



**Enforced Disappearances in Cyprus: Problems and Prospects
of the Case Law of the European Court of Human Rights**

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Enforced disappearances in Cyprus: problems and prospects of the case law of the European Court of Human Rights

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Keywords: Enforced disappearance; missing persons; continuous violation; six-month rule.

Abstract

The article critically examines the judgments of the European Court of Human Rights that relate to cases of enforced disappearance stemming from the Cyprus conflict. More particularly, it takes issue with the judgment of Varnava and others v. Turkey and challenges the Court's reasoning on the application of the six-month rule and its interplay with the continuous nature of enforced disappearances. In the final section, the author explores the avenues open to relatives of disappeared persons in the aftermath of the aforementioned judgment.

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1. Introduction

‘Missing persons’¹ is one of the parts comprising the complex puzzle of the protracted Cyprus problem. The political ramifications of this problem are interwoven with its humanitarian aspect, rendering it distinct from other aspects, such as the property claims and the constitutional structure of a future federated State. One of the most common misconceptions on the issue of Cypriot missing persons is that it affects only one side of the conflict. Contrary to the discourse developed in the Greek-Cypriot (G/c) and Turkish-Cypriot (T/c) communities, the story of missing persons in Cyprus has a dual national identity, with respect to both the perpetrators and to the victims.

Cypriot citizens from both communities disappeared during two periods of the contemporary history of the island: 1963-64 (inter-communal fights) and July-August 1974 (Turkish invasion of Cyprus). According to the information initially submitted from both sides to the Committee of Missing Persons (CMP),² the number of G/c and T/c missing persons was 1493 and 502, respectively.

Several applications relating to these disappearances have been submitted to the European Court of Human Rights (ECtHR) in the course of the last twenty years. This paper will present and analyse the following judgments and decisions with respect to the following decisions and judgments:

- a) the Grand Chamber judgment on *Cyprus v. Turkey* (interstate application);
- b) the admissibility decisions in the cases of *Karabardak v. Cyprus* and *Baybora v. Cyprus*, and
- c) the Chamber and Grand Chamber judgments in the case of *Varnava and others v. Turkey*.

The author will centre on the last judgment, with the intention of scrutinizing the Court’s approach to the issue of the six-month rule and examining how this rule relates to the legal character of enforced disappearances as a human rights violation of a continuous

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¹ Political discourse in Cyprus has established the phrase ‘missing persons’ covering both missing and disappeared persons, as the two terms exist in humanitarian and human rights law. Both will be used interchangeably in this article to refer to the persons that have disappeared due to the Cyprus conflict from 1963 to 1974.

² CMP is the only institutionalized bi-communal committee on the island, operating under the auspices of the United Nations. For information on its mandate and work, see: http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1 [Accessed September 30, 2010].

nature. Following this, the possible routes that enforced disappearance cases could follow in the future, within the context of the Cyprus conflict, will be explored.

2. The fourth interstate application of Cyprus v. Turkey

The Greek-Cypriot side considers the judgment on the interstate application of Cyprus against Turkey as its most important victory on the legal plane.³ In relation to the issue of missing persons, the Court found a continuous violation of the procedural obligation embedded in Article 2 ECHR to conduct a meaningful and effective investigation for the ascertainment of the fate or whereabouts of the G/c missing persons.⁴ Further, it found a continuous violation of Article 5 ECHR on account of the failure to conduct an investigation of the same attributes for those cases of G/cs for whom there had been a credible allegation that they had been detained at the time of their disappearance. It is worth noticing that the ECtHR did not find that any of the G/c missing persons had actually been detained by T/c authorities, due to the lack of sufficient evidence in this respect.⁵

Regarding the six-month rule, as prescribed by Article 35.1 ECHR,⁶ the Court limited itself to declaring that it would disregard situations, which ended six months before the date on which the application was introduced, namely 22 November 1994.⁷ Since 2001, when the judgment on the interstate application was handed down, the supervision of Turkey's compliance with it has been pending before the Committee of Ministers. The Committee has issued two interim resolutions on this, calling Turkey to submit information as soon as possible on the additional measures that are required to ensure effective investigations and to assist CMP in its work.⁸

³ *Cyprus v. Turkey*, (2002) 35 E.H.R.R. 30.

⁴ *Cyprus v. Turkey*, (2002) 35 E.H.R.R. 30 at [123-136].

⁵ *Cyprus v. Turkey*, (2002) 35 E.H.R.R. 30 at [142-151].

⁶ Article 35 provides: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken".

⁷ *Cyprus v. Turkey*, (2002) 35 E.H.R.R. 30 at [1043].

⁸ Committee of Ministers, Interim Resolution CM/ResDH(2007)25, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH\(2007\)25&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH(2007)25&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383) [Accessed September 19, 2010] and Interim Resolution ResDH(2005)44, <https://wcd.coe.int/ViewDoc.jsp?id=865325&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> [Accessed September 19, 2010]. The issue will be discussed again in on of the forthcoming meetings of the Committee of Ministers: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282010%291092/1&Language=lanFrench&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> [Accessed October 9, 2010].

3. Missing persons from the other side: the case of Karabardak and Baybora

A year after the fourth interstate judgment was decided, the cases of two T/c missing persons were examined by the ECtHR. The applications of Karabardak⁹ and Baybora¹⁰ against Cyprus related to the disappearance of two T/c persons in 1964. The applicants alleged that there existed continuous violations of Articles 2, 3 and 5 ECHR. The Court, in its admissibility decisions, examined whether the applicants had conformed to the six-month rule. In rejecting their applications, it stated that:

“The Court notes that nothing was done by the applicants to bring the alleged disappearance of the first applicant to the attention of the authorities of the respondent State in the first twenty five years following the alleged disappearance. In 1989 they lodged an application with the CMP. The applicants state that the CMP is not an effective remedy since it has failed to carry out any credible investigation into the alleged disappearance. However, they waited another twelve years before lodging their application with the Court. [...] For the Court, even assuming that the applicants had no effective remedies as alleged, they must be considered to have been aware of this long before 30 October 2001, the date on which they introduced their application.”¹¹

In these two decisions, the Court refrained from setting a fixed point in time from which the six-month deadline would start, but rather limited itself to a Pythian reference that this point was well before 2001. This approach was rather vague and did not work to the benefit of the rule of law (especially its predictability), leaving relatives of other disappeared persons in a limbo state as to which temporal point was pertinent to their cases. The issue was partially clarified in subsequent judgments of the Court.

4. A new admissibility criterion? The judgments on *Varnava and others v. Turkey*

The applications in the case of *Varnava and others v. Turkey* were lodged with the ECtHR in 1990. They referred to the cases of nine G/c disappeared persons (eight soldiers and a civilian), all of whom disappeared during the Turkish invasion of 1974. Admissibility decisions were issued in 1998 and the Third Chamber’s judgment on merits was handed down ten years later.¹² Following a request for referral by Turkey, the case reached the Grand Chamber, which decided on the case in 2009.¹³ In this latter judgment, the Court found the following continuous violations:

⁹ *Lütfi Celul Karabardak and others v. Cyprus* (App. No. 76575/01), admissibility decision of October 22, 2002.

¹⁰ *Saydam Hüsnü Baybora and others v. Cyprus* (App. No. 77116/01), admissibility decision of October 22, 2002.

¹¹ The text of the decision is identical in both cases.

¹² *Varnava and others v. Turkey*, (2010) 50 E.H.R.R. 21, judgment of January 10, 2008.

¹³ *Varnava and others v. Turkey* (App. No. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), judgment of September 18, 2009 (Grand Chamber).

- a) Article 2 ECHR, on account of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances;
- b) Article 3 ECHR, in respect of the applicants;
- c) Article 5 ECHR, by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of two out of the nine disappeared persons, since it was ascertained from the ICRC catalogues that these two had in fact been detained.
- d) Turkey was ordered to pay 12 000 euros in compensation for non-pecuniary damage in respect of each disappeared person.

Paragraphs 160 to 171 are one of the most intriguing sections of this judgment. In these paragraphs, the ECtHR analyses the application of the six-month rule for applying to the Court when the subject-matter relates to disappearances. The idiosyncratic feature that cases of enforced disappearances present is that they constitute continuing violations – a feature which entails concrete legal consequences.

In international human rights law, enforced disappearances are categorised as continuous violations. Article 8.1(b) of the International Convention for the Protection of All Persons against Enforced Disappearance (CPPED)¹⁴ codifies the jurisprudence of international courts and organs¹⁵ by providing that any statute of limitation shall commence from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.¹⁶ This, in turn, begs the question of how the six-month rule should be applied when the violation is continuous and “raises afresh every day”.¹⁷

The Court sets out to present the general principles in the application of temporal restrictions on the procedural obligations of Article 2 ECHR by stating that:

¹⁴ International Convention for the Protection of All Persons from Enforced Disappearance, <http://www2.ohchr.org/english/law/disappearance-convention.htm> [Accessed October 3, 2010].

¹⁵ Indicatively, *Velásquez Rodríguez v. Honduras*, Series C No. 4, Inter-American Court of Human Rights, judgment of July 29, 1988 at [155] and *Quinteros v. Uruguay*, Communication No. 107/1981, Human Rights Committee, decision of July 21, 1983.

¹⁶ Article 8(1) provides: “Without prejudice to article 5, 1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence; (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature”. See also: T. SCOVAZZI and G. CITRONI, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, (Martinus Nijhoff Publishers, 2007), 309.

¹⁷ *Varnava and others v. Turkey* (Grand Chamber) at [159]: “if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end”.

“[...] Not all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake” and that “it is indispensable that the applicants, who are the relatives of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. [...] Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay.”¹⁸

With regard to the undue delay in disappearance cases, the ECtHR accepts that the state of uncertainty and lack of knowledge on the part of relatives of the victims renders necessary a differentiated treatment of such cases, in relation to instances of unlawful or violent death. In the latter instance, the Court considers that:

“generally a precise point in time at which death is known to have occurred and some basic facts are in the public domain. The lack of progress or ineffectiveness of an investigation will generally be more readily apparent. Accordingly the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months[...].”¹⁹

In instances of enforced disappearances, the Strasbourg Court accepted that “allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance.”²⁰ In addition, international law on enforced disappearances does not place an overly rigorous burden of due diligence on the relatives’ part.²¹ However, in the case of excessive or unjustified delays by applicants from the point in time when they realise, or should realise, that no investigation has commenced or that it has been rendered inactive or ineffective without any realistic prospect of success in the future, then the applications can be declared inadmissible *ratione temporis*. If there are any initiatives in the cases of missing persons, the relatives can justifiably await developments that would resolve crucial factual or legal matters. Conversely, and depending on the circumstances of each case, there comes a moment when relatives must realise that there is and there will be no prospects of an effective investigation.²² The Court actually sets a fixed time point, stating that if ten or more years have passed from the disappearance, then the relatives must demonstrate convincingly that there was a continuous and tangible progress that would justify the delay in submitting an application to Strasbourg.²³

Applying the aforementioned principles to the nine cases at hand, the ECtHR examined at which point in time enforced disappearance applications would be admissible or not. While accepting that the extraordinary circumstances of the international conflict in Cyprus justified waiting for the results of UN and Cypriot initiatives for a settlement, the

¹⁸ *Varnava and others v. Turkey* (Grand Chamber) at [161].

¹⁹ *Varnava and others v. Turkey* (Grand Chamber) at [162].

²⁰ *Ibid.*

²¹ *Varnava and others v. Turkey* (Grand Chamber) at [165].

²² *Varnava and others v. Turkey* (Grand Chamber) at [165].

²³ *Varnava and others v. Turkey* (Grand Chamber) at [166].

Court declared that by the end of 1990 it should have been obvious that the problematic, non-binding and confidential nature of CMP procedures did not offer any realistic hope for progress in finding the remains or for ascertaining the fate of missing persons in the near future.²⁴ Finally, the Court accepted that the applications before it were admissible *ratione temporis* and proceeded to find continuing violations of Articles 2, 3 and 5 ECHR.²⁵

5. Interplay between the six-month rule and the continuous nature of the violation

The common point of analysis in the cases presented in the previous sections is the question regarding the point in time at which the six months prescribed by ECHR commence. In the judgment on the interstate and in the decision on the T/c cases, which were handed down in 2001 and 2002 respectively, the Court did not definitely determine the triggering point at which the six months would start to be calculated. In the Grand Chamber's Varnava judgment, the Court determined that this point in time was at the end of 1990.

The first paradox in the Court's approach lies in the different treatment in the judgments it handed down in relation to the deadline for submitting an application. One would expect that the finding of the Varnava judgment²⁶ would be obvious to the same Court already at the time of handing down its judgment on the interstate application, that is, 11 years after the end of 1990. Notwithstanding this, the Court inserted in an implicit, but nonetheless clear and retroactive manner, a new factor, which was not previously present in its jurisprudence. In so doing, it interpreted the admissibility requirement on similar applications in a way that was new. In the interstate application, the ECtHR fixed 22 May 1994 as the point of time before which it would not consider any enforced disappearance case. A year later, in the T/c cases, it stated that the relevant point in time had passed well before 2001. In Varnava, the time limit was again moved to the end of 1990.

The judgments in *Cyprus v. Turkey* and Varnava arise out of the same factual backgrounds, while the cases of T/c can be differentiated since the relevant facts occurred 10 years before the invasion of 1974. For the first set of cases, the contradiction is obvious: the judgment on the interstate application should, for the purposes of admissibility and merits, be considered as covering the specific case of the nine instances of disappearances in Varnava. And this is because the judgment in *Cyprus v. Turkey* relates to the totality of the G/c disappeared persons and should therefore, for the sake of consistency and coherence, be considered as covering the specific nine cases of *Varnava and others*.

²⁴ *Varnava and others v. Turkey* (Grand Chamber) at [170].

²⁵ The applicants in *Varnava* submitted their application on January 25, 1990. The violation of Article 5 considered only two of the disappeared persons because they were the only ones to appear in ICRC's lists as detained by the Turkish forces.

²⁶ That by the end of 1990 it should have been obvious to the relatives of the disappeared that CMP did not offer any realistic prospects of investigation.

As far as the T/c cases are concerned, a legal principle on the basis of which the cases were decided as inadmissible *ratione temporis* is, ironically, missing. The Court merely stated in its decisions on admissibility for the T/c cases that “nothing was done by the applicants to bring the alleged disappearance of the first applicant to the attention of the authorities of the respondent State in the first twenty five years following the alleged disappearance” and that “even assuming that the applicants had no effective remedies as alleged, they must be considered to have been aware of this long before 30 October 2001, the date on which they introduced their application”.²⁷

Furthermore, the statement by the Court, that the relatives should have shown convincingly that there was continuous and concrete progress throughout the previous ten years that could justify the delay in applying to the Strasbourg Court, has no support under international human rights law, nor can it be justified in any other way by the text of the judgment itself. On the contrary, CPPED requires from those states applying a statute of limitations on enforced disappearances to be of long duration and commensurate to the gravity of the offence.²⁸ The *ratio* of this provision is to fight impunity. *Mutatis mutandis*, it can be reasonably claimed that setting a 10-year time limit, as ECtHR has done, is contrary to this *ratio*.

Another problematic point of the Varnava judgment is the undue focus on the role played by CMP. The latter, as previously mentioned, operates under the auspices of the UN, an organisation that does not come under the *ratione personae* jurisdiction of the Strasbourg Court.²⁹ The CMP’s mandate was laid down already from its inception and, as found in the interstate application, its procedures cannot be considered as fulfilling the prerequisites of an effective investigation nor can any contribution by Turkey to it exonerate the latter from an obligation to conduct an investigation.³⁰ Thus, it was mistaken to found the judicial reasoning on the CMP’s operations and mandate from the very beginning, which was bound to deliver an unsatisfying result.

The background to the aforementioned criticisms is the conflict between the continuous nature of the enforced disappearances,³¹ on the one hand, and the procedural obligation of the six-month rule, on the other.³² In cases such as Varnava, the Court is confronted with a continuous violation, as already adjudicated by other courts and bodies, as well as by itself,³³ on the one hand, and the obligation to submit an application from the moment that Article 35.1 ECHR provides, on the other. The judgment is thus erroneous on this point

²⁷ See decisions mentioned under n. 9 and 10 above.

²⁸ CPPED, Art. 8.1(a).

²⁹ *Agim Behrami and Bekir Behrami v. France* (2007) 45 E.H.R.R. SE10, decision of May 2, 2007, admissibility decision (Grand Chamber) and *Ruzhdi Saramati against France, Germany and Norway*, (2007) 45 E.H.R.R. SE10, decision of May 2, 2007 (Grand Chamber).

³⁰ *Cyprus v. Turkey*, (2002) 35 E.H.R.R. 30 at [135-137].

³¹ The reader is directed to the ‘General Comment on Enforced Disappearance as a continuous crime’ of the UN Working Group on Enforced or Involuntary Disappearances available at: <http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf> [Accessed October 5, 2010].

³² *Varnava and others v. Turkey* (Grand Chamber), Judge Ziemele’s separate opinion, at [8-11].

³³ For a succinct review of ECtHR’s jurisprudence on this issue, see: A. VAN PACHTENBEKE, *From De Becker to Varnava: the state of continuing situations in the Strasbourg case law*, (2010) 1 European Human Rights Law Review, 47.

since it does not take into account the plethora of jurisprudential precedents and insists on setting a fictitious time limit for the end of 1990.³⁴

This fictitious nature is proven by the course of events subsequent to 1990: in 1997, the leaders of the two communities on the island adopted a common statement in which they agreed to exchange information regarding known burial sites and to return the remains of Greek Cypriot and Turkish Cypriot missing persons.³⁵ In 2001, the ECtHR's judgment was handed down and the CMP resumed its long-delayed work in 2004, producing concrete results over the last few years.³⁶ Although the Court scrutinises the CMP's operations, it omits at the same time to examine Turkey's responsibility for the lack of any effective investigation. Judge Ziemele's separate opinion is relevant to this point, as she stated: "In other words, the issue is not whether there is an event suspending the running of time (see, *a contrario*, § 171); it is whether there is an event which makes the six months begin to run."³⁷

In its reasoning, the ECtHR stated: "With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness".³⁸ The perception of a *lato sensu* procedural economy together with the aforementioned reasoning may constitute a pragmatic approach to the issue of balancing the six-month rule and the continuous nature of the violation. However, they are far from convincing when they appear as self-serving values or objectives that can supersede fundamental rights such as the right to life, the prohibition of torture, and the right to liberty and security of the individual.

The Court's understandable preoccupation regarding the effect of time on the process and the result of an enforced disappearance case must be examined separately in each case, thus affording the relatives of the disappeared the opportunity to access a judicial body (possibly for the first time, as the applicants in *Varnava and others*) and allowing the Court to examine in the concrete circumstances of the case whether witnesses can be traced and whether they can provide reliable and sufficient testimony. By opting for the other way, the Court is essentially depriving the victims' relatives of access to justice by setting up a set of hypothetical problems.

The Inter-American Court of Human Rights in its most recent case on disappearances has highlighted the same point. The San Jose Court found that in this case the passage of time without the conduct of an investigation had exceeded what could be considered as reasonable and that the lack of an investigation constituted a flagrant denial of justice and

³⁴ *Varnava and others v. Turkey* (Grand Chamber) at [158].

³⁵ <http://www.cyprus.gov.cy/moi/pio/pio.nsf/All/4632228BBD701DA4C2256D6D00314114?OpenDocument> [Accessed October 2, 2010]

³⁶ The last progress report by the CMP mentions that until today 663 individuals have been exhumed from different burial sites and 235 identifications have taken place (184 G/c and 51 T/c), http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1307 [Accessed October 9, 2010].

³⁷ *Varnava and others v. Turkey* (Grand Chamber), dissenting opinion of Judge Ziemele at [11].

³⁸ *Varnava and others v. Turkey* (Grand Chamber) at [161].

of the right to have access to it.³⁹ It is highly doubtful whether concerns of a procedural nature can take precedence over the need to allow the possibility of a judicial scrutiny of serious violations of human rights, as are those of enforced disappearances.

One of the most serious repercussions of the Varnava judgment is the light-handed exoneration of the respondent State from the obligation to respond to the applicants' allegations. The Court has silently shifted the burden of proof, requiring future applicants in similar cases to adduce evidence that would be sufficient to extend the 1990 time limit to another one which would be more favourable to the specificities of their application. However, the parties to this type of international litigation are not in the same position since the time transgressed from the occurrence of the events in 1974 until the examination of the application by the ECtHR and the ability of the State to have access to key information creates a situation of imbalance.⁴⁰

One of the most worrying features is the unintended condoning of the phenomenon of impunity. From now on, States have no incentive to cooperate, and the possibility of judicially forcing them to provide evidence or to conduct an investigation has been curtailed. Time is thus now on the States' side.

In addition, the Court's narrow options in ordering remedies run contrary to the efforts that have stepped up in the last few decades to fight impunity.⁴¹ Despite of the fact that the Court found a violation of the procedural limb of Article 2 ECHR, it did not identify the individual and/or general measures Turkey must take to remedy this violation, leaving this

³⁹ *Chitay Nech y otros Vs Guatemala* Series C No. 212, Inter-American Court of Human Rights, judgment of May 25, 2010 at [197]. The judgment is available only in Spanish: "Este Tribunal considera que en el presente caso el tiempo transcurrido sobrepasa excesivamente un plazo que pueda considerarse razonable para que el Estado iniciara las correspondientes diligencias investigativas, máxime que a ese tiempo habrá que sumar el que tome la realización de la investigación que apenas se encuentra en su fase inicial, y el trámite del proceso penal con sus distintas etapas, hasta la sentencia firme. Esta falta de investigación durante tan largo período configura una flagrante denegación de justicia y una violación al derecho de acceso a la justicia de las presuntas víctimas".

⁴⁰ T. SCOVAZZI and G. CITRONI, 107: "Lastly, in the *Quinteros* case, the Committee reiterated the importance of reversal of the burden of proof as to the valuation of evidence in cases of enforced disappearances. To find a violation of rights recognised in the Covenant, the Committee relied on the information presented by the author of the communication "in the absence of any convincing defence or evidence by the government." This standard is indispensable in cases of enforced disappearances and complies with basic needs of justice. If the victims and the relatives were subject to the usual burden of proof, they would be placed in the condition of being denied justice".

⁴¹ United Nations, A/RES/47/133, *Declaration on the Protection of all Persons from Enforced Disappearance*, December 18, 1992. Article 18: «Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account», [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.47.133.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument) [Accessed October 10, 2010]; Working Group on Enforced or Involuntary Disappearances, *Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance*, General comment on article 18 of the Declaration, <http://www2.ohchr.org/english/issues/disappear/docs/GeneralCommentsCompilationMay06.pdf> [Accessed October 4, 2010].

task to the Committee of Ministers. The only remedy that the Court ordered was the award of the sum of 12 000 euro for every missing person. In cases of similar nature, the paradigm of the Inter-American Court of Human Rights, which has developed a wide array and innovative forms of remedies, is particularly instructive, although not amenable to transposition, due to the different statutory settings in which both Courts operate. Apart from pecuniary compensation, the San Jose Court has developed the concept of ‘other forms of reparation’, including rehabilitation measures for victims, restoration of honour, educational programs for State agents, holding of public ceremonies and many others. Contrasted to the mere pecuniary compensation that the ECtHR affords, the Inter-American Court provides a more integrated, comprehensive and victim-orientated approach.

Seen in their macro-perspective trajectory, the Cypriot cases of enforced disappearances have received a serious blow as to their prospects of success. The immediate consequence of the Varnava judgment was declaring 51 similar cases as inadmissible *ratione temporis*. Two of the judgments had been submitted in 1999⁴² and the rest in the period 2004-2006.⁴³ In all of these cases the ECtHR took into consideration the precedent established by Varnava and rejected them because they had been submitted after 1990.

Only in the case of Karefyllides was an effort made to change the precedent set in Varnava by invoking new facts that would justify the delay in submitting an application. More specifically, the applicants referred to the joint statement of 31 July 1997 by the leaders of the two communities, claiming that it had renewed their hopes for the effectiveness of the CMP’s investigations. They also forwarded the argument that only by the issuance of the judgment in the interstate judgment had it been obvious that the CMP could not be regarded as an effective remedy. In any case, a veil of absolute confidentiality covered the function of CMP, which meant that they were unable to have any information about their cases. All these arguments did not convince the ECtHR, which insisted on the temporal limit it had instituted in Varnava and rejected the application.

It is thus already apparent that the ECtHR has fixed the end of 1990 as an immovable temporal threshold in cases of enforced disappearances arising from the Cyprus conflict. The only categories of applications that therefore have any realistic prospect of success in the future are:

- a) those that were submitted before the end of 1990, and

⁴² *Christos Karefyllides and others v. Turkey* (App. No. 45503/99), admissibility decision of December 1, 2009 and *Zacharias Hatzigeorgiou and others v. Turkey* (App. No. 56446/00), admissibility decision of June 1, 2010.

⁴³ 49 applications against Turkey, (App. No. 43422/04, 4568/05, 4577/05, 4613/05, 4617/05, 4630/05, 4636/05, 4638/05, 4687/05, 4711/05, 4821/05, 4829/05, 4834/05, 4844/05, 4847/05, 4888/05, 4891/05, 4896/05, 4901/05, 4920/05, 4927/05, 4931/05, 4936/05, 4947/05, 4983/05, 5030/05, 5039/05, 5044/05, 5077/05, 6631/05, 26541/05, 26557/05, 26562/05, 26566/05, 26569/05, 26610/05, 26612/05, 26634/05, 26666/05, 26670/05, 38948/05, 45653/06, 11457/07, 30881/08, 37368/08, 46369/08, 54060/08, 521/09 and 43094/09), admissibility decision of December 1, 2009.

- b) where the remains of a missing person are found and identified, there is the possibility of submitting an application alleging the lack of effective investigation by the responsible State for the time period starting from the identification of the remains.

Applications falling under category (b) have already been lodged with the Court and are currently at the admissibility stage. These cases concern 28 G/c and 17 T/c applications for missing persons, the remains of whom were identified during the period from 2007 until now.⁴⁴ The Court considered that in both sets of cases the lack of an investigation for the period commencing from the discovery of the remains of the missing persons (and not by the acts of disappearance themselves) and the treatment of relatives raised issues that fall under the scope of Articles 2 and 3 ECHR and for these reasons the Court decided to communicate them to the States involved.

6. The Turkish-Cypriot peculiarity: non-exhaustion of domestic remedies

The cases of 17 T/c applications present a peculiarity compared to those of the G/c. From the text of the admissibility decision, it transpires that the applicants have not exhausted the domestic remedies available in the Republic of Cyprus. It is therefore reasonable to assume that the applicants will allege before the ECtHR that they are not obliged to exhaust such remedies since the inclusion in their application of reference to two judgments of the Supreme Court of Cyprus (Supreme Court) suggests this.

In brief, these judgments by the Supreme Court relate to two distinct applications by both Greek and Turkish Cypriots applicants. In the G/c case, the subject matter was the dispute by the applicant of the removal of the name of a G/c from the catalogue of missing persons.⁴⁵ In the T/c case, the subject matter was the failure of the Republic of Cyprus to conduct an effective investigation into the disappearances of a number of T/c citizens.⁴⁶ In both cases, the Supreme Court considered that the issue of missing persons fell under the broader issue of the Cyprus problem, and that the responsibility for managing this lays with the President of the Republic. The latter's actions in handling the Cyprus problem is an "act of government", thus falling outside the Supreme Court's jurisdiction.⁴⁷

The final judgment by the ECtHR on the T/c case should be anticipated with interest. At first glance, the non-exhaustion of domestic remedies is more than apparent and it

⁴⁴ *Despoina Charalambous and others v. Turkey and 28 other applications against Turkey*, (App. No. 46744/07), admissibility decision of June 1, 2010 and *Semral Emin and Others, Nazli Gürtekin and Others, Fatma Aybenk Abdullah and Others, Meryem Arkut and Others, Ayşe Akay and Others, Omer Hussein and Others kai Ayşe Eray and Others against Cyprus, Greece and the United Kingdom*, (App. No. 59623/08, 3706/09, 16206/09, 25180/09, 32744/09, 36499/09 and 57250/09), admissibility decision of June 3, 2010.

⁴⁵ *Panagiota Konstantinou and others v. Republic of Cyprus*, Supreme Court of Cyprus, Case No. 1254/00, June 26, 2003.

⁴⁶ *Özalp Behiç and others v. Republic of Cyprus*, Supreme Court of Cyprus, Joint Cases Nos. 589/2006, 590/2006, 591/2006, 592/2006 and 593/2006, May 29, 2008.

⁴⁷ For a commentary on this case, see: N. KYRIAKOU, *Act of Government – Case Note*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623568 [September 16, 2010].

should suffice as a reason to dismiss the application. However, the tendency of the Cypriot courts to reject the applications of the relatives of the disappeared based on the “act of government” grounds, renders the applicants’ argument reasonable.

By rejecting cases of this type, based on this reasoning, Cypriot courts have attempted to carve out an extrajudicial space in the sphere of human rights. However, while the judicial power accepts the lack of jurisdiction to scrutinize the acts of the executive on the issue of the disappeared, it also ignores at the same time the human rights dimension of the applications: the political ramifications of these cases in conjunction with the Cyprus problem are inevitable. Nevertheless, this should not be a legal reason to reject those applications intending to protect human rights. Thus, it is probable that the ECtHR will follow a different approach, endorsing the applicants’ argument, and that this will force the Republic of Cyprus to reconsider its current legal framework and the Cypriot courts to re-orient their judgments on the basis of exclusively legal reasons.

7. Conclusive remarks: Heirs of Antigone?

One of the most pressing questions in the aftermath of the Varnava judgment is the question of the relatives’ options in the future. In my opinion, there are no realistic options, but only political possibilities. Those relatives that had recourse to the Strasbourg Court after 1990 or have not done so yet have no prospects of success, as Varnava and the subsequent rejection of 51 judgments clearly illustrate.

The first political possibility is the resolution of the Cyprus problem, which will provide the necessary impetus for the final resolution of the disappeared persons’ issue. It is reasonable to anticipate a similar provision on the missing persons issue as that contained in the 2004 UN sponsored Anan Plan for a comprehensive resolution of the Cyprus problem.⁴⁸ The CMP’s function under difficult conditions until today is encouraging with regard to its future potential of accelerating and improving its efficiency in the event of a resolution. As things currently stand, the stalled process of negotiations, the fluidity in the T/c political scene in combination with the rejectionist climate in the G/c society do not allow for optimism.⁴⁹

⁴⁸ Article 54 of the Annan Plan provided: “The heads of government of the constituent states shall without delay take steps to conclusively resolve the issue of missing persons. Both constituent states shall cooperate fully with the Committee on Missing Persons in Cyprus, in accordance with its terms of reference and keeping in mind the agreement reached between the two leaders on 31 July 1997. Each constituent state shall carry out and conclude any and all necessary inquiries, including exhumations.” Available at: http://www.hri.org/docs/annan/Annan_Plan_April2004.pdf [Accessed September 17, 2010].

⁴⁹ A recent opinion poll showed that 37% of G/c approve of a bi-communal, bi-zonal federal solution, 39% prefer separation and 16% maintaining the current *status quo*. For the results of the poll, see: <http://pdf.kathimerini.com.cy/issues/20100307.pdf> [Accessed September 18, 2010]. A second poll shows that the expectation for a solution reaches a poor 15%. The results of this poll are available here: http://www.cyprus2015.org/index.php?option=com_phocadownload&view=category&id=1%3Apublic-opinion-poll&Itemid=34&lang=el [Accessed September 18, 2010].

The second possibility is the exercising of political pressure on Turkey at the Committee of Minister's level in the monitoring of the execution of the interstate judgment. The Committee's effectiveness is directly related to the object of the judgment and its ostensible political repercussions. Since 2001, the execution of the judgment has been pending before the Committee and the only results are two interim resolutions that have not yielded any tangible alteration or commitment on the Turkish side. The aforementioned factors coupled with the negotiations in the island render it extremely doubtful that any concrete results can be expected at this level.

The third possibility is the creation of a truth commission, based on the paradigms of truth and reconciliation commissions that have proliferated in the past few years in states emerging from of international or non-international conflict or deep societal controversies.⁵⁰ Such an option would face three main challenges. First, the politicisation of the 'missing persons' issue in the past decades from both sides of the conflict discredits *a priori* any of the initiatives taken by either side in the eyes of the other. Hence, involvement of the international community is necessary, although not unproblematic, as it will have to overcome the suspicion of the population in both communities towards foreign initiatives. Beyond the political requirements, the financial viability of such a commission is a second challenge. Securing (or not) adequate funding for such an endeavour may constitute an autonomous indicator of success or failure.⁵¹ And third, it should also be added that society's active involvement or endorsement of such an effort is not definite. The creation of a truth commission has not gained support in the public sphere and is currently a concern for merely a handful of relatives and lawyers, at least in the G/c society.⁵² Further, a possible transformation of the CMP into a truth commission, with real power to conduct investigations that would live up to the standards of Article 2 ECHR is still far from becoming a reality.

The fourth possibility is the discovery and identification of the remains of the missing persons. In a scenario of this type, the prospect of lodging an application with the ECtHR regarding the failure of Turkey to conduct an effective investigation becomes increasingly likely and liable to success. Although the re-initiation of the CMP's functions is encouraging, it cannot be overlooked that recent estimates show that the CMP would be able to locate and identify at best the remains of 800 to 900 persons.⁵³ This calculation, in conjunction with the limited terms of CMP's reference places more than half of the victims

⁵⁰ P. HAYNER, *Unspeakable truths: confronting state terror and atrocity*, (Routledge, 2001); N. ROHT-ARRIAZA and J. MARIEZCURRENA, *Transitional justice in the twenty-first century: beyond truth versus justice*, (Cambridge University Press, 2006). For UN involvement http://www2.ohchr.org/english/issues/rule_of_law/transjustice.htm [Accessed September 23, 2010].

⁵¹ It has been convincingly argued that the leadership of the organisation representing the G/c relatives of the disappeared is an "institutional spoiler" in the efforts to find the truth. See I. Kovras and N. Loizides, "Delaying truth recovery for missing persons", (2010) Nations and Nationalism, Available at: http://works.bepress.com/neophytos_loizides/14. [Accessed October 15, 2010].

⁵² For example, two of the NGOs that are active in the field are «Bi-communal initiative of relatives of missing persons, victims of massacre and war» and "TRUTH NOW" www.truthnow.eu [Accessed October 9, 2010].

⁵³ O Fileleftheros [daily newspaper issued in Cyprus], July 12, 2010, 1, <http://www.philenews.com/digital/ClipForm.aspx?nid=2247445> [Accessed September 12, 2010].

and their relatives in a status of permanent victimhood. On the other hand, for those cases in which identification would be rendered possible, the right to apply to the ECtHR for failure to conduct an effective investigation from the time of discovery onwards can hardly be accepted as a moral victory.

The aforementioned prospects can only be viewed with certain amount of pessimism. Seeing the issue from the viewpoint of the relatives of the disappeared, it is clear that the impossibility or lack of likelihood of pursuing a legal or other route to find justice causes high levels of frustration and a feeling of desperation.