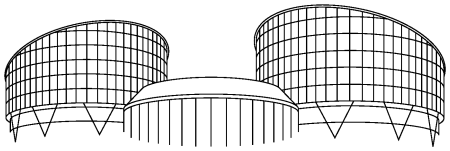

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SARGSYAN v. AZERBAIJAN

(Application no. 40167/06)

JUDGMENT
(*Merits*)

STRASBOURG

16 June 2015

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

In the case of Sargsyan v. Azerbaijan,

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 5 February 2014 and on 22 January 2015,

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

PROCEDURE

1. The case originated in an application (no. 40167/06) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Minas Sargsyan ("the applicant"), on 11 August 2006. The applicant died in 2009. Subsequently, the application was pursued by his widow, Ms Lena Sargsyan, born in 1936, and by his son Vladimir and his daughters Tsovinar and Nina Sargsyan, born in 1957 and 1959, and 1966 respectively. Ms Lena Sargsyan died in January 2014. Vladimir and Tsovinar Sargsyan pursued the proceedings on the applicant's behalf.

2. The applicant, who had been granted legal aid, was represented by Ms N. Gasparyan and Ms K. Ohanyan, lawyers practising in Yerevan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that the denial of his right to return to the village of Gulistan and to have access to his property there or to be compensated for its loss and the denial of access to his home and to the graves of his relatives in Gulistan amounted to continuing violations of Article 1 of Protocol No. 1 and of Article 8 of the Convention. Moreover, he alleged a violation of Article 13 of the Convention in that no effective remedy was available in respect to the above complaints. Finally, he alleged with a view to all complaints set out above, that he was subjected to discrimination on the basis of his ethnic origin and his religious affiliation in violation of Article 14 of the Convention.

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

5. On 11 March 2010 a Chamber of the First Section, composed of the following judges: Christos Rozakis, Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou and also of Søren Nielsen, 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 *Chiragov and Others v. Armenia* (application no. 13216/05) 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 partly 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 applicant and the Government each filed further written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from the Armenian Government.

10. On 12 September 2013 the Court decided to request factual information from the American Association for the Advancement of Science ("the AAAS") in the framework of its "Geospatial Technologies and Human Rights Programme" (Rule A1 §§ 1 and 2 of the Annex to the

Rules of Court). In November 2013 the AAAS submitted a report "High-resolution satellite imagery assessment of Gulistan, Azerbaijan 2002-2012, ("the AAAS report"). The respondent Government objected to the disclosure of a number of images. On 10 December 2013 the President granted the request. Only those parts of the report which were subject to disclosure were taken to the case-file.

11. On 3 February 2014 the Court viewed all DVDs containing footage of Gulistan and its surroundings submitted by the applicant, the respondent Government and the intervening Government and relevant parts of the AAAS report.

12. A hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 5 February 2014 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Mr C. ASGAROV, *Agent*,
Mr M.N. SHAW, QC,
Mr G. LANSKY, *Counsel*,
Mr O. GVALADZE,
Mr H. TRETTER,
Ms T. URDANETA WITTEK, *Advisers*;

(b) for the applicant

Mr P. LEACH,
Ms N. GASPARYAN, *Counsel*,
Ms K. OHANYAN,
Mr A. ALOYAN,
Mr V. GRIGORYAN, *Advisers*;

(c) for the Armenian Government

Mr G. KOSTANYAN, *Agent*,
Mr E. BABAYAN, *Counsel*.

13. The Court heard addresses by Mr Leach, Ms Gasparyan, Mr Grigoryan, Mr Shaw, Mr Lansky and Mr Kostanyan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

14. 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 km wide.

15. According to the USSR census of 1989, the NKAO had a population of around 189,000 consisting of 77% ethnic Armenians and 22% ethnic Azeris, with Russian and Kurdish minorities.

16. 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 1988 the Soviet of the NKAO appealed to the Supreme Soviets of the Armenian SSR, 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.

17. 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".

18. 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.

19. 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 1991. On 2 September 1991 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 Shahumyan district of Azerbaijan, and declared that it was no longer under Azerbaijani jurisdiction. On 26 November 1991 the Azerbaijani Parliament abolished the autonomy previously enjoyed by Nagorno-Karabakh. In a referendum organised in Nagorno-Karabakh on 10 December 1991, 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.

20. In early 1992 the conflict gradually escalated into full-scale war. By the end of 1993, ethnic Armenian forces had gained control over almost the entire territory of the former NKAO as well as seven adjacent Azerbaijani regions (Lachin, Kelbajar, Jabrayil, Gubadly and Zangilan and substantial parts of Agdam and Fizuli).

21. 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.

22. According to a Human Rights Watch report ("Seven years of Conflict in Nagorno-Karabakh", December 1994), 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

23. According to the Armenian 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 7,500 sq. km.

24. 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.

25. 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 any 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.

26. 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 later have 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.

27. 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 traveling 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."

28. 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 applicant and the property allegedly owned by him in Gulistan

29. The applicant, an ethnic Armenian, states that he and his family used to live in the village of Gulistan in the Shahumyan region of the Azerbaijan SSR. He claims to have had a house and outhouses there.

30. Geographically, Shahumyan shared a border with the NKAO and was situated to the north of it. The region did not form part of the NKAO, but was later claimed by the "NKR" as part of its territory (see paragraph 19 above). According to the applicant, 82% of the population of Shahumyan had been ethnic Armenians prior to the conflict.

31. In February 1991 Shahumyan was abolished as a separate administrative region and was formally incorporated into the present-day Goranboy region of the Republic of Azerbaijan.

32. In April-May 1991 the USSR Internal Forces and the special-purpose militia units ("the OMON") of the Azerbaijan SSR launched a military operation with the stated purpose of "passport checking" and disarming local Armenian militants in the region. However, according to various sources, the government forces, using the official purpose of the operation as a pretext, expelled the Armenian population of a number of villages in the Shahumyan region, thus forcing them to leave their homes and flee to Nagorno-Karabakh or Armenia. The expulsions were accompanied by arrests and violence towards the civilian population. In 1992, when the conflict escalated into a full-scale war, Shahumyan region came under attack by Azerbaijani forces.

1. The parties' submissions and evidence presented by them

33. The parties' positions differ in respect of the applicant's residence and possessions in Gulistan.

(a) The applicant

34. The applicant maintained that he had lived in Gulistan for most of his life until his forced displacement in 1992. In support of this claim he submitted a copy of his former Soviet passport issued in 1979, from which it can be seen that the applicant was born in Gulistan. He also submitted his marriage certificate, which shows that he and his wife, who was also born in Gulistan, got married there in 1955. In addition, the applicant asserted that, having grown up in Gulistan, he left for some years to complete his military service and to work in the town of Sumgait. A few years after his marriage he returned to Gulistan where he lived until June 1992.

35. The applicant submitted a copy of an official certificate ("technical passport") when he lodged the application. According to that document, dated 20 May 1991, a two-storey house in Gulistan and outhouses of a total

area of 167 sq. m and 2,160 sq. m of land were registered in the applicant's name. Furthermore he submitted a detailed plan of the main house.

36. According to the technical passport, of the 167 sq. m on which the house stood, 76 sq. m were occupied by the main house and 91 by various outhouses including a cow-shed. Of the 2,160 sq. m of land 1,500 were a fruit and vegetable garden. The document also contains information of a technical nature (for instance the building materials used) concerning the main house and the outhouses.

37. The applicant explained that he had obtained the land by permission of the Village Council to divide his father's plot of land between him and his brother. The decision was recorded in the Village Council's register. With the help of relatives and friends, he and his wife built their house on that plot of land in 1962-63. Their four children grew up in the house and he and his wife continued to live there until they had to flee in June 1992. Furthermore, the applicant explained that he had been a secondary school teacher in Gulistan and had earned his living partly from his salary and partly from farming and stock-breeding on his land while his wife had been working at the village's collective farm since the 1970s.

38. In addition to the technical passport and the plan of the house mentioned above, the applicant submitted photos of the house and written statements dating from August 2010 from two former officials of the Village Council, Ms Khachatryan and Mr Meghryan. The former states that she was the secretary of the Village Council from 1952 to 1976. She confirms that the Village Council allowed the applicant to divide his father's plot of land between himself and his brother. Both, Ms Khachatryan and Mr Meghryan who states the he was a member of the Board of the Village Council for some years in the 1970s, claim that entries about the allotment of land to villagers were made in the registration book of the Village Council. A number of further written statements from May 2010 from family members (including the applicant's wife, two of their children and his son-in-law), former neighbours and friends from Gulistan provide a description of Gulistan and confirm that the applicant was a secondary school teacher and had a plot of land and a two-storey house in the village. They also confirm that a number of outhouses and a fruit and vegetable garden belonged to the applicant's house, where he and his family lived until June 1992.

39. The applicant described that Shahumyan region was subjected to a blockade by the Azerbaijani Government in the early 1990s. In 1992 the armed forces started attacking the region. In June 1992 Gulistan came under direct attack by Azerbaijani forces. From 12 to 13 June 1992 the village was heavily bombed. The population of the village, including the applicant and his family members, fled in fear for their lives. The above-mentioned statements of a number of witnesses also provide a description of the

blockade of Shahumyan region during the conflict, of the attack on the village and the flight of its inhabitants.

40. The applicant and his family fled to Armenia. Subsequently, the applicant and his wife lived as refugees in Yerevan. In 2002 the applicant obtained Armenian citizenship. He was seriously ill from 2004 and died on 13 April 2009 in Yerevan.

(b) The respondent Government

41. The respondent Government submitted that it could not be verified whether the applicant had actually lived in Gulistan and had any possessions there. For the period from 1988 to the present date, the relevant departments of the Goranboy region did not possess any documentation concerning the plot of land, house or other buildings allegedly owned by the applicant. Moreover, certain archives of the former Shahumyan region, including the Civil Registry Office and the Passport Office, had been destroyed during the hostilities. No documents relating to the applicant were available in the Goranboy regional archives today.

42. In support of their position the Government submitted a number of documents, namely: a statement, dated 22 July 2007, by Colonel Maharramov, Head of the Goranboy Regional Police Department confirming that the archives of the Civil Registry Office and of the Passport Office of the former Shahumyan Region had been destroyed during the conflict; a letter from the State Registry Service for Immovable Property of 31 July 2007 according to which the relevant Regional Department's Archives did not contain any document concerning the applicant's alleged property rights; a statement dated 5 March 2012 by Mr Mammadov, Chairman of the State Land and Mapping Committee of the Republic of Azerbaijan, according to whom only the Executive Committee of the Soviet of People's Deputies of the Districts and Cities had been empowered to allocate land under the Land Code of the Azerbaijan SSR.

D. The situation obtaining in Gulistan

43. The parties' positions also differ in respect of the current situation obtaining in Gulistan. The Armenian Government, as a third-party intervener, also made submissions on the issue.

1. The parties' submissions

(a) The applicant

44. Regarding the situation in Gulistan, the applicant asserted that the Republic of Azerbaijan had control over the village and in particular that they had positions in the village itself and on its outskirts. In his view there was nothing to prove that Gulistan was on the Line of Contact (LoC)

between Azerbaijani and "NKR" forces as claimed by the respondent Government.

45. In the proceedings prior to the admissibility decision, the applicant submitted a written statement from an anonymous senior officer of the "NKR" armed forces dated 11 August 2010, according to whom Gulistan was under the *de facto* control of Azerbaijani military forces (see paragraphs 51 and 58 below). Moreover, the applicant asserted that fellow villagers had tried to return to Gulistan on several occasions but had been unable to enter the village as they would have risked to be shot at by Azerbaijani forces.

(b) The respondent Government

46. The Government accepted throughout the proceedings that Gulistan was located on the internationally recognized territory of the Republic of Azerbaijan.

47. In their submissions prior to the admissibility decision, the Government asserted that Gulistan was physically on the LoC between Azerbaijani and Armenian forces, which had been established by the ceasefire agreement of May 1994. The village was deserted and the LoC was maintained by the stationing of armed forces on either side and by the extensive use of landmines. It was thus impossible for the respondent Government to exercise any control over the area or to have any access to it.

48. In their submissions after the admissibility decision the Government stated that they did not exercise sufficient control over the village. Referring to the statements of a number of military officers who had served in the Goranboy region and had made statements on the situation in Gulistan (see, paragraph 62 below) they submitted in particular that the village, situated in a "v" shaped valley on the northern bank of the river Inzachay was on the LoC, meaning that it was surrounded by armed forces of Azerbaijan on the one side (in the north and east) and of Armenia on the other side (in the south and west). Armenian forces held strategically advantageous positions on a steep, forested slope south of the river, while Azerbaijani positions on the north bank of the river were situated in lower, relatively open territory. The Government asserted that, as a matter of fact, Gulistan was not under the effective control of either side. It was a contested area and constituted a dangerous environment. The village and its surroundings were mined. Violations of the ceasefire agreement occurred frequently. There were no safe buildings in the area as the village had been destroyed and deserted.

49. In their pleadings at the hearing of 5 February 2014, the Government underlined that Gulistan was exposed to fire from Armenian military positions situated across the river on a steep slope. In addition, they referred to the AAAS report on Gulistan (see paragraphs 74 and 75 below), noting that it confirmed, apart from the fact that Gulistan was on Azerbaijani territory, that the area around Gulistan was mountainous and was the object

of sustained military activity and that the village had been destroyed. They maintained that the area was mined and inaccessible to any civilian.

(c) The Armenian Government, third-party intervener

50. The intervening Government maintained throughout the proceedings that the respondent Government had full, effective control over Gulistan.

51. At the hearing of 15 September 2010 they had contested the respondent Government's assertion that Gulistan was on the LoC. Referring to the written statement of 11 August 2010 by an anonymous senior officer of the "NKR" armed forces serving near Gulistan which had been submitted by the applicant, the Agent of the Armenian Government had declared that he had been personally present when the statement had been made and confirmed its correctness. On the basis of this statement, the Armenian Government asserted that in the area at issue, the dividing line between the armed forces of the "NKR" and the Republic of Azerbaijan was a gorge through which the river Indzachay was flowing. Gulistan was situated north of the riverside and was under the control of Azerbaijani armed forces who had military positions in the village itself and on its outskirts, while "NKR" forces were stationed on the other side of the gorge. They also referred to the DVD containing footage of the village submitted to the Court by the applicant in 2008 (see paragraph 56 below) claiming that the person who can be seen walking between the houses, was an Azerbaijani soldier. The Armenian Government maintained that it was impossible for "NKR" forces or any Armenian to have access to the village.

52. In their submissions following the admissibility decision, the Armenian Government disclosed the identity of the senior "NKR" officer at the Court's request. The officer in question is Colonel Manukyan of the "NKR" Defence Army. Moreover, the Armenian Government submitted that their Agent, Mr Kostanyan, had obtained permission from the "NKR" authorities and had visited the territory near Gulistan in May 2012. He had obtained DVD material and recorded interviews with three "NKR" officers describing the situation on the ground in and near Gulistan (see paragraph 71 below). The Armenian Government also replied to the Court's question concerning their assertion made at the hearing of 15 September 2010 that the man walking between the ruins on the DVD submitted by the applicant in 2008 was an Azerbaijani soldier: While stating that they were not in a position to comment on that man's identity, they referred to statements of the "NKR" military officers according to whom there were Azerbaijani military positions in Gulistan, while there was no presence of civilians.

53. At the hearing of 5 February 2014 the Armenian Government repeated their description of the situation pertaining in Gulistan. Moreover, they asserted that Azerbaijani military presence in the area had also been confirmed by the AAAS report.

2. Evidence submitted by the parties

54. The parties have submitted extensive documentary material in support of their respective positions. The following paragraphs contain a short description of the main items of evidence.

(a) The applicant

(i) Map of Gulistan

55. A map of Gulistan and its surroundings: It appears to be a copy of an official map with names in Azeri, showing the entire village on the north bank of a river (Indzachay). The alleged positions of the Azerbaijani forces are indicated as follows: one is in the middle of the village, a few more are on its northern edge, others are also spread out on the north bank of the river but are further away, most of them apparently on the heights around the village.

(ii) DVDs

56. A DVD, submitted with his observations of 21 February 2008, containing footage of Gulistan and its surroundings. The village is situated on a hillside. Many of the houses are in ruins, while a few still have intact roofs. Smoke is rising from some chimneys. At one point a man walking between the ruins appears. On a hillside situated in some distance from the village, constructions are to be seen which appear to be firing positions.

(iii) Statements by "NKR" officials and by former villagers from Gulistan

57. A letter by the "Minister of Defence of the NKR" of 14 February 2008 describing the situation on the ground in Gulistan and claiming in particular that the Azerbaijani Armed Forces had several posts and shooting points right in the village.

58. A statement dated 11 August 2010 by a senior officer of the "NKR" forces serving in a military position near the village of Gulistan since 2005 (see the summary of the statement at paragraph 51 above). The statement was accompanied by a hand-drawn map of Gulistan and its surroundings and a number of photos showing the area. The officer, who had initially remained anonymous, is Colonel Manukyan from the "NKR" Defence Army.

A statement of Mr Aloyan, assistant to the representative of the applicant, who recorded the statement by the "NKR" officer on the spot, i.e. at the military unit near Gulistan, confirming the contents of that officer's statement and that the photos were taken from the "NKR" military position.

A Statement of Mr Kostanyan, Agent of the Armenian Government, in whose presence the senior "NKR" officer made his statement at his military unit close to Gulistan.

59. Statements dated March 2012 from three former villagers of Gulistan who claimed that they had unsuccessfully tried to return to the village of Gulistan between 2002 and 2004. They claim to have approached the area on the "NKR" side of the ceasefire line, two of them state that they were able to look down on the village from the height of Napat, but were prohibited from moving any further by the "NKR" soldiers accompanying them due to the risk of sniper fire from the opposing forces. One of them states that with the aid of binoculars, he was able to see a number of entrenchments in the village and a soldier standing there.

(b) The respondent Government

(i) Maps

60. A map of Gulistan and its surroundings. The map shows the entire village on the north bank of the river Indzachay, the Azerbaijani military positions are also on the north bank of the river mostly on the heights around the village. The "NKR" positions are on the south bank of the river the closest being right opposite the village.

A map of Nagorno Karabakh submitted by the Armenian Government in *Chiragov and Others v. Armenia* (cited above). The map shows Gulistan on the very border of the "NKR" to the north of a river.

A map of Azerbaijan published in 2006 by the State Land and Cartography Committee of the Republic of Azerbaijan. The map shows Gulistan on the very border of the area occupied by the "NKR". On the map the occupied areas are shaded and surrounded by a red line; Gulistan is on that red line but outside the shaded area, to the north of a river.

(ii) DVDs

61. Two DVDs containing footage of Gulistan and its surroundings, (one submitted in September 2008, the other in July 2012). The first shows the village in a hilly landscape, with most houses in ruins, plus some constructions on the crest of a hill which appear to be firing positions. The second again shows the village (houses in ruins and destroyed agricultural machines) and the surrounding landscape and is accompanied by a text explaining in particular that there is no habitation in the village, that the Armenian positions are on a forested slope and control the village with large calibre guns, while Azerbaijani positions are at a distance of some 2.5 km and can only visually control the village.

(iii) Statements from Azerbaijani military officers, officials and villagers from neighbouring villages

62. Statements made in March 2012 by six Azerbaijani army officers, Colonel Babayev, who served in a military unit in Goranboy region from 1994 to 1997, and Colonel-lieutnants Abdulov, Mammadov, Ahmadov,

Abbasov, and Huseynov who served in military units in Goranboy region at various periods between 1999 and 2009 and describe the situation on the ground in Gulistan as follows:
- Gulistan is on the north bank of the river Indzachay;
- Azerbaijani military positions are on the north bank of the river in the east and north-east of Gulistan settlement, situated in lowlands, at distances between 1 and 3 km from the destroyed village;
- Armenian military positions are on the south bank of the river in the west and south-west of Gulistan settlement, situated on strategically better upland positions (steep slopes covered with forest). The estimates given by the officers in respect of the distance at which the nearest Armenian positions are located vary between 200-300 m and 1 km;
- ceasefire violations by the Armenian forces are frequent;
- they contest the Armenian Government's assertion that some of the houses in the village have been repaired and are being used as military positions by the Azerbaijani forces;
- the Azerbaijani positions and the village itself are within shooting range of the Armenian positions (fire with large-calibre machine guns); military staff can therefore not move freely in the area but only on designated routes;
- there are no civilians in the village;
- most of the buildings (some 100 houses) in the village were destroyed during the hostilities. As the village has been deserted since 1992 houses have decayed, roofs have collapsed and trees are now growing inside the destroyed buildings. There are currently no habitable buildings left; after the hostilities, Armenian forces mined the territory of the settlement, these mines are sometimes triggered by animals;
- Colonel-lieutenant Abdulov states to have observed movements of Armenian military in the ruins in the south part of Gulistan settlement, Colonel-lieutenant Mammadov claims to have seen Armenian military servants moving from their positions towards the river. Colonel-lieutenants Abbasov and Huseynov state that they observed Armenian military forces destroying buildings and using the material for their fortifications.

63. Information by the Azerbaijani Ministry of Defence covering the period from 2003 to 2010 on ceasefire violations indicating an increase from 2008 (20 in 2008, 35 in 2009 and 52 in 2010) and casualties in the area of Gulistan as a result of mine explosions (5 soldiers killed on 5 August 2003) or violations of the ceasefire (one soldier killed on 25 February 2005).

64. A letter by the Director of the National Agency for Mine Action dated 12 July 2010 stating that Gulistan village in the Goranboy region was "defined as a territory with an extensive mine and unexploded ordinance (UXO) contamination".

65. Statements made in March 2012 by eight villagers living in neighbouring settlements, Meshali village and Yukhari Aghjakand town.

They describe that the village of Gulistan is deserted and that the surroundings are mined and regularly come under fire from the Armenian positions.

(iv) Press releases

66. Two press releases of October 2006 from an Armenian source relating to an OSCE mission monitoring the border line between Nagorno-Karabakh and Azerbaijan near village Gulistan.

67. Numerous press releases from the Azeri Press Agency issued between June 2010 and May 2012 mentioning ceasefire violations in various areas including the area of Gulistan. The text most frequently used by these press releases reads as follows: "Armenian Armed Forces fired on the opposite Azerbaijani Armed Forces from posts near Gulistan village" or "...from posts in nameless upland near Gulistan village" or "enemy units fired on the positions of Azerbaijani Armed Forces from the posts [...] near Gulistan village of Azerbaijan's Goranboy region. One of these press releases, dated 3 March 2012 reports that "Azerbaijani lieutenant Gurban Huseynov has stricken a mine in Gulistan village in the frontline of Goranboy region. Consequently, he lost his leg".

68. A statement by International Campaign to Ban Landmines of 20 September 2013 expressing concern about the increased placement of anti-personnel landmines by the Nagorno-Karabakh authorities along the Armenian-Azerbaijani line of contact east and north of the disputed territory.

(c) The Armenian Government, third-party intervener

(i) Map

69. A map of Gulistan and its surroundings, which shows the entire village on the north bank of the river Idzachay. The Azerbaijani positions are also on the north bank of the river and very close to the village (to the east and west of it and on its northern edge) while the "NKR" positions are on the south bank of the river, the closest being just opposite the village.

(ii) DVD

70. A DVD, submitted in July 2012, containing footage of Gulistan and its surroundings and interviews taken on the spot by Government Agent, Mr Kostanyan, with three "NKR" army officers serving in the military unit near Gulistan (for their contents see paragraph 71 below). It shows the village, which most houses in ruins, and the landscape around it. Towards the end of the video, a herd of sheep and some persons can be seen moving behind the destroyed village.

(iii) Statements by "NKR" military officers

71. Transcripts of the interviews recorded in May 2012 with Unit commander Sevoyan, Sergeant Petrosyan and officer Vardanyan, serving in the "NKR" military unit located near Gulistan. They describe the situation on the ground as follows:
- the Azerbaijani military forces have positions in the village and sometimes perform combat duties there, but their permanent location point is in the rear;
- there are no civilians in the village;
- there are no mines in the village itself but the area surrounding it has been mined by the Azerbaijani forces (they notice that from time to time animals trigger a mine);
- sometimes there are ceasefire violations by the Azerbaijani side; if they are negligent they risk to be shot at from the Azerbaijani positions;
- it happened several times that former villagers of Gulistan came to the area wishing to visit their village. Due to dangers from snipers or combat weapons' fire from the Azerbaijani side, they did not allow them to approach the village.

3. Evidence obtained by the Court

72. On 12 September 2013 the Court requested the American Association for the Advancement of Science ("the AAAS") in the framework of its "Geospatial Technologies and Human Rights" programme to provide a report on the following issues: the location of military positions such as trenches and fortifications in and around the village of Gulistan, for the period between the entry into force of the Convention in respect of Azerbaijan (15 April 2002) to the present, and also on the state of destruction of buildings in the village and of the village's cemeteries at the time of the Convention's entry into force (15 April 2002).

73. The report "High-resolution satellite imagery assessment of Gulistan, Azerbaijan, 2002-2012" ("the AAAS report") was submitted to the Court in November 2013. On the basis of interpretation of high-resolution satellite images from 2005, 2009 and 2012 obtained from public sources, the report provides the following information.

74. In respect of military structures it notes that there are trenches and revetments in the village and adjacent to it in the 2005 and 2009 images, a build-up having taken place in the intervening period, while after 2009 trenches seem to have fallen into disuse, as is shown by the fading visual signature of these trenches in the 2012 image. In the area surrounding Gulistan military activity was apparent. Military build-up in the 2005 to 2009 period, concerning trenches, revetments, military buildings, vehicles and vehicle tracks was followed by continued military development in the region over the period 2009 to 2012, but of a different type, in that trenches

and revetments fell into disuse, while military buildings and vehicle presence continued to increase.

75. In respect of the destruction of buildings, the report indicates that most of the approximately 250 houses in the village are destroyed, the term "destroyed" meaning that they are no longer intact. The report notes that building degradation and vegetation overgrowth obscured building footprints and made structure counts difficult. While in 2005 some 33 buildings remained intact, there were only 17 in 2009 and 13 in 2012. For most of the destroyed buildings outer and interior walls have been preserved while roofs have collapsed. While the state of the buildings suggests burning as a possible cause of destruction, the report underlines that the cause of the destruction could not be determined via satellite imagery, in particular, it was not always possible to state whether or not buildings had been destroyed deliberately. No cemeteries were identifiable on the satellite imagery. The report suggests that this might be due to vegetation overgrowth.

II. THE JOINT UNDERTAKING OF ARMENIA AND AZERBAIJAN

76. 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 222 (2000) on Azerbaijan's application for membership of the Council of Europe read as follows:

> "11. The Assembly takes note of the letter from the President of Azerbaijan reiterating his country's commitment to a peaceful settlement of the Nagorno-Karabakh conflict and stressing that Azerbaijan's accession to the Council of Europe would be a major contribution to the negotiations process and stability in the region.
>
> ...
>
> 14. The Parliamentary Assembly takes note of the letters from the President of Azerbaijan, the speaker of the parliament, the Prime Minister and the chairmen of the political parties represented in Parliament, and notes that Azerbaijan undertakes to honour the following commitments:
>
> ...
>
> ii. as regards the resolution of the Nagorno-Karabakh conflict:
>
> a. to continue efforts to settle the conflict by peaceful means only;
>
> b. 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)14 by the Committee of Ministers concerning the invitation to Azerbaijan to become a member of the Council of Europe refers to the commitments entered into by Azerbaijan, as set out in Opinion 222 (2000) and the assurances for their fulfilment given by the Government of Azerbaijan.

III. RELEVANT DOMESTIC LAW

A. The laws of the Azerbaijan SSR

77. The laws relevant to the applicant's 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

78. 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

79. 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

80. 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

81. The 1985 Instruction, in Article 2, listed the documents that served as evidence of title to a residential house. The Instruction was 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"

Article 2.3 provided as follows:

"In rural areas, as well as when rural settlements are incorporated within a city (village) boundary or reorganized as a city (village), the basis for registration performed pursuant to these Instructions shall be household lists, extracts from them, statements from the Village or Regional Executive Committee of People's Deputies as well as other documents certifying a property right in the buildings specified in Articles 2.1 and 2.2 of these Instructions."

5. The 1958 Charter on Village Councils of Deputies of the Workers of the Azerbaijan SSR

82. In addition, according to the applicant, the Charter on Village Councils of Deputies of the Workers of the Azerbaijan SSR of 23 April 1958 ("the 1958 Charter on Village Councils") was relevant to the establishment of his rights in respect to the land in the early 1960s. The Government contested that.

Section 2 paragraph 9 provided as follows:

"In the field of agriculture the Village Council of the Deputies of the Workers:

...

(j) shall manage the national land fund of villages; shall make allotment and allocation of land plots from such fund to inhabitants for private construction; shall have control over maintenance of legislation on land tenure."

Section 2 paragraph 19 provided as follows:

"In the field of maintenance of public order and rights of inhabitants the Village Council of the Deputies of the Workers:

...

(e) shall carry out registration of family property divisions in collective farms (peasant households)."

B. The laws of the Republic of Azerbaijan

1. *The 1991 Order on "Provision of Housing of Citizens who Forcibly Left Places of Permanent Residence (Refugees)"*

83. On 6 November 1991 the Supreme Soviet of the Republic of Azerbaijan issued an Order on "Provision of Housing of Citizens who Forcibly Left Places of Permanent Residence (Refugees)". This order addressed *inter alia* the developing practice of property swaps between Armenians leaving Azerbaijan and Azerbaijanis leaving Armenia, Nagorno-Karabakh and the surrounding provinces.

Section 8

"To instruct the Soviets of People's Deputies of the cities of Sumgayit, Gandja, Mingachevir, Yevlakh, Ali-Bayramli, Lenkaran, Naftalan, Sheki and of districts and their local bodies of executive authority to provide, within two months, with housing other families of refugees who have power of attorney or other documents concerning the legal exchange of houses and apartments from Armenia to Azerbaijan.

Having regard to the fact that a considerable part of refugees have exchanged their privately owned houses to the State owned apartments in the cities, to instruct the local bodies of executive authority to transfer these apartments into private ownership of the refugees, after the adoption of the relevant law on privatization.

To declare the housing facilities constructed by various ministries, institutions and organizations of the Republic of Azerbaijan after 1988 in the rural areas for housing of refugees as the private property of settled refugees and to instruct local bodies of executive authority to issue these families with relevant documents.

To transfer the free private property of families who have not exchanged or sold it when they left the Republic into private property of families of refugees who came to the Republic of Azerbaijan and permanently reside in these premises, as a compensation for housing left in their places of permanent residence in Armenia forcedly and without compensation."

84. The 1991 Order is still in force. Apart from that order no laws have been adopted in respect of property abandoned by Armenians who left Azerbaijan due to the Nagorno-Karabakh conflict. Consequently, for properties not covered by the order, the general rules of ownership described in the subsequent paragraphs apply.

85. On 9 November 1991 the Republic of Azerbaijan enacted laws concerning property which, for the first time, referred to land as being the object of private ownership. However, detailed rules on the privatization of

land allotted to citizens were only introduced later, by the 1996 Law on Land Reform.

2. The 1991 Law on Property

86. 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."

3. The 1992 Land Code

87. 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."

4. The 1995 Constitution

88. The 1995 Constitution protects the right to property and provides for State liability in respect of any damage resulting from illegal actions or omissions of State bodies and their officials.

The relevant provisions of the Constitution are the following:

Article 29

"I. Everyone has the right to own property.

II. Neither kind of property has priority. Ownership rights, including the rights of private owners, are protected by law.

III. Anyone may possess movable or real property. The right of ownership confers on owners the right to possess, use and dispose of the property himself or herself or jointly with others.

IV. Nobody shall be deprived of his or her property without a court decision. Total confiscation of property is not permitted. Transfer of property for State or public needs is permitted only on condition of prior payment of fair compensation.

V. The State guarantees succession rights."

Article 68

"I. The rights of victims of crime or of usurpation of power are protected by law. The victim has the right to take part in the administration of justice and claim compensation for damage.

II. Everyone has the right to compensation from the State for damage incurred as a result of illegal actions or omissions of State bodies or officials."

5. The Civil Code

89. Provisions of the Civil Code in force before 1 September 2000:

Article 8. Application of civil legislation of other union republics in the Azerbaijan SSR

"The civil legislation of other Union republics shall apply in the Azerbaijan SSR, according to the following rules:

(1) relations deriving from the right of ownership shall be governed by the law of the place where the property is situated.

...

(4) obligations arising as a result of the infliction of damage shall be subject to the law of the forum or, upon the request of the aggrieved party, the law of the place where the damage was inflicted; ..."

Article 142. Recovery of property from another's unlawful possession

"The owner shall have the right to recover his property from another's unlawful possession."

Article 144. Recovery of unlawfully transferred State, cooperative or other public property

"State property or property of kolkhozes or other cooperative and public organisations that has been unlawfully transferred by any means may be recovered from any purchaser by the relevant organisations."

Article 146. Settlements on the recovery of property from unlawful possession

"In recovering property from another's unlawful possession, the owner shall have the right to claim from that person, if he knew, or should have known, that he was in unlawful possession (owner in bad faith), compensation for any income which he has

derived, or should have derived, over the entire period of possession, and from a person in bona fide possession compensation for any income which he has derived, or should have derived, from the time when he learnt of the unlawfulness of the possession or received a summons from the owner claiming the return of the property."

Article 147. Protection of owner's rights from violations not entailing deprivation of possession

"The owner shall have the right to claim a remedy in respect of any violated rights, even where such violations have not entailed deprivation of possession."

Article 148. Protection of rights of persons in possession who are not owners

"The rights stipulated in Articles 142-147 of the present Code shall also vest in a person who, even though he is not the owner, is in possession of the property in accordance with the law or a contract."

Article 571-3. Law applicable to the right of ownership

"The right of ownership of the property in question shall be determined in accordance with the law of the country in which it is situated.

Subject to any contrary provision of the legislation of the USSR and the Azerbaijan SSR, a right of ownership of the property in question shall be created or terminated in accordance with the law of the country in which the property was situated when an action or other circumstance took place which served as a basis for the creation or termination of the right of ownership."

Article 571-4. Law applicable to obligations created following the infliction of damage

"The rights and duties of the parties in respect of obligations deriving from the infliction of damage shall be determined in accordance with the law of the country where an action or other circumstance took place which served as a basis for claims for compensation for loss."

90. Provisions of the Civil Code in force from 1 September 2000:

Article 21. Compensation of Losses

"21.1 A person entitled to claim full recovery of losses may claim full recovery of losses inflicted on him, unless a smaller amount has been stipulated by the law or by the contract.

21.2 By losses shall be understood the expenses which the person whose right has been violated has incurred or will have to incur in order to restore the violated right, the loss or the damage done to his property (the compensatory damage), and the unreceived profits which he or she would have gained under the ordinary conditions of the civil transactions if the right had not been violated (the missed profit)."

Article 1100. Responsibility for losses caused by State bodies, local self-government bodies or their officials

"Losses inflicted upon an individual or legal entity as a result of illegal actions or omissions on the part of State bodies, local self-government bodies or their officials, including the adoption by the State body or the local self-government body of an

unlawful measure, shall be liable to compensation by the Republic of Azerbaijan or by the relevant municipality."

6. The Code of Civil Procedure

91. Provisions of the Code of Civil Procedure in force before 1 June 2000:

Article 118. Lodging of claims at the defendant's place of residence

"Claims shall be lodged with the court at the defendant's place of residence.

Claims against a legal entity shall be lodged at its address or at the address of property belonging to it."

Article 119. Jurisdiction of the claimant's choice

"... Claims for compensation for damage inflicted upon the property of a citizen or legal entity may also be lodged at the place where the damage was inflicted."

92. Provisions of the Code of Civil Procedure in force from 1 June 2000:

Article 8. Equality of all before the law and courts

"8.1 Justice in respect of civil cases and economic disputes shall be carried out in accordance with the principle of equality of all before the law and courts.

8.2 Courts shall adopt an identical approach towards all persons participating in the case irrespective of race, religion, gender, origin, property status, business position, beliefs, membership of political parties, trade unions and other social associations, place of location, subordination, type of ownership, or any other grounds not specified by the legislation."

Article 307. Cases concerning the establishment of facts of legal significance

"307.1 The court shall establish the facts on which the origin, change or termination of the personal and property rights of physical and legal persons depend.

307.2 The court shall hear cases relating to the establishment of the following facts:

...

307.2.6 in respect of the right of ownership the fact of possession, use or disposal of immovable property ..."

Article 309. Lodging of application

"309.1 Applications concerning the establishment of facts of legal significance shall be lodged with the court at the applicant's place of residence.

309.2 In respect of the right of ownership, applications concerning the establishment of the fact of possession, use or disposal of immovable property shall be lodged with the court at the place where the immovable property is situated."

Article 443. Jurisdiction of the courts of the Azerbaijan Republic relating to cases with the participation of foreigners

"443.0 The courts of the Azerbaijan Republic shall have the right to hear the following cases with the participation of foreigners: ...

443.0.6 where, in cases relating to compensation for losses for damage inflicted on property, the action or other circumstance serving as the ground for lodging the claim for compensation of losses has occurred on the territory of the Azerbaijan Republic."

IV. DECLARATION MADE BY THE RESPONDENT GOVERNMENT UPON RATIFICATION OF THE CONVENTION

93. The instrument of ratification deposited by the Republic of Azerbaijan on 15 April 2002 contains the following declaration:

"The Republic of Azerbaijan declares that it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation."

V. RELEVANT INTERNATIONAL LAW

94. 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

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 p. 5-8; Y. Dinstein, The International Law of Belligerent Occupation (Cambridge: Cambridge University Press, 2009) at 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) 585-586.

2. 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), at 10, 17 and 33; see also E. Benvenisti, cited avove, at p. 43ff; V. Koutroulis, Le debut et la fin de l'application du droit de l'occupation (Paris: Editions Pedone, 2010) at pp. 35-41.

ground" therefore forces exercising naval or air control through a naval or air blockade do not suffice[3].

95. 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. 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.

3. T. Ferraro, cited above, at pp. 17 and 137; Y. Dinstein, cited above, at p. 44, § 100.
4. J.-M. Henckaerts, and L. Doswald-Beck, Customary International Humanitarian Law, (Geneva/Cambridge: ICRC/Cambridge University Press, 2005).

VI. RELEVANT UNITED NATIONS AND COUNCIL OF EUROPE MATERIALS

A. United Nations materials

96. 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 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 materials

97. 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)*

98. 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)

99. 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

100. 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

101. The applicant died in 2009. In its decision on the admissibility of the present case, the Court noted that his widow Ms Lena Sargsyan and their children Vladimir, Tsovinar and Nina Sargsyan had expressed their wish to continue the proceedings before the Court and were entitled to do so (*Sargsyan v. Azerbaijan* [GC] (dec.), no. 40167/06, §§ 1 and 51, 14 December 2011).

102. Subsequently, the applicant's representative stated that Ms Nina Sargsyan did not wish to pursue the application. The applicant's widow, Ms Lena Sargsyan, died in January 2014. Mr Vladimir and Ms Tsovinar Sargsyan, the applicant's son and daughter, wish to continue the proceedings before the Court. The Court has already held that they are entitled to do so and sees no reasons to deviate from this position.

103. Furthermore, the Court reiterates that, in its decision on the admissibility of 14 December 2011 in the present case, it had dismissed the following objections raised by the Government: the objection based on the Government's declaration deposited with the instrument of ratification and the objections concerning lack of jurisdiction *ratione temporis* and failure to respect the six-month rule (*Sargsyan* (dec.), cited above, §§ 71, 92 and 147). It had joined the following objections raised by the Government to the merits: firstly, the objection concerning lack of jurisdiction and responsibility, secondly the objection that the applicant lacked victim status as far as his complaint concerned the graves of his relatives and thirdly the objection concerning the exhaustion of domestic remedies (*Sargysan* (dec.), cited above, §§ 76, 99 and 111).

104. The Court considers it appropriate to deal with the questions of exhaustion of domestic remedies and of lack of jurisdiction and responsibility as separate points, while it will deal with the Government's

objection regarding the applicant's victim status in respect of his relatives' graves when examining the alleged violation of Article 8 of the Convention.

II. EXHAUSTION OF DOMESTIC REMEDIES

105. Article 35 § 1 of the Convention provides as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

A. The parties' submissions

1. The applicant

106. The applicant relied on three main arguments in order to show that he was not required to exhaust any domestic remedies.

107. Firstly, he asserted that there were no effective remedies under Azerbaijani law which would be accessible and sufficient in practice. He submitted in particular that the Government had not adduced proof of the existence of such remedies. They had not provided any details in respect of the civil cases allegedly brought before the Azerbaijani courts by ethnic Armenians. The cases individually referred to related to inheritance and had no direct relevance for a person in the applicant's situation. In short, the Government had failed to produce any example of an Armenian claimant obtaining redress in circumstances comparable to the applicant's. In addition the applicant argued that the position adopted by the Government in the proceedings before the Court was indicative of the outcome of any action the applicant might have brought before the Azerbaijani courts. According to the Government the relevant domestic authorities did not dispose of any documentary evidence showing that the applicant had had possessions in Gulistan or that he had lived there. The recourse to domestic proceedings in Azerbaijan therefore offered no prospects of success.

108. By way of comparison the applicant referred to the Court's decision in *Demopoulos and Others v. Turkey* [GC] (dec.) (nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, ECHR 2010) in which the Court had developed criteria for assessing the effectiveness of a remedy designed to provide redress for loss of property and home in the context of an international conflict. None of these criteria were met by the remedies referred to by the Government.

109. Secondly, the applicant submitted that the exhaustion rule was inapplicable in the present case due to the existence of an administrative practice – amounting to a repetition of acts incompatible with the Convention and official tolerance by the State authorities – which would make any attempt to use existing remedies futile. Referring to documents of

various United Nations bodies, in particular the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the applicant asserted that there was no political will on the part of the respondent Government to protect abandoned property of ethnic Armenians, which was often occupied by refugees or internally displaced persons, or to provide compensation for it. Moreover, there was a practice of not giving ethnic Armenians access to documentation concerning their property. There were no signs of a change of these practices. In addition, the applicant drew attention to the practical difficulties in pursuing any court case in Azerbaijan. Borders between Armenia and Azerbaijan were closed. As there were no diplomatic relations between Armenia and Azerbaijan, ethnic Armenian refugees or citizens of Armenia were unable to obtain visas except via the consular services in neighbouring countries. Visas were only granted in the context of official visits organised by international organisations or diplomatic missions. Postal services between the two countries were not viable either.

110. Finally, the applicant argued that in any case he was absolved from pursuing any remedies due to his personal circumstances. Having had to flee from Gulistan in 1992 he had lost all his property, his home and his source of income and had thus been placed in a situation of insecurity and vulnerability. Moreover, he had been seriously ill since 2004.

2. The respondent Government

111. The respondent Government asserted that, in so far as they had effective control over the territory of the Republic of Azerbaijan, which was not the case for Gulistan, there were effective remedies. To start with, Article 29 of the 1995 Constitution guaranteed the right to property. In addition, Article 68 of the Constitution provided for State liability to compensate any damage resulting from illegal actions or omissions of State bodies or their officials. The Civil Code and the Code of Civil Procedure in turn contained more detailed provisions protecting both, ownership and possession of property. Adequate procedures were in place to enable both citizens and foreigners to bring an action before the courts of Azerbaijan with regard to any damage or loss suffered on the territory of Azerbaijan (for a detailed description see the relevant domestic law, paragraphs 88-92 above). The Government disputed the allegation that an administrative practice existed which would render the use of existing remedies futile.

112. In support of their position, the Government submitted statistics by the Ministry of Justice concerning cases brought by ethnic Armenians: for instance, between 1991 and 2006 the courts of first instance in Baku examined and delivered judgments in 243 civil cases brought by ethnic Armenians, 98 of which related to housing disputes. Furthermore the Government submitted copies of judgments in two cases concerning inheritance, in which decisions in favour of ethnic Armenians living abroad

were given by the appellate courts. The case of *Mammadova Ziba Sultan gizi v. Mammadova Zoya Sergeyevna and Mammadov Farhad Tarif oglu* (judgment of the Chamber of Civil Cases of the Court of Appeal of the Republic of Azerbaijan of 24 May 2007) concerned an inheritance dispute over property, in which the defendants were the ethnic Armenian spouse and the son of the deceased, who were both living in the United States of America. The appellate court overturned the first instance's judgment dismissing the latter's assessment that the defendants had to be considered as heirs in bad faith. In the case of *Sinyukova, Korovkova and Zaimkina ('Chagaryan*', judgment of the Chamber of Civil Cases of Shaki Court of Appeal of 7 November 2007) the appellate court decided that the State Notary's Office of Mingachevir city had to issue an inheritance certificate in respect of an apartment to the three claimants, daughters of an ethnic Armenian living abroad, as they had to be considered as having made their declaration of inheritance in time. While conceding that these cases did not concern situations which were comparable to the applicant's case, they demonstrated, in the Government's view, that claims of Armenians relating to property and other protected rights could be effectively enforced in the Azerbaijani legal system.

113. The Government therefore concluded that they had shown that effective remedies existed. It was therefore for the applicant to demonstrate that such remedies were ineffective in the circumstances. However, the applicant had admitted that he had not made any attempt to make use of existing remedies and could therefore not allege that the Azerbaijani legal system had failed to provide him with the requisite protection against the alleged violation of his rights.

3. The Armenian Government, third-party intervener

114. The Armenian Government underlined the applicant's position regarding the existence of an administrative practice in Azerbaijan prohibiting Armenians who had fled during the conflict or any other person of Armenian origin from returning to or visiting Azerbaijan.

B. The Court's assessment

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*, cited above, § 69; *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* (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."

117. Turning to the present case, the Court observes that the application of Article 35 § 1 of the Convention has to be assessed against the general background of the Nagorno-Karabakh conflict. While the military phase of the conflict ended with the ceasefire agreement in May 1994, no peace treaty has been concluded to date. It is not in dispute that there are no diplomatic relations between Armenia and Azerbaijan and that borders are closed. Moreover, it appears that postal services are not viable between the two countries. In such a situation it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, there may be considerable practical difficulties in bringing and pursuing legal proceedings in the other country (see, *mutatis mutandis*, *Akdivar and Others*, cited above, § 70).

118. The Court observes that the Government have described the general scheme of protection of property and of compensation for unlawful acts or omissions as laid down in the Constitution and the Civil Code. However, they have failed to explain how these provisions would apply in the specific context, where a person in the applicant's situation, i.e. an Armenian refugee who had to leave property and home in the context of the Nagorno-Karabakh conflict, wishes to claim restitution of property or

compensation for the loss of its enjoyment. The Government have submitted statistics on civil cases which were introduced by ethnic Armenians and decided by the Azerbaijani courts. Apart from stating that the cases concerned housing disputes, the Government did not provide any details regarding the nature of the claims examined or the outcome of the proceedings. Turning to the two judgments from 2007 which the Government submitted by way of example, the Court notes that they both concerned inheritance proceedings and did not relate to claims for loss of access to and enjoyment of property and/or home of a person displaced in the context of the Nagorno-Karabakh conflict. In fact, the Government have not provided a single example of a case in which a person in the applicant's situation had been successful before the Azerbaijani courts.

119. Consequently, the Court considers that the Government have failed to discharge the burden of proving the availability to the applicant of a remedy capable of providing redress in respect of his Convention complaints and offering reasonable prospects of success. It is therefore not necessary to determine whether, as alleged by the applicant, there is an administrative practice on the part of the Azerbaijani authorities, which would prevent the applicant from making use of existing remedies. Similarly, as no effective remedies have been shown to exist, it is not necessary to examine the effect that the alleged lack of effective control over the area at issue may have on the operation of domestic remedies.

120. The Court therefore dismisses the Government's objection concerning the exhaustion of domestic remedies.

III. JURISDICTION AND RESPONSIBILITY OF AZERBAIJAN UNDER ARTICLE 1 OF THE CONVENTION

A. The parties' submissions

1. The applicant

121. The applicant pointed out that Gulistan was within the internationally recognised territory of the Republic of Azerbaijan. It followed that the onus was on the respondent Government to rebut the presumption of jurisdiction in relation to the area of Gulistan for the period since 15 April 2002 to the present day. In the applicant's view the Government had failed to produce such proof as they had not shown that they did not exercise control over Gulistan. He pointed out that the Government's position concerning the factual situation had been somewhat inconsistent, but that they had accepted that Gulistan was not under Armenian control. Consequently, the Government retained full responsibility for securing the applicant's Convention rights.

122. In the alternative, the applicant asserted that even if it were established that Azerbaijan lacked control over the area at issue, its responsibility would nevertheless be engaged as a result of its remaining positive obligations under Article 1 of the Convention to take diplomatic, economic, judicial and other measures to secure the applicant's Convention rights (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 331 and 333, ECHR 2004-VII). In the applicant's contention, the Government had failed to meet their positive obligations in that, for many years, they displayed a lack of political will to settle the conflict and had not taken any steps to secure the applicant's individual right to return or to be compensated (see paragraph 208 below).

2. The respondent Government

123. The respondent Government accepted that Gulistan was part of the internationally recognised territory of Azerbaijan. In their pleadings at the hearing of 5 February 2014 they asserted that the presumption that a State exercised jurisdiction throughout its territory could be limited not only with regard to areas under occupation by other parties but also with regard to small areas "rendered inaccessible by circumstances". Gulistan was such an area. It was on the line of contact, meaning that it was surrounded by armed forces of Azerbaijan on the one side (in the north and east) and of Armenia on the other side (in the south and west) and was not under the effective control of either side. They underlined that the village was within the shooting range of the Armenian positions situated on a rising slope above the river. The Government of Azerbaijan was thus unable to exercise its legitimate authority in the area.

124. The Government's main line of argument therefore was that they were not responsible under Article 1 of the Convention in the primary sense of that provision. As a dispossessed sovereign they had only limited responsibility, namely to fulfil their positive obligation to take all measures that were in their power to take and in accordance with international law (*Ilaşcu and Others*, cited above, § 331). They argued that such positive obligations depended on the factual circumstances of the case and were not to be construed in such a way as to impose a disproportionate burden on the State (ibid., § 332). The Government asserted that they had taken all general and individual measures they could be expected to take (see paragraph 210 below).

3. The Armenian Government, third-party intervener

125. The Armenian Government maintained their position that Azerbaijan had full, effective control over Gulistan. Referring to their submissions in respect of the situation obtaining in Gulistan (see paragraphs 50 to 53 above) and to the evidence they had submitted (see paragraphs 69

to 71 above), they asserted in particular that the Azerbaijani armed forces had military positions in the village itself and on its outskirts, while "NKR" forces were stationed on the opposite side of the gorge.

B. The Court's assessment

1. Relevant case-law principles in respect of the presumption of territorial jurisdiction

126. The relevant principles have been set out by the Court in *Assanidze v. Georgia* [GC], no. 71503/01, §§ 137-143, ECHR 2004-II and subsequently in *Ilaşcu and Others* (cited above, §§ 311-313, and §§ 333-335).

127. In *Assanidze*, the Court applied a "presumption of competence" or, in other words, a presumption of jurisdiction in respect of a State's territory. The relevant paragraphs of that judgment read as follows:

> "137. Article 1 of the Convention requires the States Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. It follows from this provision that the States Parties are answerable for any violation of the protected rights and freedoms of anyone within their 'jurisdiction' – or competence – at the time of the violation.
>
> ...
>
> 139. The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption.
>
> 140. In that connection, the Court notes, firstly, that Georgia has ratified the Convention for the whole of its territory. Furthermore, it is common ground that the Ajarian Autonomous Republic has no separatist aspirations and that no other State exercises effective overall control there (see, by converse implication, *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001, and *Loizidou*, cited above). On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory. Such a reservation would in any event have been ineffective, as the case-law precludes territorial exclusions (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 29, ECHR 1999-I) other than in the instance referred to in Article 56 § 1 of the Convention (dependent territories).
>
> ...
>
> 142. Thus, the presumption referred to in paragraph 139 above is seen to be correct. Indeed, for reasons of legal policy – the need to maintain equality between the States Parties and to ensure the effectiveness of the Convention – it could not be otherwise. But for the presumption, the applicability of the Convention could be selectively restricted to only parts of the territory of certain States Parties, thus rendering the notion of effective human rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the States

Parties, that is to say beween those which accepted the application of the Convention over the whole of their territory and those which did not.

143. The Court therefore finds that the actual facts out of which the allegations of violations arose were within the "jurisdiction" of the Georgian State (see *Bertrand Russell Peace Foundation Ltd v. the United Kingdom*, no. 7597/76, Commission decision of 2 May 1978, Decisions and Reports (DR) 14, pp. 117 and 124) within the meaning of Article 1 of the Convention."

128. In the *Ilaşcu and Others* judgment (cited above), the Court further elaborated on the presumption of jurisdiction. The relevant paragraphs of that judgment read as follows:

"311. It follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction".

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.

312. The Court refers to its case-law to the effect that the concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, judgment of 14 May 2002; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II).

From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (see *Banković and Others*, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout the State's territory.

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, and *Cyprus v. Turkey*, §§ 76-80, cited above, and also cited in the above-mentioned *Banković and Others* decision, §§ 70-71), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.

313. In order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a State's authority over its territory, and on the other the State's own conduct. The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (see, among other authorities, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).

Those obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.

...

333. The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.

334. Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.

335. Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."

129. It follows from the above-cited case-law that jurisdiction within the meaning of Article 1 of the Convention is presumed to be exercised throughout a Contracting State's territory. The undertaking given by a Contracting State under Article 1 normally includes two aspects, namely on the one hand a negative duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed and on the other hand positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (*Ilaşcu and Others*, cited above, § 313).

130. Even in exceptional circumstances, when a State is prevented from exercising authority over part of its territory, due to military occupation by the armed forces of another State, acts of war or rebellion or the installation of a separatist regime within its territory, it does not cease to have jurisdiction within the meaning of Article 1 of the Convention (*Ilaşcu and Others*, cited above, § 333; see also *Catan and Others v. Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, § 109, ECHR 2012 (extracts)).

131. However, in cases in which a State is prevented from exercising its authority in part of its territory its responsibility under the Convention is limited to discharging positive obligations (ibid., § 335). These relate both

to measures needed to re-establish control over the territory in question, as an expression of its jurisdiction, and to measures to ensure respect for the applicant's individual rights (ibid., § 339). Under the first head, the State has a duty to assert or re-assert its sovereignty over the territory and to refrain from any acts supporting the separatist regime (ibid., §§ 340-345). Under the second head the State must take judicial, political, or administrative measures to secure the applicant's individual rights (ibid., § 346).

2. Application of these principles to the present case

(a) The Court's establishment of the facts

132. In the present case the situation pertaining in Gulistan is in dispute between the parties. The relevant period to be considered runs from 15 April 2002, when the Convention entered into force in respect of Azerbaijan, to the present day.

133. In establishing the facts set out below, the Court has had regard to the parties' written observations and oral pleadings, to the maps of Gulistan and its surroundings, the DVDs containing footage of the area and other relevant evidence submitted by the parties. It also had regard to the AAAS report on Gulistan based on the interpretation of high-resolution satellite imagery.

134. The Court notes that the parties concur on a number of points: it is not in dispute that Gulistan is situated on the internationally recognized territory of Azerbaijan. The village lies in a v-shaped valley on the north bank of the river Indzachay. Azerbaijani military positions are on the north bank of the river, while "NKR" military positions are on the south bank of the river. There are no civilians in the village. At least, the surroundings of the village are mined and ceasefire violations occur frequently.

135. The parties' submissions differ, however, in respect of a certain number of other points. The most important discrepancy concerns the question whether or not there are Azerbaijani military positions in the village. The distance of both sides' military positions from the village and the question whether the village itself is mined are also in dispute.

136. It follows from the available material and in particular from the maps submitted by each of the parties and the intervening Government that the whole of the village as well as the Azerbaijani military positions are on the north bank of the river Indzachay, which constitutes a natural dividing line. The "NKR" positions are on the south bank of the river, the closest being on a slope opposite the village.

137. Regarding the disputed question of whether there is any Azerbaijani military presence in the village itself, the Court notes that there are a number of elements which indicate a presence of Azerbaijani positions and thus of Azerbaijani soldiers in the village. The AAAS report based on

the interpretation of satellite images from 2005, 2009 and 2012 indicates that there are trenches in or, at the very least, on the edges of the village. These trenches are well visible in the 2005 and 2009 images, but are less clearly distinguishable in the 2012 image. Since the village is on the north bank of the river and there are only Azerbaijani positions there, the Court considers it sufficiently established, based on the available evidence, that the trenches form part of Azerbaijani positions. This also provides an indication of the presence of military Azerbaijani personnel given that trenches need to be maintained (as follows from the AAAS report according to which trenches have fallen into disuse in the period between 2009 and 2012 and are therefore less clearly visible). In that connection the Court reiterates that it was not in dispute that there were no civilians in the village. In addition, it appears again from the AAAS report and from the DVD submitted by the third-party Government in 2012 that the territory north of the village and thus access routes to it are under the control of Azerbaijani armed forces. Further indications are provided by the DVD submitted by the applicant in 2008, on which smoke can be seen rising from the chimneys of some houses and a man is walking between houses in ruins.

138. While there are certain indications of Azerbaijani military presence in the village itself, the Court does not dispose of sufficient elements to establish whether there have been Azerbaijani forces in Gulistan throughout the whole period falling within its competence *ratione temporis*, namely from 15 April 2002 until the present. It is important to note, however, that it has not been alleged and there is no indication in the material before the Court that the "NKR" has or had any positions or troops on the north bank of the river let alone in the village of Gulistan itself during the period under examination.

(b) Assessment of the legal significance of the facts

139. Given that Gulistan is situated on the internationally recognised territory of Azerbaijan, the presumption of jurisdiction applies (see *Ilaşcu and Others*, cited above, § 312). In the Court's view it is thus for the Government to show that exceptional circumstances exist, which would limit their responsibility under Article 1 of the Convention.

140. The Court observes that a limitation of a State's responsibility on its own territory to discharging positive obligations has only been accepted in respect of areas where another State or separatist regime exercises effective control. In the *Ilaşcu and Others* case the Court found that the Moldovan Government did not exercise authority over part of its territory, namely that part which is under the effective control of the Moldovan Republic of Transdniestria (the "MRT") (cited above, § 330). The Court relied on the same finding in *Ivanţoc and Others v. Moldova and Russia* (no. 23687/05, § 105, 15 November 2011). In *Catan and Others* (cited above, § 109), the Court also held that Moldova had no authority over the

part of its territory to the east of the River Dniester, which is controlled by the "MRT". In contrast, in *Assanidze* (cited above, §§ 139-140) the Court considered as a relevant fact that the Ajarian Autonomous Republic had no separatist aspirations and that no other State exercised effective overall control there.

141. In the above Moldovan cases, it was not in dispute that the territory in question, namely Transdniestria was under the effective control of the "MRT". In Convention terms Russia was held to have jurisdiction over the area controlled by the "MRT" on account of exercising effective authority or at least decisive influence over the "MRT" and securing its survival by virtue of military, economic, financial and political support and therefore to be responsible for the violations found (see *Ilaşcu and Others*, cited above, §§ 392-394; *Ivanţoc and Others,* cited above, §§ 118-120; *Catan and Others*, cited above, § 122).

142. The present case differs from the above-mentioned cases: Gulistan is on the frontline between Azerbaijani and "NKR" forces and it is in dispute whether Azerbaijan has effective control of the village. The Court notes that on the basis of its case-law the respondent Government would have to show that another State or separatist regime has effective control over Gulistan where the alleged violations of the Convention take place.

143. At this point the Court considers it useful to reiterate that Azerbaijan has deposited a declaration with its instrument of ratification expressing that it was "unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia" (see paragraph 93 above). In its decision on the admissibility of the present case, the Court has held that the declaration was not capable of restricting the territorial application of the Convention to certain parts of the internationally recognised territory of Azerbaijan (*Sargsyan* (dec.), cited above, §§ 63-65) nor did it fulfil the requirements of a valid reservation (ibid., §§ 66-70).

144. The Court notes that under international law (in particular Article 42 of the 1907 Hague Regulations) a territory is considered occupied when it is actually placed under the authority of a hostile army, "actual authority" being widely considered as translating to effective control and requiring such elements as presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign (see paragraph 94 above). On the basis of all the material before it and having regard to the above establishment of facts, the Court finds that Gulistan is not occupied by or under the effective control of foreign forces as this would require a presence of foreign troops in Gulistan.

145. In fact, it appears that the respondent Government have not maintained their initial position that they had no effective control over Gulistan. Rather they argued that it was in a disputed area, underlining that it was surrounded by mines, encircled by opposing military positions on

either side of the river and came within the shooting range of the Armenian forces.

146. In essence the respondent Government argued that the Court's case-law developed in *Ilaşcu and Others* and subsequent cases, which accepts that a State that has lost effective control over part of its territory to another State or separatist regime, has limited responsibility under the Convention, should equally be applied to disputed zones or, as they expressed it at the hearing of 5 February 2014, "areas which are rendered inaccessible by the circumstances".

147. In addressing this question the Court must bear in mind the special character of the Convention as a constitutional instrument of European public order (*ordre public*) for the protection of individual human beings and its role, as set out in Article 19 of the Convention "to ensure the observance of the engagements undertaken by the High Contracting Parties" (see, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, §§ 75 and 93, Series A no. 310; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, ECHR 2011). When Azerbaijan ratified the Convention on 15 April 2002, the whole of its territory entered the "Convention legal space".

148. In the above-cited cases concerning Moldova the acceptance that the territorial State had only limited responsibility under the Convention was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention. In contrast, in the present case it has not been established that Gulistan is occupied by the armed forces of another State or that it is under the control of a separatist regime. In such circumstances the Court, taking into account the need to avoid a vacuum in Convention protection, does not consider that the respondent Government has demonstrated the existence of exceptional circumstances of such a nature as to qualify their responsibility under the Convention.

149. The Court is therefore not convinced by the Government's argument. The exception developed in *Ilaşcu and Others* (cited above, §§ 312-313), namely the limitation of the territorial State's responsibility in respect of parts of its internationally recognized territory which are occupied or under the effective control of another entity can therefore not be extended to disputed areas as was suggested by the Government.

150. In fact, the situation at stake in the present case is more akin to the situation in *Assanidze* (cited above, § 146) in that, from a legal point of view the Government of Azerbaijan have jurisdiction as the territorial state and full responsibility under the Convention, while they may encounter difficulties at a practical level in exercising their authority in the area of Gulistan. In the Court's view such difficulties will have to be taken into account when it comes to assessing the proportionality of the acts or omissions complained of by the applicant.

151. In conclusion, the Court finds that the facts out of which the alleged violations arise are within the "jurisdiction" of Azerbaijan within the meaning of Article 1 of the Convention and are capable of engaging the responsibility of the respondent Government. Consequently, it dismisses the Government's objection concerning lack of jurisdiction and responsibility which had been joined to the merits in the admissibility decision (*Sargsyan* (dec.), cited above, § 76).

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

152. The applicant complained that the denial of his right to return to the village of Gulistan and to have access to, control, use and enjoy his property or to be compensated for its loss 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."

153. The Government contested the applicant's position, advancing three main lines of argument: they asserted, firstly, that although Gulistan was on the internationally recognised territory of Azerbaijan and thus within Azerbaijan's jurisdiction within the meaning of Article 1 of the Convention, they did not have sufficient control over the area to be held responsible for the alleged violation. Secondly, they argued that the applicant had failed to show that he had actually had a house and land in Gulistan. Thirdly, the Government submitted that even if the Court were to dismiss their argument on the first two points, there had been no violation of the applicant's rights as they had complied with their obligations under the Convention.

A. Whether the applicant had "possessions" in Gulistan

1. The parties' submissions

(a) The applicant

154. The applicant maintained that he had submitted sufficient evidence to show that he had lived in Gulistan with his family until June 1992 and had owned a house and land of some 2,100 sq. m and other possessions there. He referred in particular to the technical passport of the house,

established in May 1991, and to the plan of the house, underlining that he had submitted both documents already when he lodged the application.

155. He asserted that he had obtained the land by a decision of the Village Council in the early 1960s granting permission to divide his father's plot of land between him and his brother. He contested the Government's assertion that the Village Council had no power to allocate land. He noted firstly, that the Government referred to the 1970 Land Code, according to which the power to allocate land was vested in the Executive Committees of the Soviet of the People's Deputies of the districts and cities. In the early 1960s the Village Councils had power to allocate land. They also had to keep a register, recording among other data the division of property of households in the village. These powers were regulated by the Charter on Village Councils (see paragraph 82 above) which had entered into force on 23 April 1958 and had been in force at the material time, i.e. in the early 1960s. Section 2 paragraph 9(j) of the Charter on Village Councils empowered the Village Council to allocate state-owned land to citizens for individual construction within the borders of the village. Pursuant to section 2 paragraph 19(e) of the Charter the Village Council had the power to register the division of land of households in the village.

156. Furthermore, the applicant repeated that the "technical passport" which he had already submitted with the application was a duly established, valid document and was sufficient proof of his right to the house and land. He contested the Government's assertion that the technical passport was deficient, addressing each of the points raised by the Government.

157. In so far as the Government had asserted that the technical passport was deficient in that it lacked a reference to a primary title of ownership, the applicant argued that no such reference was required in his case. While he agreed with the Government that the 1985 Instruction (see paragraph 81 above) applied to the registration process, he maintained that the registration of property in rural areas was governed by Article 2.3 of the said instruction, according to which the basis for registration were "the list of homesteads, abstracts from them, [or] statements from the Village or Regional Executive Committee of People's Deputies". He maintained that the list of homesteads (or lists of households as the term was also sometimes translated) meant the register of the Village Council. Finally, he noted that the technical passport submitted by him had been established on the basis of the relevant sample form provided by the Central Statistics Department of the USSR. That form did not require making a reference to any primary title of ownership.

158. Turning to the Government's argument that the technical passport was deficient as the field "description of the size of the land according to the official documents" was empty, the applicant asserted that the technical passport had been drawn up by officials from the Bureau of Technical Inventory of the Shahumyan region, who would not have signed it had it

been incomplete. Moreover, he submitted technical passports which had been issued to other former villagers of Gulistan in 1991 and in which the said field was also empty, and argued that his technical passport corresponded to the relevant registration practice at the time.

159. Finally, the Government had argued that the technical passport, which was dated May 1991, might be a forgery as the stamp used was still one of the "Azerbaijan SSR" and referred to the "Shahumyan region" although the State had been renamed to "Republic of Azerbaijan" and the former "Shahumyan region" had been incorporated into the Goranboy region in February 1991. In reply, the applicant referred to his own statement of 10 July 2006 and the statements of a number of former neighbours and friends from Gulistan submitted in 2010, who all confirmed that the whole Shahumyan region, which was inhabited by a majority of Armenians and of which Gulistan was part, had been subjected to a blockade by Azerbaijan from 1989-1992. On account of the blockade, the whole region was cut off: television stations had been bombed and there was no electricity and villagers and even officials in Gulistan were not aware and had not received any information by the authorities that the Azerbaijan SSR and Shahumyan region had been renamed. Moreover, the applicant observed that the Government only claimed that the new stamp designating the Republic of Azerbaijan should have been used, but that they had not submitted any evidence that the stamps had actually been changed at the time.

160. Furthermore, in reply to the Court's question relating to a possible contradiction in the application form regarding the question whether or not the applicant's house had been destroyed in 1992, the applicant explained that the contradiction stemmed from confusion between his own and his parents' house. The applicant pointed out that the application form, prepared by his representative, had been based on his statement drawn up on 10 July 2006. In that statement he did not speak about the destruction of his own house but used the phrase "My mother stayed in the village of Gulistan and our house was destroyed". It was common in the village to refer to the parents' house as one's own house.

161. In respect of the current state of the house, the applicant submitted that it was difficult to obtain information, as it was not possible to return to Gulistan. At best it was possible to view the village from the "NKR" border with binoculars. In that connection he referred to the statements of three former villagers of March 2012 (see paragraph 59 above). The applicant submitted an additional statement of 12 August 2013 by a former villager from Gulistan, who reported that he had carried out construction work on a site in the "NKR" near Gulistan in 2010 and had once gone to a viewpoint and looked at the village with binoculars and had been able to distinguish the applicant's house. According to him its walls were still standing, but the roof was dilapidated.

162. In sum, the applicant maintained that the technical passport submitted by him was sufficient proof of his right to "use, possess and enjoy" the house in question, but concedes that under the law in force at the time of his displacement he had not been entitled to sell the house. However, he could have expected to transform his rights into private property as provided for by the 1991 Law on Property. To his knowledge his rights had not been annulled and he was therefore still legally entitled to the property at issue.

(b) The respondent Government

163. The Government asserted that the burden was on the applicant to prove, beyond reasonable doubt, that he was the owner or had title to the property which was the subject of his application.

164. The Government submitted that it could not be verified whether the applicant had actually lived in Gulistan or whether he had any possessions there. No documents relating to the applicant or the plot of land, house or other buildings allegedly owned by him were available in the Goranboy regional archives. Moreover, certain archives of the former Shahumyan region, including the Civil Registry Office and the Passport Office had been destroyed during the hostilities. The main document submitted by the applicant, namely the technical passport of the house, was deficient and therefore did not prove that he was the owner of a house and land. His own statements and the statements of witnesses submitted by him contained numerous contradictions, for instance in respect of the number of rooms of the applicant's house and the size of his plot of land, and were thus unreliable in their entirety.

165. In respect of the applicant's alleged property in Gulistan the Government argued in the first place, that he had only complained about the house which appeared to have been destroyed before the entry into force of the Convention in respect of Azerbaijan. His complaint therefore fell outside the Court's competence *ratione temporis*.

166. Insofar as the applicant might be understood as complaining in respect of the land, the Government argued that his assertion that he had obtained permission of the Village Council to divide his father's land was not credible for a number of reasons. The statements of former members of the Village Council submitted by the applicant were not coherent. According to two statements the Village Council had divided the plot of the applicant's father between the applicant and his brother while according to another statement the Village Council had taken a decision to allocate land to the applicant. In any case, the procedure described by the applicant was not in accordance with the administrative structures and laws in force in the 1960s: the Village Council was not entitled to allocate land. In the 1960s, no specific laws, apart from the Constitution existed on the right to use land. The 1970 Land Code of the Azerbaijan SSR codified the practice which had

existed already before: it laid down that only the Executive Committee of the Soviet of the People's Deputies was empowered to allocate land for the purpose of constructing private houses. As a rule, the person concerned received an abstract of the decision.

167. There had been no central land register in Azerbaijan at the time of the hostilities. The registration and technical inventory of housing facilities had been carried out by the local administrative authorities under the 1985 Instruction, Articles 2.1 and 2.2 of which had specified which documents constituted primary or secondary evidence of title. The Government maintained that the applicant had not submitted any document which would qualify as primary title of ownership. By way of example the Government mentioned that the decision of the Lachin District Soviet of People's Deputies of 29 January 1974 submitted by one of the applicants in the case of *Chiragov and Others v. Armenia* [GC] (dec.), (no. 13216/05, 14 December 2011) constituted such primary evidence.

168. The Government explained that the technical passport was in the first place an "inventory-technical" document. They acknowledged that a technical passport of a house could constitute secondary evidence, as it was normally issued only to a person having a legal title to property. However, the technical passport submitted by the applicant did not constitute evidence of any property rights, as it was deficient or possibly even a forgery for the following reasons:

169. The technical passport lacked a reference to a primary title to the house and land: the Government maintained their submission that as a rule the technical passport would refer to a primary title of ownership and contested the applicant's position that Article 2.3 of the said Instruction was applicable. In any case, the "household lists" mentioned in that provision were not identical with the register of the Village Council.

170. In their submissions of July 2012, the Government advanced a new argument, namely that the technical passport was incomplete as it contained only an indication of the actual size of the land parcel while the field concerning the size of the land parcel according to official documents was empty.

171. As a further new argument the Government asserted in their submissions of July 2012 that the technical passport, which was dated 20 May 1991, carried a stamp of the Azerbaijan SSR/Shahumyan district which was no longer in official use at that time, as the State had been renamed to Republic of Azerbaijan in February 1991 and Shahumyan district had been incorporated into Goranboy region at the same time. The Government alleged that after the renaming of the Azerbaijan SSR into the Republic of Azerbaijan the use of old stamps for producing false documents was a frequent occurrence. In addition, they contested the applicant's assertion that the population of the former Shahumyan district had not been aware of the above-mentioned changes. They pointed out that in the

application form the applicant himself referred to the merger of Shahumyan district and a neighbouring district into the new Goranboy district. Finally, the Government pointed out that it was highly unlikely that in May 1991, during a period of rising tension and civil strife the relevant authorities would still have issued technical passports.

172. In conclusion, the Government asserted that Article 1 of Protocol No. 1 did not apply, as the applicant had failed to submit evidence in respect of his alleged rights.

173. In case the Court would nonetheless find that the applicant had rights to the house and/or land, the Government submitted that the relevant laws of the Azerbaijan SSR which were still applicable at the time of the hostilities did not provide for private ownership, but allowed citizens to own houses as personal property. Plots of land could be allotted to individuals for their use for an indefinite period of time for purposes such as housing and farming. A person to whom land had been allotted had a right to use it which was protected by law. The 1991 Law on Property and the 1992 Land Code of the Republic of Azerbaijan provided for a possibility to transfer land already allotted to citizens into their private ownership. Detailed rules on the privatization of land plots including individual houses allotted to citizens were introduced later, by the 1996 Law on Land Reform.

174. The Government had previously submitted that no laws had been adopted in respect of property abandoned by Armenians who left Azerbaijan due to the conflict. In their submissions of September 2013, they modified this statement by submitting that the 1991 Order (see paragraph 83 above) had been introduced to address a practice of property swaps (Armenians leaving Azerbaijan exchanged their property with Azerbaijanis leaving Armenia, Nagorno-Karabakh or the surrounding Armenian-held regions). However, the applicant's alleged property was not concerned.

(c) The Armenian Government, third-party intervener

175. The Armenian Government agreed with the arguments submitted by the applicant.

2. The Court's assessment

(a) Applicable principles on assessment of claims relating to property and homes of displaced persons

176. 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 other conflict situations.

177. 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).

178. 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."

179. In the case of *Doğan and Others v. Turkey* (nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004-VI) 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."

180. 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.

181. 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.

182. 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."

183. 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*). 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).

184. In sum, the Court's case-law has developped 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 "Principles on Housing and Property Restitution for Refugees and Displaced Persons" (see paragraph 96 above).

(b) Application of the above principles to the present case

(i) Proof of possessions

185. The Court will first address the Government's argument that the applicant's complaint only related to the house which appeared to have been destroyed before the entry into force of the Convention. The Court has already noted in the decision on the admissibility of the present case that the applicant referred from the beginning also to the plot of land on which the house was situated (*Sargsyan* (dec.), cited above, § 88). It therefore understands the applicant's complaint as encompassing both, the house and the land.

186. The parties' submissions focused on two issues: firstly, the probative value of the "technical passport" submitted by the applicant and, secondly, the question whether the Village Council, from which the applicant claimed to have obtained the land and permission to build a house in the early 1960s, had at that time been competent to allocate land.

187. In respect of the second issue, the Court notes that the Government relied on the general administrative structure of the Azerbaijan SSR when arguing that the Village Council was not empowered to allocate land. The applicant, for his part, referred to specific provisions of the 1958 Charter on Village Councils (see paragraph 82 above), which appear to support his position that the Village Council could allocate land for the purpose of private construction. However, it will not be necessary for the Court to decide on this issue for the following reasons.

188. It is not contested that a technical passport was, as a rule, only issued to the person entitled to the house. In the present case, the applicant has submitted a technical passport established in his name and relating to a house and land of some 2,100 sq. m in Gulistan, including a detailed plan of the house. In the Court's view the technical passport constitutes *prima facie* evidence. Provided that the technical passport can be regarded as a valid document, the Court considers that it is not required to examine the details of the parties' submissions on the relevant domestic law of the Azerbaijan SSR in respect of allocation of land in the early 1960s. The Court will therefore first examine the validity of the technical passport submitted by the applicant. The Court observes that both parties agreed that the registration of houses had been regulated by the 1985 Instruction (see paragraph 81 above). The Court will address in turn each of the reasons adduced by the Government for finding that the technical passport was deficient or a forgery.

189. In so far, as the Government claim that the technical passport did not contain a reference to a primary title of ownership, the Court notes that the parties disagreed as to which provisions of the 1985 Instruction applied in the applicant's case. The Court is not in a position to establish the correct interpretation of the law in force in Azerbaijan in May 1991 when the

technical passport was established. It notes that the applicant has at least given a plausible explanation why such a reference was not needed in his case. It is also correct, as the applicant pointed out, that the form which was used does not foresee such a reference. Finally, the applicant has submitted copies of technical passports of houses owned by other former villagers from Gulistan, which contain no such reference either.

190. Furthermore, the Government had argued that the field "land parcel size according to official documents" in the technical passport submitted by the applicant was empty. Again, the applicant has given detailed information on how the technical passport was established by officials of the regional Bureau of Technical Inventory and has submitted the copies of technical passports of houses owned by other former villagers from Gulistan, in which this field is also empty.

191. Finally, the Court turns to the Government's assertion that the technical passport carried a wrong stamp. It considers, however, that given the background which pertained in 1991, namely a situation of general civil unrest and the blockade of Shahumyan region, to which the applicant, members of his family and former villagers referred to already in their statements submitted in 2010, long before the Government raised the issue of wrong stamps, the applicant's explanation that the population as well as officials in the region had not been informed by the authorities of the change of name is not without a certain plausibility. Be that as it may, the Court attaches weight to the argument that the Government have not claimed let alone shown that new stamps had actually been provided to the relevant local authorities of the (former) Shahumyan region before May 1991, when the technical passport of the applicant's house was established.

192. In sum, the Court accepts that the technical passport submitted by the applicant constitutes *prima facie* evidence of title to the house and land, which is similar to evidence it has accepted in many previous cases (see paragraphs 178-183 above) and has not been convincingly rebutted by the Government.

193. Furthermore, the Court takes into account that from the beginning the applicant had made coherent submissions, claiming that he had lived in Gulistan until his flight in June 1992 and that he had a house and land there. He submitted a copy of his former Soviet passport and of his marriage certificate, which show that he was born in Gulistan in 1929 and got married there in 1955. The applicant's submissions as to how he obtained the land and the permission to build a house and then did so in the early 1960s with the help of neighbours and friends are supported by statements of a number of family members and former villagers. While the Court takes into account that these are written statements, which have not been tested in cross-examination, it notes that they are rich in detail and tend to demonstrate that the persons concerned have actually lived through the

events described by them. Given the long lapse of time since the villagers' displacement, the Court does not attach decisive importance to the fact that these statements do not corroborate each other in all details as pointed out by the Government.

194. Last but not least the Court has regard to the circumstances in which the applicant was compelled to leave when the village came under military attack. It is hardly astonishing that he was unable to take complete documentation with him. Accordingly, taking into account the totality of evidence presented, the Court finds that the applicant has sufficiently substantiated his claim that he had a house and land in Gulistan at the time of his flight in June 1992.

195. Finally, the Court turns to the Government's argument that the house appeared to have been destroyed before the entry into force of the Convention on 15 April 2002 and that consequently the complaint, in so far as it related to the house, fell outside the Court's competence *ratione temporis*. In the admissibility decision in the present case, the Court had noted that it was not clear whether the applicant's house had been destroyed. It went on to say that at that stage it was only concerned with examining whether the facts of the case were capable of falling within its jurisdiction *ratione temporis*, while a detailed examination of the facts and legal issues of the case had to be reserved to the merits stage (*Sargsyan* (dec.), cited above, § 88) Having regard to its case-law, the Court considered that the applicant's lack of access to his alleged property, home and the graves of his relatives in Gulistan had to be considered as a continuing situation which the Court had competence to examine since 15 April 2002. It had therefore rejected the Government's objection *ratione temporis* (ibid., §§ 91-92). However, as the Court reserved a detailed examination of the facts to the merits stage, it still has to determine whether or not the house has been destroyed prior to the entry into force of the Convention and, consequently, whether there is a factual basis for the Government's objection *ratione temporis* in respect of the house. Should the house have been destroyed before the entry into force of the Convention, this would indeed constitute an instantaneous act falling outside the Court's competence *ratione temporis* (see, *Moldovan and Others and Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001).

196. The Court notes that the applicant's submissions in his application as to whether the house had been destroyed or not were contradictory (*Sargsyan* (dec), cited above, § 24). In reply to the Court's request to explain this apparent contradiction, the applicant asserted that there had been some confusion between his house and his parent's house which had arisen when his representative drafted the application on the basis of his written statement of 10 July 2006 in which he had used the phrase "My mother stayed in the village of Gulistan and our house was destroyed." The Court notes firstly that the said statement was submitted with the

application. It accepts that the specific context in which the expression "our house" was used leaves room for different interpretations and that the relevant passage in the application form referring to the destruction of the applicant's house might be the result of a misunderstanding.

197. Having regard to the evidence before the Court, in particular the DVDs submitted by both parties and the third party Government, other relevant evidence submitted by the parties and the AAAS report, the Court observes that Gulistan has been deserted since mid-1992 and most buildings in the village are dilapidated, meaning that the outer and inner walls are still standing while roofs have fallen in. In the absence of conclusive evidence that the applicant's house was completely destroyed before the entry into force of the Convention, the Court proceeds from the assumption that it still exists though in a badly damaged state. In conclusion, there is no factual basis for the Government's objection *ratione temporis*.

198. In conclusion, the Court finds that the applicant had and still has a house and a plot of land in Gulistan and dismisses the Government's objection that it lacks competence *ratione temporis* to examine the complaint in respect of the house.

(ii) Whether the applicant's rights fall under Article 1 of Protocol No. 1

199. The Court will examine next whether the applicant had – and still has – rights to property recognized under domestic law and whether these rights can be regarded as "possessions" within the meaning of Article 1 of Protocol No. 1.

200. The Government explained that under the relevant laws of the Azerbaijan SSR, which were in force at the time of the applicant's displacement, citizens could not have private ownership of houses or land. They could, however, have personal property of a house. Moreover, land could be allotted to citizens for an indefinite period of time for purposes such as farming or housing. While the 1991 Law on Property and the 1992 Land Code provided – for the first time – for a possibility to transfer land already allotted to citizens into their private ownership, detailed rules on the privatization of land including individual houses allotted to citizens were only introduced by the 1996 Law on Land Reform.

201. The Court therefore notes, firstly, that when the applicant left Gulistan in June 1992, the relevant rules allowing individuals to transform the rights they previously held in respect of land including individual houses had not yet been adopted. It has not been claimed that the applicant has subsequently made use of this possibility. As the rights acquired by him under the old legislation were not rescinded by the enactment of the 1991 Law on Property and the 1992 Land Code, the right to the house and land that he possessed at the time of his flight must be assessed with reference to the laws of the Azerbaijan SSR.

202. The Court observes that according to these laws, in particular pursuant to Article 13 of the 1978 Constitution and Article 10.3 of the 1983 Housing Code, citizens could have personal property of residential houses. Personal property and the right to inherit it were protected by the State. In contrast, all land was owned by the State. Plots of land could be allocated to citizens for specific purposes such as farming or construction of individual housing. In that case the citizen had a "right of use" in respect of the land. This follows again from Article 13 of the 1978 Constitution and from Article 4 of the Land Code. The "right to use", though it obliged the beneficiary to use the land for the purposes for which it had been allocated, was protected by law. This is not contested by the Government. Moreover, the right was inheritable.

203. There is no doubt therefore, that the rights conferred on the applicant in respect of the house and land were protected rights which represented a substantive economic interest. Having regard to the autonomous meaning of Article 1 of Protocol No. 1, the applicant's right to personal property of the house and his "right of use" in respect of the land constituted "possessions" under that provision.

204. The Government submitted that no laws had been enacted in respect of property abandoned by Armenians who left Azerbaijan due to the conflict. They referred to one exception, namely the 1991 Order (see paragraph 83 above) explaining that the said order addressed the practice of property swaps between Armenians leaving Azerbaijan and Azerbaijanis leaving Armenia, or Nagorno-Karabakh and the surrounding provinces. However, they noted that the applicant's property was not concerned.

205. In conclusion, at the time of his displacement from Gulistan, in June 1992, the applicant had rights to a house and land which constituted possessions within the meaning of Article 1 of Protocol No. 1. There is no indication that those rights have been extinguished afterwards whether before or after the ratification of the Convention by Azerbaijan. The applicant's property rights are thus still valid. Since the applicant accordingly has existing possessions, there is no need to examine whether he also had a "legitimate expectation" to transform his rights into private property as provided for by the 1991 Law on Property.

B. Whether there has been a continuing violation of Article 1 of Protocol No. 1

1. The parties' submissions

(a) The applicant

206. The applicant maintained that the denial of his right to return to the village of Gulistan and to have access to, control, use and enjoy his property or to be compensated for its loss amounted to a continuing violation of

Article 1 of Protocol No. 1 (see *Sargsyan* (dec.), cited above, § 149). Relying on the Court's case-law relating to northern Cyprus, he argued that he was still the legal owner of his property in Gulistan, but was unable either to return or to receive any compensation for the interference with his rights.

207. The applicant asserted that since the entry into force of the Convention in 2002 the respondent Government had failed to take any specific steps with a view to restoring the rights of refugees like him, in particular to secure his right to return to his house and land or to be compensated. He observed that the right of refugees and displaced persons to return voluntarily or to be compensated has been constantly advocated in international documents, including the 2007 Madrid Basic Principles elaborated in the framework of the OSCE Minsk process (see paragraph 26 above), UN Security Council Resolutions, recommendations of the Parliamentary Assembly of the Council of Europe and the European Parliament.

208. Regarding the nature and extent of the Government's obligations, the applicant suggested that the Court take relevant international standards into account, in particular the *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, also known as the Pinheiro Principles (see paragraph 96 above). In the applicant's view, a range of measures would be available to the Government. Such measures could include creating a property records body and a process allowing refugees and displaced persons to re-establish legal title to pre-war property and file a claim for its repossession. A further step could be the creation of a zone of separation with an agreement to withdraw opposing armies from the ceasefire-line followed by the establishment of a demilitarized zone under the authority of an international peace keeping force. This zone could then become the first location where returns can take place. The applicant asserted that the Government had not even claimed that they sought to take any such steps.

(b) The respondent Government

209. The respondent Government's main argument prior to the decision on admissibility had been that they did not have effective control over Gulistan and were thus not in a position to grant the applicant access to his possessions and, consequently, could not be held responsible for the alleged continuing violation (see *Sargsyan* (dec.), cited above, § 155).

210. In the subsequent proceedings, the Government – in line with their position that they had only limited responsibility under the Convention in respect of Gulistan as they did not have sufficient control of the area – submitted in the first place that they had fulfilled their remaining positive obligations under Article 1 of the Convention, both in terms of general measures and in terms of individual measures. The Government pointed out

that they consistently opposed the unlawful occupation of Nagorno-Karabakh and the surrounding provinces by Armenian forces. In parallel, they had sought to re-establish control over the territory by all available diplomatic means, in particular by participating in the peace talks in the framework of the OSCE Minsk Group. Regular meetings were held by the co-chairs of that group with the Foreign Ministers and the Presidents of Armenia and Azerbaijan. In so far as individual measures were required to address the situation of refugees and internally displaced persons, the Government referred to the 1991 Order (see paragraph 83 above) which legalized private property swaps between Azeris fleeing from Armenia, Nagorno-Karabakh and the surrounding provinces and Armenians fleeing from Azerbaijan. This was a step taken in order to address the wholly exceptional emergency situation created by massive flows of refugees and internally displaced persons. However, to the Government's knowledge, the applicant had not been engaged in such an exchange.

211. In the alternative, should the Court hold that the Government had full responsibility under the Convention, they accepted that refusing the applicant access to Gulistan could be seen as an interference with his rights under Article 1 of Protocol No. 1 of the Convention.

212. They asserted that the refusal to grant any civilian of whatever nationality access to Gulistan was justified by the security situation in the area. Any interference with the applicant's rights was lawful and served the general interest. In that connection the Government noted that the armed forces of Azerbaijan, whose status was regulated by the 1993 Law on Armed Forces of the Republic of Azerbaijan, were responsible for defending the borders of Azerbaijan and for securing the safety of its inhabitants. Access to Gulistan, which was situated within an area of military operations, was prohibited by an Order of the Minister of Defence, which they could not disclose as it was strictly confidential. The legal basis empowering the Minister of Defence to issue such orders was to be found in Article 7 paragraph 2(11) of the Law on Defence of the Republic of Azerbaijan. In fulfilling their mission outlined above, the armed forces of Azerbaijan had to comply with the Convention and with international humanitarian law. They were thus responsible for minimizing possible harm to civilians by preventing them from entering areas of danger. In fact, allowing civilians to enter the village might be regarded as a violation of Azerbaijan's obligation to protect the right to life under Article 2 of the Convention. It was obvious that Gulistan was a dangerous area, given the presence of landmines and the risk of hostile action.

213. Furthermore, the Government referred to the case of *Doğan and Others* (cited above) noting that, in cases of this type, the Court had concentrated on issues of proportionality of the interference. They argued that the present case differed from *Doğan and Others*, in which the Court had found violations of Article 1 of Protocol No. 1 and Article 8 of the

Convention. They pointed out in essence that the applicant in the present case was not an internally displaced person. He was living in Armenia and thus came within the latter's jurisdiction. The respondent Government had made considerable efforts to cater for the needs of hundreds of thousands of internally displaced persons providing them in particular with housing and a range of social services. However given that the applicant lived in Armenia they were not in a position to provide him with any practical help.

(c) The Armenian Government, third-party intervener

214. The intervening Government agreed with the arguments submitted by the applicant.

2. The Court's assessment

215. The Court considers it useful to make a number of introductory remarks. As set out in the admissibility decision in the present case (*Sargsyan* (dec.), cited above, §§ 89-91) and in the considerations above, the acceptance of the Court's competence *ratione temporis* is based on the finding that the applicant still holds valid property rights in respect of the house and land in Gulistan (see paragraph 205 above). In contrast, the applicant's displacement from Gulistan in June 1992 falls outside the Court's competence *ratione temporis* (*Sargsyan* (dec.), cited above, § 91). Consequently, what has to be examined in the present case is whether the respondent Government have violated the applicant's rights in the ensuing situation, which is a direct result of the unresolved conflict over Nagorno-Karabakh between Armenia and Azerbaijan.

216. In that connection, the Court observes that the applicant is one of hundreds of thousands of Armenians who fled from Azerbaijan during the conflict leaving property and home behind. Currently, more than one thousand individual applications lodged by persons who were displaced during the conflict are pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan. While the issues raised fall within the Court's jurisdiction as defined in Article 32 of the Convention, it is the responsibility of the two States involved in the conflict to find a political settlement of the conflict (see, *mutatis mutandis*, *Kovačić and Others v. Slovenia*, nos. 44574/98, 45133/98 and 48316/00, §§ 255-256, 3 October 2008; *Demopoulos and Others* (cited above, § 85). Comprehensive solutions to such questions as the return of refugees to their former places of residence, re-possession of their property and/or payment of compensation can only be achieved through a peace agreement. Indeed, prior to their accession to the Council of Europe, Armenia and Azerbaijan gave undertakings to resolve the Nagorno-Karabakh conflict through peaceful means (see paragraph 76 above). Although negotiations have been conducted in the framework of the OSCE Minsk Group, more than twenty years have gone by since the

ceasefire agreement in May 1994 and more than twelve years since the accession of Azerbaijan and Armenia to the Convention on 15 and 26 April 2002, respectively, without a political solution being yet in sight. As recently as June 2013 the Presidents of the Co-Chair countries of the Minsk Group – France, the Russian Federation and the United States of America – have expressed their "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" (see paragraph 28 above). The Court cannot but note that compliance with the above accession commitment is still outstanding.

(a) Applicable rule of Article 1 of Protocol No. 1

217. The Court reiterates that Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see among many other authorities, *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V).

218. The Court notes that the parties did not comment on the rule applicable to the case. It reiterates its finding that the applicant was not deprived of his rights in respect of the house and land in Gulistan. It follows that the case does not involve a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. Nor has it been claimed that the situation complained of was the result of any measures aimed at the control of the use of property. The Court therefore considers that the situation of which the applicant complains falls to be examined under the first sentence of the first paragraph, as it concerns a restriction of the applicant's right to the peaceful enjoyment of his possessions (see, *Loizidou* (merits), cited above, § 63; *Cyprus v. Turkey* [GC], no. 25781/94, § 187, ECHR 2001-IV; *Doğan and Others*, cited above, § 146).

(b) Nature of the alleged violation

219. The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful

enjoyment of his or her possessions. However, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention." The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see *Broniowski*, cited above, § 143; *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII).

220. However, the boundaries of the State's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether a case is analysed in terms of a positive duty of the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right of property has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (*Broniowski*, cited above, § 144).

221. The Court notes that the applicant complains that he is prevented from having access to his possessions in Gulistan and that the respondent Government have failed to provide him with any compensation for the interference with his rights. The applicant has thus formulated his complaint in terms of interference. Likewise, the Government, in case the Court should dismiss their argument that they have only limited responsibility under Article 1 of the Convention, addressed the applicant's complaints as being directed against an interference with his property rights.

222. In a number of comparable cases the Court has examined complaints of refugees or displaced persons about lack of access to and enjoyment of possessions as an interference with their rights under Article 1 of Protocol No. 1 (see, for instance, *Loizidou* (merits), cited above, § 63; *Cyprus v. Turkey*, cited above, § 187; *Doğan and Others*, cited above, § 143). In the present case, the Court does not consider it appropriate to follow this approach for the following reasons.

223. The present case differs from the cases concerning northern Cyprus in which the Turkish Government was held responsible for refusing Greek-Cypriot owners access to their properties situated in the "TRNC" which were under the Turkish Government's effective control as a result of occupation and establishment of a subordinate local administration. In those cases the interference with the Greek-Cypriot owners' property rights was

closely linked with the fact of occupation and establishment of the "TRNC" (*Loizidou*, cited above, §§ 52-56 and 63; *Cyprus v. Turkey*, cited above, §§ 75-80 and § 187). In contrast, what is at stake in the present case are acts or omissions of the respondent Government within its own internationally recognised territory.

224. The present case is the first case in which the Court has to rule on the merits of a complaint against a State, which has lost control over part of its territory as a result of war and occupation, but in respect of the area remaining under its control is claimed to be responsible for refusing a displaced person access to property. The only cases which would be comparable to the present case are a number of applications against the Republic of Cyprus lodged by Turkish-Cypriots also raising complaints about lack of access to property and home situated in the areas remaining under the Cypriot Government's control. However, these have not reached the stage of examination of the merits as they were either settled (*Sofi v. Cyprus* (dec.), no. 18163/04, 14 January 2010) or dismissed for failure to exhaust remedies provided by the Republic of Cyprus in respect of abandoned properties (see, in particular, *Niazi Kazali and Hakan Kazali* (dec.), cited above, §§ 152-153).

225. In the case of *Doğan and Others* (cited above), villagers who had been evicted from their village in the state-of-emergency region of south-east Turkey in the context of violent confrontations between the security forces and members of the PKK (Worker's party of Kurdistan), were prevented by the authorities from returning for about nine years on the ground of terrorist incidents in and around the village (ibid., §§ 142-143). It is worth noting that, though analysing the villagers' complaint about the refusal of access to their property in the village in terms of interference, the Court eventually left open the questions whether the interference with their right to peaceful enjoyment of possessions was lawful and pursued a legitimate aim and concentrated its examination on the issue of proportionality (ibid., §§ 147-149).

226. Having regard to the circumstances of the present case, the Court considers it appropriate to examine the applicant's complaint with a view to establishing whether the respondent Government have complied with their positive obligations under Article 1 of Protocol No. 1. It will therefore concentrate its examination on the question whether a fair balance between the demands of the public interest and the applicant's fundamental right of property has been struck.

(c) Whether a fair balance has been struck between the demands of the public interest and the applicant's right to the peaceful enjoyment of his possessions

227. Transposing the principles developed in its case-law to the specific circumstances of the present case, the Court considers that both an

interference with the peaceful enjoyment of the applicant's possessions and abstention from action must strike a fair balance between the safety considerations relied on by the Government and the requirements of the protection of the applicant's fundamental rights. The Court reiterates that the concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a persons of his or her possessions. In each case involving the alleged violation of that Article the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden (*Broniowski*, cited above, § 150 with further references). In assessing compliance with Article 1 of Protocol No. 1 the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of (ibid., § 151).

228. The Court considers that the applicant's complaint raises two issues, firstly whether the respondent Government are under an obligation to grant him access to his house and land in Gulistan, and secondly whether they are under a duty to take any other measures to protect the applicant's property right and/or to compensate him for the loss of its use.

229. Regarding the question of access to the applicant's property in Gulistan, the Court observes that the general situation of unresolved conflict between Armenia and Azerbaijan may make travel to Azerbaijan let alone access to their property very difficult, if not impossible, for persons in the applicant's situation. However, the parties' argument concentrated on the specific situation in Gulistan. The Court will also concentrate its examination on this point.

230. The Government argued in particular that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under international humanitarian law, the Government relied mainly on interests of defence and national security and on their obligation under Article 2 of the Convention to protect life against dangers emanating from landmines or military activity.

231. The Government have not submitted any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in international humanitarian law. The Court observes that international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to home or other property. Article 49 of the Fourth Geneva Convention (see paragraph 95 above) prohibits individual or mass forcible

transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased. However, these rules are not applicable in the present context as they only apply in occupied territory, while Gulistan is situated on the respondent Government's own internationally recognised territory.

232. What is rather of relevance in the present case, is the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own" (Rule 132 of the ICRC Study on Customary International Humanitarian Law – see paragraph 95 above). However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan.

233. On the basis of the evidence before it the Court has established that Gulistan is situated in an area of military activity. At least the area around it is mined and ceasefire violations occur frequently. It has not been claimed and there is no indication that this situation changed in any significant way in the period from the entry into force of the Convention until the present day. In any case, there are no signs that the situation has improved. The evidence before the Court rather points to an increase of military activity and of ceasefire violations in the area. The Court accepts that refusing civilians, including the applicant, access to Gulistan is justified by safety considerations, in particular restricting access to a mined area and protecting civilians against the dangers existing in such an area (see, *mutatis mutandis*, *Oruk v. Turkey*, no. 33647/04, §§ 58-67, 4 February 2014 relating to the State's obligation under Article 2 of the Convention to take appropriate measures to protect civilians living near a military firing zone against dangers emanating from unexploded ammunition). It would be unrealistic at present to expect the Azerbaijani Government to ensure the applicant's access to or re-possession of his property in Gulistan irrespective of the fact that it is in a militarily sensitive zone (see, *mutatis mutandis*, *Demopoulos and Others* (dec.), cited above, § 112).

234. However, the Court considers that as long as access to the property is not possible, the State has a duty to take alternative measures in order to secure property rights. The Court refers in that respect to the case of *Doğan and Others* concerning internal displacement of villagers, in which it examined in detail the measures taken by the Turkish Government with a view to either facilitating return to villages or to providing IDPs with alternative housing or other forms of assistance (cited above, §§ 153-156).

The Court would underline that the obligation to take alternative measures does not depend on whether or not the State can be held responsible for the displacement itself. In *Doğan and Others* the Court noted that it was unable to determine the exact cause of the displacement of the applicants and therefore had to confine its consideration to the examination of their complaints concerning the denial of access to their possessions (ibid., § 143). Which measures need to be taken depends on the circumstances of the case.

235. The Court will examine whether the Government have taken measures for the protection of the applicant's property rights. The Government asserted in particular that they have been participating in peace talks. Moreover, they pointed out that they had to cater for the needs of a huge number of IDPs. As the applicant was no longer present in Azerbaijan they could not provide any assistance to him. For his part, the applicant alleged that the Government had not taken any steps which they should have taken to protect or restore his property rights, had they acted in conformity which international standards regarding the restitution of housing and property to internally displaced persons and refugees.

236. In so far as the Government asserted that they are participating in peace talks, the Court observes that the right of all internally displaced persons and refugees to return to their former places of residence is one of the elements contained in the 2007 Madrid Basic Principles which have been elaborated in the framework of the OSCE Minsk Group (see paragraph 26 above) and form the basis of the peace negotiations. The question therefore arises whether it is sufficient for the Government to participate in these negotiations in order to fulfil their duty to strike a fair balance between the competing public and individual interests. While the Court can only underline the importance of these negotiations, it has already observed that they have been ongoing for over twenty years since the ceasefire in May 1994 and for more than twelve years since the entry into force of the Convention in respect of Azerbaijan and have not yet yielded any tangible results.

237. The Court considers that the mere fact that peace negotiations are on-going does 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 98 above).

238. 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 96 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 applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.

239. The Court is fully aware that the respondent Government has had to provide assistance to hundreds of thousands of internally displaced persons, namely those Azeris who had to flee from Armenia, from Nagorno-Karabakh and the seven occupied surrounding districts. In fact, the Government have pointed out that they have made considerable efforts in order to provide internally displaced persons with housing and other means of support. The only measure indicated by the Government from which Armenian refugees could potentially benefit is the 1991 Order legalising property swaps between individuals. Even assuming that such property swaps would be acceptable under the Convention, the Court notes that the applicant has not been involved in such an exchange.

240. The Court considers that, while the need to provide for a large community of internally displaced persons is an important factor to be weighed in the balance, the protection of this group does not exempt the Government entirely from its obligations towards another group, namely Armenians like the applicant who had to flee during the conflict. In this connection, the Court refers to the principle of non-discrimination laid down in Article 3 of the above-mentioned Pinheiro principles. Finally, the Court observes that the situation has continued to exist over a very lengthy period.

241. In conclusion, the Court considers that the impossibility for the applicant to have access to his property in Gulistan without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation for his loss of their enjoyment, placed and continues to place an excessive burden on him.

242. Consequently, there has been a continuing breach of the applicant's rights under Article 1 of Protocol No. 1.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

243. The applicant complained that the denial of his right to return to the village of Gulistan and to have access to his home and to the graves of his relatives constitutes a continuing violation of Article 8 of the Convention 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 applicant

244. The applicant maintained that he was born and grew up in Gulistan and lived there in his house with his family from the early 1960s until June 1992. He referred to the evidence submitted in support of his complaint under Article 1 of Protocol No. 1. In addition, he referred to the copy of his former Soviet passport, which confirmed that he was born in Gulistan in 1929 and to his marriage certificate which showed that he had got married in Gulistan in 1955, underlining that he had submitted both documents already when he had lodged the application. Furthermore, he stated that he was no longer able to submit a complete copy of his former Soviet passport (including the page with the registration stamp showing that he lived in Gulistan) as that passport had been destroyed in 2002 when he had obtained an Armenian passport.

245. The applicant argued that the applicability of Article 8 depended on the existence of "sufficient and continuous links with a specific place" or "concrete and persisting links with the property concerned", criteria which he fulfilled in respect of his home in Gulistan. As followed from the Court's case-law relating to northern Cyprus, these links were not broken by his prolonged involuntary absence. He added that this assessment and thus the applicability of Article 8 were independent from the question of ownership of the "home" at issue. In respect of his relatives' graves he argued that the denial of access to them violated his right to respect for "private and family life" as guaranteed by Article 8. He asserted that apart from the fact that he was unable to visit the graves of his relatives, he suffered in particular from the insecurity as to their fate.

246. In sum, the applicant argued that the refusal of access to his home, or to award him compensation, and the denial of access to the graves of his relatives and the ensuing uncertainty about their fate constituted continuing violations of Article 8 of the Convention.

2. The respondent Government

247. The respondent Government asserted that the applicant had not submitted sufficient evidence to show that he actually lived in Gulistan or had a home there. They explained that under the Soviet system of residence

registration (*propiska system*) which required everyone to be registered at his or her place of living, registration was recorded in the citizen's internal passport by a registration stamp and in the archives of the local authorities. In the present case, the relevant archives had been destroyed during the hostilities and the copy of those pages of the applicant's former Soviet passport which he had submitted did not bear a registration stamp.

248. Regarding the applicability of Article 8 the Government accepted that access to a home or to the graves of relatives fell within the notions of "home" and "private life" and thus within the scope of Article 8. However, referring to *Demopoulos and Others* ((dec.), cited above, § 136), they asserted that Article 8 did not apply where there was no longer a "persisting link" with the property concerned. The Government maintained the view that, even assuming that the applicant had lived in Gulistan and had had a house there, that house had been destroyed during the hostilities in 1992. Consequently, the applicant could no longer claim to have such a persisting link with a "home" in Gulistan.

249. In so far as the applicant's complaint related to the graves of his relatives the Government observed, firstly, that he had complained about the alleged destruction of Armenian graves in Azerbaijan but had not submitted sufficient evidence to show that there were graves of his relatives in Gulistan and that these graves had been destroyed. Consequently, he could not claim to be a victim of the alleged violation of Article 8 of the Convention. If such graves had actually existed, they had most likely been destroyed during the hostilities, i.e. before the entry into force of the Convention, and this part of the complaint was therefore incompatible *ratione temporis*.

250. Should the Court nonetheless come to the conclusion that Article 8 applied, as the applicant had a home and graves of his relatives in Gulistan, the Government argued that they could not be held responsible for any alleged interference with his rights. Given the security situation in the area they were simply not in a position to grant the applicant, or any civilian, access to Gulistan.

3. The Armenian Government, third-party intervener

251. The intervening Government agreed with the arguments submitted by the applicant. They underlined that it was undisputed that the applicant had no access to his home in Gulistan and to the graves of his relatives. Seen against the background of massive destruction of Armenian graveyards (for instance the destruction of the ancient Armenian graveyard of Jugha in the Nakhichevan region of Azerbaijan) which had been condemned by the international community, the applicant lived in a state of insecurity and anxiety as regards his relatives' graves.

B. The Court's assessment

1. Whether Article 8 of the Convention applies

252. The Court notes that the applicant's complaint encompasses two aspects: lack of access to his home in Gulistan and lack of access to the graves of his relatives. The Government contested the applicant's victim status in so far as his complaint concerned the graves of his relatives. In its admissibility decision the Court had joined the Government's objection concerning the applicant's victim status to the merits (*Sargsyan* (dec.), cited above, § 99).

253. The Court reiterates its established case-law, according to which "home" is an autonomous concept which does not depend on the classification under domestic law. Whether or not a particular habitation constitutes a "home" which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely the existence of sufficient and continuous links with a specific place (see, for instance, *Prokopovich*, cited above, § 36; *Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109).

254. In comparable cases the Court has considered that the lengthy involuntary absence was not capable of breaking the link with a displaced person's home (see, *Cyprus v. Turkey*, cited above, §§ 173-175; *Doğan and Others*, cited above, §§ 159-160). However, the Court's case-law requires that a sufficiently strong link has existed in the first place: For instance, in *Loizidou* (cited above, § 66) the Court did not accept that a property on which the applicant had planned to build a house for residential purposes constituted a "home" within the meaning of Article 8 of the Convention. In *Demopoulos and Others* ((dec.), cited above, §§ 136-137) the Court did not accept that the then family home of a Greek-Cypriot family could also be regarded as "home" in respect of one applicant, the daughter, who was still very young when the family had to leave.

255. Furthermore, the Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. Among other things, it includes the right to establish and develop relationships with other human beings and the outside world (see, for instance, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III).While it has been said that the exercise of Article 8 rights, including private and family life, pertains predominantly to relationships between living human beings, it is not excluded that these notions may extend to certain situations after death (see, in particular, *Jones v. the United Kindgom* (dec.), no. 42639/04, 13 September 2005, relating to the authorities' refusal to allow the applicant to place a memorial stone with a photograph on his daughter's grave and *Elli Poluhas Dödsbo v. Sweden*, no. 61564/00, § 24, ECHR 2006-I, relating to the authorities' refusal to allow the applicant to transfer the urn containing her late husband's ashes from one cemetery to another and

Hadri-Vionnet v. Switzerland, no. 55525/00, § 52, 14 February 2008, relating to the burial of the applicant's stillborn child by the authorities without giving her an opportunity to be present). In a recent case, the Court has found that the authorities' refusal to return the bodies of the applicant's relatives and the order of their burial in an unknown location, thus depriving the applicants of the opportunity to know the location of the gravesite and to visit it subsequently, constituted an interference with their private and family life (see, *Sabanchiyeva and Others v. Russia*, no. 38450/05, §§ 122-123, ECHR 2013 (extracts)).

256. In the present case the applicant has submitted evidence, namely a copy of his former Soviet passport and his marriage certificate, which show that he was born in Gulistan in 1929 and got married there in 1955. Moreover, the Court has found it established that the applicant owned a house in Gulistan which, though badly damaged, still exists to date (see paragraph 197 above). His claim that, having built his house in the early 1960s, he lived there with his family until his flight in June 1992 is supported by a number of witness statements. Finally, the maps of Gulistan, submitted by the parties and the third-party Government, show that there was a cemetery in the village. As the applicant was from Gulistan and many of his relatives were living there, it is also credible that there were graves of his late relatives in the village's cemetery.

257. The Court therefore accepts that the applicant had a "home" in Gulistan, which he left involuntarily in June 1992. The gist of his complaint is precisely that he has been unable to return ever since. In these circumstances his prolonged absence cannot be considered to break the continuous link with his home. Furthermore, the Court finds it established that the applicant had lived in Gulistan for the major part of his life and must therefore have developed most of his social ties there. Consequently, his inability to return to the village also affects his "private life". Finally, the Court considers that, in the circumstances of the case, the applicant's cultural and religious attachment with his late relatives' graves in Gulistan may also fall within the notion of "private and family life". In sum, the inability of the applicant to return to his former place of residence affects his "private and family life" and "home".

258. In conclusion, the Court dismisses the Government's objection as regards the applicant's victim status in respect of his relatives' graves and considers that the facts of the case fall within the notions of "private and family life" and "home". Article 8 therefore applies.

2. Whether there has been a continuing violation of Article 8 of the Convention

259. The Court refers to the considerations set out above which led to the finding of a continuing violation of Article 1 of Protocol No. 1. It has found that due to the situation pertaining in Gulistan refusing the applicant,

or any civilian, access to the village served the interest of protecting civilians against the dangers existing in the area. However, the impossibility for the applicant to have access to his property in Gulistan without the Government taking any alternative measures in order to restore his property rights or to provide him with compensation for his loss of their enjoyment, had placed and continued to place an excessive burden on him.

260. The same considerations apply in respect of the applicant's complaint under Article 8 of the Convention. The impossibility for the applicant to have access to his home and to his relatives' graves in Gulistan without the Government taking any measures in order to address his rights or to provide him at least with compensation for the loss of their enjoyment, placed and continues to place a disproportionate burden on him.

261. Accordingly, the Court concludes that there has been a continuing breach of the applicant's rights under Article 8 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

262. The applicant complained that no effective remedy was available to him in respect of all his above complaints. He 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 applicant

263. The applicant referred, firstly, to the arguments submitted in respect of exhaustion of domestic remedies. Secondly, he argued in more detail that useful conclusions as to the requirements for effective remedies in a comparable context could be drawn from the Court's case-law relating to Greek-Cypriot property in Northern Cyprus.

264. In the case of *Xenides-Arestis v. Turkey* (dec.), (no. 46347/99, 14 March 2005), the Court had found that remedies available in the "TRNC" in respect of loss of access to and enjoyment of property and home were ineffective on a number of grounds. In the subsequent case of *Demopoulos and Others*, ((dec.), cited above, §§ 104-129) the Court examined the effectiveness of remedies which had been amended in the meantime. Having carried out a detailed examination, the Court was satisfied that the proceedings before the Immovable Property Commission provided an effective remedy. It noted in particular that the said commission which included two independent international members had been functioning for four years; that it had concluded eighty-five applications and

some three-hundred other claims were pending before it; there was no evidence establishing that the proceedings would take an unreasonable length; the commission had paid out significant sums of money by way of compensation; claims could also be made in respect of non-pecuniary damage, including aspects of any loss of enjoyment of home; exchange of property had been effected in several cases; and there was a right to appeal to a court. The *Demopoulos* decision showed that the Court required substantial evidence of the effectiveness in practice of a purported remedy.

265. Other examples of remedies which the Court had found effective in somewhat comparable situations, related to the eviction of villagers in south-east Turkey (see, *Içyer v. Turkey* (dec.), no. 18888/02, ECHR 2006-I).

266. In contrast, in the present case the remedies which the Government claimed to be effective fulfilled none of these requirements.

2. The respondent Government

267. The Government referred in essence to their submissions concerning exhaustion of domestic remedies. They maintained in particular that Azerbaijani law protected both ownership and possession of property and provided adequate procedures which were accessible to citizens and foreigners allowing them to take action before the courts in respect of any loss or damage suffered on the territory of Azerbaijan.

3. The Armenian Government, third-party intervener

268. The Armenian Government supported the arguments submitted by the applicant. They maintained their position that there existed an administrative practice in Azerbaijan to prevent forcibly expelled Armenians, and generally any person of Armenian origin, from returning to or even visiting Azerbaijan.

B. The Court's assessment

269. The Court has already found continuing violations of Article 1 of Protocol No. 1 and Article 8 of the Convention. The applicant's complaints are therefore "arguable" for the purposes of Article 13 (see for instance, *Doğan and Others*, cited above, § 163).

270. The applicant's complaint under this head reflects to a large extent the same or similar elements as those already dealt with in the context of the objection concerning the exhaustion of domestic remedies. In addition the applicant argued that the Court's case-law contained indications as to the specific requirements which remedies designed to address violations of refugees' or displaced persons' rights to property and home should fulfil in order to be effective.

271. The Court reiterates its above finding that the respondent Government have failed to discharge the burden of proving the availability of a remedy capable of providing redress to the applicant in respect of his Convention complaints and offering reasonable prospects of success (see paragraph 119 above).

272. Furthermore, the Court observes that its findings under Article 1 of Protocol No. 1 and of Article 8 above relate to the respondent State's failure to create a mechanism which would allow the applicant, and others in a comparable situation, to have his rights in respect of property and home restored and to obtain compensation for the losses suffered. The Court therefore perceives a close link in the present case between the violations found under Article 1 of Protocol No. 1 and Article 8 of the Convention on the one hand and the requirements of Article 13 on the other.

273. In conclusion, the Court finds that there has been and continues to be no available effective remedy in respect of the violation of the applicant's rights under Article 1 of Protocol No. 1 and under Article 8 of the Convention.

274. Accordingly there has been a continuing breach of Article 13 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

275. Finally, the applicant complained with a view to his complaints set out above that he had been subjected to discrimination on the basis of his ethnic origin and religious affiliation. He relied on Article 14 of the Convention, 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 applicant

276. In the applicant's view the discriminatory treatment of Armenians was a fundamental aspect of the case. He maintained that only ethnic Armenians had been forced by the Azerbaijani military to flee their property and homes in the context of the Nagorno-Karabakh conflict. They were still unable to return or to make use of any effective remedies. While internally displaced Azerbaijanis benefitted from Government assistance, nothing whatsoever had been done for Armenians in the applicant's position.

2. The respondent Government

277. The Government rejected the applicant's allegation that he had been subjected to discriminatory measures on account of his ethnic origin or religious affiliation. As regards his return to Gulistan, they asserted that the security situation in the area did not allow the presence of any civilian in the area. Finally, the Government claimed that they had sufficiently shown their political will to settle the conflict in a manner which would allow all refugees and internally displaced to return to their former places of residence.

3. The Armenian Government, third-party intervener

278. The Armenian Government agreed with the applicant, underlining that his complaint had to be seen against the background of the Nagorno-Karabakh conflict at large: only ethnic Armenians were subjected to forced displacement from Azerbaijan and the denial of the applicant's right to return was also related to his ethnic origin.

B. The Court's assessment

279. The Court considers that the applicant's complaints under Article 14 of the Convention amount essentially to the same complaints which the Court has already examined under Article 1 of Protocol No. 1 and under Articles 8 and 13 of the Convention. Having regard to its findings of violations in respect of these Articles 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).

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

280. 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."

281. The applicant requested first and foremost restitution of his property, including the right to return to his property and home in Gulistan. Furthermore, he suggested that it might be appropriate for the Court to indicate general measures under Article 46 of the Convention to the Government. The applicant claimed compensation for pecuniary damage in a total amount of 374,814 euros (EUR). Furthermore, he claimed non-pecuniary damage in a total amount of EUR 190,000. Finally, he

claimed reimbursement of the costs and expenses incurred in the proceedings before the Court.

282. The Government contested these claims.

283. The Court, having regard to the exceptional nature of the case, considers that the question of the application of Article 41 is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the Government and the applicant.

FOR THESE REASONS, THE COURT

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

2. *Holds*, by fifteen votes to two, that the matters complained of are within the jurisdiction of the Republic of Azerbaijan and that the respondent Government's responsibility is engaged under the Convention and *dismisses* the respondent Government's preliminary objection concerning lack of jurisdiction and responsibility;

3. *Dismisses*, by fifteen votes to two, the respondent Government's preliminary objection that the Court lacked competence *ratione temporis* in so far as the applicant's complaints relate to his house;

4. *Dismisses*, by fifteen votes to two, the respondent Government's preliminary objection that the applicant lacked victim status in so far as his complaints related to his relatives' graves;

5. *Holds*, by fifteen votes to two, that there has been a continuing violation of Article 1 of Protocol No. 1 to the Convention;

6. *Holds*, by fifteen votes to two, that there has been a continuing violation of Article 8 of the Convention;

7. *Holds*, by fifteen votes to two, that there has been a continuing violation of Article 13 of the Convention;

8. *Holds*, by sixteen votes to one that no separate issue arises under Article 14 of the Convention;

9. *Holds*, by fifteen votes to two, that the question of the application of Article 41 is not ready for decision; and consequently,

(a) *reserves* the said question in whole;
(b) *invites* the respondent Government and the applicant 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 Ziemele;
(b) concurring opinion of Judge Yudkivska;
(c) partly dissenting opinion of Judge Gyulumyan;
(d) dissenting opinion of Judge Hajiyev;
(e) dissenting opinion of Judge Pinto de Albuquerque.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I agree with the outcome of the case and with the methodology adopted in respect of positive obligations. As indicated in my separate opinion in the case of *Chiragov and Others v. Armenia*, I would have preferred to also examine Armenia's positive obligations under the Convention.

2. The case at hand raises a different issue, which is clearly related to the concept of attribution of responsibility. The main question in dispute concerns the scope of Azerbaijan's responsibility under the Convention in Gulistan, which is a village on the border with Nagorno-Karabakh where, allegedly, Azerbaijan cannot ensure respect for human rights because this area has become a no man's land in view of the exchanges of fire on both sides of the border. The respondent Government argued that they could only have limited responsibility over that area since it was effectively a war zone and referred to the notion of "limited responsibility" developed by the Court in the case of *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, ECHR 2004-VII).

3. This is another type of situation in which the existing confusion in the Court's case-law between the jurisdiction and responsibility tests gives rise to the relevant arguments of the respondent Government and puts the Court in some difficulty since the facts of the case are such that they require it to disentangle to some extent the dicta of the *Ilaşcu* case in this regard. There is no doubt that Gulistan is within the jurisdiction of Azerbaijan, just as Transnistria is within the jurisdiction of Moldova. It is another question whether Azerbaijan is in control of the situation or actions on the ground. This, however, is a question of attribution of responsibility and not one of jurisdiction (for the correct distinction, see *Ilaşcu*, § 333). The question of attribution is linked to the nature of the obligations.

4. I think it was correct to say in the *Ilaşcu* case that Moldova had positive obligations. It is equally correct to say that Azerbaijan has positive obligations here. In my view, this approach is more suitable in such situations of conflict.

5. The Court has stated in the past that the only time when acts or omissions may not be attributed to the State, even where the territory concerned is within its jurisdiction, are those cases in which the territory is under military occupation or under the control of insurgents. However, even then as far as attribution of responsibility is concerned, the Court needs to look at the facts and determine which actions complained of were under which State's control.

6. Furthermore, I am not at all convinced by the Court's statement of principle that because there is no other State that can be held responsible Azerbaijan must be responsible. This is not a test or a principle compatible with the rules of responsibility (see paragraphs 142 and 148). I do not share

such sweeping statements. Whilst this can certainly be an ultimate goal to be achieved in Europe, it is not a legal criterion on the basis of which one attributes responsibility. In the case at hand, there is no area without protection because it is a village within the jurisdiction of Azerbaijan and that means that in principle this State is responsible. The real question is which obligations we are talking about and whether some inaction can be attributed to Azerbaijan.

7. In the case at hand we have applicants who have lost their homes and cannot return there because of a long-standing conflict between two neighbouring nations. I have no doubt whatsoever that Azerbaijan is also responsible for the fact that no improvement in the conflict is in sight. There is no question but that it could do more to allow Armenians to return to their homes or grant compensation. These steps could even be taken unilaterally and possibly be a way of moving towards finding a solution to the conflict from a different angle. The same is true for Armenia. The two States do not need to agree on that together. By virtue of their Convention obligations, they could propose unilateral solutions for these people.

8. It is on the basis of this understanding that I share the finding of the Court that there has been a violation of positive obligations as regards Article 1 of Protocol No. 1 and Article 8. Finding a violation of Article 13 may indeed be understood to mean that Azerbaijan can propose its own action plan. I entirely disagree, however, that there is room for any talk about "limited liability". There may be very little that the State with jurisdiction can control or ensure and in that sense one can talk about limited possibilities for attributing actions or omissions to that State, but once some form of inaction has been attributed (for example, absence of a compensation scheme) there will be a responsibility if those obligations are not complied with.

CONCURRING OPINION OF JUDGE YUDKIVSKA

With some hesitation, I have voted in favour of finding a violation of Article 1 of Protocol No. 1 to the Convention and Article 8 of the Convention, albeit on a much more limited basis.

Two cases related to the Nagorno-Karabakh conflict – *Chiragov v. Armenia* and *Sargsyan v. Azerbaijan* – were examined concurrently by the Grand Chamber and a similar methodology pursued in both cases. The Court had the challenging task of guaranteeing a comprehensible interpretation of Article 1 of the Convention in post-conflict situations. I am convinced, however, that these cases are significantly different in a number of respects, and that their simultaneous examination was rather factitious, to the detriment of a coherent perspective of "jurisdiction", thus leading to a result that cannot be seen as a fair one, namely that Azerbaijan bears full responsibility for the violations found.

Firstly, it is established that Gulistan – a village on the north bank of the river Indzachay, where the applicant had his property – is situated on a "line of contact" (frontline) between Azerbaijani military forces and those belonging to the separatist "NKR", the latter's actions being attributed to Armenia from the Convention viewpoint. The village and its surroundings are mined, and violations of the ceasefire occur regularly, presumably by both sides. Whilst negotiations between Armenia and Azerbaijan have not yet yielded any meaningful results, and the international community remains unhelpful in solving the long-standing conflict between the two member States, I fail to understand how in this specific case we can attribute the *whole* responsibility to Azerbaijan.

Secondly, in applying its jurisprudence on issues of jurisdiction and effective control, the Grand Chamber disregarded the fact that no one can stay in a ceasefire zone separating two belligerent forces (it is recognized that there were no civilians in the village), and the scope of the Convention guarantees is therefore significantly different. For the first time in its history the Court has had to address the issue of securing Convention rights and freedoms in a *completely uninhabited* territory.

I shall further elaborate on my points of disagreement below.

(1) Concurrent responsibility of two member States

In the instant case the paradox lies in the fact that it follows from the Court's conclusion in *Chiragov* that Armenia "exercises effective control over Nagorno-Karabakh and the surrounding territories" (see paragraph 186 of the *Chiragov* judgment) including, obviously, the territory adjacent to the frontline. Thus, it should also be held accountable for the harmful outcome in the *Sargsyan* case and, consequently, bear some responsibility as well.

The issue of shared responsibility is not new to this Court, although no sufficiently clear guidance has yet been provided[1]. In previous cases many applicants believed that their Convention rights were violated by numerous States and submitted their applications accordingly. The Court thus put relevant questions to several parties concerned and had an opportunity to determine the scope of responsibility of each Contracting Party. This has been done in different contexts, such as expulsion and extradition (see, among others, *M.S.S. v. Belgium and Greece*[2], and *Shamayev and Others v. Georgia and Russia*[3]), child custody (see, as the latest example, *Furman v. Slovenia and Austria*[4]), protection from trafficking (see *Rantsev v. Cyprus and Russia*[5]) and so on.

Concurrent responsibility clearly arises in the context of post-conflict situations, the Court's landmark judgment in this respect being *Ilaşcu v. Moldova and Russia*. In *Ilaşcu*, which has provided guidance in the present cases, the territory of Transnistria was *de facto* controlled by the Russian-backed separatist regime, whilst remaining *de jure* a territory of Moldova. This factual situation affected the distribution of responsibility between Russia and Moldova.

Further cases arising from the Transnistrian conflict (*Ivanţoc*, *Catan*) were examined in the same way, that is, from the perspective of shared responsibility of both Contracting Parties (although in those cases the Court found that Moldova had discharged its positive obligations). The Court was subsequently called upon to determine the level of responsibility of both Georgia and Russia regarding the allegedly unlawful detention of the applicant in South Ossetia, governed by the separatist regime presumably subordinate to the Russian authorities, in the case of *Parastayev v. Russia and Georgia*[6]. The case was communicated to both respondent Governments, but was later withdrawn following the applicant's request.

Thus, when an applicant brings his or her claim against all allegedly responsible States, the Court has an opportunity to examine the extent to which each of the respondent States is accountable. In *Ilaşcu* the Court made it clear that the existence of a separatist regime reduced the scope of Moldovan jurisdiction (limiting this jurisdiction to positive obligations only); however, this was done in view of the further finding that the Russian Federation exercised jurisdiction over that part of Moldova. In the present case, being deprived of the possibility of examining Armenia's

1. See "Principles of Shared Responsibility in International Law - An Appraisal of the State of the Art", André Nollkaemper and Ilias Plakokefalos eds., Cambridge University Press 2014, p.278.
2. [GC], no. 30696/09, ECHR 2011.
3. no. 36378/02, ECHR 2005-III.
4. no. 16608/09, 5 February 2015.
5. no. 25965/04, ECHR 2010 (extracts).
6. see *Parastayev v. Russia and Georgia* (dec.), no. 50514/06, 13 December 2011.

responsibility for the violations complained of, the Court attributed full responsibility to Azerbaijan "taking into account the need to avoid a vacuum in Convention protection" (see paragraph 148).

I find that in the circumstances of the present case, in the absence of any claim against Armenia, this legal formula was artificial and led to erroneous and unfair conclusions: Azerbaijan, which has been trying to regain its control over the whole territory of its recognised borders for more than twenty years, was held fully accountable for the inability to establish normal life in Gulistan, which is under fire from "NKR" forces subordinate to Armenia. Full responsibility was attributed without full attribution of conduct.

The mere fact that the applicant, for obvious reasons, decided to lodge a complaint against only one High Contracting Party involved in the conflict and not both (as in *Ilaşcu* or *Parastayev*) should not automatically engage the full responsibility of Azerbaijan, which is a victim State suffering occupation of a significant part of its territory (as is clear from the *Chiragov* judgment).

Alternatively, although the Court is obviously unable to examine *proprio motu* the issue of responsibility of a State which was not party to the case at hand, the mere existence of a long-standing inter-State conflict should trigger shared responsibility. Evidently, there is no mechanism under the Convention by which to identify a High Contracting Party accountable – partially or fully – for human rights violations complained of if an applicant brings a complaint against a party not responsible or responsible only in part. Nevertheless, it would be deceptive to ignore the factually clearly limited accountability of the respondent State; and procedural impediments should not turn into substantive wrongs.

Some inspiration can be drawn from the practice of other international bodies. I can mention the classic ICJ judgment in the case of *Certain Phosphate Lands in Nauru*[7], in which the ICJ had to consider an objection by Australia based on the fact that New Zealand and the United Kingdom, which were equally involved, were not parties to the proceedings. The respondent State believed that a claim could only be brought against the three States jointly, and not against one of them individually. The ICJ found that no reason "had been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raise[d] questions of the administration of the territory, which was shared with two other States". It found that Australia had obligations in its capacity as one of the three States involved, and thus proceeded to examine its (partial) responsibility.

7. *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia): Preliminary Objections* [1992] ICJ Reports 240.

It further disagreed with the respondent State that any conclusion as to the alleged violation by Australia of its obligations would necessarily involve a finding as to the discharge by the other two States of their obligations in that respect (which in fact happened in the *Sargsyan* case):

> "53. National courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.
>
> 54. A State, however, which is not a party to a case is free to apply for permission to intervene (...) But the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. (...)"

Similarly, whilst in the present case there was no procedural possibility of establishing any responsibility on the part of Armenia, the factual context of the case should have prevented the Grand Chamber from placing the whole blame on Azerbaijan. Instead, exactly as in *Ilaşcu*, we are dealing here with the reduced scope of jurisdiction of Azerbaijan over Gulistan, and the undertaking given under Article 1 must be considered only in the light of its positive obligations.

I wholeheartedly concur with Judge Bonello, who mentioned in his separate opinion in the *Al-Skeini* judgment[8] that "[j]urisdiction arises from the mere fact of having the capability to fulfil [obligations under the Convention] (or not to fulfil them)."

Without the relevant steps on Armenia's part, which are clearly outside any control of Azerbaijan, the latter does not have the capability to fulfil its obligations in Gulistan. The applicant's inability to gain access to his property in this village was triggered by the Armenian-backed "NKR"'s belligerence, and any responsibilities of both States in this respect are concurrent and mutually dependent.

In Shakespeare's words, "what's past is prologue". The applicant's current situation is a result of the lengthy struggle between two member States with no solution for past problems yet being found and new problems evolving. As Judge Elaraby wrote, concurring with the ICJ Advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,

> "...Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation, international law seeks to 'perform a holding operation pending the termination of the conflict... [The rights] of every State in the area . . . to live in peace within secure and recognized

8. See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, concurring opinion of Judge Bonello.

> boundaries free from threats or acts of force' ... are solemn reciprocal rights which give rise to solemn legal obligations.... Security cannot be attained by one party at the expense of the other. By the same token of corresponding rights and obligations, the two sides have a reciprocal obligation to scrupulously respect and comply with the rules .... "[9]

It is not within Azerbaijan's power to unilaterally terminate the breach of the applicant's rights, and both States have a reciprocal obligation to find a solution. Ultimately, to impose full responsibility on a State, part of whose territory has been unlawfully occupied for decades, is, in my view, plainly wrong from both a legal and a moral standpoint.

(2) "Effective control"

The majority found that the Government of Azerbaijan had full jurisdiction over Gulistan although they "may encounter difficulties at a practical level in exercising their authority" (see paragraph 150).

Apart from the above-mentioned matter of concurrent responsibility, a question arises regarding how we should understand the term "jurisdiction" in the context of empty land, or merely *uninhabited* territory. I cannot but quote Judge Loucaides, who gave the following definition in his separate opinion in the *Assanidze* case[10]:

> "To my mind 'jurisdiction' means actual authority, that is to say *the possibility of imposing the will of the State on any person*, whether exercised within the territory of the High Contracting Party or outside that territory" (emphasis added).

Hence, the issue of the possibility, even a theoretical one, of imposing the State's will on a person is central to determining jurisdiction. In this respect, from a judicial review perspective, the present case is unique. As I said earlier, for the first time this Court is dealing with the question of effective control over a territory in which there is no one on whom the State's will can be imposed. As echoed by Judge Bonello in the above-mentioned separate opinion in *Al-Skeini*, "[j]urisdiction means no less and no more than 'authority over' and 'control of'. In relation to Convention obligations, jurisdiction ... ought to be *functional* ...".

Whilst in *Chiragov v. Armenia* the Court examined a fairly standard situation of illegal occupation of a populated district (Lachin) by the separatist regime backed by Armenia (which is precisely why in that judgment the Court referred to the relevant Geneva Convention and Hague Regulations on *occupatio bellica*), here we cannot discuss any State's "effective control of the relevant territory and its inhabitants" since there

9. Judge Elaraby, Separate Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 2004 ICJ 136.
10. See *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II, concurring opinion of Judge Loucaides.

have been no inhabitants at all in Gulistan since 1994, so there is no possibility of a "functional" jurisdiction.

Can anyone exercise authority, in any sense of the word, over heavily mined territory which lies either side of a frontline, surrounded by armed forces from both sides and which, consequently, no one can even enter?

Human rights instruments are by definition person-orientated: there should be a *person* to enjoy the rights guaranteed by the Convention, and the High Contracting Parties shall secure these rights and freedoms to *everyone* within their jurisdiction.

The previous jurisprudence referred to in the present judgment – *Ilaşcu* and *Assanidze* among others – is not, in my view, automatically applicable to the present situation: an empty land cannot have and does not require the same level of effective control as an inhabited area. The judgment accepted, in principle, that the present case was different (see paragraph 142, first sentence), but nevertheless suggested that it was up to the respondent Government to show that another State has "effective control". I regret that the Grand Chamber lacked the courage to admit that we were dealing with a *sui generis* situation in which the absence of "effective control" of any occupying power over Gulistan does not inevitably mean that Azerbaijan exercises effective control over the disputed area. No similar precedents, to the best of my knowledge, can be found in our case-law.

None would contest that Azerbaijan has jurisdiction over its internationally recognised territory, including Gulistan; the disagreement here is about the *scope* of this jurisdiction. In paragraph 144 the judgment refers to Article 42 of the Hague Regulations, according to which territory is considered occupied when it is actually placed under the authority of a hostile army, and such authority has been established and *can be exercised*. Basing itself on the material in its possession, the Court concluded that Gulistan was not occupied by or under the effective control of foreign forces. I can agree with this, but a similar test – whether or not authority can be exercised – should apply when we are assessing whether or not Azerbaijan had full and operational jurisdiction over this territory.

The term "effective control" was developed in international law to describe the circumstances and conditions for determining the existence of an occupation. It assesses the *exercise* of authority in a territory. Thus it is a test for attribution of conduct.

A number of international tribunals' judgments have underlined (in the context of occupation) this link between "effective control" and the possibility of exercising *actual authority* over a particular area. It is also stressed in the legal literature that the "degree of effective control required may depend on the terrain, the density of the population and a slew of other

considerations"[11]. Clearly, we cannot talk about the same degree of "effective control" in inhabited areas as in uninhabited ones, and no *actual authority* over Gulistan is or can be exercised by Azerbaijan in the absence of any population.

As suggested by Lord Brown in the *Al-Skeini* case[12] "... except when a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory... Under these approaches, then, the *test for territorial control must include a capacity to exercise public authority*, because it is only in such circumstances that the state would actually be in a position to fulfill its obligations in the ECHR. In other words, the Convention cannot be applicable in a generalized sense when the state does not enjoy such authority, since the obligations it contains in part presuppose such enjoyment".

Therefore, I find it difficult to apply, in the unique circumstances of the present case, the previous case-law in *Ilaşcu* and *Catan*, as suggested in paragraph 148, to the effect that as long as it has not been established that Gulistan is occupied by another State, Azerbaijan exercises full control over it.

I perfectly understand the Court's preoccupation with the idea that no areas of limited protection should be accepted within the Convention's legal space. It is a long-standing approach both by the Court and by the Council of Europe that no *de facto* black holes are allowed to exist in Europe[13]. However, I find this judicial construction to be illusory, and we must accept that such "black holes" do exist – Transnistria, Abkhazia, South Ossetia, Nagorno-Karabakh, to mention just some. Moreover, in a relatively recent decision in the case of *Azemi v. Serbia*[14] the Court recognized that such areas may also exist *de jure* - after Kosovo proclaimed its independence "there existed objective limitations which prevented Serbia from securing the rights and freedoms in Kosovo". The Court was not able "point to any positive obligations that the respondent State had towards the applicant", who complained about the non-enforcement of a judgment in his favour. Since Kosovo is not a party to the Convention, it would appear that it constitutes a "limited protection area" in terms of the Convention.

11. see Yoram Dinstein, "The International Law of Belligerent Occupation", Cambridge University Press, 2009, p.44.
12. *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant). Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, [2007] UKHL 26, United Kingdom: House of Lords (Judicial Committee), 13 June 2007.
13. see the reference to the PACE motion for a recommendation "Lawless areas within the territory of Council of Europe member States" cited by Judge Kovler in the *Ilaşcu* case.
14. *Azemi v. Serbia* (dec.), no.11209/09, 5 November 2013.

Further, in the decision of *Stephens v. Cyprus, Turkey and the United Nations*[15], in which the applicant complained of the continuing denial of access to her house, which was located in the buffer zone in Nicosia, controlled by the UN forces, the Court easily rejected the complaint as being incompatible *ratione personae*, since neither Turkey nor Cyprus had jurisdiction over the buffer zone, thus accepting the existence of one more "black hole" in Europe (apropos of this, the area consisted of five villages where about 8,000 people lived or worked).

Gulistan, not being an official "buffer zone" with or without the presence of peacekeepers, nevertheless remains, as described in the judgment, "the frontline between Azerbaijani and "NKR" forces". There would be nothing wrong in acknowledging that this is an area with "limited protection". In fact, we are not talking about a limitation of rights; there are just no human beings living in this area to enjoy the rights guaranteed by the Convention, so no *interference* with these rights can be envisaged. Of course, people in a situation similar to that of the applicant can claim certain rights and interests, but these rights can relate only to the State's positive obligations.

Thus I find the conclusion in paragraph 150, according to which "the situation at stake in the present case is more akin to the situation in *Assanidze*", to be strikingly wrong. In that case the Georgian Government encountered difficulties at a practical level in exercising their authority over the Ajarian Autonomous Republic, which was otherwise inhabited and fully operational. Contrary to that situation, as has been mentioned, Gulistan has remained an uninhabited territory since 1994. Consequently, although from a legal point of view Azerbaijan has jurisdiction over it, in practical terms this jurisdiction is significantly limited, as has been said earlier, comprising only positive obligations. Indeed, this was implicitly confirmed by the Grand Chamber in paragraph 226, according to which "the Court consider[ed] it appropriate to examine the applicant's complaint with a view to establishing whether the respondent Government have complied with their positive obligations".

So, what could be expected from Azerbaijan from the standpoint of positive obligations in the present case?

In *Ilaşcu* the Court found, in respect of Moldovan responsibility under the Convention, that it had to determine whether "the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent *a minimum effort* was nevertheless possible and whether it should have been made".

Azerbaijan and Armenia, I believe, share responsibility for the applicant's prolonged inability to enjoy rights guaranteed by the

15. *Stephens v. Cyprus, Turkey and the United Nations* (dec.), no. 45267/06, 11 December 2008.

Convention. Until the peace negotiations achieve a significant result, the military *status quo* in Gulistan will be preserved. Ironically, whilst the Court recognizes Azerbaijani's full jurisdiction over Gulistan and thus expects some action on its part to put an end to the continuing violations of the applicant's rights, it is clear that any activity in the village by the respondent State, and any attempt to re-establish its control over the village, may threaten the maintenance of the ceasefire and endanger peace negotiations.

Nonetheless, given that the applicant has long been unable to gain access to his property, some *minimum effort* to secure compensation should be expected from Azerbaijan. Since, as can be seen from the case materials, the respondent State has never made any meaningful attempt to even consider the possibility of compensating the displaced Armenians for their lack of access to their property, I voted for a violation of positive obligations in this case.

PARTLY DISSENTING OPINION OF JUDGE GYULUMYAN

1. I disapprove of the Court's reasoning in some parts of the judgment but agree with the conclusions of the majority finding violations of Article 1 of Protocol No. 1 to the Convention and Articles 8 and 13 of the Convention. I regret to have to disagree, however, with the Court's decision not to examine Article 14 separately. I strongly believe that the Court should have reached the reverse conclusion and found a violation of Article 14, for the reasons set out below.

2. The Court found in paragraph 279 of the judgment that the applicant's complaints under Article 14 of the Convention amounted essentially to the same complaints already examined by the Court under Article 1 of Protocol No. 1 and under Articles 8 and 13 of the Convention, and therefore considered that no separate issue arose under Article 14 of the Convention.

3. At first sight this approach seems to follow the previous case-law of the Court and in particular the Court's approach in *Cyprus v. Turkey*, *Xenides-Arestis v. Turkey,* and *Catan and Others v. Moldova and Russia*.

4. The issue here, though, is that while in the above-mentioned cases the establishment of the respondent State's jurisdiction was a cornerstone of the Court's reasoning, in the present case the issue of extra-territorial jurisdiction was not raised. In other words, at the material time the Republic of Azerbaijan exercised unconditional sovereign jurisdiction over the territories, which makes this case different from *Cyprus v. Turkey* and the other cases.

5. The Court's failure to differentiate the present case from the others, and its consequent failure to raise a separate issue under Article 14 of the Convention, presumably stem from its lack of due regard to the fact that **the respondent State forcefully displaced its own citizens from those territories on the basis of their ethnicity**. It is pertinent to mention that the respondent State did not subject ethnic Azeri citizens to similar treatment.

6. Under these circumstances one may reasonably assume that the explanation for the Court's fundamental failure to differentiate between these two situations is its reluctance to pay due regard to the politico-historical background to the case, which substantiates a finding of discriminatory treatment by the respondent State of thousands of people on the basis of their ethnicity.

7. Nagorno-Karabakh (in Armenian, *Artsakh*) is located in the north-eastern area of the Armenian highlands. Since ancient times, it has been a province of Armenia and predominantly populated by ethnic Armenians. Clear evidence of this lies in the fact that there are thousands of Armenian Christian monuments, some of which date back as far as the 4th century AD, and in references to the region in the works of Strabo, Ptolemy, Plutarch, Dion Cassius, and others.

8. After 387 AD Armenia was partitioned between Byzantium and Persia. Eastern Transcaucasia, including Nagorno-Karabakh, came under Persian rule. This did not affect the ethnic borders of the region, which remained the same throughout the centuries. Thus, it continued to remain inhabited by Armenians.

9. In 1805 the historical territory of Artsakh was artificially named "Khanate of Karabakh". Along with many areas in Eastern Transcaucasia, it was annexed to the Russian Empire by means of the Treaties of Gulistan (1813) and Turkmenchay (1828) which were signed between Russia and Persia.

10. After the collapse of the Russian Empire, which resulted in a new arrangement of recently formed States in the Caucasus, Karabakh became a theatre of war. The Caucasus Bureau of the Russian Communist Party thereafter disregarded the December 1920 Resolution of the League of Nations. It refused to accept a plebiscite as a popular mechanism for determining the borders between Armenia and Azerbaijan. Under immediate pressure from Stalin, the decision was made to separate Armenian-populated Nagorno-Karabakh and Nakhichevan from Armenia by force. On 5 July 1921 the Caucasus Bureau of the Russian Communist Party adopted a political decision to annex Nagorno-Karabakh to the Soviet Azerbaijan.

11. The discriminatory treatment that the applicants faced in the present case can hardly be qualified as unprecedented. Taking advantage of the unsettled state of affairs following the First World War and the collapse of the Russian Empire, and in continuation of its policy of Armenian Genocide (1915), the Turkish forces joined arms with Azeri military units from 1918 to 1920 and proceeded to plunder and destroy hundreds of Armenian villages. On 28 March 1920 Shushi (the area's capital) was burned and plundered and its Armenian population annihilated.

12. Throughout its Soviet history and despite calls from the international community, the Soviet Union and Azerbaijan arbitrarily denied Nagorno-Karabakh's appeal for self-determination. Every effort to discuss the dispute in a civilized fashion resulted in increased violence, economic blockades and massive disregard for the Armenian population's rights. Massacres and mass murders of Armenians occurred hundreds of kilometres away from the Nagorno-Karabakh Republic (the NKR) as assaults were organised in various Azerbaijani cities: Sumgait, Baku, Kirovabad, and later throughout Azerbaijan. This violence was followed by the 1991-1994 Azeri-instigated war on the NKR, which resulted in thousands of casualties and destroyed an estimated 80% of Nagorno-Karabakh's economy.

13. The displacement and massacres of ethnic Armenians by Azeri and Soviet military units became even more violent after 10 December 1991, when, in the referendum, the overwhelming majority of the population of Nagorno-Karabakh voted in favour of its independence from Azerbaijan. It

should be mentioned that independence was declared in accordance with the USSR legislation existing at that time, namely "The regulation governing questions concerning a union republic seceding from the USSR" (3 April 1990). This law governed the right of national autonomous regions to determine independently their legal status when a republic seceded from the USSR.

14. Using the weapons and war materials of the USSR's 4th Army that was headquartered in its territory, Azerbaijan engaged in wide-scale military actions against the people of Nagorno-Karabakh. During the Operation "Ring", which was conducted by Azeri and Soviet central forces, the population of twenty-four Armenian villages was subjected to deportation within a three-week period. In the summer of 1992, just six months after the referendum in favour of independence, Azerbaijan placed about 50% of the NKR territory under its military occupation.

15. There were times when almost 60% of the territory of Nagorno-Karabakh was occupied. The capital city of Stepanakert and other residential areas were almost incessantly subjected to massive air and artillery bombardment.

16. Since the early days of the military offensive by Azerbaijan, many international bodies, including the EU Parliament and the US Congress, have been actively engaged in efforts to find a resolution to the Nagorno-Karabakh conflict. The documents adopted by international organisations refer in most cases to displacements, torture and killings of ethnic Armenians by Azeri forces. This evidence proves beyond reasonable doubt that the actions by Azerbaijan amounted to discrimination and ethnic cleansing of Armenians not only in Nagorno-Karabakh but also in other major cities of Azerbaijan where Armenians historically represented a significant percentage of the population.

17. Thus, on 7 July 1988 the European Parliament adopted a resolution condemning the massacres in Sumgait and referring to the tragic events of February 1988. The resolution acknowledged the deteriorating political situation that threatened the safety of the Armenians living in Azerbaijan and condemned the violence employed against Armenian demonstrators. It also called upon the Soviet authorities to ensure the safety of the 500,000 Armenians living in Azerbaijan and to ensure that those found guilty of having incited or taken part in the pogroms against the Armenians were punished according to Soviet law. On 18 January 1990 the EU Parliament passed another resolution calling for the immediate lifting of the blockade imposed on Armenia and Nagorno-Karabakh.

18. In 1989 the US Senate passed a resolution highlighting America's support for the fundamental rights and aspirations of the people of Nagorno-Karabakh generally, and for a peaceful and fair settlement of the dispute over Nagorno-Karabakh specifically (S.J. Res. 178).

19. Section 907 of the United States Freedom Support Act of 24 October 1992 bans any kind of direct United States aid to the Azerbaijani government, the only Republic of the former USSR to which aid is banned, until "the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno-Karabakh."

20. Azerbaijan has ignored such demands for the cessation of offensive assaults and has continued its bombardments and attacks in Nagorno-Karabakh. There can be no doubt but that their aim was and remains the ethnic cleansing of the territory of Nagorno-Karabakh. I quote just one illustration from Azeri sources which drive this point home – a statement of a former Azeri President: "In order to preserve the territorial integrity of Azerbaijan, we paid much attention to Karabakh. Of course some dilettantes have blamed me for that. I did so firstly because Nagorno-Karabakh had to be inhabited by the Azerbaijani population and secondly in order not to give the Armenians an opportunity to raise that question". This is from the address given by H. Aliyev, President of Azerbaijan, on 24 January 2001 during the parliamentary hearings on the settlement of the conflict.

21. The continuing ethnic discrimination against Armenians by Azerbaijan after its ratification of the Convention has also been recognised by the Committee on the Elimination of Racial Discrimination (Concluding Observations of the CERD: Azerbaijan, UN Doc. CERD/C/AZE/CO/4 (14 April 2005), the European Commission Against Racism and Intolerance (ECRI) of the Council of Europe in all three of its reports on Azerbaijan (adopted on 28 June 2002, 15 December 2006 and 23 March 2011 respectively), and 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)). The ECRI stated that it "ha[d] repeatedly recognized the link between the harsh comments regularly made in this country about the Nagorno-Karabakh conflict and the discrimination that Armenians coming under Azerbaijan's jurisdiction encounter in their daily lives" and that it "consider[ed] that, today more than ever, considerable efforts [were] needed on the part of the Azerbaijan authorities to ensure that these persons d[id] not feel threatened". Unfortunately, the Court ignored this call.

22. A finding of one violation of the Convention should not always release the Court from the obligation to examine other possible violations of the Convention. I therefore believe that the Court made an error in dismissing the separate issue under Article 14 of the Convention and should have examined all the circumstances, which ultimately would have led to a finding of a violation of Article 14 of the Convention.

DISSENTING OPINION OF JUDGE HAJIYEV

In this opinion I would like to set out the reasons why I disagree with the majority opinion.

First of all I would like to point out that Gulistan is a historical place for Azerbaijanis. It is the village where the Russian Empire and Persia concluded a treaty in 1813 which went down in history as the Gulistan Treaty, according to which the Northern Azerbaijani Khanates, including the Karabakh Khanate, became part of the Russian Empire. In his poem "Gulistan", the Azerbaijani poet Bakhtiyar Vahabzade, who was prosecuted by the Soviet authorities in the 1960s, described the destiny of the nation divided by this event. I am starting with this brief background information in order to show that Azerbaijan had no interest in ruining this historical place.

Accordingly, the measures described in paragraph 32 of the judgment were not directed against the Armenian part of the population, who, according to the applicants, were living there comfortably and not in poor conditions, but taken by the Soviet authorities in order to destroy the insurgents concentrated there. The applicant, like thousands of other people from Karabakh, became a victim of the conflict and naturally my dissenting opinion does not intend to overlook the difficulties encountered by him and of which he complained to the Court in August 2006 in response to the complaints submitted in April 2005 and communicated by the Court in the case of *Chiragov and Others v. Armenia*.

The weakness of the complaint was visible to the naked eye already at the communication stage. Therefore, as is clear from the judgment, the Court faced major difficulties in justifying its position. Its reasoning does not appear at all convincing. Moreover, the very prospect of examining these two different cases at the same time is an unappealing one, since the Court may thus be wrongly understood as equating, to some extent, aggressor and victim. This unfortunate impression could have been avoided if Armenia had been involved in the case, but the Court was precluded from examining Armenia's responsibility for the violations complained of.

I would begin by saying that the parties agree on the fact that Gulistan is situated in the internationally recognised territory of Azerbaijan. The following question arises: what are the Armenian military forces doing, in the territory of a sovereign State, closing access to the village from one side and mining the surrounding area? The Azerbaijani army is located on the other side of the village, so access to the village is controlled by the Azerbaijani army. At first sight the present case may seem similar to some other cases already examined by the Court, but only at first sight. It is true that the Court has developed criteria according to which jurisdiction and effective control are established and, at first sight, some of them, for example those in *Ilaşcu*, *Assanidze* and so on, may be useful and applicable

to the present case. But this is only at first sight. In reality, the present case is distinguishable from earlier cases in which the Court has been called upon to examine under Article 1 of the Convention the issue of effective control over the area where the alleged violations have occurred. The deserted village, surrounded from both sides by the opposing armed forces, and mined at its edges is, in the language of diplomats, a Contact Line or ceasefire line, and the applicant, being in his homeland, could successfully address his question to the Armenian authorities and ask what the Armenian armed forces are doing in the territory of another sovereign State closing his access to his homeland or at least complain about the actions of both States. However, these are rather rhetorical questions ...

I will focus on the main question, which, in my view, is an important legal question to be answered in the present case: whether Azerbaijan has effective control over Gulistan. If we turn to international law, it does not contain any rules specifically applicable to zones which are located on a ceasefire line between the military positions of two opposing armies. As the Court noted in the case of *Banković and Others v. Belgium and Others* (dec.) ([GC], no. 52207/99, ECHR 2001-XII), from the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial, but also that jurisdiction is presumed to be exercised normally throughout the State's territory.

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising authority over part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (see *Loizidou v. Turkey* and *Cyprus v. Turkey*), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned. The Court has also noted that, in order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a State's authority over its territory and, on the other hand, the State's own conduct. The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to a duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (see *Z. and Others v. the United Kingdom* [GC] no. 29392/95, § 73, ECHR 2001-V). Those obligations remain even where the exercise of the State's authority is limited. Taking these principles into account, the Court found that Moldova, even in the absence of effective control over the Transnistrian region, still had a positive obligation under Article 1 of the Convention.

However, I would like to refer to the partly dissenting opinion of Judge Sir Nicolas Bratza, joined by judges Rozakis, Hedigan, Thomassen and

Panţîru, in the case of *Ilaşcu and Others v. Moldova and Russia*, in which the judges considered that the principal questions which fell to be determined were (i) whether this was an exceptional case in which the applicants were to be regarded as within the "jurisdiction" of the Russian Federation despite being at all material times outside the territory of that State and (ii) whether, being within the territory of Moldova, the applicants were to be regarded as within its "jurisdiction" so as to engage the responsibility of that State or whether, exceptionally, the presumption that they had been and were within Moldova's jurisdiction was rebutted. In the author's opinion, the two questions were closely linked and depended, as the Court's judgment in the case makes clear, on a close analysis of the factual situation existing in, and relating to, the region. Further, analysing the conclusion of the majority, the author found that he could not agree with the majority and accepted the proposition that those within a part of the territory of a State over which, as a result of its unlawful occupation by a separatist administration, the State was prevented from exercising any authority or control could nevertheless be said to be within the "jurisdiction" of that State according to the autonomous meaning of that term in Article 1 of the Convention, which term presupposed that the State had the power "to secure to everyone ... the rights and freedoms" defined therein. Judge Bratza found it equally difficult to "accept the conclusion of the majority of the Court that in such a factual situation those within the territory remain[ed] "within [the] jurisdiction" of the State but that the scope of that "jurisdiction" [was] reduced, the State continuing to owe positive obligations with regard to the Convention rights of everyone in the territory". The author found the very use of the terms "positive obligations of the State" and the reliance placed in the judgment on the case-law of the Court under Article 1 concerning such obligations misleading and unhelpful in the context of the *Ilaşcu* case. Judge Bratza rightly highlighted that "that case-law – with its references to the fair balance to be struck between the general interest and the interests of the individual and the choices to be made in terms of priorities and resources – was developed in a factual context where the respondent State exercised full and effective control over all parts of its territory and where individuals within that territory were indisputably within the 'jurisdiction' of the State for Convention purposes". In his view, the Court's reasoning could not be readily adapted to the fundamentally different context in which a State was prevented by circumstances outside its control from exercising any authority within the territory and where the very issue was whether individuals within the territory were to be regarded as within the "jurisdiction" of the State for Convention purposes.

Let us turn to the facts of the present case, on the basis of which the Court has concluded that the alleged violations are within the "jurisdiction"

of Azerbaijan within the meaning of Article 1 of the Convention and are capable of engaging the responsibility of the respondent State.

First and foremost I would like to note that, as the Court has acknowledged, Gulistan is located on the frontline between Azerbaijani and Armenian forces (see paragraph 142). Geographically, the village is situated to the north of these Azerbaijani territories occupied by the Armenian military forces, on the very border of the Contact Line, which passes through the river Injechay, where Azerbaijani military positions are on the north bank of the river Injechay and Armenian troops are on the south bank of the river. Gulistan is totally deserted, its surroundings are heavily mined by both sides and violations of the ceasefire are frequent. The unusual feature in this case, as both Azerbaijan and Armenia agree, is that the village of Gulistan, in which the applicant claims to have property, is located on the Line of Contact. Both Azerbaijani and Armenian maps bear this out. Neither side claims otherwise. The only argument is about the exact position of the forces around the village. This issue is very important for deciding the question of effective control over the village. Before moving onto an examination of this question, the following general information must be taken into account. The Line of Contact marks the ceasefire line existing at the end of the 1992-1994 war, which was frozen by the Bishkek Protocol of May 1994. In view of that, the Court is faced not with an examination of jurisdiction with regard to an area clearly within the jurisdictional competence of a Contracting Party, nor with the situation of an area clearly under the effective control of another Contracting Party, as was the case in *Ilaşcu* or other cases already examined by the Court, but rather with a small piece of land that lies on the very ceasefire line itself. In practice the Line of Contact is maintained by the stationing of the armed forces of the parties and the extensive use of land mines. It has been a long time since any civilians were living in the village. There are regular violent exchanges of fire across the Line of Contact, including in the Gulistan area.

Now I would like to turn to the evidence which, according to the Court, permits it to conclude that effective control by Azerbaijan exists. I would like to observe that in this kind of case, taking into account the special circumstances, the Court has to act as a court of first instance. This in turn permits the Court, taking into account its requirements, as, for instance, those formulated in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, ECHR 2005-VII), to examine the evidence having regard to its reliability and persuasiveness.

Thus, in the present case, the unreliability of the evidence submitted by the applicant and the third party was obvious: the “evidence” that a man was walking between houses in ruins, a man without a uniform or insignia belonging to any army, or that smoke could be seen rising from the chimneys of some houses, when it was not clear who had lit a fire in one of the few surviving houses. This evidence from the DVD submitted in 2008 is

evidence to which the Court unfortunately referred in paragraph 137 of the judgment. It is obvious that these materials did not prove anything, so, further on in the judgment, the Court, in the hope of finding something proving Azerbaijan's military presence in the village itself, referred to the Geospatial Technologies and Human Rights Project (AAAS). In my view, this did not provide any evidence either, even though the Court interpreted it as such in the same paragraph. Thus, in my opinion, the results of the AAAS report, in particular image 12, clearly show that there are trenches in or at least very close to the village. The representatives of the AAAS do not claim that the trenches are located in Gulistan. They just say, **in or behind** Gulistan. If all the elements of the AAAS report are taken together, as they are presented and interpreted in paragraph 137 of the judgment, they are contradictory, since they claim that the trenches can be seen in the 2005 and 2009 images, but are less clearly distinguishable in the 2012 image, because they are not being used. Besides, they recorded that the area was, on the whole, uninhabited. Accordingly, if the report does not claim that the trenches are located in the village, that there are military forces in the village, or that the trenches are being used, can it be claimed that there is an Azerbaijani military presence in the village? Particularly in the light of the Court's observation that "as follows from the AAAS report ... trenches have fallen into disuse in the period between 2009 and 2012 and are therefore less clearly visible". If the trenches were unfit by 2012, this must mean that they are not being used.

Accordingly, in my opinion, there is no evidence proving Azerbaijan's effective control over Gulistan. If we are to conclude otherwise, then it has to be considered that Armenia, which has occupied part of the territories of another State, also has effective control over this area. As it is confirmed that, due to continuing fighting, no civilian is able to enter the village and the village is totally deserted and heavily mined from all sides, I conclude that neither of the opposing parties has effective control of the village. The case materials clearly indicate that Gulistan is a *de facto* "no man's land". This is, I repeat, the characteristic of the present case which distinguishes it from other cases in which the Court has decided the question of jurisdiction and effective control. It is a totally new situation and the first case in which the Court has been asked to answer the question of effective control over a "no man's land" situated on a contact line between two hostile parties and has had to solve this new legal issue. On the one hand it is an internationally recognized territory of Azerbaijan and it is clear that no areas of limited protection should be accepted within the Convention legal space. The Convention requires that the State secure the rights and freedoms guaranteed under the Convention to everyone under their jurisdiction. On the other hand the conclusion – contrary to the facts – that effective control has to be attributed to one of the parties cannot be based on international law and contradicts the very concept of "effective" control. In reality the

present case does not in any way resemble the classic model of jurisdiction, and in the obvious absence of effective control as a precondition of positive obligations, it is impossible to speak of any positive obligation. In paragraph 140 of the judgment the Court affirms that "a limitation of a State's responsibility on its own territory to discharging positive obligations has only been accepted in respect of areas where another State or separatist State exercises effective control". It is the presence of the Armenian occupying forces on the other side of Gulistan that not only closes access to the village but also excludes not only effective but any control at all over this territory of Azerbaijan and therefore, discharges Azerbaijan of its positive obligations.

In *Ilaşcu* the Court, taking into account the fact that after ratification of the Convention Moldova had to enter into contact with the separatist regime in order to take certain measures to secure certain rights of the applicants guaranteed under the Convention, concluded that Moldova's responsibility could be engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which had occurred after May 2001. The Court also found that the Moldovan authorities remained under an obligation "to take all the measures in their power, whether political, diplomatic, economic, judicial and other measures ... to secure the rights and freedoms guaranteed by the Convention to those formally within their jurisdiction, and therefore, to all those within Moldova's internationally recognised borders". If these requirements were to be applied to Azerbaijan, it "must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention". As indicated in § 332 of the *Ilaşcu* judgment, "in determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden."

Hence, the measures taken in compliance with the positive obligations identified in *Ilaşcu* have to be "appropriate and sufficient" and the Court must test this in the light of the "minimum effort" required. The question whether a State hampered by an inability to exercise its authority over a part of its territory has complied with its positive obligations has to be assessed by the Court on a case-by-case basis. However, as the research report indicates, some of those positive obligations were identified by the Court in *Ilaşcu*. Some of these obligations are of a general nature, concerning the general policies and conduct of the State, and others are of an individual nature, that is, related to the applicant's situation.

As indicated in § 339 of the *Ilaşcu* judgment, a State hampered by an inability to exercise its authority over part of its territory has to take measures 1) to assert and re-assert its sovereignty over the disputed territory, 2) to refrain from supporting the separatist regime and 3) to re-establish control over that part of its sovereign territory. In my opinion, the defendant State is taking all these measures to re-establish its sovereignty not only over Gulistan, but also over all the occupied territories, is refraining from supporting the separatist regime and calling on the world community to adhere to this position as well and to respect the sovereign right of the State, and is trying, by every means, to re-establish its control over its territory.

In this regard, I would like to refer to information already given at the admissibility stage and in the further submissions of the respondent Government. These submissions confirm the continuing opposition of Azerbaijan to the unlawful occupation of Nagorno-Karabakh and the surrounding territories by Armenia. Azerbaijan's attempt to re-establish control over its alienated territory is demonstrated through its support of the OSCE Minsk process as well as continuing efforts in the United Nations. As far as the latter is concerned, the General Assembly decided in 2004 to include an item entitled "The situation in the occupied territories of Azerbaijan" in the agenda. Regular discussions have followed. In this regard it can be noted that the General Assembly adopted two resolutions (60/285 of 7 September 2006 and 62/243 of 25 April 2008) reaffirming continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognised borders. The process is continuing under the auspices of the OSCE. The Minsk process commenced in 1992 and Azerbaijan has made continuing and consistent efforts to resolve the dispute peacefully. The Basic Principles (also called "the Madrid Principles") presented by the three co-Chairs of the Minsk Group call 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; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons (IDPs) and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation. Azerbaijan takes part in the regular meetings held by the co-Chairs with the Foreign Ministers and the Presidents of Armenia and Azerbaijan. Azerbaijan has offered every support for this process, believing it to be the best means by which it can re-establish its control over the occupied territories. In these discussions, Azerbaijan has made it clear that it is ready to grant Nagorno-Karabakh "the highest status of self-rule" within Azerbaijan.

Azerbaijan has always refrained from supporting the regime established by the relevant separatist forces and has taken and continues to take all possible political, judicial and other measures at its disposal to re-establish its control. In contrast to the *Ilaşcu* case, Azerbaijan avoids any contact with the separatist regime.

In the *Ilaşcu* case, the Court specified that it was not for the Court to specify the most appropriate measures to take, but only to verify the will of the sovereign State, expressed through specific acts or measures to re-establish such control. In my opinion, this means that these obligations have to be examined in the light of the circumstances of each case. All the above-mentioned factors show that Azerbaijan has taken and continues to take all possible measures and has therefore fully complied with its positive obligations of a general nature.

As to the special duties relating to the individual applicant, this type of positive obligation has been identified in the case-law in cases such as *Ilaşcu*, *Ivantoc* and *Catan*. These obligations consist of trying to solve the applicant's fate by 1) political and diplomatic and 2) practical and technical means and 3) taking appropriate judicial measures to safeguard the applicant's rights.

In this regard it should be noted that in the somewhat similar cases already examined by the Court it only found a violation of this type of positive obligation in the case of *Ilaşcu*, where the violations in question related to Article 3 and Article 5 issues. According to the Court's general case-law concerning the core rights, the scope of the State's obligations in relation to the effective enjoyment of these rights is, as a rule, extremely broad.

The present case concerns property rights and the measures that Azerbaijan would be required to take must, according to the general case-law of the Court, depend on the general and local context as well as a balance between the general interests and the individual's rights. The particularity of this case is, as I have noted, the precise situation around the village of Gulistan, which lies, as explained above, on the ceasefire line between the two opposing forces. The measures that can realistically be taken are closely linked to the fact of occupation of these lands by one of the Contracting States to the Convention, which, according to the very nature of the Convention, must create the conditions for the return of the IDPs and refugees to their homelands.

It would constitute a gross failure of duty and a probable violation of Article 2 of the Convention were Azerbaijan to permit civilians to enter the village of Gulistan, which is a dangerous area with mines planted in the vicinity and with the armed forces of both sides patrolling the area. The village is situated on the frontline and the regularity of violations of the ceasefire would be a source of constant risk to the lives of individuals if they were to inhabit the area.

A State, by the very fact of occupation of the territories of another State, prevents it from exercising any authority or control over territory within its borders. As Judge Bratza said in his above-mentioned dissenting opinion, responsibility could "only be engaged in exceptional circumstances where the evidence before the Court clearly demonstrates such a lack of commitment or effort on the part of the State concerned to reassert its authority or to reinstate constitutional order within the territory as to amount to a tacit acquiescence in the continued exercise of authority or 'jurisdiction' within the territory by the unlawful administration".

Moreover, Azerbaijan has not enacted any law depriving the applicant or any other person who has left their property as a result of the Nagorno-Karabakh conflict of their property rights. On the contrary, the right of all IDPs and refugees to return to their former places of residence has always been a subject of the negotiations and is included among the Basic Principles (Madrid Principles) mentioned above.

As the Court has noted, as long as access to the property is not possible, the State has a duty to take alternative measures in order to secure property rights.

However, when examining the question of positive obligations with regard to an individual applicant, the Court must not overlook the requirement that the measures expected from the State must not be an excessive burden on the State. In this regard and in order to ascertain the overall economic consequences of the conflict for Azerbaijan, the following factors must be taken into consideration: firstly, 20% of the Azerbaijani territories are under Armenian occupation and secondly, as a result of the conflict in and around Nagorno-Karabakh, 800,000 individuals have become IDPs, in addition to the 200,000 refugees from Armenia; 20,000 people have been killed; 50,000 people have been wounded or become disabled; and more than 4,000 citizens of Azerbaijan are still missing. The aggression against the Republic of Azerbaijan has severely damaged the socio-economic sphere of the country. In the occupied territories six cities, twelve towns, 830 settlements, and hundreds of hospitals and medical facilities have been burnt or otherwise destroyed. Hundreds of thousands of houses and apartments and thousands of community and medical buildings have been destroyed or looted. Hundreds of libraries have been plundered and millions of books and valuable manuscripts have been burnt or otherwise destroyed. Several state theatres, hundreds of clubs and dozens of music schools have been destroyed. Several thousand manufacturing, agricultural and other kinds of factories and plants have been pillaged. The hundred-kilometre-long irrigation systems have been totally destroyed. About 70% of the summer pastures of Azerbaijan remain in the occupied zone. The regional infrastructure, including hundreds of bridges, hundreds of kilometres of roads and thousands of kilometres of water pipelines and thousands of kilometres of gas pipelines and dozens of gas distribution

stations have been destroyed. The war against Azerbaijan has also had catastrophic consequences for its cultural heritage in the occupied territories. According to preliminary data, the overall economic loss inflicted on the Republic of Azerbaijan as a result of Armenian aggression is estimated at 300 billion US dollars. Added to that is the non-pecuniary damage, which is obviously impossible to quantify. Thirdly, the State has supported and continues to support financially all the IDPs and refugees from Armenia with special social allowances.

Consequently, imposing further positive obligations on a State which is the victim of occupation by a neighbouring State will place an extremely excessive burden on that State. I conclude that Azerbaijan has complied with its positive obligations under the Convention by taking all possible and realistic measures. Contrary to the situation in *Chiragov*, where only the former inhabitants of Azeri origin of occupied Lachin are precluded from having access to their property, in the present case both the Armenian and the Azeri residents of Gulistan are equally victims of Armenian aggression.

For these reasons, I conclude that the applicant's complaints do not come within the jurisdiction of Azerbaijan for the purposes of Article 1 of the Convention and that Azerbaijan has not failed to discharge any obligation in respect of the applicant imposed by that Article and that the responsibility of Azerbaijan is accordingly not engaged in respect of the violations of the Convention complained of by the applicant.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

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I. Introduction

1. *Sargsyan* is the "twin brother" of *Chiragov and Others*. The procedural reasons for my dissent in the latter case are also valid, in a large measure, in the present case, simply because the flaws in both judgments are similar. As in *Chiragov and Others*, the present case raises an issue of compatibility of international humanitarian law with the European Convention on Human Rights (the Convention), which the majority avoid. Here again, the majority do not face the thorny questions of the case, both in terms of the evidence presented and the legal questions of the jurisdiction of the respondent State over the ceasefire line and the adjacent area and its "responsibility to protect" civilians within its territory[1]. Having acknowledged that Gulistan is a life-threatening, no-go zone and that the respondent State's refusal of access by civilians to their alleged homes, property and family graves in the extremely sensitive military area of Gulistan is "justified", the majority nonetheless suggest vague "alternative measures", derived from the Madrid political proposal[2], without providing specifics. By treating the cases of *Chiragov and Others* and *Sargsyan* as a putative inter-State case, and suggesting to the respondent States similar "alternative measures", the European Court of Human Rights (the Court) wants to send a message to the conflicting parties. In general, the pages of the judgment exude discontent, amounting to disapproval of the negotiation procedure. Left unstated, but implicit in the majority's reasoning, is that the Court will no longer wait for politicians to come to terms with the Nagorno-Karabakh conflict and its human consequences. If need be, the Court is willing to replace diplomacy, in view of the fact, censured by the majority, that the peace negotiations "have not yet yielded any tangible results" (see paragraph 236).

II. Non-exhaustion of domestic remedies

A. The constitutional and legal framework

2. The majority reject the objection of non-exhaustion of domestic remedies on the basis of two arguments: it was not explained how the available constitutional and legal framework would apply in the specific case of the applicant and insufficient data was provided by the respondent Government on the nature and outcome of the civil proceedings brought by ethnic Armenians in Azerbaijani courts. These arguments are not valid. The

1. I refer to the rule formulated in the Report of the International Commission on Intervention and State Sovereignty (ICISS), "The Responsibility to Protect", Ottawa, 2001.
2. I refer here to the Organisation for Security and Co-operation in Europe (OSCE) Minsk Group's Co-Chairs last articulation of the Basic Principles, of November 2007, in Madrid.

majority failed to consider that there were no constitutional or legal provisions in the respondent State prohibiting ownership of property by ethnic Armenians or their return to Azerbaijan or depriving them of their property as a result of the Nagorno-Karabakh conflict. Furthermore, the majority denied *en bloc* the applicability of norms of the Constitution, the Civil Code and the Land Code to the applicant's 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*!

In 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 on the application of domestic law to a novel legal issue, with possible major systemic legal consequences in view of the estimated number of displaced persons [3].

B. The available domestic remedies

3. Moreover, there is a judicial system functioning in Azerbaijan with abundant case-law regarding civil cases brought by ethnic Armenians in Azerbaijani courts in housing cases. It is highly regrettable that the majority evaded the crucial question raised by the applicant concerning the alleged existence of an "administrative practice" on the part of the Azerbaijani authorities which would prevent the applicant from making use of existing remedies. In other words, the core of the objection was not dealt with. In any case, given the applicant's ability to instruct a lawyer in the United Kingdom, he could not claim that the judicial system in Azerbaijan was inaccessible to him owing to the lack of a postal service or diplomatic relations between Azerbaijan and Armenia[4].

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

4. 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

3. 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, 7 November 2013).

4. See *Pad and Others v. Turkey* (dec.), no.60617/00, § 69, 28 June 2007, and International Law Commission (ILC), Third Report on Diplomatic Protection (A/CN.4/523), 2002, §§ 82-83.

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 Greek Cypriots living in Northern Cyprus under Article 8 of the Convention and Article 1 of Protocol No. 1[5]. The same should apply in the present case.

5. The Court should not have double standards, following one line of reasoning with regard to Cyprus and the opposite with regard to Azerbaijan. 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 Azerbaijani Government produced evidence in support of their contention that court remedies were available and highlighted the claims brought by a number of litigants of Armenian origin in Azerbaijani courts in civil cases and specifically in housing cases. This unrebutted evidence should have sufficed for the Government's objection to be accepted.

I am therefore not persuaded that any attempt to use the available domestic remedies was destined to fail. As the Court has reiterated on many occasions, the existence of doubts as to the efficacy of domestic remedies does not absolve the applicant from the obligation to, at least, try to use

5. See *Cyprus v. Turkey*, cited above, § 324. Moreover, the Court concluded that there had been a violation of Article 13 of the Convention by reason of the failure to provide Greek Cypriots not residing in northern Cyprus with any remedies to contest interferences with their rights under Article 8 of the Convention and Article 1 of Protocol No. 1. To reach such a conclusion, the Court proceeded with a thorough analysis of the constitutional framework of the "TRNC". That did not happen in the present case. As shown above, a similar analysis in the present case would have demonstrated that no constitutional restraints existed for restitution of property claims by citizens of Armenian origin.

them[6]. 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 applicant's house and plot of land

6. The applicant's victim status is in doubt. With regard to his house and other property, the majority do not know whether, when and by whom they were destroyed. But the majority cannot be unaware of the fact that, in his first submissions of 10 July 2006, the applicant himself had stated that his house had been destroyed during the bombardment of the village in 1994[7]. It was only in his heirs' later submissions that it was argued that the walls of the house were still standing, while the roof had fallen in, and the applicant had been referring to his father's house when he stated, in his first submissions, that the house had been destroyed. These late submissions merit no credence, and the circumstance that the applicant's heirs even presented to the Court testimonial evidence (Mr Tavad Meghryan's statement) of the present existence of the standing house shows just how far they were willing to go to put up a case.

7. At all events, the evidence produced by the applicant and his heirs in support of his property claims is not convincing, as actually admitted by the majority in paragraph 196. The contradictory nature of the applicant's submissions was not clarified by his explanations. The probative value of the technical passport with no reference to a primary title of ownership, with an empty field entitled "land parcel size according to official documents", such information being required by paragraph 2.2 of the Standard Reporting Forms Instructions[8], and with the incorrect official stamp for the issuing authority[9] and the incorrect name of the district in the emblem of the stamp[10], is close to nil. Not even an extraordinary "flexible" assessment of the face value of that evidence can save it from a strong suspicion of having been fabricated. Furthermore, the applicant based his property claims on written statements of witnesses who had not been submitted to

6. 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.

7. See annex 10 to the applicant's observations dated 31 May 2010, which contains the applicant's statement dated 10 July 2006.

8. See annex 32 to the respondent Government's submissions of 3 July 2012.

9. See in the technical passport the erroneous reference to "The State Republic – Azerbaijan SSR" instead of the correct reference to "The Republic of Azerbaijan".

10. See in the technical passport the erroneous reference to "Shahumyan district" instead of the correct reference to the "Goranboy district".

cross-examination, as the majority also acknowledge in paragraph 193. The witnesses presented contradictory testimony on crucial points. For example, Mr Ghulyan Yura's statement that the applicant built his house "on the plot of land provided to him by the collective farm" contradicts that of Mrs Kachatryan, secretary to the board of the village council of Gulistan, who stated that the applicant had been allowed to divide the plot of land that had already been allotted to his father[11]. The chairman of the State Land and Mapping Committee of the Republic of Azerbaijan, Mr Garib Mammadov, himself affirmed that "the village councils referred to in the case had no authority to adopt a decision on allocation of lands adjoining the house"[12]. Mr Yura's testimony that there were four rooms on the second floor also contradicts the testimony of Mrs Elmira Chirkinyan and Mrs Lena Sargsyan to the effect that there were three rooms on the second floor[13]. Mrs Lena Sargsyan's testimony that the total area of the plot of land was 1,500 square meters is contradicted by that of Mrs Elmira Chirkinyan, who said that it was a total of 1,000 square meters[14]. It beggars belief that the applicant could not offer more reliable evidence. Drawing plans and photos of a house do not represent binding proof of immovable property.

Accordingly, the majority's assumption that the house "still exists though in a badly damaged state" is pure speculation, based on an inadmissible reversal of the burden of proof which exonerates the claimant from proving the existence of the claimed fact and imposes on the respondent party the obligation to prove its non-existence (see paragraph 197: "In the absence of conclusive evidence that the applicant's house was completely destroyed before the entry into force of the Convention"). The same criticism applies to the land of which the applicant claims to be the owner.

B. Victim status with regard to the family graves

8. The more complex question of the applicant's complaint regarding his right of access to his relatives' graves would have merited the Court's attention. Had it been proven that the applicant did indeed live and had his family graves in the area of Gulistan, that claim would have been arguable in the light of *Poluhas Dodsbo*[15]. But no sufficient evidence of the applicant's residence and no evidence at all of the existence, location and ownership of the alleged family graves were ever added to the file, thus definitively undermining these claims. On top of these deficiencies, the

11. Compare Mr Yura's statement in annex 13, dated 15 May 2010, the applicant's observations dated 31 May 2010, and paragraph 5 of Mrs Kachatryan's statement.
12. See annex 34.
13. See annex 12 to the applicant's observations dated 31 May 2010, § 7, and annex 14 to the applicant's observations of the same date, § 11.
14. See annex 12 to the applicant's observations dated 31 May 2010, § 8.
15. See *Poluhas Dodsbo v. Sweden*, no. 61564/00, § 24, ECHR 2006-I.

video evidence produced to the Court is that the two cemeteries in Gulistan have been damaged, but the Court ignores the question of who did it or when the damage was caused. The satellite images did not even show the locations of the cemeteries in the village. To accept the applicant's alleged residence on the basis of incomplete copies of the applicant's former Soviet documents and the alleged existence, location and ownership of his family graves in Gulistan on the sole basis of his own word shows, once again, the measure of unlimited flexibility with which the majority approached the evidence produced by the applicant. Finally, the alleged "right to return to the village" as a facet of the applicant's "private life" widens the ambit of Article 8 well beyond its known borders[16].

C. Preliminary conclusion: the limits of the Pinheiro Principles

9. 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[17]. 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 made by especially 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 his burden of proof, the applicant 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 applicant's victim status. In view of these inconsistencies and uncertainties, I can only conclude that this is an artificial case, built on a shaky evidential basis, which was cherry-picked as a convenient mirror image of *Chiragov and Others*.

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16. Compare and contrast paragraph 257 of the present judgment with the statement in *Loizidou v. Turkey* (merits), 18 December 1996, § 66, *Reports of Judgments and Decisions* 1996-VI, where 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".

17. See principle 15.7 of the Pinheiro Principles, invoked in the judgment. The considerable degree of the Court's flexibility enjoyed by the Court can be seen in paragraphs 140, last sentence, and 141 of the judgment.

IV. Jurisdiction over the ceasefire line and the adjacent area

A. The time frame of the Court's assessment

10. Gulistan is located between two frontlines of opposing military forces from Azerbaijan and the "Nagorno-Karabakh Republic". The village and the Azerbaijani military positions are on the north bank of the river Indzachay, which constitutes not only a natural dividing line, but also the ceasefire line drawn up at the end of the war. Both the Azerbaijani and Armenian maps show the village as being situated on the line of contact between the two armies as frozen by the Bishkek Protocol of May 1994. The "Nagorno-Karabakh Republic" military positions are on the south bank of the river. The village was almost entirely destroyed, supposedly during battlefield engagements. Agricultural equipment destroyed during the war remains in that state. The place is surrounded by landmines. Every so often wild animals trigger mines. Snipers are actively at work. There are frequent incidents of shooting from both sides, causing casualties. In short, anyone attempting to reach the village or to use the adjacent field risks death or serious injury from the mines or live fire from the opposing armies.

11. The location of the exact positions of the two armies is crucial in determining the issue of jurisdiction. The applicant and the Armenian Government have submitted that the Azerbaijani army is in control of the village, and in particular that it has military positions in the village and on its outskirts, while the "Nagorno-Karabakh Republic" forces are stationed on the other side of the river Indzachay. The respondent State categorically denies this, stating that the Armenian military positions are closer to the village, which is within their shooting range, and positioned on a steep slope, providing them with a military advantage[18]. On the two diverging points of fact, namely the presence of the "Nagorno-Karabakh Republic" army in the southern part of the ceasefire line and the presence of the Azerbaijani army in the village of Gulistan, the majority affirm that the forces placed south of the river are those of the "Nagorno-Karabakh Republic" army, and not those of Armenia (see paragraphs 134 and 136), and that "there are a number of elements which indicate a presence of Azerbaijan positions and thus of Azerbaijan soldiers in the village", although they add that they do not know whether there have been Azerbaijani forces in Gulistan from 15 April 2002 until the present time (see paragraphs 137 and 138).

In the circumstances of the present case, the Court had to ascertain whether Azerbaijan in fact had effective control over Gulistan and its surrounding area at least after June 1992, i.e., when the applicant, his family

18. See the various testimonies of Azerbaijani officers in Annexes 2-8 to the submissions of the respondent Government of 3 July 2012.

and many other Armenians of the Shahumyan region were allegedly attacked by Government military forces and expelled, and until the date of delivery of the present judgment[19]. As in *Šilih*, the military actions in the area of Gulistan at the relevant time (June 1992) did not constitute "the source of the dispute"; instead, they were "the source of the rights claimed" by the applicant, and to that extent come under the jurisdiction *ratione temporis* of this Court[20].

B. The assessment of evidence

12. Basically, the evidence referred to by the majority in support of their conclusions on the jurisdiction issue are the results of the American Association for the Advancement of Science (AAAS) report, which refers to satellite images taken in 2005, 2009 and 2012, and the DVD submitted by the applicant in 2008 (see paragraph 137). I have serious doubts about the use of this evidence.

In a letter of 16 December 2013, the President of the Grand Chamber decided to grant the respondent Government's request, on national security grounds, not to disclose to the Government of Armenia images 6-11, 13 and 14, as contained in the report provided by the AAAS in November 2013 at the Court's request. Accordingly, only those parts of the report to which no objections had been made were sent to the applicant and the third-party Government for information. Since there was no legal basis for this request, the applicant and the third-party Government were deprived of relevant information without legal grounds[21]. The Court should therefore have refused that request in the absence of a precise legal framework allowing for non-disclosure of secret evidence to the parties. Equality of arms *oblige.*

13. Neither can I accept, as evidence of the presence of Azerbaijani military personnel in Gulistan, the video recording of the village which constitutes annex 3 to the applicant's observations of 21 February 2008.

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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. For my interpretation of the Court's *ratione temporis* jurisdiction, see my separate opinion in *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, ECHR 2014.

21. 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 omits any rule on restriction of disclosure of evidence to one party. The General Instruction for the Registry on 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.

According to the Government of Armenia, the video includes footage of an Azerbaijan soldier walking among the ruins of Gulistan. In fact, the man appearing in the video cannot be identified as a serviceman, since he is not in military uniform and is unarmed. The origin of the smoke rising from the chimneys of some houses is unknown. It is not impossible that this smoke came from fires lit by the shepherds seen in the DVD submitted in July 2012. Assumptions are always tempting, and sometimes convenient, but should be avoided when a court of law is establishing facts.

14. Finally, I regret that the Court did not consult the results of the October 2006 OSCE mission monitoring the border between the "Nagorno-Karabakh Republic" and Azerbaijan near Gulistan . There is no reliable alternative witness evidence. The testimonies of the "Nagorno-Karabakh Republic" officials and former villagers of Gulistan, as well as the testimonies of Azerbaijan military officers, officials and villagers from neighbouring villages, were collected in circumstances unknown to the Court, without being submitted to cross-examination. The DVDs, which contain footage of Gulistan and the surrounding area, do not provide a clear picture of the exact military positions of the two armies. Finally, regardless of the legal issue of their admissibility, the satellite images of the "trenches", "revetments", "military buildings" and "military vehicles" in and around the village are dubious. The construction and replacement of military buildings was noted "in the region north of Gulistan" (page 13 of the AAAS report). The military vehicles were also noticed in the "areas north and west of Gulistan", vehicle tracks having been spotted 2.5 km north of Gulistan (page 16 of the same report). The "trenches and revetments", "earthworks" and "earthen barriers" noted were located mostly outside Gulistan. There are no images of "military buildings" or "military vehicles" in Gulistan, and the only images of "trenches and revetments" in Gulistan refer to 2005 and 2009, but the "visual signature of these trenches fades due to disuse through 2012" (page 7 of the same report). One thing is clear: there are no traces of cemeteries in the satellite images (pages 7 and 22 of the same report). In any case, in view of the significant limitations of the AAAS report, which included "insufficient imagery, cloud cover, spectral properties of the imagery, physical geography of the region, and general difficulties in conducting multi-year assessments" (page 22 of the same report), the accuracy and credibility of the report are greatly undermined.

15. In my view, it is imprudent to sustain, solely on this doubtful evidential basis, that one of the armies controls the territory of the village and its surrounding area. In view of these doubts, it would be wiser to proceed by establishing the facts agreed on by both parties, if any, and checking them against objective evidence. Comparison of the parties' maps of the area and their respective readings of those maps would seem to show a military position located on the south of the riverside on a height just

opposite the village, which would allow servicemen there not only to survey the village and its surrounding area but also to shoot at any moving or static target in the village. On the north bank of the river to the east and north-east of the Gulistan settlement, there seem to be various Azerbaijani army positions, situated in the lowlands, at distances of between 1 and 3 km from the village. Careful assessment of the available evidence admits of no other conclusion.

C. Preliminary conclusion: *Assanidze* distorted

16. On the basis of legally controversial and factually contradictory evidence, the majority put forward a typical argument *ad consequentiam*, drawing the conclusion that the respondent State's responsibility is not "limited" from the fact that no other Convention State has "full responsibility under the Convention" for the events occurring in Gulistan (see paragraph 148). Despite the obvious fact that the area is rendered inaccessible by the military circumstances obtaining in the field, the majority accept the "full responsibility" of the respondent State simply because there is no one else to blame for any possible breaches of the Convention in that territory.

17. The fallacious conclusion drawn by the majority is supported by one single argument, namely the comparison with the *Assanidze* type of situation, on which the majority rely in paragraph 150 of the judgment. The analogy of the two situations is manifestly forced, because in *Assanidze* the Georgian Government accepted that the Ajarian Autonomous Republic was an integral part of Georgia and that the matters complained of were within the jurisdiction of the Georgian State. Moreover, apart from the case of Mr Assanidze, with its strong political overtones, there was no problem of judicial cooperation between the central authorities and the local Ajarian authorities. Hence, it is rather artificial to compare the situation of direct military confrontation in *Sargsyan* with the situation of the Ajarian Autonomous Republic, which never had separatist aspirations and was not a source of conflict between different States.

18. I would adopt a different approach, for two reasons: firstly, the facts are not clear to me, since the file contains insufficient evidence to ascertain the composition and size of the military forces in confrontation, their respective firepower and, more importantly, their exact geographical positioning with regard to Gulistan. Secondly, even accepting the parties' maps of the area at face value and assuming that the existence of the physical barrier of the river between Gulistan and the Nagorno-Karabakh army facilitates the Azerbaijani army's access to Gulistan, I do not consider this fact alone sufficient to conclude that the respondent State holds jurisdiction over Gulistan and its surrounding area and that the alleged deprivation of the applicant's rights under the Convention is attributable to

Azerbaijan. Apparently, the Nagorno-Karabakh army is closer to the village and in a more favourable strategic position, with the village within firing distance. In fact, Gulistan is situated midway between two armies, neither of which exercises effective control of the area. That is exactly what makes the area so dangerous. For these reasons, therefore, the respondent State lacks jurisdiction.

V. Responsibility for human rights breaches on the ceasefire line and the adjacent area

A. The majority's position: exceeding *Oruk*

19. Having established jurisdiction of Azerbaijan over Gulistan, the majority proceed to assess the respondent Government's justification for the deprivation of the applicant's rights under the Convention. According to the Azerbaijani Government, permitting civilian access and circulation in such a hazardous and volatile area would most likely amount to a violation of Article 2 of the Convention. In addition, international humanitarian law should heighten considerations of protecting civilians against the risks prevailing in the area. That is why, the Government further explain, they prohibited civilian access to Gulistan, by means of a secret unpublished order. The Court knows nothing about the date or the details of that order[22]. Nonetheless, its compatibility with the Convention is assessed by the majority in view of the patent dangerousness of the local military situation.

20. The majority find that the respondent Government's conduct was, and still is, justified, extending the case-law of *Oruk v. Turkey* (no. 33647/04, 4 February 2014) to the present case (see paragraph 233 of the judgment). The analogy is improper, since the underlying factual situations are not at all comparable. In the Turkish case, the victims lived near a military firing zone, the fatal accident having been caused by the careless conduct of military personnel who had left unexploded ammunition on the ground after their training. Accordingly, there is no similarity to the facts in the present case, whether in terms of space (non-conflict, populated zone), time (peacetime), result (death of a person), or even *mens rea* (negligence on the part of soldiers). Needless to say, this unfortunate analogy merely served as a pretext for avoiding the central issue of the case. Even assuming the majority's factual premise regarding the effective control of Gulistan by the Azerbaijan army, which I in fact do not, the case should have been argued on the basis of the restrictions which Article 1 of

22. See letter of 27 August 2013 from the Azerbaijani Ministry of Defence, annex 3, and § 18 of the respondent State's submissions of 18 September 2013. Here again, without a rule for the protection of confidential evidence, the respondent party cannot be blamed for not having provided the Court with the sensitive evidence.

Protocol No. 1 itself sets out, when read in conjunction with the international humanitarian law obligations, including the obligation to protect civilians (POC), and the broader international-law "responsibility to protect" (R2P) of the respondent State. 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* international humanitarian law and the responsibility to protect[23].

For the sake of completeness, I will further argue the case on the basis of the majority's factual premises and taking into account the State's international humanitarian law obligations, including the obligation to protect civilians, and its responsibility to protect.

B. Responsibility to protect in international law

(i) Formation of the customary rule

(a) United Nations practice

21. Article 2 § 4 of the United Nations Charter on prohibition of the use of force is a *jus cogens* rule, which applies in both inter-State and intra-State cases. This rule may be restricted only by another rule of similar nature (see Article 53 of the Vienna Convention on the Law of Treaties). The targeting of a population by their own government, which perpetrate, seek to perpetrate or allow the perpetration of genocide, crimes against humanity or war crimes, directly or through private agents acting under their direction or with their connivance, constitutes criminal conduct under treaty and customary law. The prevention and punishment of such crimes is a *jus cogens* obligation of a non-derogable, imperative nature, in times of both peace and war. In case of the deliberate selection of a part of the population on the basis of a racial, ethnic, religious or other identity-based criterion as a

23. This principle was set out in *Varnava and Others v. Turkey* ([GC], no. 16064/90, § 185, ECHR 2009) with regard to Article 2 of the Convention, but is applicable to all Convention provisions: "Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict". This interpretation results from the need to avoid fragmentation of international law, since the "internal rules" of the Court (the Convention and its protocols) must be applied coherently with "external rules" (see on this topic my separate opinion appended to *Valentin Campeanu v. Romania* [GC], no. 47848/08, ECHR 2014). If international humanitarian law provides a higher degree of protection than the Convention, the States parties to the Convention cannot invoke it in order to avoid compliance with international humanitarian law (Article 53 of the Convention). This provision has major potential for the enforcement of international humanitarian law by this Court, which is in line with Article 31-3 (c) of the Vienna Convention on the Law of Treaties. Unfortunately, in the present case, the majority admitted the applicability of international humanitarian law but concluded that it did not provide a "conclusive answer" (paragraph 232).

target of a systematic attack, the unlawfulness of the conduct is compounded by the discriminatory intent, which also calls for mandatory prevention and punishment[24]. Thus, the *jus cogens* prohibition of the use of force may be restricted for reasons of protecting a population from the commission of *jus cogens* crimes, the application of Article 103 of the Charter being excluded in this conflict of norms.

22. Shortly after the end of the Second World War, the General Assembly expressed the view that "it [was] in the highest interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination", and that therefore governments should "take prompt and energetic steps to that end"[25]. In the context of the fight against colonialism, bolder statements were made expressing the same principle. In paragraph 3.2 of the Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, approved by General Assembly Resolution 2621 (XXV) of 12 October 1970 (A/RES/2621 (XXV), see also A/8086), it was affirmed that States "shall render all necessary moral and material assistance" to the oppressed population of another State "in their struggle to attain freedom and independence"[26]. The Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, approved by General Assembly Resolution 3103 of 12 December 1973 (A/RES/3103 (XXVIII)), even declared that "(t)he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence [was] legitimate and in full accordance with the principles of international law", stating that "[a]ny attempt to suppress the struggle against colonial

24. Article 1 of the Genocide Convention and Article 89 of the Additional Protocol I to the Geneva Conventions. See also on *jus cogens* crimes, Human Rights Committee, General Comment 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), § 11 ("States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence"), International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 26, p. 85 ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."), and Rules 156 to 161 of the ICRC Study on Rules of customary international humanitarian law.

25. General Assembly Resolution 103 (I), of 19 November 1946, on "Persecution and Discriminations".

26. A notable example is General Assembly Resolution ES-8/2, of 14 September 1981 (A/RES/ES-8/2) on the question of Namibia, which "calls upon Member States, specialized agencies and other international organizations to render increased and sustained support and material, financial, military and other assistance to the South West Africa People´s Organization to enable it to intensify its struggle for the liberation of Namibia".

and alien domination and racist régimes [was] incompatible with the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitute[d] a threat to international peace and security".

More recently, the "right" of peoples forcibly deprived of the right to self-determination, freedom and independence, "particularly peoples under colonial and racist regimes or other forms of alien domination", to struggle to that end and to seek and receive support was reiterated in paragraph 3 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, approved by General Assembly Resolution 42/22, of 18 November 1987 (A/RES/42/22).

Step by step, the Security Council has enshrined this same "right" to use force in a non-colonial context as well. On the one hand, it referred to grave human rights violations as a threat to international peace and security, since the seminal Resolution 688 (1991), of 5 April 1991 (S/RES/688 [1991]), later confirmed by many others, such as Resolutions 733 (1992) of 23 January 1992 (S/RES/733 [1992]), and 794 (1992) of 3 December 1992 (S/RES/794 [1992]), on the situation in Somalia, and 1199 (1998), of 23 September 1998 (S/RES/1199 [1998]), on the situation in Kosovo. On the other hand, it authorised the use of "all necessary means" or the taking of "all necessary measures", including military measures, to put an end to human rights violations, ensure humanitarian aid and restore peace, e.g. in Resolutions 678 (1990) of 29 November 1990 (S/RES/0678 [(1990]), 770 (1992) of 13 August 1992 (S/RES/770 [1992]), 794 (1992) of 3 December 1992 (S/RES/794 [1992]), 940 (1994) of 31 July 1994 (S/RES/940 [1994]), and 1529 (2004) of 29 February 2004 (S/RES/1529 [2004]).

General Assembly Resolution 43/131 of 8 December 1988 (A/RES/43/131), considering that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitute[d] a threat to human life and an offence to human dignity", Resolution 45/100 of 14 December 1990 (A/RES/45/100), with the first reference to "humanitarian corridors", and Resolution 46/182 of 19 December 1991 (A/RES/46/182), approving the "guiding principles" on humanitarian assistance, and stating that each State ha[d] the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory, reinforced that trend.

23. In other words, a government's treatment of the population living under its authority is no longer an issue which lies within the reserved domain of States. As the Abbé Grégoire also wrote, in his lesser-known

Article 15 of the *Déclaration du Droit des Gens*, "*Les entreprises contre la liberté d'un peuple sont un attentat contre tous les autres*" (an assault on the freedom of one people is an attack against all peoples). States cannot remain indifferent in the face of situations of systematic discrimination and human rights violations. Having been introduced by the International Commission on Intervention and State Sovereignty (ICISS)[27], advocated in the Secretary-General's note presenting the report of the High-level Panel on Threats, Challenges and Change[28] and adopted in the 2005 World Summit Outcome Document, the rule concerning the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was formally enshrined in General Assembly Resolution 60/1 of 24 October 2005, which adopted the Document in question (A/RES/60/1), and Security Council Resolution 1674 of 28 April 2006 on the protection of civilians in armed conflict, which endorsed paragraphs 138 and 139 of the World Summit Outcome Document (S/RES/1674 [2006])[29]. In undertaking to provide a "timely and decisive" response, the political leaders of the world affirmed their determination to act not only when the crimes in question were already occurring but also when they were imminent, by

27. ICISS, "The Responsibility to Protect", cited above, 2001, §§ 2.24, 4.19-4.36 ("emerging guiding principle"). In the Commission's view, military intervention for human protection purposes is justified in order to halt or avert "large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large-scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape" (§ 4.19).

28. "A More Secure World: Our Shared Responsibility", 2 December 2004, A/59/565, §§ 201-208 ("an emerging norm of collective international responsibility to protect"). In the Panel's view, "There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe - mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease" (§ 201).

29 It should be noted that Resolution 1674 contains the first official reference by the Security Council to the responsibility to protect and that this reference is made in connection with the protection of civilians in armed conflict. Thus, the responsibility to protect and the protection of civilians have mutually reinforced their respective legal dimensions. The protection of civilians in armed conflict was first promoted by the Security Council under a comprehensive package of measures approved by Resolutions 1265 (1999), of 17 September 1999 (S/RES/1265 (1999)) and 1296 (2000) of 19 April 2000 (S/RES/1296 (2000)). This latter Resolution underscored, for the first time, the Council's responsibility to take "appropriate steps" for the protection of civilians during armed conflict, since "the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security". The same position of principle was affirmed in Resolution 1894 (2009) of 11 November 2009 (S/RES/1894 [2009]), which reiterated the Security Council's "willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures".

using all the permissible and necessary means, including those of a military nature, to avert their occurrence. Conceptually and practically, this responsibility entailed the prevention of such crimes, including incitement to commit them, as the normative statement of paragraph 138 clarified, reinforced by the statement of political support to the Special Advisor for the Prevention of Genocide in paragraph 140. The nature of the requisite response was not left indefinite, since it must be all-inclusive in order to be "decisive", and obviously to encompass the full range of coercive and non-coercive enforcement actions available to the Security Council, as shown by the express reference to Chapters VI, VII and VIII of the Charter. Needless to say, the requirements of proportionality were applicable to the international community's response.

With this degree of specificity, the Outcome Document established not only an unambiguous political commitment to use those powers, but set a universally binding obligation to protect populations from the most atrocious human rights violations. This protection extended to all "populations" within the territory of the State, including refugees, migrants, displaced persons and minorities, and not only to "groups", "civilians" or "citizens"[30]. The indissoluble link between international human rights law, the rule of law and responsibility to protect was confirmed by placing the latter issue under the heading "IV. Human rights and the rule of law" in the Outcome Document. The apparent casuistic approach ("on a case-by-case basis") referred to the individual assessment of the adequate and necessary means of addressing each specific situation, and evidently not to the legal rule set out in the Document, whose normative language ("responsibility") reflected that of Article 24 of the Charter. After imposing an affirmative duty on the Security Council to react to the catalogued international crimes, the Outcome Document omitted to mention the consequences of any Security Council failure to respond. But that omission is highly significant in legal terms. Having regard to the preparatory materials for the Vienna meeting, namely the ICISS and High-level Panel reports, as well as the previous practice of international organisations in Africa, the silence of the Outcome Document left the door open to the possibility of regional or individual enforcement alternatives if the Security Council failed to act. Such regional or individual enforcement measures could, in any event, not be excluded in view of the cogent nature of the international crimes at stake. Finally, by stressing the need for the General Assembly to continue its

30. These less inclusive expressions were used by the ICISS Report, cited above, "A More Secure World", cited above, and "In Larger Freedom: Towards Development, Security and Human Rights for All", Report of the Secretary-General, A/59/2005, 21 March 2005. The word "populations" avoided the exclusion of non-civilians from the ambit of beneficiaries of responsibility to protect. The emphasis on "its populations" envisaged the inclusion of all permanently or temporarily residents within the national territory and the territories over which the State had effective control.

consideration of the responsibility to protect populations, the Outcome Document enhanced its subsidiary role in this field in the light of the Charter principles and, more broadly, of the general principles of international law and customary international law.

The Security Council's reaffirmation of paragraphs 138 and 139 of the Outcome Document, in the operative part of Resolution 1674, reinforced the binding nature of the legal obligations resulting therefrom and the obligations of member States of the United Nations to implement decisions taken in accordance with the Outcome Document (under Article 25 of the Charter). The later statement by the UN Secretary-General that "the provisions of paragraphs 138 and 139 of the Summit Outcome [were] firmly anchored in well-established principles of international law" served only to acknowledge their intrinsic legal strength[31].

Subsequently, the Security Council[32], the General Assembly[33] and the Secretary-General[34] applied the rule of responsibility to protect profusely in binding and non-binding documents. In 2007 the Secretary-General appointed a Special Advisor on the Responsibility to Protect, whose office was recently merged with the office of the Special Adviser on the Prevention of Genocide, paving the way for a more comprehensive and coordinated approach to the core problem faced by these offices. In his landmark report "Implementing the Responsibility to Protect", of

31. "Implementing the Responsibility to Protect": Report of the Secretary-General, A/63/677, 12 January 2009, § 3. As to the legal nature of the obligation of the international community, see ICISS Report, cited above, § 2.31; "A More Secure World", cited above, §§ 201-202; and General Assembly Resolution 60/1, cited above.

32. For example, Resolution 1706, of 31 August 2006, on the situation in Darfur (S/RES/1706 [2006]), Resolution 2014, of 21 October 2011, on the situation of Yemen (S/RES/2014 [2011]), Resolution 1970, of 26 February 2011 (S/RES/1970 (2011)), Resolution 1973, of 17 March 2011 (S/RES/1973 [2011]), Resolution 2016, of 27 October 2011 (S/RES/2016 [2011]), and Resolution 2040, of 12 March 2012 (S/RES/2040 (2012]) on the situation in Libya, Resolution 1975, of 30 March 2011 (S/RES/1975 [2011]) on the situation in the Ivory Coast; and Resolution 2085, of 20 December 2011, on the situation in Mali (S/RES/2085 [2011]).

33. For example, Resolution 66/176, of 23 February 2011 (A/RES/66/176), and Resolution 66/253, of 21February 2012 (A/RES/66/253).

34. In "Larger Freedom: Towards Development, Security and Human Rights for All", cited above, § 132; "Implementing the Responsibility to Protect": Report of the Secretary-General, A/63/677, 12 January 2009; "Early Warning, Assessment and the Responsibility to Protect": Report of the Secretary-General, A/64/864, 14 July 2010; "The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect": Report of the Secretary-General, A/65/877-S/2011/393,28 June 2011; "Responsibility to Protect: Timely and decisive Response": Report of the Secretary-General, A/66/874-S/2012/578, 25 July 2012; "Responsibility to Protect: State Responsibility and prevention": Report of the Secretary-General, A/67/929-S/2013/399, 9 July 2013; "Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect": Report of the Secretary-General, A/68/947-S/2014/449, 11 July 2014.

12 January 2009 (A/63/677), the Secretary-General interpreted the Outcome Document, acknowledging the role of the General Assembly under the Uniting for Peace procedure to resolve the impasse of the Security Council (paragraphs 11, 57 and 63)[35]. By its Resolution 63/308 (2009), of 7 October 2009 (A/RES/63/308), the General Assembly took note of the Secretary-General's report, accepting it tacitly.

24. The United Nations practice teachings are clear: if human rights have prevailed over sovereignty and territorial integrity in order to liberate colonised populations from oppression and tyranny, the same applies with regard to non-colonised populations faced with governments that do not represent them and carry out a policy of discrimination and human rights abuses against them. The principle of equality warrants such a conclusion. In both situations, human rights protection comes first, the dignity of the women and men who are the victims of such a policy trumping the interest of the State. Although peace is the primary concern of the international community and the United Nations, which seeks "to save succeeding generations from the scourge of war", this must not be a rotten peace, established and maintained on the basis of the systematic sacrifice of the human rights of the population of a State, or part of it, at the hands of its own government. In these cases, the international community has a responsibility to protect, with all strictly necessary means, the victims.

(b) State practice

25. Less recent international practice of military intervention in favour of non-colonised populations by third States includes such examples as the military intervention of Great Britain, France and Russia to protect the Greek nationalists, in 1827, the French military intervention in Syria in favour of the Maronite Christians, in 1860-61, the United States intervention in Cuba in 1989, and the joint military intervention of Austria, France, Great Britain, Italy and Russia in the Balkans in favour of Macedonian Christians, in 1905. More recent practice includes the examples of the military intervention of Vietnam in Kampuchea, in 1978-1979, that of Tanzania in Uganda, in 1979, or that of the United States, the United Kingdom, France and others in favour of the Kurdish population in Iraq, in 1991.

35. In addition, two references make it clear that, according to the Secretary-General, the UN system concurs with regional and individual enforcement initiatives: "In a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through 'timely and decisive' action" (paragraph 50), and "this will make it more difficult for States or groups of States to claim that they need to act unilaterally or outside of United Nations channels, rules and procedures to respond to emergencies relating to the responsibility to protect." (paragraph 66).

In the context of secession, the military intervention of India in the conflict with Pakistan is the most cited example, since Pakistan had not only denied the right of internal self-determination of the East Bengali population, but had also abused their human rights[36]. Neither Security Council Resolution 307 (1971), of 21 December 1971 (S/RES/307 (1971)), nor General Assembly Resolution 2793 (XXVI), of 7 December 1971 (A/RES/2793 (XXVI)), considered India as an "aggressor" or "occupant", nor did they ask for the immediate withdrawal of troops[37].

26. The paradigm shift at the end of the twentieth century is remarkable, most notably in Africa. With the vivid memory of the Rwanda genocide and of the uncoordinated response of the international community to tragedy, African leaders decided to take action, by creating mechanisms for humanitarian intervention and military enforcement operations in intra-State conflicts, including genocide, crimes against humanity, ethnic cleansing, gross violation of human rights and military coups, as follows:

(a) As regards the Economic Community of West African States, see Articles 3 (d) and (h) and 22 of the 1999 ECOWAS Protocol establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security:

> "ECOMOG is charged, among others, with the following missions: ... b) Peace-keeping and restoration of peace; c) Humanitarian intervention in support of humanitarian disaster; d) Enforcement of sanctions, including embargo; e) Preventive deployment; f) Peace-building, disarmament and demobilisation".

(b) As to the Economic Community of Central African States, see Article 5 (b) of the 2000 Protocol Relating to the Establishment of a Mutual Security Pact in Central Africa:

> "Aux fins enoncés ci-dessus, le COPAX: ... b. peut également engager toute action civile et militaire de prévention, gestion et de reglement de conflits".

(c) As regards the Southern African Development Community, see Articles 3 § 2 (e) and (f) and 11 of the 2001 SADC Protocol on Politics, Defence and Security Co-operation:

> "The Organ may seek to resolve any significant intra-state conflict within the territory of a State party and a 'significant intra-state conflict' shall include: (i) large-scale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights; (ii) a military coup or other threat to the legitimate authority of a State;

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36. On this particular situation see International Commission of Jurists, "The events in East Pakistan", Geneva, 1972.

37. At this juncture, it is important to note that a modern conception of customary international law, especially in such domains where there is a lack of State practice, like those of State secession, admits the relevance of non-binding resolutions like those of the General Assembly, for the formation of a customary rule (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports* 1996, pp. 255-256, §§ 70-73).

> (iii) a condition of civil war or insurgency; (iv) a conflict which threatens peace and security in the Region or in the territory of another State Party."

(d) For the Organisation of African Unity, see Article 4 (h) of the African Union Act and Articles 4 (j) and 7 § 1 (f) of the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union:

> "The Peace and Security Council shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights. It shall, in particular, be guided by the following principles: ... j. the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4(h) of the Constitutive Act."

According to the so-called Ezulwini consensus, approval by the Security Council can be granted "after the fact" in circumstances requiring "urgent action" and, thus, Article 53 § 1 of the Charter is not always applicable[38]. By lending its institutional authority to the Ezulwini Consensus, the African Commission on Human and Peoples' Rights Resolution 117 (XXXXII), of 28 November 2007, on "Strengthening the Responsibility to Protect in Africa", further enhanced the lawfulness of this interpretation.

Central to these initiatives is the decisive political will to avoid the tragic inaction of the United Nations in the past, if necessary, by replacing its universal peace and security mechanism by regional multilateral action[39]. The Security Council reacted positively, and has even approved *ex post facto* military interventions implemented within the framework of these regional and sub-regional mechanisms. For example, it did so explicitly with the ECOWAS intervention in Sierra Leone and in Liberia[40] and the African Union intervention in Burundi[41], as well as implicitly with the intervention of SADC in the Democratic Republic of Congo[42]. This coherent and consistent practice embodies a positive belief that it is required by international law.

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38. African Union, The Common African Position on the proposed Reform of the United Nations: The Ezulwini Consensus, Executive Council 7th Extraordinary Session, 7-8 March 2005 (Ext./EX.CL./2(VII)).

39. On the United Nations reaction to the Rwanda events see the Carlsson Report of 15 December 1999 (S/1999/1257).

40. Security Council Resolution 788 (1992), of 19 November 1992 (S/RES/788 (1992)), and Resolution 1497, of 1 August 2003 (S/RES/1497 (2003)), both on the situation on Liberia, and Resolution 1132 (1997), of 8 October 1997 (S/Res/1132/1997 (1997)), and Resolution 1315, of 14 August 2000 (S/RES/1315 (2000)), on the situation in Sierra Leone.

41. Security Council Resolution 1545 (2004) (S/RES/1545 (2004) which paid tribute to the African Union intervention, encouraged it to "maintain a strong presence in Burundi to accompany the efforts of the Burundian parties" and authorised the deployment of the United Nations Operation in Burundi (ONUB) for an initial period of six months.

42. Security Council Resolution 1234, of 9 April 1999 (S/RES/1234 (1999)), which neither endorses nor condemns the operation.

(c) The opinio juris

27. Having in mind the genocide of the Armenian population by the Ottoman Empire, Fenwick once stated that lawyers generally believed that there should be a right to stop such massacres, but were unable to determine who had the responsibility to intervene[43]. Sir Hersch Lauterpacht gave the correct answer[44]. Recalling Grotius' lesson, he admitted that intervention by any State was lawful when a ruler "inflict[ed] upon his subjects such treatment as no one [was] warranted in inflicting", adding:

> "This is, on the face of it, a somewhat startling rule, for it may not be easy to see why he (Grotius) permits a foreign state to intervene, through war, on behalf of the oppressed while he denies to the persecuted themselves the right of resistance. Part of the answer is, perhaps, that he held such wars of intervention to be permitted only in extreme cases which coincide largely with those in which the king reveals himself as an enemy of his people and in which resistance is permitted."

In the year of the fall of communism in Eastern Europe, the question resurfaced again with much ado on the agenda of the international community. With the Institute of International Law approving Article 2 of the 1989 Resolution on "The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States", it was admitted that States, acting individually or collectively, were entitled to take diplomatic, economic and other measures *vis-à-vis* any other State which had committed grave violations of human rights, notably large-scale or systematic violations, as well as those infringing rights that could not be derogated from in any circumstances, provided such measures were permitted under international law and did not involve the use of armed force in violation of the UN Charter. *A contrario*, any initiative in accordance with the Charter for the purpose of ensuring human rights in another State can be taken by States acting individually or collectively, and should not be considered an intrusion in its internal affairs. Some years later, quite restrictively, Article VIII of the 2003 Resolution on Humanitarian Assistance reformulated the rule, with much caution, as follows: in the event that a refusal to accept a *bona fide* offer of humanitarian assistance or to allow access to the victims leads to a threat to international peace and security, the Security Council may take the necessary measures under Chapter VII of the Charter of the United Nations. Meanwhile, both humanitarian intervention[45]

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43. Fenwick, "Intervention: individual and collective", in *American Journal of International Law*, vol. 39 (1945), pp. 650-651. That question had already been addressed by the founding fathers of international law: Grotius, in *De jure belli ac pacis, Libri tres*, 2.2.25; Vitoria, in *De jure belli*, qt. 3, art. 5, § 15; and Vattel, in *Le droit des gens ou les principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des Souverains*, book II, chapter IV, § 56.

44. H. Lauterpacht, "The Grotian Tradition in International Law", in *British Year Book of International Law*, vol. 23 (1946), p. 46.

45. In the twentieth century, most notably: Rougier, "La théorie de l'intervention d'humanité", in *Revue Générale de Droit International Public*, 17 (1910), pp. 468-526;

and the responsibility to protect doctrine[46] have received attention and support from reputed scholars and experienced practitioners.

28. In view of the practice and *opinio* mentioned above, the rule of responsibility to protect shows some important differences with regard to the "right to humanitarian intervention": firstly, responsibility to protect presupposes the primary State's obligation to respect and protect the human

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Stowell, "Intervention in International Law", Washington, 1921; Franck and Rodley, "After Bangladesh: the law of humanitarian intervention by military force", in *American Journal of International Law*, vol. 67 (1973), pp. 275-303; Fonteyne, "The customary international law doctrine of humanitarian intervention: its current validity under the UN Charter", in *California Western International Law Journal*, vol. 4 (1974), pp. 203-270; Klintworth, "Vietnam's Intervention in Cambodia in International Law", Canberra, 1989; Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities", in *Fordham International Law Journal*, vol. 16 (1992), pp. 120-158; Torrelli, "De l'assistance à l'ingerence humanitaires", in *International Review of the Red Cross*, vol. 74 (1992), pp. 238-258; Forbes and Hoffman (eds.), "Political Theory, International Relations and the Ethics of Intervention", London, 1993; Téson, *Humanitarian intervention: an inquiry into law and morality*, second edition, Irvington-On-Hudson, 1997; Cassesse, "*Ex inuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian countermeasures in world community", in *European Journal of International Law*, vol. 10 (1999), pp. 23-30; Independent International Commission on Kosovo, "The Kosovo Report", 2000, pp. 167-175; Wheeler, "Legitimating humanitarian intervention: principles and procedures", in *Melbourne Journal of International Law*, vol. 2 (2001), pp. 550-567; *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, 2002; Terry, "The Paradox of Humanitarian Action: Condemned to Repeat", New York, 2002; Lepard, *Rethinking Humanitarian Intervention*, Penn State University Press, 2002; Welsh, *Humanitarian Intervention and International Relations*, Oxford, 2006; and Thakur, "Humanitarian Intervention", in Weiss and Daws (eds.), *The Oxford Handbook on the United Nations*, Oxford, 2007, pp. 387-403.

46. Among others: Deng and Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, 1996; Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, Lanham, 2005; Jütersonke and Krause (eds.), *From Rights to Responsibilities: Rethinking Interventions for Humanitarian Purposes*, Geneva, 2006; Société Française pour le Droit International (ed.), *La Responsabilité de Protéger*, Paris, 2008; Evans, *The Responsibility to Protect: Ending mass atrocity crimes once and for all*, Washington, 2008; Arbour, "The responsibility to protect as a duty of care in international law and practice", in *Review of International Studies*, vol. 34, pp. 445-458; Bellami, *Responsibility to Protect*, London, 2009; *Global Politics and the Responsibility to Protect: From Words to Deeds*, New York, 2010; Kuwali, *The Responsibility to Protect, Implementation of Article 4 (h) Intervention*, Leiden, 2011; Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Washington, 2011; Hoffmann and Nollkaemper (eds.), *Responsibility to Protect From Principle to Practice*, Amsterdam, 2012; Knight and Egerton (eds.), *The Routledge Handbook of the Responsibility to Protect*, New York, 2012; Francis et al. (eds.), *Norms of Protection, Responsibility to Protect, Protection of Civilians and their Interaction*, Paris, 2012; Genser and Cotler (eds.), *The Responsibility to Protect, the Promise of Stopping Mass Atrocities in our Time*, Oxford, 2012; Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect*, Cambridge, 2013; Hajjami, *La Responsabilité de Protéger*, Brussels, 2013; and the Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2011, and the *Core Humanitarian Standard on Quality and Accountability*, 2014.

rights of its population, which underlines the subsidiary preventive and protective role of the international community; secondly, responsibility to protect departs from the concept of the "right" of each State to intervene in another State's internal affairs, by establishing the specific conditions for intervention and hence limiting the discretion of a State to take action against another State; thirdly, responsibility to protect shifts the focus from the "right" of the target State to territorial integrity to the rights of the victims in peril; and fourthly, and most importantly, sovereignty becomes instrumental to the welfare of the population, and is not an end in itself, the use of force constituting the last-resort instrument to safeguard the fundamental rights and freedoms of the victimised population in the target State.

29. Hence, responsibility to protect corresponds to a customary norm which has benefited from three different but converging lines of development of international law: first, human rights do not belong to the reserved domain of sovereignty of States (Article 2 § 7 of the UN Charter)[47], which excludes from this domain "the outlawing of acts of aggression, and of genocide" and "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination", respect for which constitutes an *erga omnes* obligation of States[48], and where disrespect may constitute a threat to international peace; second, State officials have a personal responsibility to protect the population under their political authority, on pain of international criminal responsibility for the *delicta juris gentium*: genocide, crimes against humanity and war crimes (Articles I, IV, V, VI and VIII of the Genocide Convention and Articles 6 to 8 of the Rome Statute of the International Criminal Court), whose prevention and prosecution is also an *erga omnes* obligation[49]; third, the protection of civilians in armed conflicts is a

47. The reserved domain is an evolving concept, defined negatively by the lack of international norms regulating a certain issue and not positively by its inclusion in a closed catalogue of issues (*Aegean Sea Continental Shelf, Judgment, ICJ Reports* 1978, p. 25, § 59; and Institute of International Law, 1954 Resolution on *La détermination du domaine réservé et ses effets*).

48. *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports* 1970, p. 33, §§ 33-34; and Institute of International Law, Article 1 of the 1989 Resolution on The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States.

49. *Application of the Convention on the prevention and Punishment of the Crime for Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports* 2007, p. 221, § 430 ("the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible"); *Barcelona Traction, Light and Power Company, Limited, Judgment*, cited above, p. 32, §34; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports* 1951, p. 23; and Resolution ICC-ASP/5/Res.3, adopted at the 7th plenary meeting on 1 December 2006, by consensus. As the ICJ put it, when referring to genocide, States must cooperate "in order to liberate Mankind from such an odious scourge". The obligation to

responsibility of the international community, requiring States to take action jointly or individually to suppress serious violations of the Geneva Conventions or Protocol I thereto (Article 89 of Additional Protocol I), as well as any other serious violations of international humanitarian law embodying elementary considerations of humanity, with *erga omnes* effect, including in non-international armed conflicts between the government of a State and "dissident armed forces or other organized armed forces" (Article 1 § 1 of Additional Protocol II to the four Geneva Conventions) and between the government and non-organised forces, and even in civil strife outside of armed conflict (Common Article III of the Geneva Conventions)[50]. This customary rule applies both to action by a State in foreign territories under its effective control and to conduct of private persons, in national or foreign territories, when they act under the control of the State[51].

30. In international law, States have a duty to cooperate to bring to an end, through lawful means, any serious breach by a State of an obligation arising under a peremptory norm of general international law (see Article 41 § 1 of the Draft Articles on State Responsibility for Internationally Wrongful Acts of the International Law Commission (ILC)). Any State other than the injured State may invoke the responsibility of the perpetrator State when "[t]he obligation breached is owed to the international community as a whole" and claim from the responsible State the cessation of the internationally wrongful act (ibid., Article 48 § 1 (b))[52].

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prevent and prosecute war crimes resulted already from the Geneva treaty and customary law. The obligation to do likewise regarding crimes against humanity is a direct consequence of the Rome Statute. Ethnic cleansing may be criminally punished both as a war crime or a crime against humanity.

50. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports* 2004, pp 199-200, §§ 155-158, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports* 2005, p. 60, § 178. Most of the universally ratified Geneva treaty law codifies customary law, which means that every State, whether or not it is a party to the specific conflict, is obliged to ensure respect for these rules and to take action, jointly or individually, in order to protect civilians in armed conflict. Admittedly, this obligation requires States to ensure that no other State commits genocide, war crimes or crimes against humanity. The action undertaken must evidently be in accordance with the State's obligations under the Charter (Article 109).

51. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports* 1986, p. 62, §§ 109-110; *Democratic Republic of the Congo* v. *Uganda*, cited above, p. 231, §§ 178-180; and *Bosnia and Herzegovina* v. *Serbia and Montenegro*, cited above, pp. 207-211, §§ 399-406; see also Article 8 of International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. The extent of the effective control test will not be dealt with in this opinion.

52. As the ILC explained, Article 48 § 1 (b) "intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew 'an essential distinction' between obligations owed to particular States and those owed 'towards the international community

Mass atrocities committed or condoned by a government against their own population entail such legal consequences in view of the *jus cogens* nature of these crimes and the *erga omnes* nature of the corresponding human rights protection obligation. In this context, the legal status of both the collective State responsibility and the extra-territorial individual State responsibility for preventing and stopping *jus cogens* crimes is unambiguous. As a matter of principle, all States are to be considered as the "injured State" in the case of the *delicta juris gentium*, whose perpetrators are deemed to be *hostis human generis*[53]. In the words of Lauterpacht, "the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins"[54].

31. International human rights law, international criminal law and international humanitarian law have evolved in such a way that they converge into acknowledging the legal obligation to take, collectively or individually, preventive and coercive action against a State which systematically attacks, or condones an attack on, all or part of its population[55]. The human-rights based intervention is strictly limited to preventing or stopping mass atrocities in the form of genocide, crimes against humanity, war crimes and ethnic cleansing, and does not purport to change the constitutional system of the target State[56].

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as a whole'. With regard to the latter, the Court went on to state that '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'" (see ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, cited above, p. 127). These Draft Articles apply to breaches of inter-State obligations of a bilateral character, as well as to international responsibility for breaches of State obligations owed to an individual, groups of individuals or the international community as a whole.

53. Both General Assembly Resolution 2840 (1971), of 12 December 1971, on the question of the punishment of war criminals and of persons who have committed crimes against humanity (A/RES/2840(XXVI)), and its Resolution 3074 (1973), of 3 December 1973, on "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity" (A/RES/3074(XXVIII)), underscore the States' obligation to take steps for the arrest, extradition, trial and punishment of these criminals.

54. See H. Lauterpacht, "The Grotian Tradition", cited above, p. 46.

55. This should not be confused with a right to a State-building, prodemocracy intervention, aimed at expanding a certain model of political governance (see *Nicaragua v. United States of America*, cited above, pp. 109-110, § 209). The ICJ admitted humanitarian intervention to "prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need" in Nicaragua, and not merely to the contras and their dependants (p. 125, § 243). Nevertheless, it is obviously unrealistic to suppose that it will be possible to eradicate a policy of systematic human rights abuse without some change in terms of the political regime of the target State.

56. This should also not be confused with a right to intervention based on a general negative assessment of the human rights situation in a particular country (contrast with *Nicaragua v. United States of America*, cited above, pp. 134-135, § 268).There must be an element of systematicity in the infringement of human rights (see on this systematic

As an *ultimum remedium* mechanism, human-rights based intervention presupposes that where human rights are protected by international conventions, that protection did not take the regular form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The use of force by the international community is thus limited by a double subsidiarity, in view of the failure of both the national human rights protection mechanisms and the common international human rights treaty mechanisms.

The international community's subsidiary reaction may take place, in decreasing order of authority, by way of a Security Council resolution[57], a General Assembly recommendation[58], an action of a regional organisation whether or not authorised beforehand under Article 53 of the Charter, both *ad intra* or *ad extra*[59], and an action of a group of like-minded States or an

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element, my separate opinion in *Mocanu and Others*, cited above). Such an element is present in the types of crimes which trigger responsibility to protect.

57. The 2005 World Summit Outcome Document, § 139. The clause urging the five permanent Members of the Security Council not to veto action aimed at preventing or stopping genocide or ethnic cleansing was not included in the final version. The ICISS report ("The Responsibility to Protect", cited above, § 6.21), the High-level Panel report ("A More Secure World", cited above, § 256) and the Secretary-General ("Implementing the Responsibility to Protect", cited above, § 61) have voiced their agreement with that restriction of the veto power.

58. General Assembly Resolution 377 (V) A, of 3 November 1950, or "Uniting for Peace Resolution" (A/RES/377, see also A/1775 (1951)). On the role of this Resolution, see ICISS, "The Responsibility to Protect", cited above, § 6.30, Independent International Commission on Kosovo, "The Kosovo Report", Oxford, 2000, p. 166, and the Secretary-General's report, "Implementing the Responsibility to Protect", cited above, § 56. In fact, the General Assembly has already made significant use of this Resolution, such as by calling upon all States and authorities "to continue to lend assistance to the United Nations action in Korea", which meant military assistance (Resolution 498 (V), of 5 November 1951 (A/RES/498 (V)), "establishing" peacekeeping operations in Egypt (Resolution 1000 (ES-I), of 5 November 1956 (A/RES/1000 (ES-I)), "requesting" the Secretary-General "to take vigorous action … to assist the Central Government of the Congo in the restoration and maintenance of law and order throughout the territory of the Republic of Congo", thus confirming the mandate of the UN Operation in the Congo (Resolution 1474 (ES-IV), of 16 September 1960 (A/RES/1474 (ES-IV)) and condemning South Africa for occupation of Namibia and calling for foreign military assistance to the liberation struggle (Resolution ES-8/2, cited above). The so-called "Chapter VI ½ measures" relied on the target State's consent, but neither the text nor the spirit of Resolution 377 excludes its use in order to recommend the use of force in situations of breach of the peace even where consent is lacking.

59. ICISS, "The Responsibility to Protect", cited above, § 6.31-6.35 ("there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard"), "A More Secure World", cited above, § 272, Report of the Security Council *Ad Hoc* Working Group on conflict prevention and resolution in Africa, of 30 December 2005 (S/2005/833), § 10, and "Fourth report on responsibility of international organizations" by the Special Rapporteur Giorgio Gaja, § 48 (A/CN.4/564). The Secretary-General's report, "Implementing the Responsibility to Protect", cited above, § 56, referred to the use of force by regional or

individual State[60]. Whenever the more authoritative means of response is deadlocked, or it seriously appears that this will be the case, a less authoritative means may be used. Inaction is not an option in the face of a looming or actual tragedy, putting at risk the lives of untold numbers of victims. Not only does the Charter not cover the whole area of the regulation of the use of force[61], the Charter itself also pursues other aims such as the protection of human rights (Articles 1 § 2, 1 § 3 and 55), and the systematic flouting of these rights by a State within its own borders jeopardises international peace and security as well. In such circumstances, States must take joint and separate action to secure observance of the violated human rights of the victimised population (Article 56 of the Charter).

(ii) Responsibility of the respondent Government

32. Sovereign States are entitled to defend their national territory and protect their populations. This is not only their right, but their obligation as well. Each government has the obligation to maintain or re-establish law and order in the State or to defend its national unity and territorial integrity by "all legitimate means"[62]. While fulfilling these obligations, "all reasonable precautions" are due to avoid any losses of civilian lives and damage to civilian objects[63]. When absolutely necessary, civilian property may be destroyed for military purposes[64]. Civilians should not be arbitrarily

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subregional arrangements "with the prior authorization of the security Council". The World Summit Outcome Document envisages cooperation between the Security Council and the "appropriate" regional organisation, meaning one from within the geographical area of the conflict. But practice has shown that the Security Council may pick another choice. For example, Resolution 1484 (2003), of 30 May 2003, authorised the European Union-led Operation Artemis in the Democratic Republic of the Congo during the Ituri conflict.

60. The World Summit Outcome Document did not exclude these possibilities. As explained above, they derive not only from the *jus cogens* nature of the crimes at stake, but also from the *erga omnes* nature of the human rights protection obligation.

61. *Nicaragua v. the United States*, cited above, p. 94, § 176, and ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, cited above, p. 85: "But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility."

62. Article 3, al. 1, of the 1977 Additional Protocol II to the Geneva Conventions.

63. Article 13 of the 1977 Additional Protocol II to the Geneva Conventions and Article 57 of the 1977 Additional Protocol I to the Geneva Conventions, and Rules 1 to 10 and 15 of the International Committee Red Cross (ICRC) Study on Rules of customary international humanitarian law, in Henkaerts and Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Geneva, 2005.

64. Article 52 of the 1977 Additional Protocol I to the Geneva Conventions, Article 14 of the 1977 Additional Protocol II to the Geneva Conventions, Article 53 of 1949 Convention IV relative to the protection of civilian persons in time of war, Article 6 (b) of the Charter

displaced from their homes or places of habitual residence, imperative military reasons being necessary to justify such displacement[65]. In the case of forced displacement of civilians, their rights to return to and enjoy their homes and property should be implemented as soon as the reasons for their displacement cease to exist[66].

33. In the context of secession, military action by the parent State against the seceding movement and intervening third States is, in principle, justified. The obligation to defend territorial integrity applies unless the secession complies with the following requirements: (1) the seceding population fulfil the Montevideo criteria for statehood, namely they constitute a permanent population and have a defined territory, a government and the capacity to enter into relations with other States; (2) prior to secession the seceding population were not allowed fair participation in a government that represented the whole population of the former State; and (3) the seceding population were systematically treated by the government, or by 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[67].

When secession complies with these requirements, military action of the government of the parent State against the seceding population and intervening third States is no longer lawful. A State forfeits the right to defend its territory when it systematically breaches the human rights of a part of its population, or condones such breaches by private agents.

(iii) Responsibility of the international community

34. Sovereignty, equality of all States and prohibition of the threat or use of force against another State are the founding principles of the Charter of the United Nations. These principles have a practical consequence, already set out in the well-known Article 7 of the *Déclaration du Droit des Gens* (1795), "*Un peuple n'a pas le droit de s'immiscer dans le gouvernement des autres*" (no people has the right to interfere in the government of others). An allegation of human rights violations in another State may evidently provide a convenient pretext for intrusion into its internal politics and, even worse, for the overthrow of legitimate governments, as the "manifestation of a

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of the International Military Tribunal, Articles 46 and 56 of the Hague Regulations Respecting the Laws and Customs of War on Land, and Rules 51 and 52 of the ICRC Study on Rules of customary international humanitarian law.

65. Article 17 the 1977 Additional Protocol II to the Geneva Conventions, Rules 129 and 130 of the ICRC Study on Rules of customary international humanitarian law, and Principle 6 of the Guiding principles on internal displacement (E/CN.4/1/1998/53/Add.2), of 11 February 1998.

66. Article 49 of the Fourth Geneva Convention and Rule 132 of the ICRC Study on Rules of customary international humanitarian law.

67. See my separate opinion appended to *Chiragov and Others v. Armenia* [GC], no. 13216/05.

policy of force, such as has, in the past, given rise to most serious abuses"[68]. Nevertheless, the mere circumstance that the right to intervene may be abused is not *per se* decisive of its existence or otherwise in international law. One should remember the wisdom of Grotius: "We know, it is true, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but a right does not cease to exist in case it is to some extent abused by evil men."[69]

During the first decade of the twenty-first century, the following rule of customary international law crystallised:

States have the legal obligation to prevent and stop the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. When a State commits these crimes, condones the commission of these crimes or is manifestly unable to oppose their commission in the national territory or the territories under its effective control, the international community has a legal obligation to react with all adequate and necessary means, including the use of military means, in order to protect the targeted populations. The reaction must be timely, effective and proportionate. By order of precedence, the power to take action is vested in the following authorities: the Security Council under Chapters VI and VII of the UN Charter, the General Assembly of the United Nations under the "Uniting for Peace" Resolution and regional or sub-regional organisations in accordance with their respective statutory framework, whether *ad intra* or *ad extra*. When the primary authorities are deadlocked, or it seriously appears that this will be the case, any State or group of States will be competent to take action.

35. In the context of secession, third States are prohibited from taking military action against the parent state on the pretext that the seceding population is entitled to self-determination. Thus, the territory of a State cannot be the object of acquisition by another State resulting from the threat or use of force, no territorial acquisition resulting from the threat or use of

68. On the principle of non-intervention, see Article 15 (8) of the Covenant of the League of Nations, Article 8 of the 1933 Montevideo Convention on Rights and Duties of States, Article 1 of its 1936 Additional Protocol on Non-Intervention, and Article 3, al. 2, of Additional Protocol II to the Geneva Convention. In the UN practice, United Nations General Assembly Resolution 36/103, of 9 December 1981, approving the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (A/RES/36/103), 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 (A/8082 (1970)), and Resolution 2131 (XX), of 21 December 1965, which adopted the Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States, and Article 4 of the 1949 ILC Draft Declaration on Rights and Duties of States. In the ICJ case-law, see *Nicaragua* v. *United States of America*, cited above, p. 126, § 246, and *Corfu Channel case, Judgment of April 9th, 1949, ICJ Reports* 1949, p. 35, from where the citation in the text is taken.

69. *De jure belli ac pacis, Libri tres*, 2.2.25.

force shall be recognised as legal, and every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State[70].

The rule of non-interference in favour of a seceding population has an exception, namely the situation where the government of the parent State is not representative of the seceding population and systematically abuses their human rights or condones a systematic attack by private agents against them. In this situation, strictly necessary military action taken by third States in favour of the seceding population is lawful after the latter have established control of their territory and declared their secession. Military action by third States prior to that time constitutes prohibited intervention in the internal affairs of another State[71].

If, in addition to the above-mentioned requirements, the interference envisages the protection of a seceding population which is ethnically the same as that of the intervening third State, the lawfulness of the interference is even less questionable, because it closely equates to a situation of self-defence. In any event, as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct of the intervening third State[72].

C. Preliminary conclusion: is the *Doğan and Others* standard really expanded?

36. The applicant claims that the Shahumyan region was subjected to a blockade by the Azerbaijani Government in the early 1990s. In June 1992 Gulistan came under direct attack by Azerbaijani forces and the population of the village, including the applicant and his family, were expelled and fled to Nagorno-Karabakh and Armenia. He complains about being denied the possibility of returning to his home and property and enjoying them, or of obtaining compensation for the loss thereof.

37. In paragraph 32 of the judgment, the majority accept that:

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70. Article 11 of the 1933 Montevideo Convention on Rights and Duties of States, paragraph 5 of the Declaration on the Strengthening of International Security adopted by the General Assembly Resolution 2734 (XXV), of 16 December 1970 (A/RES/25/2734), and Article 5 (3) of the General Assembly Resolution 3314 (XXIX), of 14 December 1974, on the definition of the crime of aggression (A/RES/3314(XXIX)).

71. For the prohibition on recognising as a State a secessionist territory which is the result of the use of unlawful force by a third State, see the case of the "Turkish Republic of Northern Cyprus" after Turkey's invasion of Cyprus (Security Council Resolutions 541 (1983), of 18 November 1983 (S/RES/541 (1983)), and 550 (1984), of 11 May 1984 (S/RES/550 (1984)).

72. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, cited above, p. 74.

> "in April-May 1991 the USSR Internal Forces and the special purpose militia units ('the OMON') of the Azerbaijan SSR launched a military operation with the stated purpose of 'passport checking' and disarming local Armenian militants in the region. However, according to various sources, the government forces, using the official purpose of the operation as a pretext, expelled the Armenian population of a number of villages in the Shahumyan region, thus forcing them to leave their homes and flee to Nagorno-Karabakh or Armenia. The expulsions were accompanied by arrests and violence towards the civilian population. In 1992, when the conflict escalated into a full-scale war, Shahumyan region came under attack by Azerbaijani forces."

Plainly speaking, the majority establish that the respondent State attacked the Armenian population of Shahumyan region and forced them to flee, as the applicant claims, but unfortunately they find it unnecessary to discuss "whether the reasons for the applicant's displacement have ceased to exist" (paragraph 232).

Instead of dealing with the thorny issue of the "reasons for the forced displacement" and their persistence from at least 2006 until the present day, the majority invoke vague "safety considerations" without any evaluation of the six classic circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned: consent (Article 20 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). What is more, the argument of "safety considerations" is supported by a forced analogy with *Oruk* (cited above), a case without the slightest connection to the facts of the present case.

38. Even though the respondent State's international obligations in 1992 (year of the alleged forced displacement), in 2006 (year of the lodging of the application) and in 2015 (year of delivery of the present judgment) have evolved, there is nonetheless a continuum between its international humanitarian obligations and the human rights obligations it assumed with the adoption and entry into force of the Convention in Azerbaijan. Thus, the Court should not have adjudicated upon the alleged deprivation of the applicant's rights without assessing the "source of the rights claimed"[73].

With a view to fully clarifying the existence of the "source" of the rights claimed, the essential questions to be addressed are the following: Did the Azerbaijani Government attack the Armenian population and expel them from Shahumyan region in June 1992 and, if so, did it have any justification for that action? Did the attack and expulsion of the Armenian population comply with the respondent State's humanitarian obligations? Were the reasons for the expulsion of the Armenian population still valid in 2006 when the applicant filed his complaint? Were the restrictions imposed on the applicant's return to Gulistan valid in view of the respondent State's

73. *Šilih*, cited above, §§ 159-163.

responsibility to protect the lives of civilians in Gulistan and its surroundings?

Gulistan may be a no-man's-land, but it is certainly not a legal vacuum in Europe. There is a law regulating the front line between two armies facing each other, and that law is international humanitarian law, including the obligation to protect civilians, as well as the responsibility to protect. Article 1 of Protocol No. 1 to the Convention refers to general principles of international law as a ground for restricting the right to property, and the principles of military necessity, protection of civilians and responsibility to protect are such principles.

39. Although the majority consider the deprivation of the right of access to the house, property, land and village "justified", they purport to impose positive obligations on the respondent State, such as the setting up of a property claims mechanism to deal with the restoration of property rights and compensate for the loss of enjoyment. The authority invoked is *Doğan and Others*[74]. Again, the reference is misplaced. For two reasons: firstly, unlike the applicants in *Doğan and Others*, the applicant in the present case was not an internally displaced person, since he was living in Armenia; secondly, in *Doğan and Others* the Court left open the questions whether the refusal of any access to Boydaş village until 22 July 2003 on the ground of terrorist incidents in and around the village was lawful and pursued a legitimate aim, concentrating its examination on the issue of proportionality, while in the present case, the majority expressly consider the government's conduct to be "justified by safety considerations", i.e., they found that the governmental order restricting access to Gulistan pursued a legitimate aim.

40. Furthermore, Armenian refugees, like the applicant, could already benefit from a 1991 Order legalising property swaps between individuals. The majority note this fact, but dismiss it as irrelevant with the argument that "the applicant has not been involved in such an exchange" (paragraph 239). Implicitly, the majority presuppose that the Government had the obligation to identify and locate all the displaced persons from the conflict who had lost their property, including those living abroad, in order to "involve" them in the property swap mechanism. Such presupposition places an unreasonable burden on the Government. Furthermore, the majority did not even venture to check whether the applicant had ever taken the initiative to be involved in such a property exchange and had been denied that possibility. Finally, no objective grounds pertaining to the swap mechanism itself are given by the majority to reject it as a satisfactory means of implementing the Government's obligation to put in place administrative measures to secure the applicant's individual rights[75].

74. *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004-VI, cited in paragraph 234 of the judgment.
75. *Ilaşcu and Others*, cited above, § 346.

In any event, if the majority intended to expand the *Doğan and Others* standard for positive obligations in the case of Article 1 Protocol No. 1 claims by internationally displaced persons, they failed[76]. Conscious of the inexistence of a legal basis for "alternative measures", the majority not only give them a hypothetical formulation (paragraph 238: "it would appear particularly important"), but also downgrade them to mere *obiter dicta*, not covered by an Article 46 injunction in the operative part of the judgment. In this context, the mention of these measures resonates more like wishful thinking than a legally binding obligation.

VI. Final conclusion

41. The Westphalian State is *passé*. Sovereignty is no longer what it was in the seventeenth century. After one century of mass murders committed by political leaders against their own peoples, like the Armenians under Talat Pacha, the Ukrainians under Stalin, the Jews under Hitler, the Cambodians under Pol Pot, the Tutsi at the hands of the Hutu, the international community came up with a two-pronged response: on the one hand, in Rome it established the rules on international criminal responsibility of political and military leaders and, on the other, in Vienna it affirmed sovereignty as responsibility to protect human rights and the international community's subsidiary responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity in the face of the national authorities' manifest failure to ensure their protection. Being at the intersection of international human rights law, international criminal law and international humanitarian law, responsibility to protect is not a mere political catalyst for international action. It is a customary international rule which creates human rights protection obligations for States. Action aimed at their implementation is thus also subject to the international rule of law, including that of the Convention. Therefore, when implemented by Contracting Parties to the Convention, responsibility to protect is subject to the oversight of this Court. Those who seek to enforce international law must be fully accountable.

42. While in *Chiragov and Others* the majority did not clarify whether the Azerbaijani Government had failed in their obligation to protect the human rights of their population of Armenian origin and had thus laid the grounds for remedial secession by the "Nagorno-Karabakh Republic" and ultimately for the intervention of a foreign nation in the opening of a humanitarian corridor in Lachin, with its enduring negative consequences

76. It is significant that, in paragraph 226, the majority consider it appropriate to examine the applicant's complaint with a view to establishing whether the respondent Government have complied with their "positive obligations" under Article 1 of Protocol No. 1, but in the following text never refer again to this expression, using instead the expression "alternative measures".

for the applicants, the majority in the present case omitted, once again, to consider the respondent State's international obligation to prevent and stop the breaches of the human rights of the Armenian population of Shahumyan region and the subsequent continuous human rights restrictions on the ceasefire line between its own army and the army of the "Nagorno-Karabakh Republic". I regret that the majority failed in both cases to give a principled response to matters of this magnitude.