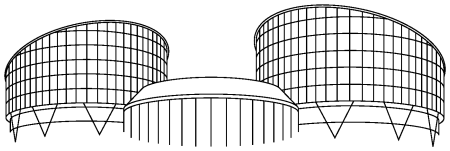

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF CHIRAGOV AND OTHERS v. ARMENIA

(Application no. 13216/05)

JUDGMENT
(*Merits*)

STRASBOURG

16 June 2015

This judgment is final but may be subject to editorial revision.

In the case of Chiragov and Others v. Armenia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Isabelle Berro,
Ineta Ziemele,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Khanlar Hajiyev,
George Nicolaou,
Luis López Guerra,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Ksenija Turković,
Egidijus Kūris,
Robert Spano,
Iulia Antoanella Motoc, *judges,*
and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 22-23 January 2014 and 22 January 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 13216/05) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Azerbaijani nationals, Mr Elkhan Chiragov, Mr Adishirin Chiragov, Mr Ramiz Gebrayilov, Mr Akif Hasanof, Mr Fekhreddin Pashayev and Mr Qaraca Gabrayilov ("the applicants"), on 6 April 2005. The sixth applicant died in June 2005. The application was pursued on his behalf by his son, Mr Sagatel Gabrayilov.

2. The applicants, who had been granted legal aid, were represented by Mr M. Muller QC, Ms C. Vine, Ms M. Butler, Mr M. Ivers, Ms B. Poynor and Mr S. Swaroop, lawyers practising in London, as well as Mr K. Yıldız. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia before the Court.

3. The applicants alleged, in particular, that they were prevented from returning to the district of Lachin in territory occupied by the respondent Government, that they were thus unable to enjoy their property and homes located there and that they had not received any compensation for their losses. They submitted that this amounted to continuing violations of Article 1 of Protocol No. 1 to the Convention and of Article 8 of the Convention. Moreover, they alleged a violation of Article 13 of the Convention in that no effective remedy was available in respect of the above complaints. Finally, they claimed, with a view to all complaints set out above, that they were subjected to discrimination by virtue of ethnic origin and religious affiliation in violation of Article 14 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). The Azerbaijani Government made use of their right to intervene under Article 36 § 1 of the Convention. They were represented by their Agent, Mr. C. Asgarov.

5. On 9 March 2010 a Chamber of the Third Section, composed of judges Josep Casadevall, Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Alvina Gyulumyan, Egbert Myjer and Luis López Guerra, and also of Stanley Naismith, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. The President of the Court decided that, in the interests of the proper administration of justice, the present case and the case of *Sargsyan v. Azerbaijan* (application no. 40167/06) should be assigned to the same composition of the Grand Chamber (Rules 24, 42 § 2 and 71).

7. A hearing on the admissibility and merits of the application took place in public in the Human Rights Building, Strasbourg, on 15 September 2010 (Rule 59 § 3).

8. On 14 December 2011 the application was declared admissible by a Grand Chamber consisting of judges Nicolas Bratza, Jean-Paul Costa, Christos Rozakis, Françoise Tulkens, Josep Casadevall, Nina Vajić, Corneliu Bîrsan, Peer Lorenzen, Boštjan M. Zupančič, Elisabet Fura, Alvina Gyulumyan, Khanlar Hajiyev, Egbert Myjer, Sverre Erik Jebens, Giorgio Malinverni, George Nicolaou and Luis López Guerra, and also of Michael O'Boyle, Deputy Registrar.

9. The applicants and the respondent Government each filed further written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from the Azerbaijani Government.

10. A hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 22 January 2014.

There appeared before the Court:

(a) *for the respondent Government*
Mr G. KOSTANYAN, *Agent*,
Mr G. ROBERTSON, QC, *Counsel*,
Mr E. BABAYAN,
Mr T. COLLIS, *Advisers*;

(b) *for the applicants*
Mr M. MULLER, QC,
Mr M. IVERS,
Mr S. SWAROOP,
Ms M. BUTLER, *Counsel*,
Ms C. VINE,
Ms B. POYNOR,
Ms S. KARAKAŞ,
Ms A. EVANS, *Advisers*;

(c) *for the Azerbaijani Government*
Mr C. ASGAROV, *Agent*,
Mr M.N. SHAW, QC,
Mr G. LANSKY, *Counsel*,
Mr O. GVALADZE,
Mr H. TRETTER,
Ms T. URDANETA WITTEK,
Mr O. ISMAYILOV, *Advisers*.

The applicants A. Hasanof and F. Pashayev were also present.

The Court heard addresses by Mr Muller, Mr Swaroop, Mr Ivers, Ms Butler, Mr Robertson, Mr Shaw and Mr Lansky.

11. Following the hearing, the Court decided that the examination of the case did not require it to undertake a fact-finding mission or to conduct a hearing of witnesses.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

12. At the time of the demise of the USSR, the Nagorno-Karabakh Autonomous Oblast (“the NKAO”) was an autonomous province of the

Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"). Situated within the territory of the Azerbaijan SSR, it covered 4,388 sq. km. There was at that time no common border between Nagorno-Karabakh (known as Artsakh by its Armenian name) and the Armenian Soviet Socialist Republic ("the Armenian SSR"), which were separated by Azerbaijani territory, at the shortest distance by the district of Lachin, including a strip of land often referred to as the "Lachin corridor", less than ten kilometres wide.

13. According to the USSR census of 1989, the NKAO had a population of 189,000, consisting of 77% ethnic Armenians and 22% ethnic Azeris, with Russian and Kurdish minorities. The district of Lachin had a different demographic, the great majority of its population of some 60,000 being Kurds and Azeris. Only 5-6% were Armenians.

14. In early 1988 demonstrations were held in Stepanakert, the regional capital of the NKAO, as well as in the Armenian capital of Yerevan, demanding the incorporation of Nagorno-Karabakh into Armenia. On 20 February the Soviet of the NKAO made a request to the Supreme Soviets of the Armenian SSR, the Azerbaijan SSR and the USSR that the NKAO be allowed to secede from Azerbaijan and join Armenia. The request was rejected by the Supreme Soviet of the USSR on 23 March. In June it was also rejected by the Supreme Soviet of Azerbaijan whereas its counterpart in Armenia voted in favour of unification.

15. Throughout 1988 the demonstrations calling for unification continued. The district of Lachin was subjected to roadblocks and attacks. The clashes led to many casualties, and refugees, numbering hundreds of thousands on both sides, flowed between Armenia and Azerbaijan. As a consequence, on 12 January 1989 the USSR Government placed the NKAO under Moscow's direct rule. However, on 28 November of that year, control of the province was returned to Azerbaijan. A few days later, on 1 December, the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh regional council adopted a joint resolution, "On the reunification of Nagorno-Karabakh with Armenia". As a result of this resolution a joint budget for the two entities was established in January 1990 and a decision to include Nagorno-Karabakh in the upcoming Armenian elections was taken in the spring of that year.

16. In early 1990, following an escalation of the conflict, Soviet troops arrived in Baku and Nagorno-Karabakh, and the latter province was placed under a state of emergency. Violent clashes between Armenians and Azeris continued, however, with the occasional intervention by Soviet forces.

17. On 30 August 1991 Azerbaijan declared independence from the Soviet Union. This was subsequently formalised by means of the adoption of the Constitutional Act on the State Independence of 18 October. On 2 September the Soviet of the NKAO announced the establishment of the Nagorno-Karabakh Republic (hereinafter the "NKR"), consisting of the territory of the NKAO and the Shaumyan district of Azerbaijan, and

declared that it was no longer under Azerbaijani jurisdiction. On 26 November the Azerbaijani parliament abolished the autonomy previously enjoyed by Nagorno-Karabakh. In a referendum organised in Nagorno-Karabakh on 10 December, 99.9% of those participating voted in favour of secession. However, the Azeri population boycotted the referendum. In the same month, the Soviet Union was dissolved and Soviet troops began to withdraw from the region. Military control of Nagorno-Karabakh was rapidly passing to the Karabakh Armenians. On 6 January 1992 the "NKR", having regard to the results of the referendum, reaffirmed its independence from Azerbaijan.

18. In early 1992 the conflict gradually escalated into full-scale war. The ethnic Armenians conquered several Azeri villages, leading to at least several hundred deaths and the departure of the population.

19. The district of Lachin, in particular the town of Lachin, was attacked many times. The applicants claimed that the attacks were made by troops of both Nagorno-Karabakh and the Republic of Armenia. The respondent Government maintained, however, that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups. For almost eight months in 1991 the roads to Lachin were under the control of forces of Armenian ethnicity who manned and controlled checkpoints. The town of Lachin became completely isolated. In mid-May 1992 Lachin was subjected to aerial bombardment, in the course of which many houses were destroyed.

20. On 17 May 1992, realising that troops were advancing rapidly towards Lachin, villagers fled. The following day the town of Lachin was captured by forces of Armenian ethnicity. It appears that the town was looted and burned in the days following the takeover. According to information obtained by the respondent Government from the authorities of the "NKR", the city of Lachin and the surrounding villages of Aghbulag, Chirag and Chiragli were completely destroyed during the military conflict.

21. In July 1992 the Armenian parliament decreed that it would not sign any international agreement stipulating that Nagorno-Karabakh remain a part of Azerbaijan.

22. According to a Human Rights Watch (HRW) report ("Seven Years of Conflict in Nagorno-Karabakh", December 1994), the capture of the district of Lachin created approximately 30,000 Azeri displaced persons, many of them of Kurdish descent.

23. Following the capture of Lachin, ethnic Armenian forces continued to conquer four more Azerbaijani districts surrounding Nagorno-Karabakh (Kelbajar, Jabrayil, Gubadly and Zangilan) and substantial parts of two others (Agdam and Fizuli).

24. On 5 May 1994 a ceasefire agreement (the Bishkek Protocol) was signed by Armenia, Azerbaijan and the "NKR" following Russian mediation. It came into effect on 12 May.

25. According to the above-mentioned HRW report, between 1988 and 1994 an estimated 750,000–800,000 Azeris were forced out of Nagorno-Karabakh, Armenia, and the seven Azerbaijani districts surrounding Nagorno-Karabakh. According to information from Armenian authorities, 335,000 Armenian refugees from Azerbaijan and 78,000 internally displaced persons (from regions in Armenia bordering Azerbaijan) have been registered.

B. Current situation

26. According to the respondent Government, the "NKR" controls 4,061 sq. km of the former Nagorno-Karabakh Autonomous Oblast. While it is debated how much of the two partly conquered districts is occupied by the "NKR", it appears that the occupied territory of the seven surrounding districts in total amounts to some 7,500 sq. km.

27. Estimates of today's population of Nagorno-Karabakh vary between 120,000 and 145,000 people, 95% being of Armenian ethnicity. Virtually no Azerbaijanis remain. The district of Lachin has a population of between 5,000 and 10,000 Armenians.

28. No political settlement of the conflict has so far been reached. The self-proclaimed independence of the "NKR" has not been recognised by any State or international organisation. Recurring breaches of the 1994 ceasefire agreement along the borders have led to the loss of many lives and the rhetoric of officials remains hostile. Moreover, according to international reports, tension has heightened in recent years and military expenditure in Armenia and Azerbaijan has increased significantly.

29. Several proposals for a peaceful solution of the conflict have failed. Negotiations have been carried out under the auspices of the OSCE (Organization for Security and Co-operation in Europe) and its so-called Minsk Group. In Madrid in November 2007 the Group's three Co-Chairs – France, Russia and the United States – presented to Armenia and Azerbaijan a set of Basic Principles for a settlement. The Basic Principles, which have since been updated, call, *inter alia*, for the return of the territories surrounding Nagorno-Karabakh to Azerbaijani control, an interim status for Nagorno-Karabakh providing guarantees for security and self-governance, a corridor linking Armenia to Nagorno-Karabakh, a future determination of the final legal status of Nagorno-Karabakh through a legally binding referendum, the right of all internally displaced persons and refugees to return to their former places of residence, and international security guarantees that would include a peacekeeping operation. The idea is that the endorsement of these principles by Armenia and Azerbaijan would enable the drafting of a comprehensive and detailed settlement. Following intensive shuttle diplomacy by Minsk Group diplomats and a number of meetings between the presidents of the two countries in 2009, the process lost

momentum in 2010. So far the parties to the conflict have not signed a formal agreement on the Basic Principles.

30. On 24 March 2011 the Minsk Group presented a "Report of the OSCE Minsk Group Co-Chairs' Field Assessment Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh", the executive summary of which reads as follows:

> "The OSCE Minsk Group Co-Chairs conducted a Field Assessment Mission to the seven occupied territories of Azerbaijan surrounding Nagorno-Karabakh (NK) from October 7-12, 2010, to assess the overall situation there, including humanitarian and other aspects. The Co-Chairs were joined by the Personal Representative of the OSCE Chairman-in-Office and his team, which provided logistical support, and by two experts from the UNHCR and one member of the 2005 OSCE Fact-Finding Mission. This was the first mission by the international community to the territories since 2005, and the first visit by UN personnel in 18 years.
>
> In travelling more than 1,000 kilometers throughout the territories, the Co-Chairs saw stark evidence of the disastrous consequences of the Nagorno-Karabakh conflict and the failure to reach a peaceful settlement. Towns and villages that existed before the conflict are abandoned and almost entirely in ruins. While no reliable figures exist, the overall population is roughly estimated as 14,000 persons, living in small settlements and in the towns of Lachin and Kelbajar. The Co-Chairs assess that there has been no significant growth in the population since 2005. The settlers, for the most part ethnic Armenians who were relocated to the territories from elsewhere in Azerbaijan, live in precarious conditions, with poor infrastructure, little economic activity, and limited access to public services. Many lack identity documents. For administrative purposes, the seven territories, the former NK Oblast, and other areas have been incorporated into eight new districts.
>
> The harsh reality of the situation in the territories has reinforced the view of the Co-Chairs that the status quo is unacceptable, and that only a peaceful, negotiated settlement can bring the prospect of a better, more certain future to the people who used to live in the territories and those who live there now. The Co-Chairs urge the leaders of all the parties to avoid any activities in the territories and other disputed areas that would prejudice a final settlement or change the character of these areas. They also recommend that measures be taken to preserve cemeteries and places of worship in the territories and to clarify the status of settlers who lack identity documents. The Co-Chairs intend to undertake further missions to other areas affected by the NK conflict, and to include in such missions experts from relevant international agencies that would be involved in implementing a peace settlement."

31. On 18 June 2013 the Presidents of the Co-Chair countries of the Minsk group issued a joint statement on the Nagorno-Karabakh conflict:

> "We, the Presidents of the OSCE Minsk Group Co-Chair countries – France, the Russian Federation, and the United States of America – remain committed to helping the parties to the Nagorno-Karabakh conflict reach a lasting and peaceful settlement. We express our deep regret that, rather than trying to find a solution based upon mutual interests, the parties have continued to seek one-sided advantage in the negotiation process.
>
> We continue to firmly believe that the elements outlined in the statements of our countries over the last four years must be the foundation of any fair and lasting settlement to the Nagorno-Karabakh conflict. These elements should be seen as an

integrated whole, as any attempt to select some elements over others would make it impossible to achieve a balanced solution.

We reiterate that only a negotiated settlement can lead to peace, stability, and reconciliation, opening opportunities for regional development and cooperation. The use of military force that has already created the current situation of confrontation and instability will not resolve the conflict. A renewal of hostilities would be disastrous for the population of the region, resulting in loss of life, more destruction, additional refugees, and enormous financial costs. We strongly urge the leaders of all the sides to recommit to the Helsinki principles, particularly those relating to the non-use of force or the threat of force, territorial integrity, and equal rights and self-determination of peoples. We also appeal to them to refrain from any actions or rhetoric that could raise tension in the region and lead to escalation of the conflict. The leaders should prepare their people for peace, not war.

Our countries stand ready to assist the sides, but the responsibility for putting an end to the Nagorno-Karabakh conflict remains with them. We strongly believe that further delay in reaching a balanced agreement on the framework for a comprehensive peace is unacceptable, and urge the leaders of Azerbaijan and Armenia to focus with renewed energy on the issues that remain unresolved."

C. The applicants and the property allegedly owned by them in the district of Lachin

32. The applicants have stated that they are Azerbaijani Kurds who lived in the district of Lachin, where their ancestors had lived for hundreds of years. On 17 May 1992 they were forced to flee from the district to Baku. They have since been unable to return to their homes and properties because of Armenian occupation.

1. Mr Elkhan Chiragov

33. Mr Elkhan Chiragov was born in 1950. He lived in the district of Lachin. In the original application, it was mentioned that he lived in the village of Chirag, but in the reply to the Government's observations it was stated that his correct home village was Chiragli, where he worked as a teacher for 15 years. He claimed that his possessions included a large furnished house of 250 sq. m, 55 beehives, 80 head of small livestock and nine head of big livestock, and five handmade carpets.

34. On 27 February 2007, together with the applicants' reply to the respondent Government's observations, he submitted an official certificate ("technical passport"), dated 19 July 1985, according to which a two-storey, 12-bedroom dwelling-house with a total area of 408 sq. m (living area 300 sq. m and subsidiary area 108 sq. m) and a storehouse of 60 sq. m, situated on a plot of land of 1200 sq. m, had been registered in his name.

35. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey, 16-room dwelling-house of 260 sq. m and a car, as well as a statement by A. Jafarov and A. Halilov,

representatives of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Elkhan Chiragov had used to live in Chiragli village.

36. Before the Grand Chamber, the applicant submitted, *inter alia*, a marriage certificate according to which he was born in Chiragli and married there in 1978, birth certificates for his son and daughter, both born in Chiragli in 1979 and 1990 respectively, as well as a 1979 letter and a 1992 employment book issued by the Lachin District Educational Department, showing that he worked as a teacher in Chiragli.

2. Mr Adishirin Chiragov

37. Mr Adishirin Chiragov was born in 1947. He lived in the district of Lachin. In the original application, it was mentioned that he lived in the village of Chirag, but in the reply to the Government's observations it was stated that his correct home village was Chiragli, where he worked as a teacher for 20 years. He claimed that his possessions included a large furnished house of 145 sq. m, a new "Niva" car, 65 head of small livestock and 11 head of big livestock, and six handmade carpets.

38. On 27 February 2007 he submitted a technical passport dated 22 April 1986, according to which a two-storey, eight-bedroom dwelling-house with a total area of 230.4 sq. m (living area 193.2 sq. m and subsidiary area 37.2 sq. m) and a storehouse of 90 sq. m, situated on a plot of land of 1200 sq. m, had been registered in his name.

39. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey dwelling-house with eight rooms, as well as a statement by A. Jafarov and A. Halilov, representatives of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Adishirin Chiragov had used to live in Chiragli village.

40. Before the Grand Chamber, the applicant submitted, *inter alia*, a marriage certificate according to which he was born in Chiragli and married there in 1975, birth certificates for his son and two daughters, all born in Chiragli in 1977, 1975 and 1982 respectively, as well as a USSR passport issued in 1981, indicating Chiragli as place of birth and containing a 1992 registration stamp designating Chiragli as place of residence.

3. Mr Ramiz Gebrayilov

41. Mr Ramiz Gebrayilov was born in Chiragli in 1960. In 1988 he graduated with a degree in engineering from the Polytechnic Institute in Baku. In 1983, while still studying in Baku, he visited the town of Lachin and was given a 5,000 sq. m plot of land by the State. He claimed that he built a six-bedroom house with a garage on it and lived there with his wife and children until he was forced to leave in 1992. There were also some cattle sheds. He also owned a car repair business called "Auto Service", a

shop and a café, which were situated on a further 5,000 sq. m of land that he owned. In addition, he had 12 cows, 70 lambs and 150 sheep.

42. Mr Gebrayilov had been unable to return to Lachin since his departure in 1992. In 2001 Armenian friends went to Lachin and videotaped the condition of the houses in the town. According to the applicant, he could see from the video that his house had been burnt down. He had also been informed by people who left Lachin after him that his house had been burnt down by Armenian forces a few days after he had left Lachin.

43. On 27 February 2007 Mr Gebrayilov submitted a technical passport dated 15 August 1986, according to which a two-storey, eight-bedroom dwelling-house with a total area of 203.2 sq. m (living area 171.2 sq. m and subsidiary area 32 sq. m), situated on a plot of land of 480 sq. m, had been registered in his name.

44. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey house with eight rooms, as well as a statement by V. Maharramov, representative of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Gebrayilov had used to live in his personal house in Lachin.

45. Before the Grand Chamber, the applicant submitted, *inter alia*, a birth certificate and a marriage certificate according to which he was born in Chiragli and married there in 1982, birth certificates for his daughter and two sons, all born in Lachin in 1982, 1986 and 1988 respectively, as well as an army book issued in 1979.

4. Mr Akif Hasanof

46. Mr Akif Hasanof was born in 1959 in the village of Aghbulag in the district of Lachin. He worked there as a teacher for 20 years. He claimed that his possessions included a large furnished house of 165 sq. m, a new "Niva" car, 100 head of small livestock and 16 head of big livestock, and 20 handmade carpets.

47. On 27 February 2007 he submitted a technical passport dated 13 September 1985, according to which a two-storey, nine-bedroom dwelling-house with a total area of 448.4 sq. m (living area 223.2 sq. m and subsidiary area 225.2 sq. m) and a storehouse of 75 sq. m, situated on a plot of land of 1600 sq. m, had been registered in his name.

48. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey, nine-room dwelling-house as well as a stall for livestock and subsidiary buildings, as well as a statement by V. Maharramov, representative of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Hasanof had used to live in his personal house in Aghbulag.

49. Before the Grand Chamber, the applicant submitted a birth certificate, a USSR passport issued in 1976 and an employment book issued by the Lachin District Educational Department, indicating that he was born

in Aghbulag and had worked as a teacher and school director in that village between 1981 and 1988.

5. Mr Fekhreddin Pashayev

50. Mr Fekhreddin Pashayev was born in 1956 in the village of Kamalli in the district of Lachin. After graduating with a degree in engineering from the Polytechnic Institute in Baku in 1984, he returned to the town of Lachin where he was employed as an engineer and, from 1986, as chief engineer at the Ministry of Transport. He claimed that he owned and lived in a two-storey, three-bedroom house in Lachin which he had built himself. The house was situated at no. 50, 28 Aprel Kucesi, Lachin Seheri, Lachin Rayonu. Mr Pashayev submitted that the current market value of the house would be 50,000 US dollars (USD). He also owned the land around his house and had a share (about ten hectares) in a collective farm in Kamalli. Furthermore, he owned some land by means of "collective ownership".

51. On 27 February 2007 he submitted a technical passport dated August 1990, according to which a two-storey dwelling-house with a total area of 133.2 sq. m (living area 51.6 sq. m and subsidiary area 81.6 sq. m), situated on a plot of land of 469.3 sq. m, had been registered in his name.

52. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey, four-room dwelling-house, as well as a statement by V. Maharramov, representative of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Pashayev had used to live in his own house at 28 Aprel Kucesi, Lachin.

53. Before the Grand Chamber, the applicant submitted, *inter alia*, a marriage certificate according to which he was born in Kamalli and married there in 1985, birth certificates for his two daughters, born in Kamalli in 1987 and in Lachin in 1991 respectively, a birth certificate for his son, registered as having been born in Kamalli in 1993, as well as an army book issued in 1978 and an employment book dated in 2000. He explained that, while his son had in fact been born in Baku, it was normal under the USSR *propiska* system to record a child as having been born at the parents' registered place of residence.

6. Mr Qaraca Gabrayilov

54. Mr Qaraca Gabrayilov was born in the town of Lachin in 1940 and died on 19 June 2005. On 6 April 2005, at the time of submitting the present application, he stated that, when he was forced to leave on 17 May 1992, he had been living at holding no. 580, N. Narimanov Street, apt 128a in the town of Lachin, a property he owned and which included a two-storey residential family house built in 1976 with a surface of 187.1 sq. m and a yard area of 453.6 sq. m. He also claimed that he owned a further site of 300 sq. m on that street. Annexed to the application was a technical passport

dated August 1985, according to which a two-storey house with a yard, of the mentioned sizes, had been registered in his name.

55. On 27 February 2007 the applicant's representatives submitted, however, that he had been living at 41 H. Abdullayev Street in Lachin. Still, he owned the two properties on N. Narimanov Street. Attached to these submissions were a statement by three former neighbours and a statement by V. Maharramov, representative of Lachin City Executive Power of the Azerbaijan Republic, who stated that Mr Gabrayilov had used to live in his own house at H. Abdullayev Street, Lachin. Attached were also a decision of 29 January 1974 by the Lachin District Soviet of People's Deputies to allocate the above-mentioned plot of 300 sq. m to the applicant and several invoices for animal feed, building materials and building subsidies allegedly used during the construction of his properties.

56. On 21 November 2007 Mr Sagatel Gabrayilov, the son of the applicant, stated that the family had used to live at N. Narimanov Street but that, on some unspecified date, the name and numbering of the street had been changed and their address was thereafter H. Abdullayev Street. Thus, the two addresses mentioned above referred to the same property.

57. Before the Grand Chamber, the applicant's representatives submitted, *inter alia*, a birth certificate and a marriage certificate according to which he was born in Chiragli and married there in 1965, a birth certificate for his son, born in Alkhasli village in the district of Lachin in 1970, as well as an army book issued in 1963.

D. Relations between the Republic of Armenia and the "Republic of Nagorno-Karabakh"

58. On the issue of whether the Republic of Armenia exercises authority in or control over the "NKR" and the surrounding territories, the applicants and the respondent Government as well as the third-party intervener, the Azerbaijani Government, have submitted extensive documentation and statements. The information thus received is summarised below, in so far as considered relevant by the Court.

1. Military aspects

59. In 1993 the United Nations Security Council adopted four resolutions relating to the Nagorno-Karabakh conflict.

Resolution 822 of 30 April (S/RES/822 (1993)):

> "The Security Council,
>
> ...
>
> Noting with alarm the escalation in armed hostilities and, in particular, the latest invasion of the Kelbadjar district of the Republic of Azerbaijan by local Armenian forces,

...

1. Demands the immediate cessation of all hostilities and hostile acts with a view to establishing a durable cease-fire, as well as immediate withdrawal of all occupying forces from the Kelbadjar district and other recently occupied areas of Azerbaijan,

...”

Resolution 853 of 29 July (S/RES/853 (1993)):

“The Security Council,

...

Expressing its serious concern at the deterioration of relations between the Republic of Armenia and the Azerbaijani Republic and at the tensions between them,

...

Noting with alarm the escalation in armed hostilities and, in particular, the seizure of the district of Agdam in the Azerbaijani Republic,

...

3. Demands the immediate cessation of all hostilities and the immediate, complete and unconditional withdrawal of the occupying forces involved from the district of Agdam and other recently occupied districts of the Republic of Azerbaijan;

...

9. Urges the Government of the Republic of Armenia to continue to exert its influence to achieve compliance by the Armenians of the Nagorny-Karabakh region of the Azerbaijani Republic with its resolution 822 (1993) and the present resolution, and the acceptance by this party of the proposals of the Minsk Group of the [OSCE];

...”

Resolution 874 of 14 October (S/RES/874 (1993)):

“The Security Council,

...

Expressing its serious concern that a continuation of the conflict in and around the Nagorny Karabakh region of the Azerbaijani Republic, and of the tensions between the Republic of Armenia and the Azerbaijani Republic, would endanger peace and security in the region,

...

5. Calls for the immediate implementation of the reciprocal and urgent steps provided for in the [OSCE] Minsk Group’s “Adjusted timetable”, including the withdrawal of forces from recently occupied territories and the removal of all obstacles to communication and transportation;

...”

Resolution 884 of 12 November (S/RES/884 (1993)):

“The Security Council,

...

> Noting with alarm the escalation in armed hostilities as [a] consequence of the violations of the cease-fire and excesses in the use of force in response to those violations, in particular the occupation of the Zangelan district and the city of Goradiz in the Azerbaijani Republic,
>
> ...
>
> 2. Calls upon the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with resolutions 822 (1993), 853 (1993) and 874 (1993), and to ensure that the forces involved are not provided with the means to extend their military campaign further;
>
> ...
>
> 4. Demands from the parties concerned the immediate cessation of armed hostilities and hostile acts, the unilateral withdrawal of occupying forces from the Zangelan district and the city of Goradiz, and the withdrawal of occupying forces from the other recently occupied areas of the Azerbaijani Republic in accordance with the "Adjusted timetable of urgent steps to implement Security Council resolutions 822 (1993) and 853 (1993)" ... as amended by the [OSCE] Minsk Group meeting in Vienna of 2 to 8 November 1993;
>
> ..."

60. The above-mentioned HRW report of December 1994 (see paragraph 22 above) contains accounts of the Nagorno-Karabakh conflict. While stating that "[a] Karabakh Armenian military offensive in May/June 1992 captured a large part of Lachin province", it goes on to summarise the events in 1993 and 1994 as follows (at p. 58):

> "... Karabakh Armenian troops – often with the support of forces from the Republic of Armenia – captured the remaining Azerbaijani provinces surrounding Nagorno-Karabakh and forced out the Azeri civilian population: the rest of Lachin province, and Kelbajar, Agdam, Fizuli, Jebrayil, Qubatli, and Zangelan provinces."

The HRW report presents several pieces of information which point to an involvement of the army of the Republic of Armenia in Nagorno-Karabakh and the surrounding territories (pp. 67-73). Allegedly, Armenia had even sent members of its police force to perform police duties in the occupied territories. HRW spent two days in April 1994 interviewing Armenian uniformed soldiers on the streets of Yerevan. Thirty per cent of them were draftees in the army of the Republic of Armenia who had either fought in Karabakh, had orders to go to Karabakh or had ostensibly volunteered for service there. Moreover, on a single day in April 1994 HRW researchers had counted five buses holding an estimated 300 soldiers of the Armenian army entering Nagorno-Karabakh from Armenia. Other western journalists had reported to HRW researchers that they had seen eight more buses full of Armenian army soldiers heading for Azerbaijani territory from Armenia. According to HRW, as a matter of law, Armenian army troop involvement in Azerbaijan made Armenia a party to the conflict and made the war an international armed conflict between Armenia and Azerbaijan.

61. Several proposals for a solution to the conflict have been presented within the OSCE Minsk Group. A "package deal" proposal of July 1997 set out, under the heading "Agreement I – The end of armed hostilities", a two-stage process of withdrawal of armed forces. The second stage included the provision that "[t]he armed forces of Armenia will be withdrawn to within the borders of the Republic of Armenia".

The "step-by-step" approach presented in December 1997 also contained a two-stage withdrawal process and stipulated, as part of the second phase, that "[a]ll Armenian forces located outside the borders of the Republic of Armenia will be withdrawn to locations within those borders". Substantially the same wording was contained in the "common state" proposal of November 1998.

While these documents were discussed in Minsk Group negotiations, none of them led to an agreement between Armenia and Azerbaijan.

62. The applicants referred to statements by various political leaders and observers. For instance, Mr Robert Kocharyan, then prime minister of the "NKR", stated in an interview with the Armenian newspaper "Golos Armenii" in February 1994 that Armenia supplied anti-aircraft weapons to Nagorno-Karabakh.

Moreover, Mr Vazgen Manukyan, Armenian minister of defence in 1992-1993, admitted in an interview with British journalist and writer Thomas de Waal in October 2000 that the public declarations that the Armenian army had taken no part in the war had been purely for foreign consumption (see Thomas de Waal, "Black Garden: Armenia and Azerbaijan through Peace and War", New York University Press 2003, p. 210):

> "You can be sure that whatever we said politically, the Karabakh Armenians and the Armenian Army were united in military actions. It was not important for me if someone was a Karabakhi or an Armenian."

63. The annual report of the International Institute for Strategic Studies (IISS), "The Military Balance", for the years 2002, 2003 and 2004 assessed that, of the 18,000 troops in Nagorno-Karabakh, 8,000 were personnel from Armenia. The 2013 report by the same institute expressed, *inter alia*, that "since 1994, Armenia has controlled most of Nagorno-Karabakh, and also seven adjacent regions of Azerbaijan, often called the 'occupied territories'" ("The Military Balance" 2002, p. 66; 2003, p. 66; 2004, p. 82; and 2013, p. 218).

64. Mr David Atkinson, rapporteur of the Parliamentary Assembly of the Council of Europe, stated in November 2004 in his second report to the Political Affairs Committee concerning Nagorno-Karabakh (PACE Doc. 10364):

> "According to the information given to me, Armenians from Armenia had participated in the armed fighting over the Nagorno-Karabakh region besides local Armenians from within Azerbaijan. Today, Armenia has soldiers stationed in the

> Nagorno-Karabakh region and the surrounding districts, people in the region have passports of Armenia, and the Armenian government transfers large budgetary resources to this area."

Based on this report, the Parliamentary Assembly adopted on 25 January 2005 resolution 1416 in which it, *inter alia*, noted:

> "1. The Parliamentary Assembly regrets that, more than a decade after the armed hostilities started, the conflict over the Nagorno-Karabakh region remains unsolved. Hundreds of thousands of people are still displaced and live in miserable conditions. Considerable parts of the territory of Azerbaijan are still occupied by Armenian forces, and separatist forces are still in control of the Nagorno-Karabakh region.
>
> 2. The Assembly expresses its concern that the military action, and the widespread ethnic hostilities which preceded it, led to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing. The Assembly reaffirms that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the de facto annexation of such territory to another state. The Assembly reiterates that the occupation of foreign territory by a member state constitutes a grave violation of that state's obligations as a member of the Council of Europe and reaffirms the right of displaced persons from the area of conflict to return to their homes safely and with dignity."

65. In its report "Nagorno-Karabakh: Viewing the Conflict from the Ground" of 14 September 2005, the International Crisis Group (ICG) stated the following in regard to the armed forces in the "NKR" (pp. 9-10):

> "[Nagorno-Karabakh] may be the world's most militarized society. The highly trained and equipped Nagorno-Karabakh Defence Army is primarily a ground force, for which Armenia provides much of the backbone. A Nagorno-Karabakh official told Crisis Group it has some 20,000 soldiers, while an independent expert [U.S. military analyst Richard Giragosian, July 2005] estimated 18,500. An additional 20,000 to 30,000 reservists allegedly could be mobilised. Based on its population, Nagorno-Karabakh cannot sustain such a large force without relying on substantial numbers of outsiders. According to an independent assessment [by Mr Giragosian], there are 8,500 Karabakh Armenians in the army and 10,000 from Armenia. ...
>
> Nevertheless, many conscripts and contracted soldiers from Armenia continue to serve in NK. The (de facto) minister of defence admits his forces have 40 per cent military contract personnel, including citizens of Armenia. He claims that no Armenian citizens are unwillingly conscripted and says 500,000 Armenians of Nagorno-Karabakh descent live in Armenia, some of whom serve in the Nagorno-Karabakh forces. Former conscripts from Yerevan and other towns in Armenia have told Crisis Group they were seemingly arbitrarily sent to Nagorno-Karabakh and the occupied districts immediately after presenting themselves to the recruitment bureau. They deny that they ever volunteered to go to Nagorno-Karabakh or the adjacent occupied territory. They were not paid a bonus for serving outside Armenia, and they performed military service in Nagorno-Karabakh uniform, under Nagorno-Karabakh military command. Young Armenian recruits' opposition to serving in Nagorno-Karabakh has increased, which may help explain an apparent decrease in the numbers being sent to NK.

> There is a high degree of integration between the forces of Armenia and Nagorno-Karabakh. Senior Armenian authorities admit they give substantial equipment and weaponry. Nagorno-Karabakh authorities also acknowledge that Armenian officers assist with training and in providing specialised skills. However, Armenia insists that none of its army units are in Nagorno-Karabakh or the occupied territories around it."

The Armenian Government objected to the report of the ICG, which organisation had no office in Armenia or the "NKR". Further, the statement on the number of Armenian servicemen in the "NKR" derived from an e-mail communication with Mr Giragosian, who had been contacted by the Government and had given the following declaration:

> "While having this opinion I didn't mean that the people serving in the Nagorno Karabakh armed forces are soldiers. I meant that approximately that number of volunteers are involved in the Nagorno Karabakh armed forces from Armenia and other states according to my calculations. As for the number mentioned by me I can't insist that it's correct as it is confidential information and nobody has the exact number. The background for my opinion was that in my opinion many Armenians from different parts of the world participate in the Nagorno Karabakh self-defence forces."

66. On 19 April 2007 the Austrian newspaper "Der Standard" published an interview with the then foreign minister of Armenia, Mr Vartan Oskanyan. On the subject of the disputed territories, Mr Oskanyan reportedly referred to them as "the territories, which are now controlled by Armenia".

A few days later the Armenian Embassy in Austria issued a press release stating that Mr Oskanyan had been misinterpreted and that the correct expression was "the territories, which are now controlled by Armenians".

67. On 14 March 2008 the UN General Assembly adopted a resolution on "The Situation in the occupied territories of Azerbaijan" (A/RES/62/243). Recalling the 1993 Security Council resolutions (see paragraph 59 above), it contained the following passages:

> "The General Assembly,
>
> ...
>
> 2. Demands the immediate, complete and unconditional withdrawal of all Armenian forces from all occupied territories of the Republic of Azerbaijan;
>
> 3. Reaffirms the inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes, and stresses the necessity of creating appropriate conditions for this return, including the comprehensive rehabilitation of the conflict-affected territories;
>
> ..."

68. In an interview with Armenia Today, published on 29 October 2008, Mr Jirayr Sefilyan, a Lebanese-born Armenian military commander and political figure who was involved in the capture of the town of Shusha/Shushi in early May 1992 and later continued to serve in the armed

forces of both the "NKR" and Armenia, reportedly made the following statement:

> "We must turn the page of history, as starting from 1991 we have considered Karabakh as an independent state and declared that they should conduct negotiations. Who are we kidding? The whole world knows that the army of the NKR is a part of the armed forces of Armenia, that the budget of the NKR is financed from the budget of Armenia, the political leaders of the NKR are appointed from Yerevan. It is time to consider Karabakh as a part of Armenia, one of its regions. In the negotiation process the territory of Karabakh should be considered as a territory of Armenia and no territorial cession must be made."

69. In a resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus, the European Parliament expressed, *inter alia*, the following:

> "[The European Parliament is] seriously concerned that hundreds of thousands of refugees and IDPs who fled their homes during or in connection with the Nagorno-Karabakh war remain displaced and denied their rights, including the right to return, property rights and the right to personal security; calls on all parties to unambiguously and unconditionally recognise these rights, the need for their prompt realisation and for a prompt solution to this problem that respects the principles of international law; demands, in this regard, the withdrawal of Armenian forces from all occupied territories of Azerbaijan, accompanied by deployment of international forces to be organised with respect of the UN Charter in order to provide the necessary security guarantees in a period of transition, which will ensure the security of the population of Nagorno-Karabakh and allow the displaced persons to return to their homes and further conflicts caused by homelessness to be prevented; calls on the Armenian and Azerbaijani authorities and leaders of relevant communities to demonstrate their commitment to the creation of peaceful inter-ethnic relations through practical preparations for the return of displaced persons; considers that the situation of the IDPs and refugees should be dealt with according to international standards, including with regard to the recent PACE Recommendation 1877(2009), 'Europe's forgotten people: protecting the human rights of long-term displaced persons'."

70. In April 2012 the European Parliament passed a further resolution which, *inter alia*, noted that "deeply concerning reports exist of illegal activities exercised by Armenian troops on the occupied Azerbaijani territories, namely regular military manoeuvres, renewal of military hardware and personnel and the deepening of defensive echelons". The European Parliament recommended that negotiations on the EU-Armenia Association Agreements be linked to commitments regarding "the withdrawal of Armenian forces from occupied territories surrounding Nagorno-Karabakh and their return to Azerbaijani control" and "call[ed] on Armenia to stop sending regular army conscripts to serve in Nagorno-Karabakh" (European Parliament resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Armenia Association Agreement).

71. The applicants submitted that, on various occasions in 2012 and 2013, the Armenian president, the minister of defence and high-ranking military staff visited the disputed territories to inspect troops, attend military exercises and hold meetings with military and other officials in the "NKR". In July 2013, Armenia's top army generals and other military officials, including the Armenian minister of defence and the commanders of the armed forces of the "NKR", held a meeting in Nagorno-Karabakh, focusing on efforts to strengthen the Armenian military.

72. On 15 January 2013 Armenian president Mr Serzh Sargsyan held a meeting with the leaders of the legislative, executive and judiciary branches of the Republic of Armenia Ministry of Defence. His speech given at the meeting was published the same day on the official website of the president of the Republic of Armenia. It contained, *inter alia*, the following statements:

> "It happened that from the first years of independence, the Army has been playing a special role in our society. It was the war, whose spirit was felt all over Armenia – in some places more than in the others. In those days, every family had a close or a distant relative in the Armenian Army; and the Army was in everyone's heart. That feeling became stronger when our Army attained victory which was so important, which was vital.
>
> ...
>
> The ultimate goal of our foreign policy is the final legal formulation of the victory achieved in the aggressive war unleashed by Azerbaijan against Artsakh. The Republic of Nagorno Karabakh must be recognized by the international community since there is no logical explanation as to why the people, who have exercised their legal right for self-determination and later protected it in the uneven war, should ever be part of Azerbaijan. Why the destiny of these people should be defined by the illegal decision once made by Stalin?
>
> ...
>
> Armenia and Artsakh do not want war; however everyone must know that we will give a fitting rebuff to any challenge. The people of Artsakh will never face the danger of physical extermination again. The Republic of Armenia will guarantee against that.
>
> ...
>
> Security of Artsakh is not a matter of prestige for us; it is a matter of life and death in the most direct sense of these words. The entire world must know and realize that we, the power structures of Armenia and Artsakh stand against the army which pays wages to the murderers, if that horde can be called army in the first place."

73. In an opinion drawn up at the request of the Armenian Government, Dr Hari Bucur-Marcu, a military expert of Romanian nationality, stated that he had found nothing in the Armenian military policy that envisaged any form of control over "NKR" forces nor any indications on the ground that Armenian forces were present or active in the "NKR". He further concluded that there was no evidence that Armenia exercised control or authority over the "NKR" or its defence force or that Armenian forces exercised any

control over the government or governance of the "NKR". The Government stated that Dr Bucur-Marcu had been given the opportunity to interview senior military officers in Armenia and access their records. By arrangement with the "NKR" Ministry of Foreign Affairs, he had further been able to travel there and to talk to military and political officials and examine documents.

74. On 25 June 1994 an "Agreement on Military Co-operation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh" was concluded. It provides, *inter alia*, the following:

> "The Government of the Republic of Armenia and the Government of the Republic of Nagorno-Karabakh (hereinafter referred to as 'the Parties'),
>
> having regard to mutual interest in the field of military co-operation, taking into account the need to develop bilateral relationships and mutual trust through co-operation between the armed forces of the states of the Parties, seeking to strengthen the military and military-technical co-operation,
>
> agreed on the following:
>
> ...
>
> **Article 3**
>
> Both Parties shall conduct the military co-operation in the following directions:
>
> (1) establishment of the army and reform of the armed forces;
>
> (2) military science and education;
>
> (3) military legislation;
>
> (4) logistics of the armed forces;
>
> (5) military medicine recovery of military servants and their family members;
>
> (6) cultural and sport activities, tourism.
>
> The co-operation in other directions shall be conducted upon mutual written agreement.
>
> **Article 4**
>
> The parties shall conduct co-operation through:
>
> (1) visits and working meetings at the level of Ministers of Defence, Chiefs of General Staff or other representatives authorised by the Ministers of Defence;
>
> (2) consultations, exchange of experience, training of military staff and increasing of qualification;
>
> (3) implementation of mutual military exercises;
>
> (4) participation in conferences, consultations, seminars;
>
> (5) exchange of information, documents and services upon specific arrangements;
>
> (6) cultural events;
>
> (7) provision of military services;

(8) creation of conditions for mutual use of elements of infrastructure of the armed forces of the Parties within the framework of this Agreement;

(9) education of highly qualified military and technical staff and specialists.

Within the framework of co-operation under this Agreement the Parties shall agree that conscripts of the Republic of Armenia and the Republic of Nagorno-Karabakh have the right to serve their fixed-term military service in the Republic of Nagorno-Karabakh and the Republic of Armenia respectively. In case of serving the fixed-term military service in the territory of that state the person shall be considered exempt from the fixed-term military service in the country of his citizenship.

Article 5

Within the framework of this Agreement the Parties shall agree also that:

(1) in case the citizens of the Republic of Armenia serving the fixed-term military service in the Republic of Nagorno-Karabakh commits a military crime, the criminal prosecution and trial against them shall be conducted in the territory of the Republic of Armenia by the authorities of the Republic of Armenia in accordance with the procedure established under the legislation of the Republic of Armenia;

(2) in case the citizens of the Republic of Nagorno-Karabakh serving the fixed-term military service in the Republic of Armenia commits a military crime, the criminal prosecution and trial against them shall be conducted in the territory of the Republic of Nagorno-Karabakh by the authorities of the Republic of Nagorno-Karabakh in accordance with the procedure established under the legislation of the Republic of Nagorno-Karabakh.

Within the framework of this Agreement the Parties will provide mutual technical support with regard to armament and recovery and maintenance of military equipment.

Concluding agreements with those performing activities on armament and recovery and maintenance of military equipment, as well as ensuring the living conditions of the representatives of manufacturing enterprises in the territory of the states of the Parties shall be carried out by the Ministry of Defence of the client State.

Other forms of cooperation shall be conducted upon mutual written agreement.

..."

75. The Armenian Government asserted that the Armenian conscripts who, pursuant to Article 4 of the 1994 agreement, performed their service in the "NKR" were mainly in the lower ranks and comprised no more than 5% (up to 1,500 persons) of the "NKR" defence force. However, the Government did not rule out the possibility that some Armenian nationals may have served in the "NKR" defence force on a contractual and voluntary basis. Among those serving in the "NKR" defence force, side by side with inhabitants of Nagorno-Karabakh, were also volunteers of Armenian origin from various countries where there is an Armenian diaspora. Allegedly, the Armenian soldiers serving in the "NKR" were under the direct command of the "NKR" defence force, which was the only armed force operational in the "NKR". The Government maintained that the Armenian conscripts

serving in the "NKR" under the 1994 agreement did so in accordance with their own wishes (see, however, the ICG report, paragraph 65 above).

The Armenian Government further stated that the Armenian army and the "NKR" defence force co-operate in a defence alliance in matters such as intelligence sharing, visits of senior officers, seminars, joint military exercises, parade inspections and the like.

76. On 11 October 2007 the Court issued a partial decision as to the admissibility of the cases of *Zalyan, Sargsyan and Serobyan v. Armenia* (applications nos. 36894/04 and 3521/07), which concerns the alleged ill-treatment and unlawful detention of three military servicemen. The facts of the case reveal that the applicants had been drafted into the Armenian army in May 2003 and had been assigned to military unit no. 33651, stationed near the village of Mataghis in the Martakert region of the "NKR". Two servicemen of the same military unit were found dead in January 2004. A criminal investigation into their murders ensued and the applicants were questioned for a number of days in April 2004 in Nagorno-Karabakh – first at their military unit, then at the Martakert Garrison Military Prosecutor's Office and finally at the Stepanakert Military Police Department – before being transported to Yerevan for further proceedings. The officers conducting the questioning of the applicants in Nagorno-Karabakh included two investigators of the Military Prosecutor's Office of Armenia, an investigator of the Martakert Garrison Military Prosecutor's Office and an Armenian military police officer. A chief of battalion of the military unit was also present at the first questioning. The applicants were subsequently charged with murder and the criminal trial against them commenced in November 2004 at the Syunik Regional Court, sitting in Stepanakert. The applicants were present at the trial. On 18 May 2005 the court found the applicants guilty of murder and sentenced them to 15 years' imprisonment.

77. Similarly, as reported by the human rights organisation Forum 18 as well as HRW, Mr Armen Grigoryan, an Armenian citizen and conscientious objector, was taken from a military recruitment office in Yerevan in June 2004 and transferred to a military unit based in Nagorno-Karabakh. After having fled the unit, Mr Grigoryan was arrested and was eventually, by a court sitting in Stepanakert on 9 June 2005, found guilty of having refused military service and sentenced to two years' imprisonment.

2. Political and judicial connections

78. Several prominent Armenian politicians have held, at different times, high positions in both the Republic of Armenia and the "NKR" or have otherwise had close ties to Nagorno-Karabakh. The first president of the Republic of Armenia, Mr Levon Ter-Petrosyan, was a member of the Armenian "Karabakh Committee" which, in the late 1980s, led the movement for unification of Nagorno-Karabakh with Armenia. He was in April 1998 succeeded as president of Armenia by Mr Robert Kocharyan,

who had previously served as prime minister of the "NKR" from August 1992 to December 1994, as president of the "NKR" from December 1994 to March 1997 and as prime minister of the Republic of Armenia from March 1997 to April 1998. In April 2008 Mr Serzh Sargsyan became the third president of Armenia. In August 1993 he had been appointed minister of defence of Armenia after having served from 1989 to 1993 as chairman of the "Nagorno-Karabakh Republic Self-Defense Forces Committee". Furthermore, in 2007 Mr Seyran Ohanyan switched from being the minister of defence of the "NKR" to becoming the commander-in-chief of the Armenian armed forces. In April 2008 he was appointed minister of defence of Armenia.

79. The applicants claimed that the laws of the Republic of Armenia apply in the "NKR". However, according to the Armenian Government, between January 1992 and August 2006 the "NKR" adopted 609 different laws, one of the first being "The Law on the Basis of Nagorno-Karabakh Republic State Independence". Article 2 of this law provides that the "NKR decides independently all issues concerning the Republic's political, economic, social and cultural, construction, administrative and territorial division policies". Also in January 1992, bodies of executive and judicial power were created, including the Council of Ministers (the Government), the Supreme Court and the first instance courts of the "NKR" as well as the "NKR" prosecutor's office. The "NKR" also has its own president, parliament and police force as well as bodies of local self-government, including administrations governing the territories surrounding the "NKR", whose representatives are appointed by "NKR" authorities. Presidential and parliamentary elections are held. While several laws have been adopted from Armenian legislation, the Armenian Government maintained that they did not apply automatically, i.e. by decisions of Armenian courts, but were independently interpreted and applied by "NKR" courts, whether in the district of Lachin or elsewhere.

3. Financial and other support

80. In its 2005 report (referred to above, paragraph 65), the ICG stated the following (pp. 12-13):

> "The economy of Nagorno-Karabakh was previously integrated into Soviet Azerbaijan's but was largely destroyed by the war. Today it is closely tied to Armenia and highly dependent on its financial inputs. All transactions are done via Armenia, and products produced in Nagorno-Karabakh often are labelled "made in Armenia" for export. Yerevan provides half the budget. ...
>
> Nagorno-Karabakh is highly dependent on external financial support, primarily from Armenia but also from the U.S. and the world-wide diaspora. It cannot collect sufficient revenue to meet its budgetary needs, and in absolute terms is receiving increasing external support. The 2005 budget totalled 24.18 billion drams (some $53.73 million). Locally collected revenues are expected to total 6.46 billion drams (about $14.35 million), 26.7 per cent of expenditures.

> Since 1993 Nagorno-Karabakh has benefited from an Armenian 'inter-state loan'. According to the Armenian prime minister, this will be 13 billion drams ($28.88 million) in 2005, a significant increase from 2002 when it was 9 billion drams ($16.07 million). However, Nagorno-Karabakh's (de facto) prime minister argues that part of this loan – 4.259 billion drams (about $9.46 million) – is in fact Armenia's repayment of VAT, customs and excise duties that Armenia levies on goods that pass through its territory, destined for Nagorno-Karabakh. The remainder of the loan has a ten-year repayment period at nominal interest. Though Armenia has provided such loans since 1993, nothing has been repaid. According to the Armenian prime minister, Stepanakert 'is not yet in a position to repay... . In the coming years we will need to continue providing this loan to help them continue building their infrastructure ... we do not envision that they will be able to go ahead on their own anytime soon'.
>
> The U.S. is the only other state that provides direct governmental assistance. In 1998 Congress for the first time designated Nagorno-Karabakh a recipient of humanitarian aid distinct from Azerbaijan. The U.S. money is administered by its Agency for International Development (USAID), which has distributed it to such NGOs as the Fund for Armenian Relief, Save the Children, and the International Committee of the Red Cross. Through September 2004, the U.S. had pledged $23,274,992 to Nagorno-Karabakh and had spent $17,831,608. Armenian lobby groups have been influential in making these allocations possible."

The ICG further stated that the Armenian "inter-state loan" had accounted for 67.3% of the "NKR" budget in 2001 (according to the "Statistical Yearbook of Nagorno-Karabakh") and 56.9% in 2004 (according to an ICG communication with the director of the "NKR" National Statistical Service).

81. The loan provided by the Republic of Armenia to the "NKR" for the years 2004 and 2005 amounted to USD 51,000,000. USD 40,000,000 went to rebuilding educational institutions and USD 11,000,000 to help the families of killed soldiers.

82. The Hayastan All-Armenian Fund was founded by an Armenian presidential decree on 3 March 1992. According to its official website, its mission is the following:

> "[T]o unite Armenians in Armenia and overseas to overcome the country's difficulties and to help establish sustainable development in Armenia and Artsakh. In addition to [the] problems associated with the break-up of the Soviet Union, the government had to find solutions to the aftermath of the 1988 Spitak earthquake, an economic blockade and the rehabilitation of areas that had suffered from the Artsakh conflict."

The fund's annual report for 2012 include messages from Mr Serzh Sargsyan, president of the Republic of Armenia, and Mr Bako Sahakyan, "president of the Republic of Artsakh", which, *inter alia*, contain the following statements:

> Mr Sargsyan:
>
> "The Hayastan All-Armenian Fund is an embodiment of the unity between Armenia, Artsakh and the diaspora. As such, the fund is consistently, resolutely, and before our very eyes transforming our pan-national inner strength into tangible power."

Mr Sahakyan:

> "The year 2012 was a jubilee year for the Armenian people. As a nation, we celebrated the 20th anniversary of the founding of the NKR Defense Army and the liberation of Shushi, a magnificent victory which was made possible by the united efforts and indestructible will of the entire Armenian people, the selfless bravery and daring of its valiant sons and daughters."

The fund has 25 affiliates in 22 different countries. Its resources come from individual donations, mainly from members of the Armenian diaspora. It now raises about USD 21,000,000 annually.

The Board of Trustees is the fund's supreme governing body. Under the fund's charter, the president of the Republic of Armenia is *ex officio* the president of the Board of Trustees. The board, which during its existence has had between 22 and 37 members, includes many prominent individuals and representatives of political, non-governmental, religious and humanitarian institutions from Armenia and the diaspora. In 2013 the board, in addition to the Armenian president Mr Sargsyan, comprised the former Armenian president Mr Kocharyan; the Armenian prime minister as well as the ministers of foreign affairs, finance and diaspora; the president, former president and prime minister of the "NKR"; the chairmen of the Armenian constitutional court, national assembly and central bank; four Armenian religious leaders, three representatives of Armenian political parties; a representative of the Union of Manufacturers and Businessmen (Employers) of Armenia; and representatives of four non-governmental organisations incorporated in the United States and Canada. The remainder of the 37-person board was made up of 13 individuals from the Armenian diaspora. The composition of the Board of Trustees has been similar since the fund's creation.

The Hayastan All-Armenian Fund has financed and overseen numerous projects since its establishment, including the construction or renovation of roads, housing, schools, hospitals as well as water and gas networks. In the mid to late 1990s it constructed the highway linking the town of Goris in Armenia with Lachin and with Shusha/Shushi and Stepanakert in Nagorno-Karabakh. In 2001 it financed the construction of the north-south highway in Nagorno-Karabakh. According to the fund's annual report for 2005, it had paid approximately USD 11,000,000 during the year to various projects, of which about USD 6,100,000 had gone to projects in Nagorno-Karabakh. According to figures provided by the Armenian Government, the not fully complete expenditure for 2012 amounted to USD 10,700,000 in Nagorno-Karabakh and USD 3,100,000 in Armenia. Also according to Government figures, in 1995-2012 the fund allocated about USD 111,000,000 in total – or about USD 6,000,000 annually – to projects in Nagorno-Karabakh. In 1992-2012 it allocated USD 115,000,000 to projects in Armenia.

83. The applicants and the Azerbaijani Government claimed that residents of the "NKR" and the surrounding territories are routinely issued with Armenian passports. The ICG has stated that "Armenia has given a majority of the inhabitants its passports for travel abroad" (2005 report, referred to above, p. 5). The Azerbaijani Government also pointed to the possibility for residents of the mentioned territories to acquire Armenian citizenship. They referred to Article 13 ("Citizenship by Naturalization") of the Law of the Republic of Armenia on Citizenship of the Republic of Armenia, which provides as follows:

> "Any person 18 years of age and capable of working that is not an RA citizen may apply for RA citizenship, if he/she
>
> 1) has been lawfully residing on the territory of the Republic of Armenia for the preceding three years;
>
> 2) is proficient in the Armenian language; and
>
> 3) is familiar with the Constitution of the Republic of Armenia.
>
> A person who is not an RA citizen may be granted RA citizenship without being subject to the conditions set forth in points 1) and 2) of the first part of this article, if he/she:
>
> 1) marries a citizen of the Republic of Armenia or has a child who holds RA citizenship;
>
> 2) has parents or at least one parent that had held RA citizenship in the past or was born on the territory of the Republic of Armenia and had applied for RA citizenship within three years of attaining the age of 18;
>
> 3) is Armenian by origin (is of Armenian ancestry); or
>
> 4) has renounced RA citizenship of his/her own accord after January 1, 1995."

The Armenian Government, for their part, stated that both Armenia and the "NKR" have provisions for dual citizenship. Moreover, in accordance with a 24 February 1999 agreement with "NKR" on "the organisation of the passport system", Armenia issues passports to residents of the "NKR" in certain circumstances. Article 1 of the agreement reads:

> "The Parties agree that their citizens have the right to free movement and residence on the territory of each of the Parties.
>
> Within the scope of this Agreement, until the Republic of Nagorno-Karabakh is internationally recognized, the citizens of the Republic of Nagorno-Karabakh willing to leave the territory of either the Republic of Nagorno-Karabakh or the Republic of Armenia may apply and obtain a passport of the Republic of Armenia.
>
> The Parties agree that within the scope of this Article obtaining a passport of the Republic of Armenia by the citizens of the Republic of Nagorno-Karabakh does not mean granting a citizenship of the Republic of Armenia. Those passports can be used only for travel outside of the territory of the Republic Armenia and the Republic of Nagorno-Karabakh by the citizens of the Republic of Nagorno-Karabakh, and cannot be used as an identification document internal use in the Republic of Nagorno-Karabakh and in the Republic of Armenia."

Regulations on the application of this agreement were also issued in 1999 and provide that an Armenian passport is issued to an "NKR" resident only in exceptional cases where the purpose for going abroad is medical treatment, education or another personal matter. The Armenian Government asserted that fewer than 1000 persons had been issued with a passport under the 1999 agreement.

84. The applicants and the Azerbaijani Government stated that the Armenian dram was the main currency in the "NKR", whereas the Armenian Government maintained that the currencies accepted there included also euros, US dollars, pounds sterling and even Australian dollars.

85. The Azerbaijani Government pointed out that the National Atlas of Armenia, published in 2007 by the State Committee of the Real Estate Cadastre, adjunct to the Government of the Republic of Armenia and thus allegedly an official publication, consistently on various types of maps incorporated the "NKR" and the surrounding occupied territories within the boundaries of the Republic of Armenia.

86. The applicants and the Azerbaijani Government submitted that there is an Armenian Government policy of encouraging settlers to move to the "NKR" from Armenia and, more recently, Syria.

February 2005 saw the publication of the "Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK)". The mandate of the mission was to determine whether settlements existed in the territories; military structures and personnel as well as political considerations were strictly outside that mandate. In regard to settlements in the district of Lachin, the report concluded:

> "Generally, the pattern of settlers' origins in Lachin is the same as in the other territories. Thus, the overwhelming majority has come to Lachin from various parts of Azerbaijan, mostly after years of living in temporary shelters in Armenia. A comparatively small minority are Armenians from Armenia, including earthquake victims. They heard about Lachin as a settlement options [sic] by word-of-mouth, through the media or from NGOs in Armenia and NK. There was no evidence of non-voluntary resettlement or systematic recruitment."

The report further stated:

> "The direct involvement of NK in Lachin District is uncontested. Nagorno-Karabakh provides the Lachin budget and openly acknowledges direct responsibility for the district. Lachin residents take part both in local and NK elections.
>
> While the links between Nagorno Karabakh and the Republic of Armenia remain outside the purview of this report, the FFM found no evidence of direct involvement of the government of Armenia in Lachin settlement. However, the FFM did interview certain Lachin residents who had Armenian passports and claimed to take part in Armenian elections."

II. THE JOINT UNDERTAKING OF ARMENIA AND AZERBAIJAN

87. Prior to their accession to the Council of Europe, Armenia and Azerbaijan gave undertakings to the Committee of Ministers and the Parliamentary Assembly committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict (see Parliamentary Assembly Opinions 221 (2000) and 222 (2000) and Committee of Ministers Resolutions Res (2000)13 and (2000)14).

The relevant paragraphs of Parliamentary Assembly Opinion 221 (2000) on Armenia's application for membership of the Council of Europe read as follows:

> "10. The Assembly takes note of the letter from the President of Armenia in which he undertakes to respect the cease-fire agreement until a final solution is found to the conflict [in Nagorno-Karabakh] and to continue the efforts to reach a peaceful negotiated settlement on the basis of compromises acceptable to all parties concerned.
>
> ...
>
> 13. The Parliamentary Assembly takes note of the letters from the President of Armenia, the speaker of the parliament, the Prime Minister and the chairmen of the political parties represented in the parliament, and notes that Armenia undertakes to honour the following commitments:
>
> ...
>
> ii. the conflict in Nagorno-Karabakh:
>
> a. to pursue efforts to settle this conflict by peaceful means only;
>
> b. to use its considerable influence over the Armenians in Nagorno-Karabakh to foster a solution to the conflict;
>
> c. to settle international and domestic disputes by peaceful means and according to the principles of international law (an obligation incumbent on all Council of Europe member states), resolutely rejecting any threatened use of force against its neighbours;
>
> ..."

Resolution Res (2000)13 by the Committee of Ministers concerning the invitation to Armenia to become a member of the Council of Europe referred to the commitments entered into by Armenia, as set out in Opinion 221 (2000), and the assurances for their fulfilment given by the Armenian Government.

III. RELEVANT DOMESTIC LAW

A. The laws of the Azerbaijan SSR

88. The laws relevant to the establishment of the applicants' right to property were the 1978 Constitution of the Azerbaijan SSR and its Land Code of 1970 and Housing Code of 1983.

1. The 1978 Constitution

89. The Constitution stated as follows:

Article 13

"The basis of the personal property of citizens of the Azerbaijan SSR is earned income. Personal property may include household items, items of personal consumption, convenience and utility, a house, and earned savings. The personal property of citizens and the right to inherit it are protected by the State.

Citizens may be provided with plots of land as prescribed by law for subsidiary farming (including the keeping of livestock and poultry), gardening and construction of individual housing. Citizens are required to use their land rationally. State and collective farms provide assistance to citizens for their small land holdings.

Personal property or property with a right of use may not be utilised to derive unearned income to the detriment of the public interest."

2. The 1970 Land Code

90. The relevant provisions of the Land Code stated the following:

Article 4. State (people's) ownership of land

"In accordance with the USSR Constitution and the Azerbaijan SSR Constitution, land is owned by the State – it is the common property of all Soviet people.

In the USSR land is exclusively owned by the State and is allocated for use only. Actions directly or indirectly violating the State's right of ownership of land are forbidden."

Article 24. Documents certifying the right of use of land

"The right of use by collective farms, State farms and others of plots of land is certified by a State certificate on the right of use.

The form of the certificate is determined by the USSR Soviet of Ministers in accordance with the land legislation of the USSR and the union republics.

The right of temporary use of land is certified by a certificate in the form determined by the Soviet of Ministers of the Azerbaijan SSR."

Article 25. Rules on issuance of the certificates on the right of use of land

"The State certificates on the right of indefinite use of land and the certificates on the right of temporary use of land are issued to collective farms, State farms and other State, cooperative and public institutions, agencies and organisations as well as citizens by the Executive Committee of the Soviet of People's Deputies of the district or city (under the republic's governance) in the territory of which the plot of land to be allocated for use is situated."

Article 27. Use of land for specified purpose

"Users of land have a right to and should use the plots of land allocated to them for the purpose for which the plots of land were allocated."

Article 28. Land users' rights of use over allocated plots of land

"Depending on the designated purpose of an allocated plot of land, land users are entitled to the following in accordance with the relevant rules:

– to construct residential, industrial and public-amenities buildings as well as other buildings and structures;

– to plant agricultural plants, to afforest and to plant fruit, decorative and other trees;

– to use harvesting areas, pasture fields and other agricultural lands;

– to use widespread natural subsoil resources, peat, and bodies of water for economic needs as well as to use other valuable properties of a land.

Article 126-1. Right of use of land in case of inheritance of ownership right to a building

"If the ownership of a building located in a village is inherited and if the heirs do not have a right to buy a household plot in accordance with the relevant procedure, a right of use shall be given to them over a plot of land needed for keeping the building, in the size determined by the Soviet of Ministers of the Azerbaijan SSR."

Article 131. Allocation of plots of land to citizens for construction of personal residential flats

"Land plots for construction of single-flat residential buildings to become personal property shall be allocated to citizens who live in populated settlements of the Azerbaijan SSR where construction of personal flats is not prohibited under the legislation in force, from land belonging to cities and urban settlements; from villages' land that is not used by collective farms, state farms or other agricultural enterprises; from land of the State reserve; and from land of the State forest fund that is not included in the greening zones of cities. Land shall be allocated for the mentioned purpose in accordance with procedure provided under ... this Code.

Construction of personal flats in cities and workers' settlements shall be carried out on empty areas which do not require expenditure for their use or technical preparation; and, as a rule, near railroads and motorways which provide regular passenger communication, in a form of stand-alone residential districts or settlements."

3. The 1983 Housing Code

91. Article 10.3 of the Housing Code read as follows:

"Citizens have the right to a house as personal property in accordance with the legislation of the USSR and the Azerbaijan SSR."

4. The 1985 Instruction on Rules of Registration of Housing Facilities

92. The 1985 Instructions, in Article 2, listed the documents that served as evidence of title to a residential house. The Instructions were approved by the USSR Central Statistics Department through Order no. 380 of 15 July 1985. Article 2.1 enumerated the various types of documents constituting primary evidence of title. Article 2.2 stated that, if the primary

evidence was missing, title could be shown indirectly through the use of other documents, including:

> "inventory-technical documents in cases when they contain an exact reference to possession by owner of duly formalised document certifying his right to the residential house"

B. The laws of the Republic of Azerbaijan

93. Following independence, the Republic of Azerbaijan enacted, on 9 November 1991, laws concerning property which, for the first time, referred to land as being the object of private ownership. However, detailed rules on the privatisation of land allotted to citizens were only introduced later, by the 1996 Law on Land Reform. The applicants' having left Lachin in 1992, they could not therefore have applied to become owners of the land that they used.

1. The 1991 Law on Property

94. The 1991 Law on Property in the Republic of Azerbaijan entered into force on 1 December 1991. It stated, *inter alia*, the following:

> **Article 21. Objects of proprietary rights of the citizen**
>
> "1. A citizen may possess:
>
> – plots of land;
>
> – houses, apartments, country houses, garages, domestic utensils and articles for private use;
>
> – shares, bonds and other securities;
>
> – facilities of mass media;
>
> – enterprises and property complexes for production of goods destined for the consumer, social and cultural markets, with the exception of certain types of property specified by law which cannot be owned by citizens for reasons of state or public security or due to international obligations.
>
> ...
>
> 5. A citizen who owns an apartment, residential house, country house, garage or other premises or structures has the right to dispose of this property at his own will: to sell, bequeath, give away, rent or to take other action not in contravention of the law."

2. The 1992 Land Code

95. The new Land Code, which entered into force on 31 January 1992, contained the following provisions:

> **Article 10. Private ownership of plots of land**
>
> "Plots of land are allocated for private ownership to the citizens of the Republic of Azerbaijan in accordance with requests by the local executive authorities based on

decisions of a district or city Soviet of People's Deputies for the purposes mentioned below:

1) for persons permanently residing on the territory in order to construct private houses and subsidiary constructions as well as for the establishment of private subsidiary agriculture;

2) for the activity of farms and other organisations that are involved in the production of agricultural products for sale;

3) for the constructions of private and collective country houses and private garages within the bounds of cities;

4) for constructions connected to business activities;

5) for the activity of traditional ethnic production.

Under the legislation of the Republic of Azerbaijan plots of land may be allocated for private ownership to citizens for other purposes."

Article 11. Conditions for allocation of plots of land for private ownership

"For the purposes stipulated in Article 10 of this Code, the right of ownership over a plot of land is granted free of charge.

Plots of land allocated to citizens for their private houses, country houses and garages before the date of entry into force of this Code are transferred into their ownership.

The right of private ownership or lifetime inheritable possession over a plot of land cannot be granted to foreign citizens or to foreign legal entities.

A plot of land shall not be returned to the former owners and their heirs. They can obtain a right of ownership over the plot of land on the basis provided for in this Code."

Article 23. Allocation of plots of land

"Land plots shall be allocated to citizens, enterprises and organisations for their ownership, possession, use or rent by a decision of a district or city Soviet of People's Deputies, pursuant to the land allocation procedure and in accordance with land utilisation documents.

The designated purpose of a plot of land shall be indicated in the land allocation certificate.

The procedure for lodging and examination of a request for allocation or seizure of a plot of land, including seizure of a plot of land for State or public needs, shall be determined by the Cabinet of Ministers of the Republic of Azerbaijan.

Citizens' requests for allocation of plots of land shall be examined within a period of no longer than one month."

Article 30. Documents certifying land ownership rights, rights of possession and perpetual use of land

"The ownership rights to land and rights of possession and perpetual use of land shall be certified by a State certificate issued by a district or city Soviet of People's Deputies.

The form of the mentioned State certificate shall be approved by the Cabinet of Ministers of the Republic of Azerbaijan."

Article 31. Formalisation of the right of temporary use of land

"A right of temporary use of land, including a right given on rental terms, shall be documented by means of an agreement and a certificate. These documents shall be registered by a district or city Soviet of People's Deputies and shall be issued to the land user. The forms of the agreement and the certificate shall be approved by the Cabinet of Ministers of the Republic of Azerbaijan."

Article 32. Grounds for termination of land ownership rights, rights of possession and use of land and rights to rent land

"The district or city Soviets of People's Deputies which provided an ownership right over a plot of land or over its part, rights of possession and use of land or a right to rent it shall terminate these rights in the following cases:

1) voluntary surrender or alienation of the plot of land by its owner;

2) expiry of the period for which the plot of land was provided;

3) termination of activities of an enterprise, agency, organisation or a peasant farm;

4) use of the land for purposes other than its designated purpose;

5) termination of the employment relationship on the basis of which a land allotment had been provided, except for cases provided by law;

6) failure to comply with the terms of a rent agreement;

7) failure to pay the land tax or a rental payment prescribed by the legislation or by a land rent agreement for two consecutive years, without a good reason;

8) failure to use, for one year and without a good reason, the plot of land allocated for agricultural production, or failure to use, for two years and without a good reason, the plot of land allocated for non-agricultural production;

9) necessity to seize plots of land for State or public needs;

10) transfer of the ownership right over buildings or structures or transfer of a right of operational management over them;

11) death of the possessor or user.

The legislation of the Republic of Azerbaijan may envisage other grounds for termination of an ownership right over a plot of land, rights of possession and use of land or a right to rent it."

IV. RELEVANT INTERNATIONAL LAW

96. Article 42 of the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereafter "the 1907 Hague Regulations") defines belligerent occupation as follows:

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Accordingly, occupation within the meaning of the 1907 Hague Regulations exists when a state exercises actual authority over the territory, or part of the territory, of an enemy state.[1] The requirement of actual authority is widely considered to be synonymous to that of effective control.

Military occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion physical presence of foreign troops is a *sine qua non* requirement of occupation,[2] i.e. occupation is not conceivable without "boots on the ground" therefore forces exercising naval or air control through a naval or air blockade do not suffice.[3]

97. The rules of international humanitarian law do not explicitly address the issue of preventing access to homes or property. However, Article 49 of Convention [No. IV] relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ("the Fourth Geneva Convention") regulates issues of forced displacement in or from occupied territories. It provides as follows:

> "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

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1. See, for example, E. Benvenisti, "The International Law of Occupation" (Oxford: Oxford University Press, 2012), at p. 43; Y. Arai-Takahashi, "The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law (Leiden: Martinus Nijhoff Publishers, 2009), at pp. 5-8; Y. Dinstein, "The International Law of Belligerent Occupation" (Cambridge: Cambridge University Press, 2009), at pp. 42-45, §§ 96-102; and A. Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", 100 American Journal of International Law 580 (2006), at pp. 585-586.

2. Most experts consulted by the International Committee of the Red Cross (ICRC) in the context of the project on occupation and other forms of administration of foreign territory agreed that 'boots on the ground' are needed for the establishment of occupation – see T. Ferraro, "Occupation and other Forms of Administration of Foreign Territory" (Geneva: ICRC, 2012), at pp. 10, 17 and 33; see also E. Benvenisti, cited above, at pp. 43ff; and V. Koutroulis, "Le debut et la fin de l'application du droit de l'occupation" (Paris: Editions Pedone, 2010), at pp. 35-41.

3. T. Ferraro, cited above, at pp. 17 and 137; Y. Dinstein, cited above, at p. 44, § 100.

> The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
>
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

Article 49 of the Fourth Geneva Convention applies in occupied territory while there are no specific rules regarding forced displacement on the territory of a party to the conflict. Nonetheless, the right of displaced persons "to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist" is regarded as a rule of customary international law (see Rule 132 of the ICRC Study on Customary International Humanitarian Law[4]) that applies to any kind of territory.

V. RELEVANT UNITED NATIONS AND COUNCIL OF EUROPE MATERIALS

A. United Nations

98. The "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 28 June 2005, E/CN.4/Sub.2/2005/17, Annex) are the most complete standards on the issue. They are also known as the Pinheiro principles. The aim of these principles, which are grounded within existing international human rights and humanitarian law, is to provide international standards and practical guidelines to States, UN agencies and the broader international community on how best to address the complex legal and technical issues surrounding housing and property restitution.

They provide, *inter alia*, as follows:

> **2. The right to housing and property restitution**
>
> "2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.
>
> 2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor

4. J.-M. Henckaerts and L. Doswald-Beck, "Customary International Humanitarian Law" (Geneva/Cambridge: ICRC/Cambridge University Press, 2005).

non-return of refugees and displaced persons entitled to housing, land and property restitution."

3. The right to non-discrimination

"3.1 Everyone has the right to be protected from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status.

3.2 States shall ensure that *de facto* and *de jure* discrimination on the above grounds is prohibited and that all persons, including refugees and displaced persons, are considered equal before the law."

12. National procedures, institutions and mechanisms

"12.1 States should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. ...

...

12.5 Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

12.6 States should include housing, land and property restitution procedures, institutions and mechanisms in peace agreements and voluntary repatriation agreements. ..."

13. Accessibility of restitution claims procedures

"13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination. States should not establish any preconditions for filing a restitution claim.

...

13.5 States should seek to establish restitution claims-processing centres and offices throughout affected areas where potential claimants currently reside. In order to facilitate the greatest access to those affected, it should be possible to submit restitution claims by post or by proxy, as well as in person. ...

...

13.7 States should develop restitution claims forms that are simple and easy to understand ...

...

13.11 States should ensure that adequate legal aid is provided, if possible free of charge ...

..."

15. Housing, land and property records and documentation

"...

15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.

..."

21. Compensation

"21.1 All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

..."

B. Council of Europe

99. Council of Europe bodies have repeatedly addressed issues of property restitution to internally displaced persons (IDPs) and refugees. The following Resolutions and Recommendations are of particular relevance in the context of the present case:

1. "Solving property issues of refugees and displaced persons", Parliamentary Assembly (PA) Resolution 1708 (2010)

100. The Parliamentary Assembly noted that as many as 2.5 million refugees and IDPs faced situations of displacement in Council of Europe member States in particular in the North and South Caucasus, the Balkans and the eastern Mediterranean, and that displacement was often protracted with affected persons being unable to return to or to access their homes and land since the 1990s and earlier (paragraph 2). It underlined the importance of restitution:

"3. The destruction, occupation or confiscation of abandoned property violate the rights of the individuals concerned, perpetuate displacement and complicate reconciliation and peace-building. Therefore, the restitution of property – that is the restoration of rights and physical possession in favour of displaced former residents – or compensation, are forms of redress necessary for restoring the rights of the individual and the rule of law.

4. The Parliamentary Assembly considers that restitution is the optimal response to the loss of access and rights to housing, land and property because, alone among forms of redress, it facilitates choice between three 'durable solutions' to displacement: return to one's original home in safety and dignity; local integration at the site of displacement; or resettlement either at some other site within the country or outside its borders."

The Parliamentary Assembly then referred to Council of Europe Human Rights instruments, in particular the European Convention on Human Rights, the European Social Charter and the Framework Convention for the Protection of National Minorities, as well as to the UN Pinheiro principles and called on member states to take the following measures:

"9. In the light of the above, the Assembly calls on member States to resolve post-conflict housing, land and property issues of refugees and IDPs, taking into account the Pinheiro Principles, the relevant Council of Europe instruments and Recommendation Rec (2006)6 of the Committee of Ministers.

10. Bearing in mind these relevant international standards and the experience of property resolution and compensation programmes carried out in Europe to date, member States are invited to:

10.1. guarantee timely and effective redress for the loss of access and right to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts or the status of a particular territory;

10.2. ensure that such redress takes the form of restitution in the form of confirmation of the legal rights of refugees and displaced persons to their property and restoration of their safe physical access to, and possession of, such property. Where restitution is not possible, adequate compensation must be provided, through the confirmation of prior legal rights to property and the provision of money and goods having a reasonable relationship to their market value or other forms of just reparation;

10.3 ensure that refugees and displaced persons who did not have formally recognised rights prior to their displacement, but whose enjoyment of their property was treated as de facto valid by the authorities, are accorded equal and effective access to legal remedies and redress for their dispossession. This is particularly important where the affected persons are socially vulnerable or belong to minority groups;

...

10.5 ensure that the absence from their accommodation of holders of occupancy and tenancy rights who have been forced to abandon their homes shall be deemed justified until the conditions that allow for voluntary return in safety and dignity have been restored;

10.6 provide rapid, accessible and effective procedures for claiming redress. Where displacement and dispossession have taken place in a systematic manner, special adjudicatory bodies should be set up to assess claims. Such bodies should apply expedited procedure that incorporate relaxed evidentiary standards and facilitated procedure. All property types relevant to the residential and livelihood needs of displaced persons should be within their jurisdiction, including homes, agricultural land and business properties;

10.7 secure the independence, impartiality and expertise of adjudicatory bodies including through appropriate rules on their composition that may provide for the inclusion of international members. ...

..."

2. "Refugees and displaced persons in Armenia, Azerbaijan and Georgia", PA Resolution 1497 (2006)

101. In this resolution, the Parliamentary Assembly notably called on Armenia, Azerbaijan and Georgia:

"12.1. to focus all their efforts on finding a peaceful settlement of the conflicts in the region with a view to creating conditions for the voluntary return of refugees and displaced persons to their places of origin, safely and with dignity;

...

12.4. to make the return of the displaced persons a priority and do everything possible in their negotiations so as to enable these people to return in safety even before an overall settlement;

...

12.15. to develop practical co-operation as regards the investigation of the fate of missing persons and to facilitate the return of identity documents and the restitution of property in particular, making use of the experience of handling similar problems in the Balkans."

3. Recommendation of the Committee of Ministers to member states on internally displaced persons, Rec(2006)6

102. The Committee of Ministers recommended notably the following:

"8. Internally displaced persons are entitled to the enjoyment of their property and possessions in accordance with human rights law. In particular, internally displaced persons have the right to repossess their property left behind following their displacement. If internally displaced persons are deprived of their property, such deprivation should give rise to adequate compensation."

THE LAW

I. INTRODUCTION

103. By its decision of 14 December 2011 the Court declared the applicants' complaints admissible. It also examined the six preliminary objections raised by the respondent Government under Article 35 of the Convention. Three of them – concerning the question whether the matter had already been submitted to another procedure of international investigation or settlement, the lack of jurisdiction *ratione temporis* and the failure to respect the six-month rule, respectively – were rejected. The other

three objections were joined to the merits and will be examined below in the following order: exhaustion of domestic remedies, the applicant's victim status, and the respondent Government's jurisdiction over the territory in question.

II. EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

1. The applicants

104. The applicants submitted that the Armenian authorities had prevented them as displaced persons from returning to their homes and that this reflected an acknowledged official policy and, accordingly, an administrative practice. In these circumstances, they did not have access to any domestic remedies.

105. Moreover, there were no remedies known to them – either in the Republic of Armenia or in the "NKR" – that could be effective in respect of their complaints. Allegedly, the lack of domestic remedies was most clearly shown by the international discussions regarding the right of return of internally displaced persons. Constituting one of the major differences between the parties to the ongoing OSCE Minsk Group negotiations, this issue remained unresolved. The applicants had not lodged any "applications" to return and questioned whether there was a forum to which such a request could be submitted. Allegedly, a request would in any event be entirely fruitless. Furthermore, given the denial of the Republic of Armenia of any involvement in the events relating to the conflict in Nagorno-Karabakh, the applicants asserted that it would be contradictory to have expected them to have approached the authorities of the Republic of Armenia.

106. The applicants further maintained that the respondent Government bore the burden of proof to show that a remedy existed and that it was effective both in theory and in practice and, in particular, that it had been successfully used by litigants in a position similar to theirs. They argued that the Government had failed to discharge this burden. Specifically, none of the examples of cases given by the Government in their observations to the Chamber in July 2007 related to the right to return to enjoy properties or private and family life. Only in their July 2012 observations had the Government pointed to some constitutional remedies in Armenia and the "NKR" and claimed that the applicants had always been able to enter the disputed territories, at least for the purpose of exercising their legal rights. Read in conjunction with the Government's previous observations, where these remedies had not been mentioned and where the return of and compensation to displaced persons were conditioned on a comprehensive

and final conflict resolution agreement, the 2012 submissions lacked credibility. Furthermore, they had not contained any examples of redress actually offered to Azerbaijani nationals for breaches of the type of rights referred to in the present case.

2. The respondent Government

107. The Armenian Government submitted that the applicants had failed to exhaust domestic remedies, as they had not shown that they had taken any steps to protect or restore their rights. In particular, the applicants had not applied to any judicial or administrative body of the Republic of Armenia. Furthermore, maintaining that the territories in question were under the jurisdiction and control of the "NKR", the Government claimed that the "NKR" had all the judicial and administrative bodies capable of protecting the rights of individuals. The applicants had purportedly been able to obtain visas to both Armenia and the "NKR" to seek legal advice, even free of charge from "public defender" services, and bring restitution or compensation claims against the Armenian army and authorities or the "NKR" before independent and unbiased courts. As far as Armenia was concerned, this opportunity had existed ever since the ratification of the Convention in April 2002. The positions taken in the OSCE Minsk Group negotiations concerned the return of all displaced persons and were of no relevance to the situation of individuals who wished to exercise their legal rights.

108. Moreover, the Government argued that the constitutions and other laws in Armenia and the "NKR", in particular their land codes and civil codes, protected individuals' right to property, provided for restitution of or compensation for dispossessed land and made no distinction between the rights of nationals and foreigners.

109. In order to show the effectiveness of Armenian remedies for people of Kurdish or Azeri ethnicity, the Government in June 2007 submitted three court cases: one concerned the amnesty granted to a convicted person of, allegedly, Azerbaijani nationality, one related to the friendly settlement reached between a Kurdish person and his employer in a dispute about unpaid salary and one concerned the dispute between another Kurdish person and a local Armenian administration over the prolongation of a land lease contract. Furthermore, the Government submitted three cases examined by "NKR" courts to demonstrate that there were effective judicial remedies in that region: two concerned the criminal convictions of persons of Armenian ethnicity living in the "NKR" and the remaining one was about an inheritance dispute between two private individuals, apparently of Armenian ethnicity.

3. The Azerbaijani Government, third-party intervener

110. According to the Azerbaijani Government, the respondent Government had failed to fulfil their obligation to specify which remedies existed in either the Republic of Armenia or the "NKR" that could be effective in the circumstances and had further failed to provide any example of a displaced Azerbaijani national having had successful recourse to such claimed, albeit totally unspecified, remedies. In this connection, the Azerbaijani Government asserted that the land codes of Armenia and the "NKR" did not provide any rules or mechanisms by virtue of which persons displaced in circumstances similar to the applicants' could obtain restitution of or compensation for their dispossessed property.

111. Furthermore, in the light of the general context, there was allegedly no need to exhaust domestic remedies due to administrative practices or special circumstances. Reference was made, *inter alia*, to the continuing tension and hostility in the region, the application of martial law within Nagorno-Karabakh and the other occupied territories and the deliberate policy of encouraging Armenian settlers to move into, in particular, the district of Lachin.

112. The Azerbaijani Government further asserted that any remedies that the respondent Government would argue were available before the Armenian courts and organs could not by definition be effective in view of Armenia's declared view that the "NKR" was an independent state within whose jurisdiction and control Lachin was to be found. Moreover, the territorial framework relevant to the "NKR" "declaration of independence" in September 1991 excluded the other areas of Azerbaijan occupied later, including Lachin, over which, accordingly, the "NKR" courts were constitutionally incapable of exercising jurisdiction.

B. The Court's assessment

1. Admissibility of additional submissions

113. It should first be noted that, on 20 January 2014 – two weeks after the extended time-limit set by the Court for the submission of additional documentary material – the respondent Government presented several documents, including two judgments which purportedly acknowledged the ownership rights to private houses and the surrounding land situated in the disputed territories to two displaced plaintiffs of Azerbaijani nationality. The judgments had been issued in 2003 and 2005, respectively, by the "First Instance Court of the Nagorno-Karabakh Republic".

114. On 22 January 2014, the President of the Court, after having consulted the Grand Chamber, decided, in accordance with Rules 38 § 1 and 71 § 1 of the Rules of Court, that the mentioned documents, because of their late submission, should not be included in the case-file. The respondent

Government had not given a satisfactory explanation why the documents could not have been filed in time. The Court notes, in this connection, that the respondent Government were invited, on 8 June 2006, to submit written observations in the case and that they, both then and later in the proceedings, were asked to specifically address the question of exhaustion of remedies. No mention was made of the 2003 and 2005 judgments on any of these occasions. Consequently, these documents will not be taken into account.

2. General principles on exhaustion of domestic remedies

115. The Court reiterates that it is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV). The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdiction (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010; and *Niazi Kazali and Hakan Kazali v. Cyprus* (dec.), no. 49247/08, § 132, 6 March 2012).

116. The Court has set out the general principles pertaining to the exhaustion of domestic remedies in a number of judgments. In *Akdivar and Others v. Turkey* (cited above) it held as follows (further case references – in brackets – deleted):

> "65. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article [35] of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an

opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity –, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...).

66. Under Article [35] normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (...).

Article [35] also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (...).

67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (...). The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (...).

68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (...). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article [35] must be applied with some degree of flexibility and without excessive formalism (...). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (...). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal

system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

3. Application of these principles to the facts of the case

117. While maintaining that the Republic of Armenia has no jurisdiction over Nagorno-Karabakh and, in particular, the district of Lachin, the respondent Government claimed that the applicants could have been afforded redress by judicial and administrative bodies in the Republic of Armenia and the "NKR". They referred to provisions in the laws of the two entities concerning land disputes, including issues of restitution and compensation in case of someone else's illegal possession. They also presented statements by domestic judges and officials to the effect that the courts of Armenia and the "NKR" are independent and impartial and are ready to adjudicate cases brought by Azerbaijani citizens without discrimination. The applicants and the Azerbaijani Government, for their part, asserted that the laws of Armenia and the "NKR" did not provide any redress for displaced persons who had been dispossessed of their property in circumstances similar to those of the applicants.

118. The Court finds that, for the question of exhaustion of domestic remedies, it need not determine whether the Republic of Armenia can be considered to have jurisdiction over the area in question and whether such jurisdiction would have an effect on the operation of its domestic remedies to the issues of restitution of or compensation for property situated in the disputed territories. The reason for this is that the respondent Government have not shown that there is a remedy – whether in Armenia or in the "NKR" – capable of providing redress in respect of the applicant's complaints. The legal provisions referred to by them are of a general nature and do not address the specific situation of dispossession of property as a result of armed conflict or in any other way relate to a situation similar to that of the applicants. As regards the domestic judgments submitted by way of example in June 2007 (see paragraph 109 above), none of them relate to claims concerning loss of homes or property by persons displaced in the context of the Nagorno-Karabakh conflict.

119. It should also be noted that the Republic of Armenia has denied that their armed forces or other authorities have been involved in the events giving rise to the complaints in the present case or that Armenia exercises – or have at any point in time exercised – jurisdiction over Nagorno-Karabakh and the surrounding territories. Given such a denial of involvement or jurisdiction, it would not be reasonable to expect the applicants to bring claims for restitution or compensation before the Armenian courts and authorities. Regard must further be had to the political and general context. As a consequence of the war, virtually all Azerbaijanis have left the disputed territories. No political solution of the conflict has been reached. Rather, the hostile rhetoric between the leaders of Armenia and Azerbaijan

appear to have intensified, ceasefire breaches are recurrent and the military build-up in the region has escalated in recent years. In these circumstances, it is not realistic that any possible remedy in the unrecognised "NKR" entity in practice could afford displaced Azerbaijanis effective redress.

120. In these circumstances, the Court considers that the respondent Government have failed to discharge the burden of proving the availability to the applicants of a remedy capable of providing redress in respect of their Convention complaints and offering reasonable prospects of success. The Government's objection of non-exhaustion of domestic remedies is therefore dismissed.

III. THE APPLICANTS' VICTIM STATUS

A. The parties' submissions

1. The applicants

121. The applicants maintained that they had submitted documentation with their application and their subsequent observations in the case that constituted sufficient proof of their identity and of the fact that they owned or had the right to use identifiable property in the territory in question and that they had been residing there when they had had to flee in May 1992. They referred, *inter alia*, to the technical passports, statements by witnesses and invoices for building materials and building subsidies. As regards the technical passports, the applicants maintained that they, in all details, complied with the formal requirements under the domestic law in force at the material time. They explained that the discrepancies between the statements made in the application form and the specifications contained in the passports were due to the statements having been given to their representative in difficult circumstances in Baku in early 2005 during a brief meeting. The original statements were made from memory, without access to documents, and it was therefore the information contained in the passports that was correct and should be taken into account. The applicants further asserted that the passports constituted secondary evidence of their possessions. In addition, the sixth applicant had submitted primary evidence in the form of an abstract from the session protocol of the Soviet of People's Deputies of Lachin District of 29 January 1974 that contained the decision to allocate land to him. When they fled, they had not had the time to take all of their papers with them. Furthermore, there had not been a centralised land register at the time from which they could have obtained further documents.

122. The applicants claimed that, under the 1970 Housing Code and the 1983 Land Code of the Azerbaijan SSR, still in force at the time of their flight, a citizen had a right of ownership to his individual house and an inheritable right to use a plot of land in line with the purposes for which it

had been allocated. Both rights allegedly constituted possessions within the meaning of Article 1 of Protocol No. 1 to the Convention. Moreover, the 1991 Law on Property in the Republic of Azerbaijan made reference to a land plot as the object of individual ownership and thus gave the applicants a legitimate expectation of becoming owners of land.

2. The respondent Government

123. The Armenian Government contended that, with the exception of the sixth applicant, the applicants had not submitted with their application any evidence that could prove that they in fact had any property, let alone that the property was located on the territory claimed and that they had owned it at the relevant time. In the Government's view, it was remarkable that, although they all claimed to have fled empty-handed, the technical passports of the other five applicants had later appeared out of nowhere. Further, the statements of friends and neighbours submitted to the Court amounted to no more than hearsay. In respect of all applicants, the Government maintained that they had failed to prove "beyond reasonable doubt" that they were the persons they claimed to be, that they had resided in the territories specified by them or that they owned the property in question. In particular, the documents provided by them contained numerous contradictions and inaccuracies. For instance, the second applicant had first claimed to have lived in the village of Chirag and had then changed this to Chiragli. Moreover, most of the technical passports submitted as proof of ownership gave different figures with regard to the size of the houses than the figures stated by the applicants themselves. The Government also claimed that a technical passport is a document showing the technical condition of a building and nothing else, unless its origin and provenance is established.

124. The Government further questioned whether the applicants had ever held a right to the alleged properties that had been recognised under the law in force in 1992 or certified by the appropriate authority. In particular, under the socialist system of the USSR before 1991, land was under the exclusive ownership of the State. While the 1991 Law on Property recognised the possibility of private ownership, it did not transfer land occupied by individuals to their private ownership. With respect to individual land users and lessees, the legislation set out that their rights were formalised through a certificate, which was registered in a land register kept by the local Soviet of People's Deputies. Thus, no rights to land could be asserted without such a registered certificate. Furthermore, the Azerbaijani Land Code of 1992 stipulated that the rights of a user or lessee could be extinguished following a failure to use the land for a period of two years. As the applicants had not returned to the district of Lachin since 1992, the Government presumed that their alleged rights had been terminated before Armenia became subject to the jurisdiction of the Court in 2002. Also, the

applicants' claimed legitimate expectation to become owners of land was no longer a realistic expectation in 2002. Furthermore, before that date, the applicants' alleged property had been allocated to other individuals, with their names recorded on the land register in accordance with the laws of the "NKR". Thus, the applicants had no "existing possessions" but were merely claimants seeking to have their property restored or to receive compensation. The Armenian Government maintained that no domestic legislation or judicial decision existed which gave rise to a legitimate expectation of such restitution or compensation. However, in the same observations, the Government stated that the "NKR" had not adopted any legal act that deprived the applicants of the right to enter the territory of Lachin or of the right to peacefully enjoy their property.

3. The Azerbaijani Government, third-party intervener

125. The Azerbaijani Government pointed out that almost all displaced persons had had to flee their homes in the occupied territories quickly, without having had the time to collect documents. At the present time, it was impossible to obtain property documents as the records had been kept by the local authorities and their archives had most likely been destroyed. Nevertheless, a technical passport was classified as an "inventory-technical" document that served to indirectly establish the right to an individual house where the original document was missing. This document constituted secondary evidence of title to a house and a plot of land if its text directly referred to documents confirming the property rights. Such a reference was included in the applicants' technical passports. Thus, considered together with the witness statements and building invoices submitted, they demonstrated that the applicants owned individual houses and had the right to use the land plots allotted to them. These rights still existed.

126. The Azerbaijani Government further stated that, at the time of the applicants' flight, private ownership of individual houses was protected by the still valid laws of the Azerbaijan SSR. No private ownership existed, however, in regard to land, which was exclusively owned by the State. All land transactions were prohibited, but plots of land were allotted by decision of the local authority, the Soviet of People's Deputies, to citizens for their use for a definite or indefinite period of time, free of charge. The right of use, which was an inheritable title, was granted for purposes such as individual housing, i.e. construction of privately owned houses, as well as pasture, haymaking and farming. Furthermore, the 1991 Law on Property in the Republic of Azerbaijan, while not yet enforceable at the relevant time, had added a legitimate expectation for the applicants to become owners of land.

B. The Court's assessment

127. The examination of the issue of the applicants' victim status is twofold. First, it must be assessed whether the applicants have submitted sufficient proof of their personal identity and former residence as well as the existence of the assets they allegedly left behind. If so, it needs to be determined whether these assets constitute "possessions" and help create "homes" under the Convention. For the determination of the second issue the domestic legal classification or significance is of importance.

1. General principles on assessment of claims relating to property and homes of displaced persons

128. The Court has previously dealt with cases concerning property and housing rights of persons who have been displaced as a result of an international or internal armed conflict. The issues have arisen in the context of the occupation of northern Cyprus, the actions of the security forces in Turkey and Russia, and in some other conflict situations.

129. The Court examined for the first time the rights of displaced persons to respect for their homes and property in the case of *Loizidou v. Turkey* ((merits), 18 December 1996, *Reports* 1996-VI). The applicant claimed to be the owner of a number of plots of land in northern Cyprus. The Turkish Government did not call into question the validity of the applicant's title, but argued that she had lost ownership of the land by virtue of Article 159 of the 1985 Constitution of the "Turkish Republic of Northern Cyprus" (the "TRNC") which declared all abandoned immovable properties to be the property of the "TRNC". The Court, having regard to the lack of recognition of the "TRNC" as a State by the international community, did not attribute any legal validity to the provision and considered that the applicant could not be deemed to have lost title to her property as a result of it (§§ 42-47).

130. In a number of cases related to the above-mentioned conflict, the Court has established the applicants' "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention on the basis of *prima facie* evidence which the Government failed convincingly to rebut, including copies of original title deeds, certificates of registration, purchase contracts and affirmations of ownership issued by the Republic of Cyprus. As explained by the applicant in the case of *Solomonides v. Turkey* (no. 16161/90, § 31, 20 January 2009), his titles of ownership had been registered at the District Lands Office. However, at the time of the Turkish military intervention he had been forced to flee and had been unable to take with him the title deeds. The authorities of the Republic of Cyprus had reconstructed the Land Books and had issued certificates of affirmation of title. These certificates were the best evidence available in the absence of the original records or documents. It is noteworthy that in *Saveriades*

v. Turkey (no. 16160/90, 22 September 2009) the reasons why the applicant could not submit the original title deeds were specifically taken into account. The applicant argued that he had been forced to leave his premises where the documents were held in great haste and had subsequently been unable to return there or otherwise retrieve the title deeds. The Court accepted that the documents submitted by the applicant (such as a sale contract, ownership certificates and a building permit) provided *prima facie* evidence that he had a title of ownership over the properties at issue, and continued (§ 18):

> "... As the respondent Government failed to produce convincing evidence in rebuttal, and taking into account the circumstances in which the applicant had been compelled to leave northern Cyprus, the Court considers that he had a "possession" within the meaning of Article 1 of Protocol No. 1."

131. In the case of *Doğan and Others v. Turkey* (nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004-VI (extracts)) which concerned the forced eviction of villagers in the state-of-emergency region in south-east Turkey and the refusal to let them return for several years, the respondent Government raised the objection that some of the applicants had not submitted title deeds attesting that they had owned property in the village in question. The Court considered that it was not necessary to decide whether or not in the absence of title deeds the applicants had rights of property under domestic law. The question was rather whether the overall economic activities carried out by the applicants constituted "possessions" coming within the scope of Article 1 of Protocol No. 1. Answering the question in the affirmative, it stated as follows (§ 139):

> "... [T]he Court notes that it is undisputed that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as "possessions" for the purposes of Article 1."

132. The autonomous meaning of the concept of "possessions" has been proclaimed in many judgments and decisions of the Court. In *Öneryıldız v. Turkey* (no. 48939/99, § 124, ECHR 2004-XII), it was summarised thus:

> "The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision ... . Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as "property rights", and thus as "possessions" for the purposes of this provision ... . The concept of "possessions" is not limited to "existing possessions" but may also cover assets,

> including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right ... ."

In that case, the Court considered that a dwelling illegally erected on public land next to a rubbish tip, where the applicant and his family had lived undisturbed, albeit unauthorised, while paying council tax and public service charges, represented a proprietary interest which, *de facto*, had been acknowledged by the authorities and which was of a sufficient nature to constitute a possession within the meaning of Article 1 of Protocol No. 1.

133. The question whether the applicants had substantiated their claim under Article 1 of Protocol No. 1 has arisen also in a number of cases against Russia where the applicants' houses or other property were destroyed or damaged as a result of aerial attacks on the towns where they lived. For instance, in *Kerimova and Others v. Russia* (nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, § 293, 3 May 2011), the Court accepted the claim of ownership by some of the applicants on the basis of extracts from a housing inventory issued by the town administration after the attack which showed that the applicants were the owners of their houses. As regards the applicants who had submitted no proof of title, the Court established their property right on the basis of other evidence, such as a certificate of residence issued by the town administration. The Court also considered it likely that any documents confirming the applicants' title to the houses had been destroyed during the attack.

134. In situations where it has been established that the applicant was the owner of a house, the Court has not required further documentary evidence of his or her residence there to show that the house constituted a "home" within the meaning of Article 8 of the Convention. For example, in *Orphanides v. Turkey* (no. 36705/97, § 39, 20 January 2009) it stated as follows:

> "The Court notes that the Government failed to produce any evidence capable of casting doubt upon the applicant's statement that, at the time of the Turkish invasion, he was regularly residing in Lapithos and that his house was treated by him and his family as a home."

135. However, if an applicant does not produce any evidence of title to property or of residence, his complaints are bound to fail (see, for example, *Lordos and Others v. Turkey*, no. 15973/90, § 50, 2 November 2010, where the Court declared a complaint incompatible *ratione materiae* in the absence of evidence of ownership; see also the conclusion as to some applicants in the above-mentioned case of *Kerimova and Others v. Russia*). In several cases the Court has reiterated that the applicants are required to provide sufficient *prima facie* evidence in support of their complaints. In *Damayev v. Russia* (no. 36150/04, §§ 108-111, 29 May 2012) it considered that an applicant complaining about the destruction of his home should provide at least a brief description of the property in question. Since no documents or

detailed claims were submitted, his complaint was found to be unsubstantiated. As further examples of *prima facie* evidence of ownership of or residence on property, the Court has mentioned documents such as land or property titles, extracts from land or tax registers, documents from the local administration, plans, photographs and maintenance receipts as well as proof of mail deliveries, statements of witnesses or any other relevant evidence (see, for instance, *Prokopovich v. Russia*, no. 58255/00, § 37, ECHR 2004-XI, and *Elsanova v. Russia* (dec.), no. 57952/00, 15 November 2005).

136. In sum, the Court's case-law has developed a flexible approach regarding the evidence to be provided by applicants who claim to have lost their property and home in situations of international or internal armed conflict. The Court notes that a similar approach is reflected in Article 15 § 7 of the UN Pinheiro Principles (see paragraph 98 above).

2. Application of these principles to the facts of the case

(a) Proof of identity and place of residence

137. While the applicants, at the time of lodging the present application, did not submit documents showing their identity and place of residence, they did so following the Grand Chamber's request in April 2010. The documents included birth certificates, for themselves and for their children, marriage certificates, USSR passports, work records and extracts from military service books (for details, see paragraphs 33-57 above). In the Court's view, these documents demonstrate that all the applicants were born in the district of Lachin and that they lived and worked there, at least for major parts of their lives. Having regard to the applicant's own statements – and in the absence of any evidence to the contrary – they must be deemed to have still lived there with their families at the time when they fled on 17 May 1992.

(b) Proof of possessions

138. The applicants claimed that they owned or had protected rights to land, houses and certain moveable property that they were forced to leave behind when they fled. It is not known whether any of the houses are still intact and the claimed moveable property is most certainly no longer in existence. Thus, what remain are mainly the plots of land.

139. Originally, only the sixth applicant submitted a document relating to property, a so-called technical passport. The other applicants presented such evidence only when they replied to the respondent Government's first observations. In addition to technical passports, they all submitted witness statements from former neighbours who affirmed that the applicants owned houses in the respective villages as well as statements by representatives of an Azerbaijani administration for Lachin. The sixth applicant also presented

a decision on land allocation taken by the Lachin District Soviet of People's Deputies as well as invoices for animal feed, building materials and building subsidies.

140. The most significant pieces of evidence supplied by the applicants are the technical passports. Being official documents, they all contain drawings of houses and state, among other things, their sizes, measurements and number of rooms. The sizes of the plots of land in question are also indicated. The passports are dated between July 1985 and August 1990 and contain the applicants' names. Moreover, it appears that the passports include references to the respective land allocation decisions.

141. Having regard to the submissions of the Azerbaijani Government, the Court considers that the applicants' technical passports must be seen as "inventory-technical documents" constituting indirect evidence of title to houses and land which, in addition, conforms with Article 2.2 of the 1985 Instructions on Rules of Registration of Housing Facilities (see paragraph 92 above). Furthermore, the land allocation decision supplied by the sixth applicant represents primary evidence under Article 2.1 of that Instruction. While the Armenian Government have contested the probative value of the passports, claiming that they show the technical condition of a building and nothing else, the Court notes that they do not simply contain specifications of the houses in question but also include the applicants' names. In the circumstances, they provide such *prima facie* evidence of title to property that has been accepted by the Court in many previous cases.

142. It is noteworthy that, except for the fifth and sixth applicants, there are discrepancies between the applicants' initial descriptions of their houses and the figures contained in the technical passports presented later in the proceedings. For example, the first applicant originally stated that he owned a house of 250 sq. m. The technical passport submitted, however, concerns a house of 408 sq. m total area and 300 sq. m living area (and a storehouse of 60 sq. m not previously mentioned). Similarly, the fourth applicant originally claimed that his house had an area of 165 sq. m, whereas the house specified in the passport measures in total 448 sq. m and has a living area of 223 sq. m (to which, again, a previously unmentioned storehouse, measuring 75 sq. m, is added). The applicants have stated that it is the information contained in the passports that is correct and that their original statements were made from memory at a brief meeting with their representative when they did not have access to the documents.

The Court can accept the applicants' explanation; the discrepancies between their original statements and the technical passports are, in the circumstances, not of the nature to discredit the authenticity of the documents, in particular when the figures initially given by the applicants are compared with the living-area measurements specified in the passports.

143. The applicants have submitted further *prima facie* evidence in regard to property, including statements by former neighbours. Also the

documents examined above in relation to the applicants' identities and residence, which show that they resided in the district of Lachin, lend support to their property claims. Moreover, while all but the sixth applicant have failed to present title deeds or other primary evidence, regard must be had to the circumstances in which they were compelled to leave the district, abandoning it when it came under military attack. Accordingly, taking into account the totality of evidence presented, the applicants have sufficiently substantiated their claims that they were in possession of houses and land at the time of their flight.

(c) Whether the applicants' rights fall under Article 1 of Protocol No. 1 and Article 8 of the Convention

144. It remains to be determined whether the applicants had – and still have – rights to property which are protected by Article 1 of Protocol No. 1 and whether the property, considered together with the other personal circumstances of the applicants, have constituted their homes within the meaning of Article 8 of the Convention. As has been mentioned above (see paragraph 132), the concept of "possessions" in Article 1 of Protocol No. 1 is autonomous and is not dependent on the formal classification in domestic law. However, a starting point of the determination is to establish whether domestic law and practice conferred or acknowledged rights which are protected under the Convention.

145. First, it should be noted that, although the land legislation enacted shortly after Azerbaijan's independence acknowledged for the first time the right of private ownership of land, a procedure whereby land could be privatised had not been introduced at the relevant time, that is, in May 1992. In any event, it is undisputed that no application had been made by the applicants to become owners of land. As, moreover, the rights acquired by individuals under the old legislation were not rescinded by the enactment of the 1991/1992 property laws, the applicants' legal rights to the houses and land that they possessed at the time of their flight must be assessed with reference to the laws of the Azerbaijan SSR.

146. Under the Soviet legal system, citizens had a right to own residential houses, but there was no private ownership of land which instead was considered State property. For the Azerbaijan SSR (including Nagorno-Karabakh and the district of Lachin and the other surrounding territories now under occupation) these rules were laid down in the 1978 Constitution as well as the 1970 Land Code and the 1983 Housing Code. Article 10.3 of the Housing Code provided for ownership of houses and the Land Code, notably Articles 4, 25, 27 and 28, laid down the rules and procedures for allocation of land to individuals for their use. Consequently, the houses that the applicants inhabited in the district of Lachin were part of their personal property whereas the plots of land on which these houses stood were under their "right of use". As has already been mentioned (see paragraph 138), the

moveable property – livestock, carpets, cars – that the applicants claimed to have possessed (the rights to which were also protected by the laws of the Azerbaijan SSR) is likely to have been destroyed during the military attack on Lachin or in the following years. It is further unclear whether their houses have been destroyed or are still partly or wholly intact. Consequently, it is of crucial importance to examine the significance of the "right of use".

147. The "right of use" was the only title to land that an individual could acquire. Granted by the local Soviet of People's Deputies, the right could be given for several different purposes, including pasture and farming and – most importantly in the context of the present case – the erection of a house. The beneficiaries were obliged to use the plots of land strictly for the purposes for which they had been allocated. The "right of use" was conferred indefinitely or for a temporary period. Thus, if the individual held an indefinite "right of use" and complied with the purpose specified, he or she could use the land for life. Moreover, the right was inheritable.

There is no doubt, therefore, that the "right of use" conferred on the applicants was a strong and protected right which represented a substantive economic interest. While there is no indication that the applicants' rights were of a temporary nature, the Court notes, for the sake of completeness, that this conclusion is applicable to both indefinite and temporary "rights of use". Having regard to the autonomous meaning of Article 1 of Protocol No. 1, the "right of use" of land thus constituted a "possession" under that provision. This conclusion applies also to the rights held by individuals to residential houses and moveable property.

148. In their observations submitted on 11 July 2012 the respondent Government stated that the applicants' rights to land would presumably have been terminated by virtue of Article 32, section 1(8) of the 1992 Land Code, as they had not returned to their land since May 1992 and had thus failed to use it during two successive years. The Government further claimed that, in any event, the land had been allocated to other individuals in accordance with the laws of the "NKR". In support of the second claim, they submitted a number of "NKR" land registry documents from 2000 and 2001.

In regard to the Government's first contention, the Court notes that the termination of land rights under Article 32 of the 1992 Land Code necessitated a decision to that effect by the local Soviet of People's Deputies and, moreover, required that the failure to use land was without good reason. The latter can hardly be said to be the case here in view of the military presence in the the relevant territories since 1992/93. In these circumstances, the claim, which amounts to no more than speculation, must be rejected. As to the Government's second contention, it is unclear to which land or possessors the submitted land registry documents refer. Moreover, the claim seems to contradict the statement that the "NKR" had

not adopted any legal act that deprived the applicants of the right to peacefully enjoy their property. In any event, this issue has already been examined at the admissibility stage in regard to the Court's jurisdiction *ratione temporis* following a similar claim by the respondent Government. The claim was rejected on the following grounds (see paragraph 102 of the admissibility decision):

> "At a late stage of the proceedings, the Armenian Government introduced the claim that the authorities of the "NKR", in 1998, had enacted a law on privatisation and a land code, which had extinguished the land rights of the applicants and other people who had fled the occupied territories. The texts of these laws have not been submitted to the Court. In any event, the Court notes that the "NKR" is not recognised as a State under international law by any countries or international organisations. Against this background, the invoked laws cannot be considered legally valid for the purposes of the Convention and the applicants cannot be deemed to have lost their alleged rights to the land in question by virtue of these laws (see *Loizidou* (merits), cited above, §§ 42-47)."

149. In conclusion, at the time of their leaving the district of Lachin, the applicants held rights to land and to houses which constituted "possessions" within the meaning of Article 1 of Protocol No. 1. There is no indication that those rights have been extinguished afterwards – legitimately or otherwise – whether before or after Armenia's ratification of the Convention. Their proprietary rights are thus still valid. Since the applicants accordingly hold existing possessions, there is no need to examine their claim that they had a "legitimate expectation" to become formal owners of their land following the enactment of the 1992 Land Code.

150. Moreover, having regard to the above conclusion that the applicants lived in the district of Lachin with their families at the time of their flight and earned their livelihood there, their land and houses must also be considered to have constituted their "homes" for the purposes of Article 8 of the Convention.

151. The Government's objection concerning the applicants' victim status is therefore dismissed.

IV. JURISDICTION OF THE REPUBLIC OF ARMENIA

A. The parties' submissions

1. The applicants

152. The applicants submitted that the Republic of Armenia exercised effective control over Nagorno-Karabakh and the surrounding territories, in particular the district of Lachin, and that the matters complained of therefore fell within the jurisdiction of Armenia in accordance with Article 1 of the Convention. Alternatively, such jurisdiction derived from Armenia's authority or control over the area in question through its agents operating

there. The applicants asserted that the Court's case-law on this issue was settled and referred, *inter alia*, to the cases of *Loizidou v. Turkey* (cited above), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, ECHR 2004-VII) and *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, ECHR 2011). As regards the burden of proof, they maintained that the test was not "beyond reasonable doubt"; instead, in the present case, there was a presumption of fact that Armenia had jurisdiction over the mentioned territories, a presumption that the respondent Government had failed to rebut.

153. The applicants claimed that Armenia's military participation in the Nagorno-Karabakh conflict had been considerable and that the evidence to that effect was overwhelming. They submitted, *inter alia*, that Armenian conscripts had served in Nagorno-Karabakh. According to the above-mentioned HRW report of 1994, Armenian conscripts had been sent to Nagorno-Karabakh and the surrounding Azerbaijani provinces, and military forces from Armenia had taken part in fighting in Azerbaijan. The applicants also referred to statements by various political leaders and observers, pointing towards the involvement of the Armenian army, including the above-mentioned statements by Mr Robert Kocharyan and Mr Vazgen Manukyan (see paragraph 62).

154. The applicants also adduced as evidence of Armenian army involvement in the military actions the capture of a number of its soldiers by Azerbaijani units and the increased Armenian draft requirements at the material time. They further submitted that conscripts of the Armenian army were still sent to serve in Nagorno-Karabakh, that such service entitled the officers and soldiers to higher salaries than if they had served in Armenia and that conscripts had no choice as to where they would like to be deployed, in Armenia or in Nagorno-Karabakh. In support of this assertion, they referred, *inter alia*, to several judicial and administrative proceedings that had been taken in Stepanakert against Armenian military personnel and an Armenian conscientious objector.

155. In addition to committing troops to the conflict, Armenia had, according to the applicants, provided material aid to Nagorno-Karabakh. Allegedly, the country supplied as much as 90% of the enclave's budget in the form of interest-free credits. These credits constituted financial assistance which contributed to Armenia's effective control over Nagorno-Karabakh and the surrounding territories. As to the Hayastan All-Armenian Fund, the applicants submitted that it could not be seen as a distinct body independent of the Armenian Government, as it had been established by presidential decree, as its charter designated the Armenian president as president of the Board of Trustees and as that board otherwise included several of the highest-ranking representatives of the Armenian government, parliament, constitutional court and central bank. Furthermore,

its mission was to support sustainable development in both Armenia and Nagorno-Karabakh.

156. Moreover, the Republic of Armenia had provided and continued to provide political support to Nagorno-Karabakh. Numerous key figures in Armenian politics had close ties to and continued to be involved in the political sphere in Nagorno-Karabakh. For example, in August 1993 the Armenian Government had appointed Mr Serzh Sargsyan, the defence minister of Nagorno-Karabakh, as defence minister of Armenia, and in 1998 Mr Robert Kocharyan had become president of Armenia, after having previously been the prime minister and president of Nagorno-Karabakh. Also, as the "NKR" remained unrecognised by the international community, it was reliant on Armenia for political support and its ability to enter into relations with other states.

157. The applicants further submitted that, in Nagorno-Karabakh, many laws of Armenia were applied and the Armenian dram was the main currency in use. Moreover, people from Nagorno-Karabakh were issued with Armenian passports for the purpose of travelling abroad.

2. The respondent Government

158. The Armenian Government submitted that the jurisdiction of the Republic of Armenia did not extend to the territory of Nagorno-Karabakh and the surrounding territories; allegedly, Armenia did not and could not have effective control of or exercise any public power on these territories. In their view, effective control implied detailed direction or control over specific operations of the controlled entity, with the capacity to start and stop them as well as to determine their course. Pointing out that extra-territorial jurisdiction was an exception to the principle that a State had jurisdiction over its own territory, the Government maintained that the burden of proving such control was on the applicants, to a standard that was high, and that they could not discharge this burden, as evidence rather showed that there was no Armenian influence, let alone control, over the "NKR". The Government was of the opinion that the *Al-Skeini* case (cited above) was not relevant to the present circumstances as that judgment relied on "State agent authority and control" which did not apply to the facts of the present case. Furthermore, the merely supportive role played by Armenia in relation to the "NKR" was fundamentally different from the number of Turkish soldiers involved in northern Cyprus or the size of the Russian military arsenal present in Transdniestria (as established in *Loizidou* and *Ilaşcu and Others*, cited above) and did not, under any reasonable definition, amount to effective control.

159. The Government asserted that Armenia had not participated in the military conflict in question. The attack on Lachin on 17-18 May 1992 – as well as the capture of Shusha/Shushi on 9 May – had been conducted by the "NKR" defence force, which was to 90% made up of people from

Nagorno-Karabakh. The military actions were actually against the interests of the Government of the Republic of Armenia, which was at the time negotiating a ceasefire agreement with the Azerbaijani leaders; a meeting had been held on 8-9 May in Tehran. Nonetheless, the capture of these two towns had been deemed necessary by the "NKR" forces in order to stop Azerbaijani war crimes and open up a humanitarian corridor to Armenia.

160. The Government further maintained that Armenia had not taken part in any later military actions either. This was allegedly shown by the fact that there was not a single mention in any international document of Armenian army participation. Instead, these documents talked about "local Armenian forces". Nor had the authorities of Armenia adopted any legal acts or programmes or taken other official steps to get involved in the actions. Instead, the self-defence had been entirely conducted by the "NKR" defence force, which had been established in early 1992 following the enactment of the "NKR" Law on Conscription. It had been assisted by the Armenian population in Nagorno-Karabakh and the surrounding territories as well as volunteers of Armenian origin from various countries. Armenia had only been involved in the war in so far as it had defended itself against Azerbaijani attacks on territory within the recognised borders of Armenia. However, as Armenia and the "NKR" had a common enemy, their armed forces co-operated in various ways.

161. Armenia did not currently have any military presence in Nagorno-Karabakh and the surrounding territories. No military detachment, unit or body was stationed there. In the district of Lachin there were no military units at all, as Lachin was at a considerable distance from the "NKR" border with Azerbaijan and there was thus no military need to keep units there. It could not be ruled out that some Armenian nationals may have served in the "NKR" defence force on a contractual and voluntary basis. Also, according to the 1994 agreement on military cooperation signed by the Armenian and "NKR" Governments, draftees from Armenia, upon their consent, may perform their military service in the "NKR" and vice versa, as well as participate in military exercises organised in the "NKR" or in Armenia. The legal proceedings involving Armenian conscripts who had served in the "NKR" had a simple explanation: under the 1994 agreement, criminal charges against Armenian conscripts were dealt with by the Armenian prosecutors and any such charges against Karabakhi conscripts were dealt with by the "NKR" authorities. However, only a small number of Armenian volunteer conscripts had served in Nagorno-Karabakh where, moreover, they had been under the direct command of the "NKR" defence force.

162. The Government further submitted that the "NKR", since its formation, had carried out its political, social and financial policies independently. Armenia had not given any economic help to the "NKR" except that, for several years, it had provided the "NKR" with long-term

loans for the implementation of specific projects, including the rebuilding of schools and other educational institutions and the provision of financial help to the families of killed soldiers. Such help had been provided by other countries as well. Moreover, the Hayastan All-Armenian Fund played a great role in the development of the "NKR". Its main mission was to provide financial help to Armenia and the "NKR", using resources collected by the Armenian diaspora. While there were representatives of Armenia on the Board of Trustees, the majority of the board's members were collected from the Armenian diaspora and the "NKR". The fund's agenda was not set by the Armenian government; often the donors themselves decided to which projects their money should go. The only governmental assistance to the fund was the provision of rent-free offices in a government building in Yerevan. Thus, it was not an instrument of control, but a non-political, charitable organisation, which had provided USD 111,000,000 to the "NKR" for building schools and hospitals, reconstructing roads and villages, assisting cultural events and subsidising work and education for the poor. Further resources were provided by other funds and international organisations. Charity and international investments in the "NKR" annually accounted for 20-30 and 30-40 million US dollars respectively.

163. In the view of the Armenian Government, the "NKR" was a sovereign, independent state possessing all the characteristics of an independent state under international law. It exercised control and jurisdiction over Nagorno-Karabakh and the territories surrounding it. Only the laws and other legal acts of the "NKR" were applied on these territories, and it was normal for the "NKR" to have borrowed or adopted some laws from Armenia. The "NKR" had its own court system which operated entirely independently. Political elections were held in the "NKR", and the fact that some individuals had been in high political office in both the "NKR" and Armenia was nothing out of the ordinary in the early days of both countries' independence. Armenia's political support was limited to taking part in the settlement negotiations conducted within the framework of the OSCE Minsk Group, with a view to regulate the Nagorno-Karabakh conflict. "NKR" passports were issued to its citizens, who had political rights and civil obligations on the basis of their citizenship. Armenian passports had been issued only to some residents of Nagorno-Karabakh in order for them to be able to travel abroad. Several currencies were used in the "NKR", not only the Armenian dram.

164. The Government also asserted that the only facts relevant for the Court's examination of the jurisdiction issue were those dating from May 1992 ("the causation question") and post-April 2002 ("the jurisdiction question"). Evidence since 2002 demonstrated that the Republic of Armenia and the "NKR" were friendly countries, with much in common and with close economic and social links, a military alliance and a shared ethnicity. Armenia had had some influence in so far as it had, from time to time, given

financial and other assistance to the "NKR". Also, as a good neighbour and ally, it had helped to maintain from its end the humanitarian corridor in the district of Lachin. However, the Republic of Armenia and the "NKR" were different countries.

3. The Azerbaijani Government, third-party intervener

165. The Azerbaijani Government agreed with the applicants that the Republic of Armenia exercised effective control of Nagorno-Karabakh and the surrounding territories, including the Lachin area. They invoked statements by various international and non-governmental organisations and the US Department of State as well as many political leaders in claiming that, at the beginning of the 1990s, Armenian forces, fighting beside separatist Karabakhi forces, had occupied Nagorno-Karabakh as well as Lachin and the other surrounding territories and that these territories continued to be occupied by Armenia, which had soldiers stationed there. In the latter respect, they referred to the Court's cases of *Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007-III) and *Zalyan, Sargsyan and Serobyan v. Armenia* (cited above). The "NKR" was not an independent state, as claimed by the respondent Government, but a subordinate local administration surviving by virtue of the military and other support afforded by Armenia. Allegedly, it was not conceivable that the "NKR" defence force would exist in any recognisable form without the extensive support of Armenia, expressed, for example, in weapons, equipment, training and, above all, the constant provision of a highly significant percentage – if not an actual majority – of soldiers based in the occupied territories.

166. The Azerbaijani Government also submitted that the "NKR" could not survive – politically, economically or militarily – without the significant support provided by Armenia. They pointed, *inter alia*, to the close political links between Nagorno-Karabakh and the Republic of Armenia which, moreover, had a strong personal element at the highest level. Furthermore, economic aid provided by Armenia was essential for the "NKR". The Government referred to the Hayastan All-Armenian Fund, which allegedly had to be seen as an organ of the Armenian State in relation to the aid given to Nagorno-Karabakh. The fund had had a significant impact in the "NKR", not just financially but also socially. Allegedly, it was carried by political will, reinforcing Nagorno-Karabakh's economic dependency of Armenia and further integrating the "NKR" into Armenia. They also referred to the Armenian state loans, which constituted a major part of the "NKR" budget. Moreover, the Azerbaijani Government asserted that individuals residing in Nagorno-Karabakh and the surrounding territories were holders of passports of the Republic of Armenia.

B. The Court's assessment

167. While a State's jurisdictional competence is primarily territorial, the concept of jurisdiction within the meaning of Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties and the State's responsibility can be involved because of acts and omissions of their authorities producing effects outside their own territory.

Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. General principles on extra-territorial jurisdiction

168. The Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when this State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. The principles have been set out in several cases, including *Ilaşcu and Others* (cited above, §§ 311-319), *Al-Skeini and Others* (cited above, §§ 130-139) and *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012 (extracts)). The relevant passages of the latter judgment are cited here:

> "103. The Court has established a number of clear principles in its case-law under Article 1. Thus, as provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001-XII). "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, 7 July 2011).
>
> 104. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković*, cited above, §§ 61 [and] 67; *Ilaşcu*, cited above, § 312; *Al-Skeini*, cited above § 131). Jurisdiction is presumed to be exercised normally throughout the State's territory (*Ilaşcu*, cited above, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (*Banković*, cited above, § 67; *Al-Skeini*, cited above § 131).
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> 105. To date, the Court has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was

exercising jurisdiction extra-territorially must be determined with reference to the particular facts (*Al-Skeini*, cited above, § 132).

106. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (*Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314-316; *Loizidou* (merits), cited above, § 52; *Al-Skeini*, cited above, § 138). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey*, cited above, §§ 76-77; *Al-Skeini*, cited above, § 138).

107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56; *Ilaşcu*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu*, cited above, §§ 388-394; *Al-Skeini*, cited above, § 139).

...

115. ... As the summary of the Court's case-law set out above demonstrates, the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law."

2. Application of these principles to the facts of the case

169. The Court first considers that the situation pertaining in Nagorno-Karabakh and the surrounding territories is not one of Armenian State agents exercising authority and control over individuals abroad, as alternatively argued by the applicants. Instead, the issue to be determined on the facts of the case is whether the Republic of Armenia exercised and continues to exercise effective control over the mentioned territories and as a result may be held responsible for the alleged violations. As noted by the Court in *Catan and Others* (cited above, § 107), this assessment will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance.

170. While the applicants used to live in the district of Lachin, the issue of jurisdiction does not concern solely this area. In fact, Lachin is one of the

parts of the mentioned territories that is situated farthest away from the Line of Contact with Azerbaijan. The district is sheltered by Nagorno-Karabakh to the east, by the districts of Kelbajar as well as Gubadly and Jabrayil to the north and south and by Armenia to the west. To determine whether Armenia has jurisdiction in the present case, it is thus necessary to assess whether it exercises effective control over Nagorno-Karabakh and the surrounding territories as a whole.

171. Moreover, although responsibility for an alleged violation cannot be imputed to Armenia on the basis of events that took place before 26 April 2002, the date of its ratification of the Convention, facts relating to earlier events may still be taken into account as indicative of a continuous situation which still persisted after that date.

(a) Military involvement

172. The Nagorno-Karabakh conflict escalated into full-scale war in 1992 but had started already some years earlier, with calls for the incorporation of Nagorno-Karabakh into Armenia coming from both entities. Significantly, in December 1989, the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh regional council adopted a joint resolution on the "reunification" of the two entities and, in January 1990, a joint budget was established. It is clear that, from the beginning of the conflict, the Armenian SSR and the Republic of Armenia have strongly supported the demands for Nagorno-Karabakh's incorporation into Armenia or, alternatively, its independence from Azerbaijan.

173. The material available to the Court does not – and could not be expected to – provide conclusive evidence as to the composition of the armed forces that occupied and secured control of Nagorno-Karabakh and the seven surrounding districts between the outbreak of war in early 1992 and the ceasefire in May 1994. For instance, the UN Security Council resolutions adopted in 1993, while expressing serious concern at the tension between Armenia and Azerbaijan, referred to invasion and occupation by "local Armenian forces" and urged Armenia to exert its influence on "the Armenians of the Nagorny-Karabakh region" (see paragraph 59 above). Nevertheless, the report by Human Rights Watch (paragraph 60) attests to the involvement of the armed forces of the Republic of Armenia at this point in time. Also the Armenian minister of defence in 1992-93, Mr Vazgen Manukyan, acknowledged this state of affairs (paragraph 62).

174. Moreover, in the Court's view, it is hardly conceivable that Nagorno-Karabakh – an entity with a population of less than 150,000 ethnic Armenians – was able, without the substantial military support of Armenia, to set up a defence force in early 1992 that, against the country of Azerbaijan with approximately seven million people, not only established control of the former NKAO but also, before the end of 1993, conquered the whole or major parts of seven surrounding Azerbaijani districts.

175. In any event, the military involvement of Armenia in Nagorno-Karabakh was, in several respects, formalised in June 1994 through the "Agreement on Military Co-operation between the Governments of the Republic of Armenia and the Republic of Nagorno-Karabakh" (see paragraph 74 above). In addition to identifying many military issues on which the two entities will work together, the agreement notably provides that conscripts of Armenia and the "NKR" may do their military service in the other entity.

176. Later reports and statements confirm the participation of Armenia's forces in the conflict. For instance, while not leading to any agreement between the parties, the "package deal" and the "step-by-step" approach elaborated within the OSCE Minsk Group in 1997 stated that the armed forces of Armenia should withdraw to within the borders of the Republic of Armenia (see paragraph 61 above). Similar demands were made by the UN General Assembly in March 2008 (paragraph 67) and by the European Parliament in April 2012 (paragraph 70). In January 2005 the Parliamentary Assembly of the Council of Europe, noting the occupation by Armenian forces of "considerable parts of the territory of Azerbaijan", reaffirmed that independence and secession of a territory may not be achieved in the wake of "the de facto annexation of such territory to another state" (paragraph 64). The ICG report of September 2005 concluded, on the basis of statements by Armenian soldiers and officials, that "there is a high degree of integration between the forces of Armenia and Nagorno-Karabakh" (paragraph 65). Indications of service of Armenian soldiers in the "NKR" is also available in cases before this Court and elsewhere (paragraphs 76 and 77).

177. As the Court stated in *El-Masri v. the Former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, § 163, ECHR 2012), it will, in principle, treat with caution statements given by government ministers or other high officials, since they would tend to be in favour of the government that they represent or represented. However, statements from high-ranking officials, even former ministers and officials, who have played a central role in the dispute in question are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavourable light. They may then be construed as a form of admission (see in this context, *mutatis mutandis*, the judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 14, § 64).

178. Accordingly, it is striking to note the statements of representatives of the Republic of Armenia which appear to go against the official stance that the armed forces of Armenia have not been deployed in the "NKR" or the surrounding territories. The statement by Mr Manukyan, the former minister of defence, has already been mentioned (see paragraph 62 above).

Of even greater significance is the speech given by the incumbent president of Armenia, Mr Serzh Sargsyan, to leaders of the Ministry of Defence in January 2013, in which he declared that the goal of Armenian foreign policy was to achieve legal recognition of the victory attained by "our Army" in the Nagorno-Karabakh war (paragraph 72). It should be noted as well that the Armenian Government in the present case have acknowledged, with reference to the 1994 military co-operation agreement, that the Armenian army and the "NKR" defence force co-operate in a defence alliance.

179. While Mr Jirayr Sefilyan could not be considered as an official representative of the Republic of Armenia, as a prominent political figure and former military commander who had served during the war, the Court has regard to his statement in an October 2008 interview: "The whole world knows that the army of the NKR is a part of the armed forces of Armenia" (paragraph 68).

In contrast, the Court notes that the opinion of Dr Bucur-Marcu (paragraph 73) was commissioned by the respondent Government and thus must be treated with caution in the circumstances.

180. The number of Armenian soldiers serving in the "NKR" is in dispute; the respondent Government have stated that they are no more than 1,500 persons while the applicants rely on the figures given by the IISS and the ICG in 2002-2005 which indicated that 8,000 or 10,000 Armenian troops are deployed in Nagorno-Karabakh (see paragraphs 63 and 65 above). The Court need not solve this issue as, based on the numerous reports and statements presented above, it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated.

(b) Other support

181. The integration of the two entities is further shown by the number of politicians who have assumed the highest offices in Armenia after previously having held similar positions in the "NKR" (see paragraph 78 above). The general political support given to the "NKR" by Armenia is also evident from the statements mentioned above in regard to Armenia's military involvement.

182. The Armenian Government have claimed that the "NKR" has its own legislation and its own independent political and judicial bodies. However, its political dependence on Armenia is evident not only from the mentioned interchange of prominent politicians, but also from the fact that its residents acquire Armenian passports for travel abroad as the "NKR" is

not recognised by any State or international organisation (see paragraph 83 above). In regard to the legislation and the judiciary, there is further evidence of integration. The Armenian Government have acknowledged that several laws of the "NKR" have been adopted from Armenian legislation. More importantly, the facts of the Court's cases of *Zalyan, Sargsyan and Serobyan v. Armenia* (paragraph 76) show not only the presence of Armenian troops in Nagorno-Karabakh but also the operation of Armenian law enforcement agents and the exercise of jurisdiction by Armenian courts on that territory. The case of Mr Grigoryan (paragraph 77) provides a similar indication.

183. Finally, the financial support given to the "NKR" from or via Armenia is substantial. The ICG reported that, in the 2005 "NKR" budget, only 26.7 per cent of expenditures were covered by locally collected revenues. An Armenian "inter-state loan" has provided the "NKR" with considerable amounts of money, in the years of 2004 and 2005 totalling USD 51,000,000. According to the ICG, relying on official sources, the loan made up 67.3% of the "NKR" budget in 2001 and 56.9% in 2004. While in place since 1993, as of 2005 nothing of the loan had been repaid (see paragraphs 80 and 81 above).

184. Further assistance is provided by the Hayastan All-Armenian Fund which, according to the Armenian Government, allocated about USD 111,000,000 to projects in the "NKR" between 1995 and 2012. While the fund is not a governmental institution and its resources come from individual donations, it is noteworthy that it was established by presidential decree. Furthermore, the Armenian president is the *ex officio* president of the Board of Trustees and the board includes among its members several present and former presidents and ministers of Armenia and the "NKR" as well as other prominent officials of Armenia. While these members do not make up a majority, it is clear from the board's composition that the official representatives of Armenia – together with their "NKR" counterparts – are in a position to greatly influence the fund's activities.

185. It is true that substantial financial assistance to "NKR" is also coming from other sources, including the US government and direct contributions from the Armenian diaspora. Nevertheless, the figures mentioned above show that the "NKR" would not be able to subsist economically without the substantial support stemming from Armenia.

(c) Conclusion

186. All of the above reveals that the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survives by virtue of the military, political, financial and other support given to it by

Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.

187. The Government's objection concerning the jurisdiction of the Republic of Armenia over Nagorno-Karabakh and the surrounding territories is therefore dismissed.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

188. The applicants complained that the loss of all control over, as well as of all potential to use, sell, bequeath, mortgage, develop and enjoy, their properties amounted to a continuing violation of Article 1 of Protocol No. 1, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The parties' submissions

1. The applicants

189. The applicants submitted that their rights under Article 1 of Protocol No. 1 had been violated as a direct result of an exercise in governmental authority on the part of the Republic of Armenia. They feared that their property had been destroyed or pillaged soon after they had been forced to flee the district of Lachin. Nevertheless, their complaint concerned an interference with all of their property, including land, which remained in Lachin and which they still owned or had the right to use. The applicants claimed that they had been continuously denied access to their property, and that this constituted an interference that was far from being in accordance with law. Moreover, whatever the aim of the occupation of Lachin, the total exclusion of the applicants from their property and the possible destruction of it without the payment of compensation could not be seen as proportionate to the achievement of that aim. The applicants did not see any prospect of being permitted to return to the properties or anywhere else in the occupied territories in the foreseeable future.

2. The respondent Government

190. The Armenian Government maintained that the applicants had not been prevented from entering the town of Lachin or the surrounding villages; in fact, they had never tried to enter these territories since their alleged flight and had not applied to the authorities of Armenia or the "NKR" to have any rights of theirs protected or restored. As mentioned already in regard to the issue of exhaustion of domestic remedies, Armenia's position in the OSCE Minsk Group negotiations – that the return of displaced persons can be considered only after a final settlement of the status of the "NKR" has been agreed upon – referred to displaced persons as a group and had no relevance to individuals who could obtain entry visas if they had a legitimate reason to enter the "NKR" or Armenia. Travel to the "NKR" involved no danger, as the only open entry point – the road from Yerevan to Stepanakert – is situated far away from the Line of Contact. The Government further asserted that the capture of Lachin – as well as Shushi/Shusha – was a lawful act of self-defence against war crimes committed by Azerbaijan, in particular military attacks on Stepanakert. It was necessary to create a "humanitarian corridor" to Armenia, as large numbers of people in Nagorno-Karabakh were killed and in danger of starving to death. Reiterating that the Republic of Armenia bore no responsibility for the actions alleged by the applicants, they submitted that there had been no violation of Article 1 of Protocol No. 1.

3. The Azerbaijani Government, third-party intervener

191. The Azerbaijani Government submitted that the applicants had not been expelled from the occupied territories in question by any legal act but had been forced to flee by virtue of the activities of the Armenian military forces. They were still physically prevented from entering the territories and enjoying their possessions, through the deployment of Armenian troops and land mines on the Line of Contact, at the same time as Armenians were being offered incentives to settle in the territories. This state of affairs was further shown by Armenia's position on returns in the OSCE Minsk Group negotiations. Allegedly, the level and strength of Armenian sustenance of the subordinate local administration had not lessened but rather intensified over the years. The Azerbaijani Government therefore contended that the Republic of Armenia was responsible for a continuing violation of the applicants' rights under Article 1 of Protocol No. 1.

B. The Court's assessment

192. The Court first refers to its above finding (see paragraph 149) that, while it is uncertain whether the applicants' houses still stand, they all have existing rights to their plots of land which constitute "possessions" within

the meaning of Article 1 of Protocol No. 1. Given that the matters complained of come within the jurisdiction of the Republic of Armenia (see paragraph 186), the question to be examined is whether Armenia is responsible for a violation of the applicants' rights to their possessions.

193. The applicants were forced to leave Lachin when the district came under military attack in May 1992. However, the Court's task is not to scrutinise this event as such, but to determine whether the applicants have been denied access to their property after 26 April 2002, the date on which Armenia ratified the Convention, and whether they have thereby suffered a continuous violation of their rights. Earlier events may still be indicative of such a continuous situation.

194. As has been mentioned above (see paragraphs 119-121), no effective domestic remedies, whether in the Republic of Armenia or in the "NKR", have been identified. Consequently, the applicants have not had access to any legal means whereby they could obtain compensation for loss of property or – more importantly in the present context – whereby they could gain physical access to the places where they used to live and thus to the property and homes left behind. The continuing denial of access is further shown by the respondent Government's assertion, albeit unproven, that the applicants' property – and, presumably, the property belonging to other displaced persons – had been allocated by the "NKR" administration to other individuals who had been recorded in the land register.

195. Moreover, twenty years after the ceasefire agreement, people displaced during the conflict have not been able to return to Nagorno-Karabakh and the surrounding territories. The Court notes, in this respect, the resolutions passed by the UN General Assembly and the European Parliament (see paragraphs 67 and 69 above). In the Court's view, it is not realistic, let alone possible, in practice for Azerbaijanis to return to these territories in the circumstances which have prevailed throughout this period and which include the continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the Line of Contact, an overall hostile relationship between Armenia and Azerbaijan and no prospect of a political solution yet in sight.

196. Consequently, there has been an interference with the applicants' rights under Article 1 of Protocol No. 1 in that they have continuously been denied access to their property and have thereby lost the control over it and any possibility to use and enjoy it (see *Loizidou v. Turkey*, cited above, § 63). This amounts to an interference with the peaceful enjoyment of their possessions.

197. The Armenian Government submitted that the capture of Lachin and the creation of a land link between Armenia and Nagorno-Karabakh involved a lawful act of self-defence. The Court takes note of the claims that the district of Lachin was of military strategic importance and that there was a need to deliver food, medicine and other supplies into Nagorno-Karabakh.

However, whether or not these circumstances could constitute a justification for interfering with the individual rights of residents in the area, the capture of Lachin in May 1992 has no direct bearing on the issue under examination which is whether the applicants' inability to return and the consequent continuous denial of access to their property could be seen as justified.

198. Nor does the Court find that the ongoing negotiations within the OSCE Minsk Group on the issues relating to displaced persons provide a legal justification for the interference with the applicants' rights. These negotiations do not absolve the Government from taking other measures, especially when negotiations have been pending for such a long time (see, *mutatis mutandis*, *Loizidou*, cited above, § 64; *Cyprus v. Turkey*, cited above, § 188). In that connection the Court refers to Resolution 1708 (2010) on *"*Solving property issues of refugees and displaced persons*"* of the Parliamentary Assembly of the Council of Europe which, relying on relevant international standards, calls on member states to "guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts of the status of a particular territory" (see paragraph 100 above).

199. Guidance as to which measures the respondent Government could and should take in order to protect the applicant's property rights can be derived from relevant international standards, in particular from the UN Pinheiro Principles (see paragraph 98 above) and the above-mentioned Resolution of the Parliamentary Assembly of the Council of Europe. At the present stage, and pending a comprehensive peace agreement, it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.

200. The Court is fully aware that the respondent Government has had to provide assistance to hundreds of thousands of Armenian refugees and internally displaced persons. However, while the need to provide for such a large group of people requires considerable resources, the protection of this group does not exempt the Government from its obligations towards another group, namely Azerbaijani citizens like the applicants who had to flee during the conflict. In this connection, reference is made to the principle of non-discrimination laid down in Article 3 of the above-mentioned Pinheiro Principles. Finally, the Court observes that the situation at issue is no longer an emergency situation but has continued to exist over a very lengthy period.

201. In conclusion, as concerns the period under scrutiny, that is, from 26 April 2002, no aim has been indicated which could justify the denial of access of the applicants to their property and the lack of compensation for

this interference. Consequently, the Court finds that there has been and continues to be a breach of the applicants' rights under Article 1 of Protocol No. 1 for which the Republic of Armenia is responsible.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

202. The applicants claimed that their inability to return to the district of Lachin involved a continuing violation also of their right to respect to homes and to private and family life. They invoked Article 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The applicants

203. The basis for the applicants' complaint was much the same as for the one submitted under Article 1 of Protocol No. 1: they maintained that the continuing refusal of the respondent Government to allow them to return to the district of Lachin violated also their rights under Article 8. In this respect, they referred to the case of *Cyprus v. Turkey* (cited above). Distinguishing their case from the situation in *Loizidou v. Turkey* (cited above), the applicants pointed out that, as opposed to Mrs Loizidou, they had all lived for many years in the Lachin area and had established homes and private and family lives there. There was allegedly no justification under Article 8 § 2 for the interference of their rights.

2. The respondent Government

204. The Armenian Government's submissions also essentially mirrored their arguments under Article 1 of Protocol No. 1. In addition, they maintained that, since the houses and the other property allegedly owned by the applicants had been destroyed in 1992, the applicants could not claim to have had any private or family life or a home in the area in question after that date. To support this assertion, the Government likened the applicants' situation to the case of *Loizidou v. Turkey* (cited above) and referred to the Court's finding (in § 66 of the judgment): "[I]t would strain the meaning of the notion "home" in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be

interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives." In any event, the Government argued, the alleged interference was in accordance with the law and was necessary in a democratic society: by providing a "humanitarian corridor" linking the "NKR" with the outside world, control over the district of Lachin served the interests of national security, public safety and the economic well-being of the country.

3. The Azerbaijani Government, third-party intervener

205. The Azerbaijani Government supported the position of the applicants.

B. The Court's assessment

206. The notions of "private life", "family life and "home" under Article 8 are, like "possessions" under Article 1 of Protocol No. 1, autonomous concepts; their protection does not depend on the classification under domestic law, but on the factual circumstances of the case. As noted above (paragraphs 137 and 150), all the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there for all or major parts of their lives. Almost all of them married and had children in the district. Moreover, they earned their livelihood there and their ancestors had lived there. Also, they had built and owned houses in which they lived. It is thus clear that the applicants had long-established lives and homes in the district, and that their situation contrasts with that of Mrs Loizidou in the case of *Loizidou v. Turkey* (cited above). The applicants have not voluntarily taken up residence anywhere else, but live as internally displaced persons in Baku and elsewhere out of necessity. In the circumstances of the case, their forced displacement and involuntary absence from the district of Lachin cannot be considered to have broken their link to the district, notwithstanding the length of time that has passed since their flight.

207. For the same reasons as those presented under Article 1 of Protocol No. 1, the Court finds that the denial of access to the applicants' homes constitutes an unjustified interference with their right to respect for their private and family lives as well as their homes.

208. Accordingly, the Court concludes that there has been and continues to be a breach of the applicants' rights under Article 8 of the Convention and that the Republic of Armenia is responsible for this breach.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

209. The applicants claimed that no effective remedies had been available to them in respect of their complaints. They relied on Article 13, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicants

210. The applicants maintained that no remedy had been provided to persons displaced from the occupied territories. They asserted that, not being ethnic Armenians, it would have been entirely fruitless for them to seek redress from the authorities of the Republic of Armenia or the "NKR". In their view, no remedy existed which was available, in theory and in practice, for their complaints. The lack of domestic remedies became even more evident when regard was had to the fact that the issue of the right of return of internally displaced persons constituted one of the major disagreements between the parties to the ongoing peace process and, accordingly, remained unresolved.

2. The respondent Government

211. The Armenian Government claimed that the applicants had had effective administrative and judicial remedies at their disposal, both in the Republic of Armenia and in the "NKR", which did not differentiate between displaced persons and people of another status. As regards the remedies in the "NKR", the Government referred to the Court's conclusions in the case of *Cyprus v. Turkey* (cited above, § 98) and maintained that the remedies of an internationally unrecognised entity should be exhausted unless their inexistence or ineffectiveness could be proved. The Government further referred to the arguments and the examples of cases presented in relation to the issue of exhaustion of domestic remedies and asserted that the applicants had failed to make use of the available remedies and had not submitted any evidence that the remedies were inexistent or ineffective.

3. The Azerbaijani Government, third-party intervener

212. The Azerbaijani Government essentially agreed with the arguments submitted by the applicants. In addition, referring to the case of *Doğan and Others v. Turkey* (cited above, § 106), they submitted that Armenia had not only failed to provide an effective remedy but had also failed to conduct an

investigation into those responsible for the refusal of access to property and homes.

B. The Court's assessment

213. The Court has already found violations of Article 1 of Protocol No. 1 and Article 8 of the Convention in regard to the continuing denial of access to the applicants' possessions and homes. Their complaints are therefore "arguable" for the purposes of Article 13 (see, for instance, *Doğan and Others v. Turkey* (cited above, § 163).

214. The present complaint comprises the same or similar elements as those already dealt with in the context of the objection concerning the exhaustion of domestic remedies. The Court reiterates its above finding that the respondent Government have failed to discharge the burden of proving the availability to the applicants of a remedy capable of providing redress in respect of their Convention complaints and offering reasonable prospects of success (see paragraph 120 above). For the same reasons, the Court finds that there was no available effective remedy in respect of the denial of access to the applicants' possessions and homes in the district of Lachin.

215. Accordingly, the Court concludes that there has been and continues to be a breach of the applicants' rights under Article 13 of the Convention and that the Republic of Armenia is responsible for this breach.

VIII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

216. The applicants claimed that, in relation to the complaints set out above, they had been subjected to discrimination by the respondent Government by virtue of ethnic and religious affiliation. They relied on Article 14, which provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The applicants

217. The applicants submitted that, if they had been ethnic Armenian and Christian rather than Azerbaijani Kurds and Muslim, they would not have been forcibly displaced from their homes by the Armenian-backed forces. They referred to the report of Mr David Atkinson and the resolution of the Parliamentary Assembly of the Council of Europe, according to which "the military action, and the widespread ethnic hostilities which

preceded it, led to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing" (see paragraph 64 above). Alternatively, the applicants submitted that they had been subjected to indirect discrimination by the Republic of Armenia, since the actions taken by the Armenian military and the Armenian-backed Karabakh forces had disproportionately affected Azerbaijani Kurds, who were individuals belonging to an identifiable group.

2. The respondent Government

218. The Armenian Government submitted that no issues arose under Article 14 of the Convention as there were no violations of the other Articles relied on by the applicants. In any event, the applicants had not been subjected to discriminatory treatment, because the military actions in Lachin had been aimed merely at opening a "humanitarian corridor" between Armenia and Nagorno-Karabakh and had not been directed against the residents of the district, whatever their ethnic or religious affiliation. Moreover, Kurds had never been subjected to discrimination in the Republic of Armenia or the "NKR" and the population of approximately 1,500 Kurds living in Armenia at present actively participated in social and political life and enjoyed all rights.

3. The Azerbaijani Government, third-party intervener

219. The Azerbaijani Government contended that the military actions in the "NKR" and the surrounding districts had had the aim of creating a mono-ethnic area. They further submitted that the applicants and other Azerbaijani internally displaced persons were still prevented from returning to their homes and possessions, while Armenians were being offered various incentives (including free housing, money, livestock and tax benefits) to settle in the territory, especially in Lachin. The intervener also stated that the Azerbaijani Kurds are different from the Kurds living in Armenia in that the former are Muslims whereas the latter practise the Yazidi religion.

B. The Court's assessment

220. The Court's findings of violations of Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention in the present case relate to a general situation which involves the flight of practically all Azerbaijani citizens, presumably most of them Muslims, from Nagorno-Karabakh and the surrounding territories and their inability to return to these territories. The applicants' complaint under Article 14 of the Convention is thus intrinsically linked to the other complaints. Consequently, in view of the violations found under the other provisions, the Court considers that no

separate issue arises under Article 14 (see, for instance, *Cyprus v. Turkey*, cited above, § 199; *Xenides-Arestis v. Turkey*, no. 46347/99, § 36, 22 December 2005; *Catan and Others*, cited above, § 160).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

221. 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."

222. The applicants claimed pecuniary damage in individual amounts varying from 808,950 to 2,093,050 Azerbaijani (new) manat (AZN), totalling – for all six applicants – AZN 8,386,600. This amount corresponds to approximately 7,900,000 euros (EUR). In addition, they claimed EUR 50,000 each in non-pecuniary damage. Finally, the legal costs and expenses, as of 6 October 2013, ran to 41,703.37 pounds sterling (GBP). At the Court's hearing on 22 January 2014, the applicants' representatives requested, however, that an expert be appointed to give an opinion on the evaluation of the damage incurred by the applicants.

223. The respondent Government opposed all the applicants' claims.

224. The Court, having regard to the exceptional nature of the case, finds that the question of the application of Article 41 is not ready for decision. It must accordingly be reserved and the further procedure fixed.

FOR THESE REASONS, THE COURT

1. *Dismisses*, by 14 votes to 3, the respondent Government's preliminary objection of non-exhaustion of domestic remedies;

2. *Dismisses*, by 15 votes to 2, the respondent Government's preliminary objection concerning the applicants' victim status;

3. *Holds*, by 14 votes to 3, that the matters complained of are within the jurisdiction of the Republic of Armenia and *dismisses* the respondent Government's preliminary objection concerning jurisdiction;

4. *Holds*, by 15 votes to 2, that there has been a continuing violation of Article 1 of Protocol No. 1 to the Convention;

5. *Holds*, by 15 votes to 2, that there has been a continuing violation of Article 8 of the Convention;

6. *Holds*, by 14 votes to 3, that there has been a continuing violation of Article 13 of the Convention;

7. *Holds*, by 16 votes to 1, that no separate issue arises under Article 14 of the Convention;

8. *Holds*, by 15 votes to 2, that the question of the application of Article 41 is not ready for decision; and consequently
   (a) *reserves* the said question;
   (b) *invites* the Armenian Government and the applicants to submit, within twelve months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 June 2015.

Michael O'Boyle
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Motoc;
(b) partly concurring, partly dissenting opinion of Judge Ziemele;
(c) partly dissenting opinion of Judge Hajiyev;
(d) dissenting opinion of Judge Gyulumyan;
(e) dissenting opinion of Judge Pinto de Albuquerque.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE MOTOC

The Court, which is being asked to rule on one aspect of a multi-faceted and complex dispute while excluding the other aspects, is inevitably put in a difficult position. Nevertheless, its ruling must be exclusively confined to the subject of the dispute as delimited by the applicants. An international court cannot refuse to judge on the basis of a difficult political context or ongoing Minsk negotiations; *non liquet* cannot be accepted.

This judgment carries special weight on account of the context, the Nagorno-Karabakh conflict, and also raises the question as to whether it is a timely judgment. The legal, historical and political aspects of the Nagorno-Karabakh conflict are extremely complex. "What is the cause of historical events? Power. What is power? Power is the sum total of wills transferred to one person. On what condition are the wills of the masses transferred to one person? On condition that the person expresses the will of the whole people. That is, power is power. That is, power is a word the meaning of which we do not understand." (Leo Tolstoy, "War and Peace").

How can we expect the Court to give a complete answer? Accordingly, the Court's judgments concerning the Nagorno-Karabakh conflict are going to be yet another example of the Court's empirical approach. "I am sitting with a philosopher in the garden; he says again and again 'I know that that's a tree', pointing to a tree that is near us. Someone else arrives and hears this, and I tell him: 'This fellow isn't insane. We are only doing philosophy." are the words of the outstanding empiricist author, Ludwig Wittgenstein. The limits of the empiricist approach of the Court are really visible in the second judgment of the Court regarding the Nagorno-Karabakh conflict, *Sargsyan v. Azerbaijan* (case no. 40167/06).

Let me clarify briefly three questions: 1) the question of proofs, 2) the question of jurisdiction, and 3) the question of secession.

1. The question of proofs

In my view, there was no need for a fact-finding mission in this case. The paragraph of the judgment is quoting extensively the proofs, similar with proofs required by the International Court of Justice. The Court has made extensive references to the standards of proof used in the Nicaragua judgment.

2. The question of jurisdiction

In the present case, in order to establish the exercise by Armenia of extra-territorial jurisdiction, the Court uses the concept of "effective control" and considers (see paragraph 186) that the central element of the

exercise of this jurisdiction lies in the fact that Armenia and Nagorno-Karabakh are "highly integrated":

> "... the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR', ... the two entities are highly integrated in virtually all important matters and ... this situation persists to this day. ... the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin."

The Court also uses another concept of strong legal significance, which is that of military occupation and presence.

Before proceeding to an analysis of the application by the Court of these different legal concepts, in particular that of "effective control", it is necessary to determine which concepts are applicable in the instant case. It is true that, as they are *lex specialis*, the various branches of international law have provided different legal answers to the question of interpretation of the concept of effective control. The Court itself had to clarify this matter in *Catan and Others v. Moldova and Russia*, paragraph 115 of which is cited in the present judgment. In order to outline the elements on the basis of which the Court's case-law could be made more systematic and consistent in the area of jurisdiction, these various answers need to be examined.

a) General international law

The applicable rules regarding the imputation to an external power of responsibility for the acts of a secessionist entity are set out in Articles 4 to 8 and 11 of the draft articles of the International Law Commission (United Nations) on the responsibility of States for internationally wrongful acts. The relevant parts of these Articles are worded as follows:

> **Article 4. Conduct of organs of a State**
>
> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> ..."
>
> **Article 5. Conduct of persons or entities exercising elements of governmental authority**
>
> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

Article 6. Conduct of organs placed at the disposal of a State by another State

"The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

Article 7. Excess of authority or contravention of instructions

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Article 8. Conduct directed or controlled by a State

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

In order for the international responsibility of an external power for the internationally wrongful conduct of a secessionist entity to be established, it has to be shown that the scope of the international obligation of the external power extends beyond its own territory to that of the secessionist entity, namely, that the international obligation in question can apply extra-territorially and that the acts or omissions of the secessionist entity which violate that obligation are attributable to that external power.

The International Court of Justice has established two criteria for determining the existence of extra-territorial jurisdiction. One of these is the "effective control" test.

The "effective control" criterion applies where there is evidence of "partial dependence" of the secessionist entity on the external power. That partial dependence can be presumed where, *inter alia*, the external power provides the secessionist entity with financial, logistic and military assistance, and information based on intelligence, and selects and pays the leaders of that entity. That partial dependence gives rise to the possibility for the external power to control the entity.

However, unlike complete dependence, partial dependence does not permit the Court to consider the authorities of the secessionist entity as *de facto* organs of the external power and to find that the general conduct of those authorities can be regarded as acts by that power; responsibility for particular conduct has to be determined on a case-by-case basis. The responsibility of the authorities of the external power cannot be engaged purely and simply on account of the conduct of the authorities of the secessionist entity; it has to be imputable to the conduct of the organs of that power acting in accordance with its own rules. Moreover, the control in question is no longer that exercised over the secessionist entity itself but that exercised over the activities or operations which give rise to the internationally illegal act.

Barring a few exceptions, international legal commentary and jurisprudence refer to only one of the ICJ's criteria: "effective control". However, the ICJ did in fact apply two different criteria of control in the two leading judgments it has delivered on the subject: *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 14, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43. The former concerned the responsibility of the United States of America for acts by the *contras*, an armed opposition group operating in Nicaragua, while the latter concerned the responsibility of Serbia and Montenegro for the activities of the Republika Srpska, a secessionist entity which had been created in 1992 with the assistance of the Federal Republic of Yugoslavia (FRY) on the territory of Bosnia and Herzegovina and had "enjoyed some *de facto* independence".

In the Nicaragua case the ICJ established three elements that had to be made out in order to establish strict control:

– the secessionist entity has to be completely dependent on the external power;

– this complete dependence has to extend to all areas of activity of the secessionist entity;

– the external power must have actually made use of the potential for control inherent in that complete dependence, that is to say, it must have actually exercised a particularly high degree of control.

The secessionist entity must be "completely dependent on aid" from the external power for a strict control to arise as a result of that complete dependence. Complete dependence means that the secessionist entity has "no real autonomy" and is "merely an instrument" or an "agent" of the external power, which acts through it. Use of the same currency or the fact that a substantial portion of the population of the secessionist entity has had, has claimed, or can claim, nationality or citizenship of the external power, are not in themselves a sufficient basis on which to conclude that the secessionist entity is an "agent" of the external power. The same is true of the payment of salaries, pensions and other advantages that the leaders of the secessionist entity may receive. In general, neither close political, military, economic, ethnic or cultural relations between the external power and the secessionist entity nor the provision of logistic support in the form of weapons, training or financial assistance will enable the existence of a relationship of complete dependence to be established without other evidence, even where the secessionist entity and the support it receives from outside, be this largely military, are complementary or pursue the same political objectives.

In the Nicaragua case the ICJ established two factors on the basis of which it considered that the existence of "complete dependence" could be

established. In its view, the fact that the external power had conceived, created and organised the secessionist entity, or the armed opposition group which created the secessionist entity, appeared to establish a strong presumption that the secessionist entity was completely dependent on the external power – whose creation it was – and was none other than its instrument or agent. However, it did not suffice for the external power to have taken advantage of the existence of a secessionist movement and used it in its policies *vis-à-vis* the parent State. For the dependence on the external power to be complete, the latter must also provide assistance taking various forms (financial assistance, logistic support, supply of information on the basis of intelligence) and which was crucial for the pursuit of the secessionist entity's activities. In other words, the secessionist entity is completely dependent on the external power if it can only carry out its activities with the various forms of support supplied by that power, so that withdrawal of that assistance would result in the cessation of the entity's activities.

In the Nicaragua case the ICJ drew a distinction between the assistance supplied by the United States to the *contras* during the first years and that supplied subsequently. It found that the *contras* were completely dependent on the United States at the beginning but that this had subsequently ceased to be the case as the *contras* had pursued their activities despite the fact that they had no longer received military assistance from the United States. In respect of the latter period the ICJ accordingly concluded that the United States did not exercise "effective control" in Nicaragua, the latter having failed to show that the United States had directed every activity by the *contras* on the ground.

b) The European Convention on Human Rights

There is no need to repeat the case-law of our Court here; references to the relevant precedents can be found in the judgment. Thus, it is reiterated in paragraph 168 that the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when this State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. This is followed by the relevant passages from *Catan*, in which the Court's case-law in the area is summarised and illustrated with a number of examples. However, the present judgment does not cite either the paragraphs of the decision in *Banković* (see *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII) which heavily rely on international law or paragraph 152 of the judgment in *Jaloud* (see *Jaloud v. the Netherlands* [GC], no. 47708/08, ECHR 2014), in which the Court

examined for the first time the concept of "attribution" under international law.

Accordingly, even if one can speak of *lex specialis* with regard to the Court's case-law, that *lex specialis* establishes, save in *Jaloud* (cited above, § 154), an automatic link between control and jurisdiction.

c) Application of the principles

The Court uses a number of legal concepts in the present case: occupation, military presence and, finally, effective control.

It can be said that in *Chiragov* the Court raises the threshold of effective control that it had established in earlier cases. In the case of *Loizidou* (see *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI), it took note of the substantial number of military officers present in Cyprus – a criterion it used again in the case of *Issa* (see *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004), in which it concluded that Turkey did not exercise its jurisdiction. In the present case, however, it notes that "[t]he number of Armenian soldiers serving in the 'NKR' is in dispute" but that it "need not solve this issue as, based on the numerous reports and statements presented above, it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date." It considers that "this military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue", and that "the evidence, not least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the 'NKR' are highly integrated" (see paragraph 180 of the judgment).

Finding that the "high degree" of integration between the "NKR" and Armenia – a criterion that it uses here for the first time – also exists in the political and judicial sphere, the Court concludes that the latter exercises "effective control" over the former.

It does not, however, consider it necessary to draw a distinction between effective control and the type of control that it had established in the case of *Ilaşcu* (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII).

It is true that in the present case the Court did not examine the question of attribution of the acts on account of which the applicants have been deprived of their possessions. However, the situation under general international law is not the same as in the earlier cases. Here, the Court has already established the existence of a high degree of integration between the two entities. A State may perhaps have been able to prove the involvement of the Armenian armed forces in the acts of the authorities of the "NKR" but for an individual wishing to assert their fundamental rights that would have

been very difficult, if not impossible. That is why this *lex specialis* was introduced. The Court's logic is much easier to see in the present case than in the earlier cases: even if it does not examine the question of attribution and does not seek to establish the actual participation of the Armenian forces in the acts that resulted in the applicants being deprived of their possessions, the exercise of jurisdiction by the defendant State has been convincingly established here.

In this respect, the Chiragov case looks to me to be the closer to the criteria of effective control, imposed by the ICJ. Even if the words "complete control" are not used by the Court, it does use "occupation" and "high degree of integration". The reasoning of the Court follows the resolutions of the Security Council which use the words "local Armenian forces" and indicate in the particular way of the Security Council (see my opinion in I. Motoc, "Interpréter la guerre, les exceptions de l'article 2&4 devant le Conseil de Securité de l'ONU"). In my opinion, this judgment represents one of the strongest returns to general international law or, to put it in a plastic way, to "Oppenheim world".

3. The question of secession

The Armenian government has invoked the fact that "NKR" is a state. The Court is not in a position to pronounce itself on issues of creation of a state and on secession in this case, or on self-determination. Judge Wildhaber expressed a similar view in his concurrent opinion in the *Loizidou* case. Any statement of the Court in this respect will be pure speculation since the Court has no arguments before it in order to judge the question of secession, remedial or not. The Court is not in a position to judge outside the framework of arguments and proofs brought before it and to develop theories of self-determination.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

1. In my view, the message of this judgment is not very clear. This difficulty is partly due to the methodology that the majority chose to follow in a case which, in essence, is about an international conflict with too many open and hidden dimensions for the European Court of Human Rights to examine within the scope of its traditional competence. If the message to be conveyed is that Armenia should do its utmost to engage effectively with Azerbaijan in finding a solution to the conflict through the Minsk or any other processes, I can follow the finding of a violation under Article 8 of the Convention and Article 1 of Protocol No. 1. Indeed I voted with the majority with this understanding in mind. There is no question but that persons such as the applicants who cannot access or claim compensation for their property should be able to do so. To my mind, however, Armenia's responsibility lies in its positive obligations under these Articles. The Court does not have competence *ratione temporis* to assess how the property was lost or interfered with at the time. Today the Court can only examine whether by the time the applicants lodged a complaint with the Court Armenia had done what is within its responsibility concerning the normalisation of the situation of those individuals. I see this obligation as one of a positive character.

2. The most complex issues in the case are yet again those of jurisdiction and attribution of responsibility. In the case of *Jaloud v. the Netherlands* ([GC], no. 47708/08, ECHR 2014), with reference to *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 3370/04, 418454/06, 8252/05, ECHR 2012), the Court attempted to further clarify the point that these concepts are not identical. They may overlap, but they may also be distinct. In paragraph 154 of that judgment the Court reiterated that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law (see *Catan and Others*, cited above, § 115)". In other words, the Court cannot assume that jurisdiction automatically leads to the responsibility of the State concerned for the alleged violations of the Convention obligations. At the same time, the absence of territorial jurisdiction does not mean that the State will never bear responsibility for those acts that it has generated, at least under general international law. The Court's case-law has been criticised for creating uncertainty or even confusion between those two concepts. The Court's argument has been that within the scope of Article 1 of the Convention it cannot proceed otherwise, since, according to the ordinary meaning of Article 1, the precondition for its assessment of responsibility is the establishment of jurisdiction of the respondent State.

Within this logic jurisdiction is a threshold criterion, as the Court has always emphasized.

3. The need to establish Armenia's jurisdiction over the district of Lachin so as to be able to assess whether Armenia has any obligations stemming from the Convention in relation to the applicants' properties is exactly the issue which makes this an impossible case. As stated above, while I think Armenia has important obligations, I have great difficulty in following the Court's reasoning in paragraphs 169-87 and therefore voted against establishing the jurisdiction of Armenia in the manner proposed in these paragraphs. Similarly, I cannot follow the inclusion in the section on Relevant International Law of references to the Hague and Geneva Conventions. There is no further reference to these international texts in the Court's assessment. The proposed legal weight of the reference to the documents regulating belligerent occupation is not at all clear.

4. Previously, the Court has examined cases such as *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI or *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII in which there was an evident and considerable presence of Turkish and Russian armed forces respectively in the disputed or occupied territories. The situation in northern Cyprus has been clearly defined as being contrary to the UN Charter. The situation after the demise of the USSR, with its 14th army remaining in the territory of Transnistria, does not raise too many doubts as to the control of that territory. As far as our case is concerned, however, we have information which is somewhat disputed. The Court did not accept the proposal of a fact-finding mission, which, as in the *Ilaşcu* case, might have provided it with much-needed evidence. In my view, the Court should have given proper weight to the UN Security Council assessment. The UN Security Council Resolutions have stated that "local Armenian forces" are well organised and have created their own governance of the territories that they occupy. It is also apparent from the UN Security Council Resolutions that Armenia can exercise influence on the Armenians of Nagorno-Karabakh. The question remains whether this is sufficient to establish Armenia's jurisdiction in the disputed territories and to conclude that there is high integration in virtually all important matters between Armenia and the "NKR".

5. Unlike the particularly scrupulous establishment of the facts normally carried out by the International Court of Justice ("the ICJ") in cases concerning disputes over territories, jurisdiction and attribution of responsibility, the Court appears to be watering down certain evidentiary standards in highly controversial situations. Furthermore, even if Armenia does have jurisdiction over Nagorno-Karabkh it is necessary, in order to find violations of the Convention, to attribute those alleged violations to Armenia, so one needs to have evidence that Armenia prevents the applicants from accessing their property in Lachin. The Court may not need

to do so if it adopts a different interpretation of jurisdiction and responsibility for the purposes of the Convention, even though it has always reiterated that it refers to the definition of jurisdiction traditionally employed in international law. As far as international law is concerned, the establishment of the fact of jurisdiction does not mean that Armenia a) had specific obligations under the Convention and b) committed an internationally wrongful act. In both respects a careful examination is needed.

6. The following passage from the Court's case-law does indeed indicate that it has developed its own interpretation of "jurisdiction and responsibility" for the purposes of compliance with the Convention obligations. The Court has stated: "Where the fact of such domination over the territory [i.e. effective control] is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions." (see paragraph 168 of the present judgment, citing *Catan and Others*, § 106). This approach contrasts with the methodology employed by the International Court of Justice, which uses the standard of "complete dependence". Moreover, that is the standard for State responsibility irrespective of the issue of jurisdiction.

7. The ICJ reiterated its approach to the issue of attribution of responsibility as concerns subordinate local administrations or similar groups in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro, ICJ Judgment of 26 February 2007). It stated that "[t]he first issue raised ... is whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) (Merits, Judgment, I.C.J. Reports 1986, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to 'determine ... whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government' (p. 62). Then, examining the facts in the light of the information in its possession, the Court observed that 'there is no clear evidence of the United States

having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf' (paragraph 109), and went on to conclude that 'the evidence available to the Court ... is insufficient to demonstrate [the contras'] complete dependence on United States aid', so that the Court was "unable to determine that the contra force may be equated for legal purposes with the forces of the United States' (pp. 62-63, paragraph 110)" (see ICJ, 391). The ICJ summed up by saying (in §§ 392 and 393 of the aforementioned judgment) that "[t]he passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious. However, *so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them*, a relationship which the Court's Judgment quoted above expressly described as 'complete dependence'" (emphasis added).

8. The ICJ's required standard of proof is high and it has, through several cases, developed a detailed methodology regarding different elements of evidence submitted by the parties. For example, in our case the applicants submitted to the Court statements allegedly made by high-ranking Armenian politicians. The Court has chosen to refer to the Nicaragua case in order to explain its decision to admit in evidence these statements, which, according to the Court's interpretation, show the high level of integration between the armed forces of Armenia and the NKR entity (see paragraphs 178-79). The Court refers to paragraph 64 of the Nicaragua judgment, which indeed explains that "the Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value". At the same time, in paragraph 65 of that same judgment – to which the Court does not make reference – the ICJ explains the limits of such a method. It states: "However it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take

account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also have regard to whether the text of the officia1 statement in question appeared in the language used by the author or on the basis of a translation (see I.C.J. Reports 1980, p. 10, paragraph 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by officia1 communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably sometimes had to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact." According to the facts of the present case, the applicants referred to statements of Armenian leaders and an interview was published in the newspaper (see paragraphs 62 and 68). In accordance with the principles stated by the ICJ in the Nicaragua case, in such circumstances the principle of equality between the parties is of paramount importance as is a proper assessment of the source of such statements. The procedure followed by the Court concerning these pieces of information remains unclear and does not appear to have complied with the principles of fairness and caution.

9. As for the Agreement on Military Co-operation between Armenia and Nagorno-Karabakh (see paragraph 175), there are many such agreements between two or more States. One would hope that they do not automatically result in the loss of jurisdiction or the acquisition of control over new territories for the purposes of international responsibility and do not in themselves represent a threat to the neighbouring countries. The letter, legal character and practical consequences of the agreement have to be examined carefully. It may well be that in terms of international law such an agreement between a State and a non-recognised entity does not have any legal value. It may also be that the international community, wishing to end the conflict in the region, does not appreciate such a document and condemns it. However, the manner in which the Court invokes the 1994 Agreement coupled with the assertion that the Republic of Armenia "has been significantly involved in the Nagorno-Karabakh conflict from an early date" (see paragraph 180) makes one wonder what the scope of the case is. Is it really a case about the lack of access to property following the ratification of the Convention by Armenia or is it a case about the war in 1992 in Azerbaijan and its consequences (see paragraphs 18-20)?

10. There is no question but that the Court has many choices. It may or may not choose to pronounce on broader questions of international law, such as the war and its consequences. With this case it has chosen to make certain pronouncements. It has done so in earlier cases too, but such a choice is still unusual for the Court. I do not have a problem with an international court, such as the European Court of Human Rights, taking

cognizance of the broader picture. On the contrary. However, in that case the Court has to be consistent and do so in all relevant cases. There have been cases in which the Court has, on the contrary, openly refused to take into consideration arguments deriving from international law. This point does not, however, answer the more difficult question as to whether the European Court of Human Rights should apply a different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction. I have serious reservations in that regard.

11. The Court has now established that Armenia controls the "NKR" in the same way as Turkey controls northern Cyprus or Russia controls Transnistria. From now on it seems that the presumption will be that alleged violations of human rights within the "NKR" should be brought against Armenia. There is no doubt that one should not support a Convention vacuum in Europe. I do not think that Nagorno-Karabakh is such a vacuum. Clearly, cases coming from there should be adjudicated.

12. However, it is essential in my view that in this category of cases, as in other cases, a proper attribution of responsibility test should be used after the Court has identified the nature of the Convention obligation at stake. The Court has already done this, for example in cases that have arisen following the dissolution of the Socialist Federal Republic of Yugoslavia and in particular in the so-called "bank savings" cases. In *Kovačić and Others v. Slovenia* the Court examined the question of attribution of responsibility with regard to the specific context of State succession (see *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, 3 October 2008) and also Judge Ress's Concurring Opinion). In the case at hand, the conclusion is that "the denial of access to the applicants' homes constitutes an unjustified interference with their right to respect for their private and family lives as well as their homes" (see paragraph 207). It is not previously explained by what means Armenia has denied access to their homes, unless one considers that by the very fact that Armenia has, in the Court's view, jurisdiction over Nagorno-Karabakh it denies access to homes. It is with this in mind that I voted against finding a violation of Article 13 since in my view the Court did not have sufficient information regarding whether property claims were indeed not examined by local courts. As I have explained above, this approach fails to address the real issue in the case. To my mind, the question is whether given that Armenia can influence the local Armenian government in Nagorno-Karabakh and that it is one of the parties to negotiations, it bears responsibility for not having taken positive steps over many years which would have permitted the return of displaced persons or compensation. I cannot qualify that as a denial of property rights. It is an issue of positive obligations having regard to the more general context of international law. For all these reasons I did not find that Armenia has jurisdiction over

Nagorno-Karabakh in the manner indicated in the judgment but I did find that Armenia has failed to comply with its positive obligations under Article 1 of Protocol No. 1 to the Convention and Article 8 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE HAJIYEV

The obvious fact of occupation of Nagorno-Karabakh and the surrounding region, constituting almost one fifth of the territory of Azerbaijan, by the Armenian Republic, has been politically recognised by four resolutions of the UN Security Council, by resolutions of the UN General Assembly, by the Parliament of the European Union, the Parliamentary Assembly of the Council of Europe and decisions of other international organisations. I note, with satisfaction, that with the present judgment the European Court has confirmed this fact, once again, by a judicial decision. The Court has come to that conclusion on the basis of irrefutable evidence indicating that the Republic of Armenia, through its military presence and provision of military equipment, has been significantly involved in the Nagorno-Karabakh conflict from an early date. The military support has been – and continues to be – decisive for the conquest of and continued control over the Azerbaijani territories. According to the Court, the evidence, not least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated, that the so-called "NKR" is under the influence of Armenia and enjoys its military, financial and political support, and that Nagorno-Karabakh and all the surrounding occupied regions of Azerbaijan are under the direct control of Armenia. As rightly noted by T. Ferraro, effective control is the main characteristic of occupation as, under international humanitarian law, there cannot be occupation of a territory without effective control exercised therein by hostile foreign forces (see T. Ferraro, "Determining the beginning and the end of an occupation under international humanitarian law" (International Review of the Red Cross, 2012, p. 140) The foregoing is fully consistent, in my opinion, with the requirements of Article 42 of the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, to which the Court refers in paragraph 96 of the judgment: " ... occupation within the meaning of the Hague Regulations exists when a state exercises actual authority over the territory, or part of the territory, of an enemy state (see, for example, E. Benvenisti, "The International Law of Occupation" (Oxford: Oxford University Press, 2012), at p. 43; Y. Arai-Takahashi, "The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law" (Leiden: Martinus Nijhoff Publishers, 2009), pp. 5-8; Y. Dinstein, "The International Law of Belligerent Occupation"(Cambridge: Cambridge University Press, 2009), pp. 42-45, paragraphs 96-102; and A. Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", 100 American Journal of International Law 580 (2006), pp. 585-586)". The requirement of actual authority is widely considered to be synonymous with that of effective control. Military

occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion, the physical presence of foreign troops is a *sine qua non* requirement of occupation (most experts consulted by the ICRC in the context of the project on occupation and other forms of administration of foreign territory agreed that "boots on the ground" are needed for the establishment of occupation - see T. Ferraro, "Occupation and other Forms of Administration of Foreign Territory" (Geneva: ICRC, 2012), pp. 10, 17 and 33; see also E. Benvenisti, cited above, pp. 43 et seq.; and V. Koutroulis, "Le debut et la fin de l'application du droit de l' occupation" (Paris: Editions Pedone, 2010), pp. 35-41)".

In paragraph 172 of the judgment, the Court rightly notes that " it is hardly conceivable that Nagorno-Karabakh – an entity with a population of fewer than 150,000 ethnic Armenians – was able, without the substantial military support of Armenia, to set up a defence force in early 1992 that, against the country of Azerbaijan with approximately seven million people [at present more than nine million – KH], not only established control of the former NKAO but also, before the end of 1993, conquered the whole or major parts of seven surrounding Azerbaijani districts". I would add that the occupation was accompanied by the forcible expulsion of almost 800,000 people, which in itself required substantial military force, military equipment and forcible retention. Accordingly, the continuing occupation requires no fewer human and material resources. Despite the frustration expressed by Armenian parents about their sons' military service in the occupied territories, which can be seen in the press (http://www.epress.am, news bulletin of 11 June 2014), the situation of occupation continues. As recently as November 2014, Armenia conducted military manoeuvres in the occupied territories under the symbolic name of "Unity" with the participation of 47,000 military personnel and a large quantity of military equipment (www.regnum.ru, news bulletin of 12 November 2014). The existing situation was contrary to the very essence of the European Convention of Human Rights at the time of its ratification by the Armenian Republic and continues to be contrary to it today. The Convention declares in its Preamble that the States which signed the Convention and which are members of the Council of Europe must demonstrate a profound belief in those fundamental freedoms which are the foundation of justice and peace in the world. This paradox has always reminded me of the words of Oscar Wilde: "I can believe in anything, provided that it is quite incredible".

The Council of Europe has reacted to the current situation in Resolution no. 1416 of the Parliamentary Assembly adopted on 25 January 2005, in which it was noted that "The Assembly expresses its concern that the military action and the widespread ethnic hostilities which preceded it, led

to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing. The Assembly reaffirms that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the *de facto* annexation of such territory of another State. The Assembly reiterates that the occupation of foreign territory by a member State constitutes a grave violation of that State's obligations as member of the Council of Europe and reaffirms the right of displaced persons from the area of conflict to return to their homes safely and with dignity."

As can be seen from the above-mentioned Resolution, the Assembly, by reflecting the existing picture, points to the ethnic nature of the expulsion of people from their homeland.

Taking into account the circumstances and the arguments of the applicants, which, in my view, had to be adequately answered, I disagreed with the majority's conclusion that no separate issue arises under Article 14 of the Convention.

Thus, the applicants' loss of all control over, as well as any possibility to use, sell, bequeath, mortgage, develop or enjoy, their property; the respondent Government's continued refusal to allow them to return to their homes in Lachin; and their failure to provide an effective or indeed any remedy to persons displaced from occupied territories are the result of discrimination and accordingly, in my opinion, are in violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention and Article 8 and Article 13 of the Convention. The Court has repeatedly indicated that Article 14 of the Convention does not prohibit every difference of treatment. According to the Court, it is necessary to develop criteria on the basis of which it can be determined whether a given difference of treatment in securing the human rights and freedoms guaranteed in the Convention is contrary to Article 14. Following the principles which can be inferred from the legal practices of the numerous democratic countries, the Court will find that the principle of equal treatment is violated where a difference of treatment has no objective and reasonable justification. A difference of treatment in securing the rights and freedoms guaranteed by the Convention must not only pursue a legitimate aim; Article 14 will also be violated if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Rasmussen v. Denmark*, 28 November 1984, § 38, Series A no. 87, and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 177, Series A no. 102).

The aforementioned legal approach of the Court, when applied to the circumstances of the present case, demonstrates an obvious inequality of treatment with regard to the applicants. This difference of treatment does

not pursue a legitimate aim and has no objective and reasonable justification. The applicants stress, not without reason, that they have been subjected to discrimination because the actions taken by the Armenian military forces have disproportionately affected them. I also agree that when considering the applicants' Article 14 claim, the standard of proof which the Court adopts should not be equated with the criminal standard of proof applicable in common-law domestic courts. Other human rights tribunals do not require this high standard. Judge Mularoni, in her partly dissenting opinion in *Hasan Ilhan v. Turkey*, noted: "I consider that as the Court persists in requiring in the context of Article 14 complaints of discrimination on grounds of racial or national origin a 'beyond reasonable doubt' standard of proof, this will result in the removal in practice of human rights protection guaranteed by Article 14 in areas where the highest level of protection, rather than the highest level of proof, should be the priority. There could be no more effective a tool for ensuring that the protection against discrimination on grounds of racial or national origin will become illusory and inoperative than to expect victims to submit themselves to such a high standard of proof. In reality, the application of such a high standard is tantamount to rendering it impossible for applicants to prove that there was a violation of Article 14. I would add that this high standard is not required by other leading human rights tribunals". The given principle was recognised by the Court in the case of *Nachova v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, ECHR 2005-VII). Where, as in this case, on the face of it there is clear evidence of differential treatment of two different ethnic groups it should be for the State to show that such treatment is not discriminatory This is because they have exclusive access to the reasons behind their actions and accordingly are aware of whether the apparently differential treatment has some other innocent explanation.

The evidence suggests not only that the expulsions were discriminatory but that the respondent State has since allowed the return of non-Azeri who were displaced. This is not only clear evidence of a discriminatory policy but illustrates the ongoing nature of the violations. Moreover, in support of a finding that the treatment of the applicants was discriminatory we can add the fact that after the ethnic cleansing of non-Armenian inhabitants of the Lachin region, a policy of populating the region with Armenians from the Republic of Armenia was pursued. Thus, according to the Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh, the FFM conducted interviews in Lachin District with certain Lachin residents who had Armenian passports and claimed to take part in Armenian elections.

Accordingly, the applicants, who were expelled from Lachin more than twenty years ago and have no access to their homes in Lachin, are not in a position to assert their rights guaranteed under the Convention as they were discriminated against, contrary to Article 14 of the Convention taken in

conjunction with Article 1 of Protocol No.1 to the Convention and Article 8 and Article 13 of the Convention.

DISSENTING OPINION OF JUDGE GYULUMYAN

It is with regret that I find myself in deep disagreement with the Grand Chamber judgment in the present case and cannot subscribe to either the reasoning or the conclusions of the majority for several reasons.

Firstly, by failing to address the question of the international legal personality of the NKR (questions of self-determination and statehood) the Court has oversimplified the legal issue at hand. I believe that in determining that the alleged violations came within the jurisdiction of the Republic of Armenia the Court has confused two completely different concepts of international law – jurisdiction and attribution – and has effectively created an amalgamation of the two concepts. In so doing the Court has indirectly lowered to an unprecedented level the threshold for the responsibility of States for the acts of third parties, and has also contributed to the fragmentation of international law.

Secondly, in my view the evidence before the Court was not sufficient to discharge the high evidentiary burden that must be applied in this kind of sensitive case. Furthermore, the way in which the Court dealt with the admissibility and evaluation of the evidence was unacceptable and was an unfortunate case of application of different standards in different cases. I find it hard to accept the majority's selective approach regarding the resolutions of international organisations – accepting those favourable to the applicants and the intervening third party, while completely ignoring those favourable to the respondent State.

I will set out my own views here on some of the significant issues in order to clarify the grounds for my dissent.

Issues of Statehood and Self-Determination of Peoples: Status of the NKR under International Law

1. The Court failed to touch even slightly upon the issue of the status of the NKR. This issue is of primary importance, in my opinion, given the different rules of attribution and different standards for engaging the responsibility of States that apply in cases of actions by non-State-actors and groups on the one hand and States (whether recognised or unrecognised) on the other.

2. Thus, a State providing financial and any other form of assistance to another State would not be responsible for the acts of the latter, but only for the aid and assistance provided (Article 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ARS"), Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, *Yearbook of the International Law Commission (ILC)* (2001) vol. 2, p. 26) unless of course it is proven that the latter State acted under the direction and control (ASR,

Article 17) or under the coercion (ASR, Article 18) of the former, which is extremely hard to prove. According to the ILC, the term "control" refers "to cases of domination over the commission of" conduct, whereas the term "direction" does not imply "mere incitement or suggestion but rather connotes actual direction of an operative kind" (Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, *Yearbook of the International Law Commission*, 2001, vol. 2, p. 69).

3. Thus, if the NKR is a State any aid and assistance provided to it by the Republic of Armenia would not put the territories controlled by the NKR under the jurisdiction of Armenia, unless it is shown that the acts carried out by the NKR are dominated and are under the operative direction of the Republic of Armenia.

4. It is important to differentiate between the present case and other situations previously examined by the Court, in order to show why the issue of status matters now whilst it did not really matter in earlier cases. Thus, in the situation concerning the so-called "Turkish Republic of Northern Cyprus – the TRNC" there were Security Council resolutions expressly "deploring" the declaration of independence of the TRNC and calling it "legally invalid", as well as "condemning" the secession of the TRNC in general, and calling upon the international community to refrain from recognising it (SC Resolution 541, UN Doc. S/RES/541, 18 November 1983; SC Resolution 550, UN Doc. S/RES/550 11 May 1984).

5. In the Cyprus cases there was simply no need to determine the status of the TRNC. The latter's status had already been determined by the Security Council, which had qualified it as an illegal regime. The status of the TRNC could play no role in the determination of the responsibility of Turkey; it simply had no legal significance.

6. The situation is completely different here however. The UN Security Council of UN has never declared the Nagorno-Karabakh movement legally invalid. Furthermore, the mere fact that the peace process is ongoing also suggests that the issue of the status of the NKR has thus far remained open and remains a matter of political negotiation (see paragraph 29 of the present judgment).

7. Accordingly, the lack of international condemnation and invalidation of the NKR and its declaration of independence means that its international recognition as a State in the future is also a possible option. That said, an important issue here is the definition of statehood.

8. According to the classic formulation of statehood under the Montevideo Convention on the Rights and Duties of States ("the Montevideo Convention"), a State "as a person of international law should possess ... a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states" (Art. 1, 26 December 1933, 165 LNTS 19).

9. That definition of statehood is widely accepted by international scholars (Sh. Rosenne, "The Perplexities of Modern International Law", *Hague Recueil*, vol. 291 (2001), p. 262; A. A. C. Trindade, "International Law for Humankind: Towards a New Jus Gentium", *Hague Recueil*, vol. 316 (2005), p. 205), different international institutions (Report of the Working Group on Jurisdictional Immunities of States and their Property, Annex to the Report of the ILC on the Work of its 51st Session, UN Doc. A/54/10 (1999), p. 157) and even courts (*Deutsche Continental Gas-Gesellschaft v. Polish State*, [1929] ILR, vol. 5, p. 13). Furthermore, States have consistently and uniformly invoked these criteria when determining their policies of recognition (see, for example, SC 383rd Meetings Record, UN Doc. S/PV.383 (2 December 1948)).

10. Thus, the NKR possesses a government, a permanent population and is capable of entering into relations, which is proven by the fact that the NKR does in fact have representations in a number of States. The NKR also controls territory; the central issue, however, is whether the NKR is entitled to all or at least part of that territory. And it is in this respect that the issue of self-determination becomes important.

Relevance of the right to self-determination of peoples

11. The Court's determination that the NKR is highly integrated with the Republic of Armenia is effectively an intervention in the determination of the status and legal personality of the NKR, something that even the Security Council has abstained from doing.

12. Notably, and as indicated above, the declaration of independence by the NKR has never been criticised or invalidated by the Security Council, unlike similar declarations in Southern Rhodesia, northern Cyprus or the Republika Srpska.

13. In this respect the ICJ's interpretation of the Security Council's approach to certain declarations of independence, expressed in the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* advisory opinion ("*Kosovo advisory opinion*"), is of central relevance. In that opinion the ICJ indicated:

> "Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.
>
> The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international

> law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council" (2010 ICJ Reports 403, pp. 437-38, § 81).

14. Thus, those Security Council resolutions examined by the ICJ were manifestations of the doctrine of collective non-recognition, that is situations where the SC calls upon the international community to refrain from recognising certain new entities as States, given that breaches of fundamental international obligations were involved during the process of their establishment (see, for example, J. Dugard & D. Raič, "The role of recognition in the law and practice of secession", *Secession: International Law Perspectives* (M. G. Kohen ed., Cambridge University Press 2006), pp. 100-01).

15. No such determination of illegality of conduct or call to the international community to refrain from recognition of the NKR was made in Security Council resolutions 822, 853, 874 and 884, concerning the NKR conflict. Thus, the Security Council has left open the possibility for the NKR to become a full and legitimate member of the international community and to exercise its right to self-determination.

16. Despite that, and in stark contrast to the Security Council's approach, the Court has now introduced qualifications that are, on the contrary, detrimental to the exercise of that right and thus fails to recognise that the creation of the NKR and its endurance was not only an expression of the will of the local population, but also done against the background of discriminatory policies of Azerbaijan.

17. In this respect the recent developments of the right to self-determination of peoples and the manifestation of that right, which has increasingly been labelled a right to "remedial secession", are of primary importance.

18. The concept of remedial secession denotes the possibility for certain cohesive groups of people to secede from a State in cases of gross human rights violations and repression by the latter or in case of incapability of materialising their right to self-determination internally (C. Tomuschat, "Secession and Self-Determination", in *Secession: International Law Perspectives* (M. G. Kohen ed., Cambridge University Press 2006), p. 35; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995, p. 120).

19. The concept is based on an *a contrario* reading of the "safeguard clause" of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Resolution 2625 (XXV) (24 October 1970)) ("the Friendly Relations Declaration"), which document was described by the International Court of Justice as reflective of customary

international law (*Kosovo advisory opinion*, p. 436, § 80) and is widely accepted by prominent scholars to constitute an authoritative interpretation of the UN Charter (G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law* (Sijthoff & Noordhoff 1979), pp. 73-88; I. Brownlie, *Principles of Public International Law* (7th ed., Oxford University Press 2008, p. 581).

20. The Declaration states as follows:

> "Nothing in the ... paragraphs [addressing the right of peoples to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."

21. The same "safeguard clause" is also used in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (UN Doc. A/CONF.157/23, ¶2 (25 June 1993). The "safeguard clause" suggests that in situations where States do not adhere to the conduct described in the second part of the clause, they do not merit protection of their territorial integrity (D. Murswiek, "The Issue of a Right of Secession – Reconsidered", in *Modern Law of Self-Determination* (C. Tomuschat ed., Martinus Nijhoff Publishers 1993, p. 92).

22. The understanding that violations of human rights create situations where a persecuted group becomes entitled to create its own statehood is further supported by a significant number of decisions of international and domestic institutions.

23. That right was implied in *Kevin Mgwanga Gunme et al v. Cameroon* (*Kevin Mgwanga Gunme et al v. Cameroon*, African Commission on Human and Peoples' Rights, Communication No. 266/03 (2009), §199) and in the *Katangese Peoples' Congress v. Zaire* cases of the African Commission on Human and Peoples' Rights, which indicated that the obligation to "exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire" exists absent "concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question" (*Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Communication No. 75/92 (1995), §6).

24. The same approach was also reflected in the concurring opinion of Judges Wildhaber and Ryssdal in *Louizidou v. Turkey*, and in the *Reference Re Secession of Quebec* by the Supreme Court of Canada, which proposed that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession" ([1998] 2 S.C.R. 217, ¶134 (Can.)).

25. This right to remedial secession has further been acknowledged by many prominent scholars of international law, such as Thomas Franck ("Postmodern Tribalism and the Right to Secession", in C. Brölmann *et al.* (ed.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers 1993, pp. 13-14) or James Crawford ("The Creation of States in International Law*",* (2nd ed., Clarendon Press 2006, p. 126).

26. The approach is also evident in the practice of States. Thus, only two years after the adoption of the Friendly Relations Declaration 47 States had recognised the State of Bangladesh on account of the violence directed against the local population, despite the fact that Pakistan recognised it only in 1976. 110 States today recognise the State of Kosovo.

27. Thus, the right to remedial secession is now widely acknowledged in international instruments, judgments and decisions of international courts and institutions, the practice of States and the doctrine of international law.

28. Given the above, it must be noted that the anti-Armenian violence in Sumgait in February 1988, the persecution of Armenians in Baku in January 1990, the so-called "Operation Ring" in spring 1991, resulting in the emptying of more than twenty Armenian villages, were all events predating the declaration of independence of the NKR, which was simply a logical response. It is noteworthy that all these events have been recognised by independent human rights organisations, EU and UN bodies (see, for example, Human Rights Watch, Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh (Human Rights Watch: New York, Washington, Los Angeles, London, Brussels 1994); Committee on the Elimination of Discrimination against Women, Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Armenia (UN Doc. CEDAW/C/ARM/1/Corr.1, 11 February 1997).

29. The continuing policies of ethnic discrimination by Azerbaijan today have also been recognised by the Committee on the Elimination of Racial Discrimination (Concluding Observation of the CERD: Azerbaijan, UN Doc. CERD/C/AZE/CO/4 (14 April 2005), the European Commission against Racism and Intolerance of the Council of Europe in all its three reports on Azerbaijan (adopted respectively on 28 June 2002, 15 December 2006 and 23 March 2011, as well as the Advisory Committee on the Framework Convention for the Protection of National Minorities (Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001 (22 May 2003); Second Opinion on Azerbaijan, ACFC/OP/II(2007)007 (9 November 2007)).

30. The State-level propaganda of ethnic hatred towards Armenians is further confirmed by the continuing destruction of Armenian cultural heritage – of which the destruction of the Jugha necropolis was the most barbaric manifestation – or the glorification of the Azerbaijani officer who was convicted of murdering an Armenian colleague in Hungary in his sleep.

31. It is against this background that the issue of self-determination of the people of the NKR should be viewed, since the self-determination of the people of the NKR has been the sole means of ensuring their protection from those discriminatory policies, and it is this background that the Court has completely ignored when exercising its jurisdiction. This background is, notably, a human-rights background and the Court, whose function is to protect human rights, has in fact produced a judgment that, as I have indicated above, is effectively detrimental to the exercise of the right to self-determination and therefore the fundamental rights and freedoms of the people of the NKR.

Exhaustion of Domestic Remedies

32. An issue closely related to the question of the NKR's international legal personality is the question of exhaustion of domestic remedies. In dismissing the respondent Government's objection of non-exhaustion, the Court stated that it was not realistic that any possible remedy "in the unrecognised 'NKR' entity" in practice could afford displaced Azerbaijanis effective redress (see paragraph 119 of the judgment). This approach conflicts with the established case-law.

33. It is noteworthy that in the case of *Demopoulos and Others* the Court acknowledged the fact that even *de facto* entities may have effective remedies, and that it was the particularities of the remedies at hand that made them ineffective. Thus, the Court found that there was no direct, or automatic, correlation of the issue of recognition of the self-proclaimed State and its purported assumption of sovereignty over northern Cyprus on an international plane and the application of Article 35 § 1 (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, ECHR 2010, § 100). On the basis of the Court's findings in the case of *Demopoulos and Others v. Turkey*, it has to be noted that the fact that the sovereign status of Nagorno-Karabakh is not recognised by any State does not exempt the applicants from the duty to exhaust domestic remedies within the NKR.

34. There is absolutely no doubt that there is an established and working judiciary within Nagorno-Karabakh. However, the applicants had never made any attempt to lodge a claim before the courts of the NKR and had failed to provide any evidence that there were insurmountable obstacles to bringing proceedings in those courts. The fact that the applicants live outside the territory of the NKR provides no grounds for justifying their failure to pursue such remedies.

35. Borders, whether *de facto* or *de jure*, are not an obstacle to the exhaustion of domestic remedies. Thus, in *Pad and Others v. Turkey* ((dec.), no. 60167/00, 28 June 2007, § 69) concerning Iranian villagers shot in the border area by Turkish security forces, the Court upheld the Government's

objection on grounds of non-exhaustion of domestic remedies and noted that, given the applicants' ability to instruct a lawyer in the United Kingdom, they could not claim that the judicial mechanism in Turkey – a foreign country – was physically and financially inaccessible to them. The fact that the applicants in the present case have successfully instructed English lawyers to act on their behalf shows that their abilities were not limited.

36. The sole obstacle to the applicants' ability to exhaust the remedies available to them in the NKR has been erected by their own Government. Azerbaijan has announced its intention to "punish" people who visit the NKR without its permission by declaring them "*persona non grata*" and denying their further entry into Azerbaijan. Amongst those on the "black list" are members of parliament from Britain, Germany, France, Russia, as well as several other European countries, and others from as far away as Australia and Uruguay. This may be the reason why the applicants' lawyers did not try to lodge a claim before the courts of the NKR.

37. The majority's conclusion that the respondent Government failed to discharge their burden of proving that there was an appropriate and effective remedy available to the applicants is the result of procedural deficiencies.

As can be seen from paragraphs 113-14 of the judgment, the respondent Government discharged their burden of proving that there was an effective remedy available to the applicants, but the President of the Court decided that the additional documentary material, including two judgments acknowledging the ownership rights of two displaced plaintiffs of Azeri ethnicity and delivered by the First Instance Court of the NKR, should not be included in the case file.

38. Absent any explicit provisions relating to the admissibility of evidence in the Convention, the Court, as a rule, takes a flexible approach, allowing itself an absolute discretion when it comes to the admissibility and evaluation of evidence. There are no procedural barriers to the admissibility of evidence, as the Grand Chamber of the Court reiterated in *Nachova v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). In some cases the Court has accepted new evidence even after the deliberations on the merits before the delivery of a judgment (see *Vučković and Others v. Serbia* [GC], no. 17153/11, 25 March 2014, and *W.A. v. France* (dec.), no. 34420/07, 21 January 2014).

39. By a letter dated 7 June 2013 the Deputy Grand Chamber Registrar informed the Government Agent of the respondent State that the President of the Grand Chamber had decided to obtain the parties' oral submissions. Moreover, the "Notes for the guidance of persons appearing at hearings before the Court" enclosed with the aforementioned letter enabled the parties to rely on "any additional documentary material" with the only condition that it "should be submitted at least three weeks before the hearing **or be incorporated verbatim in their oral submissions**". Following the

Registrar's instruction on the possibilities of submitting evidence, the Government relied, in their oral submissions, on two judgments (incorporated verbatim) delivered by the NKR courts in favor of two Azeris.

40. Bearing in mind the Court's established practice on admissibility of evidence submitted before the Court, and taking into account the importance of the two above-mentioned judgments for the consideration of the present case and the fact that this evidence was submitted, at least orally, by the Government in due time, the refusal to receive crucial evidence on the grounds that the documents were submitted late is not convincing and gives the impression that the Court simply suppressed evidence which was inconvenient for its conclusions. I hope that this is the first and last time that the Court of Human Rights itself fails to guarantee that justice be seen to be done.

41. Given the above considerations, I cannot agree with the opinion of the majority of the Grand Chamber that the applicants were not required to exhaust domestic remedies.

Establishment of the facts

42. In the vast majority of cases the Court has been able to establish the facts from the documentary evidence before it. In view of the Convention requirement to exhaust domestic remedies prior to bringing an application before the Court, in most cases the significant facts are no longer in dispute following the decisions of the domestic courts. In exceptional situations, as in the present case, where the domestic authorities were unable to carry out a fact-finding function owing to the applicants' failure to bring their claims before them, it falls to the Court to establish the circumstances of the case. It is evident that there were fundamental factual disputes between the parties in the present case, which were not possible to resolve by considering the submitted documents alone. The applicants submitted dozens of contradictory statements and evidence whose reliability can be considered only by means of investigatory measures. It is worth observing that the applicants made contradictory statements regarding the size of the land and homes in question and later submitted technical passports with substantially different figures.

43. Moreover, the fact of the existence of Armenian armed forces on the territory of the NKR cannot be substantiated by the Court on the basis of the hearsay evidence referred to by the applicants' representatives and dubious expert opinions. Therefore fact-finding was a precondition to, and integral element of, any binding legal determination regarding the existence or non-existence of Armenian military control over the NKR. The only way for the Court to establish the facts of the case was therefore to carry out a fact-finding mission as in the cases of *Loizidou v. Turkey* and *Ilaşcu and Others v. Moldova and Russia* or hear evidence from witnesses and conduct an

investigation as in the case of *Georgia v. Russia (I)*. Article 19 of the Convention obliges the Court "to ensure the observance of the engagements undertaken by the High Contracting Parties", which requires the comprehensive scrutiny of each application's admissibility and merits. Where the facts cannot be established on the basis of the parties' written submissions, the right of the Court to initiate a fact-finding mission turns into a legal obligation to do so in order to be in line with its obligations under the Convention.

44. A fact-finding mission was necessary not only for a decision regarding the admissibility of the case, but also for the consideration of the merits. The Court cannot come to any reasonable decision as to the size of the house and the land allegedly owned by the applicants purely on the basis of the contradictory documents submitted by them. In particular, concerning Mr Chiragov's alleged property, his representatives submitted that he used to have a house with a surface of 250 sq.m. However, in the document submitted in order to prove the fact of his ownership of the house it is stated that his house was 260 sq.m. On the other hand, in the technical passport relating to the house it is stated that the house had a surface area of 408 sq.m. The Court referred in this regard to Article 15 § 7 of the UN Pinheiro Principles (see paragraph 136), which is not relevant because it is about the non-existence of documentary evidence, whereas here we have conflicting documents concerning the same subject.

45. In this respect, in so far as the facts are concerned, the Court had no alternative but to go through the fact-finding procedure or take other investigative measures set out in Rule A1 of the Annex to the Rules of Court in administering proper and fair justice. Without carrying out one of these procedures the Court was not able to come to a definitive conclusion, at least in assessing the victim status of the applicants (admissibility criteria) and the merits of the case.

46. It is also strange, to say the least, that the Court has accepted the resolutions of some of the international organisations as fact, while completely ignoring others. In this respect it is important to note the report of the OSCE Fact-Finding Mission which states very clearly that the "FFM found no evidence of the involvement of the Government of Armenia in the Lachin settlement." The UN Security Council resolutions which I am going to cite below are yet another group of documents which are important and which, although being noted in the judgment, are ignored in the Court's evaluation.

Jurisdiction and Attribution

47. Central to the present case is the question whether the applicants are to be regarded as within the jurisdiction of the Republic of Armenia for the purposes of Article 1 of the Convention. In my opinion, the previous

jurisprudence of the Court on the issue of extra-territorial jurisdiction was in line with the generally accepted standards of responsibility of States for international wrongful acts as these have been codified by the International Law Commission ("ILC") or applied and interpreted by the International Court of Justice ("ICJ"). The opinion expressed by the Court in the current case, however, is a new and – in my opinion – regrettable tendency.

48. The fundamental issue here lies in the method according to which the Court deems Armenia's jurisdiction to be established. As the Court states in paragraph 169, it is not referring to the agency exception, but to the "effective control over territory" exception. The Court indicates:

> "Instead, the issue to be determined on the facts of the case is whether the Republic of Armenia exercised and continues to exercise effective control over the mentioned territories and as a result may be held responsible for the alleged violations".

49. The crux of the judgment on the issue of jurisdiction is in paragraph 180, where the Court states as follows:

> "[B]ased on the numerous reports and statements presented above, it finds it established that the Republic of Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over their territories in issue, and the evidence, not the least the 1994 military co-operation agreement, convincingly shows that the armed forces of Armenia and the 'NKR' are highly integrated".

Thus, according to the majority this case – like *Catan and Others v. Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012) – is a situation where the extra-territorial exercise of jurisdiction is based on the "effective control of an area" exception. How it is different, however, from other previous cases examined by the Court is that this control is allegedly exercised through "a subordinate local administration" (as I will indicate below, in the Cyprus cases such control was established on the basis of the direct involvement of the military forces of Turkey and not through "a subordinate local administration").

50. The fundamental problem lies in the Court's failure to distinguish situations where the control over the territory is established through "a subordinate local administration" from situations where control is established through "the Contracting State's own armed forces". And this is not simply a difference in fact; it is a difference in law, since both situations are concerned with different rules of attribution.

In *Catan* the Court claimed that it did not deal with attribution at all, indicating that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law" (see *Catan*, cited above, § 115; see also *Jaloud v. the Netherlands* ([GC], no. 47708/08, § 154, ECHR 2014)). This, in my

opinion, is a fatal oversimplification and the primary reason why the Court has come to the conclusion that Armenia is responsible for the events that have occurred in the territory of Lachin.

51. This oversimplification is also the primary reason why I cannot agree with the Court. I will try to explain exactly why below.

Jurisdiction cannot be established without attribution of conduct

52. In my opinion, the very concept of a "subordinate local administration" implies that the rules of attribution are necessarily involved (see, for example, A. Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, vol. 18 (2007), p. 658, fn. 17).

53. Control over a territory by a local administration, no matter how effective or obvious such control is, can have no consequences for the responsibility of a Contracting State unless the acts of that local administration are attributable to that State or – in the language applied by the Court – if that local administration is "subordinated" to the State. Absent such attribution (or "subordination") there is no control over the territory by the State and thus its jurisdiction cannot be established and, therefore, its responsibility cannot be involved.

54. In fact attribution is also involved where control is exercised through "the Contracting State's own armed forces". The difference is only in the rule of attribution involved.

These rules of attribution are – of course – to be found in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, 2 *Yearbook of the International Law Commission* (2001) 2, p. 26) (hereinafter "the ARS"), which have been favoured by the General Assembly (GA Resolution 56/83, UN Doc. A/56/589, 28 January 2002) and have been widely accepted as reflecting customary law on the matter. In particular, the ARS have also been referred to by the European Court in a number of cases (see, *inter alia*, *Blečić v. Croatia* [GC], § 48, no. 59532/00, ECHR 2006-III; see also *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 319-21, ECHR 2004-VII).

55. Thus, in a case of control over a territory exercised through "the Contracting State's own armed forces", the rule involved is the attribution of "Conduct of Organs of a State" (Article 4 of the ARS), whereas in a case of control over a territory exercised through "a subordinate local administration", the rule involved is the attribution of "Conduct Directed or Controlled by a State" (Article 8 of the ARS).

56. Accordingly, attribution is always involved. The difference is that attribution of the conduct of armed forces of a State to that State is intrinsically implied, whereas attribution of acts of a local administration has to be proven and the threshold of the control required for such attribution has to be determined (given the ongoing debate on the matter in the doctrine of international law).

57. Thus, it would not be redundant to emphasise once again that the concept of "effective overall control" used by the Court in the Cyprus cases is a jurisdictional test and qualifies the level of control exerted by the State over territories outside its recognised borders, whereas the notions of "effective control" or "overall control" are attribution tests and refer to the State's control over individuals, groups or entities (see, for example, M. Milanovič, "State Responsibility for Genocide", 17 *European Journal of International Law* (2006), p. 586).

58. The equation of the two concepts is also unacceptable and is an attempt to show the need to prove one factor rather than two.

It would be relevant to state here once again that despite the special character of the European Convention on Human Rights as a human rights treaty (see, *inter alia*, *McElhinney v. Ireland* [GC], no. 31253/96, § 36, ECHR 2001-XI (extracts)), the Court has indicated on a number of occasions that "the principles underlying the Convention cannot be interpreted and applied in a vacuum" and that the Court "must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, **determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part**..." (see *Behrami and Behrami v. France*, and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, emphasis added, § 122; see also *Bankovič et al. v. Belgium and other NATO member states* (dec.) [GC], no. 52207/99, § 57).

59. Bearing that in mind, the approach applied by the Court in the present case is nothing but circumventing and turning a blind eye to the rules of general international law. This approach effectively results in the confusion and fusion of the notions of jurisdiction and attribution and the creation of a standard of responsibility, which is unprecedented in the practice of international courts and tribunals and is exactly what the Court warned against earlier: the application of the Convention in a vacuum.

Earlier case-law of the Court is implicitly consistent with the differentiated application of rules of attribution and jurisdiction

60. As indicated above, the Court's previous case-law on the issue of extra-territorial jurisdiction was, in my opinion, in line with the generally accepted standards of responsibility of States for international wrongful acts

as these have been codified by the International Law Commission or applied and interpreted by the International Court of Justice. Therefore, no support can be found for the Court's current position in that jurisprudence.

Starting with the Cyprus cases, despite the fact that the European Court has indicated on a number of occasions that a State's effective overall control over a territory can be established through a subordinate local administration, until quite recently the Court had not had a clear-cut case where control would be established through such administration alone, and the Cyprus cases are not an exception. Indeed, in all cases examined by the European Court, except for *Catan*, the Contracting State was directly involved either on account of its significant military presence (see *Loizidou v. Turkey* (merits), 18 December 1996, § 56, *Reports of Judgments and Decisions* 1996-VI; *Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV) or through its direct involvement in the violations in issue (which is already a case of the "State agent authority" exception).

In this regard the Cyprus cases stand as an important guideline. It is true that in both *Loizidou v. Turkey* and *Cyprus v. Turkey* the European Court indicated that "effective overall control over a territory" could be exercised through a subordinate local administration (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310, and *Loizidou v. Turkey* (merits), cited above, § 52). However, eventually such control was, in fact, established not on account of the control of the territory by the TRNC, but on account of the significant military presence of Turkey in northern Cyprus and their direct involvement in both the occupation of northern Cyprus and in preventing the applicant from gaining access to her property (see *Loizidou* (preliminary objections), cited above, § 63). The Court found in *Loizidou* (see *Loizidou* (merits), § 56):

> "It is obvious from the large number of [Turkey's] troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island"

The Court then proceeded to conclude that Turkey's responsibility for the acts of TRNC was engaged, but it was not the level of control over the TRNC that was decisive but the fact of direct control over the territory itself.

61. This means that the degree of control exercised over the subordinate local administration was not really important for the Court, since irrespective of the degree of control over the TRNC itself the fact that Turkey had direct control over the island through its own forces would engage Turkey's positive and negative human rights obligations.

62. Thus, the relevant rule of ARS applicable in these cases is the attribution of Conduct of Organs of a State (Article 4):

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and

> whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Thus, the Turkish forces, whose conduct is obviously attributable to Turkey, were the means of establishing control over the territory.

63. As the Court indicated in *Cyprus v. Turkey* (cited above, § 77):

> "Having effective overall control over northern Cyprus, its [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration ..."

Thus, that control was over the territory of northern Cyprus (a matter of jurisdiction) and not over the TRNC (a matter of attribution) and in that respect whether that local administration survives through Turkey's support or not, or what degree of control Turkey exercises over that administration are secondary issues, it is Turkey's direct control over the territory that matters (and therefore the claim of the intervening third party that these cases support the "overall control" test of attribution is without merit).

64. Thus, the Cyprus cases do not in fact provide a conclusive rationale for establishing a State's indirect control over a territory through a subordinate administration either, since in those cases the subordinate local administration was not in fact the means of establishing effective overall control over the territory; the Turkish army was.

65. During the hearings both the applicants' representatives and the representatives of the intervening third party referred to the Court's judgment in *Ilaşcu and Others v. Moldova and Russia* (cited above) as an example of State control exercised over a subordinate local administration.

66. I believe, however, that *Ilaşcu* was not a case of effective overall control over a territory – either directly or indirectly – but a case of a State agent authority exception and therefore completely distinguishable and irrelevant.

67. Nowhere in the Court's analysis in *Ilaşcu* of Russia's extra-territorial exercise of jurisdiction (§§ 379-94) can terms such as "effective overall control over a territory", "puppet State" or "subordinate local administration" be found; these terms are used only in the Court's general description of situations where a State's extra-territorial jurisdiction can be established (examination of the law on the question of extra-territorial jurisdiction), and not where the Court applies the law to the facts of the case.

68. Thus, the Court's reasoning was based on a causal connection between the acts of the Russian forces and the applicants' subsequent deprivation of liberty by the local administration. Although it did receive some political and military support from the Russian Federation, that support was not the decisive factor in determining Russia's responsibility.

69. If Russia's support to the Transnistrian authorities had in itself sufficed to qualify the latter as a "subordinate local administration" through which Russia exercised effective overall control over the territory, there would have been absolutely no need to establish the direct involvement of the Russian forces in the arrest and subsequent treatment of the applicants in that case, since, as the Court has explained, the "effective overall control over a territory" engages the State's responsibility for all events occurring on that territory irrespective of the State's direct involvement, given that the "controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights" (see *Ilaşcu,* cited above, § 316, and *Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV).

70. Thus, the Court did not indicate in *Ilaşcu* that all the acts of the Transnistrian authorities were attributable to the Russian Federation, but only that on account of the support provided to those authorities "the Russian Federation's responsibility [was] **engaged** in respect of the unlawful acts **committed by the Transdniestrian separatists**, regard being had to the military and political support it gave them to help them set up the separatist regime and **the participation of its military personnel in the fighting**" (emphasis added, § 382).

71. In terms of public international law, this is not an attribution of acts of the Transnistrian authorities to the Russian Federation as such (which is tantamount to qualifying the Moldovan Republic of Transnistria as a "puppet state"), but the establishment of a State's responsibility for aiding and assisting another entity. Thus, Article 16 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts provides for the responsibility of States for "[a]id or assistance in the commission of an internationally wrongful act". The latter stipulates:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> that State does so with knowledge of the circumstances of the internationally wrongful act;
>
> the act would be internationally wrongful if committed by that State."

72. Such responsibility cannot, however, be established *in abstracto*, but must be related to each and every specific act or violation in question, hence the requirement of Article 16(a) that the aiding and assisting State must have "knowledge of the circumstances of the internationally wrongful act". And the Court was obviously following that line of reasoning when it established the direct involvement of the Russian authorities in the detention of the applicants and emphasised their knowledge of the subsequent events in issue that took place after the applicants were handed over to the Transnistrian authorities (§ 384, emphasis added):

> "... the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transnistrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.
>
> **In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them"**

73. Thus, the Court did not conclude that the acts of the Transnistrian authorities were attributable to the Russian Federation, which would be the logical consequence should those authorities be regarded as a "puppet State", but only that the responsibility of the Russian Federation was engaged in relation to the specific acts, which is a language peculiar to the State's responsibility for aiding and assisting (ibid., § 385):

> "In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime"

74. Thus, it is the accumulation of Russia's collaboration with the Transnistrian authorities (not control thereof), knowledge of the fate of the victims and the direct involvement of the agents of the Russian Federation in the events in issue that together engaged the responsibility of the latter. These elements are completely in line with the above-mentioned rule of State responsibility for aiding and assisting the commission of illegal acts.

75. Another important element here is the causal link between the acts of the agents of the Russian Federation and the subsequent treatment of the victims.

76. This was not defined by the Court for the first time in *Ilaşcu*, however, but in the earlier case of *Soering v. United Kingdom*, in which it used the same language as in *Ilaşcu* (see *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161):

> "The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State .... It would hardly be compatible with the underlying values of the Convention that the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed."

77. The above wording used in the *Soering* judgment clearly and manifestly shows that the mere fact that the responsibility of a State is engaged through certain acts has nothing to do with attribution. The

contrary argument would bring us to the preposterous conclusion that the potential acts of the US authorities were attributable to the UK. Thus, in the case of the *Soering* judgment, too, we were in fact dealing with responsibility for aiding and assisting.

78. In *Ilaşcu* the responsibility of the Russian Federation was established on account of the cumulative combination of several factors: (1) direct involvement of Russian troops in the detention of the applicants, (2) the handing over of the applicants by the Russian troops to the Transnistrian authorities and their knowledge of the fate of the applicants, (3) support provided by the Russian authorities to Transnistria. Therefore, in *Ilaşcu* the responsibility of the State was established on account of its aid and assistance to the group perpetrating the illegal acts, while the threshold criterion of extra-territorial exercise of jurisdiction was established through the agency exception and by no means through the "effective overall control over a territory" exception, which is clear from the Court's reliance on the causality between the acts of the Russian troops and the subsequent treatment and deprivation of liberty that the applicants were subjected to.

79. Therefore, the *Ilaşcu* case, too, provides no support for the position of the Court expressed in the instant case, which is totally distinguishable. Absent any direct proof of the involvement of the forces of the Republic of Armenia in the deprivation of the applicants of their property or proof of huge numbers of those forces directly controlling the territories at issue, the only way of proving Armenia's extra-territorial exercise of jurisdiction is to prove the subordination of the NKR to Armenia, whereupon the NKR must be the means of establishing the control over the territory.

80. At first sight a deviation from the said approach can be observed in the *Catan* judgment. In that judgment the Court indicated that the case had nothing to do with attribution at all (§ 115). However, the European Court then went on to conclude that "the 'MRT''s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the 'MRT' administration during the period of the schools' crisis" (§ 122). Thus, unlike the wording used in the Cyprus cases, this is not control over the territory (jurisdiction), but control over an entity.

81. However, at the time *Catan* was being deliberated, the Court had already examined the *Ilaşcu* case. Thus, the findings of the Court can to a certain extent be explained by the inclination of the Court to apply the same standards for the protection of all human rights in the same geopolitical situation.

The standard of attribution to be applied

82. Having thus indicated that the issue of attribution is indispensable to the determination of the exercise of extra-territorial jurisdiction through a subordinate local administration, the next question to be answered is the standard of attribution to be applied, that is, the standard of attribution which must be used in order to determine whether the local administration is in fact subordinate or not, or in other words whether the local administration can be qualified as a *de facto* body of the respondent State.

83. When determining this standard, we must bear in mind that it is part of the general international law on State responsibility and therefore needs to be found in the practice of States. Another matter of which heed must be taken when determining that standard is the obligation of any international tribunal to avoid contributing to the fragmentation of international law, or rather a particular type of that phenomenon, where the same international legal concepts are interpreted in a different manner by different *fora*.

84. As the ILC has indicated in its report on fragmentation, there is a strong presumption against normative conflict in international law. The ILC has further specified that "[d]iffering views about the content of general law ... diminish legal security" and "put legal subjects in an unequal position vis-à-vis each other", given that "[t]he rights they enjoy depend on which jurisdiction is seized to enforce them" ("Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", UN Doc. A/CN.4/L.682, § 52).

85. That said, the uniformity of interpretation and application of general international law by different courts and other institutions stands as a prerequisite of international justice and legal order. Thus, bearing this consideration in mind, regard must also be had to the practice of other international institutions.

86. The general rule is described under the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARS), namely Article 8 ("Conduct Directed or Controlled by a State"), which provides:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of that State in carrying out the conduct".

87. The pertinent question is therefore what kind of control must be exerted by a State in order to result in the attribution to it of the acts of persons or of a group of persons (or indeed of an entity having all the features of a State).

88. According to the ICJ's reasoning in the *Military and Paramilitary Activities in and Against Nicaragua* case:

> "Participation of a State, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping [the non-state-actors] and the planning

> of the whole of its operation, is still insufficient in itself, ... for the purpose of attribut[ion]. [...E]ven the general control by the ... State over a force with a high degree of dependency on it would not in themselves mean, without further evidence, that the [...State] direct[s] or enforce[s] the ... acts. ... **For this conduct to give rise to legal responsibility of the [...State], it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed**" (1986 ICJ Reports 14, p. 65, § 115, emphasis added)

89. It is noteworthy that the ICJ has never deviated from the "effective control" rule, applying it consistently in all similar cases. Thus, in the *Armed Activities on the Territory of the Congo (DRD v. Uganda)* case, the ICJ did not attribute the acts of the so-called Congo Liberation Movement to Uganda, despite the established fact of Uganda's financial support and training provided to the former, the decisive factor being that the Congo Liberation Movement was not created by Uganda and that Uganda did not control the manner in which the assistance provided was being put to use (2005 ICJ Reports 168, p. 226, § 160).

90. In its most recent case relevant to the subject matter, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ yet again confirmed its approach, denying the attribution of acts of the Republica Srpska to Serbia and Montenegro, despite the military, financial and logistical support provided by Serbia to the former, the active exchange of military personnel between the two entities, which was far greater than any support provided by the Republic of Armenia to the Nagorno-Karabakh Republic, and despite the fact that many of the high-ranking military officials in the Republika Srpska maintained simultaneous positions in Serbia and actually retired in Serbia and despite the fact that, unlike the Nicaragua and Congo cases, the forces of the Republika Srpska were in fact created by Serbia (see, for example, M. Milanovič, "State Responsibility for Genocide", *op. cit.*, p. 598). The ICJ noted:

> "It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, ICJ Reports 43, p. 208, § 400).

91. Thus, the practice of the ICJ – the primary judicial body dealing with the responsibility of States – in the area is absolutely consistent. However, an alternative claim has been raised by the intervening third party that "overall control is sufficient", and that issue must therefore also be addressed here.

92. The concept of "overall control" has been developed and applied by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") (*Prosecutor v. Tadič,* Case No. IT-94-1-A, Judgment of the Appeals Chamber of 15 July 1999, § 137).

93. However, the ICTY is not concerned with issues of State responsibility, but with issues of international criminal responsibility of individuals. Therefore, its primary purpose (or rather its sole purpose) when applying the "overall control" test was to determine the nature of the armed conflict in question, that is, to prove the involvement, if any, of Serbia and Montenegro in the conflict which was taking place on the territory of Bosnia and Herzegovina and not to determine the attribution of acts of local Serbian forces to Serbia.

94. Thus, the ICJ openly rejected any possible application of the "overall control" test with regard to issues of State responsibility (see *Bosnia and Herzegovina v. Serbia and Montenegro*, op. cit., p. 209, § 403). Thus, according to the ICJ, the "overall control" test can be applied, for example, when determining whether the conflict is international or not, but not in any case when dealing with issues of State responsibility (*ibid.*, p. 210, § 404). That said, the reference by the intervening third party to the "overall control" test is, in my opinion, irrelevant.

95. Given the above, in my opinion determination as to whether Armenia exercises extra-territorial jurisdiction over the territory of Lachin is directly dependent on the issue of whether Armenia has effective control over the Nagorno-Karabakh forces, which, in turn, actually control the territory at issue.

Application of the effective control test to the relations between the Republic of Armenia and the Nagorno-Karabakh Republic

96. To sum up the effective control test, as described above, its application requires proof of direction and enforcement of conduct by the State. It requires not only material assistance to be provided by the State, but also proof of control over the manner in which such assistance is put to use. Additionally, evidence to support the finding that the State itself has created the subject at issue may contribute to establishing the existence of effective control exercised over that subject by the State. None of the above, however, has been established in the present case.

97. What we do know is that (i) Armenia has been providing funds to the NKR, but has not in fact been the only State to do so; (ii) a few high-ranking State officials had pursued political careers in the Republic of Armenia after first doing so in the NKR; (iii) several State officials had made statements about the unity of the people of the Republic of Armenia and the people of the NKR. These, in my opinion, hardly prove that the NKR is subordinate to the Republic of Armenia.

98. The Court has found it to be established that the Republic of Armenia and the All Armenian Fund have provided financial assistance. Nothing in the case supports the claim that Armenia has in fact influenced in any way the method and manner in which that financial assistance has been used by the NKR.

99. However, before addressing that issue in more detail one thing to be emphasised here and which the Court forgets is the reason why such assistance is being provided. What is not reflected in the judgment is the fact that this assistance is being provided to improve the inhuman conditions in which the people of the NKR find themselves as a result of the continuing blockade and military attacks by its only other neighbour – Azerbaijan.

100. The primary issue, however, is of course whether the Republic of Armenia is capable of directing or has in fact directed the acts of the NKR. In my opinion, the relevant Security Council resolutions and other United Nations documents are of major importance in assessing this matter.

101. Starting with the interpretation of the relevant Security Council resolutions, it should be pointed out that these documents, like any other legal document, are subject to precise and strict rules of interpretation.

102. Such rules of interpretation are to be found in general international law. As has been indicated by the ILC, "[w]hen seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT [Vienna Convention on the Law of Treaties] and especially the provisions in its articles 31-33 having to do with the interpretation of treaties" (Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/61/10, § 251).

103. Accordingly, these rules provide guidance in case of interpretation of the Security Council Resolutions, which should therefore be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the resolutions in their context and in the light of their object and purpose (Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Art. 31).

104. On the other hand, however, the ICJ has drawn attention to the "differences between Security Council resolutions and treaties [which means] that the interpretation of Security Council resolutions also require that other factors be taken into account" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), 2010 ICJ Reports, p. 442, § 94). Therefore, according to the ICJ:

> "The interpretation of Security Council resolutions may require ... to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as

> the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."

105. Thus, the relevant provisions of the Security Council Resolutions must also be interpreted in their context, taking into account all the developments – statements, reports and so on – that accompanied the Security Council deliberations at the time.

106. The first of the Security Council Resolutions on the matter – Resolution 822 (April 30, 1993) – expressly refers in its preamble to the "invasion of Kelbadjar district of the Republic of Azerbaijan by **local Armenian forces**" (SC resolution 822, UN Doc. S/RES/822, 30 April 1993, preamble, emphasis added), and not by the Republic of Armenia. The same distinction between the Republic of Armenia and the local Armenian forces is apparent from the Note by the President of the Security Council, cited in the preamble of the resolution, where the President, addressing the Council on behalf of the SC, draws a clear line of distinction between the issue of relations between Armenia and Azerbaijan and the hostilities on the ground (Note by the President of the Security Council, UN Doc. S/25539, 6 April 1993):

> "The Security Council expresses its serious concern at the deterioration of the relations between the Republic of Armenia and the Republic of Azerbaijan, and the escalation of hostile acts in the Nagorny-Karabakh conflict, especially the invasion of the Kelbadjar district of the Republic of Azerbaijan by local Armenian forces."

107. Yet another document that the SC Resolution 822 (1993) refers to in its preamble – the report of the Secretary-General dated 14 April 1993 (UN Doc. S/25600, §§ 7 and 8) – clearly indicates that while the regions of the Republic of Armenia adjacent to the border were subject to shelling from the Azerbaijani side, no hostile actions in response were taken by the Republic of Armenia itself:

> "On his first field mission, from 9 to 10 April, the acting United Nations Representative in Armenia visited the southern provinces of Ararat and Goris. In Several villages near the Azeri border the mission was shown evidence of substantial destruction, resulting from mortar shelling. While visiting the village of Khndzorask a mortar shell exploded only about 20 meters away from the United Nations vehicle, which was clearly marked as such. The mission also had to leave the village of Korndzor when tank fire began, apparently from the territory of Azerbaijan.
>
> ...on 12 April the United Nations Representative was able to carry out a reconnaissance, from Armenian airspace, of the border between the Republic of Armenia and the Kelbadjar district of Azerbaijan. No sign of hostilities, military movements or presence of the armed forces of the Republic of Armenia was observed."

108. A follow-up speech made by the Permanent Representative of France after the adoption of the SC Resolution 822 further confirmed this position. It emphasized that the preamble of the Resolution reflected "a reasonable balance between acknowledging that tension exist[ed] between

Armenia and Azerbaijan, and recognizing the localized nature of the fighting" (Provisional Verbatim Record of the Three Thousand Two Hundred and Fifth Meeting of the Security Council, UN Doc. S/PV.3205, 30 April 1993, p. 11). It was further noted that the clashes should be prevented from turning into a conflict between States – meaning Armenia and Azerbaijan (ibid.).

109. Thus, nothing in the text of the SC Resolution 822, documents referred to therein or statements of the States parties made in its respect, support directly or indirectly the claim that the NKR forces were being controlled by the Republic of Armenia and that the Republic of Armenia exercised control over the region through the NKR forces. Moreover, at the time of adoption of the said resolution Lachin was already under the control of the NKR.

110. The same is true of the other three Security Council resolutions. Resolution 853 refers to the "Armenians of the Nagorny-Karabakh" as the party that was supposed to comply with both Resolution 822 and 853 (SC resolution 853, UN Doc. S/RES/853, 29 July 1993, § 9).

111. It further urged "the Government of the Republic of Armenia to continue to exert its influence to achieve compliance by the Armenians of the Nagorny-Karabakh region of the Azerbaijani Republic with its resolution 822 (1993) and the present resolution ..." (ibid.). The acknowledgement of influence, however, has nothing to do with *de facto* control. The wording – "continue to exert" – is thus unequivocal and can be interpreted only as follows: (1) Armenia had influence over the NKR; and (2) Armenia had exerted its influence over the NKR to achieve compliance before.

112. Also in their follow-up speeches to the Resolution, members of the SC – France, Russia, United States of America, Brazil, Spain, Venezuela – referred clearly and unequivocally to the "Armenians of Nagorny-Karabakh", "Armenian community of Nagorny-Karabakh" or "local Armenian forces" (Provisional Verbatim Record of the Three Thousand Two Hundred and Fifty-Ninth Meeting, UN Doc. S/PV.3259, 29 July 1993). The only country to speak of Armenia's involvement was Pakistan – a State that has to this day failed to recognise the Republic of Armenia.

113. Yet another document, referred to in the preamble of Resolution 853 – the Report by the Chairman of the Minsk Conference of the CSCE – further confirms the distinct political approaches present in the NKR and Armenia; according to this report, whilst the President of Armenia reconfirmed his support for the CSCE Minsk Group timetable during the Chairmen's visit to Yerevan, the position of the leaders in the NKR was completely different ("In Nagorny Karabakh I found a completely different attitude on the part of the local Armenian community leaders", Report by the Chairman of the Minsk Conference of the Conference on Security and

Cooperation in Europe on Nagorny Karabakh to the President of the Security Council dated 27 July 1993, UN Doc. S/26184, 28 July 1993, §§ 4-5.) This is yet one more indication that Armenia and the NKR were not guided by the same political will.

114. Security Council Resolutions 874 and 884 are no different. Security Council Resolution 874 maintained the same line of distinction between the "conflict in and around the Nagorny Karabakh" and "tensions between the Republic of Armenia and the Azerbaijani Republic" (UN Doc. S/RES/874, 14 October 1993, preamble), whilst SC Resolution 884 also used wording similar to that of Resolution 853, calling upon "the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorno-Karabakh..." (UN Doc. S/RES/884, 12 November 1993, § 2).

115. Thus nothing in the four Security Council Resolutions supports the position that the Republic of Armenia exerted control over the NKR.

116. Another argument adduced in support of the claim of control of the NKR by the Republic of Armenia is the so-called "exchange of officials" argument. In this respect it must first of all, and yet again, be noted that this is a factor applied by the ICTY in the context of the "overall control" test, namely, in determining the nature of a conflict and not in order to solve issues of attribution. The classic case in this regard is the *Prosecutor v. Blaskič* case (Case No. IT-95-14-T, Judgment of the Trial Chamber of 3 March 2000), which dealt with the nature of the armed conflict between Bosnia and Herzegovina and the Croatian Defence Council of the so-called "Croatian Republic of Herzeg-Bosnia".

117. In *Blaskič*, however, the fact that Croatian military personnel served in the Croatian Defence Council's forces was not the sole factor determining the existence of overall control. In fact, the criteria of overall control were deemed by the Trial Chamber to be satisfied on account of the existence of a number of factors – these included, *inter alia*, (i) the exchange of personnel; (ii) the direct appointment of generals by Croatia; (iii) the fact that the personnel continued to receive wages from Croatia; (iv) the fact that they received direct orders from Croatia; and (v) their receipt of financial and logistic support (ibid., §§ 100-20).

118. None of this has been proven with respect to the relations of the forces of the Republic of Armenia and of the NKR. Neither direct appointments from Armenia, nor wages coming directly from Armenia, nor orders coming from Armenia have been proven by the facts of this case. Instead, the Court is talking about a generalised concept of high integration.

119. Furthermore, in *Blaskič* the exchange of personnel was circular in nature, with Croatian officers serving in the Croatian Defence Council for some time and then returning to service in the Republic of Croatia (ibid., § 115). In those circumstances it was obvious that service in the Croatian Defence Council was simply part of their service in the forces of the Republic of Croatia and was part of the latter's political agenda. No such

situation is present, however, in the case of the relations of the Republic of Armenia and the NKR, and the few examples produced by the Intervening Third Party are not indicative of a political agenda of transfer of State officials, but rather illustrate the peculiarities of the political careers of those few individuals, no matter how influential their positions.

120. Furthermore, this movement has been from the NKR to the Republic of Armenia and not vice versa, so I fail to see how this can contribute to the determination that the Republic of Armenia controlled the NKR, even if we apply and adhere to the "overall control" standards used by the ICTY.

121. Yet another factor which, in the opinion of the Court, proves the "high integration" of the forces of the Republic of Armenia and the NKR and with which, once again, I cannot agree, relates to the statements of State officials.

Thus, as the Court indicates in paragraph 177, "statements from high-ranking officials, even former ministers and officials, who have played a central role in the dispute in question are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavorable light" (see also *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 175, ECHR 2012). This rationale is taken word for word from the ICJ's *Nicaragua v. USA* judgment (*op. cit.*, p. 41, § 64).

122. In my opinion, however, the Court has applied the logic of the ICJ in a fundamentally different and incorrect manner.

123. The ICJ has used the statements of officials in evaluating claims relating to the facts (such as whether the USA had sent support to the contras in Nicaragua or not) and not in evaluating claims about the law (whether the acts of the contras were attributable to the USA or not).

124. Thus, issues of jurisdiction, attribution of conduct, "high integration" of forces, subordination of a local administration, and so on, are issues of law which are to be determined by the Court on the basis of facts and not the statements of State officials. Such statements can be referred to only to prove facts, on which, in turn, the determination of legal matters can be based. Such determination cannot be based directly on general statements.

125. What the Court has further failed to take into account is that such statements can be guided by patriotic and internal, as well as external, political considerations. Thus, the ICJ also noted that it had "*to interpret* the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact" (*Nicaragua*, *op. cit.* p. 41, § 65, emphasis added). However, I can see no such evaluation by the Court in this case.

126. In any event, such statements are also far from being a sufficient basis on which to establish that the Republic of Armenia in fact controls and

directs the actions of the NKR and that the NKR is a subordinate local administration installed by the Republic of Armenia.

127. Thus, I conclude that the Court failed to interpret the statements in their context, and that it was also wrong to use such statements as direct proof of integration of the armed forces of Armenia and the NKR, instead of using them as a means of proving facts, which, in turn, could be used to prove such integration.

128. Given the foregoing, I cannot concur with the Court's determination that the Republic of Armenia has jurisdiction over the territories controlled by the NKR and that the Republic of Armenia is responsible for any alleged violations of human rights that may occur on those territories.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I. Introduction

1. *Chiragov and Others* is a missed opportunity to address the most important problem of public international law at the beginning of the twenty-first century, namely the acknowledgment of a right to remedial secession in a non-colonial context. The core of this case concerns the international legality of the secession of the "Nagorno-Karabakh Republic", following the independence of the Republic of Azerbaijan from the Soviet Union, and its consequences for the rights and obligations of alleged displaced persons from the new, seceded "Republic", including the right to enjoy their property and family life in the district of Lachin and the obligation to exhaust the local remedies of the "Nagorno-Karabakh Republic"[1].

2. Adding to the complexity of these legal issues, the case has an extremely intricate factual basis, which has evolved over the last twenty years. The multiple weaknesses of the evidence presented by the parties, as well as the unfortunate rejection of both the taking of testimonial evidence and an on-site investigation by the European Court of Human Rights (the Court), only made it more difficult, indeed impossible, to establish most of the facts alleged by the parties. For that reason alone, and regardless of the legal problems related to the contested victim status of the applicants and the even more disputed jurisdiction of the respondent State over the territory where the alleged violations of the European Convention on Human Rights (the Convention) took place, it is my inner conviction that a finding on the merits is premature. A finding on the merits without a thorough evaluation of the core facts of the case, conveniently replaced by a sample of highly

1. The name Nagorno-Karabagh or Nagorno-Karabakh is of Russian, Persian and Turkish origin. Nagorno is the Russian word for "mountainous". Kara comes from Turkish and bagh/bakh from Persian. Karabagh or Karabakh may be translated as "black garden". The Armenian name for the territory is Artsakh. I will use the transliterated name Nagorno-Karabakh for the sake of consistency with the majority's judgment.

uncertain factual assumptions, runs the risk of not seeing the wood for the trees, or even worse, for some of the trees.

II. Non-exhaustion of domestic remedies

A. The constitutional and legal framework of the "Nagorno-Karabakh Republic"

3. The application fails already on the basis of the non-exhaustion of domestic remedies. Several reasons can be put forward to support this conclusion. First, there are no constitutional or legal provisions in the "Nagorno-Karabakh Republic" which prohibit ownership of land or other property by people of Azeri or Kurdish ethnic origin[2]. Second, anyone enjoying legal residence status in the territory of the "Nagorno-Karabakh Republic", regardless of nationality, has the right to return there[3]. Thus, people of Azeri or Kurdish ethnic origin may return to their places of former residence and claim their plots of land and homes and compensation for wrongful actions of the "Nagorno-Karabakh Republic" army[4].

4. Even accepting that the "Nagorno-Karabakh Republic" has not been recognised by the international community, the domestic means of redress of any alleged breaches of human rights must be exhausted if they are available to the applicants in the territory of Nagorno-Karabakh or the surrounding districts, including Lachin. The so-called "Namibia exception" has been enshrined in the Court's case-law, since the cases on the Turkish invasion of Cyprus, with the practical consequence that, when confronted with violations of Article 8 of the Convention and Article 1 of Protocol No. 1, the current and former inhabitants of a territory must exhaust the local remedies even in the case of a judicial system established by an unrecognised political regime, and even where they did not choose voluntarily to place themselves under its jurisdiction[5]. The State alleged to have breached its international obligation must first be given the

2. See Article 33 of the Constitution of the "Nagorno-Karabakh Republic".
3. See Article 25 of the Constitution of the "Nagorno-Karabakh Republic".
4. In Cyprus v. Turkey [GC], no. 25781/94, § 184, ECHR 2001-IV, the Court agreed with the Commission's analysis of the relevant constitutional provisions of the TRNC. I fail to understand why the constitutional framework of the "Nagorno-Karabakh Republic" has not been examined in the present case as well.
5. See Loizidou v. Turkey (merits), judgment of 18 December 1996, § 45, Reports of Judgments and Decisions 1996-VI, on the basis of the Advisory Opinion of the International Court of Justice (ICJ) on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p. 56, § 125.

opportunity to redress the wrong alleged by its own means and in its own legal system[6].

5. That being said, since there is no correlation between the international recognition of a State and Article 35 of the Convention, asking the applicants to exhaust domestic remedies in Nagorno-Karabakh evidently does not correspond to recognition of the "Nagorno-Karabakh Republic"[7]. The applicants have to exhaust the available remedies in the "Nagorno-Karabakh Republic" simply because there is a judicial system operating *de facto* in that territory which could provide them with effective redress.

B. The available domestic remedies

6. As a matter of fact, the competent court of Lachin is available to entertain the applicants' complaints regarding restitution of property to internationally displaced persons of Azeri and Kurdish origin and compensation for deprivation of their property. The evidence of that availability was provided by the judge of the competent court of Lachin himself. The local judge unequivocally stated that, according to the legal framework of the "Nagorno-Karabakh Republic", he could order restoration of property and just satisfaction to the victims of any forced displacement. Since the factual authenticity and legal force of this evidence was not rebutted by the applicants, it cannot be ignored by the Court[8]. Nonetheless, no attempt was made to submit the applicants' complaints to the competent court.

7. Furthermore, in respect of the alleged refusal of the Nagorno-Karabakh authorities to allow people of Azeri or Kurdish ethnic origin to return to their properties in Nagorno-Karabakh or the surrounding districts, it should be observed that no concrete instances were referred to of any persons who had been hindered from doing so. In any case, given the applicants' ability to instruct a lawyer in the United Kingdom, they could not claim that the judicial system in the "Nagorno-Karabakh Republic" was physically and financially inaccessible to them[9].

8. Thus, the majority's brief justification of the dismissal of the respondent Government's objection is not at all convincing. Only two

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6. This is a well-established rule of customary international law (see Interhandel Case, Judgment of March 21st 1959, ICJ Reports 1959, p. 27, and Article 14 of the Draft Articles on Diplomatic Protection of the International Law Commission (ILC).

7. See Demopoulos and Others v. Turkey (dec.), nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, § 100, 1 March 2010.

8. It is highly regrettable that this evidence, which has been available in the file since 2006, was simply ignored by the majority. No attention is given to this argument of the respondent State in paragraphs 117 and 118 of the judgment.

9. See Pad and Others v. Turkey (dec.), no. 60617/00, § 69, 28 June 2007, and ILC Third Report on Diplomatic Protection (A/CN.4/523), § 83.

arguments are presented in paragraph 118 of the judgment: the insufficiency of the domestic legal framework and the lack of domestic judgments on the exact issue here at stake. Furthermore, the majority denied the applicability of norms of "a general nature" concerning property to the applicants' claims, implying without any further explanation that the assessment of the facts of the case could not be based on these norms and thus assuming what had to be demonstrated. The logical fallacy incurred is patent. *Circulus in demonstrando*!

By so doing, the majority imposed their own assessment of domestic law, as if they were sitting as a first-instance court, without giving the domestic courts the opportunity to express their own views as to the application of domestic law to a novel legal issue, with possible systemic, major legal consequences in view of the estimated number of displaced persons[10].

C. Preliminary conclusion: deviating from *Cyprus v. Turkey*

9. A comparison of the present case with *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV) is revealing. In the inter-State case between Cyprus and Turkey, the Turkish Government presented a list of cases brought by Greek Cypriots in Turkish Cypriot courts, which included cases relating to trespass by other persons and unlawful cultivation of land belonging to Greek Cypriot plaintiffs in the Karpas area, and where the claims of the plaintiffs were accepted by the competent courts of the "Turkish Republic of Northern Cyprus" (TRNC). The Cypriot Government argued that any remedies which might exist in Turkey or in the "TRNC" were not practical or effective for Greek Cypriots living in the government-controlled area and that they were ineffective for enclaved Greek Cypriots, having regard to the particular nature of the complaints and the legal and administrative framework set up in the north of Cyprus. As regards the case-law of "TRNC" courts referred to by the Turkish Government, the Cypriot Government claimed that it related to situations that were different from those complained of in the application, i.e., to disputes between private parties and not to challenges to legislation and administrative action. The fate that befell the Cypriot Government´s arguments is well known: the Court considered that the Cypriot Government had failed to rebut the evidence laid before the Commission that aggrieved Greek Cypriots had access to local courts in order to assert civil claims against wrongdoers, and held that no violation of Article 13 of the Convention had been established by reason of the alleged absence of remedies in respect of interferences by private persons with the rights of

10. I have already referred to this censurable way of proceeding in a case where the persons potentially interested in the outcome of the case were not so numerous (see my separate opinion appended to Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, ECHR 2013).

Greek Cypriots living in Northern Cyprus under Article 8 of the Convention and Article 1 of Protocol No. 1[11]. The same should apply in the present case.

10. The Court should not have double standards, following one line of reasoning with regard to Cyprus and the opposite with regard to Armenia. In the Cypriot inter-State case, the Court did not require that the cases dealt with in the occupied part of Cyprus by "TRNC" courts should precisely concern restitution of property claims. It sufficed that civil claims of Greek Cypriots had been entertained by the "TRNC" courts to conclude that these courts had to be regarded as affording remedies to be exhausted. The Armenian Government produced evidence in support of their contention that court remedies were available and highlighted the successful claims brought by a number of Azeri and Kurdish litigants in Armenian courts and in "Nagorno-Karabakh Republic" courts in civil and criminal cases[12]. This unrebutted evidence should have sufficed for the Government's objection to be accepted.

11. The majority think it wise to close their assessment of the objection as to non-exhaustion of domestic remedies with consideration of the "political and general context" (paragraph 119). Unfortunately, the Court embarks upon an unnecessary political assessment of the conflict, based on appearances ("appear to have intensified"). This exercise is not welcome, because the political overtone of some statements of the Court may give the impression, certainly unfounded, but in any case regrettable, that the Court is a player with its own political views on the Nagorno-Karabakh conflict.

12. In conclusion, I am not persuaded that any attempt to use the available domestic remedies was destined to fail. Had the *Cyprus v. Turkey* standard been observed, the majority would have had to conclude that there were domestic remedies in this case as well, in view of the domestic legal framework and the case-law presented by the respondent State. Furthermore, a domestic court is willing to entertain the applicants' complaints, and that could have happened, at least from 2006 onwards. Even if the Parliamentary Assembly has stated that Nagorno-Karabakh is one of the "geographical 'black holes' where the Council of Europe's human rights mechanisms cannot be fully implemented"[13], the existence of doubts as to the efficacy of domestic remedies does not absolve the

11. See Cyprus v. Turkey, cited above, § 324.

12. Even if the majority do not take into account the final judgments presented by the respondent Government in the hearing before the Grand Chamber, which refer to complaints similar to those of the applicants in the present case, there are other judicial cases which concern criminal, labour and land law where persons of Azeri or Kurdish origin were successful before Armenian and "Nagorno-Karabakh Republic" courts, one of the cases referring to an inheritance claim by a person of Kurdish origin before a "Nagorno-Karabakh Republic" court.

13. See Parliamentary Assembly of the Council of Europe, Resolution 1547 (2007) on the state of human rights and democracy in Europe.

applicant from the obligation to, at least, try to use them[14]. It is regrettable that this principle is not upheld in the present case. In other words, for the majority, subsidiarity plays no role in this part of Europe.

III. Lack of victim status

A. Victim status with regard to the applicants' houses

13. The applicants complained about having been deprived of the possibility of accessing and enjoying their homes and plots of land. I will deal with these issues separately.

Regarding the applicants' houses, the Court does not have the means to know if they existed and, if so, when, how and by whom they were destroyed. Assuming that these houses were destroyed in 1992, the related complaints would be outside the temporal scope of the Convention, since Armenia only ratified it ten years later. Anticipating this objection, the applicants invoke not only their right to property, but also the permanent emotional link to the area where they used to live. The proof of this emotional link, let alone of emotions felt over a period of more than twenty years, is a herculean task that the applicants failed to fulfil. No evidence was brought to the Court to support the assertion that the applicants had – and still have – a permanent emotional link to an area that they left more than twenty-two years ago. In any case, this purely fictional contention serves only to replace the unfounded complaint regarding the applicants' right to their homes by a vague "right to live in a village", thereby widening the ambit of Article 8 well beyond its known borders[15].

B. Victim status with regard to the applicants' plots of land

14. Regarding the applicants' rights in respect of the plots of land in question, the situation is no clearer. The applicants acknowledged that they had never had a right to property under the USSR Constitution, the Azerbaijan Soviet Republic Constitution and Article 4 (State ownership of land) of the 1970 Land Code, but only a right to use the land. They claimed that they still had this right in 2005, when they lodged their complaints, although they had left Lachin thirteen years earlier, in 1992. No sufficient evidence of such right, neither documentary nor testimonial, exists in the file.

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14. See, for example, Sardinas Albo v. Italy (dec.), no. 56271/00, ECHR 2004-I, and Brusco v. Italy (dec.), no. 69789/01, ECHR 2001-IX.

15. In Loizidou (merits), cited above, § 66, the Court found, when interpreting the concept of "home" in Article 8: "Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives".

The grave discrepancies between the different versions of the applicants' complaints given at the various stages of the proceedings, and between those versions and the documentary evidence, the so-called technical passports that they themselves presented to the Court, have not been convincingly dissipated[16]. The information contained in the technical passports deviated considerably from that given in the application form. For example, the first applicant originally claimed that he owned a house of 250 sq. m, but his "technical passport" concerns a house of 408 sq. m and a storehouse of 60 sq. m not previously mentioned. Similarly, the fourth applicant originally stated that his house had an area of 165 sq. m, whereas the house described in the "technical passport" measures 448 sq. m to which, again, a previously unmentioned storehouse, of 75 sq. m, is added. The applicants have repeatedly been requested to submit further documentation on their property and to explain the divergences between the original statements and the "technical passports". No further documentation on the property allegedly owned by the applicants has been submitted, as the applicants said they were unable to obtain further documents. As to the above-mentioned discrepancies, the applicants have stated that when they met their representative in Baku in early 2005, owing to the brevity of the meeting they gave him only general information and it was agreed that they would submit copies of official documents by mail at a later date. Allegedly, the original statements were made from memory, without access to the documents, and it is therefore the information contained in the "technical passports" that should be taken into account.

The explanations offered by the applicants are not convincing, as their original statements were not general in nature but rather detailed in describing the extent of the property they claimed to own and the size of the land and houses. Also, the applicants' original claims – now changed through the submission of "technical passports" – had in some cases been confirmed in statements made by former neighbours. The testimony of witnesses, who were not cross-examined, can certainly not fill the gap in the applicants' evidence, having regard to such blatant contradictions.

15. The majority admit the "unclear" destination of the houses and other moveable property claimed by the applicants[17]. With regard to the land, and in order to establish the existence of "private ownership" or "personal property" in respect thereof, the majority entangle themselves in a discussion on the interpretation of the 1970 Land Code and the 1983 Housing Code of the Soviet Republic of Azerbaijan, without any reference

16. The majority themselves acknowledge these discrepancies in paragraph 142, but accept them in view of the "totality of evidence presented", meaning the statements of former neighbours and the documents showing the applicants' identities.

17. See paragraphs 146 and 149 of the judgment. Consequently, the simple question of the very existence of the houses, which was left open in the Court's admissibility decision, remains undecided even now.

to relevant national case-law or legal opinion. This virtual exercise becomes even more complex when the majority take in account the subsequent process of privatisation of the land which occurred in May 1992. The majority's dismissal of the legal force of this process, ultimately on the basis that it emanated from a non-recognised State and is therefore not legally valid, cannot be accepted, since it simply begs the question of the legitimacy of the privatisation process, based on the assumption of the international invalidity of all legislation of the Nagorno-Karabakh Republic, and thus contradicting, as mentioned above, previous positions of the Court on the validity of legislation approved by non-recognised States. There is no evidence in the file to justify the assumption that the privatisation law was enacted in order to entrench an advantageous position of ethnic Armenians or to prejudice citizens of Azeri and Kurdish ethnic origin. Finally, the majority seem to be oblivious of the rights of *bona fide* secondary occupants, whose legal position is also protected by international law, and namely by Principle 17 of the Pinheiro Principles.

C. Preliminary conclusion: the limits of the Pinheiro Principles

16. When judicial authorities are confronted with undocumented property restitution claims from refugees and displaced people, a certain degree of flexibility may be required, according to the Pinheiro Principles[18]. Indeed, in situations of forced, mass displacement of people it may be impossible for the victims to provide the formal evidence of their former home, land, property or even place of habitual residence. Nonetheless, even if some flexibility may be admitted in terms of the Court's evidential standards in the context of property claims by particularly vulnerable persons, such as refugees and displaced persons, there should be reasonable limits to the flexible approach of the Court, since experience shows that mass displacement of people fosters improper property claims by opportunists hoping to profit from the chaos. Unlimited flexibility will otherwise discredit the Court's factual assessment. Having failed to meet their burden of proof, the applicants relied on the Court's flexibility, which in this case exceeded all reasonable limits as it accepted clearly contradictory testimonial and documentary evidence as being sound and reliable. Such blatant contradictions would strongly suggest a fabricated version of the facts, thus undermining the applicants' victim status.

18. See Principle 15.7 of the Pinheiro Principles, invoked in the judgment. The considerable degree of the Court's flexibility can be seen in paragraphs 142, last sentence, and 143, of the judgment.

IV. Lack of jurisdiction

A. The time frame of the Court's assessment

17. Worse still than any other previously-mentioned shortcoming of the applicants' case is the objection of a lack of jurisdiction raised by the respondent State. With the evidence gathered in the file, it cannot seriously be established that the Armenian State has effective control of the "Nagorno-Karabakh Republic" territory. Nor can it be ascertained that the Armenian State has authority and control over State agents of that "Republic". There is simply no factual basis for these conclusions as the file stands.

In the circumstances of the present case, the Court had to ascertain whether, as a matter of fact, Armenia exercised effective control over "Nagorno-Karabakh Republic" territory and the surrounding districts, at least after 18 May 1992, i.e., the date of the taking of Lachin and the flight of its inhabitants, and until the date of delivery of the present judgment[19]. As in *Šilih*, the military actions in the district of Lachin at the relevant time (18 May 1992) did not constitute "the source of the dispute"; instead, they were "the source of the rights claimed" by the applicants, and to that extent come under the jurisdiction *ratione temporis* of this Court[20].

In actual fact, the majority did accept evidence related to events that occurred before the entry into force of the Convention in respect of Armenia, on the basis that "[e]arlier events may still be indicative of such a continuous situation" (paragraph 193). That evidence was assessed for the purpose of finding a "continuous violation" as claimed by the applicants, but not for the purpose of "justification" for the deprivation of the applicants' rights as claimed by the respondent State (paragraph 197). I cannot accept this one-sided approach to the evidence.

18. In making such an assessment, the Court could take as its basis all the material placed before it and, if necessary, material obtained *proprio motu*[21]. Unfortunately, the shortcomings of the evidence provided by the applicants were not remedied by any initiative of the Court to gather other evidence of its own motion.

I will assess the objection as to lack of jurisdiction on the basis of the available evidence, accepted by the majority, pertaining to different

19. In Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, §§ 330 and 392, ECHR 2004-VII, the Court assessed the effective control until the date of delivery of the Grand Chamber judgment. This approach was confirmed in Catan and Others v. Moldova and Russia [GC], nos. 43370/04, 8252/05 and 18454/06, §§ 109 and 111, ECHR 2012.
20. See Šilih v. Slovenia [GC], no. 71463/01, §§ 159-163, ECHR 2009. See for my interpretation of the Court's ratione temporis jurisdiction, my separate opinion in Mocanu and Others v. Romania [GC], nos. 10865/09, 45886/07 and 32431/08, ECHR 2014.
21. See Catan and Others, cited above, § 116.

military, political, administrative and financial arguments advanced by the applicants to support the contention of existing effective control by Armenia over the "Nagorno-Karabakh Republic". For that purpose I will review one by one all the items of evidence relied upon by the majority in the judgment.

B. The assessment of evidence of a military nature

(i) The 1994 military agreement between Armenia and the "Nagorno-Karabakh Republic"

19. The majority conclude that the Republic of Armenia "has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue" (paragraph 180). In fact, the majority's reasoning is built on a fallacious *argumentum ad ignorantum*, which draws a conclusion detrimental to the respondent State from the lack of information or incomplete or insufficient sources of information and the supposed impossibility of obtaining the necessary information (see paragraph 173: "and could not be expected to"), in order to argue that the applicants' allegations have been proven and the opposite allegations of the respondent Government have not been proven. This reasoning subverts the basic principle of the *onus probandi*, by releasing in practical terms the persons who have laid charges from their burden of proof and placing on the respondent party the burden of reversing those charges.

20. Worse still, the highly speculative nature of the majority's overall assessment of the military reality (see paragraph 174: "it is hardly conceivable that") shows clearly that the subsequent reasoning was aimed at proving a foregone conclusion. None of the subsequent three arguments of the majority supports adequately the said overall assessment, whose accuracy must be called into question. Neither the military agreement between the Republic of Armenia and the "Nagorno-Karabakh Republic" (see paragraph 175), nor the various political statements made by international organisations (see paragraph 176) and by Armenian politicians (paragraph 177) may be accepted as "decisive evidence" of the military control of the "Nagorno-Karabakh Republic" by Armenia.

21. The above-mentioned 1994 military agreement provides, among other things, for "mutual military exercises" and "mutual technical support", including the possibility for Armenian conscripts to do their military service in the "Nagorno-Karabakh Republic". The letter of the agreement is clear, referring explicitly to the "right" of conscripts of the Armenian Republic to carry out their fixed-term military service in the Nagorno-Karabakh army, as well as the right of conscripts of the "Nagorno-Karabakh Republic" to do their military service in the Armenian army (paragraph 4 of that agreement). The letter of the agreement should not therefore be misinterpreted as

imposing a legal obligation on Armenian conscripts to serve in the "Nagorno-Karabakh Republic". In addition, there is no evidence of a written or unwritten policy of mandatory military service of Armenian soldiers in the "Nagorno-Karabakh Republic"[22]. The exact number of conscripts of the Armenian Republic performing their service in the "Nagorno-Karabakh Republic" was not revealed by the respondent Government, arguing that it was a military secret. Since the Rules of Court have no specific regime of non-disclosure of evidence to the parties, the respondent State is clearly absolved from the obligation to provide the Court with highly confidential evidence that might be sensitive for national and military security, and it may not be censured for failing to do so[23]. In any event, the respondent State did provide some indicative information with regard to the military presence of Armenian conscripts pursuant to Article 4 of the 1994 agreement (see paragraph 75 of the judgment).

That being said, the relevant military agreement in itself contains nothing unique. Thousands of soldiers of other European nations have performed their military service on foreign ground, side by side with the local military forces, based on international agreements between the receiving States and the deploying States, some of them with United Nations backing[24]. In none of these cases, including those where cooperation has involved a considerable amount of manpower and financial means, has any inference of control by the deploying State been drawn.

(ii) The language of international organisations

22. The majority admit that there is no "conclusive evidence" as to the composition of the armed forces that occupied and secured control of Nagorno-Karabakh and they even refer to the dubious language used in the UN Security Council Resolutions (see paragraph 173). In fact, the wording

22. Reference to isolated cases evidently does not suffice. In fact, in paragraphs 76 and 182, the majority refer to three cases (Zalyan, Sargsyan and Serobyan v. Armenia, nos. 36894/04 and 3521/07) that have not even been finalised yet, in spite of the time that has passed since the delivery of the admissibility decision. Another fourth case is mentioned, that of Mr Armen Grigoryan, of which the Court has no direct evidence.

23. Rule 33 of the Rules of Court provides for the possibility of restricting public access to certain documents in the interests of public order or national security. It does not contain any rule on the restriction of disclosure of evidence to one party. The General Instruction for the Registry on the treatment of internal secret documents approved by the President of the Court in March 2002 does not apply to the evidence provided by the parties either. Finally, the Practice Direction on Written Pleadings issued by the President of the Court in November 2003 and amended in 2008 and 2014 ("Secret documents should be filed by registered post") is manifestly insufficient.

24. See, for some examples of these agreements, http://www.army.mod.uk/operations-deployments/22753.aspx.,
http://www.defense.gouv.fr/operations/rubriques_complementaires/carte-des-operations-exterieures and http://www.emgfa.pt/pt/operacoes/estrangeiro.

of Resolutions 822 (1993) of 30 April 1993[25], 853 (1993) of 29 July 1993[26], 874 (1993) of 14 October 1993[27] and 884 (1993) of 12 November 1993[28] and of General Assembly Resolution 62/243, of 14 May 2008, entitled "The situation in the occupied territories of Azerbaijan"[29], does not lend support to the applicants' contention of direct military involvement of the Armenian State in Nagorno-Karabakh, i.e., its occupation of Azerbaijani territory. No explicit reference is made to Armenian State army troop involvement in Azerbaijan or to the war as being an international armed conflict between Armenia and Azerbaijan, the texts referring only to "tensions between the Republic of Armenia and the Azerbaijani Republic", which "would endanger peace and security in the region".

Moreover, Security Council Resolution 884 (1993) "[c]alls upon the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with resolutions 822 (1993), 853 (1993) and 874 (1993)". By so doing, it admits that the previous resolutions were addressed primarily to "the Armenians of the Nagorny Karabakh region" as the opposing party and not to the Armenian State, which is portrayed as a third party to the conflict between the Armenians of Nagorno-Karabakh and the State of Azerbaijan.

23. The majority also refer to the "package deal" proposal of July 1997 and the "step-by-step" approach of December 1997 of the Organisation for Security and Cooperation in Europe (OSCE) Minsk Group (paragraph 176), but omit important details of both proposals. Firstly, the "package deal" also included the following: "The armed forces of Nagorny Karabakh will be withdrawn to within the 1988 borders of the Nagorny Karabakh Autonomous Oblast (NKAO; with the exceptions detailed below in Clauses VIII and IX); The armed forces of Azerbaijan will be withdrawn to positions agreed in Appendix I on the basis of the High Level Planning Group's ["HLPG"] recommendations". Secondly, the "step-by-step" approach of December 1997 and the "common State" proposal of November 1998 were even more detailed, with references to the Lachin corridor and the invasion of Armenia by Azerbaijan: "Nagorny Karabakh forces will be withdrawn to locations within the 1988 boundaries of the Nagorno-Karabakh Autonomous Oblast (NKAO), with the exception of the Lachin corridor. Azerbaijani armed forces will be withdrawn to the line indicated in Appendix 1 on the basis of the HLPG's recommendations, and

25. S/RES/882 (1993).
26. S/RES/853 (1993).
27. S/RES/874 (1993).
28. S/RES/884 (1993). The expressions used are "the local Armenian forces" (Resolution 822) and "Armenians of the Nagorno Karabakh region of Azerbaijan" (Resolutions 853 and 884).
29. A/RES/62/243. The expression used is "all Armenian forces". Thus, the reference to this Resolution in paragraph 176 of the judgment is misleading, since the General Assembly does not refer to the withdrawal of armed forces of the Republic of Armenia.

will be withdrawn from all territories of Armenia." These omitted aspects show clearly that the military situation in 1997 and 1998 was much more complicated than the oversimplified picture portrayed by the majority.

(iii) The political rhetoric of Armenian statesmen

24. The rhetorical political statements made by Armenian statesmen and public officials, to which reference is made in the judgment, should be approached with the utmost prudence, and this is for two reasons: firstly, because they are evidently not statements with legal force, and secondly, because when citing these political statements, hasty generalisations and faulty deductions are a strong temptation that should be resisted. The temptation becomes even stronger when these statements are de-contextualised. An unfortunate example is the citation of the speech of Mr Serzh Sargsyan (see paragraph 178). It is misleading to quote only the words "our Army" and relate this to the Nagorno-Karabakh conflict, as if those words had been used by the speaker in that connection. They were not so used, as is confirmed simply by reading the speaker's previous sentences.

The subsequent use of an *ad hominem* argument to discredit the opinion of Dr Bucur-Marcu, because of his supposed lack of independence (see paragraph 179), without questioning the expert in person or giving him at least the opportunity to respond to the Court's doubts, further adds to the general picture of an ill-balanced assessment of the file's evidence.

25. Ultimately, the majority do not have the slightest idea of how many soldiers from the Republic of Armenia have allegedly served, or are still serving, in the "Nagorno-Karabakh Republic" and the surrounding districts (paragraph 180: "The Court need not solve this issue"). Yet these facts are crucial. A comparison with the Court's relevant precedents could, here again, have shed some light on the matter under discussion. The present case cannot be assimilated with the Turkish invasion of Cyprus, where the Court did establish that a 30,000 strong Turkish military force had invaded and occupied Northern Cyprus[30], nor with the Transdniestrian conflict, where the Court also established that separatists were armed and supported by military units of the USSR 14th Army deployed in Transdniestria and which received direct orders from Moscow[31]. That is not the case here,

30. See paragraph 16 of the Loizidou judgment, cited above, for a detailed establishment of the facts.

31. In the Ilaşcu and Others judgment (cited above) the Grand Chamber found it established "beyond reasonable doubt" (§ 26) that the support provided to the separatists by the troops of the 14th Army and the massive transfer to them of arms and ammunition from the 14th Army's stores put the Moldovan army in a position of inferiority that prevented it from regaining control of Transdniestria. On 1 April 1992 the President of the Russian Federation officially transferred the 14th Army to Russian command, and it thereafter became the "Russian Operational Group in the Transdniestrian region of Moldova" (ROG). The Court went on to describe the military activities of the ROG in order to support the

where there was no evidence of Armenian units stationed in the "Nagorno-Karabakh Republic", massive transfer to "Nagorno-Karabakh Republic" defence forces of arms and ammunition, direct orders from Yerevan to the forces on the ground in the "Nagorno-Karabakh Republic", or direct attacks organised by the Armenian military force in order to support the separatists.

C. The assessment of evidence of a political nature

(i) The official position of the United Nations

26. The majority argue that the "Nagorno-Karabakh Republic" is not recognised formally by any United Nations member State, including Armenia (see paragraph 182)[32]. Moreover, the above-mentioned UN Security Council Resolutions (822 (1993), 853 (1993), 874 (1993), and 884 (1993)), and General Assembly Resolution 62/243 of 14 March 2008, referred to Nagorno-Karabakh as a region of the Azerbaijani Republic. However, none of the Security Council Resolutions were passed under Chapter VII of the United Nations Charter[33] and the General Assembly Resolution was approved with a very weak majority, a considerable number of abstentions and the opposition of the countries involved in the peace negotiation process, such as the United States, France and Russia[34]. The two previous General Assembly Resolutions, 48/114 of 23 March 1994, "Emergency international assistance to refugees and displaced persons in Azerbaijan"[35], and 60/285 of 7 September 2006, "The situation in the occupied territories of Azerbaijan"[36], did not even refer to Nagorno-Karabakh.

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separatists. The same evidential criterion has been applied in Cyprus v. Turkey, cited above, § 113, and in Catan and Others, cited above, §§ 19 and 118.

32. Nonetheless, it has been recognised by Transdniestria, Abkhazia and South Ossetia, which themselves have limited international recognition.

33. This does not necessarily call into question their binding force (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), cited above, p. 53, § 113). The language used in these resolutions is indicative that they are not mere recommendations or exhortations, but legally binding decisions. For the dispute over the legal force of the Security Council acts approved outside the scope of Chapter VII, see for example the comments of Hervé Cassan and Suy/Angelet, in Cot et al., La Charte des Nations Unies, Commentaire article par article, I, 3rd edition, Paris, 2005, respectively, pp. 896-897 and 912-915.

34. The resolution was voted on as follows: 39 States in favour, 7 against and 100 abstentions. The three co-chairs opposed the "unilateral text" of the draft resolution, because it "threatened to undermine the peace process". The majority of the Grand Chamber did refer to this document in the "Facts" part, but omitted the result of the vote taken, and did not use the reference in the "Law" part. No mention was made in the judgment of the two previous General Assembly Resolutions taken without a vote.

35. A/RES/48/114.

36. A/RES/60/285.

Furthermore, neither the Security Council nor the General Assembly identified the Armenian State as an "occupying force" or "aggressor". The primary concern of both United Nations organs being the "serious humanitarian emergency in the region", they called on all parties to refrain from all violations of international humanitarian law and allow unimpeded access for international humanitarian relief efforts in all areas affected by the conflict. They also reaffirmed the sovereignty and territorial integrity not only of Azerbaijan, but also of "all other States in the region", and therefore condemned the "violations of cease-fire", "hostilities", "attacks on civilians and bombardments" and urged "all States in the region" to refrain from any hostile acts and from any interference or intervention which would lead to the widening of the conflict and undermine peace and security in the region.

(ii) The official position of the Council of Europe

27. In 1994 the Parliamentary Assembly of the Council of Europe welcomed the agreement signed on 26 July 1994 by the Ministers of Defence of Armenia and Azerbaijan and the commander of the army of Nagorno-Karabakh. Most important of all, it urgently called on Azerbaijan and Turkey "to immediately end the blockade of their means of communication with Armenia" and called on the parties to the conflict to organise the return home of refugees on an urgent basis and to respect minority rights as advocated in its Recommendation 1201[37].

In 1997 the Assembly stressed that the political settlement of the conflict had to be negotiated by all parties involved, drawing in particular on the following principles, based upon the 1975 Helsinki Final Act and the 1990 Paris Charter: inviolability of borders; guaranteed security for all peoples in the areas concerned, particularly through multinational peacekeeping forces; extensive autonomy status for Nagorno-Karabakh to be negotiated by all the parties concerned; right of return of refugees and displaced persons and their reintegration respecting human rights[38].

In 2002 the Assembly acknowledged and welcomed "the undeniable efforts Armenia has made to maintain regular high-level contacts with Azerbaijan and the positive influence that they have on the Armenians in Nagorno-Karabakh with a view to arriving at a suitable peaceful solution"[39].

After stating that "[c]onsiderable parts of the territory of Azerbaijan [were] still occupied by Armenian forces, and separatist forces [were] still in control of the Nagorno-Karabakh region", the Assembly reaffirmed, in

37. Parliamentary Assembly of the Council of Europe (PACE) Resolution 1047 (1994) on the Conflict in Nagorno-Karabakh and Recommendation 1251 (1994) on the Conflict in Nagorno-Karabakh.
38. PACE Resolution 1119 (1997) on Conflicts in Transcaucasia.
39. PACE Resolution 1304 (2002) on the Honouring of obligations and commitments by Armenia.

2005, that "independence and secession of a regional territory from a state [might] only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the *de facto* annexation of such territory to another state"[40]. The Assembly reiterated that the occupation of foreign territory by a member State constituted a grave violation of that State's obligations as a member of the Council of Europe and reaffirmed the right of displaced persons from the area of conflict to return to their homes safely and with dignity. It also referred to Resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993) of the United Nations Security Council and urged the parties concerned to comply with them, in particular by refraining from any armed hostilities and by withdrawing military forces from any occupied territories. The Assembly observed that both Armenia and Azerbaijan had committed themselves upon their accession to the Council of Europe in January 2001 to using only peaceful means for settling the conflict, by refraining from any threat of using force against their neighbours. At the same time, Armenia committed itself to using its considerable influence over Nagorno-Karabakh to foster a solution to the conflict. The Assembly urged both governments to comply with these commitments and refrain from using armed forces against each other and from propagating military action.[41]

(iii) The official position of the European Union

28. The European Union (EU) has four principal policy tools with which it seeks to address the conflict over the Nagorno-Karabakh territory: the European Neighbourhood Policy, developed and implemented by the European Commission through Action Plans[42], the EU Strategy for the South Caucasus[43], the Negotiations of the EU-Armenia Association

40. The edited reference in paragraph 176 to this passage of the PACE Resolution is misleading, because the PACE does not mention the occupation of Azerbaijani territory by the army of the Armenian Republic, nor the annexation of Azerbaijani territory by the State of Armenia. One should not read into the letter of the resolution something which it clearly does not say.

41. PACE Recommendation 1690 (2005)1 on The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference and Resolution 1416 (2005) on The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference.

42. See the European Parliament Resolutions of 19 January 2006 on the European Neighbourhood Policy (ENP), of 15 November 2007 on strengthening the ENP, of 6 July 2006 on the European Neighbourhood and Partnership Instrument (ENPI), of 7 April 2011 on the review of the European Neighbourhood Policy – Eastern Dimension, and more recently, of 23 October 2013 on the European Neighbourhood Policy: towards a strengthening of the partnership. Position of the European Parliament on the 2012 reports.

43. See the European Parliament Resolution of 20 May 2010 on the Need for an EU Strategy for the South Caucasus.

Agreement[44] and the EU Special Representative for the South Caucasus, who operates under a mandate of the Council of the European Union.

According to these instruments, the position of the EU is that the occupation by one country of the Eastern Partnership of the territory of another violates the fundamental principles and objectives of the Eastern Partnership and that the resolution of the Nagorno-Karabakh conflict should comply with UN Security Council Resolutions 822, 853, 874 and 884 of 1993 and the OSCE Minsk Group Basic Principles, enshrined in the "Aquila" joint statements. The EU condemns the idea of a military solution and the heavy consequences of military force already used, and calls on both parties to avoid any further breaches of the 1994 ceasefire. It also calls for withdrawal of "Armenian forces" from all occupied territories of Azerbaijan, accompanied by deployment of international forces to be organised in accordance with the UN Charter in order to provide the necessary security guarantees in a period of transition, which will ensure the security of the population of Nagorno-Karabakh and allow the displaced persons to return to their homes, with further conflicts caused by homelessness thus being prevented. Finally, it calls on Armenia and Azerbaijan to undertake substantive measures for confidence-building, such as general demilitarisation and withdrawal of snipers from the line of contact[45].

(iv) The official position of the Organisation for Security and Co-operation in Europe

29. The OSCE has committed itself to working to reach an agreement based, in particular, upon the principles of the Helsinki Final Act of Non-Use of Force or Threat of Force, Territorial Integrity, and the Equal Rights and Self-Determination of Peoples. This effort has been without success thus far.

In 1992 the Conference on Security and Cooperation in Europe (CSCE) created the Minsk Group, with the purpose of encouraging a peaceful, negotiated resolution to the Nagorno-Karabakh conflict. At the OSCE Lisbon Summit of 1996, the member States laid out three principles as a legal basis for the peaceful settlement process. The principles were as follows: territorial integrity of the Republic of Armenia and the Republic of Azerbaijan; legal status of Nagorno-Karabakh, defined in an agreement

44. European Parliament Resolution of 18 April 2012 containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Armenia Association Agreement.

45. Thus, the reference in paragraph 176 of the judgment to the 2012 EP Resolution is misleading, since the EP did not refer to the occupation of Azerbaijani territory by the army of the State of Armenia. The call on Armenia to stop sending conscripts to serve in Nagorno-Karabakh, which is based on the 1994 agreement referred to above, must be understood in the framework of the EU proposal of general demilitarisation of the region.

based on self-determination, which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan; and guaranteed security for Nagorno-Karabakh and its population, including mutual obligations to ensure the compliance by other parties with the provisions of the settlement.

The following year, the Minsk Group "package" on a comprehensive agreement on the resolution of the Nagorno-Karabakh conflict provided the following measures concerning the Lachin corridor: "A. Azerbaijan will lease the corridor to the OSCE, which will conclude a contract on the exclusive use of the corridor by the Nagorny Karabakh authorities (with exceptions envisaged for transit, explained below in Clause E). B. The OSCE will observe security conditions in conjunction with the Nagorny Karabakh authorities. C. The boundaries of the Lachin corridor are agreed in Appendix II with due consideration of the recommendations of the HLPG. D. The OSCE will observe the construction of roads around the town of Lachin. Upon the completion of road construction the town of Lachin will be excluded from the Lachin corridor. It will return to Azerbaijani jurisdiction (as part of the division zone) and its former inhabitants will be able to return. E. Permanent settlement or armed forces are not allowed in the corridor, with the exception of permitted security force contingents. Representatives of official bodies, observers and OSCE peacekeeping forces have the right of transit subject to prior notification, as do Azerbaijani inhabitants of the region in transit from the Lachin district to the Gubatly district or vice versa. Territory of the Lachin district lying outside of the corridor forms part of the division zone."

The Minsk Group "common State" proposal of November 1998 included the following proposal concerning the Lachin Corridor: "The question of the use of the Lachin corridor by Nagorny Karabakh for unimpeded communication between Nagorny Karabakh and Armenia is the subject of a separate agreement, if other decisions on a special regime in the Lachin district are not taken proceeding from the agreement between Azerbaijan and Nagorny Karabakh. The Lachin district must remain a permanently and fully demilitarized zone."

The OSCE Minsk Group Fact-Finding Mission (FFM) on Settlements in the Occupied Territories of Azerbaijan (Aghdam, Jabrayil, Fizuli, Zangilan, Gubadly, Kalbajar and Lachin), which took place from 30 January to 5 February 2005, concluded that: "The FFM has seen no evidence of direct involvement by the authorities of Armenia in the territories, except for the provision of electricity to parts of the Jebrail and Kubatly Districts from Kapan, Armenia". With regard specifically to the situation in Lachin, "[t]he FFM conducted numerous interviews over the entire Lachin District which revealed that private initiative and not government action was the driving force prompting a move to Lachin. The FFM has found no evidence that the authorities, in a planned and organized manner, actually asked or selected people to settle in Lachin town. ... There was no evidence of nonvoluntary

resettlement or systematic recruitment. ... the FFM found no evidence of direct involvement of the government of Armenia in Lachin settlement."[46]

The ministers of the USA, France and Russia presented a preliminary version of the Basic Principles for a settlement to Armenia and Azerbaijan in November 2007 in Madrid. The Basic Principles called for, *inter alia*: return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation.

On 20 July 2009 the presidents of the OSCE Minsk Group's Co-Chair countries, France, the Russian Federation and the USA made a joint statement, reaffirming their commitment to support the leaders of Armenia and Azerbaijan as they finalised the Basic Principles for the peaceful settlement of the Nagorno-Karabakh conflict. They also instructed their mediators to present to the Presidents of Armenia and Azerbaijan an updated version of the Madrid Document of November 2007.

The second OSCE Minsk Group Co-Chairs Field Assessment Mission to the seven occupied territories of Azerbaijan surrounding Nagorno-Karabakh, which took place in October 2010, but was published only in March 2011, confirmed that there had been no significant growth in the population since 2005. The settlers, for the most part ethnic Armenians who were relocated to the territories from elsewhere in Azerbaijan, live in precarious conditions, with poor infrastructure, little economic activity, and limited access to public services.

(v) The external representation of the "Nagorno-Karabakh Republic"

30. The "Nagorno-Karabakh Republic" was represented by its own representatives in the Bishkek Protocol of 5 May 1994, as well as the ceasefire agreement based on it and signed respectively by M. Mamedov in Baku on 9 May, S. Sargsyan in Yerevan on 10 May and S. Babayan in Stepanakert on 11 May 1994[47]. Moreover, Conclusion no. 9 of the Helsinki Additional Meeting of the CSCE Council of 24 March 1992 provided: "Elected and other representatives of Nagorno-Karabakh will be invited to

46. The majority refer to this evidence in the "Facts" part, but do not take it in account in the "Law" part.

47. See also the Zheleznovodsk Communiqué of 23 September 1991, the Sochi Agreement of 19 September 1992, the military-technical protocol on the implementation of the Sochi Agreement of 25 September 1992, the Timetable of Urgent Steps proposed by the Chairman of the CSCE Minsk Group of September 1993, in which Nagorno-Karabakh appears as a party to the conflict for the first time.

the Conference as interested parties by the Chairman of the Conference after consultation with the States participating at the Conference." The representatives of Nagorno-Karabakh were an official party to the peace talks until Azerbaijan refused to continue negotiations with them in 1998.

The Committee on Relations with European Non-Member Countries of the Parliamentary Assembly of the Council of Europe has organised a series of hearings since 1992 with delegations from the Armenian and Azerbaijani Parliaments, the "leadership of Nagorno-Karabakh" and the "Azeri interested party of Nagorno-Karabakh"[48].

In 2005 the Parliamentary Assembly of the Council of Europe called on the Government of Azerbaijan to establish contact, without preconditions, with the "political representatives of both communities from the Nagorno-Karabakh region" regarding the future status of the region. It added that it was prepared to provide facilities for such contacts in Strasbourg, recalling that it had done so in the form of a hearing on previous occasions with Armenian participation[49].

Thus, the external representation of the interests of the "Nagorno-Karabakh Republic" by local representatives has been acknowledged by pivotal interlocutors. If Armenian statesmen and public officials also assume such tasks, this is not unusual in terms of diplomatic practice. Nor is it unusual that foreign nationals should be appointed to high-ranking positions in other States in Eastern Europe, as in the case of the first and the third Ministers for Foreign Affairs of Armenia, who were both citizens of the USA. Thus, such practices may not *per se* be regarded as jeopardising the independence of the State concerned.

D. The assessment of evidence of a judicial, administrative and financial nature

(i) The independence of the judiciary

31. The control by a member State over the judicial, administrative and financial organisation of a territory of another member State, with the concurrent exercise of public powers, may entail jurisdiction of the former over the latter's territory[50]. In the present case, no "conclusive evidence" was presented to the Court of such control.

Armenian law does not apply automatically in the "Nagorno-Karabakh Republic". So long as Armenian laws are voluntarily adopted and independently applied and interpreted, there can be no inference of control. Thus, the majority's argument that "several laws of the 'NKR' have been

48. Recommendation 1251 (1994)1 on the conflict in Nagorno-Karabakh.
49. Resolution 1416 (2005) on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference.
50. See Al-Skeini and Others, cited above, § 139.

adopted from Armenian legislation" proves nothing (paragraph 182). Based on evidence from the Chief Justice of the Supreme Court and the head of the Bar Association of the "Nagorno-Karabakh Republic" and other local judges and lawyers, which the applicants did not contradict and the majority preferred to ignore, it must be concluded that the "Republic" not only has a different court system from Armenia, but also does not accept Armenian court decisions as precedents or even as authorities. The courts of the "Republic" operate entirely independently and are not staffed by Armenian judges, prosecutors or clerks.

(ii) The autonomy of the administration

32. The provision of Armenian passports to citizens of the "Republic of Nagorno-Karabakh" is regulated by an international agreement of 24 February 1999 between the Armenian State and the "Republic of Nagorno-Karabakh", which allows for that possibility only in "exceptional" cases (see paragraph 83 of the judgment). Neither the "exceptional" issuance of Armenian passports to citizens of the "Republic of Nagorno-Karabakh", nor the current use of the Armenian dram in the latter's territory prove that the State that issued the passports or currency controls the administration or territory of the "Republic of Nagorno-Karabakh". The best evidence of the autonomous character of the Nagorno-Karabakh administration is given by the two OSCE fact-finding missions to the territories under its control, which concluded that there was no evidence of direct involvement of the Armenian State in the administration of these territories[51].

(iii) The external financial support

33. Even less credible is the contention that the financial support afforded to the "Republic of Nagorno-Karabakh" by the Armenian State and world-wide diaspora, or by United States citizens and organisations of Armenian origin or sympathetic to Armenia, legitimises a legal presumption of effective control of the relevant territory by Armenia. Taken separately or together, these various financial contributions do not provide a cogent argument in view of the contemporary practice of international financial cooperation[52].

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51. See the references above to the 2005 OSCE mission, the result of which was confirmed by the 2010 mission.

52. For example, Armenia receives funding from the European Neighbourhood and Partnership Instrument (ENPI) through a national programme. EU bilateral assistance to Armenia amounts to EUR 157 m for 2011-13 (compared to EUR 98.4 m for 2007-10). As a result of progress in reforms, governance and democracy, Armenia benefitted from additional EU allocations (EUR 15 m in 2012 and EUR 25 m in 2013) under the Eastern Partnership Integration and Cooperation programme (EAPIC), in the framework of the application of the "more for more" principle of the revised European Neighbourhood

E. Preliminary conclusion: *Al-Skeini and Others* watered down

34. In *Al-Skeini and Others v. the United Kingdom* the Court summarised the state of its case-law, regarding "the strength of the State's military presence in the area" as the "primary" element for assessing whether effective controls existed over an area outside the national territory[53]. Other indicators, such as the "the extent to which its military, economic and political support for the local subordinate administration provide[d] it with influence and control over the region" were "relevant", but could evidently not replace the "primary" factor. That is exactly what has happened in the present case. The Court's criteria have thus been turned upside down. In *Chiragov and Others*, the majority of the Grand Chamber give up the "primary factor" of "boots on the ground" and replace it by an unclear mix of other factors, involving "military support"[54]. Entangled in their contradictions, they abandon the well-established criteria used by the Court in the past with regard to the military control of a foreign territory, turning a blind eye to the real size and strength of the military force serving on foreign ground. Such methodology opens the floodgates to a slippery slope without any foreseeable limits for the extension of the concept of "effective control" of a foreign territory.

"Boots on the ground", in the sense of the physical presence of the hostile army in the occupied territory, are no longer a *sine qua non* requirement of occupation. By admitting a long-distance remote-controlled exercise of authority by the Armenian State in Nagorno-Karabakh, the majority depart also from long-established international humanitarian customary and treaty law, which, based on Article 42 of the 1907 Hague Regulations, affirms that there is no occupation without the unconsented

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Policy. Armenia also benefits from a number of thematic programmes such as the European Instrument for Democracy and Human Rights (EIDHR). No one would pretend that Armenia is therefore under the effective control of the EU.

53. See Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 139, ECHR 2011.

54. Ultimately, the majority contradict themselves, since in paragraph 96 of the judgment they consider that military occupation always involves "the presence of foreign troops which are in a position to exercise effective control without the consent of the sovereign", and in paragraph 146 they refer explicitly to Nagorno-Karabakh, the district of Lachin and the other surrounding territories as "now under occupation", while in paragraph 180 they retract from the "boots on the ground" criterion in favour of a more complacent and slippery criterion of "significant involvement" based on military support in terms of equipment and expertise. The contrast of paragraph 180 of Chiragov and Others with paragraphs 144 and 224 of the Sargsyan judgment is even more astonishing. In paragraph 144 of Sargsyan, the majority return to "the presence of foreign troops" as the necessary criterion to establish occupation and in paragraph 224 they maintain that Azerbaijan "lost control over part of its territory as a result of war and occupation".

physical presence of the foreign army on the ground and without it substituting its own authority for that of the local government[55].

35. At this stage, the Court simply does not have before it the evidence to establish with the required certainty the facts that support the applicants' claims. The Court cannot proceed on the basis of virtual assertions and unfounded allegations, without the benefit of either a judicial fact-finding mission or the taking of testimonial evidence, or even the prior assessment of the facts by the competent courts at national level. The majority of the Grand Chamber have refused to take such steps in spite of the fact that the Court, in cases of similar relevance, had shown its willingness to undertake enquiries, for example, "directed towards ascertaining the relevant facts in order to be able to determine whether Moldova and the Russian Federation had jurisdiction, particularly over the situation in Transdniestria, relations between Transdniestria, Moldova and the Russian Federation, and the applicants' conditions of detention" (*Ilaşcu and Others*, cited above, § 12), which even included the taking of evidence by the judges of the Court from witnesses belonging to the armed forces of the Russian Federation at the headquarters of the Russian Operational Group in the Transdniestrian region of Moldova. Indeed, not even the possibility of hearing witnesses at the Court has been considered, as has happened in cases of a similar nature, and most notably in *Georgia v. Russia (I)* ([GC], no. 13255/07, ECHR 2014). The Court being a European Constitutional Court, and in view of the principle of subsidiarity, the task of fact-finding and taking of evidence should remain exceptional, reserved, for example, for cases with a serious pan-European repercussion[56]. This was such a case[57].

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55. Thus, the test of effective control in international humanitarian law depends on the cumulative requirements of unconsented presence of hostile troops on the ground and substitution of local authority (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports* 2005, p. 230, § 173, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004*, p. 167, § 78; see also Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", International Review of the Red Cross, 94 (2012), pp. 143-148; Koutroulis, "Le début et la fin de l´application du droit de l'occupation", Paris, 2010, pp. 35-41; and Benvenisti, "The International Law of Occupation", second edition, Oxford, 2012, pp. 43-54). The possibility of an "indirect administration" through various Congolese rebel factions was considered possible by the International Court of Justice in the first case cited above, but rejected for lack of evidence. In any event, the specific actions of the non-State actor would have to be attributable to the foreign State in the sense of Article 8 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

56. On the nature of the Court as the European Constitutional Court, see my separate opinion in the case of Fabris v. France [GC], no. 16574/08, ECHR 2013.

57. It is difficult to understand why the present case did not deserve the same care and attention as others of lesser repercussions, such as Davydov and Others v. Ukraine, nos. 17674/02 and 39081/02, Naumenko v. Ukraine, no. 42023/98, and Tekin Yildiz v. Turkey, no. 22913/04, where such evidential investigations took place. The Court did not

36. In sum, the Court simply does not know, as a result of its own omission, what is going on in the "Nagorno-Karabakh Republic" territory and the surrounding districts today, and even less what has gone on over the last twenty-three years since 1992. The argument could be made that this case is about getting a general impression of the situation in the "Nagorno-Karabakh Republic", based on an aggregated sample of different elements, and that even if one or more elements of this sample are proven false the whole impression remains intact. This line of reasoning should be emphatically rejected.

37. As a matter of principle, an international court should not decide based on impressions, but on facts, established preferably by domestic courts. It is stating the obvious that an uncoordinated bunch of doubtful evidential elements do not make out a case. Truth cannot be reached on the basis of a broad brush of dubious assertions of the alleged victims coupled with contradictory witness testimony, vague factual assumptions from outsiders and tortuous inferences from the documentary evidence. The Court's long-standing evidential criterion of "facts established beyond reasonable doubt" must not be replaced by an impressionistic overview of the evidence. Concomitantly, the Court's substantive criterion of "effective control" must not be watered down for the convenience of the case. *Chiragov and Others* will thus be remembered as an unfortunate example of a negative correlation of judicial inertia, missing evidence, lack of facts and dilution of established legal criteria.

V. The right to remedial secession in international law

A. The presumption against secession

38. It was affirmed by the respondent State that the seizure of Lachin was justified under the laws of war, since it was obviously of great military strategic importance to create a land link between Nagorno-Karabakh and Armenia in order to transport military equipment, food and other supplies into the former. In other words, the seizure of Lachin was a necessary military defence measure in order to avoid the blockade of the Nagorno-Karabakh region by the Azerbaijan military forces. Moreover, the respondent State pleaded for the right of secession of the Armenian population in the former Soviet Nagorno-Karabakh *oblast* in view of the alleged crimes against humanity committed against them, namely the

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even give reasons for rejecting the evidential steps proposed by the parties. For example, in McKerr v. the United Kingdom, no. 28883/95, § 117, ECHR 2001-III, the Court rejected an investigation because it considered that a fact-finding exercise would duplicate the ongoing domestic procedure. That would not have been true in the present case, where precisely the lack of domestic procedures made additional evidential enquiries indispensable.

attacks on Stepanakert and other places by the Azeri population and army. These issues were ignored in the majority's judgment[58].

39. No word is pronounced on the problem of "self-defence" of the Armenian population in the Nagorno-Karabakh region and the closely related problem of remedial secession in international law, which has been extensively discussed not only in the literature[59], but also by national and international courts especially after the 2010 Advisory Opinion of the International Court of Justice on the unilateral declaration of independence

58. Although the majority took note of the problem of the "justification for interfering with the individual rights of residents in the area" in paragraph 197 of the judgment, they avoided the issue by simply assuming that the "justification" for the capture of Lachin in May 1992 and the creation of a land link between Armenia and Nagorno-Karabakh had no "direct bearing" on the events that followed or on today's situation. The majority failed to explain why. They have also neglected to justify why the current situation is no longer "an emergency situation" (paragraph 200). This position is not coherent with the stance taken in paragraphs 231-232 of the Sargsyan judgment, where the same majority discussed the relevance of international humanitarian law for the purposes of justifying deprivation of the Convention right. Unlike the majority in Chiragov and Others, but like the majority in Sargsyan, I am convinced that only the assessment of the "justification" for the 1992 events can provide a solid legal basis for the evaluation of both today's situation and the situation during the time which elapsed in between, as will be demonstrated below. A similar methodological critique, according to which "it is impossible to separate the situation of the individual from a complex historical development and a no less complex current situation", can be found in the separate opinion of Judge Bernhardt, joined by Judge Lopes Rocha, in the Loizidou v. Turkey judgment (cited above) and in the separate opinion of Judge Kovler in the Ilaşcu and Others judgment (cited above).

59. See, among many voices in the literature in favour of a right to remedial secession, Umozurike, Self-determination in International Law, Hamden, 1972, p. 199; Buchanan, Secession: the Legitimacy of Self-Determination, New Haven, 1978, p. 332; Kingsbury, "Claims by non-state groups in international law", in Cornell International Law Journal, 25 (1992), p. 503; Kirgis, "The degrees of self-determination in the United Nations era", in American Journal of International Law, 88 (1994), p. 306; McCorquordale, "Self-determination: a Human Rights Approach", in International and Comparative Law Quarterly, 43 (1994), pp. 860-861; Cassese, Self-determination of Peoples, Cambridge, 1995, pp. 112-118; Okafor, "Entitlement, Process, and Legitimacy in the Emergent International Law of Secession", in International Journal on Minority and Group Rights, 9 (2002), pp. 53-54; Raic, Statehood and the Law of Self-Determination, Leiden, 2002, pp. 324-332; Doehring, in Simma (ed), The Charter of the United Nations, 2002, article 1, annex: self-determination, notes 40 and 61; Novak, UN Covenant on Civil and Political Rights Commentary, 2nd revised edition, Kehl, 2005, pp. 19-24; Suski, "Keeping the lid on the secession kettle: a review of legal interpretation concerning claims of self-determination by minority populations", in International Journal of Minority and Group Rights, 12 (2005), p. 225; Tomuschat, Secession and self-determination, in Kohen (ed.), Secession, International Law Perspectives, Cambridge University Press, 2006, pp. 41-45; Dugard and Raic, "The role of recognition in the law and practice of secession", in Kohen (ed), ibid., p. 103; Dugard, "The Secession of States and their Recognition in the Wake of Kosovo", Collected Courses of the Hague Academy of International Law, Leiden, 2013, pp. 116-117; and Ben Saul et al., The International Covenant on Economic, Social and Cultural Rights Commentary, Cases and Materials, Oxford, 2014, pp. 25-52.

of Kosovo[60] and the 1998 case of the Canadian Supreme Court on the right to unilateral secession of the Quebec province from the Canadian federation[61]. The Court's silence is even less understandable in the face of recent international practice acknowledging remedial secession as a right, most notably in the 1999 Agreement between Indonesia and Portugal for the acknowledgment of the rights to self-determination and remedial secession of Timor Leste through a popular consultation of the East Timorese people in the form of a referendum[62].

40. International law regulates the formation of new States, including that of secessionist States. Since the formation of States, by secession or any other means, is not a matter of pure politics, recognition is not a discretionary, let alone arbitrary, decision of each State[63]. There is a principle in international law of prohibition of non-consensual secession, which is derived from the principles of territorial integrity and sovereignty, as established by Article 10 of the Covenant of the League of Nations and Article 2 § 4 of the Charter of the United Nations. The presumption against secession is even more forceful if it came about by means of the use of force, since this contradicts the customary and treaty prohibition of the use of force acknowledged by the 1928 General Treaty for the Renunciation of War, Article 10 and 11 of the 1933 Montevideo Convention on the Rights and Duties of States and Article 2 § 4 of the UN Charter. The same applies for the use of "other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)"[64]. *Ex injuria jus non oritur*.

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60. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010.

61. [1998] 2 SCR 217.

62. The erga omnes nature of the right to self-determination was authoritatively confirmed by the ICJ in the East Timor Case (East Timor Case (Portugal v. Australia), ICJ, Judgment of 30 June 1995, p. 102, § 29). In this particular case, while Indonesian-controlled militiamen were massacring the East Timorese, Secretary-General Annan had to threaten the Indonesian Government with international prosecution for crimes against humanity in exchange for co-operation with the international community and admission of the principle of self-determination of Timor Leste (see Secretary-General's Press Conference at the UN Headquarters, 10 September 1999). This is the reason why some have viewed Indonesia's position as a "coerced consent", which would make the Timor Leste secession a truly non-consensual secession (see Evans, The Responsibility to Protect: Ending mass atrocity crimes once and for all, Washington, 2008, p. 63, and Bellami, Responsibility to Protect, London, 2009, pp. 147 and 148).

63. Like Sir Hersch Lauterpacht (Recognition in International Law, Cambridge, 1947, p. 1), my point of departure is that recognition is not outside the orbit of international law and it depends on an objective legal appraisal of true facts. Although fraught with political implications, this issue does not fall within the purview of pure politics.

64. The ICJ has referred to UN Security Council resolutions condemning some declarations of independence (see Security Council Resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council Resolution 541 (1983), concerning Northern Cyprus; and Security Council Resolution 787 (1992), concerning Republika

B. Non-consensual secession as an expression of self-determination

(i) The factual and legal requirements of secession

41. Like colonised populations[65], non-colonised populations have a right to self-determination, as has been acknowledged by the 1966 twin International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights[66], United Nations General Assembly Resolution 2625 (XXV), of 24 October 1970, containing the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[67] and the United Nations General Assembly Resolution 48/121, of 14 February 1994[68], endorsing the Declaration and Programme of Action of the Vienna Conference adopted by the United Nations World Conference on Human Rights[69]; in the African context, by Article 20 of the African Charter on Human Rights and Peoples' Rights[70]; in the American context, by the

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Srpska) in order to conclude that "in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). … The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council". Pointing in the same direction, see Articles 40 and 41 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

65. United Nations General Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/RES/1514 (XV), see also A/L.323 and Add.1-6 (1960)) and, in the constant case-law of the ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, cited above, p. 31, § 52; Western Sahara, Advisory Opinion, 1CJ Reports 1975, pp. 31-33, §§ 54-59; East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 102, § 29; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, cited above, pp. 171-172, § 88.

66. The UN Human Rights Committee has affirmed that the principle of self-determination applies to all populations and not only to colonised populations (Concluding Comments on Azerbaijan, CCPR/C/79/Add.38, § 6 and also its General Comment 12, § 7, which refers to General Assembly Resolution 2625 (XXV)).

67. A/RES/25/2625 (XXV) (see also A/8082 (1970)). Although adopted without a vote, the Declaration reflects customary international law (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, pp. 101-103, §§ 191-193).

68. A/RES/48/121. The Resolution was adopted without a vote.

69. A/CONF.157/24 (Part I) at 20 (1993). The Vienna Declaration was adopted by consensus by representatives of 171 States.

70. See African Commission on Human and Peoples' Rights, Katangese People's Congress v. Zaire, communication no. 75/92 (2000), and Kevin Mgwanga Gunme

Canadian Supreme Court *re Secession of Quebec* (1998)[71]; and finally, in the European context, by the Final Act of the 1975 Conference on Security and Co-operation in Europe (the Helsinki Accords)[72] and the 1991 European Community Guidelines on the recognition of new States in Eastern Europe and the Soviet Union[73].

42. In the pursuit of the right to self-determination, new States may be formed, by non-consensual secession[74], if and when they fulfil the following factual and legal requirements: (1) the Montevideo criteria for statehood, namely a permanent population, a defined territory, a government and the capacity to enter into relations with other States[75]; (2) prior to secession the seceding population were not allowed fair participation in a government that represented the whole population of the parent State; and (3) the seceding population were systematically treated by the government, or a part of the population of the parent State whose action was condoned by the government, in a discriminatory manner or in a manner disrespectful of their human rights. In these restrictive terms, the right to remedial secession by non-colonised populations has continuously gained support from evolving State practice and *opinio juris*, having crystallised into a norm of customary international law[76].

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v. Cameroon, communication no. 266/2003, with two findings of no violation of Article 20 of the African Charter.

71. Paragraph 138: "the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development".

72. Given that the States Parties to the CSCE are exclusively European, the "equal rights of peoples and their right to self-determination" cannot be ascribed evidently to colonial peoples.

73. See also Opinion no. 2 of the Badinter Arbitration Commission on Yugoslavia.

74. The Committee on the Elimination of Racial Discrimination, General Recommendation 21 (1996), § 6, admitted "the possibility of arrangements by free agreements of all parties concerned".

75. See Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.

76. In addition to the references already made above, see in particular the Declaration on Principles of International Law concerning Friendly Relations, cited above, principle V, paragraph 7, which requires the observance of the principles of equal rights and self-determination of peoples and a "government representing the whole people belonging to the territory without distinction as to race, creed or colour". A contrario this "safeguard clause" must be understood in the sense that a government which discriminates against a part of its population on the basis of race, creed or colour does not represent the whole people and may not require from them respect for its territorial integrity. Both systematic and teleological interpretations of the Declaration reinforce this conclusion, having regard to the preamble and its acknowledgment of the paramount importance of the right of self-determination. The 1993 Vienna Declaration on Human Rights, cited above, extended the right to external self-determination on the basis of violations of human rights, referring to a "government representing the whole people belonging to the territory without distinction of any kind" (A/Conf.157.24 (1993)). General Assembly Resolution 50/6, of

(ii) The Montevideo requirements of statehood

43. The discussion of the nature of the Armenian population of Nagorno-Karabakh as a "people" is superfluous, in view of its undisputed ethnic, religious, linguistic and cultural identity and its historical bond to that territory. If Kosovar Albanians constitute a "people", as the ICJ held[77], the Armenians of Nagorno-Karabakh must inevitably be considered as such as well. Additionally, if in the ICJ's logic "the principle of territorial integrity is confined to the sphere of relations between States", it must be inferred *a contrario* that the same principle does not limit the secession of non-State actors within a multinational State in a non-colonial context[78]. Under this light, the Montevideo population and territory criteria would pose no problem for the acknowledgment of the right to secession of the Armenian population of Nagorno-Karabakh. The available evidence of the

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14 October 1995, which approved "by acclamation" the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (A/RES/50/6), reiterated the Vienna formulation. The historical predecessor of this right to secession is the position of the Committee of Rapporteurs appointed by the League of Nations to give an opinion on the Aaland Islands dispute, which concluded as follows: "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" (Report of the Committee of Rapporteurs, 16 April 1921, League of Nations Council Document B7 21/68/106 (1921)). For additional references to the practice, see also my separate opinion in Sargsyan v. Azerbaijan (cited above).

77. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, cited above, p. 448, § 109.

78. ibid., p. 437, § 80. Although timid, this is the main contribution of the ICJ to the quarrel over the right to secession in international law. With this narrow interpretation of the territorial integrity principle, the ICJ's position must be seen as endorsing tacitly that right for non-State actors in multinational States, which was also the position of Albania, Estonia, Finland, Germany, Ireland, Jordan, the Netherlands, Norway, Poland, Russia, Slovenia and Switzerland. The same line of argument could be drawn from Article 11 of the ILC's Draft Declaration on Rights and Duties of States ("Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9."). Judge Antônio Cançado Trindade expressed similar views in his convincing separate opinion appended to the ICJ's Kosovo Advisory Opinion, according to which the systematic violations of the human rights of the Kosovar Albanians gave rise to a right to external self-determination from the parent State (Separate Opinion of Judge Cançado Trindade, ibid., pp. 594-595, §§ 177-181). Judge Abdulqawi Ahmed Yusuf also accepted the existence of such a right, under which the ICJ should have examined the concrete facts of the case (Separate Opinion of Judge Yusuf, ibid;, pp. 622-623, §§ 11-13). Identically, Judge Wildhaber admitted in his separate opinion in Loizidou v. Turkey (cited above, joined by President Rysdall) the existence of a "right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way".

other legal elements of statehood, i.e., government and capacity to enter into relations with other States, is also beyond dispute[79].

(iii) The lack of internal self-determination of the seceding population

44. A right to create a new, independent State (i.e., the right to external self-determination) arises whenever the seceding population do not have the legal and factual means to express their own political will within the constitutional structure of the parent State, i.e., when their right to internal self-determination has been disregarded[80]. The military actions in the district of Lachin at the heart of the case took place on 18 May 1992, eight months after the date of declaration of secession of 2 September 1991 and two years before the signing of the Bishkek Protocol and the ceasefire agreement of May 1994 and its implementation on 12 May 1994.

In order to clarify the alleged lack of internal self-determination of the Armenian population, the essential questions to be put are the following: prior to 2 September 1991 did the Azerbaijani Government represent the Armenian population of Nagorno-Karabakh? Did the Armenian population enjoy a constitutional status which allowed them to express their political will within the framework of the Azerbaijani State freely? Did the Armenian population exercise their right to internal self-determination within that framework?

(iv) The systematic attack on the human rights of the seceding population

45. A right of external self-determination further requires the occurrence of a systematic attack by the government of the parent State, or by part of its population whose actions are condoned by the government, against the human rights of the seceding population[81]. In the words of Grotius, a people

79. On the structure of the State and its functioning, see the Constitution of the Republic mentioned above and the regular multiparty elections which take place in the territory. On the capacity to enter into relations with other States even before the May 1994 Bishkek Protocol and the subsequent ceasefire agreement, see the evidence mentioned above in the present opinion.

80. See the above-cited case of the Canadian Supreme Court as well as the African Commission cases Katangese People's Congress v. Zaire and Kevin Mgwanga Gunme v. Cameroon, where the populations of Quebec, Katanga and Southern Cameroon were denied the right to external self-determination in view of their internal self-determination. This stance was confirmed by Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295, of 13 September 2007 (A/RES/61/295), by a majority of 143 States in favour, 4 votes against and 11 abstentions.

81. The acquiescence or connivance of the State in the acts of private individuals which violate Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (see Cyprus v. Turkey, cited above, § 81, and Ilaşcu and Others, cited above, § 318).

has no right to secession, "unless it plainly appears that it is absolutely necessary for its own preservation"[82].

With a view to clarifying the existence of this requirement, the essential questions to be addressed relate to the clashes between the Armenian and Azeri population of Azerbaijan prior to the critical date, and are the following: Did the Azerbaijani Government commit, or condone the commission by private persons of, systematic attacks against the human rights of the Armenian population in the national territory? Did these attacks occur prior to or after the critical date of 2 September 1991?

46. Finally, in order to ascertain the possible international responsibility of the respondent State for acts occurring during the war of secession and in particular for the destruction of property and displacement of the civilian population, the following questions are of paramount importance: Did the Armenian State intervene militarily before the critical date of 2 September 1991 in Nagorno-Karabakh or the surrounding districts? Did the Armenian State intervene militarily in the opening of the Lachin corridor and the taking of that district and, if so, did it have any justification for that action, such as the blockade, aggression and imminent risk of extinction of the Armenian population in Nagorno-Karabakh? Did the Armenian State proceed with the destruction of civilian property, including that of the applicants, on that occasion or later and, if so, did it have any justification for that action? Did the Armenian State expel or displace the local population, including the applicants, on that occasion or later and, if so, did it have any justification for that action? Did the Armenian State hinder the return of the local population, including the applicants, to the district of Lachin and, if so, did it have any justification for that action? Does this justification still hold true today?

47. Had the Armenian population been denied the right to internal self-determination within the Azerbaijani State and had the Azerbaijani Government committed, or condoned the commission by private persons of, systematic attacks against the human rights of the Armenian population in the national territory prior to the critical date of 2 September 1991, the military intervention of the Armenian State after that date in favour of the Armenian population of Nagorno-Karabakh, including the opening of the Lachin corridor, if it took place, would have to be assessed in the light of the international community's humanitarian obligations and "responsibility to protect"[83].

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82. Grotius, De jure belli ac pacis, Libri tres, 2.6.5.

83. At this juncture, it is worthwhile to recall the crucial importance of the Lachin corridor, as the Security Council and the CSCE/OSCE have explicitly recognised. Security Council Resolutions 822 (1993) and 853 (1993) thus reiterated: "Calls once again for unimpeded access for international humanitarian relief efforts in the region, in particular in all areas affected by the conflict, in order to alleviate the increased suffering of the civilian population and reaffirms that all parties are bound to comply with the principles and rules

C. Preliminary conclusion: the unanswered questions of the case

48. In my view, the fate of the present case is closely related to the answers to be given to the above-mentioned questions. Without a logically consistent intellectual road-map for the assessment of the case, the Court's erratic output is not credible. By confining its deliberation to the narrowest of boundaries, the Court evades the full clarification of the premises of its reasoning, further discrediting that output. Even accepting that the applicants had lived in the area of Lachin and had owned property there, as they have claimed, but have not sufficiently proven, the case could not be resolved without a thorough analysis of the legality of the military actions in the district of Lachin at the relevant time (18 May 1992) in the context of the secession of the "Nagorno-Karabakh Republic", involving the opening of a humanitarian corridor between Nagorno-Karabakh and Armenia for the safeguarding of a threatened Armenian population and eventually the consecutive displacement of civilians and destruction of civilian property for that purpose[84].

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of international humanitarian law". Resolution 874 insisted: "Calls on all parties to refrain from all violations of international humanitarian law and renews its call in resolutions 822 (1993) and 853 (1993) for unimpeded access for international humanitarian relief efforts in all areas affected by the conflict". The Helsinki Additional Meeting of the CSCE Council (Summary of Conclusions, Helsinki, 24 March 1992, § 10), "urged all CSCE participating States and all concerned parties to take all necessary steps to ensure that humanitarian assistance is provided to all those in need through rapid and effective means including safe corridors under international control." It is clear from these calls that the situation at the relevant time did require urgent humanitarian intervention, if need be through the means of safe corridors. On humanitarian intervention, both as a right and a responsibility of the international community, see my separate opinion in Sargsyan v. Armenia (cited above).

84. A thorough reply to these questions would require attentive consideration of the available official evidence of violations of the human rights of the Armenian population in Azerbaijan at the relevant time, such as, for example, the European Parliament Resolutions of 7 July 1988 ("whereas the deteriorating political situation, which has led to anti-Armenian pogroms in Sumgait and serious acts of violence in Baku, is in itself a threat to the safety of the Armenians living in Azerbaijan … [the European Parliament] [c]ondemns the violence employed against Armenian demonstrators in Azerbaijan"), 18 January 1990 ("having regard to the resumption of anti-Armenian activities by the Azeris in Baku (an initial estimate talks of numerous victims, some of whom died in particularly horrific circumstances) and the attacks on Armenian villages outside Nagorno-Karabakh, such as Shaumyan and Getashen, … whereas the blockade of Nagorno-Karabakh has been reinstated by Azerbaijan as harshly as ever"), 15 March 1990 ("concerned at the human rights situation in Nagorno-Karabakh, which is administered by Azerbaijan against the will of the majority of its inhabitants, more than 75% of whom are Armenians, and at the continuing violence in Azerbaijan"), 14 March 1991 ("massacres of Armenians in Azerbaijan"), 16 May 1991 ("deploring the continual aggravation of violence in the Caucasus, particularly against Armenians in the autonomous region of Karabakh"), 13 February 1992 ("whereas the Armenian population living in Nagorno-Karabakh has been subjected to constant blockade and aggression for the last three years, whereas at the end of December 1991 Azerbaijan launched a huge and unprecedented offensive against

The full assessment of the legal implications of the opening of the Lachin corridor as a crucial military measure during the war of secession is evidently relevant for the purposes of deciding on the lawfulness and proportionality of the alleged continued restrictions of the applicants' rights to enjoy their property and family life in the district of Lachin. Thus, the Court should not have adjudicated upon the alleged deprivation of these rights without assessing "the source of the rights claimed"[85].

49. To put it in Convention terms, the ultimate question that this case raises, which the majority chose to ignore, is the extent to which the "general principles of international law", including the law of secession of States and international humanitarian law, may restrict the enjoyment of the right to property under Article 1 of Protocol No. 1 (second sentence). The effect of such a *renvoi* is to render the application of Article 1 of Protocol No. 1 conditional upon the way the Court interprets *incidenter tantum* the law of secession and international humanitarian law. How can the provisions of the European Convention on Human Rights and Protocol No. 1 thereto be reconciled with the imperatives of the law of secession of States and international humanitarian law? How can the human rights enshrined in the Convention and Protocol No. 1 be protected in the context of a remedial secession of a State and the military action carried out by the

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Armenians living in Nagorno-Karabakh, whereas Armenian villages in Nagorno-Karabakh were bombarded with heavy artillery on 34 occasions during January 1992, with over 1 100 rockets and mortars fired at them, wounding about 100 civilians, including women and children, whereas the situation of the people of Nagorno-Karabakh with regard to food and health has worsened to the point of becoming untenable") 21 January 1993 ("aware of the tragic situation of the 300 000 Armenian refugees who have fled the pogroms in Azerbaijan… [the European Parliament] [t]akes the view that the relentless blockade carried out by Azerbaijan constitutes a violation of international law and insists that the Azerbaijani Government lift it forthwith"), and 10 February 1994 ("whereas the Azerbaijani air force has resumed its bombing of civilians, particularly in the town of Stepanakert"); section 907 of the United States Freedom Support Act of 24 October 1992, still in force ("United States assistance under this or any other Act (other than assistance under title V of this Act) may not be provided to the Government of Azerbaijan until the President determines, and so reports to the Congress, that the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno-Karabakh."); and the US Senate Resolution of 17 May 1991 ("Whereas Soviet and Azerbaijani forces have destroyed Armenian villages and depopulated Armenian areas in and around Nagorno-Karabakh in violation of internationally recognized human rights… [the US Senate] condemns the attacks on innocent children, women, and men in Armenian areas and communities in and around Nagorno-Karabakh and in Armenia; condemns the indiscriminate use of force, including the shelling of civilian areas, on Armenia's eastern and southern borders; calls for the end to the blockades and other uses of force and intimidation directed against Armenia and Nagorno-Karabakh"). The Court itself acknowledged the existence of "expulsions", accompanied by "arrests and violence", of the Armenian civilian population, committed by the "government forces" in Azerbaijan territory in April-May 1991 (paragraph 32 of the Sargsyan v. Azerbaijan judgment, cited above).

85. See Šilih v. Slovenia, cited above, §§ 159-163.

defence forces of a threatened ethnical and religious minority? These questions would have taken us to a very different approach to the case.

VI. Final conclusion

50. Self-determination is not *passé*. It is not a mere political rallying cry, but a legal right, which evolved from an historical anti-colonialist claim to a broader human-rights based claim. As a matter of principle, the right to external self-determination is recognised in international law, not only in a colonial but also in a non-colonial context. Whenever a part of the population of a State is not represented by its government and the human rights of that population are systematically infringed by its own government, or by private agents whose action is condoned by that government, the victimised population may have recourse "as a last resort, to rebellion against tyranny and oppression", to use the powerful formulation of the preamble to the Universal Declaration of Human Rights.

51. This Court is competent *ratione materiae* to ascertain such human rights violations and the legal consequences that derive from them, namely in terms of the property rights of displaced civilians. Nevertheless, the present case should have been dismissed owing to non-exhaustion of domestic remedies, lack of victim status and lack of jurisdiction. Had the Court taken more seriously its role in the gathering of evidence, these objections could possibly have been overcome. Then, and only then, the Court would have been in a position to address fully the substantive issues at stake in this case. It did not do so. Those who suffer more from these omissions are precisely the Armenian and Azeri women and men of good will who simply want to live in peace in Nagorno-Karabakh and the surrounding districts.