

A. European Court of Human Rights, Cyprus v. Turkey - Paras 1 to 157

N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** European Court of Human Rights, *Cyprus v. Turkey*, Judgment of 10 May 2001, available on <http://hudoc.echr.coe.int> ^[2]]

Case of Cyprus v. Turkey The European Court of Human Rights

(Application no. 25781/94)

Judgment

Strasbourg, 10 May 2001

[...]

PROCEDURE [...]

3. The applicant Government alleged with respect to the situation that has existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974 that the Government of Turkey ("the respondent Government") have continued to violate the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms] [...]. The applicant Government invoked in particular Articles 1 to 11 and 13 of the Convention as well as Articles 14, 17 and 18 read in conjunction with the aforementioned provisions. They further invoked Articles 1, 2 and 3 of Protocol No. 1.

These complaints were invoked, as appropriate, with reference to the following subject-matters: Greek-Cypriot missing persons and their relatives; the home and property of displaced persons; the right of displaced Greek Cypriots to hold free elections; the living conditions of Greek Cypriots in northern Cyprus; and the situation of Turkish Cypriots and the Gypsy community living in northern Cyprus. [...]

THE FACTS

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, the Turkish military presence at the material time was described in the following terms [...]:

"Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication. [...]"

14. A major development in the continuing division of Cyprus occurred in November 1983 with the proclamation of the “Turkish Republic of Northern Cyprus” (the “TRNC”) and the subsequent enactment of the “TRNC Constitution” on 7 May 1985.

This development 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. A similar call was made by the Security Council on 11 May 1984 in its Resolution 550 (1984). 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. [...] 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. [...]

D. The Commission’s findings of fact in the instant application [...]

1. *Alleged violations of the rights of Greek-Cypriot missing persons and their relatives* [...]

22. The Commission proceeded on the understanding that its task was not to establish what actually happened to the Greek-Cypriot persons who went missing following the Turkish military operations conducted in northern Cyprus in July and August 1974. Rather, it saw its task as one of determining whether or not the alleged failure of the respondent State to clarify the facts surrounding the disappearances constituted a continuing violation of the Convention. [...]
24. In the present case, the Commission further recalled that in its 1983 report it found it established that there were sufficient indications in an indefinite number of cases that missing Greek Cypriots had been in Turkish custody in 1974 and that this finding once again created a presumption of Turkish responsibility for the fate of these persons.
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. [...]
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.
27. The Commission further concluded that its examination of the applicant Government's complaints in the instant application was not precluded by the ongoing work of the CMP. It noted in this connection that the scope of the investigation being conducted by the CMP was limited to determining whether or not any of the missing persons on its list were dead or alive; nor was the CMP empowered to make findings either on the cause of death or on the issue of responsibility for any deaths so established. Furthermore, the territorial jurisdiction of the CMP was limited to the island of Cyprus, thus excluding investigations in Turkey where some of the disappearances were claimed to have occurred. The Commission also observed that persons who might be responsible for violations of the Convention were promised

impunity and that it was doubtful whether the CMP's investigation could extend to actions by the Turkish army or Turkish officials on Cypriot territory.

2. *Alleged violations of the rights of the displaced persons to respect for their home and property*

28. The Commission established the facts under this heading against the background of the applicant Government's principal submission that over 211,000 displaced Greek Cypriots and their children continued to be prevented as a matter of policy from returning to their homes in northern Cyprus and from having access to their property there for any purpose. The applicant Government submitted that the presence of the Turkish army together with "TRNC"-imposed border restrictions ensured that the return of displaced persons was rendered physically impossible and, as a corollary, that their cross-border family visits were gravely impeded. [...]
30. The Commission found that it was common knowledge that with the exception of a few hundred Maronites living in the Kormakiti area and Greek Cypriots living in the Karpas peninsula, the whole Greek-Cypriot population which before 1974 resided in the northern part of Cyprus had left that area, the large majority of these people now living in southern Cyprus. The reality of this situation was not contested by the respondent Government. [...]

3. *Alleged violations arising out of the living conditions of Greek Cypriots in northern Cyprus [...]*

39. The Commission further found that there existed a functioning court system in the "TRNC" which was in principle accessible to Greek Cypriots living in northern Cyprus. It appeared that at least in cases of trespass to property or personal injury there had been some successful actions brought by Greek-Cypriot litigants before the civil and criminal courts. However, in view of the scarcity of cases brought by Greek Cypriots, the Commission was led to conclude that the effectiveness of the judicial system for resident Greek Cypriots had not really been tested.
40. In a further conclusion, the Commission found that there was no evidence of continuing wrongful allocation of properties of resident Greek Cypriots to other

persons during the period under consideration. However, the Commission did find it established that there was a continuing practice of the “TRNC” authorities to allocate to Turkish-Cypriots or immigrants the property of Greek Cypriots who had died or left northern Cyprus.

41. In the absence of legal proceedings before the “TRNC” courts, the Commission noted that it had not been tested whether or not Greek Cypriots or Maronites living in northern Cyprus were in fact considered as citizens enjoying the protection of the “TRNC Constitution”. It did however find it established that, in so far as the groups at issue complained of administrative practices such as restrictions on their freedom of movement or on family visits which were based on decisions of the “TRNC Council of Ministers”, any legal challenge to these restrictions would be futile given that such decisions were not open to review by the courts.
42. Although the Commission found no evidence of cases of actual detention of members of the enclaved population, it was satisfied that there was clear evidence that restrictions on movement and family visits continued to be applied to Greek Cypriots and Maronites notwithstanding recent improvements. [...]
43. The Commission found it established that there were restrictions on the freedom of movement of Greek-Cypriot and Maronite schoolchildren attending schools in the south. [...]
44. As to educational facilities, the Commission held that, although there was a system of primary-school education for the children of Greek Cypriots living in northern Cyprus, there were no secondary schools for them. The vast majority of schoolchildren went to the south for their secondary education and the restriction on the return of Greek-Cypriot and Maronite schoolchildren to the north after the completion of their studies had led to the separation of many families. [...]
47. As to alleged restrictions on religious worship, the Commission found that the main problem for Greek Cypriots in this connection stemmed from the fact that there was only one priest for the whole Karpas area and that the Turkish-Cypriot authorities were not favourable to the appointment of additional priests from the south. The Commission delegates were unable to confirm during their visit to the Karpas area whether access to the Apostolos Andreas Monastery was free at any time for Karpas Greek Cypriots. [...]

4. *Alleged violations in respect of the rights of Turkish Cypriots and the Turkish-Cypriot Gypsy community in northern Cyprus [...]*

52. The Commission found that there existed rivalry and social conflict between the original Turkish Cypriots and immigrants from Turkey who continued to arrive in considerable numbers. Some of the original Turkish Cypriots and their political groups and media resented the “TRNC” policy of full integration for the settlers.
53. Furthermore, while there was a significant incidence of emigration from the “TRNC” for economic reasons, it could not be excluded that there were also cases of Turkish Cypriots having fled the “TRNC” out of fear of political persecution. The Commission considered that there was no reason to doubt the correctness of witnesses’ assertions that in a few cases complaints of harassment or discrimination by private groups of or against political opponents were not followed up by the “TRNC” police. However, it concluded that it was not established beyond reasonable doubt that there was in fact a consistent administrative practice of the “TRNC” authorities, including the courts, of refusing protection to political opponents of the ruling parties. [...]
54. Regarding the alleged discrimination against and arbitrary treatment of members of the Turkish-Cypriot Gypsy community, the Commission found that judicial remedies had apparently not been used in respect of particularly grave incidents such as the pulling down of shacks near Morphou and the refusal of airline companies to transport Gypsies to the United Kingdom without a visa.
55. In a further conclusion, the Commission observed that there was no evidence before it of Turkish-Cypriot civilians having been subjected to the jurisdiction of military courts during the period under consideration. [...]

THE LAW

I. PRELIMINARY ISSUES [...]

Issues reserved by the Commission to the merits stage [...]

3. *As to the respondent State's responsibility under the Convention in respect of the alleged violations*

69. The respondent Government disputed Turkey's liability under the Convention for the allegations set out in the application. In their submissions to the Commission, the respondent Government claimed that the acts and omissions complained of were imputable exclusively to the "Turkish Republic of Northern Cyprus" (the "TRNC"), [...].
77. [...] Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey. [...]

4. *As to the requirement to exhaust domestic remedies [...]*

101. The Court does wish to add, [...] that the applicant Government's reliance on the illegality of the "TRNC" courts seems to contradict the assertion made by that same Government that Turkey is responsible for the violations alleged in northern Cyprus – an assertion which has been accepted by the Court [...]. It appears indeed difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law. [...]
102. The Court concludes accordingly that, for the purposes of former Article 26 (current Article 35 para. 1) of the Convention, remedies available in the "TRNC" may be regarded as "domestic remedies" of the respondent State and that the question of their

effectiveness is to be considered in the specific circumstances where it arises. [...]

III. ALLEGED VIOLATIONS OF THE RIGHTS OF GREEK-CYPRriot MISSING PERSONS AND THEIR RELATIVES

A. Greek-Cypriot missing persons [...]

2. As to the merits of the applicant Government's complaints

(a) Article 2 of the Convention [Right to life] [...]

129. The Court observes that the applicant Government contend first and foremost that the missing persons must be presumed to be still alive unless there is clear evidence to the contrary [...]. Although the evidence adduced before the Commission confirms a very high incidence of military and civilian deaths during the military operations of July and August 1974, the Court reiterates that it cannot speculate as to whether any of the missing persons have in fact been killed by either the Turkish forces or Turkish-Cypriot paramilitaries into whose hands they may have fallen. [...]
130. The Court notes that the evidence given of killings carried out directly by Turkish soldiers or with their connivance relates to a period which is outside the scope of the present application. [...] The Court concludes, therefore, that it cannot accept the applicant Government's allegations that the facts disclose a substantive violation of Article 2 of the Convention in respect of any of the missing persons.
131. For the Court, the applicant Government's allegations must, however, be examined in the context of a Contracting State's procedural obligation under Article 2 to protect the right to life. It recalls in this connection that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State [...].
133. Against this background, the Court observes that the evidence bears out the applicant Government's claim that many persons now missing were detained either by Turkish

or Turkish-Cypriot forces. Their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. [...]

134. [...] The Court cannot but note that the authorities of the respondent State have never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare. [...] It does not appear either that any official inquiry was made into the claim that Greek-Cypriot prisoners were transferred to Turkey.
135. The Court agrees with the applicant Government that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes that, although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations [...].
136. Having regard to the above considerations, the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances. [...]

(c) Article 5 of the Convention [Right to liberty and safety] [...]

143. According to the applicant Government, the fact that the authorities of the respondent State had failed to carry out a prompt and effective investigation into the well-documented circumstances surrounding the detention and subsequent disappearance of a large but indefinite number of Greek-Cypriot missing persons gave rise to a violation of the procedural obligations inherent in Article 5. [...]
147. The Court stresses at the outset that the unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of the person contained in Article 5 of the Convention and a most grave violation of that Article. Having assumed control over a given individual, it is incumbent on the authorities to account

for his or her whereabouts. [...]

148. The Court refers to the irrefutable evidence that Greek Cypriots were held by Turkish or Turkish-Cypriot forces. There is no indication of any records having been kept of either the identities of those detained or the dates or location of their detention. From a humanitarian point of view, this failing cannot be excused with reference either to the fighting which took place at the relevant time or to the overall confused and tense state of affairs. Seen in terms of Article 5 of the Convention, the absence of such information has made it impossible to allay the concerns of the relatives of the missing persons about the latter's fate. Notwithstanding the impossibility of naming those who were taken into custody, the respondent State should have made other inquiries with a view to accounting for the disappearances. [...]
150. The Court concludes that, during the period under consideration, 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 missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared. [...]

B. Greek-Cypriot missing persons' relatives

1. Article 3 of the Convention [Prohibition of torture and inhuman or degrading treatment or punishment] [...]

156. The Court recalls that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of

the “disappearance” of the family member but rather in the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct [...].

157. The Court observes that the authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons. In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. [...] [The Court] recalls that the military operation resulted in a considerable loss of life, large-scale arrests and detentions and enforced separation of families. The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died. The fact that a very substantial number of Greek Cypriots had to seek refuge in the south coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3. [...]

Paras 171 to 359

IV. ALLEGED VIOLATIONS OF THE RIGHTS OF DISPLACED PERSONS TO RESPECT FOR THEIR HOME AND PROPERTY [...]

B. As to the merits of the applicant Government’s complaints

1. Article 8 of the Convention [Right to the respect of private and family life, home and correspondence] [...]

171. The Court notes that in the proceedings before the Commission the respondent Government did not dispute the applicant Government's assertion that it was not possible for displaced Greek Cypriots to return to their homes in the north. [...]
172. The Court observes that the official policy of the "TRNC" authorities to deny the right of the displaced persons to return to their homes is reinforced by the very tight restrictions operated by the same authorities on visits to the north by Greek Cypriots living in the south. Accordingly, not only are displaced persons unable to apply to the authorities to reoccupy the homes which they left behind, they are physically prevented from even visiting them.
173. The Court further notes that the situation impugned by the applicant Government has obtained since the events of 1974 in northern Cyprus. It would appear that it has never been reflected in "legislation" [...].
174. The Court would make the following observations in this connection: firstly, the complete denial of the right of displaced persons to respect for their homes has no basis in law within the meaning of Article 8 para. 2 of the Convention [...]; secondly, the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; thirdly, the violation at issue has endured as a matter of policy since 1974 and must be considered continuing.
175. In view of these considerations, the Court concludes that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus. [...]

2. *Article 1 of Protocol No. 1 [Property rights] [...]*

183. The Commission [...] concluded that during the period under consideration there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.
184. The Court agrees with the [...] analysis. [...] It would appear that the legality of the interference with the displaced persons' property is unassailable before the "TRNC" courts. Accordingly, there is no requirement for the persons concerned to use

domestic remedies to secure redress for their complaints. [...]

187. [...] The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1. It further notes that, as regards the purported expropriation, no compensation has been paid to the displaced persons in respect of the interferences which they have suffered and continue to suffer in respect of their property rights. [...]
189. For the above reasons the Court concludes that there has been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights. [...]

V. ALLEGED VIOLATIONS ARISING OUT OF THE LIVING CONDITIONS OF GREEK CYPRIOTS IN NORTHERN CYPRUS

207. The applicant Government asserted that the living conditions to which the Greek Cypriots who had remained in the north were subjected gave rise to substantial violations of the Convention. They stressed that these violations were committed as a matter of practice and were directed against a depleted and now largely elderly population living in the Karpas area of northern Cyprus in furtherance of a policy of ethnic cleansing, the success of which could be measured by the fact that from some 20,000 Greek Cypriots living in the Karpas in 1974 only 429 currently remained. Maronites, of whom there were currently 177 still living in northern Cyprus, also laboured under similar, if less severe, restrictions. [...]

B. As to the merits of the applicant Government's complaints [...]

4. Article 9 of the Convention [Freedom of religion]

241. The applicant Government alleged that the facts disclosed an interference with the enclaved Greek Cypriots' right to manifest their religion, in breach of Article 9 of the Convention [...].
243. The Commission observed that the existence of a number of measures limited the

religious life of the enclaved Greek-Cypriot population. It noted in this respect that, at least until recently, restrictions were placed on their access to the Apostolos Andreas Monastery as well as on their ability to travel outside their villages to attend religious ceremonies. In addition, the “TRNC” authorities had not approved the appointment of further priests for the area, there being only one priest for the whole of the Karpas region. [...]

244. The Commission accordingly concluded that during the period under consideration there had been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus.
245. The Court accepts the facts as found by the Commission, which are not disputed by the applicant Government. It has not been contended by the applicant Government that the “TRNC” authorities have interfered as such with the right of the Greek-Cypriot population to manifest their religion either alone or in the company of others. Indeed there is no evidence of such interference. However, the restrictions placed on the freedom of movement of that population during the period under consideration considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life.
246. The Court concludes that there has been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus. [...]

7. *Article 1 of Protocol No. 1 [Right to and respect of property] [...]*

265. In a further submission, the applicant Government pointed to their claim that third parties interfered with the property of the persons concerned, whether situated inside their villages or beyond the three-mile zone and that the “TRNC” authorities acquiesced in or tolerated these interferences. In the applicant Government’s view, the evidence adduced before the Commission clearly demonstrated that the local police did not, as a matter of administrative practice, investigate unlawful acts of trespass, burglary and damage to property [...].
268. As to the criminal acts of third parties referred to by the applicant Government, the Commission considered that the evidence did not bear out their allegations that the

“TRNC” authorities had either participated in or encouraged criminal damage or trespass. It noted that a number of civil and criminal actions had been successfully brought before the courts in respect of complaints arising out of such incidents and that there was a recent increase in criminal prosecutions. [...]

269. The Court notes from the facts established by the Commission that, as regards ownership of property in the north, the “TRNC” practice is not to make any distinction between displaced Greek-Cypriot owners and Karpas Greek-Cypriot owners who leave the “TRNC” permanently, with the result that the latter’s immovable property is deemed to be “abandoned” and liable to reallocation to third parties in the “TRNC”.

For the Court, these facts disclose a continuing violation of Article 1 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory.

270. The Court further observes that the evidence taken in respect of this complaint also strongly suggests that the property of Greek Cypriots in the north cannot be bequeathed by them on death and that it passes to the authorities as “abandoned” property. [...]

8. *Article 2 of Protocol No. 1 [Right to education] [...]*

277. The Court notes that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the “TRNC” ever since the decision of the Turkish-Cypriot authorities to abolish it. Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. [...]
278. [...] [I]n the Court’s opinion, the option available to Greek-Cypriot parents to continue their children’s education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-

Cypriot parents that the schooling of their children be completed through the medium of the Greek language. [...]

279. Having regard to the above considerations, the Court concludes that there has been a violation of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them. [...]

VII. ALLEGED VIOLATIONS IN RESPECT OF THE RIGHTS OF TURKISH CYPRIOTS, INCLUDING MEMBERS OF THE GYPSY COMMUNITY, LIVING IN NORTHERN CYPRUS [...]

C. The merits of the applicant Government's complaints [...]

3. *Alleged violation of Article 6 of the Convention [Right to fair and regular trial]*

354. The applicant Government contended that the "TRNC" authorities, as a matter of law and practice, violated Article 6 of the Convention in that civil rights and obligations and criminal charges against persons could not be determined by an independent and impartial tribunal established by law within the meaning of that provision. [...]
355. The applicant Government further submitted that the "TRNC" authorities operated a system of military courts which had jurisdiction to try cases against civilians in respect of matters categorised as military offences. In their view it followed from the Court's *Incal v. Turkey* judgment of 9 June 1998 (Reports 1998-IV) that a civilian tried before a military court was denied a fair hearing before an independent and impartial tribunal. The jurisdiction of the military courts in this respect was laid down in "Article 156 of the TRNC Constitution", with the result that their composition could not be challenged. [...]
357. The Court considers that it does not have to be satisfied on the evidence that there was an administrative practice of trying civilians before military courts in the "TRNC". [...]
358. For the Court, examination in *abstracto* of the impugned "constitutional provision" and the "Prohibited Military Areas Decree" leads it to conclude that these texts clearly introduced and authorised the trial of civilians by military courts. It considers that there is no reason to doubt that these courts suffer from the same defects of independence and impartiality which were highlighted in its *Incal v. Turkey* judgment

in respect of the system of National Security Courts established in Turkey by the respondent State [...], in particular the close structural links between the executive power and the military officers serving on the “TRNC” military courts. In the Court’s view, civilians in the “TRNC” accused of acts characterised as military offences before such courts could legitimately fear that they lacked independence and impartiality.

359. For the above reasons the Court finds that there has been a violation of Article 6 of the Convention on account of the legislative practice of authorising the trial of civilians by military courts. [...]

Partly dissenting opinion of Judge Fuad

[...]

10. The nettle must be grasped. The Court’s majority judgment must mean that unless every Cypriot who wishes to recover possession of his or her property is allowed to do so, crossing the UN-controlled buffer-zone as may be necessary, immediately and before a solution to the Cyprus problem has been found, there will be a violation of Convention rights in respect of the person whose wish is denied. As matters stand today (and sadly, have stood for over a quarter of a century) could anyone, armed with his title deed, go up to a unit of the UN peace-keeping force and demand the right to cross the buffer-zone to resume possession of his or her property? Who would police the operation? What might be the attitude of any present occupier of the property in question? Would not serious breaches of the peace inevitably occur? Who would enforce any eviction which was necessary to allow the registered owner to retake possession?
11. If considerations of this kind are relevant (and I do not see how they can be brushed aside) then, it seems to me, it must be acknowledged that in present-day Cyprus it is simply not realistic to allow every dispossessed property owner to demand the immediate right to resume possession of his or her property wherever it lies. In my opinion, these problems are not overcome by giving such persons the solace of an award of compensation and/or damages because their property rights cannot, for practical reasons, be restored to them. [...]

12. Events over the past thirty years or so have shown that despite the devoted and unremitting efforts of the United Nations (through successive holders of the office of Secretary-General and members of their staff), other organisations and friendly governments, a solution acceptable to both sides has not been found. This is surely an indication of the complexity and difficulty of the Cyprus problem. These efforts continue: talks were in progress in New York as the Court was sitting.
13. Sadly, it may be that when a solution is ultimately found it will be one that fails to satisfy the understandable desire of every Cypriot to return to his or her home and fields, etc. [...]
19. [...] The UN General Assembly called for the establishment of an investigatory body to resolve the cases of missing persons from both communities. The General Assembly requested the Secretary-General to support the establishment of such a body with the participation of the International Committee of the Red Cross (“ICRC”) “which would be in a position to function impartially, effectively and speedily so as to resolve the problem without undue delay”.
20. Eventually it was decided that the CMP should comprise three members: representatives from the Greek and the Turkish side and a representative of the Secretary-General nominated by the ICRC. What seems clear is that the United Nations, for obvious reasons, envisaged a body that would perform its sad and difficult task objectively and without bias. The UN’s call was met by the composition of the CMP. Very wisely, if I may say so, the ICRC was to be involved so that its resources and wide experience in the often heartbreaking task involved could be called upon. [...]
22. Turkey’s stand on the whole issue of the missing persons is well known. I have seen no evidence that Turkey has refused to cooperate with the CMP or obstructed its work. If the Terms of Reference, the Rules or the Guidelines that govern the way that the CMP operates are unsatisfactory these can be amended with good will and the help of the Secretary-General. I am not able to agree with my colleagues that the CMP procedures are not of themselves sufficient to meet the standard of an effective investigation required by Article 2. As the applicable Rules and Guidelines, read with the Terms of Reference, have developed, provided both sides give their ungrudging cooperation to the CMP, an effective investigating team has been created. That the

CMP was the appropriate body to make the necessary investigations was acknowledged by the UN Working Group on Enforced and Involuntary Disappearances. [...]

B. European Court of Human Rights, Varnava and Others v. Turkey

[Source: European Court of Human Rights, *Varnava and Others v. Turkey*, Judgment of 18 September 2009, available on <http://hudoc.echr.coe.int> ^[2]]

CASE OF VARNAVA AND OTHERS v. TURKEY

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

JUDGMENT

STRASBOURG

18 September 2009

[...]

PROCEDURE

1. The case originated in nine applications [...] against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eighteen Cypriot nationals [...].
3. The applicants alleged that the first applicants in the above applications had disappeared after being detained by Turkish military forces from 1974 and that the Turkish authorities had not accounted for them since. They invoked Articles 2, 3, 4, 5,

6, 8, 10, 12, 13 and 14 of the Convention.

[...]

THE LAW

[...]

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

[...]

A. The Chamber judgment

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

[...]

C. The Court's assessment

[...]

1. *The burden of proof*

181. The Court notes that the procedural obligation was stated as arising where individuals, last seen in the custody of agents of the State, subsequently disappeared in a life-threatening context. In the context of the inter-State case it was not necessary to specify which individuals were included in the “many persons” shown by the evidence to have been detained by Turkish or Turkish Cypriot forces at the time of their disappearance. There is no basis on which it can be assumed that the missing men in the present case were included in the Court’s findings. It must therefore be determined in this case whether the conditions for a procedural obligation arose.
182. In response to the respondent Government’s argument about the burden of proof, the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt [...].
185. Turning to the present case, the Court would note that the respondent Government did not accept that the missing men had been taken into custody under their responsibility. Nor is it for the Court to seek to establish what occurred in 1974, which is outside its temporal jurisdiction. However, it is satisfied that there is a strongly arguable case that two men were last seen in circumstances falling within the control of the Turkish or Turkish Cypriots forces, [...] who were included on an ICRC list as detainees [...]. As concerns the other seven men, no such documentary evidence of actual detention has been forthcoming. There is nonetheless an arguable case that the other seven men were last seen in an area under the control, or about to come under the control of the Turkish armed forces. Whether they died, in the fighting or of their wounds, or whether they were captured as prisoners, they must still be accounted for. Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict [...].

[Footnote: 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).]

The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.

186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted.

2. *Compliance with the procedural obligation*

[...]

192. The Court finds no indication that the CMP is going beyond its limited terms of reference to play any role in determining the facts surrounding the deaths of the missing persons who have been identified or in collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution. Nor is any other body or authority taking on that role. It may be that investigations would prove inconclusive, or insufficient evidence would be available. However, that outcome is not inevitable even at this late stage and the respondent Government cannot be absolved from making the requisite efforts. [...]
194. The Court concludes that there has been a continuing violation of Article 2 on account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974.

[...]

Discussion

[N.B.: The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”) is available at <http://conventions.coe.int> ^[3]]

1.
 - a. Does international humanitarian law (IHL) apply to the events in northern Cyprus in 1974 and to the continuing division of the territory of Cyprus? Does the Court qualify the situation? Does it say that IHL applies?
 - b. In *Cyprus v. Turkey*, did the Court apply IHL? Could it have done so? Does the Court even refer to IHL? Could it have done so? Should it have done so? (Art. 15 of the ECHR stipulates that:
“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
“2. No derogation (...), except in respect of deaths resulting from lawful acts of war, (...) shall be made under this provision [protecting the right to life]. (...)”)

- c. In *Varnava and Others v. Turkey*, did the Court apply IHL? Did the Court find that Turkey had violated IHL? May the Court find and condemn violations of IHL? Does Article 15 give the Court the possibility to apply IHL?
 - d. In *Varnava and Others v. Turkey*, was the Court under the obligation to interpret Art. 2 of the ECHR in light of IHL? Why didn't it do so in *Cyprus v. Turkey*, although the facts were similar? Why has the Court been so reluctant to refer to IHL?
2. (*Cyprus v. Turkey*) Is northern Cyprus an occupied territory within the meaning of IHL? Would it be, even if Turkey's invasion of northern Cyprus in 1974 had been lawful? Even if the "Turkish Republic of Northern Cyprus" (TRNC) were an independent State? Even if Turkey had no more troops in northern Cyprus? (GC IV, Art. 2 ^[4]; P I, Preamble, para. 5 ^[5])
 3.
 - a. (*Cyprus v. Turkey*) For each problem considered by the Court, determine whether there was any violation of IHL. (HR ^[6], Arts 43 ^[7] and 46 ^[8]; GC IV ^[9], Arts 25 ^[10], 26 ^[11], 49(1) ^[12], 50(3) ^[13], 53 ^[14], 58 ^[15], 64 ^[16], 66 ^[17], 136 ^[18], 137 ^[19] and 140 ^[20])
 - b. When a practice in an occupied territory is a violation of IHL, is it also necessarily a violation of the ECHR (*see* Art. 15 thereof in question 1b above)? If a practice of an occupying power is allowed under IHL but not under the ECHR, is it a violation of international law?
 4.
 - a. Are the following people under the jurisdiction of Turkey?
 - a. missing Greek Cypriots
 - b. families of missing Greek Cypriots living in southern Cyprus
 - c. inhabitants of southern Cyprus denied access to northern Cyprus
 - d. Greek Cypriots living in northern Cyprus
 - e. Turkish Cypriots living in northern Cyprus
 - b. Does IHL protect the people listed above? Which of these are "protected persons"? (GC IV ^[9], Arts 4 ^[21], 13 ^[22], 25 ^[10] and 26 ^[11])
 5. (*Cyprus v. Turkey*) Is Turkey responsible for the acts of its armed forces in northern Cyprus? Is it responsible for the acts of the TRNC? Because it occupies the territory of the TRNC? Because it established the TRNC? Because it gives instructions to the organs of the TRNC? Does Turkey have a responsibility only in the terms of the

ECHR, or also in the terms of IHL? (GC IV, Arts 29 [23] and 47 [24])

6. Must the TRNC authorities comply with the rules of GC IV applicable to occupied territories? With respect to the Greek Cypriots? With respect to the Turkish Cypriots? With respect to the Turkish settlers? (GC IV, Arts 4 [25], 13 [26], 25 [27], 26 [28], 29 [23] and 47 [24])
7. Under IHL, is Turkey responsible for the acts of Turkish settlers in northern Cyprus? On what grounds could it be responsible? By virtue of the ECHR? By virtue of IHL? Why does the Court not recognize such a responsibility in this particular case? On factual or legal grounds? (HR, Art. 43 [29]; GC IV, Arts 1 [30], 4 [25], 29 [23] and 49(6) [31])
8. Does the Court recognize the legal system of the TRNC? On what grounds? According to IHL, could Turkey have allowed the TRNC to set up such a legal system? (HR, Art. 43 [29]; GC IV, Arts 47 [24], 54 [32], 64 [33] and 66 [34])
9. (*Cyprus v. Turkey*)
 - a. How did Turkey violate the right to life and liberty of the missing Greek Cypriots? By killing them? Are their deaths attributable to Turkey? By detaining them? Were they ever detained by Turkey? Under the ECHR, is Turkey responsible for these missing people? What are Turkey's obligations with regard to the families of these missing people?
 - b. What would Turkey's obligations towards missing people have been under IHL? Did it fulfil these obligations? (GC IV [9], Arts 25 [10], 26 [11], 136 [18], 137 [19] and 140 [20]; P I [35], Arts 32 [36]-34 [37])
 - c. Can Turkey investigate the fate of the missing people on its own?
 - d. Doesn't the existence of an international investigative body (the CMP) relieve Turkey of its obligation to investigate the missing people's fate? Do these two "types" of investigation have the same objectives?
 - e. Does the fact that the ICRC, or a body in which the ICRC participates, is handling the problem of missing people prevent another body from establishing where responsibility for the disappearances lies? In what areas could the activity of each reduce the other's chances of success? Should the two bodies exchange the information obtained?
10. (*Varnava and Others v. Turkey*) On which basis did the Court find that Art. 2 had been violated? Was it because Turkey did not collect and provide information about

the identity and fate of missing persons? Did Turkey have such an obligation under IHL? Under the ECHR? Why did the Court refer here to IHL regarding this obligation, but did not do so in *Cyprus v. Turkey* when dealing with the same obligation?

11. Discuss the dissenting opinion of Judge Fuad. Do you think that the Court's decision will be respected? What would be the consequence of a mass movement of Greek Cypriots to their properties in the north? Are there situations in which respect for human rights is better achieved through political negotiations than by the decision of a court of law recognizing individual rights? Can a similar result be achieved by the work of humanitarian organizations on the ground?
12.
 - a. Is IHL more suitable than the ECHR for dealing with the problems of humanitarian concern identified in this case? What are the advantages and disadvantages of the two branches of international law in such a situation?
 - b. Which problems of humanitarian concern identified in this case is the ICRC best able to resolve? For which of them is the Court best placed? Are there drawbacks to pooling the efforts of both organizations?

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Links

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[4]

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[6] [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD0002D6788&action=openDocument)

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[9] [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD0002D6788&action=openDocument)

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