

Finally, the awards stand out for the complexity of the case and the Tribunal's meticulous treatment of parallel and related litigation.¹⁵ In many instances the Tribunal reviewed the findings of other arbitration tribunals or the European Court of Human Rights in detail, comparing its reasoning with theirs and explaining its concurrent or different conclusions.¹⁶ Given the increasing occurrence of parallel and related litigation in international forums, this detailed treatment sets a good example.¹⁷

CHIARA GIORGETTI
Richmond University Law School

European Convention on Human Rights—Article 41—just satisfaction—state responsibility

CYPRUS v. TURKEY. App. No. 25781/94. At <http://hudoc.echr.coe.int>.
 European Court of Human Rights, Grand Chamber, May 12, 2014.

In a judgment rendered on May 12, 2014,¹ the Grand Chamber of the European Court of Human Rights (Court) ordered Turkey to pay Cyprus unprecedented sums for nonpecuniary damage suffered by the relatives of missing persons and by the “enclaved” Greek Cypriot residents of the Karpas Peninsula stemming from the Turkish invasion of Cyprus in 1974 and its aftermath. In doing so, the Court applied Article 41 on just satisfaction of the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention or Convention)² to an interstate complaint for the first time.

Turkey invaded the northern part of Cyprus during July and August 1974 and has occupied that part of Cyprus ever since, resulting in the de facto division of the island. Cyprus challenged the Turkish actions, first before the (former) European Commission on Human Rights and then before the Court, alleging violations of various rights of Greek Cypriot missing persons and their relatives, the home and property rights of displaced persons, and the rights of enclaved Greek Cypriots in northern Cyprus. On May 10, 2001, the Grand Chamber found (in its “principal judgment”) numerous violations of the Convention by Turkey arising out of the

¹⁵ The events that resulted in the expropriation of Yukos were at the center of several international proceedings in diverse forums. The *Yukos* Tribunal specifically analyzed the decisions of the European Court of Human Rights in *OAO Neftyanaya Kompaniya Yukos v. Russia*, *supra* note 8, Merits; *Quasar de Valores SICAV S.A. v. Russian Fed'n*, Award (Stockholm Ch. Comm. [SCC] July 20, 2012), at <http://www.italaw.com> [hereinafter *Quasar*]; *RosInvestCo UK Ltd. v. Russian Fed'n*, SCC No. V (079/2005), Final Award (SCC Sept. 12, 2010), at <http://www.italaw.com>.

¹⁶ For example, the Tribunal noted that its findings were consistent with those of the *RosInvestCo* and *Quasar* tribunals, which found many aspects of the YNG auction “more than suspect” and concluded that “the auction of YNG was rigged.” Final Awards, para. 986 (quoting *Quasar*, *supra* note 15, para. 116, and *RosInvestCo*, *supra* note 15, para. 620(d), respectively); *see also id.*, paras. 1181, 699–700 (referring to *RosInvestCo* and *Quasar*, and quoting *OAO Neftyanaya Kompaniya Yukos*, *supra* note 8, Merits, paras. 601–02, respectively).

¹⁷ *See* Chiara Giorgetti, *Horizontal and Vertical Relationships of International Courts and Tribunals—How Do We Address Their Competing Jurisdiction?*, 30 ICSID REV. 98 (2015).

¹ *Cyprus v. Turkey* (Just Satisfaction), App. No. 25781/94 (Eur. Ct. H.R. May 12, 2014) [hereinafter Judgment]. Judgments of the Court cited herein are available at its website, <http://hudoc.echr.coe.int>.

² Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221, *as amended by* Protocol No. 14, May 13, 2004, CETS No. 194 [hereinafter Convention]. Article 41 of the Convention provides: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

1974 events, the division of the territory of Cyprus, and the activities of the Turkish Republic of Northern Cyprus established by Turkish Cypriots in the north, but at that time the Court adjourned its decision on just satisfaction.³

On March 11, 2010, and on June 18, 2012, the Cypriot government submitted its claims for just satisfaction under Article 41 concerning missing persons regarding whom the Court had earlier found violations of Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), and 5 (right to liberty and security); and claims concerning enclaved Greek Cypriot residents of the Karpas Peninsula for violations of Article 3 and other provisions of the Convention and its Protocol No. 1 (paras. 6, 9). These claims related to two precise and objectively identifiable groups of people: 1456 missing persons and the enclaved Greek Cypriot residents of the Karpas Peninsula (para. 47). Cyprus sought just satisfaction not for its own benefit, but with a view to assisting individual victims or their relatives.

The Turkish government challenged the admissibility of the claims as time barred, noting that they had been presented nine years after the Court's principal judgment. The Court disagreed. It noted that, as an international treaty, the Convention must be interpreted in light of the relevant principles of public international law, including those set forth in the Vienna Convention on the Law of Treaties (Vienna Convention).⁴ Although it acknowledged that public international law recognizes the obligation of an applicant state "to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State,"⁵ in its 2001 judgment on the merits the Court had indicated that the applicability of Article 41 was not ready for determination.⁶ In the instant judgment, because it had not previously fixed any time limits for the submission of just satisfaction claims, the Court considered that the Cypriot submissions were not out of time and were therefore admissible (paras. 25–30).

Turkey also contended that as a general rule, Article 41 of the Convention does not apply to interstate disputes since it is intended to respond to the physical and psychological damage to and suffering of individuals. Accordingly, it argued, the Court lacked the power to award "just satisfaction" in the current circumstances (para. 36). Here again, the Court disagreed. Referring to the principles of public international law relating to state responsibility for internationally wrongful acts,⁷ it found that Article 41, despite its specific and narrow nature, did not exclude interstate applications (paras. 41–42). The underlying rationale of Article 41, it stated, conformed with the logic of the reparations regime under public international law (para. 40).⁸ At the same time, as identifiable individuals (not the state) had suffered the injuries caused by the violation of Convention rights, if just satisfaction were awarded in an interstate case, it would have to be done for the benefit of individual victims (para. 46).

³ *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1 [hereinafter Merits Judgment].

⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention].

⁵ Judgment, para. 24 (citing *Certain Phosphate Lands in Nauru* (*Nauru v. Austl.*), Preliminary Objections, 1992 ICJ REP. 240, 253–54, 254–55, paras. 32, 36 (June 26)).

⁶ Merits Judgment, operative pt. VIII.

⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n 26, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles].

⁸ *See also* Judgment, para. 41 (quoting *Factory at Chorzów* (*Jurisdiction*), 1927 PCIJ (ser. A) No. 9, at 21).

Noting that the applicants had endured decades of not knowing what happened to their relatives, the Court awarded the Cypriot government the aggregate sum of €30 million for the nonpecuniary damage suffered by the surviving relatives of the missing persons (para. 56). In light of the protracted feelings of helplessness, distress, and anxiety of the enclaved residents of Karpas, the Court awarded the Cypriot government an aggregate sum of €60 million for the nonpecuniary damage sustained by these victims (para. 57). The Committee of Ministers of the Council of Europe will supervise the Cypriot government's distribution of these sums to the individual victims (para. 59).

Because Turkey remains bound under Article 46 to comply with the 2001 principal judgment, the Court deemed it unnecessary to make a declaratory judgment, as requested by Cyprus (paras. 62–63). The Court had found, in its earlier judgment, a continuing violation of Article 1 of Protocol 1 on the protection of property by virtue of the fact that Greek Cypriot property owners in northern Cyprus were being denied access to and the control, use, and enjoyment of their property, as well as compensation for the violation of their property rights.

Nine of the seventeen judges in the Grand Chamber filed a joint concurring opinion, which declared that

[t]he present judgment heralds a new era in the enforcement of human rights upheld by the Court and marks an important step in ensuring respect for the rule of law in Europe. It is the first time in the Court's history that the Court has made a specific judicial statement as to the import and effect of one of its judgments in the context of execution.⁹

They also stressed the significance of the Court's view that, in the circumstances, this statement "obviate[s] the need to examine whether a formal declaratory judgment for the purposes of Article 46 of the Convention might be issued under Article 41. The Court has spoken: it remains for it to be heard."¹⁰

In a concurring opinion, Judge Pinto de Albuquerque, joined by Judge Vučinić, described the judgment as "the most important contribution to peace in Europe in the history of the European Court of Human Rights," not only because it acknowledged the applicability of Article 41 to interstate applications and established criteria for the assessment of the time limit for these just satisfaction claims, but also because in effect it awarded punitive damages to the claimant state.¹¹

Judges Tulkens, Vajić, Raimondi, and Bianku issued a partly concurring opinion, joined by Judge Karakaş, in which they objected to one part of the Court's judgment (in the final sentence of paragraph 63) that, in their view, ran counter to Article 46(2) of the Convention. By suggesting that the Court could consider whether or not a contracting party had complied with its obligations under a judgment, the judgment in question encroached on the powers of the Committee of Ministers of the Council of Europe. The Court itself lacks jurisdiction to verify

⁹ Judgment, Joint Concurring Opinion of Judges Zupančič, Gyulumyan, David Thór Björgvinsson, Nicolaou, Sajó, Lazarova Trajkovska, Power-Forde, Vučinić and Pinto de Albuquerque [hereinafter joint concurring op.].

¹⁰ *Id.*

¹¹ Judgment, Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić, para. 1 [hereinafter concurring op. Pinto de Albuquerque & Vučinić, JJ.].

compliance with its judgments; instead, applicant states must refer such matters to the committee under paragraph 3 or 4 of Article 46 of the Convention.¹²

In a partly concurring and partly dissenting opinion, Judge Casadevall took the position that “*in principle*, the just satisfaction rule should not apply to inter-State cases.”¹³ In this case, however, Article 41 could apply to claims of missing persons identified by name, but not to those of the enclaved residents of the Karpas Peninsula, who had not been specifically identified.¹⁴ His particular concern was “the complications that are bound to arise in identifying and listing the thousands of displaced persons.”¹⁵

Finally, Judge Karakaş filed a dissenting opinion objecting to the judgment on four grounds: (a) for finding that the passage of time since the delivery of the principal judgment in 2001 had not rendered the applicant government’s just satisfaction claims inadmissible; (b) for applying Article 41 to the claims on behalf of the missing persons; (c) for applying Article 41 to claims on behalf of the enclaved Greek Cypriot residents of the Karpas Peninsula; and (d) for awarding sums as just satisfaction without knowing the actual number of missing persons or the number and identity of the Karpas residents.

* * * * *

The *Cyprus v. Turkey* judgment is notable in several respects: it is the first time the Court has awarded just satisfaction in an interstate case and the first time the Court has referred to the provisions of the Vienna Convention as the sole frame of reference for the interpretation of the rights and freedoms enshrined in the European Convention.

In applying the rules of the Vienna Convention, the Court took into account the applicable rules and principles of international law as between the two parties. This is the approach it had previously adopted on several occasions, including in the *Loizidou*, *Al-Adsani*, and *Bosphorus* cases,¹⁶ which also raised public international law questions. The Court followed the classic method of interpretation laid down in Article 31(3)(c) of the Vienna Convention, which provides that, in interpreting a treaty, “[a]ny relevant rules of international law applicable in the relations between the parties” shall be taken into account.¹⁷

Presumably, the Court adopted the classic public international law method of interpretation because the case law on Article 41 is scant. It had previously dealt with the applicability of the just satisfaction rule in only one interstate case, *Ireland v. United Kingdom*. There, the Court did not find it necessary to apply the just satisfaction rule because the applicant had expressly declared that it did “not invite the Court to afford just satisfaction . . . , of the nature of monetary compensation, to any individual victim of a breach of the Convention.”¹⁸

¹² Judgment, Partly Concurring Opinion of Judges Tulkens, Vajić, Raimondi and Bianku, Joined by Judge Karakaş, paras. 2, 5–9.

¹³ Judgment, Partly Concurring and Partly Dissenting Opinion of Judge Casadevall, para. 1 [hereinafter sep. op. Casadevall, J.].

¹⁴ *Id.*, para. 2.

¹⁵ *Id.*, para. 6.

¹⁶ *Loizidou v. Turkey*, 1996-IV Eur. Ct. H.R. 2216, para. 43; *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, para. 55; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, 2005-IV Eur. Ct. H.R. 107, para. 150.

¹⁷ Vienna Convention, *supra* note 4, Art. 31(3)(c).

¹⁸ *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A), para. 245 (1978), *quoted in* Judgment, para. 39.

In *Cyprus v. Turkey*, the Court properly interpreted Article 41 in line with public international law principles, including the regime of state responsibility. The *travaux préparatoires* to Article 41 state clearly that “[t]his provision is in accordance with the actual international law relating to the violation of an obligation by a State. In this respect, jurisprudence of the European Court will never, therefore, introduce any new element or one contrary to existing international law.”¹⁹ The relevant rules are spelled out in Articles 31, 34, and 37 of the draft ILC Articles on State Responsibility of the International Law Commission (ILC Articles).²⁰ Article 31(1) provides that the “responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Article 31(1) crystallizes the customary rule first articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case and further solidified in the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros* case.²¹

Whereas Article 31(2) of the ILC Articles provides that “[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State,” the Court did not make any explicit reference to it but, rather, reiterated its dictum in the *Varnava* case, where it held that

there is no express provision [in the Convention] for non-pecuniary or moral damage. Evolving case by case, the Court’s approach in awarding just satisfaction has distinguished situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, . . . and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself.²²

The Court explained in *Varnava* that its guiding principle is “equity,” which involves “flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.”²³ The Court’s nonpecuniary awards recognize that “moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned.”²⁴ Similarly, the ILC Articles in Article 37(3) provide that satisfaction “shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”²⁵

On this basis and with little effort to explain how it had arrived at the sums concerned, the Court awarded €30 million for the surviving relatives of the missing persons, and €60 million for the enclaved residents of the Karpas Peninsula (para. 58). Moreover, it awarded

¹⁹ Judgment, para. 40 (quoting Council of Europe, Committee of Experts, Report to the Committee of Ministers, Doc. CM/WP 1(50)15 (Mar. 16, 1950)).

²⁰ ILC Articles, *supra* note 7, Arts. 31, 34, 37, at 28.

²¹ *Factory at Chorzów* (Jurisdiction), *supra* note 8, at 21; *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 ICJ REP. 7, 81, para. 152 (Sept. 25).

²² Judgment, para. 56 (quoting *Varnava v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 50 Eur. H.R. Rep. 467, para. 224 (2010)).

²³ *Varnava*, *supra* note 22, para. 224, *quoted in* Judgment, para. 56.

²⁴ *Id.*, *quoted in* Judgment, para. 56.

²⁵ ILC Articles, *supra* note 7, Art. 37(3), at 28.

these lump sums as nonpecuniary damages without indicating any criteria for their distribution.²⁶ What it seems to have done is to multiply the number of missing persons (1,456) by €20,000, in the case of the missing persons, which amounts to €29,120,000. Regarding the enclaved persons of the Karpas Peninsula, the applicant requested €50,000 per person and that their number be determined between the parties within six months of the Court's order (para. 52).

Guidance on how an award of just satisfaction might be determined can be found in the concurring opinion of Judges Pinto de Albuquerque and Vučinić, where they list some criteria for quantifying a just satisfaction award in an interstate case. Among the relevant criteria, they suggest, are the "objective gravity of the wrongful conduct, the degree of reprehensibility of the intention or recklessness of the wrongdoer, the extent of the harm caused to the applicant and third parties, the consequential gains obtained by the wrongdoer and third parties and the probability of non-enforcement of a breached right."²⁷ Perhaps a better approach to compensation would have been to award an individual sum on a per capita basis, rather than to order the payment of a lump sum.²⁸

In their separate opinion, Judges Pinto de Albuquerque and Vučinić considered that the amount of the just satisfaction award made by the Court was of a flagrant "punitive nature."²⁹ The judgment also sent a strong message to other member states of the Council of Europe not to repeat the same pattern of wrongful action or omission.³⁰ Just satisfaction therefore seems to be an appropriate additional layer of enforcement for prolonged and deliberate noncompliance with the Court's judgments on the merits.

Moreover, according to Judges Pinto de Albuquerque and Vučinić, the judgment sends a signal that war and armed interventions are no longer tolerable in Europe and that member states not complying with this principle must be made judicially accountable.³¹ Punitive, or exemplary, damages are aimed at atoning for the deeds of the wrongdoer and preventing repetition of the wrongful act by the offender or its emulation by third parties, without being limited to compensation for pecuniary and nonpecuniary losses suffered by the claimant.³² Nevertheless, it should be recalled that the notion of "punitive damages" is not widely accepted in international law and was not endorsed by the ILC Articles.³³

The Convention protects individuals primarily and states secondarily.³⁴ In the latter case, it is the state itself that brings a case for its injured citizens. Such individuals must be considered victims within the scope of Article 34,³⁵ rather than the state itself. Accordingly, such persons must have been directly or indirectly affected by the alleged violation.³⁶

²⁶ Sep. op. Casadevall, J., para. 5.

²⁷ Concurring op. Pinto de Albuquerque & Vučinić, JJ., para. 18.

²⁸ Sep. op. Casadevall, J., para. 5 (referring in this regard to the 1456 missing persons).

²⁹ Concurring op. Pinto de Albuquerque & Vučinić, JJ., para. 13.

³⁰ *Id.*, para. 18.

³¹ *Id.*, para. 1.

³² *Id.*, para. 1 n.1.

³³ See, e.g., ILC Articles, *supra* note 7, Arts. 34–39 with Commentary, at 95–110.

³⁴ Article 34 of the Convention, *supra* note 2, provides in pertinent part that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

³⁵ *Vallianatos v. Greece*, App. Nos. 29381/09, 32684/09, para. 47 (Eur. Ct. H.R. Nov. 7, 2013).

³⁶ *Tănase v. Moldova*, App. No. 7/08, 53 Eur. H.R. Rep. 744, para. 104 (2011).

One revolutionary aspect of the Convention, when it came into force, was that it guaranteed the right of individual application against a state, a genuine right to take legal action at the international level. It was one of the first international treaties to give individuals that right, originally by filing an application with the Commission, and later with the Court, alleging that one or several of their human rights had been violated.³⁷ As noted, the present case marks the first time the Court has acknowledged the applicability of Article 41 of the Convention to interstate applications.

Nonetheless, the relationship between just satisfaction and compensation remains unclear. Are these two remedies complementary? In its previous practice the Court often conflated the two, ordering compensation even though the applicant had not lodged a claim for just satisfaction.³⁸ Judges Pinto de Albuquerque and Vučinić offer an indication in their concurring opinion about where the dividing line might lie: just satisfaction is to be awarded only when the domestic legal order has not provided full reparation and the need for prevention and punishment in the specific circumstances of the case has also been established.³⁹ Full reparation in their view thus goes beyond the pecuniary and nonpecuniary damage caused to identified persons and may include punitive damages.⁴⁰

As regards the Court's power to deliver a declaratory judgment on the cessation of ongoing violations, Article 48(2)(a) of the ILC Articles is relevant. It provides that "[a]ny State entitled to invoke responsibility . . . may claim from the responsible State . . . cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30."⁴¹ Cyprus had requested that a declaratory judgment state that an ongoing violation of human rights must cease, particularly since the conduct in question had already been found in violation of the Convention in the Court's prior judgment on the merits. In such cases, just satisfaction is provided by way of declaratory relief. Here, however, the Court found that its judgment obviated the need to examine whether a formal declaratory judgment for the purposes of Article 46 of the Convention might be issued under Article 41.⁴²

With this judgment the Court has acted as "the ultimate defender of a Europe rooted in the rule of law and faithful to human rights."⁴³ Turkey was duly "punished" for the protracted search for the missing persons and the prolonged suffering of the enclaved Greek Cypriots of the Karpas area. The judgment intensifies the pressure on Turkey to implement in full the Grand Chamber's decision on the merits of 2001. It remains to be seen whether Turkey will comply with the 2001 and present judgments.

ALEXIA SOLOMOU

³⁷ The right of individuals to submit petitions directly to the Court, now set forth in Article 34 of the Convention, *supra* note 34, was added by Protocol No. 11, May 11, 1994, ETS No. 155.

³⁸ *Chember v. Russia*, 2008-IV Eur. Ct. H.R. 1, 22–23, para. 77 (€10,000); *Gorodnitchev c. Russie*, App. No. 52058/99, para. 143 (Eur. Ct. H.R. May 24, 2007) (€10,000); *Bursuc c. Roumanie*, App. No. 42066/98, para. 124 (Eur. Ct. H.R. Oct. 12, 2004) (€10,000).

³⁹ Concurring op. Pinto de Albuquerque & Vučinić, JJ., para. 14.

⁴⁰ *Id.*

⁴¹ ILC Articles, *supra* note 7, Art. 48(2)(a).

⁴² Joint concurring op., *supra* note 9.

⁴³ Concurring op. Pinto de Albuquerque & Vučinić, JJ., para. 18.