come to light concerning the whereabouts of the applicant's sons for almost nine and a half years, the Court is satisfied that Servet and İkram İpek must be presumed dead following their unacknowledged detention by the security forces." (emphasis added)

In the case of *Çiçek v. Turkey* (no. 25704/94, 27 February 2001) the Court concluded there was a presumption of death as there had been no information on the whereabouts of the applicant's son for almost six and a half years. Similarly, in the more recent *Akdeniz v. Turkey* case (no. 25165/94, 31 May 2005), the Court again concluded that a period of 11 years was sufficient to accept the presumption of death.

In the *Timurtaş* judgment (*Timurtaş v. Turkey*, no. 23531/94, § 83, ECHR 2000-VI) the Court gave the following assessment:

> "In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died."

This being so, and in the light of the general principle in *Blečić* with regard to temporal jurisdiction, the most recent case-law confirms that a person missing in a life-threatening situation about whom there has been no information for a substantial period of time is to be "*presumed dead"*. This is a presumption that the Court is now able to draw following the authoritative Grand Chamber precedent.

In the present case, the period since the applicants disappeared in life-threatening conditions, that is to say, during the war in 1974, is 33 years. It follows that the disappeared first applicants must be presumed to have died long before 28 January 1987, the date from which the Turkish Government authorised the Commission to receive individual petitions. Similarly, therefore, since the *presumption of death* situation occurred before the date of ratification, the Court has no competence *ratione temporis* to examine the alleged failure to comply with an obligation to conduct an effective

investigation which is derived from the date of this *presumption of fact*, prior to ratification. Any investigation conducted before ratification but continued after ratification does not change the lack of competence (see *Blečić*, § 77). In short, with a *presumption of death* established prior to 1987, no allegation of a violation of a continuing nature subsisting up to the date of ratification can be upheld.

My conviction is that the only logical inference that could be drawn from the facts that have actually been proven is the existence of the *presumption of death*. Simple lack of evidence as to what actually happened to the missing persons does not preclude this inference from being drawn. Considering the circumstances that existed at the time of their disappearance, unless rebutted by proof of their being alive, the only inference that should have been drawn was one of 'presumed dead'. This has not been the case. I am sure that my colleagues will agree with me that it is not contradictory to reach a different conclusion in respect of individual applicants from that reached on the collective complaints in the inter-State case. Equally so, the onus and degree of proof in individual applications is much more demanding than in the inter-State cases. With the actual facts as presented and proved, and also in line with recent case-law, the Court is now able to draw a different inference or presumption than the one drawn in the fourth inter-State case. I cannot find myself agreeing with the presumption made by the majority in the Chamber, although I perceive that it stems perhaps from an admirable intention to assuage the feelings of loss.

The inter-State case judgment of 2001, while of general application on the missing persons' issues and concerning the "phenomenon of disappearances", in no way precludes us from benefiting also from more recent case-law on how to approach and solve issues in disappearance cases which carry an "ongoing situation of uncertainty" (see paragraph 111). The fourth inter-State case provided guidance in reaching the decision arrived at in the present application. This, of course, I accept. But one must not forget that in such individual cases as those before us where the element of personal, subjective views in the applicants' assertions is prevalent, discharging the onus of proof of such alleged obligations is all the more exacting and stringent in application than it would be in inter-State cases. I also humbly concede that it is probably easier to follow the inter-State case reasoning on missing persons, than create a new precedent in the Cyprus missing persons issue as a whole.

The facts on which precedent-making decisions are based may be different, yet I am of the opinion that, unless there are compelling reasons not to do so, new precedent-creating case-law relevant to the subject should have been followed here. I am not convinced that there are such reasons in the present cases not to follow the principles enunciated in *Blečić*.

On the whole, I am not satisfied there was substantial evidence *beyond reasonable doubt* which raised and supported the improbable assertion that the applicants could still be alive. In *Ireland v. the United Kingdom* (cited above), Judge Zekia, in a separate opinion, dealt briefly with the principle underlying the onus of proof and the discharge of such onus in a case where a Contracting State is alleged to have violated its obligation under an Article of the Convention:

> "On whom lies the burden to discharge the onus of proof.
>
> When a Contracting State is alleged to have committed a violation of a specific Article or Articles of the Convention by disregarding its obligation under it and such allegation is denied, surely there is a burden of proof to be discharged in some way or other in order to substantiate such accusation before an authorised organ of the Convention. What is material here is not whether a burden of proof does exist or not - it is an elementary rule of justice that it does exist and the fact that the presumption of innocence is codified by Article 6 para. 2 (art. 6-2) of the Convention is a strong indication of it - but by whom and how such onus should be discharged. ... I would say that, at the end of proceedings, the Commission or the Court has, on the totality of evidence and material before them, to decide whether the burden of proof required to substantiate an allegation of contravention of the Convention by the respondent State has been discharged or not."

Similarly, the Court in the *Cyprus v. Turkey* judgment noted in paragraphs 112-13 (see also §§ 114-17):

> "112. The Court also observes that in its assessment of the evidence in relation to the various complaints declared admissible, the Commission applied the standard of proof 'beyond reasonable doubt' as enunciated by the Court in its *Ireland v. the United Kingdom* judgment of 18 January 1978 (Series A no. 25), it being noted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (ibid., pp. 64-65, § 161).
>
> 113. The Court, for its part, endorses the application of this standard, all the more so since it was first articulated in the context of a previous inter-State case and has, since the date of the adoption of the judgment in that case, become part of the Court's established case-law (for a recent example, see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII)."

Leaving aside the recent case-law on the issue for the moment, in my respectful opinion and in all honesty, I fail to understand how under any circumstance, let alone in Cyprus in 1974, even by applying simple logic, persons who have disappeared in a life-threatening situation or have gone missing and have not been heard of for a period of over 33 years, can be presumed or accepted to be still "legally" alive. Even if one were to take Turkey's ratification date of 1987, a time-period of 13 years would still have elapsed.

Accordingly, I reiterate 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 the respondent Government 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" needs 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 exists* 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.*

Six-month rule

As I stated for the above reasons, I do not agree that there is a continuing violation.

Since I am of the opinion that a "presumption of death" should be the presumption drawn in the case before us, I do not concur with my colleagues when they observe that the present case before us is one "where the continuing situation flows from a factual situation arising at a particular point in time" (paragraph 116), thereby bringing it within the six-month rule. I find that a continuing situation does not "flow". The presumption of death excludes this possibility.

Another point about the majority's assessment in this connection, which I feel I must make here simply because of a possible paradox that I notice may exist, is that while in the present application a finding is made that there is a "continuing violation", in contrast to a previous judgment concerning Turkish Cypriot missing persons who had gone missing under similar life-threatening circumstances in 1964, at the time of inter-

communal strife, the majority accept that the Court "in reaching th[at] decision, as with the other similar applications, made no mention of a 'continuing situation' in its analysis in reaching the conclusion that the case had been introduced out of time" (paragraph 116).

I note that the explanation given is that in the *Karabardak* case (*Karabardak and Others v. Cyprus*, (dec.) no. 76575/01, 22 October 2002) the "long delay" of over thirty years in bringing the matter to examination pursuant to Article 35(1) of the Convention was not accounted for and that: "[i]t is not in the interests of the practical and effective functioning of the Convention system, which is of crucial importance to the protection of the fundamental rights and freedoms, that the Court be called upon to deal with stale complaints" (see paragraph 117). Whereas in the present application the applicants applied to the Commission three days after Turkey had recognised the jurisdiction of the old Court on 22 January 1990.

In view of the majority's decision in the present application I have found it difficult to understand how the decisions in *Karabardak* and *Baybora* were reached. I cannot seem to find this assessment consistent with the jurisprudence of the Court. Observing that the *Karabardak and Others* case also concerned disappearances occurring in a strife-ridden Cyprus where life-threatening circumstances prevailed, and bearing in mind the reasoning followed by the majority of my colleagues in the present application as to a "continuing situation" or violation, can one assume, even at the risk of appearing speculative, that a decision on the *merits* in the *Karabardak and Others* case would have been similar to the one reached in the present application? Hence, with great respect and modesty, merely for the sake of completeness, were I to apply the majority view (I merely reiterate, but do not adopt it) *mutatis mutandis* to the *Karabardak and Others* case, it too might have been found admissible as maintaining continuing violations which generated a continuing obligation of effective investigation. Yet, I perceive an anomaly in the approach in the present applications and feel that a consistency of logic in conformity with, and no different from, the *Karabardak and Others* case should have been adopted.

I wholeheartedly agree that in the interests of the "practical and effective functioning of the Convention system, the greater the lapse of time the more problematic any attempted examination of the facts and issues". However, this observation applies to the present case and was also the main issue in the admissibility stages of *Baybora* and *Karabardak*.

With due respect to my colleagues adjudicating in the cases of both *Baybora* and *Karabardak* (on perusal of the Observations of the Government of Turkey of 1 March 2007, § 27) it may have been a more positive step to have communicated or have invited the respondent Government to give their views so as to present before the Court a more balanced view of the case and thus aid the Court on the issue of jurisdiction *ratione temporis*, as they have done in the present case.

I merely mention that I feel there may be some frailty in the reasoning here in rejecting the respondent Government's whole argument under this head; for the applicants, on the introduction of the present application, applied to the Commission, not to the Court, for redress. The important factor, or date, for consideration, is the date when Turkey recognised the right of individual application to the Commission that is 1987; it is not 1990, the date when Turkey recognised the Court's jurisdiction. Therefore, I was not able to concur in this assessment. In addition, I make note of the fact that:

(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. Turke*y, 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. I refer in support of this view to comments of Judge Fuad in the *Cyprus v. Turkey* judgment: "With great respect, in my view the majority has not given sufficient weight to the causes and effects of the ugly and catastrophic events which took place in Cyprus between 1963 and 1974 (which literally tore the island apart)" (Partly dissenting opinion, § 2).

Accordingly, since the present application has been found admissible, I would like to note that I am unable to regard this decision as sustaining a justification as to why the *Karabardak and Others* case was treated differently on the issue of jurisdiction *ratione temporis* and why those applicants' claims for redress were not accepted. Therefore, I conclude that the respondent Government's preliminary objection under this head should have been accepted, and a judgment in conformity with the *Baybora* and *Karabardak* decisions recorded (followed in preceding cases of *Şemi and Others v. Cyprus*, no. 13212/02, and *Hüseyin and Göçer v. Cyprus,* no. 28280/02).

It is here, also, that I again find myself in agreement with my colleague Judge Kutlu Fuad, who in his partly dissenting opinion in the *Cyprus v. Turkey* case said (§ 25):

> "Here the position is not simple. The events which the majority of the Court held to have given rise to an obligation to conduct effective investigations occurred in July and August 1974. This was some fifteen years before the operative date of Turkey's declaration. Neither the Commission nor the Court found sufficient evidence to hold that the missing persons were still in the custody of the Turkish authorities at the relevant time. In my opinion, it cannot be right to treat the Convention obligation which arises in certain circumstances to conduct a prompt and effective investigation as having persisted for fifteen years after the events which required investigation so that, when Turkey did become bound by the Convention, her alleged failure to date to conduct appropriate investigations can be regarded as a violation of the Convention. In my view, the concept of continuing violations cannot be prayed in aid to reach such a result. It seems to me that such an approach would be to apply an obligation imposed by the Convention retrospectively and to divest the time limitation in the declaration of its effect."

Accordingly, the case is inadmissible under Article 35(3) and (4) of the Convention.

Committee of Missing Persons (CMP)

Without committing myself to comments on the merits of this case I find it important to make some reference to the developments regarding the facts relating to the Committee of Missing Persons (CMP). In the information we

have before us (Further submissions of Turkey 21 August 2007, § 20) we note that the last few years have seen the CMP's role in ascertaining the whereabouts of missing persons increase in a substantial and successful manner. So without prejudice to the rest of my opinion, I would also like to make some brief remarks before concluding.

We see that the CMP since 2004 has been activated in a substantial manner. It is assisted by well-known international experts and has developed several programmes in order to start exhumations to identify remains with anthropological and genetic tests, with a view to returning the remains to the families. Exhumation, identification and burial procedures are implemented not only with respect to scientific criteria, but also with respect to the dignity of the deceased and their families. With international financial support provided, and forthcoming, this shows that the CMP has become an international experimented model for similar investigations in other parts of the world.

Exhumations are producing *concrete* and *convincing* results. There is much more which *prima facie* shows that the CMP's work today may in the future represent more of an effective investigation into the circumstances surrounding the disappearances, despite the terms of reference. There is a clear movement towards complying with Article 2 and I feel that views in line with the fourth inter-State ruling may be excessive in light of the CMP's present day activities and functions. If there was no effective investigation I do not think it possible that the remains of the missing could have been found or the findings and discoveries made. While the work of the CMP is conducted in secrecy, this does not mean that it is not the most effective method of tracing the disappearances.

Regrettably, I simply cannot agree with my colleagues' opinion on the ineffectiveness of CMP investigations into the fate of the missing persons. While it may have been the case in 2001 (*Cyprus v. Turkey*), the present activities and events relating to the CMP's work and findings, as I have described above, today, cannot go unnoticed.

In light of what I have said above in regard to the present-day CMP investigations and the disclosures that they have made, I do not agree with the view that there are *"no developments, legal or factual"* which change the assessment of the Court with regard to the CMP's work. There is significant proof of the developments and width of CMP activities. I do not find it correct to say that the fact that the "...remains of Savvas Hadjipanteli have recently been discovered...does not demonstrate that the CMP has been able to take any meaningful investigative steps beyond the belated location and identification of remains." (paragraph 132).

If the scope of the CMP's work had not been sufficiently enlarged so as to be effective or investigative, the remains and evidence of bullet-wounds would not have been revealed in the first place. The "recent developments"

(paragraphs 89 and 102) reveal how remarkably the work of the CMP is steadily advancing today.

I ask for indulgence as I express my sensitivities in the following views:

A period of almost 33 years has passed. I find myself asking such questions as: The missing persons issue in Cyprus as it stands today, would any other form be an "effective investigation" sufficient to satisfy Article 2 in the upholding and protection of human rights? Would it be more successful than the CMP, especially in discoveries of the whereabouts of the missing? Would it interfere or hamper the work of the CMP?

The CMP has been built up to its present strength over long years of trial and error, and continues to build in potency. Dedicated persons, scientists, from both sides, and internationally, strive endlessly to diminish the loss of loved ones of both Greek and Turkish Cypriots alike. To find and give the remains of the missing back to loved ones; thus not prolonging the anguish for those directly concerned. The events of 1974 in all its aspects, created many separations, sadness, confusion and uncertainties for all concerned. What is left and what I feel is wanted by the people of Cyprus today, is to find their missing loved ones. Memories have faded, become distorted, persons have passed on. What if the successful work of the CMP is undermined by any other form of investigation, where sensitivity and secrecy is the operating factor? As far as I am concerned, it is this aspect that has gained precedence in today's Cyprus. Here, I leave aside the fact that the CMP has gone far beyond the purpose for which it was set up.

I am therefore of the view that the CMP is capable of effectively doing all that can reasonably and possibly be done. I find that the CMP satisfies the criteria of effective investigation as is necessary in the events and developments in Cyprus today. This is my view of the work and purpose of CMP, and nothing I can see in the present case has convinced me otherwise.

Damages and costs

I have found the respondent Government justified in their preliminary objections and the applications inadmissible. Therefore, I do not see any purpose in giving my opinion as to whether any of the *"significant distress, frustration, uncertainty and anguish"* that may have been suffered by the second applicants can be attributable to actions or non-action of the respondent Government in violation of the Convention.

Since I do not concur on the findings that the applications are admissible on their merits, 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 the case is inadmissible *ratione temporis* and time-barred by the six-month rule.