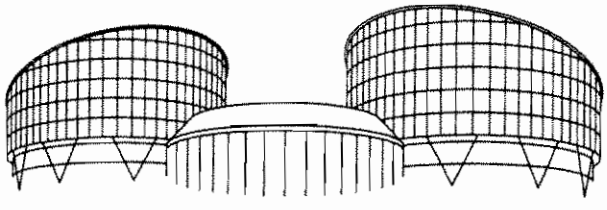

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application nos. 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

49 applications against Turkey

The European Court of Human Rights (Fourth Section), sitting on 1 December 2009 as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Işıl Karakaş, *judges,*

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above applications (see annexed table)

Having deliberated, decides as follows:

THE FACTS

The applicants are all relatives of persons who have been missing since the Turkish military operations in northern Cyprus in July and August 1974. Their bodies have never been found.

The applicants applied to the Court between 2004 and 2009 (see annexed table).

COMPLAINTS

The applicants complained about the events surrounding the disappearance of their relatives, the consequences of the disappearances and the fact that the fate of the missing persons was still unknown. They complained under some or all of the following Articles: Articles 1 to 3, 5 to 6, 8 to 14 and 17 of the Convention and Article 1 of Protocol No. 1.

THE LAW

The Court recalls that, pursuant to Article 35 § 1 of the Convention, it may only deal with a matter "within a period of six months from the date on which the final decision was taken".

In *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, the Court noted as follows:

> **"a. General principles**
>
> 156. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).
>
> 157. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (*Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Nor can Article 35 § 1 be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of

the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Aubrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001).

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

159. Nonetheless it has been said that the six month time-limit does not apply as such to continuing situations (see, for example, *Agrotexim Hellos S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1991, DR 71, p. 148, and *Cone v. Romania*, no. 35935/02, § 22, 24 June 2008); this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end. In the fourth inter-State case, where it was implicit that a similar approach was applicable to a continuing practice – and in that case it was a continuous failure to comply with the obligation to investigate disappearances – the Court notes that the issue of the six-month rule had been joined to the merits by the Commission and neither Government had since made any submissions on the point (§§ 103-104). The issue was thus not addressed expressly by the Court in that judgment. It therefore falls to the Court to resolve the point in the present case.

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

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

161. In that context, the Court would confirm the approach adopted by the Chamber in the present applications. Not all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake. In cases of disappearances, just as it is imperative that the relevant domestic authorities launch an investigation and take measures as soon as a person has disappeared in life-threatening circumstances, it is indispensable that the applicants, who are the relatives

of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness. Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay. What this involves is examined below.

c. Undue delay in disappearance cases

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

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

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

165. Nonetheless, the Court considers that applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic

possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case.

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

It concluded (at § 170):

"The Court considers that the applicants, who were amongst a large group of persons affected by the disappearances, could, in the exceptional situation of international conflict where no normal investigative procedures were available, reasonably await the outcome of the initiatives taken by their Government and the United Nations. These procedures could have resulted in steps being taken to investigate known sites of mass graves and provided the basis for further measures. The Court is satisfied, however, that by the end of 1990 it must have become apparent that the problematic, non-binding, confidential nature of these processes no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of their relatives in the near future."

The applicants in *Varnava* having applied to the Court in January 1990, they were found to have acted with reasonable expedition for the purposes of Article 35 § 1 and the Government's preliminary objection to the contrary was rejected.

In the present cases, the applicants applied to the Court between 17 November 2004 and 6 August 2009. In light of the Court's conclusion in *Varnava*, the applications must be taken to have been lodged out of time unless in the specific circumstances of individual cases it is shown that since the end of 1990 there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg (see *Varnava*, cited above, §§ 165 to 166).

The Court observes that there is no evidence in the present applications of any activity post-1990 which could have provided to the applicants some indication, or realistic possibility, of progress in investigative measures in relation to their relatives' disappearances and which could have justified a further lapse of fourteen years or more in coming to Strasbourg.

It follows that the applications were introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President

Annex

Application number	Name of applicants	Date lodged
43422/04	Costas & Thomas ORPHANOU	17 November 2004
4568/05	Stelios & Eirini GAVRIEL	8 November 2004
4577/05	STERGENAKI and others	7 September 2004
4613/05	CONSTANTINOU and others	12 November 2004
4617/05	ACHILLEOS NICOLADJIS and others	13 August 2004
4630/05	LAMBROU and others	26 September 2004
4636/05	SKALISTIS and others	26 September 2004
4638/05	SERGIDES and others	21 September 2004
4687/05	DAVID and others	23 September 2004
4711/05	PHORI and others	28 September 2004
4821/05	Eleni & Kyriaki CHARALAMBOUS	6 October 2004
4829/05	Giorgoula VARNAVA	6 October 2004
4834/05	LOIZOU and others	28 September 2004
4844/05	THEOCHAROUS-LAOUTARI & THEOCHAROUS-MOUTTA	5 October 2004
4847/05	NIKOLAOU-GEORGIOU HADJIYIANNI & KYRIAKOU HADJIYIANNI	17 October 2004
4888/05	Katina SOLOMOU and others	8 September 2004
4891/05	POLOS	17 October 2004
4896/05	CHRISTODOULOU and others	10 November 2004
4901/05	IOANNOU and others	10 November 2004
4920/05	MAKRIDES and others	11 November 2004
4927/05	LOIZOU & KTORI	22 November 2004
4931/05	ZACHARIADES GEORGIOU and others	15 November 2004
4936/05	COSTI and others	18 November 2004
4947/05	TZIORTZI and others	22 November 2004
4983/05	TOUROUROU and others	16 November 2004
5030/05	PANAGI and others	3 December 2004
5039/05	PAMBOULOS and others	6 December 2004
5044/05	AGATHOCLEOUS and others	15 January 2005
5077/05	Michael MAKRIDES and others	10 November 2004
6631/05	CHRISTOFI and others	31 January 2005
26541/05	CHADJIAVGUSTIDU	13 July 2005
26557/05	BITSAKIS	13 July 2005
26562/05	AVLONITI	13 July 2005
26566/05	KAILA-TSIAKKA & SIDERI-TSIAKKA	13 July 2005
26569/05	KATOUNTA	13 July 2005

26610/05	RACHOVITSAS	13 July 2005
26612/05	CHUNTALA	13 July 2005
26634/05	PAPHIOLIS	13 July 2005
26666/05	Stavroula STAVROU	13 July 2005
26670/05	KOUROUPI	13 July 2005
38948/05	Marios & Androula KYPRIANOU (II)	24 October 2005
45653/06	DEMETRIOU and others	23 October 2006
11457/07	SHIALOUNAS	26 February 2007
30881/08	KALMPOURTZI	19 June 2008
37368/08	HADJISOTERIOU and others	1 July 2008
46369/08	XENOFONTOS and others	19 September 2008
54060/08	PSARAS	15 October 2008
521/09	ELLINAS	2 December 2008
43094/09	ATHANASIOU	6 August 2009