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Punishment for Unjust War: First International Court Decision

Awarding Damages for Aggression: Will it be Enforced? © 2015

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On May 12, 2014, The European Court of Human Rights (ECHR) issued a ground breaking decision ordering Turkey to pay 90 million euro (30,000,000 Euro for damage to the surviving relatives of missing persons from Cyprus, and 60,000,000 Euro for damage suffered by the enclave residents of the Karpas peninsula on Cyprus).¹ This decision requiring “just satisfaction” followed a judgment of the ECHR from 2001. The “just satisfaction” judgment demonstrated the belief of the judges of the court that they were issuing a very momentous opinion. As a Joint Concurring Opinion states:

“THE PRESENT JUDGEMENT 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.”²

In the words of a two judge concurring opinion, “The Cyprus v. Turkey (just satisfaction) case is the most important contribution to peace in Europe in the history of the European Court of Human rights.”³ “[T]hose member States that wage war, invade

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¹ Cyprus v. Turkey, 25781/94, May 12, 2014. (One judge dissenting) The judgment on the merits of the case was entered May 10, 2001. Not a single judge from that earlier Grand Chamber decision participated in the just satisfaction Grand Chamber decision.

² Joint Concurring Opinion of Judges Zupancic, Gyulumyan, David Thor Bjorgvinsson, Nicolaou, Sajo, Lazarova Trajkovska, Power-Forde, Vucinic and Pinto De Albuquerque. Nine of the seventeen judges who decided the case joined this unusual joint concurrence. It is unclear if there is any precedent in the ECHR for such a joint concurrence, with a majority of the court concurring.

³ Concurring opinion of Judge Pinto De Albuquerque, joined by Judge Vucinic.

or support foreign armed intervention in other member States must pay for their unlawful actions, and the consequences of their actions, and the victims, their families and the States of their nationality have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe....”⁴

Whether or not the Council of Europe has the ability to enforce this “just satisfaction” judgment is, however, a very significant question for the future. Nevertheless, the “just satisfaction” judgment establishes a very important precedent on its own right.

While issuing this ground breaking decision, the court also reaffirmed basic principles of public international law that are rarely invoked.

First, a nation state may sue for, and recover damages for, injuries to that state’s own citizens or subjects.

Second, exemplary damages, or what the United States calls, punitive damages, are awardable against a miscreant nation state.

Third, claims for just satisfaction are not barred by the passage of time, even substantial amounts of time. In the instant case, the original action that was commenced in the ECHR began in 1994, but concerned actions taken by Turkey in northern Cyprus in July and August, 1974.⁵

⁴ Id, at ¶ 1.

⁵ Cyprus v. Turkey, supra note 1 at ¶ 4.

The implications for other member nation states of the Council of Europe, which now include Russia, are blatantly obvious. Indeed, the timing of the release of the just satisfaction decision during Russia's "reacquisition of the Crimea" is interesting.⁶

However, it is critically important that the Council of Europe is able to enforce the judgment against Turkey. Absent enforcement, a deliberate governmental policy decision to wage war would remain unpunished, and in the worst of all possible worlds, the Cyprus v. Turkey decision could be the equivalent of Italy's Ethiopian war which effectively terminated the League of Nations. Enforcement is discussed near the end of this article.

This just satisfaction decision established some other significant legal precedent. Rarely do nation states bring cases to the ECHR: the total number of complaints filed is only 16 and only four of those resulted in judgments.⁷ Such cases are

⁶ "International law and its institution do not provide support for the separation of Crimea or its annexation to Russia." Thomas G. Grant, Annexation of Crimea, *Amer. J. Int'l. L.*, 68, 95 (2015). See also n. 188 and accompanying text referring to the instant Cyprus v. Turkey decision as well as to the Preliminary decision of the E.C.H.R. in *Loizidou v Turkey*, App. No. 15318/89, 1996-VI Eur. Ct. H.R. 2216(1996).

⁷ *Ireland v. the United Kingdom*, 18 January 1978, ¶¶244-246, Series A no. 25, is one such case. *Ireland v. the United Kingdom* dealt with allegations that various interrogation techniques employed by British armed forces against suspected Irish Republican Army (IRA) members and sympathizers violated the European Convention on Human Rights. The court held that the "five techniques," which included wall standing, bagging the head, subjecting individuals to prolonged periods of loud noises and sleep deprivation, violated the Convention by constituting inhuman treatment. Another case is *Denmark v. Turkey*, 34382/97 (5 April 2000) which resulted in a friendly settlement. The case concerned the treatment of a Danish citizen by Turkish authorities. The friendly settlement included the ex gratia payment of 450,000 Danish kroner to the Danish government with the Turkish government expressing its acknowledgement and regret concerning occasional and individual cases of torture and ill-treatment in Turkey. A training program for the police was also established with Denmark assisting in the financing of the Council of Europe training project. The only other ECHR opinion was in the case of the grand chamber decisions of *Georgia v. Russia*, 13255/07 (3

rarely brought because it is a delicate matter for one nation state to accuse another nation state of human rights violations. The overwhelming number of cases filed before the ECHR today are brought by individuals.⁸ The ECHR held that in State versus State cases compensation is normally owed not to the nation state but to individuals. “According to the very nature of the Convention, it is the individual, and not the States, who is directly or indirectly harmed and primarily ‘injured’ by a violation of one or several Convention rights. Therefore, if just satisfaction is affected by an inter-State case, it should always be done for the benefit of individual victims.”⁹

It is unsurprising that a convention adopted for the protection of human rights against the misdeeds of nation states should generate potential damage awards to individuals. Yet the *Cyprus v. Turkey* decision is the first proclamation of the general nature of the obligation under the Convention. Indeed, the decision is an illustrative precedent for other international human rights conventions. However, some international conventions protecting human rights lack any possibility of individual damage entitlements. For example the United Nations International Convention for the Protection of Civil and Political Rights has no ancillary protective mechanism that might generate damage awards to individuals.

The ECHR awarded 30,000,000 euro for surviving relatives of the missing persons from Cyprus, which it numbered at 1,456 persons, or roughly 20,600 euro per

July 2014). That case involved thousands of arrests, detention and deportation of Georgia nationals from the territory of the Russian Federation. Most of the other cases had been examined by the Commission and also had further attention by the Committee of Ministers, but were not subjected to the court’s decision process.

⁸ Recent filings of individual cases before the ECHR number well above a thousand each year.

⁹ *Id.* at 46.

person.¹⁰ Moreover, the Court's order includes an obligation on the state of Cyprus to pay the compensation ordered to the persons affected.¹¹ This goes beyond traditional public International Law which recognized the right of a nation state to recover damages on behalf of injuries inflicted upon its subjects, but did not obligate the nation state to convey onward any sums recovered to its subjects. Whether the nation state would compensate any of its subjects was a matter of grace, not an obligation under traditional public international law. The Cyprus v. Turkey decision thus establishes a new international obligation upon a nation state, an obligation in international law to compensate a nation states' subjects!

Punitive Damages

A concurring opinion by Judges Pinto De Albuquerque and Vucinic, discusses punitive damages in the jurisprudence of the ECHR. The opinion enumerates seven situations in which the ECHR has ordered punitive damages.¹² The violation of the European Convention on Human rights by Turkey in the instant case was described as flagrant, indeed the State's actions and omissions were designated both "massive and gross."¹³ Indeed, punitive damages was described as essential in at least three cases: 1) gross violations of human rights, especially when there are multiple violations at the same time, repeated violations over a significant period of time, or a single continuing violation over a significant period of time, 2) prolonged deliberate non-compliance with a

¹⁰ Id at ¶¶ 48-49. The Cypriot Government requested 12,000 Euro in its initial claim, but by the time of the court's decision, considered that that amount failed to correspond to awards subsequent to the sums awarded by the court in *Varmava and Others v. Turkey* (16065/90 to 16073/90 ECHR 2009).

¹¹ Id ¶ 58.

¹² Id. ¶ 13.

¹³ Id.

judgment of the Court delivered with regard to the recalcitrant Contracting Party, and 3) severe curtailment or threat thereof of the applicant's human rights with the purpose of avoiding, impairing or restricting his or her access to the Court as well as the Court's access to the applicant.¹⁴

The fundamental purpose of punitive damages is to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention.¹⁵ Punitive damages have been recognized in international practice and law, including in diplomatic practice, arbitration proceedings, international labour practice and private international law, European Union law as well as under international human rights law.¹⁶

The Merits Decision: Turkey and an Unjust War

Although the European Declaration on Human Rights emerged from the turmoil of WWII, the Convention lacks any specific provision outlawing war as such.¹⁷ Instead it aims to protect a set of enumerated rights, the right to life, prohibition against torture, etc.¹⁸ Thus it would have been impossible in the merits stage of *Cyprus v.*

¹⁴ Id. ¶ 18.

¹⁵ Id. ¶ 13.

¹⁶ Id. ¶ 14.

¹⁷ The fifth clause in the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms references "fundamental freedoms which are the foundation of justice and peace in the world...." Rome 4, XI 1950. The Convention was adopted after the establishment of the United Nations. Under the U.N. charter, with the exception of "wars of self defense," war and related employment of sanctions against another nation state were assigned to the purview of the U.N. Security Council. In theory, one might suppose, there was no need for the European Charter to itself ban "war" given the structure of the U.N. Charter. Perhaps that was a mistake since wars seem all too frequent during the last half of the twentieth century and the beginning of the twenty first century.

¹⁸ European Convention, articles 2 through 14, as amended by various Protocols, particularly protocol number 1, enumerate various specific rights.

Turkey for the court to have declared a violation constituting conduct of an unjust war. What was found, however, by votes of 16 to 1, was specific violations of Articles 2, 3, 5, 6, 8, 9, 10, 13 and articles one and 2 of protocol 1. These findings implicated the rights to life, rights against torture, rights to liberty and security, rights to a fair trial, rights with respect to private and family life, rights regarding freedom of thought, conscience and religion, freedom of expression, rights to an effective remedy and various property rights. That is quite a list of violations attributed to the nation state of Turkey. The most significant findings of violations will be discussed below, but it is well to remember the overall import of the initial merits decision in *Cyprus v. Turkey*, decided May 10, 2001.

The case arose as a result of the military operations of Turkey in northern Cyprus in July 1974.¹⁹ However, the ECHR made no specific finding about the war itself; instead it found that Turkey was liable for what it did or in some cases did not do in the period subsequent to commencement of hostilities.²⁰ The fact finding component of the decision is quite important.

Fact Finding

The court predicated much of its fact finding upon the investigation previously carried out by the Commission.²¹ In both 1976 and 1983 reports had been prepared by the Commission. The Reports concluded that it was widely accepted that a considerable number of Cypriots were still missing as a result of the armed conflict and

¹⁹ *Cyprus v. Turkey*, (hereinafter Merits Decision of May 10, 2001,) ¶ 3.

²⁰ A friend of the author was in Istanbul when the Turkish actions began. An order was issued in Istanbul that all headlights were to be masked at night by blue paper because of fear Greece might bomb Istanbul. Such bombing never took place.

²¹ Until revision of the Convention, initial inquiries in cases were conducted by a Commission. The Commission system was abandoned largely because it added considerable time to resolve cases.

that a number of those missing were Greek Cypriots taken prisoner by the Turkish army.²² It was also conceded 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.²³ Moreover, that property was not returned, nor was compensation paid in recent years according to investigations of the Commission of the European Court of Human Rights despite inter-communal talks sponsored by the Secretary General of the United Nations.²⁴ No progress on these accounts had occurred more than a decade later when the ECHR rendered its decision about remedies for the incursion.

By the time of the hearing before the Court the applicant Government stated that the number of missing persons was 1,485, and represented that evidence indicated that these individuals were either detained by, or were in the custody of, or under the actual authority of, the Turkish army or its militia, and were last seen in areas under the effective control of Turkey.²⁵ Instead of finding Turkey directly responsible for murder of these individuals, the court held that Turkey violated Article 2 of the Convention by failing to adequately research the disappearances of these persons.²⁶ Similarly the ECHR held Turkey violated Article 5 of the convention by failing to conduct an effective investigation.²⁷ Furthermore, the relatives of the disappeared were

²² 2001 Merits decision, ¶23.

²³ Id, ¶28.

²⁴ Id. ¶ 33.

²⁵ Id. ¶119.

²⁶ Id. ¶136

²⁷ Id. ¶ 150. Article 5 Provides in part : “(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...”

also found to have had their rights violated under Article 3 of the Convention by Turkey's failure to conduct an effective investigation.²⁸

The ECHR went on to find that Turkey's barring of return of displaced Greek Cypriots violated Article 8 of the Convention.²⁹ Such action was also found in violation of Article 1 of Protocol No. 1 of the Convention.³⁰ This was found to be a continuing violation "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."³¹

The ECHR also found that Turkey had violated Article 9 of the Convention, which provides for freedom of thought, conscience and religion in limiting the freedom of movement and access to places of worship, as well as limitations on the appointment of further priests to serve the enclaved Greek-Cypriot population.³² The ECHR also held that excessive measures of censorship were applied to school books for Greek Cypriots living in northern Cyprus.³³ This was found a violation of Article 10 of

²⁸ Id. ¶¶ 157-158. Article 2 Provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

²⁹ Id. ¶¶ 172-175. Article 8 provides in part: "(1) Everyone has a right to respect for his private and family life, his home and his correspondence."

³⁰ Id. ¶¶ 184-189. Protocol 1 provides protection to "peaceful enjoyment of possessions."

³¹ Id. ¶ 189. In association with these violations, the ECHR also found a violation in the failure of Turkey to provide an effective remedy for violation of these rights. ¶ 194.

³² Id. ¶¶ 242-246. Because of insufficient evidence the ECHR refused to find a violation with regards to the Maronite community living in northern Cyprus. The court applied a standard of proof beyond a reasonable doubt. ¶ 247.

³³ Id. ¶ 254.

the Convention relating to the right of freedom of expression and to receive and impart information and ideas without interference by public authority.³⁴

The ECHR also found that the property rights of Greek Cypriots who permanently departed from Cyprus as well as the inheritance rights of Greek Cypriots were infringed, all violations of Article 1 of Protocol 1 of the Convention.³⁵ Article 2 of Protocol 1 was also violated by failure to provide appropriate secondary-school facilities in northern Cyprus.³⁶

The ECHR also found that the right to private life and home of the enclaved Greek Cypriots were not respected in that they were monitored with respect to movements and contacts, having to account for the most mundane reasons for moving outside the confines of their villages.³⁷ Surveillance even extended to physical presence of state agents in the homes of Greek Cypriots on the occasion of social or other visits by third parties, including family members.³⁸ The ECHR endorsed the conclusion of the Commission that Greek Cypriots felt they were compelled to live in a hostile environment “in which it is hardly possible to lead a normal private and family life.”³⁹ The court further found that restrictions on movement of the Greek Cypriots were in pursuit of a policy of racial discrimination (racial, ethnic origin and religion) amounting to a breach of Article 3 of the Convention, i.e. degrading treatment.⁴⁰ “The conditions under which that population is condemned to live are debasing and violate the very

³⁴ Id.

³⁵ Id. ¶¶ 269-270.

³⁶ Id. ¶ 280.

³⁷ Id. ¶ 294 These were violations of article 8 of the Convention.

³⁸ Id. ¶ 294.

³⁹ Id. ¶¶ 300-311.

⁴⁰ Id. ¶¶ 302

notion of respect of the human dignity of its members.”⁴¹ The ECHR also found multiple violations of Convention rights by the authorities under Article 13 of the convention (failure to provide effective remedies) with respect to rights under Articles, 3, 8, 9, and 10 of the Convention and Articles 1 and 2 of Protocol No. 1.⁴²

Lastly, the ECHR did conclude that a law authorizing trial by military courts violated Article 6 of the Convention which provides that civil rights and criminal matters must be tried before an independent and impartial tribunal, even though the court could not definitively conclude that such trials actually took place. The authorization of such trials by legislative practice violated Article 6.⁴³

Various other matters were raised by the applicant Government on which the ECHR found no violations of provisions of the Convention. However, the lengthy litany of violations that were found is impressive. The last determination by the court was that as of the date of 10 May, 2001 the application of Article 41 of the Convention was not ready for decision and adjourned consideration of remedies. The decision this year thus completed the ECHR’s consideration of the matter.

Turkish Compliance?

It was reported by a Turkish newspaper that the Turkish Foreign Minister reacted even before the announcement of the ECHR decision that the ruling would “neither be binding nor carry any value” for Ankara.⁴⁴ In a press conference after the

⁴¹ Id. ¶ 309.

⁴² Id. 322

⁴³ Id. ¶ 359. The court found that it had the power to consider the issue “in abstracto”. Id. ¶ 358.

⁴⁴ <http://www.parikiaki.com/2014/05/reactions-over-the-echr-decision-by-davutoglu-and-the-turkish-ministry-of-foreign-affairs/>
Reactions over the ECHR decision by Davutoglu and the Turkish Ministry of

announcement of the decision that the Foreign minister further stated “We are not thinking of paying this amount to a country that we do not recognize.”⁴⁵

The Committee of Ministers of the European Commission has scheduled for detailed examination the Cyprus v. Turkey case on its meeting scheduled for 9-11 of June, 2015. No indication exists on the Council of Europe’s website that any response has been received from Turkey regarding compliance with the court decision. Nor was there any indication that any response was received by that date.

This is not the first time Turkey indicated it would not comply with a decision of the ECHR. A similar statement issued decades ago also in relationship to the same invasion of Cyprus, but involving but a single house owned by a Greek Cypriot, Mrs Loizidou. However, Turkey did eventually agree to pay the assessed damages of £530,000, although it took five years from the ECHR's decision.⁴⁶

As one article put it, ‘Turkey has lost hundreds of judgments in the European Court and has paid, whether it liked it or not, countless millions of dollars in penalties. Turkey has no other choice, if it wants to remain a member of the Council of Europe.’⁴⁷ Turkey could also forfeit its slim chance of joining the European Union.⁴⁸

By failing to resolve its dispute with Cyprus, Turkey also inflicts upon itself a complete barrier towards trying to develop any undersea oil and gas reserves in the waters along its coast lines. The underlying reason is that neither Turkey, nor Greece

Foreign Affairs Posted on 14 May 2014 <last accessed May 14, 2015>

⁴⁵ Id.

⁴⁶ “Turkey agrees to pay Greek Cypriot compensation for house seized in 1974.” The Guardian, U.S edition. www.TheGuardian.com/2003.nov/20/Cyprus-Turkey (last accessed July 19, 2015)

⁴⁷Harut Sassounian, Like it or not, Turkey will have to pay up, (May 27, 2014) www.theCoiforniaCourier.com. (last accessed July 19, 2015).

⁴⁸ Id.

nor Cyprus can securely say what belongs to whom. The Law of the Sea permits a nation state to extend its Exclusive Economic Zones up to 200 nautical miles from a country's coast line. However the hundreds of small islands and rocks in the Aegean and eastern Mediterranean complicate matters significantly. This legal impass cannot be broken short of a resolution of the political dispute with Cyprus.⁴⁹ Not only has Turkey taken a hit to its diplomatic image, it has lost EU aid in the past.⁵⁰

The complex legal situation regarding the boundary disputes between Greece and Turkey centers on Turkey's coastline, one of the longest in Europe, and the various islands, rocks, islets, and contiguous continental shelf areas associated with those coastal waters in both the Aegean and the Mediterranean.. The disputes about these matters got back to the break up of the Ottoman Empire at the end of the First World War as well as the first Balkan War that ended in 1913. Various treaties,⁵¹ as well as the multilateral Law of the Sea Convention (which Turkey does not recognize), and decisions by international courts leave these matters unsettled.⁵² Greece even took Turkey before the International Court of Justice, but that court found it had no jurisdiction because Turkey did not accept its jurisdiction.

⁴⁹ Hugh, Pope, Ekathimerini, 25 Mr. 2013. The Cost of Frozen Conflict for Cyprus, Greece and Turkey, www.crisisgroup.org/en/regions/europe/tirley-cyprus/oped/Hugh-Pope -the cost of frozen conflict for Cyprus, Greece and Turkey. (last accessed July 19, 2015)

⁵⁰ Id.

⁵¹ These treaties include the Treaty of London of 1913, the Treaty of Lausanne (1924), which formalized the current boundaries of Turkey (1924), and The Treaty of Paris (1947).

⁵² For excellent discussions of these complex matters see: Emily A, Georgiades, The IMIA Islets: a Beginning to the Maritime Delimitation of the Aegean Sea, *Dispute*, 17 *Ocean & Coastal L.J.* 103 (2011) and Scott Keefer, Solving the Greek Turkish Boundary Dispute, 11 *Cardozo J. Int'l & Comp. L.* 55 (2003). The Law of the Sea Convention may constitute evidence of the customary law of the sea that might bind Turkey nevertheless.

Thus it is clearly in Turkey's economic and political interest to pay the damages assessed by the E.C.H.R. to Cyprus and then attempt to resolve the larger disputes with Greece. It is important to remember that the 1974 action of Turkey in Cyprus was on behalf of the minority of Turkish people living in Cyprus, which was primarily populated by people who identified themselves as Greek.

It is also important that the Council of Ministers of the Council of Europe ensure that the payment does take place to maintain the credibility of the E.C.H.R. in modern Europe. It would be terribly sad were the Cyprus case to function in a manner similar to the Italy's war in Ethiopia that destroyed the League of Nations.

According to the latest annual report of the European Court of Human Rights the overall success rate in obtaining compliance with its decisions regarding just satisfaction has risen to 84 per cent within the deadlines for compliance.⁵³ Indeed the report compliments Turkey for making significant progress in resolving issues relating to the excessive length of legal proceedings.⁵⁴ On the other hand various numerical comparisons reported are not comforting about Turkey's performance in making final payments. It is in the top three of countries with the number of cases with no information provided about payment more than 6 months after the deadline for payment.⁵⁵ In total amounts awarded as Just satisfaction, Turkey is second among countries with outstanding

⁵³ 8th Annual Report of the committee of Ministers (2014) at p. 10. The document can be found on the website of the European court of Human rights at www.coe.int/.../execution/Source/Publications/CM_annreport2014_en.pdf (last accessed August 21, 2015).

⁵⁴ Id. p. 11 paragraph 16, and p. 14, paragraph 26.

⁵⁵ Id. Appendix 1, Statistics, pp. 45-46. Turkey has 107 such cases, the Ukraine 141 and the Russian federation 186.

balances, in 2014, 99.8 million Euro, with only the Russian Federation having a higher outstanding balance, 1,879 million Euro.⁵⁶

In a very real sense Turkish compliance with decisions of the ECHR remains problematic.

⁵⁶ Id. Appendix, Statistics, pp. 57-58.