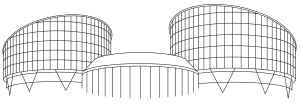
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

REPORTS OF JUDGMENTS AND DECISIONS

RECUEIL DES ARRÊTS ET DÉCISIONS

2015-III



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

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

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The *Reports of Judgments and Decisions* is an official publication of the European Court of Human Rights containing a selection of key judgments and decisions of the Court with summaries prepared by the Registry. For the years 2007 and onwards the selection has been made by the Bureau[1] of the Court following a proposal by the Jurisconsult[2].

With the exception of decisions by single judges, all the Court's judgments and decisions, including those not published in this series, can be consulted online in the HUDOC database at http://hudoc.echr.coe.int.

Note on citation

The form of citation for judgments and decisions published in this series from 1 November 1998 follows the pattern: name of case (in italics), application number, paragraph number (for judgments), abbreviation of the European Court of Human Rights (ECHR), year and (for the years 1999 to 2007 inclusive) number of volume.

In the absence of any indication to the contrary the cited text is a judgment on the merits delivered by a Chamber of the Court. Any variation from that is added in brackets after the name of the case: "(dec.)" for a decision on admissibility, "(preliminary objections)" for a judgment concerning only preliminary objections, "(just satisfaction)" for a judgment concerning only just satisfaction, "(revision)" for a judgment concerning revision, "(interpretation)" for a judgment concerning interpretation, "(striking out)" for a judgment striking the case out, "(friendly settlement)" for a judgment concerning a friendly settlement. If the judgment or decision has been given by the Grand Chamber of the Court, "[GC]" is added after the name of the case or after the case description that appears in brackets.

Examples

Judgment on the merits delivered by a Chamber
Campbell v. Ireland, no. 45678/98, § 24, ECHR 1999-II

Judgment on the merits delivered by the Grand Chamber
Campbell v. Ireland [GC], no. 45678/98, § 24, ECHR 1999-II

Decision on admissibility delivered by a Chamber
Campbell v. Ireland (dec.), no. 45678/98, ECHR 1999-II

Decision on admissibility delivered by the Grand Chamber
Campbell v. Ireland (dec.) [GC], no. 45678/98, ECHR 1999-II

Judgment striking the case out delivered by a Chamber
Campbell v. Ireland (striking out), no. 45678/98, § 24, ECHR 1999-II

Judgment on a friendly settlement delivered by a Chamber
Campbell v. Ireland (friendly settlement), no. 45678/98, § 24, ECHR 1999-II

For further information on the Court's mode of citation, which is regularly updated, please see the "Note on citation" published on the Court's website (www.echr.coe.int).

1. The Bureau is composed of the President and Vice-Presidents of the Court and of the Section Presidents.

2. The Jurisconsult is responsible for case-law monitoring and plays a key role in preventing case-law conflicts.

Le *Recueil des arrêts et décisions* est la collection officielle de la Cour européenne des droits de l'homme renfermant une sélection des arrêts et décisions les plus importants ainsi que des sommaires rédigés par le greffe. Depuis 2007, la sélection est faite par le Bureau[1] à la suite de la proposition du jurisconsulte[2].

À l'exception des décisions prises par les juges uniques, tous les arrêts et décisions de la Cour, y compris ceux et celles non publiés dans la présente série, peuvent être consultés dans la base de données HUDOC (http://hudoc.echr.coe.int).

Note concernant la citation des arrêts et décisions

Les arrêts et décisions publiés dans la présente série à compter du 1er novembre 1998 sont cités de la manière suivante : nom de l'affaire (en italique), numéro de la requête, numéro du paragraphe (pour les arrêts), sigle de la Cour européenne des droits de l'homme (CEDH), année et (pour les années 1999 à 2007 incluse) numéro du recueil.

Sauf mention particulière, le texte cité est celui d'un arrêt sur le fond rendu par une chambre de la Cour. L'on ajoute après le nom de l'affaire « (déc.) » pour une décision sur la recevabilité, « (exceptions préliminaires) » pour un arrêt ne portant que sur des exceptions préliminaires, « (satisfaction équitable) » pour un arrêt ne portant que sur la satisfaction équitable, « (révision) » pour un arrêt de révision, « (interprétation) » pour un arrêt d'interprétation, « (radiation) » pour un arrêt rayant l'affaire du rôle, « (règlement amiable) » pour un arrêt sur un règlement amiable. Si l'arrêt ou la décision ont été rendus par la Grande Chambre de la Cour, « [GC] » est ajouté après le nom de l'affaire ou après la description de l'affaire qui apparaît entre parenthèses.

Exemples

Arrêt rendu par une chambre sur le fond
Dupont c. France, n° 45678/98, § 24, CEDH 1999-II

Arrêt rendu par la Grande Chambre sur le fond
Dupont c. France [GC], n° 45678/98, § 24, CEDH 1999-II

Décision rendue par une chambre sur la recevabilité
Dupont c. France (déc.), n° 45678/98, CEDH 1999-II

Décision rendue par la Grande Chambre sur la recevabilité
Dupont c. France (déc.) [GC], n° 45678/98, CEDH 1999-II

Arrêt rendu par une chambre rayant l'affaire du rôle
Dupont c. France (radiation), n° 45678/98, § 15, CEDH 1999-II

Arrêt rendu par une chambre sur un règlement amiable
Dupont c. France (règlement amiable), n° 45678/98, § 15, CEDH 1999-II

Pour plus d'information sur le mode de citation des arrêts et décisions, lequel est régulièrement mis à jour, veuillez consulter la « Note concernant la citation des arrêts et décisions » sur le site Internet de la Cour (www.echr.coe.int).

1. Le bureau est composé du président et des vice-présidents de la Cour et des présidents de section.
2. Le jurisconsulte est chargé d'une veille jurisprudentielle et joue un rôle-clé pour la prévention des conflits de jurisprudence.

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LAMBERT ET AUTRES c. FRANCE

(Requête n° 46043/14)

GRANDE CHAMBRE

ARRÊT DU 5 JUIN 2015[1]

1. Arrêt rendu par la Grande Chambre après dessaisissement d'une chambre en vertu de l'article 30 de la Convention. Extraits.

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Interruption de l'alimentation et de l'hydratation artificielles maintenant en vie une personne en situation d'entière dépendance

Lors de l'examen des griefs sur le terrain des obligations positives de l'État, sont pris en compte les éléments suivants : l'existence dans le droit et la pratique internes d'un cadre législatif conforme aux exigences de l'article 2, la prise en compte des souhaits précédemment exprimés par le requérant et par ses proches, ainsi que l'avis d'autres membres du personnel médical et la possibilité d'un recours juridictionnel en cas de doute sur la meilleure décision à prendre dans l'intérêt du patient (paragraphe 143 de l'arrêt).
S'il n'existe pas de consensus entre les États membres du Conseil de l'Europe pour permettre l'arrêt d'un traitement maintenant artificiellement la vie, il existe toutefois un consensus sur le rôle primordial de la volonté du patient dans la prise de décision, quel qu'en soit le mode d'expression (paragraphe 147 de l'arrêt).

Article 2

Vie – Obligations positives – Interruption de l'alimentation et de l'hydratation artificielles maintenant en vie une personne en situation d'entière dépendance – Qualité pour agir – Distinction entre la mort infligée volontairement et l'abstention thérapeutique – Existence d'un cadre législatif approprié – Prise en compte du souhait du patient et de ses proches – Prise en compte de l'avis du personnel médical – Existence d'un recours juridictionnel – Consensus sur le rôle primordial de la volonté du patient – Marge d'appréciation – Équilibre entre la protection du droit à la vie du patient et celle du droit au respect de sa vie privée et de son autonomie personnelle – « Obstination déraisonnable » – Désaccord entre les membres de la famille

*

* *

En fait
Les requérants sont respectivement les parents, un demi-frère et une sœur de Vincent Lambert. Ce dernier, victime d'un accident de la route en septembre 2008, a subi un traumatisme crânien qui l'a rendu tétraplégique et entièrement dépendant. Il bénéficie d'une hydratation et d'une alimentation artificielles par voie entérale. En septembre 2013, le médecin en charge de Vincent Lambert entama la procédure de consultation prévue par la loi du 22 avril 2005 relative aux droits des malades

1. Rédigé par le greffe, il ne lie pas la Cour.

et à la fin de vie dite « loi Leonetti ». Il consulta six médecins, dont l'un désigné par les requérants, réunit la presque totalité de l'équipe soignante et convoqua deux conseils de famille auxquels ont participé l'épouse, les parents et les huit frères et sœurs de Vincent Lambert. À l'issue de ces réunions, l'épouse de Vincent Lambert, Rachel Lambert, et six de ses frères et sœurs se déclarèrent favorables à l'arrêt des traitements, ainsi que cinq des six médecins consultés, alors que les requérants s'y opposèrent. Le médecin s'est également entretenu avec François Lambert, le neveu de Vincent Lambert. Le 11 janvier 2014, le médecin en charge de Vincent Lambert décida de mettre fin à l'alimentation et à l'hydratation du patient.

Saisi en tant que juge des référés, le Conseil d'État indiqua que le bilan effectué remontait à deux ans et demi et estima nécessaire de disposer des informations les plus complètes sur l'état de santé de Vincent Lambert. Il ordonna donc une expertise médicale confiée à trois spécialistes en neurosciences reconnus. Par ailleurs, vu l'ampleur et la difficulté des questions posées par l'affaire, il demanda à l'Académie nationale de médecine, au Comité consultatif national d'éthique, au Conseil national de l'ordre des médecins et à M. Jean Leonetti de lui fournir en qualité d'*amicus curiae* des observations générales de nature à l'éclairer, notamment sur les notions d'obstination déraisonnable et de maintien artificiel de la vie. Les experts examinèrent Vincent Lambert à neuf reprises, procédèrent à une série d'examens, prirent connaissance de la totalité du dossier médical, consultèrent également toutes les pièces du dossier contentieux utiles pour l'expertise et rencontrèrent toutes les parties concernées. Le 24 juin 2014, le Conseil d'État jugea légale la décision prise le 11 janvier 2014 par le médecin en charge de Vincent Lambert de mettre fin à son alimentation et hydratation artificielles.

Saisie d'une demande d'article 39 de son règlement, la Cour a décidé de faire suspendre l'exécution de l'arrêt rendu par le Conseil d'État pour la durée de la procédure devant elle. Le 4 novembre 2014, une chambre de la Cour a décidé de s'en dessaisir au profit de la Grande Chambre.

Les requérants considèrent notamment que l'arrêt de l'alimentation et de l'hydratation artificielles de Vincent Lambert est contraire aux obligations découlant de l'article 2.

En droit

1. Recevabilité :

a) *Sur la qualité pour agir au nom et pour le compte de Vincent Lambert* – i. Concernant les requérants – Deux critères principaux ressortent de l'examen de la jurisprudence : le risque que les droits de la victime directe soient privés d'une protection effective et l'absence de conflit d'intérêts entre la victime et le requérant. La Cour ne décèle en premier lieu aucun risque que les droits de Vincent Lambert soient privés d'une protection effective. En effet, les requérants, en leur qualité de proches de Vincent Lambert, peuvent invoquer devant elle en leur propre nom le droit à la vie protégé par l'article 2. Concernant le second critère, on note que l'un des aspects primordiaux de la procédure interne a précisément consisté à déterminer

les souhaits de Vincent Lambert. Dans ces conditions, il n'est pas établi qu'il y ait convergence d'intérêts entre ce qu'expriment les requérants et ce qu'aurait souhaité Vincent Lambert. Par conséquent, les requérants n'ont pas qualité pour soulever au nom et pour le compte de Vincent Lambert les griefs tirés de l'article 2.

ii. Concernant Rachel Lambert (épouse de Vincent Lambert) – aucune disposition de la Convention n'autorise un tiers intervenant à représenter une autre personne devant elle. Par ailleurs, aux termes de l'article 44 § 3 a) du règlement, un tiers intervenant est toute personne intéressée « autre que le requérant ». Dans ces conditions, la demande de Rachel Lambert doit être rejetée.

b) *Sur la qualité de victime des requérants* – Les proches parents d'une personne dont il est allégué que le décès engage la responsabilité de l'État peuvent se prétendre victimes d'une violation de l'article 2 de la Convention. Même si à ce jour Vincent Lambert est en vie, il est certain que si l'hydratation et l'alimentation artificielles devaient être arrêtées, son décès surviendrait dans un délai rapproché. Dès lors, même s'il s'agit d'une violation potentielle ou future, les requérants, en leur qualité de proches de Vincent Lambert, peuvent invoquer l'article 2.

2. Article 2 : tant les requérants que le Gouvernement font une distinction entre la mort infligée volontairement et l'abstention thérapeutique et souligne l'importance de cette distinction. Dans le contexte de la législation française, qui interdit de provoquer volontairement la mort et ne permet que dans certaines circonstances précises d'arrêter ou de ne pas entreprendre des traitements qui maintiennent artificiellement la vie, la Cour estime que la présente affaire ne met pas en jeu les obligations négatives de l'État au titre de l'article 2 et n'examine les griefs des requérants que sur le terrain des obligations positives de l'État.

Pour se faire, les éléments suivants sont pris en compte : l'existence dans le droit et la pratique internes d'un cadre législatif conforme aux exigences de l'article 2, la prise en compte des souhaits précédemment exprimés par le requérant et par ses proches, ainsi que l'avis d'autres membres du personnel médical et la possibilité d'un recours juridictionnel en cas de doute sur la meilleure décision à prendre dans l'intérêt du patient. Sont également pris en compte les critères posés par le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe.

Il n'existe pas de consensus entre les États membres du Conseil de l'Europe pour permettre l'arrêt d'un traitement maintenant artificiellement la vie, même si une majorité d'États semblent l'autoriser. Bien que les modalités qui encadrent l'arrêt du traitement soient variables d'un État à l'autre, il existe toutefois un consensus sur le rôle primordial de la volonté du patient dans la prise de décision, quel qu'en soit le mode d'expression. En conséquence, il y a lieu d'accorder une marge d'appréciation aux États, non seulement quant à la possibilité de permettre ou pas l'arrêt d'un traitement maintenant artificiellement la vie et à ses modalités de mise en œuvre, mais aussi quant à la façon de ménager un équilibre entre la protection du droit à

la vie du patient et celle du droit au respect de sa vie privée et de son autonomie personnelle.

a) *Le cadre législatif* – Les dispositions de la loi Leonetti, telles qu'interprétées par le Conseil d'État, constituent un cadre législatif suffisamment clair, aux fins de l'article 2 de la Convention, pour encadrer de façon précise la décision du médecin dans une situation telle que celle de la présente affaire en ce qu'elles définissent la notion de « traitements susceptibles d'être limités ou arrêtés » et celle d'« obstination déraisonnable » et ont donné les critères devant être pris en compte lors du processus décisionnel. Par conséquent, l'État a mis en place un cadre réglementaire propre à assurer la protection de la vie des patients.

b) *Le processus décisionnel* – Si la procédure en droit français est appelée « collégiale » et qu'elle comporte plusieurs phases de consultation (de l'équipe soignante, d'au moins un autre médecin, de la personne de confiance, de la famille ou des proches), c'est au seul médecin en charge du patient que revient la décision. La volonté du patient doit être prise en compte. La décision elle-même doit être motivée et elle est versée au dossier du patient.
La procédure collégiale dans la présente affaire a duré de septembre 2013 à janvier 2014 et, à tous les stades, sa mise en œuvre a été au-delà des conditions posées par la loi. La décision du médecin, longue de treize pages est très motivée. Le Conseil d'État a conclu qu'elle n'avait été entachée d'aucune irrégularité.
En son état actuel, le droit français prévoit la consultation de la famille (et non sa participation à la prise de décision), mais n'organise pas de médiation en cas de désaccord entre ses membres. Il ne précise pas non plus l'ordre dans lequel prendre en compte les opinions des membres de la famille, contrairement à ce qui est prévu dans certains autres États. En l'absence de consensus en la matière, l'organisation du processus décisionnel, y compris la désignation de la personne qui prend la décision finale d'arrêt des traitements et les modalités de la prise de décision, s'inscrivent dans la marge d'appréciation de l'État. La procédure a été menée en l'espèce de façon longue et méticuleuse, en allant au-delà des conditions posées par la loi, et, même si les requérants sont en désaccord avec son aboutissement, cette procédure a respecté les exigences découlant de l'article 2 de la Convention.

c) *Les recours juridictionnels* – Le Conseil d'État a examiné l'affaire dans sa formation plénière, ce qui est très inhabituel pour une procédure de référé. L'expertise demandée a été menée de façon très approfondie. Dans sa décision du 24 juin 2014, le Conseil d'État a tout d'abord examiné la compatibilité des dispositions pertinentes du code de la santé publique avec les articles 2, 8, 6 et 7 de la Convention, puis la conformité de la décision prise par le médecin en charge de Vincent Lambert avec les dispositions du code. Son contrôle a porté sur la régularité de la procédure collégiale et sur le respect des conditions de fond posées par la loi, dont il a estimé, en particulier au vu des conclusions du rapport d'expertise, qu'elles étaient réunies. Il a notamment relevé qu'il ressortait des conclusions des experts que l'état clinique

de Vincent Lambert correspondait à un état végétatif chronique, qu'il avait subi des lésions graves et étendues, dont la sévérité ainsi que le délai de cinq ans et demi écoulé depuis l'accident conduisaient à estimer qu'elles étaient irréversibles, avec un « mauvais pronostic clinique ». Le Conseil d'État a considéré que ces conclusions confirmaient celles qu'avait faites le médecin en charge. En outre, le Conseil d'État, après avoir souligné « l'importance toute particulière » que le médecin doit accorder à la volonté du malade, s'est attaché à établir quels étaient les souhaits de Vincent Lambert. Ce dernier n'ayant ni rédigé de directives anticipées, ni nommé de personne de confiance, le Conseil d'État a tenu compte du témoignage de son épouse, Rachel Lambert. Il a relevé que son mari et elle, tous deux infirmiers ayant notamment l'expérience de personnes en réanimation ou polyhandicapées, avaient souvent évoqué leurs expériences professionnelles et qu'à ces occasions Vincent Lambert avait à plusieurs reprises exprimé le souhait de ne pas être maintenu artificiellement en vie dans un état de grande dépendance. Le Conseil d'État a considéré que ces propos – dont la teneur était confirmée par un frère de Vincent Lambert – étaient datés et rapportés de façon précise par Rachel Lambert. Il a également tenu compte de ce que plusieurs des autres frères et sœurs avaient indiqué que ces propos correspondaient à la personnalité, à l'histoire et aux opinions de leur frère et a noté que les requérants n'alléguaient pas qu'il aurait tenu des propos contraires. Le Conseil d'État a enfin relevé que la consultation de la famille prévue par la loi avait eu lieu.

Même hors d'état d'exprimer sa volonté, le patient est celui dont le consentement doit rester au centre du processus décisionnel, qui en est le sujet et l'acteur principal. Le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe préconise qu'il soit intégré au processus décisionnel par l'intermédiaire des souhaits qu'il a pu précédemment exprimer, dont il prévoit qu'ils peuvent avoir été confiés oralement à un membre de la famille ou à un proche. Par ailleurs, dans un certain nombre de pays, en l'absence de directives anticipées ou « testament biologique », la volonté présumée du patient doit être recherchée selon des modalités diverses (déclarations du représentant légal, de la famille, autres éléments témoignant de la personnalité, des convictions du patient, etc.).

Dans ces conditions, le Conseil d'État a pu estimer que les témoignages qui lui étaient soumis étaient suffisamment précis pour établir quels étaient les souhaits de Vincent Lambert quant à l'arrêt ou au maintien de son traitement.

d) *Considérations finales* – La Cour a considéré conformes aux exigences de l'article 2 le cadre législatif prévu par le droit interne, tel qu'interprété par le Conseil d'État, ainsi que le processus décisionnel, mené en l'espèce d'une façon méticuleuse. Par ailleurs, quant aux recours juridictionnels dont ont bénéficié les requérants, la Cour est arrivée à la conclusion que la présente affaire avait fait l'objet d'un examen approfondi où tous les points de vue avaient pu s'exprimer et tous les aspects avaient

été mûrement pesés, au vu tant d'une expertise médicale détaillée que d'observations générales des plus hautes instances médicales et éthiques.
En conséquence, les autorités internes se sont conformées à leurs obligations positives découlant de l'article 2 de la Convention, compte tenu de la marge d'appréciation dont elles disposaient en l'espèce.
Conclusion: non-violation (douze voix contre cinq).

Jurisprudence citée par la Cour

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A.K. et L. c. Croatie, n° 37956/11, 8 janvier 2013
Ada Rossi et autres c. Italie (déc.), n^os^ 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08, 16 décembre 2008
Burke c. Royaume-Uni (déc.), n° 19807/06, 11 juillet 2006
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Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie [GC], n° 47848/08, CEDH 2014
Ciechońska c. Pologne, n° 19776/04, 14 juin 2011
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Evans c. Royaume-Uni [GC], n° 6339/05, CEDH 2007-I
Giuliani et Gaggio c. Italie [GC], n° 23458/02, CEDH 2011
Glass c. Royaume-Uni (déc.), n° 61827/00, 18 mars 2003
Haas c. Suisse, n° 31322/07, CEDH 2011
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Koch c. Allemagne, n° 497/09, 19 juillet 2012
L.C.B. c. Royaume-Uni, 9 juin 1998, *Recueil des arrêts et décisions* 1998-III
McCann et autres c. Royaume-Uni, 27 septembre 1995, série A n° 324
Nejdet Şahin et Perihan Şahin c. Turquie [GC], n° 13279/05, 20 octobre 2011
Nencheva et autres c. Bulgarie, n° 48609/06, 18 juin 2013
Post c. Pays-Bas (déc.), n° 21727/08, 20 janvier 2009
Powell c. Royaume-Uni (déc.), n° 45305/99, CEDH 2000-V
Pretty c. Royaume-Uni, n° 2346/02, CEDH 2002-III
Raw et autres c. France, n° 10131/11, 7 mars 2013
S.P., D.P. et A.T. c. Royaume-Uni, n° 23715/94, décision de la Commission du 20 mai 1996, non publiée
Sanles Sanles c. Espagne (déc.), n° 48335/99, CEDH 2000-XI
Scozzari et Giunta c. Italie [GC], n^os^ 39221/98 et 41963/98, CEDH 2000-VIII
Šneersone et Kampanella c. Italie, n° 14737/09, 12 juillet 2011
Tauira et 18 autres c. France, n° 28204/95, décision de la Commission du 4 décembre 1995, Décisions et rapports 83-A
Verein gegen Tierfabriken Schweiz (VgT) c. Suisse (n° 2) [GC], n° 32772/02, CEDH 2009
Vo c. France [GC], n° 53924/00, CEDH 2004-VIII
Y.F. c. Turquie, n° 24209/94, CEDH 2003-IX

En l'affaire Lambert et autres c. France,

La Cour européenne des droits de l'homme, siégeant en une Grande Chambre composée de :

Dean Spielmann, *président*,
Guido Raimondi,
Mark Villiger,
Isabelle Berro,
Khanlar Hajiyev,
Ján Šikuta,
George Nicolaou,
Nona Tsotsoria,
Vincent A. De Gaetano,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki,
Helena Jäderblom,
Aleš Pejchal,
Valeriu Griţco,
Egidijus Kūris, *juges*,

et de Erik Fribergh, *greffier*,

Après en avoir délibéré en chambre du conseil les 7 janvier et 23 avril 2015,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 46043/14) dirigée contre la République française et dont quatre ressortissants de cet État, M. Pierre Lambert et M^me^Viviane Lambert, M. David Philippon et M^me^ Anne Tuarze (« les requérants »), ont saisi la Cour le 23 juin 2014 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Les requérants ont été représentés par M^e^ J. Paillot, avocat à Strasbourg et M^e^ J. Triomphe, avocat à Paris. Le gouvernement français (« le Gouvernement ») a été représenté par son agent, M. F. Alabrune, directeur des affaires juridiques au ministère des Affaires étrangères.

3. Les requérants allèguent en particulier que l'arrêt de l'alimentation et de l'hydratation artificielles de Vincent Lambert serait contraire aux obligations découlant pour l'État de l'article 2 de la Convention, constituerait

un mauvais traitement constitutif de torture, au sens de l'article 3 de la Convention, ainsi qu'une atteinte à son intégrité physique, au sens de l'article 8 de la Convention.

4. La requête a été attribuée à la cinquième section de la Cour (article 52 § 1 du règlement). Le 24 juin 2014, la chambre compétente a décidé d'appliquer l'article 39 du règlement, de communiquer la requête au Gouvernement et de la traiter par priorité.

5. Le 4 novembre 2014, une chambre de la cinquième section composée de Mark Villiger, président, Angelika Nußberger, Boštjan M. Zupančič, Vincent A. De Gaetano, André Potocki, Helena Jäderblom, Aleš Pejchal, juges, ainsi que de Stephen Phillips, greffier de section, s'est dessaisie au profit de la Grande Chambre, aucune des parties ne s'y étant opposée (articles 30 de la Convention et 72 du règlement).

6. La composition de la Grande Chambre a été arrêtée conformément aux articles 26 §§ 4 et 5 de la Convention et 24 du règlement.

7. Tant les requérants que le Gouvernement ont déposé un mémoire sur la recevabilité et sur le fond de l'affaire.

8. Des observations ont également été reçues de Rachel Lambert, François Lambert et Marie-Geneviève Lambert, respectivement épouse, neveu et demi-sœur de Vincent Lambert, de l'Union nationale des associations de familles de traumatisés crâniens et de cérébro-lésés, de l'association Amréso-Bethel, ainsi que de la Clinique des droits de l'homme de l'Institut international des droits de l'homme, que le président avait autorisés à intervenir dans la procédure écrite en tant que tierces parties (articles 36 § 2 de la Convention et 44 § 3 a) du règlement). Rachel Lambert, François Lambert et Marie-Geneviève Lambert ont également été autorisés à intervenir dans la procédure orale.

9. Une audience s'est déroulée en public au Palais des droits de l'homme, à Strasbourg, le 7 janvier 2015 (article 59 § 3 du règlement).

Ont comparu :

– *pour le Gouvernement*

M. F. Alabrune, directeur des affaires juridiques,
ministère des Affaires étrangères
et du Développement international, *agent*,

M^me^ E. Jung, rédactrice à la sous-direction des droits
de l'homme, ministère des Affaires étrangères et
du Développement international,

M. R. Féral, rédacteur à la sous-direction des droits
de l'homme, ministère des Affaires étrangères

et du Développement international,
M^me^ S. RIDEAU, chargée de mission à la direction
des affaires juridiques, ministère des Affaires sociales,
de la Santé et des Droits des femmes,

M^me^ I. ERNY, conseillère juridique à la division
des droits des usagers, des affaires juridiques
et éthiques, ministère des Affaires sociales,
de la Santé et des Droits des femmes,

M^me^ P. ROUAULT-CHALIER, sous-directrice des affaires
juridiques générales et du contentieux, ministère de la Justice,
M^me^ M. LAMBLING, rédactrice au bureau du droit
des personnes et de la famille,
ministère de la Justice, *conseillers* ;

– *pour les requérants*
M^es^ J. PAILLOT, avocat,
J. TRIOMPHE, avocat, *conseils*,
M. G. PUPPINCK,
P^r^ X. DUCROCQ,
D^r^ B. JEANBLANC, *conseillers* ;

– *pour Rachel Lambert, tiers intervenant*
M^e^ L. PETTITI, avocat, *conseil*,
D^r^ OPORTUS,
D^r^ SIMON, *conseillers* ;

– *pour François et Marie-Geneviève Lambert, tiers intervenants*

M^es^ M. MUNIER-APAIRE, avocat au Conseil d'État
et à la Cour de cassation,
B. LORIT, avocat, *conseils.*

Les requérants (à l'exception du premier requérant), ainsi que Rachel Lambert, François Lambert et Marie-Geneviève Lambert, tiers intervenants, étaient également présents.

La Cour a entendu en leurs déclarations M. Alabrune, M^e^ Paillot, M^e^ Triomphe, M^e^ Munier-Apaire et M^e^ Pettiti, ainsi que M. Alabrune et M^e^ Paillot en leurs réponses aux questions posées par un juge.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

10. Les requérants, tous ressortissants français, sont M. Pierre Lambert et son épouse M^me^ Viviane Lambert, nés respectivement en 1929 et 1945 et résidant à Reims, M. David Philippon, né en 1971 et résidant à Mourmelon et M^me^ Anne Tuarze, née en 1978 et résidant à Milizac. Ils sont respectivement les parents, un demi-frère et une sœur de Vincent Lambert, né le 20 septembre 1976.

11. Victime d'un accident de la route le 29 septembre 2008, Vincent Lambert subit un grave traumatisme crânien qui le rendit tétraplégique et entièrement dépendant. Selon l'expertise médicale ordonnée par le Conseil d'État le 14 février 2014, il est dans un état végétatif chronique (paragraphe 40 ci-dessous).

12. De septembre 2008 à mars 2009, il fut hospitalisé dans les services de réanimation, puis de neurologie du centre hospitalier de Châlons-en-Champagne. De mars à juin 2009, il fut pris en charge au centre héliomarin de Berck-sur-Mer puis, à compter du 23 juin 2009, au centre hospitalier universitaire (CHU) de Reims, dans l'unité des patients en état pauci-relationnel (unité de soins de suite et de réadaptation) où il est toujours hospitalisé. Cette unité accueille huit patients en état végétatif ou en état de conscience minimale. Vincent Lambert bénéficie d'une hydratation et d'une alimentation artificielles par voie entérale, à savoir au moyen d'une sonde gastrique.

13. En juillet 2011, il fit l'objet d'une évaluation dans un service spécialisé du centre hospitalier universitaire de Liège, le Coma Science Group, qui conclut qu'il était dans un état neurovégétatif chronique qualifié d'état pauci-relationnel (conscience minimale plus). Conformément aux préconisations du Coma Science Group, il bénéficia de séances quotidiennes de kinésithérapie entre septembre 2011 et fin octobre 2012, qui ne donnèrent pas de résultats, ainsi que de quatre-vingt-sept séances d'orthophonie entre mars et septembre 2012, en vue d'établir un code de communication. Toutefois, aucun code ne put être établi. Des essais de mise en fauteuil furent également réalisés.

A. La première décision prise en vertu de la loi Leonetti

14. Les soignants de Vincent Lambert ayant cru percevoir en 2012 chez lui des signes de plus en plus marqués d'opposition aux soins et à la toilette, l'équipe médicale engagea au cours des premiers mois de 2013 la procédure collégiale prévue par la loi du 22 avril 2005 relative aux droits des malades et

à la fin de vie dite « loi Leonetti » (paragraphe 54 ci-dessous), en y associant son épouse, Rachel Lambert.

15. Cette procédure aboutit à la décision du Dr Kariger, médecin en charge de Vincent Lambert et chef du service où il est hospitalisé, d'arrêter sa nutrition et de réduire son hydratation. Cette décision fut mise en œuvre le 10 avril 2013.

B. L'ordonnance de référé du 11 mai 2013

16. Le 9 mai 2013, les requérants saisirent le juge des référés du tribunal administratif de Châlons-en-Champagne d'une action fondée sur l'article L. 521-2 du code de justice administrative (référé liberté) visant à enjoindre sous astreinte au centre hospitalier de rétablir l'alimentation et l'hydratation normales de Vincent Lambert et de lui prodiguer les éventuels soins nécessités par son état.

17. Par une ordonnance du 11 mai 2013, le juge des référés fit droit à leurs demandes. Le juge considéra que, faute de directives anticipées de Vincent Lambert et en l'absence d'une personne de confiance conformément aux dispositions pertinentes du code de la santé publique, la procédure collégiale devait être poursuivie avec sa famille, quand bien même elle était divisée sur son devenir. Le juge releva que, si l'épouse de Vincent Lambert avait été associée à cette procédure, il ressortait de l'instruction que ses parents n'avaient pas été informés de sa mise en œuvre, et que la décision d'arrêter l'alimentation et de limiter l'hydratation, dont ils ne connaissaient ni la nature ni les motifs, ne respectait pas leurs souhaits.

18. Le juge estima en conséquence que ces manquements procéduraux caractérisaient une atteinte grave et manifestement illégale à une liberté fondamentale, à savoir le droit au respect de la vie, et enjoignit au centre hospitalier de rétablir l'alimentation et l'hydratation normales de Vincent Lambert et de lui prodiguer les soins nécessaires à son état de santé.

C. La seconde décision prise en vertu de la loi Leonetti

19. À compter de septembre 2013, une nouvelle procédure collégiale fut engagée. Le Dr Kariger consulta six médecins, dont trois médecins extérieurs à l'établissement (un neurologue, une cardiologue et un anesthésiste ayant une expérience de médecine palliative), choisis respectivement par les parents, l'épouse de Vincent Lambert et l'équipe médicale. Il prit également connaissance d'une contribution écrite d'un médecin responsable d'un service comprenant une unité de vie spécialisée dans une maison de santé.

20. Par ailleurs, il réunit deux conseils de famille les 27 septembre et 16 novembre 2013, comprenant l'épouse, les parents et les huit frères et

sœurs de Vincent Lambert. Rachel Lambert et six des huit frères et sœurs se prononcèrent pour l'interruption de son alimentation et de son hydratation artificielles, tandis que les requérants se prononcèrent pour leur maintien.

21. Le 9 décembre 2013, le Dr Kariger réunit l'ensemble des médecins, ainsi que la presque totalité de l'équipe soignante. À l'issue de cette réunion, le Dr Kariger et cinq des six médecins consultés se déclarèrent favorables à l'arrêt du traitement.

22. Au terme de cette consultation, le Dr Kariger annonça le 11 janvier 2014 son intention d'interrompre la nutrition et l'hydratation artificielles à compter du 13 janvier, sous réserve d'une saisine du tribunal administratif. Sa décision, un rapport motivé de treize pages dont une synthèse de sept pages fut lue à la famille, constatait notamment que la situation de Vincent Lambert se caractérisait par la nature irréversible de ses lésions cérébrales, que le traitement apparaissait inutile, disproportionné et n'ayant d'autre effet que le maintien artificiel de la vie et qu'il était certain que Vincent Lambert ne souhaitait pas avant son accident vivre dans de telles conditions. Le Dr Kariger concluait que la prolongation de sa vie par la poursuite de traitements de nutrition et l'hydratation artificielles relevait d'une obstination déraisonnable.

D. Le jugement du tribunal administratif du 16 janvier 2014

23. Le 13 janvier 2014, les requérants saisirent le tribunal administratif de Châlons-en-Champagne d'une nouvelle requête en référé liberté fondée sur l'article L. 521-2 du code de justice administrative, afin que soit interdit au centre hospitalier et au médecin concerné de faire supprimer l'alimentation et l'hydratation de Vincent Lambert et que soit ordonné le transfert immédiat de ce dernier dans une unité de vie spécialisée à Oberhausbergen gérée par l'association Amréso-Bethel (paragraphe 8 ci-dessus). Rachel Lambert et François Lambert, neveu de Vincent Lambert, intervinrent dans la procédure en qualité de tierces parties.

24. Le tribunal administratif, siégeant en formation plénière de neuf juges, tint son audience le 15 janvier 2014. Par un jugement du 16 janvier 2014, il suspendit l'exécution de la décision du Dr Kariger du 11 janvier 2014.

25. Le tribunal affirma tout d'abord que l'article 2 de la Convention ne s'opposait pas à ce qu'un État réglemente la possibilité pour un individu de s'opposer à un traitement qui pourrait avoir pour effet de prolonger sa vie, ou celle ouverte à un médecin en charge d'un patient hors d'état d'exprimer sa volonté et dont il estimait, après avoir mis en œuvre un ensemble de garanties, que le traitement administré au patient consistait en une obstination déraisonnable, de mettre fin à ce traitement, cette possibilité s'exerçant

sous le contrôle du conseil de l'ordre des médecins, du comité d'éthique du centre hospitalier, le cas échéant, ainsi que du juge administratif et du juge pénal.

26. Le tribunal estima ensuite qu'il résultait des dispositions pertinentes du code de la santé publique, telles qu'issues de la loi Leonetti et éclairées par les travaux parlementaires, que l'alimentation et l'hydratation artificielles par voie entérale –, lesquelles empruntent aux médicaments le monopole de distribution des pharmacies et ont pour objet d'apporter des nutriments spécifiques aux patients dont les fonctions sont altérées et nécessitent le recours à des techniques invasives en vue de leur administration – constituent des traitements.

27. Observant que la décision du D[r] Kariger était fondée sur la volonté qu'aurait exprimée Vincent Lambert, lequel n'avait pas rédigé de directives anticipées ni désigné de personne de confiance, de ne pas être maintenu en vie dans un état de grande dépendance, le tribunal considéra que la position qu'il avait exprimée devant son épouse et l'un de ses frères émanait d'une personne valide qui n'était pas confrontée aux conséquences immédiates de son souhait et ne se trouvait pas dans le contexte d'une manifestation formelle d'une volonté expresse, quelle qu'ait été sa connaissance professionnelle de patients dans une telle situation. Le tribunal estima par ailleurs que le fait que Vincent Lambert ait eu des relations conflictuelles avec ses parents, dont il ne partageait pas les valeurs morales ou les engagements religieux, ne permettait pas de le regarder comme ayant manifesté une volonté certaine de refuser tout traitement, et qu'il ne pouvait pas être déduit de ses manifestations d'opposition aux soins une volonté univoque quant à sa volonté de rester ou non en vie. Le tribunal conclut que le D[r] Kariger avait apprécié de manière erronée la volonté de Vincent Lambert.

28. Par ailleurs, le tribunal releva que, selon le rapport établi en 2011 par le Coma Science Group du centre hospitalier universitaire de Liège (paragraphe 13 ci-dessus), Vincent Lambert était dans un état pauci-relationnel impliquant la persistance d'une perception émotionnelle et l'existence de possibles réactions à son environnement et que, dès lors, l'alimentation et l'hydratation artificielles n'avaient pas pour objet de le maintenir artificiellement en vie. Enfin, le tribunal estima qu'en l'absence de contraintes ou souffrances engendrées par le traitement, celui-ci ne pouvait être qualifié d'inutile ou disproportionné. Il conclut donc que la décision du D[r] Kariger constituait une atteinte grave et manifestement illégale au droit à la vie de Vincent Lambert, ordonna la suspension de son exécution et rejeta par ailleurs la demande visant à le transférer dans une unité de vie spécialisée à Oberhausbergen.

E. La décision du Conseil d'État du 14 février 2014

29. Par trois requêtes du 31 janvier 2014, Rachel Lambert, François Lambert et le centre hospitalier firent appel de ce jugement devant le juge des référés du Conseil d'État. Les requérants formèrent un appel incident, en demandant le transfert immédiat de Vincent Lambert dans l'unité de vie spécialisée. L'Union nationale des associations de familles de traumatisés crâniens et de cérébro-lésés (UNAFTC) forma une demande de tierce intervention.

30. À l'audience de référé du 6 février 2014, le président de la section du contentieux du Conseil d'État décida de renvoyer l'affaire devant la formation plénière de dix-sept membres, l'assemblée du contentieux.

31. L'audience eut lieu le 13 février 2014. Dans ses conclusions devant le Conseil d'État, le rapporteur public cita notamment les propos tenus par le ministre de la Santé aux sénateurs qui examinaient le projet de loi dite Leonetti :

> « Si le geste d'arrêter un traitement (...) entraîne la mort, l'intention du geste [n'est pas de tuer : elle est] de restituer à la mort son caractère naturel et de soulager. C'est particulièrement important pour les soignants, dont le rôle n'est pas de donner la mort. »

32. Le Conseil d'État rendit sa décision le 14 février 2014. Après avoir joint les requêtes et admis l'intervention de l'UNAFTC, le Conseil d'État précisa dans les termes suivants l'office du juge des référés appelé à statuer sur le fondement de l'article L. 521-2 du code de justice administrative :

> « Considérant qu'en vertu [de l'article L. 521-2], le juge administratif des référés, saisi d'une demande en ce sens justifiée par une urgence particulière, peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale à laquelle une autorité administrative aurait porté une atteinte grave et manifestement illégale ; que ces dispositions législatives confèrent au juge des référés, qui se prononce en principe seul et qui statue, en vertu de l'article L. 511-1 du code de justice administrative, par des mesures qui présentent un caractère provisoire, le pouvoir de prendre, dans les délais les plus brefs et au regard de critères d'évidence, les mesures de sauvegarde nécessaires à la protection des libertés fondamentales ;
>
> Considérant toutefois qu'il appartient au juge des référés d'exercer ses pouvoirs de manière particulière, lorsqu'il est saisi sur le fondement de l'article L. 521-2 (...) d'une décision, prise par un médecin sur le fondement du code de la santé publique et conduisant à interrompre ou à ne pas entreprendre un traitement au motif que ce dernier traduirait une obstination déraisonnable et que l'exécution de cette décision porterait de manière irréversible une atteinte à la vie ; qu'il doit alors, le cas échéant en formation collégiale, prendre les mesures de sauvegarde nécessaires pour faire obstacle à son exécution lorsque cette décision pourrait ne pas relever des hypothèses prévues par la loi, en procédant à la conciliation des libertés fondamentales en cause que sont le droit au respect de la vie et le droit du patient de consentir à un traitement médical et de ne pas subir un traitement qui serait le résultat d'une obstination déraisonnable ;

que, dans cette hypothèse, le juge des référés ou la formation collégiale à laquelle il a renvoyé l'affaire peut, le cas échéant, après avoir suspendu à titre provisoire l'exécution de la mesure et avant de statuer sur la requête dont il est saisi, prescrire une expertise médicale et solliciter, en application de l'article R. 625-3 du code de justice administrative, l'avis de toute personne dont la compétence ou les connaissances sont de nature à éclairer utilement la juridiction. »

33. Le Conseil d'État affirma qu'il résultait des termes mêmes des articles pertinents du code de la santé publique (articles L. 1110-5, L. 1111-4 et R. 4127-37) et des travaux parlementaires que ces dispositions étaient de portée générale et s'appliquaient à Vincent Lambert comme à tous les usagers du système de santé, en précisant ce qui suit :

« Considérant qu'il résulte de ces dispositions que toute personne doit recevoir les soins les plus appropriés à son état de santé, sans que les actes de prévention, d'investigation et de soins qui sont pratiqués lui fassent courir des risques disproportionnés par rapport au bénéfice escompté ; que ces actes ne doivent toutefois pas être poursuivis par une obstination déraisonnable et qu'ils peuvent être suspendus ou ne pas être entrepris lorsqu'ils apparaissent inutiles ou disproportionnés ou n'ayant d'autre effet que le seul maintien artificiel de la vie, que la personne malade soit ou non en fin de vie ; que lorsque celle-ci est hors d'état d'exprimer sa volonté, la décision de limiter ou d'arrêter un traitement au motif que sa poursuite traduirait une obstination déraisonnable ne peut, s'agissant d'une mesure susceptible de mettre en danger la vie du patient, être prise par le médecin que dans le respect de la procédure collégiale définie par le code de déontologie médicale et des règles de consultation fixées par le code de la santé publique ; qu'il appartient au médecin, s'il prend une telle décision, de sauvegarder en tout état de cause la dignité du patient et de lui dispenser des soins palliatifs ;

Considérant, d'autre part, qu'il résulte des dispositions des articles L. 1110-5 et L. 1111-4 du code de la santé publique, éclairées par les travaux parlementaires préalables à l'adoption de la loi du 22 avril 2005, que le législateur a entendu inclure au nombre des traitements susceptibles d'être limités ou arrêtés, au motif d'une obstination déraisonnable, l'ensemble des actes qui tendent à assurer de façon artificielle le maintien des fonctions vitales du patient ; que l'alimentation et l'hydratation artificielles relèvent de ces actes et sont, par suite, susceptibles d'être arrêtées lorsque leur poursuite traduirait une obstination déraisonnable. »

34. Le Conseil d'État considéra ensuite qu'il lui incombait de s'assurer, au vu de l'ensemble des circonstances de l'affaire, qu'avaient été respectées les conditions mises par la loi pour que puisse être prise une décision mettant fin à un traitement dont la poursuite traduirait une obstination déraisonnable et qu'il devait disposer à cette fin des informations les plus complètes, notamment sur l'état de santé de Vincent Lambert. Il estima en conséquence nécessaire, avant de statuer sur la requête, d'ordonner une expertise médicale confiée à des praticiens disposant de compétences reconnues en neurosciences, aux fins de se prononcer, de façon indépendante et collégiale, après avoir examiné le patient, rencontré l'équipe médicale

et le personnel soignant et pris connaissance de l'ensemble de son dossier médical, sur l'état actuel de Vincent Lambert et de donner au Conseil d'État toutes indications utiles sur ses perspectives d'évolution.

35. Le Conseil d'État décida que l'expertise serait confiée à un collège de trois médecins désignés par le président de la section du contentieux sur proposition respectivement des présidents de l'Académie nationale de médecine, du Comité consultatif national d'éthique et du Conseil national de l'ordre des médecins, avec la mission suivante, à remplir dans un délai de deux mois à compter de sa constitution :

> « – de décrire l'état clinique actuel de M. Lambert et son évolution depuis le bilan effectué en juillet 2011 par le Coma Science Group du centre hospitalier universitaire de Liège ;
>
> – de se prononcer sur le caractère irréversible des lésions cérébrales de M. Lambert et sur le pronostic clinique ;
>
> – de déterminer si ce patient est en mesure de communiquer, de quelque manière que ce soit, avec son entourage ;
>
> – d'apprécier s'il existe des signes permettant de penser aujourd'hui que M. Lambert réagit aux soins qui lui sont prodigués et, dans l'affirmative, si ces réactions peuvent être interprétées comme un rejet de ces soins, une souffrance, le souhait que soit mis fin au traitement qui le maintient en vie ou comme témoignant, au contraire, du souhait que ce traitement soit prolongé. »

36. Par ailleurs, le Conseil d'État estima nécessaire, vu l'ampleur et la difficulté des questions d'ordre scientifique, éthique et déontologique qui se posaient à l'occasion de l'examen de l'affaire, d'inviter, en application de l'article R. 625-3 du code de justice administrative, l'Académie nationale de médecine, le Comité consultatif national d'éthique et le Conseil national de l'ordre des médecins ainsi que M. Jean Leonetti, rapporteur de la loi du 22 avril 2005, à lui présenter avant la fin du mois d'avril 2014 des observations écrites d'ordre général de nature à l'éclairer utilement sur l'application des notions d'obstination déraisonnable et de maintien artificiel de la vie au sens de l'article L. 1110-5 précité, en particulier au regard des personnes qui sont, comme Vincent Lambert, dans un état pauci-relationnel.

37. Enfin, le Conseil d'État rejeta la demande des requérants visant son transfert dans une unité de vie spécialisée (paragraphe 29 ci-dessus).

F. L'expertise médicale et les observations générales

1. L'expertise médicale

38. Les experts examinèrent Vincent Lambert à neuf reprises. Ils prirent connaissance de la totalité du dossier médical, incluant notamment le rapport du Coma Science Group de Liège (paragraphe 13 ci-dessus), du

dossier de soins, du dossier administratif et eurent accès à tous les examens d'imagerie. Ils consultèrent également toutes les pièces du dossier contentieux utiles pour l'expertise. Par ailleurs, ils rencontrèrent entre le 24 mars et le 23 avril 2014 toutes les parties (famille, équipe médicale et soignante, médecins-conseils et représentants de l'UNAFTC et du centre hospitalier) et effectuèrent sur Vincent Lambert une série d'examens.

39. Le 5 mai 2014, les experts adressèrent aux parties leur pré-rapport en vue de recueillir leurs observations. Leur rapport définitif, déposé le 26 mai 2014, donna les réponses suivantes aux questions posées par le Conseil d'État.

a) Sur l'état clinique de Vincent Lambert et son évolution

40. Les experts indiquèrent que l'état clinique de Vincent Lambert correspondait à un état végétatif, sans aucun signe en faveur d'un état de conscience minimale. Par ailleurs, ils soulignèrent qu'il présentait des troubles de la déglutition et une atteinte motrice très sévère des quatre membres avec d'importantes rétractions tendineuses. Ils notèrent que son état de conscience s'était dégradé depuis l'évaluation faite à Liège en 2011.

b) Sur le caractère irréversible des lésions cérébrales et sur le pronostic clinique

41. Les experts rappelèrent que les deux principaux éléments à prendre en compte pour apprécier le caractère réversible ou non de lésions cérébrales sont, d'une part, le délai écoulé depuis la survenue de l'accident qui les a provoquées et, d'autre part, la nature même des lésions. En l'espèce, ils notèrent que cinq ans et demi s'étaient écoulés depuis le traumatisme crânien initial et que les examens d'imagerie avaient montré une atrophie cérébrale majeure témoignant d'une perte neuronale définitive, une destruction quasi-complète de régions stratégiques telles que les deux thalamus et de la partie haute du tronc cérébral, et une atteinte sévère des voies de communication cérébrales. Ils conclurent que les lésions cérébrales étaient irréversibles. Par ailleurs, ils indiquèrent que la longue durée d'évolution, la dégradation clinique depuis juillet 2011, l'état végétatif actuel, la nature destructrice et l'étendue des lésions cérébrales, les résultats fonctionnels, joints à la sévérité de l'atteinte motrice des quatre membres, constituaient autant d'éléments en faveur d'un mauvais pronostic clinique.

c) Sur la capacité de Vincent Lambert à communiquer avec son entourage

42. Au vu des examens effectués, et tenant compte notamment de ce que le protocole de rééducation orthophonique suivi en 2012 n'était pas parvenu à établir un code de communication, les experts conclurent que

Vincent Lambert n'était pas en mesure d'établir une communication fonctionnelle avec son entourage.

d) Sur l'existence de signes permettant de penser que Vincent Lambert réagit aux soins prodigués et sur leur interprétation

43. Les experts constatèrent que Vincent Lambert réagissait aux soins ou stimulations douloureuses, mais conclurent qu'il s'agissait de réponses non conscientes. Ils estimèrent qu'il n'était pas possible de les interpréter comme un vécu conscient de souffrance ou comme l'expression d'une intention ou d'un souhait à l'égard de l'arrêt ou de la prolongation du traitement.

2. Les observations générales

44. Les 22 et 29 avril et le 5 mai 2014, le Conseil d'État reçut les observations générales du Conseil national de l'ordre des médecins, de M. Jean Leonetti, rapporteur de la loi du 22 avril 2005, de l'Académie nationale de médecine et du Comité consultatif national d'éthique.

Le Conseil national de l'ordre des médecins précisa notamment que, par les termes de « seul maintien artificiel de la vie » à l'article L. 1110-5 du code de la santé publique, le législateur visait la situation des personnes chez lesquelles non seulement le maintien de la vie n'est assuré que par le recours à des moyens et techniques de substitution de fonctions vitales essentielles, mais aussi et surtout chez lesquelles on constate une altération profonde et irréversible des fonctions cognitives et relationnelles. Il mit en exergue l'importance de la notion de temporalité, en soulignant qu'en présence d'un état pathologique devenu chronique, entraînant une détérioration physiologique de la personne et une perte de ses facultés cognitives et relationnelles, l'obstination pourrait être considérée comme déraisonnable dès lors qu'aucun signe d'amélioration n'apparaîtrait.

M. Leonetti souligna que la loi s'appliquait à des patients cérébro-lésés, et donc atteints d'une maladie grave et incurable dans un état avancé de leur maladie, mais qui n'étaient pas obligatoirement « en fin de vie », ce qui avait amené le législateur à intituler la loi « droits des malades *et* fin de vie » et non pas « droits des malades *en* fin de vie ». Il précisa les critères de l'obstination déraisonnable ainsi que ses éléments d'évaluation et indiqua que la formulation de traitement n'ayant « d'autre effet que le seul maintien artificiel de la vie », plus stricte que celle initialement envisagée de traitement « qui prolonge artificiellement la vie », était plus restrictive et faisait référence au maintien artificiel de la vie « au sens purement biologique, avec la double caractéristique qu'il s'agit d'un patient présentant des lésions cérébrales majeures et irréversibles et que son état ne présente plus de possibilité de conscience de soi et de vie relationnelle ». Il indiqua que la loi faisait

porter la responsabilité de la décision d'arrêt de traitement au seul médecin et n'avait pas voulu transférer cette responsabilité à la famille, pour éviter tout sentiment de culpabilité et pour que la personne qui a pris la décision soit identifiée.

L'Académie nationale de médecine rappela l'interdit fondamental pour le médecin de donner délibérément la mort à autrui, qui est à la base de la relation de confiance entre le patient et le médecin. L'Académie se référa à l'analyse qu'elle faisait de longue date selon laquelle la loi Leonetti s'appliquait non seulement aux diverses situations de « fin de vie », mais aux situations posant le très difficile questionnement éthique « d'arrêt de vie » d'un patient en « survie », en état de conscience minimale ou état végétatif chronique.

Le Comité consultatif national d'éthique examina de façon approfondie les difficultés posées par les notions d'obstination déraisonnable, de traitements, de maintien artificiel de la vie, rappela les données médicales sur l'état pauci-relationnel ou état de conscience minimale et exposa le questionnement éthique relatif à de telles situations. Il préconisa notamment qu'une réflexion soit engagée pour que le processus de délibération collective puisse aboutir à un véritable processus de décision collective et qu'en cas d'absence de consensus il puisse être fait recours à une possibilité de médiation.

G. La décision du Conseil d'État du 24 juin 2014

45. L'audience eut lieu le 20 juin 2014 devant le Conseil d'État. Dans ses conclusions, le rapporteur public souligna notamment ce qui suit :

> « (...) à ceux dont la vocation [est] de soigner, le législateur [n'a] pas voulu imposer de franchir le fossé existant entre laisser la mort faire son œuvre, lorsque plus rien ne peut l'empêcher, et celui de l'infliger directement par l'administration d'un produit létal. En interrompant un traitement, le médecin ne tue pas, il se résout à se retirer lorsqu'il n'y a plus rien à faire. »

Le Conseil d'État rendit sa décision le 24 juin 2014. Après avoir admis l'intervention en qualité de tierce partie de Marie-Geneviève Lambert, demi-sœur de Vincent Lambert, et rappelé les dispositions de droit interne applicables, telles que commentées et éclairées par les observations générales reçues, le Conseil d'État examina successivement les arguments des requérants fondés sur la Convention et sur le droit interne.

46. Sur le premier point, le Conseil d'État réitéra que lorsque le juge des référés était saisi sur le fondement de l'article L. 521-2 du code de justice administrative (référé liberté) d'une décision prise par un médecin en application du code de la santé publique, conduisant à interrompre ou ne pas entreprendre un traitement au motif que ce dernier traduirait une obstination déraisonnable et que l'exécution de cette décision porterait d'une

manière irréversible une atteinte à la vie, il lui appartenait d'examiner un moyen tiré de l'incompatibilité des dispositions en cause avec la Convention (paragraphe 32 ci-dessus).

47. En l'espèce, le Conseil d'État répondit dans les termes suivants aux arguments fondés sur les articles 2 et 8 de la Convention :

> « Considérant, d'une part, que les dispositions contestées du code de la santé publique ont défini un cadre juridique réaffirmant le droit de toute personne de recevoir les soins les plus appropriés, le droit de voir respecter sa volonté de refuser tout traitement et le droit de ne pas subir un traitement médical qui traduirait une obstination déraisonnable ; que ces dispositions ne permettent à un médecin de prendre, à l'égard d'une personne hors d'état d'exprimer sa volonté, une décision de limitation ou d'arrêt de traitement susceptible de mettre sa vie en danger que sous la double et stricte condition que la poursuite de ce traitement traduise une obstination déraisonnable et que soient respectées les garanties tenant à la prise en compte des souhaits éventuellement exprimés par le patient, à la consultation d'au moins un autre médecin et de l'équipe soignante et à la consultation de la personne de confiance, de la famille ou d'un proche ; qu'une telle décision du médecin est susceptible de faire l'objet d'un recours devant une juridiction pour s'assurer que les conditions fixées par la loi ont été remplies ;
>
> Considérant ainsi que, prises dans leur ensemble, eu égard à leur objet et aux conditions dans lesquelles elles doivent être mises en œuvre, les dispositions contestées du code de la santé publique ne peuvent être regardées comme incompatibles avec les stipulations de l'article 2 de la Convention (...), ainsi qu'avec celles de son article 8 (...) »

Le Conseil d'État rejeta par ailleurs les moyens des requérants fondés sur les articles 6 et 7 de la Convention, en retenant que le rôle confié au médecin par les dispositions du code de la santé publique n'était pas incompatible avec l'obligation d'impartialité résultant de l'article 6 précité et que l'article 7, qui s'applique aux condamnations pénales, ne pouvait être utilement invoqué en l'espèce.

48. Sur l'application des dispositions pertinentes du code de la santé publique, le Conseil d'État énonça ce qui suit :

> « Considérant que, si l'alimentation et l'hydratation artificielles sont au nombre des traitements susceptibles d'être arrêtés lorsque leur poursuite traduirait une obstination déraisonnable, la seule circonstance qu'une personne soit dans un état irréversible d'inconscience ou, à plus forte raison, de perte d'autonomie la rendant tributaire d'un tel mode d'alimentation et d'hydratation ne saurait caractériser, par elle-même, une situation dans laquelle la poursuite du traitement apparaîtrait injustifiée au nom du refus de l'obstination déraisonnable ;
>
> Considérant que, pour apprécier si les conditions d'un arrêt d'alimentation et d'hydratation artificielles sont réunies s'agissant d'un patient victime de lésions cérébrales graves, quelle qu'en soit l'origine, qui se trouve dans un état végétatif ou dans un état de conscience minimale le mettant hors d'état d'exprimer sa volonté et dont le maintien en vie dépend de ce mode d'alimentation et d'hydratation, le médecin en charge doit se fonder sur un ensemble d'éléments, médicaux et non médicaux, dont le poids

respectif ne peut être prédéterminé et dépend des circonstances particulières à chaque patient, le conduisant à appréhender chaque situation dans sa singularité ; qu'outre les éléments médicaux, qui doivent couvrir une période suffisamment longue, être analysés collégialement et porter notamment sur l'état du patient, sur l'évolution de son état depuis la survenance de l'accident ou de la maladie, sur sa souffrance et sur le pronostic clinique, le médecin doit accorder une importance toute particulière à la volonté que le patient peut avoir, le cas échéant, antérieurement exprimée, quels qu'en soient la forme et le sens ; qu'à cet égard, dans l'hypothèse où cette volonté demeurerait inconnue, elle ne peut être présumée comme consistant en un refus du patient d'être maintenu en vie dans les conditions présentes ; que le médecin doit également prendre en compte les avis de la personne de confiance, dans le cas où elle a été désignée par le patient, des membres de sa famille ou, à défaut, de l'un de ses proches, en s'efforçant de dégager une position consensuelle ; qu'il doit, dans l'examen de la situation propre de son patient, être avant tout guidé par le souci de la plus grande bienfaisance à son égard (...) »

49. Le Conseil d'État précisa ensuite qu'il lui revenait de s'assurer, au vu de l'ensemble des circonstances de l'affaire et des éléments versés dans le cadre de l'instruction contradictoire menée devant lui, en particulier du rapport de l'expertise médicale, que la décision prise par le D[r] Kariger le 11 janvier 2014 avait respecté les conditions posées par la loi pour que puisse être prise une décision mettant fin à un traitement dont la poursuite traduirait une obstination déraisonnable.

50. À cet égard, le Conseil d'État statua comme suit :

« Considérant, en premier lieu, qu'il résulte de l'instruction que la procédure collégiale menée par le D[r] Kariger (...), préalablement à l'intervention de la décision du 11 janvier 2014, s'est déroulée conformément aux prescriptions de l'article R. 4127-37 du code de la santé publique et a comporté, alors que les dispositions de cet article exigent que soit pris l'avis d'un médecin et, le cas échéant, d'un second, la consultation de six médecins ; que le D[r] Kariger n'était pas légalement tenu de faire participer à la réunion du 9 décembre 2013 un second médecin désigné par les parents de M. Lambert, lesquels en avaient déjà désigné un premier ; qu'il ne résulte pas de l'instruction que certains membres du personnel soignant auraient été délibérément écartés de cette réunion ; que le D[r] Kariger était en droit de s'entretenir avec M. François Lambert, neveu du patient ; que les circonstances que le D[r] Kariger se soit opposé à une demande de récusation et au transfert de M. Lambert dans un autre établissement et qu'il se soit publiquement exprimé ne traduisent pas, eu égard à l'ensemble des circonstances de l'espèce, de manquement aux obligations qu'implique le principe d'impartialité, auquel il a satisfait ; qu'ainsi, contrairement à ce qui était soutenu devant le tribunal administratif de Châlons-en-Champagne, la procédure préalable à l'adoption de la décision du 11 janvier 2014 n'a été entachée d'aucune irrégularité ;

Considérant, en deuxième lieu, qu'il ressort, d'une part, des conclusions des experts que « l'état clinique actuel de M. Lambert correspond à un état végétatif », avec « des troubles de la déglutition, une atteinte motrice sévère des quatre membres, quelques signes de dysfonctionnement du tronc cérébral » et « une autonomie respiratoire préservée » ; que les résultats des explorations cérébrales structurales et fonctionnelles

effectuées du 7 au 11 avril 2014 (...) sont compatibles avec un tel état végétatif et que l'évolution clinique, marquée par la disparition des fluctuations de l'état de conscience de M. Lambert qui avaient été constatées lors du bilan effectué en juillet 2011 au Coma Science Group du centre hospitalier universitaire de Liège, ainsi que par l'échec des tentatives thérapeutiques actives préconisées lors de ce bilan, suggère « une dégradation de l'état de conscience depuis cette date » ;

Considérant qu'il ressort, d'autre part, des conclusions du rapport des experts que les explorations cérébrales auxquelles il a été procédé ont mis en évidence des lésions cérébrales graves et étendues, se traduisant notamment par une « atteinte sévère de la structure et du métabolisme de régions sous-corticales cruciales pour le fonctionnement cognitif » et par une « désorganisation structurelle majeure des voies de communication entre les régions cérébrales impliquées dans la conscience » ; que la sévérité de l'atrophie cérébrale et des lésions observées conduisent, avec le délai de cinq ans et demi écoulé depuis l'accident initial, à estimer les lésions cérébrales irréversibles ;

Considérant, en outre, que les experts ont conclu que « la longue durée d'évolution, la dégradation clinique depuis 2011, l'état végétatif actuel, la nature destructrice et l'étendue des lésions cérébrales, les résultats des tests fonctionnels ainsi que la sévérité de l'atteinte motrice des quatre membres » constituaient des éléments indicateurs d'un « mauvais pronostic clinique » ;

Considérant, enfin, que si les experts ont relevé que M. Lambert peut réagir aux soins qui lui sont prodigués et à certaines stimulations, ils ont indiqué que les caractéristiques de ces réactions suggèrent qu'il s'agit de réponses non conscientes et n'ont pas estimé possible d'interpréter ces réactions comportementales comme témoignant d'un «vécu conscient de souffrance » ou manifestant une intention ou un souhait concernant l'arrêt ou la poursuite du traitement qui le maintient en vie ;

Considérant que ces conclusions, auxquelles les experts ont abouti de façon unanime, au terme d'une analyse qu'ils ont menée de manière collégiale et qui a comporté l'examen du patient à neuf reprises, des investigations cérébrales approfondies, des rencontres avec l'équipe médicale et le personnel soignant en charge de ce dernier ainsi que l'étude de l'ensemble de son dossier, confirment celles qu'a faites le D^r^ Kariger quant au caractère irréversible des lésions et au pronostic clinique de M. Lambert ; que les échanges qui ont eu lieu dans le cadre de l'instruction contradictoire devant le Conseil d'État postérieurement au dépôt du rapport d'expertise ne sont pas de nature à infirmer les conclusions des experts ; que, s'il ressort du rapport d'expertise, ainsi qu'il vient d'être dit, que les réactions de M. Lambert aux soins ne peuvent pas être interprétées, et ne peuvent ainsi être regardées comme manifestant un souhait concernant l'arrêt du traitement, le D^r^ Kariger avait indiqué dans la décision contestée que ces comportements donnaient lieu à des interprétations variées qui devaient toutes être considérées avec une grande réserve et n'en a pas fait l'un des motifs de sa décision ;

Considérant, en troisième lieu, qu'il résulte des dispositions du code de la santé publique qu'il peut être tenu compte des souhaits d'un patient exprimés sous une autre forme que celle des directives anticipées ; qu'il résulte de l'instruction, en particulier du témoignage de M^me^ Rachel Lambert, qu'elle-même et son mari, tous deux infirmiers, avaient souvent évoqué leurs expériences professionnelles respectives auprès de patients

en réanimation ou de personnes polyhandicapées et qu'à ces occasions, M. Lambert avait clairement et à plusieurs reprises exprimé le souhait de ne pas être maintenu artificiellement en vie dans l'hypothèse où il se trouverait dans un état de grande dépendance ; que la teneur de ces propos, datés et rapportés de façon précise par M^me^ Rachel Lambert, a été confirmée par l'un des frères de M. Lambert ; que si ces propos n'ont pas été tenus en présence des parents de M. Lambert, ces derniers n'allèguent pas que leur fils n'aurait pu les tenir ou aurait fait part de souhaits contraires ; que plusieurs des frères et sœurs de M. Lambert ont indiqué que ces propos correspondaient à la personnalité, à l'histoire et aux opinions personnelles de leur frère ; qu'ainsi, le D^r^ Kariger, en indiquant, dans les motifs de la décision contestée, sa certitude que M. Lambert ne voulait pas avant son accident vivre dans de telles conditions, ne peut être regardé comme ayant procédé à une interprétation inexacte des souhaits manifestés par le patient avant son accident ;

Considérant, en quatrième lieu, que le médecin en charge est tenu, en vertu des dispositions du code de la santé publique, de recueillir l'avis de la famille du patient avant toute décision d'arrêt de traitement ; que le D^r^ Kariger a satisfait à cette obligation en consultant l'épouse de M. Lambert, ses parents et ses frères et sœurs lors des deux réunions mentionnées précédemment ; que si les parents de M. Lambert ainsi que certains de ses frères et sœurs ont exprimé un avis opposé à l'interruption du traitement, l'épouse de M. Lambert et ses autres frères et sœurs se sont déclarés favorables à l'arrêt du traitement envisagé ; que le D^r^ Kariger a pris en considération ces différents avis ; que, dans les circonstances de l'affaire, il a pu estimer que le fait que les membres de la famille n'aient pas eu une opinion unanime quant au sens de la décision n'était pas de nature à faire obstacle à sa décision ;

Considérant qu'il résulte de l'ensemble des considérations qui précèdent que les différentes conditions mises par loi pour que puisse être prise, par le médecin en charge du patient, une décision mettant fin à un traitement n'ayant d'autre effet que le maintien artificiel de la vie et dont la poursuite traduirait ainsi une obstination déraisonnable peuvent être regardées, dans le cas de M. Vincent Lambert et au vu de l'instruction contradictoire menée par le Conseil d'État, comme réunies ; que la décision du 11 janvier 2014 du D^r^ Kariger de mettre fin à l'alimentation et à l'hydratation artificielles de M. Vincent Lambert ne peut, en conséquence, être tenue pour illégale. »

51. En conséquence, le Conseil d'État, réformant le jugement du tribunal administratif, rejeta les demandes des requérants.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Le code de la santé publique

52. Selon l'article L. 1110-1 du code de la santé publique (ci-après « le code »), le droit fondamental à la protection de la santé doit être mis en œuvre par tous moyens disponibles au bénéfice de toute personne. L'article L. 1110-2 du code énonce que la personne malade a droit au respect de sa dignité et l'article L. 1110-9 garantit à toute personne dont l'état le requiert le droit d'accéder à des soins palliatifs, définis par l'ar-

ticle L. 1110-10 comme des soins actifs et continus visant à soulager la douleur, à apaiser la souffrance psychique, à sauvegarder la dignité de la personne malade et à soutenir son entourage.

53. La loi du 22 avril 2005 relative aux droits des malades et à la fin de vie, dite « loi Leonetti » du nom de son rapporteur, M. Jean Leonetti (paragraphe 44 ci-dessus), a modifié un certain nombre d'articles du code. Cette loi a été adoptée à la suite des travaux d'une mission parlementaire d'information présidée par M. Leonetti, qui avait pour objectif d'appréhender l'ensemble des questions posées par la fin de vie et d'envisager d'éventuelles modifications législatives ou réglementaires. Lors de ses travaux, la mission d'information a procédé à l'audition de nombreuses personnes ; elle a rendu son rapport le 30 juin 2004. La loi a été votée à l'unanimité à l'Assemblée nationale le 30 novembre 2004 et au Sénat le 12 avril 2005.

La loi n'autorise ni l'euthanasie, ni le suicide assisté. Elle ne permet au médecin d'interrompre un traitement que si sa poursuite manifeste une obstination déraisonnable (autrement dit relève de l'acharnement thérapeutique) et selon une procédure réglementée.

Les articles pertinents du code, dans leur rédaction résultant de la loi, se lisent ainsi :

Article L. 1110-5

« Toute personne a, compte tenu de son état de santé et de l'urgence des interventions que celui-ci requiert, le droit de recevoir les soins les plus appropriés et de bénéficier des thérapeutiques dont l'efficacité est reconnue et qui garantissent la meilleure sécurité sanitaire au regard des connaissances médicales avérées. Les actes de prévention, d'investigation ou de soins ne doivent pas, en l'état des connaissances médicales, lui faire courir de risques disproportionnés par rapport au bénéfice escompté.

Ces actes ne doivent pas être poursuivis par une obstination déraisonnable. Lorsqu'ils apparaissent inutiles, disproportionnés ou n'ayant d'autre effet que le seul maintien artificiel de la vie, ils peuvent être suspendus ou ne pas être entrepris. Dans ce cas, le médecin sauvegarde la dignité du mourant et assure la qualité de sa vie en dispensant les soins visés à l'article L. 1110-10 (...)

Toute personne a le droit de recevoir des soins visant à soulager sa douleur. Celle-ci doit être en toute circonstance prévenue, évaluée, prise en compte et traitée.

Les professionnels de santé mettent en œuvre tous les moyens à leur disposition pour assurer à chacun une vie digne jusqu'à la mort (...) »

Article L. 1111-4

« Toute personne prend, avec le professionnel de santé et compte tenu des informations et des préconisations qu'il lui fournit, les décisions concernant sa santé.

Le médecin doit respecter la volonté de la personne après l'avoir informée des conséquences de ses choix (...)

Aucun acte médical ni aucun traitement ne peut être pratiqué sans le consentement libre et éclairé de la personne et ce consentement peut être retiré à tout moment.

Lorsque la personne est hors d'état d'exprimer sa volonté, aucune intervention ou investigation ne peut être réalisée, sauf urgence ou impossibilité, sans que la personne de confiance prévue à l'article L. 1111-6, ou la famille, ou à défaut, un de ses proches ait été consulté.

Lorsque la personne est hors d'état d'exprimer sa volonté, la limitation ou l'arrêt de traitement susceptible de mettre sa vie en danger ne peut être réalisé sans avoir respecté la procédure collégiale définie par le code de déontologie médicale et sans que la personne de confiance prévue à l'article L. 1111-6 ou la famille ou, à défaut, un de ses proches et, le cas échéant, les directives anticipées de la personne, aient été consultés. La décision motivée de limitation ou d'arrêt de traitement est inscrite dans le dossier médical (...) »

Article L. 1111-6

« Toute personne majeure peut désigner une personne de confiance qui peut être un parent, un proche ou le médecin traitant, et qui sera consultée au cas où elle-même serait hors d'état d'exprimer sa volonté et de recevoir l'information nécessaire à cette fin. Cette désignation est faite par écrit. Elle est révocable à tout moment. Si le malade le souhaite, la personne de confiance l'accompagne dans ses démarches et assiste aux entretiens médicaux afin de l'aider dans ses décisions.

Lors de toute hospitalisation dans un établissement de santé, il est proposé au malade de désigner une personne de confiance dans les conditions prévues à l'alinéa précédent. Cette désignation est valable pour la durée de l'hospitalisation, à moins que le malade n'en dispose autrement (...) »

Article L. 1111-11

« Toute personne majeure peut rédiger des directives anticipées pour le cas où elle serait un jour hors d'état d'exprimer sa volonté. Ces directives anticipées indiquent les souhaits de la personne relatifs à sa fin de vie concernant les conditions de la limitation ou l'arrêt de traitement. Elles sont révocables à tout moment.

À condition qu'elles aient été établies moins de trois ans avant l'état d'inconscience de la personne, le médecin en tient compte pour toute décision d'investigation, d'intervention ou de traitement la concernant (...) »

54. La procédure collégiale prévue par le cinquième alinéa de l'article L. 1111-4 du code est précisée à l'article R. 4127-37 du code, qui fait partie du code de déontologie médicale et se lit ainsi :

« I. En toutes circonstances, le médecin doit s'efforcer de soulager les souffrances du malade par des moyens appropriés à son état et l'assister moralement. Il doit s'abstenir de toute obstination déraisonnable dans les investigations ou la thérapeutique et peut renoncer à entreprendre ou poursuivre des traitements qui apparaissent inutiles, disproportionnés ou qui n'ont d'autre objet ou effet que le maintien artificiel de la vie.

II. Dans les cas prévus au cinquième alinéa de l'article L. 1111-4 et au premier alinéa de l'article L. 1111-13, la décision de limiter ou d'arrêter les traitements dispensés ne peut être prise sans qu'ait été préalablement mise en œuvre une procédure collégiale. Le médecin peut engager la procédure collégiale de sa propre initiative. Il est tenu de le faire au vu des directives anticipées du patient présentées par l'un des détenteurs de celles-ci mentionnés à l'article R. 1111-19 ou à la demande de la personne de confiance, de la famille ou, à défaut, de l'un des proches. Les détenteurs des directives anticipées du patient, la personne de confiance, la famille ou, le cas échéant, l'un des proches sont informés, dès qu'elle a été prise, de la décision de mettre en œuvre la procédure collégiale.

La décision de limitation ou d'arrêt de traitement est prise par le médecin en charge du patient, après concertation avec l'équipe de soins si elle existe et sur l'avis motivé d'au moins un médecin, appelé en qualité de consultant. Il ne doit exister aucun lien de nature hiérarchique entre le médecin en charge du patient et le consultant. L'avis motivé d'un deuxième consultant est demandé par ces médecins si l'un d'eux l'estime utile.

La décision de limitation ou d'arrêt de traitement prend en compte les souhaits que le patient aurait antérieurement exprimés, en particulier dans des directives anticipées, s'il en a rédigé, l'avis de la personne de confiance qu'il aurait désignée ainsi que celui de la famille ou, à défaut, celui d'un de ses proches.

(...)

La décision de limitation ou d'arrêt de traitement est motivée. Les avis recueillis, la nature et le sens des concertations qui ont eu lieu au sein de l'équipe de soins ainsi que les motifs de la décision sont inscrits dans le dossier du patient. La personne de confiance, si elle a été désignée, la famille ou, à défaut, l'un des proches du patient sont informés de la nature et des motifs de la décision de limitation ou d'arrêt de traitement.

III. Lorsqu'une limitation ou un arrêt de traitement a été décidé en application de l'article L. 1110-5 et des articles L. 1111-4 ou L. 1111-13, dans les conditions prévues aux I et II du présent article, le médecin, même si la souffrance du patient ne peut pas être évaluée du fait de son état cérébral, met en œuvre les traitements, notamment antalgiques et sédatifs, permettant d'accompagner la personne selon les principes et dans les conditions énoncés à l'article R. 4127-38. Il veille également à ce que l'entourage du patient soit informé de la situation et reçoive le soutien nécessaire. »

55. L'article R. 4127-38 du code dispose :

« Le médecin doit accompagner le mourant jusqu'à ses derniers moments, assurer par des soins et mesures appropriés la qualité d'une vie qui prend fin, sauvegarder la dignité du malade et réconforter son entourage.

Il n'a pas le droit de provoquer délibérément la mort. »

(...)

III. TEXTES DU CONSEIL DE L'EUROPE

(...)

B. Le Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie

60. Ce guide a été élaboré par le Comité de bioéthique du Conseil de l'Europe, dans le cadre de ses travaux relatifs aux droits des patients et dans le but de faciliter la mise en œuvre des principes établis dans la Convention sur les droits de l'homme et la biomédecine.

Il a pour objet de proposer des repères pour la mise en œuvre du processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie, de rassembler les références tant normatives qu'éthiques, ainsi que les éléments relevant de la bonne pratique médicale utiles aux professionnels de santé confrontés à la mise en œuvre de ce processus décisionnel et de participer, par les clarifications qu'il apporte, à la réflexion globale sur ce sujet.

61. Le guide cite comme cadre juridique et éthique du processus décisionnel les principes d'autonomie (consentement libre, éclairé et préalable du patient), de bienfaisance et de non-malfaisance, et de justice (équité dans l'accès aux soins). Le guide précise que le médecin ne doit pas mettre en œuvre un traitement inutile ou disproportionné au regard des risques et contraintes qu'il présente ; il doit délivrer au patient des traitements proportionnés et adaptés à sa situation. Il a de plus l'obligation de prendre soin de lui, de soulager sa souffrance et de l'accompagner.

Les traitements recouvrent les interventions visant à améliorer l'état de santé d'un patient en agissant sur les causes de la maladie, mais également celles qui n'agissent pas sur l'étiologie de la maladie mais sur des symptômes, ou qui répondent à une insuffisance fonctionnelle. Sous la rubrique « Ce qui fait débat », le guide expose ce qui suit :

> « **La question de la limitation, de l'arrêt ou de la non-mise en place de l'hydratation et de la nutrition artificielles**
>
> La nourriture et la boisson données à un patient encore en capacité de se nourrir et de boire constituent des apports extérieurs relevant des besoins physiologiques qu'il convient de satisfaire. Elles relèvent des soins qui devraient être apportés, sauf en cas de refus du patient.
>
> La nutrition et l'hydratation artificielles sont apportées au patient en réponse à une indication médicale et supposent le choix d'une procédure et d'un dispositif médical (perfusion, sonde entérale).
>
> Dans un certain nombre de pays, la nutrition et l'hydratation artificielles sont ainsi considérées comme des traitements, et sont donc susceptibles d'être limitées ou arrêtées dans les conditions et selon les garanties prévues pour les limitations et arrêts de traitement (refus de traitement exprimé par le patient, refus de l'obstination déraisonnable ou d'un traitement disproportionné évalué par l'équipe soignante, et admis dans le cadre d'une procédure collective). Les questions posées les concernant sont celle de

la volonté du patient et celle du caractère approprié du traitement dans la situation considérée.

Toutefois, dans d'autres pays, il est considéré que l'hydratation et la nutrition artificielles ne sont pas des traitements susceptibles de faire l'objet d'une décision de limitation ou d'arrêt, mais sont des soins répondant à des besoins essentiels de la personne que l'on ne peut arrêter à moins que le patient, en phase terminale de sa fin de vie, en ait exprimé le souhait.

La question du caractère approprié, au plan médical, de la nutrition et de l'hydratation artificielles en phase terminale est elle-même débattue. Pour certains, la mise en œuvre ou le maintien d'une nutrition et d'une hydratation artificielles sont considérés comme nécessaires au confort du patient en fin de vie. Pour d'autres, le bénéfice pour le patient d'un recours à la nutrition et l'hydratation artificielles en phase terminale, compte tenu des recherches dans le domaine des soins palliatifs, ne va pas de soi. »

62. Le guide concerne le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie (qu'il s'agisse de leur mise en œuvre, de leur modification, de leur adaptation, de leur limitation ou de leur arrêt). Il ne porte ni sur la question de l'euthanasie, ni sur celle du suicide assisté, que certaines législations nationales autorisent.

63. Même si le processus décisionnel comprend d'autres acteurs, le guide souligne que le sujet et acteur principal en est le patient. Lorsque ce dernier ne peut pas ou plus participer à la décision, celle-ci est alors prise par un tiers, selon des modalités prévues par la législation nationale en vigueur, mais le patient est néanmoins intégré au processus décisionnel par l'intermédiaire des souhaits qu'il a pu précédemment exprimer. Le guide en énumère les différentes modalités : ils peuvent avoir été confiés oralement à un membre de la famille ou à un proche, ou à une personne de confiance désignée comme telle ; ils peuvent revêtir une expression formelle, telles les directives anticipées ou testament de vie, ou le mandat donné à un tiers, parfois appelé mandat de protection future.

64. Parmi les autres acteurs du processus décisionnel figurent, le cas échéant, le représentant légal ou mandataire, les membres de la famille et les proches, ainsi que les soignants. Le guide souligne que la place du médecin est essentielle, voire prépondérante, en raison de sa capacité à apprécier la situation de son patient sur le plan médical. Lorsque le patient n'est pas ou plus en mesure d'exprimer sa volonté, il est celui qui, dans le cadre du processus décisionnel collectif ayant impliqué l'ensemble des professionnels de santé concernés, prendra la décision clinique, guidé par l'intérêt supérieur du patient, après avoir pris connaissance de l'ensemble des éléments de contexte (consultation de la famille, des proches, de la personne de confiance, etc.) et pris en compte les souhaits précédemment exprimés lorsqu'ils existent.

Dans certains systèmes, la décision est prise par un tiers, mais le médecin est dans tous les cas le garant de la bonne marche du processus décisionnel.

65. Le guide réitère que le patient est toujours au centre du processus décisionnel, lequel revêt une dimension collective lorsque le patient ne peut plus ou ne veut plus y participer directement. Le guide distingue trois grandes étapes dans le processus décisionnel : individuelle (chaque acteur construit son argumentation sur la base des informations collectées), collective (les différents acteurs échangent et débattent entre eux) et conclusive (la prise de décision proprement dite).

66. Le guide précise qu'il est parfois nécessaire, en cas de divergence importante des positions ou de grande complexité ou de spécificité de la question posée, de prévoir la consultation de tiers soit pour enrichir le débat, soit pour lever une difficulté ou pour résoudre un conflit. La consultation d'un comité d'éthique clinique peut par exemple se révéler opportune. Au terme de la délibération collective, un accord doit être trouvé et une conclusion dégagée et validée collectivement, puis formalisée et transcrite par écrit.

67. Si le médecin prend la décision, il doit le faire sur la base des conclusions de la délibération collective et l'annoncer, le cas échéant, au patient, à la personne de confiance et/ou à l'entourage du patient, à l'équipe soignante et aux tiers concernés qui ont pris part au processus. La décision doit en outre être formalisée (sous la forme d'un écrit reprenant les motivations) et conservée en un lieu défini.

68. Le guide expose, comme point faisant débat, le recours à la sédation profonde en phase terminale, qui peut avoir pour effet de raccourcir la durée de vie restante. Le guide suggère enfin une évaluation du processus décisionnel après sa mise en œuvre.

(...)

EN DROIT

I. SUR LA QUALITÉ POUR AGIR AU NOM ET POUR LE COMPTE DE VINCENT LAMBERT

80. Les requérants considèrent que l'arrêt de l'alimentation et de l'hydratation artificielles de Vincent Lambert serait contraire aux obligations découlant pour l'État de l'article 2 de la Convention. Ils estiment que la privation de nourriture et d'hydratation serait pour lui un mauvais traitement constitutif de torture, au sens de l'article 3 de la Convention, et font également valoir que la privation de kinésithérapie depuis octobre 2012, ainsi que de rééducation à la déglutition équivalent à un traitement inhumain et dégradant prohibé par cette disposition. Ils estiment enfin que

l'arrêt de l'alimentation et de l'hydratation s'analyserait également en une atteinte à l'intégrité physique de Vincent Lambert, au sens de l'article 8 de la Convention.

81. Les articles 2, 3 et 8 de la Convention se lisent ainsi :

Article 2

« Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement (...) »

Article 3

« Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants. »

Article 8

« 1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. »

A. Sur la qualité pour agir des requérants au nom et pour le compte de Vincent Lambert

1. Les arguments des parties

a) Le Gouvernement

82. Le Gouvernement observe que les requérants n'indiquent pas vouloir agir au nom de Vincent Lambert et estime sans objet la question de savoir s'ils peuvent saisir la Cour en son nom.

b) Les requérants

83. Les requérants font valoir que toute personne doit pouvoir bénéficier des garanties apportées par la Convention, quel que soit son handicap, y compris s'il n'a pas de représentant. Ils soulignent qu'à aucun moment leur défaut de qualité ou d'intérêt à agir n'ont été mis en cause devant les juridictions internes, dans la mesure où le droit français reconnaît à la famille d'un patient dont on veut arrêter le traitement le droit de prendre position sur la mesure considérée, ce qui emporte nécessairement qualité pour agir non seulement en son propre nom devant une juridiction, mais également au nom du patient.

84. Citant les critères posés par la Cour dans l'arrêt *Koch c. Allemagne* (nº 497/09, §§ 43 et suiv., 19 juillet 2012), les requérants estiment que ces critères sont réunis en l'espèce, à savoir l'intérêt général de l'affaire, ainsi que les liens familiaux étroits et leur intérêt personnel pour l'affaire. Ils soulignent avoir saisi les juridictions nationales puis la Cour pour faire valoir les droits fondamentaux de Vincent Lambert au titre des articles 2 et 3 qu'il ne peut invoquer lui-même et que son épouse ne peut davantage invoquer, puisqu'elle a accepté la décision médicale contestée.

c) Les tiers intervenants individuels

85. Rachel Lambert, épouse de Vincent Lambert, considère que les requérants n'ont pas qualité pour agir au nom de Vincent Lambert. Elle rappelle que la Cour s'est montrée disposée à reconnaître la qualité pour agir d'un proche, soit parce que ses griefs soulevaient une question d'intérêt général touchant au « respect des droits de l'homme » et qu'en tant qu'héritier il avait un intérêt légitime à maintenir la requête, soit en raison d'un effet direct sur ses propres droits. Toutefois, dans l'affaire *Sanles Sanles c. Espagne* ((déc.), nº 48335/99, CEDH 2000-XI), la Cour a estimé que les droits invoqués par la requérante au titre des articles 2, 3, 5 et 8 de la Convention relevaient de la catégorie des droits non transférables et a conclu que l'intéressée, qui était la belle-sœur et l'héritière légitime du défunt, ne pouvait se prétendre victime d'une violation au nom de feu son beau-frère.

86. En ce qui concerne la représentation, elle rappelle qu'il est essentiel pour le représentant de démontrer qu'il a reçu des instructions précises et explicites de la part de la victime alléguée ; or, tel n'est pas le cas des requérants, qui n'ont reçu aucune instruction précise et explicite de Vincent Lambert, alors même que l'instruction diligentée par le Conseil d'État a mis en évidence qu'elle-même avait reçu de son époux ses souhaits, vœux et confidences, appuyés par des attestations produites devant les juridictions nationales.

87. François Lambert et Marie-Geneviève Lambert, neveu et demi-sœur de Vincent Lambert, estiment que les requérants n'ont pas qualité pour agir au nom de ce dernier. Ils font valoir en premier lieu que les violations des articles 2, 3 et 8 de la Convention que les requérants allèguent concernent des droits non transférables qu'ils ne peuvent s'approprier en leur nom, en deuxième lieu qu'ils n'ont pas la qualité de représentants légaux de Vincent Lambert, majeur né en 1976 et, en troisième lieu, que leur recours contrevient à la liberté de conscience de ce dernier, au droit à sa propre vie et porte atteinte à sa vie privée. François Lambert et Marie-Geneviève Lambert rappellent que si, à titre exceptionnel, la Cour a pu admettre que des parents puissent agir en lieu et place d'une victime pour invoquer une violation de

l'article 3 de la Convention, c'était dans la seule hypothèse d'une disparition ou du décès de la victime, et en présence de circonstances particulières, conditions qui ne sont pas présentes en l'espèce, rendant la requête irrecevable. Ils font valoir que la Cour a eu l'occasion de confirmer cette irrecevabilité dans des affaires de fin de vie similaires à la présente (*Sanles Sanles*, décision précitée, et *Ada Rossi et autres c. Italie* (déc.), n^os^ 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08, 58424/08, 16 décembre 2008).

88. Ils estiment enfin que, dans les faits, les requérants sont « illégitimes » à contester la décision du Conseil d'État, dès lors que la position qu'ils défendent est à l'opposé des convictions de Vincent Lambert et que les médecins comme les juges ont tenu compte des souhaits de ce dernier, exprimés à son épouse à laquelle l'unissaient des liens très forts, et en connaissance de cause compte tenu de son expérience professionnelle d'infirmier.

2. L'appréciation de la Cour

a) Rappel des principes

89. La Cour a récemment rappelé, dans les affaires *Nencheva et autres c. Bulgarie* (n° 48609/06, 18 juin 2013) et *Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie* ([GC], n° 47848/08, CEDH 2014), les principes suivants.

Pour se prévaloir de l'article 34 de la Convention, un requérant doit pouvoir se prétendre victime d'une violation de la Convention ; la notion de « victime », selon la jurisprudence constante de la Cour, doit être interprétée de façon autonome et indépendante des notions internes telles que celles concernant l'intérêt ou la qualité pour agir (*Nencheva et autres*, précité, § 88). L'intéressé doit pouvoir démontrer qu'il a « subi directement les effets » de la mesure litigieuse (*Centre de ressources juridiques au nom de Valentin Câmpeanu*, précité, § 96, et la jurisprudence citée).

90. Ce principe connaît une exception lorsque la ou les violations invoquées de la Convention sont étroitement liées à des disparitions ou décès dans des circonstances dont il est allégué qu'elles engagent la responsabilité de l'État. Dans de tels cas, en effet, la Cour reconnaît aux proches parents de la victime la qualité pour soumettre une requête (*Nencheva et autres*, précité, § 89, *Centre de ressources juridiques au nom de Valentin Câmpeanu*, précité, §§ 98-99, et la jurisprudence citée).

91. Par ailleurs, si la requête n'est pas introduite par la victime elle-même, l'article 45 § 3 du règlement impose de produire un pouvoir écrit dûment signé. Il est essentiel pour le représentant de démontrer qu'il a reçu des instructions précises et explicites de la part de la victime alléguée au nom de

laquelle il entend agir devant la Cour (*Post c. Pays-Bas* (déc.), nº 21727/08, 20 janvier 2009, *Nencheva et autres*, précité, § 83, et *Centre de ressources juridiques au nom de Valentin Câmpeanu*, précité, § 102). Les organes de la Convention ont toutefois estimé que des considérations spéciales pouvaient se justifier dans le cas de victimes alléguées de violations des articles 2, 3 et 8 de la Convention subies aux mains des autorités nationales. Des requêtes introduites par des particuliers au nom de la ou des victimes ont ainsi été déclarées recevables, alors même qu'aucun type de pouvoir valable n'avait été présenté (*Centre de ressources juridiques au nom de Valentin Câmpeanu*, précité, § 103).

92. Une attention particulière a été accordée à des facteurs de vulnérabilité, tels que l'âge, le sexe ou le handicap, propres à empêcher certaines victimes de soumettre leur cause à la Cour, compte dûment tenu par ailleurs des liens entre la victime et la personne auteur de la requête (*ibidem*).

93. Ainsi, dans l'affaire *S.P., D.P. et A.T. c. Royaume-Uni* (nº 23715/94, décision de la Commission du 20 mai 1996, non publiée), qui portait notamment sur l'article 8 de la Convention, la Commission a admis la requête introduite par un *solicitor* au nom d'enfants qu'il avait représentés dans la procédure interne, dans laquelle il avait été désigné par le tuteur *ad litem*, après avoir relevé notamment que leur mère s'en désintéressait, que les autorités locales étaient critiquées dans la requête et qu'il n'y avait pas d'opposition d'intérêts entre le *solicitor* et les enfants.

Dans l'affaire *İlhan c. Turquie* ([GC], nº 22277/93, §§ 54-55, CEDH 2000-VII), dans laquelle la victime directe souffrait de séquelles graves résultant de mauvais traitements infligés par les forces de sécurité, la Cour a estimé que la requête fondée sur les articles 2 et 3 de la Convention était valablement introduite par son frère, dès lors qu'il résultait des faits que la victime avait consenti à l'engagement de la requête, qu'il n'y avait pas de conflit d'intérêts entre elle-même et son frère, qui avait été touché de près par l'incident, et qu'elle était dans une situation particulièrement vulnérable en raison des séquelles dont elle souffrait.

Dans l'affaire *Y.F. c. Turquie* (nº 24209/94, § 31, CEDH 2003-IX), dans laquelle un mari se plaignait, en invoquant l'article 8 de la Convention, que son épouse ait été forcée de subir un examen gynécologique à l'issue de sa garde à vue, la Cour a considéré qu'il était loisible au requérant, en tant que proche de la victime, de soulever un grief concernant les violations alléguées de la Convention formulées par son épouse, compte tenu en particulier de la situation vulnérable dans laquelle elle s'était trouvée dans les circonstances particulières de l'espèce.

94. Par ailleurs, toujours dans le contexte de l'article 8 de la Convention, la Cour a admis à plusieurs reprises que des parents qui n'avaient pas de droits

parentaux puissent la saisir au nom de leurs enfants mineurs (voir notamment *Scozzari et Giunta c. Italie* [GC], nos 39221/98 et 41963/98, §§ 138-139, CEDH 2000-VIII, *Šneersone et Kampanella c. Italie*, no 14737/09, § 61, 12 juillet 2011, *Diamante et Pelliccioni c. Saint Marin*, no 32250/08, §§ 146-147, 27 septembre 2011, *A.K. et L. c. Croatie*, no 37956/11, §§ 48-50, 8 janvier 2013, et *Raw et autres c. France*, no 10131/11, §§ 51-52, 7 mars 2013). Le critère essentiel qu'elle a retenu dans ces affaires était le risque que certains intérêts des mineurs ne soient pas portés à son attention et qu'ils soient privés d'une protection effective des droits qu'ils tirent de la Convention.

95. Enfin, la Cour a adopté récemment une approche similaire dans l'affaire *Centre de ressources juridiques au nom de Valentin Câmpeanu* (précitée, § 112), qui concernait un jeune homme d'origine rom gravement handicapé et séropositif décédé à l'hôpital avant l'introduction de la requête, sans proches connus et sans que l'État lui ait désigné de représentant. Au vu des circonstances exceptionnelles de l'espèce et de la gravité des allégations formulées, la Cour a reconnu au Centre de ressources juridiques la qualité pour représenter Valentin Câmpeanu, en soulignant que conclure autrement reviendrait à empêcher que ces graves allégations de violation de la Convention puissent être examinées au niveau international.

b) Application au cas d'espèce

96. Les requérants allèguent au nom de Vincent Lambert la violation des articles 2, 3 et 8 de la Convention (paragraphe 80 ci-dessus).

97. La Cour estime tout d'abord que la jurisprudence concernant les requêtes introduites au nom de personnes décédées n'est pas applicable en l'espèce, puisque Vincent Lambert n'est pas décédé mais se trouve dans un état qualifié par l'expertise médicale d'état végétatif (paragraphe 40 ci-dessus). Il incombe donc à la Cour d'établir si l'on se trouve face à des circonstances où elle a jugé qu'une requête pouvait être introduite au nom et pour le compte d'une personne vulnérable sans que cette dernière ait donné ni pouvoir valable, ni instructions, à celui qui prétendait agir pour elle (paragraphes 93-95 ci-dessus).

98. Elle relève qu'aucune des affaires dans lesquelles elle a admis de façon exceptionnelle qu'une personne puisse agir pour une autre n'est similaire à la présente affaire. L'affaire *Centre de ressources juridiques au nom de Valentin Câmpeanu*, précitée, doit en être distinguée, dans la mesure où la victime directe était décédée et n'avait personne pour la représenter. Or, en l'espèce, si la victime directe est hors d'état de s'exprimer, plusieurs membres de sa famille proche souhaitent s'exprimer pour elle, tout en faisant valoir des points de vue diamétralement opposés. D'un côté, les requérants font essen-

tiellement valoir le droit à la vie protégé par l'article 2, dont la Cour a rappelé dans l'affaire *Pretty c. Royaume-Uni* (nº 2346/02, § 65, CEDH 2002-III) le « caractère sacré », de l'autre les tiers intervenants individuels (Rachel Lambert, François Lambert et Marie-Geneviève Lambert) se fondent sur le droit au respect de la vie privée et en particulier le droit de chacun, compris dans la notion d'autonomie personnelle (*ibidem*, § 61), de décider de quelle manière et à quel moment sa vie doit prendre fin (*ibidem*, § 67, *Haas c. Suisse*, nº 31322/07, § 51, CEDH 2011, et *Koch*, précité, § 52).

99. Pour leur part, les requérants proposent à la Cour d'appliquer les critères énoncés dans l'arrêt *Koch* (précité, § 44), qu'ils estiment remplir, à savoir l'existence de liens familiaux étroits, l'existence dans leur chef d'un intérêt personnel ou juridique suffisant à l'issue de la procédure et l'expression antérieure de leur intérêt pour l'affaire.

100. Toutefois, la Cour rappelle que, dans l'affaire (*ibidem*, § 43), le requérant soutenait que les souffrances de son épouse et les circonstances finales du décès de celle-ci l'avaient affecté au point d'emporter violation *de ses propres droits* en vertu de l'article 8 de la Convention. C'est donc sur ce point que la Cour était appelée à se prononcer, et c'est dans ce contexte qu'elle a estimé qu'il y avait lieu de tenir compte aussi des critères développés dans sa jurisprudence permettant à un proche ou à un héritier de porter une action devant elle au nom de la personne décédée (*ibidem*, § 44).

101. Or, la Cour est d'avis que ces critères ne sont pas applicables en l'espèce, puisque Vincent Lambert n'est pas décédé et que les requérants entendent soulever des griefs *en son nom.*

102. L'examen de la jurisprudence concernant les cas dans lesquels les organes de la Convention ont admis qu'un tiers puisse, dans des circonstances exceptionnelles, agir au nom et pour le compte d'une personne vulnérable (paragraphes 93-95 ci-dessus) fait ressortir les deux critères principaux suivants : le risque que les droits de la victime directe soient privés d'une protection effective et l'absence de conflit d'intérêts entre la victime et le requérant.

103. Faisant application de ces critères à la présente affaire, la Cour ne décèle en premier lieu aucun risque que les droits de Vincent Lambert soient privés d'une protection effective. En effet, conformément à sa jurisprudence constante (paragraphes 90 ci-dessus et 115 ci-dessus), les requérants, en leur qualité de proches de Vincent Lambert, peuvent invoquer devant elle en leur propre nom le droit à la vie protégé par l'article 2.

104. En application du second critère, la Cour doit ensuite établir s'il y a convergence d'intérêts entre les requérants et Vincent Lambert. À cet égard, elle relève que l'un des aspects primordiaux de la procédure interne a précisément consisté à déterminer les souhaits de ce dernier. En effet, la

décision du Dr Kariger du 11 janvier 2014 était fondée sur la certitude qu'il « ne voulait pas avant son accident vivre dans de telles conditions » (paragraphe 22 ci-dessus). Dans sa décision du 24 juin 2014, le Conseil d'État a estimé, au vu des témoignages de l'épouse et d'un frère de Vincent Lambert et des déclarations de plusieurs de ses autres frères et sœurs, qu'en se fondant sur ce motif, le Dr Kariger « ne [pouvait] être regardé comme ayant procédé à une interprétation inexacte des souhaits manifestés par le patient avant son accident » (paragraphe 50 ci-dessus). Dans ces conditions, la Cour n'estime pas établi qu'il y ait convergence d'intérêts entre ce qu'expriment les requérants et ce qu'aurait souhaité Vincent Lambert.

105. La Cour conclut que les requérants n'ont pas qualité pour soulever au nom et pour le compte de Vincent Lambert les griefs tirés des articles 2, 3 et 8 de la Convention qu'ils invoquent.

106. Il s'ensuit que ces griefs sont incompatibles *ratione personae* avec les dispositions de la Convention au sens de l'article 35 § 3 a) et doivent être rejetés en application de l'article 35 § 4.

B. Sur la qualité pour agir de Rachel Lambert au nom et pour le compte de Vincent Lambert

1. Les arguments des parties

107. Par une lettre de son conseil du 9 juillet 2014, Rachel Lambert a demandé à représenter son mari, Vincent Lambert, en qualité de tiers intervenant dans la procédure. Elle a communiqué à l'appui de cette demande un jugement du juge des tutelles de Châlons-en-Champagne du 17 décembre 2008 l'autorisant à représenter son époux dans l'exercice des pouvoirs résultant du régime matrimonial, ainsi que deux attestations établies par une sœur et un demi-frère de Vincent Lambert. Selon ces attestations, ce dernier n'aurait pas souhaité que ses parents, dont il était éloigné moralement et physiquement, prennent de décision dans son cas, mais plutôt son épouse, qui serait sa personne de confiance. Elle a également produit une attestation de sa belle-mère qui rapporte l'avoir accompagnée en juillet 2012 à la consultation d'un professeur de médecine au centre hospitalier universitaire de Liège, en présence des deux premiers requérants, consultation où elle-même et Rachel Lambert auraient fait part des souhaits de Vincent Lambert de ne pas vivre dans le handicap si la situation devait se présenter, et où la deuxième requérante aurait dit que, si la question d'une euthanasie devait se poser, elle laisserait la décision à Rachel Lambert. Dans ses observations, Rachel Lambert fait valoir qu'ayant reçu les souhaits de son mari, appuyés par des attestations qu'elle a produites, elle est seule à avoir qualité pour agir juridiquement au nom de Vincent Lambert et le représenter.

108. Le Gouvernement ne s'est pas exprimé sur ce point.

109. Les requérants soutiennent que le jugement du juge des tutelles produit par Rachel Lambert ne lui donne pas un pouvoir de représentation général de son mari, mais seulement un pouvoir de représentation dans le domaine patrimonial. Elle ne peut donc revendiquer être la seule personne à représenter son mari devant la Cour. Par ailleurs, les requérants soutiennent que les attestations qu'elle a produites n'ont aucune valeur juridique et contestent le contenu de celle de sa belle-mère. Ils relèvent que Vincent Lambert n'a pas nommé de personne de confiance et concluent qu'en l'état du droit français et faute de placement sous tutelle ou curatelle, Vincent Lambert n'est représenté par personne dans les procédures qui le concernent personnellement.

2. L'appréciation de la Cour

110. La Cour relève qu'aucune disposition de la Convention n'autorise un tiers intervenant à représenter une autre personne devant elle. Par ailleurs, aux termes de l'article 44 § 3 a) du règlement, un tiers intervenant est toute personne intéressée « autre que le requérant ».

111. Dans ces conditions, la Cour ne peut que rejeter la demande de Rachel Lambert.

C. Conclusion

112. La Cour a conclu que les requérants n'avaient pas qualité pour invoquer, au nom et pour le compte de Vincent Lambert, la violation des articles 2, 3 et 8 de la Convention (paragraphes 105-106 ci-dessus) et a également rejeté la demande faite par Rachel Lambert de représenter son mari en qualité de tiers intervenant (paragraphes 110-111 ci-dessus).

Toutefois, la Cour souligne qu'en dépit des constats qu'elle vient de faire sur la recevabilité, elle examinera ci-après l'ensemble des questions de fond soulevées par la présente affaire sous l'angle de l'article 2 de la Convention, dès lors qu'elles ont été invoquées par les requérants en leur propre nom.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 2 DE LA CONVENTION

113. Les requérants considèrent que l'arrêt de l'alimentation et de l'hydratation artificielles de Vincent Lambert serait contraire aux obligations découlant pour l'État de l'article 2 de la Convention. Ils soulèvent l'absence de clarté et de précision de la loi Leonetti et contestent le processus qui a abouti à la décision du médecin du 11 janvier 2014.

114. Le Gouvernement s'oppose à cette thèse.

A. Sur la recevabilité

115. La Cour rappelle sa jurisprudence selon laquelle les proches parents d'une personne dont il est allégué que le décès engage la responsabilité de l'État peuvent se prétendre victimes d'une violation de l'article 2 de la Convention (paragraphe 90 ci-dessus). Même si à ce jour Vincent Lambert est en vie, il est certain que si l'hydratation et l'alimentation artificielles devaient être arrêtées, son décès surviendrait dans un délai rapproché. Dès lors, même s'il s'agit d'une violation potentielle ou future (*Tauira et 18 autres c. France*, n° 28204/95, décision de la Commission du 4 décembre 1995, Décisions et rapports 83-A, pp. 112,131), la Cour considère que les requérants, en leur qualité de proches de Vincent Lambert, peuvent invoquer l'article 2.

116. La Cour constate que ce grief n'est pas manifestement mal fondé, au sens de l'article 35 § 3 a) de la Convention. La Cour relève par ailleurs qu'il ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de le déclarer recevable.

B. Sur le fond

1. Sur la norme applicable

117. La Cour rappelle que la première phrase de l'article 2, qui se place parmi les articles primordiaux de la Convention en ce qu'il consacre l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe (*McCann et autres c. Royaume-Uni*, 27 septembre 1995, §§ 146-147, série A n° 324), impose à l'État l'obligation non seulement de s'abstenir de donner la mort « intentionnellement » (obligations négatives), mais aussi de prendre les mesures nécessaires à la protection de la vie des personnes relevant de sa juridiction (obligations positives) (*L.C.B. c. Royaume-Uni*, 9 juin 1998, § 36, *Recueil des arrêts et décisions* 1998-III).

118. La Cour se penchera successivement sur ces deux aspects et examinera en premier lieu si la présente affaire met en jeu les obligations négatives de l'État au titre de l'article 2.

119. Si les requérants reconnaissent que l'arrêt de l'alimentation et de l'hydratation peut être légitime en cas d'obstination déraisonnable et s'ils disent admettre la distinction légitime entre, d'une part, l'euthanasie et le suicide assisté et, d'autre part, l'abstention thérapeutique qui consiste à arrêter ou ne pas entreprendre un traitement devenu déraisonnable, ils soutiennent à plusieurs reprises dans leurs observations que, ces conditions n'étant pas selon eux réunies, il s'agit en l'espèce de donner volontairement la mort et font référence à la notion « d'euthanasie ».

120. Le Gouvernement souligne que la finalité de la décision médicale n'est pas d'interrompre la vie, mais de mettre un terme à des traitements que le patient refuse ou, s'il ne peut exprimer sa volonté, que le médecin estime, au vu d'éléments médicaux et non médicaux, être constitutifs d'une obstination déraisonnable. Il cite le rapporteur public devant le Conseil d'État qui, dans ses conclusions du 20 juin 2014, a relevé qu'en interrompant un traitement, le médecin ne tue pas, il se résout à se retirer lorsqu'il n'y a plus rien à faire (paragraphe 45 ci-dessus).

121. La Cour observe que la loi Leonetti n'autorise ni l'euthanasie, ni le suicide assisté. Elle ne permet au médecin d'interrompre un traitement que si sa poursuite manifeste une obstination déraisonnable et selon une procédure réglementée. Dans ses observations remises au Conseil d'État, l'Académie nationale de médecine a rappelé l'interdit fondamental pour le médecin de donner délibérément la mort à autrui, qui est à la base de la relation de confiance entre le patient et le médecin. Cette interdiction figure à l'article R. 4127-38 du code de la santé publique, qui dispose que le médecin n'a pas le droit de provoquer délibérément la mort (paragraphe 55 ci-dessus).

122. Lors de l'audience du 14 février 2014, le rapporteur public devant le Conseil d'État a cité les propos tenus par le ministre de la Santé aux sénateurs qui examinaient le projet de loi dite Leonetti :

> « Si le geste d'arrêter un traitement (...) entraîne la mort, l'intention du geste [n'est pas de tuer : elle est] de restituer à la mort son caractère naturel et de soulager. C'est particulièrement important pour les soignants, dont le rôle n'est pas de donner la mort. »

123. Dans l'affaire *Glass c. Royaume-Uni* ((déc.), n° 61827/00, 18 mars 2003), les requérants se plaignaient, en invoquant l'article 2 de la Convention, de l'administration de diamorphine à leur fils, sans leur consentement, par les médecins de l'hôpital où il était soigné, au risque d'entraîner son décès. La Cour a relevé que les médecins n'avaient pas l'intention délibérée de tuer l'enfant ni de hâter son décès et a examiné les griefs des parents sous l'angle des obligations positives des autorités (voir également *Powell c. Royaume-Uni* (déc.), n° 45305/99, CEDH 2000-V).

124. La Cour note que tant les requérants que le Gouvernement font une distinction entre la mort infligée volontairement et l'abstention thérapeutique (paragraphes 119-120 ci-dessus) et souligne l'importance de cette distinction. Dans le contexte de la législation française, qui interdit de provoquer volontairement la mort et ne permet que dans certaines circonstances précises d'arrêter ou de ne pas entreprendre des traitements qui maintiennent artificiellement la vie, la Cour estime que la présente affaire ne met pas en jeu les obligations négatives de l'État au titre de l'article 2

et n'examinera les griefs des requérants que sur le terrain des obligations positives de l'État.

2. Sur le respect par l'État de ses obligations positives

a) Les arguments des parties et des tiers intervenants

i. Les requérants

125. Les requérants considèrent tout d'abord que la loi Leonetti ne s'applique pas à Vincent Lambert, qui selon eux n'est ni malade ni en fin de vie, mais gravement handicapé. Ils dénoncent le caractère « flou » de la loi sur les points suivants : la notion d'obstination déraisonnable (et en particulier le critère du traitement « n'ayant d'autre effet que le maintien artificiel de la vie » qu'ils estiment totalement imprécis) et la qualification de l'hydratation et l'alimentation artificielles comme traitements et non comme soins. Ils estiment que l'alimentation entérale que reçoit Vincent Lambert n'est pas un traitement susceptible d'être arrêté et que sa situation médicale ne relève pas de l'obstination déraisonnable.

126. Ils considèrent que le processus qui a conduit à la décision du médecin du 11 janvier 2014 n'est pas conforme aux obligations de l'État découlant de l'article 2 de la Convention. Ils font valoir qu'il n'y a pas de collégialité effective de la procédure, qui ne concerne que la prise d'avis purement consultatifs, le médecin décidant seul. Ils estiment que d'autres systèmes seraient possibles, qui permettraient à d'autres médecins ou aux membres de la famille, en l'absence de personne de confiance, de participer à la prise de décision. Ils font enfin valoir que la loi devrait prendre en compte l'hypothèse d'un désaccord entre les membres de la famille et prévoir à tout le moins une médiation.

ii. Le Gouvernement

127. Le Gouvernement fait valoir que la loi Leonetti concilie le droit au respect de la vie et le droit du patient de consentir à un traitement ou de le refuser. La définition de l'obstination déraisonnable repose sur les principes éthiques de bienveillance et non-malfaisance rappelés dans le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe, en fonction desquels les professionnels de santé ne peuvent délivrer que des traitements appropriés et doivent être guidés par le seul bénéfice du patient, lequel doit être apprécié globalement. À cet égard, des éléments médicaux, mais également non médicaux, et notamment la volonté du patient, entrent en ligne de compte. Il rappelle que, lors des débats parlementaires sur la loi, un amendement visant à exclure l'hydratation et l'alimentation artificielles du champ des traitements

a été rejeté et souligne que les traitements recouvrent aussi les moyens et interventions qui répondent à une insuffisance fonctionnelle du patient et qui supposent la mise en œuvre de techniques médicales intrusives.

128. Le Gouvernement souligne que la loi française prévoit un certain nombre de garanties procédurales : la prise en compte de la volonté du patient, de l'avis de la personne de confiance, de la famille ou des proches, et la mise en œuvre d'une procédure collégiale à laquelle la famille et les proches sont associés. Il précise enfin que la décision du médecin est soumise au contrôle du juge.

iii. Les tiers intervenants

α) Rachel Lambert

129. Rachel Lambert estime que la loi Leonetti entoure la décision du médecin de nombreuses garanties et concilie le droit de toute personne de recevoir les soins les plus appropriés et celui de ne pas subir un traitement qui traduirait une obstination déraisonnable. Elle souligne que le législateur n'a pas entendu limiter la reconnaissance d'une expression antérieure des volontés du patient aux cas où celui-ci a désigné une personne de confiance ou rédigé des directives anticipées ; lorsque tel n'est pas le cas, l'avis de la famille est sollicité avec pour premier objectif de rechercher quelle serait sa volonté.

130. Se référant à la procédure collégiale mise en œuvre en l'espèce, elle fait valoir que le D[r] Kariger a consulté six médecins (dont trois extérieurs à l'hôpital), a convoqué une réunion avec la presque totalité du personnel soignant et l'ensemble des médecins, a réuni deux conseils de famille et que sa décision est longuement motivée et témoigne du sérieux de sa démarche.

β) François Lambert et Marie-Geneviève Lambert

131. François Lambert et Marie-Geneviève Lambert considèrent que la décision du médecin a été prise conformément à la loi Leonetti précitée, dont ils rappellent les dispositions. Ils soulignent que les données de l'expertise médicale ordonnée par le Conseil d'État ont bien caractérisé la notion de traitements ne tendant plus qu'au seul maintien artificiel de la vie, en précisant que c'est l'incapacité de Vincent Lambert à s'alimenter et à s'hydrater seul sans l'assistance médicale d'une hydratation et d'une alimentation entérale qui causerait son décès.

132. Ils font valoir que le processus décisionnel a été en l'espèce particulièrement long, méticuleux et respectueux des droits de chacun, des avis médicaux et paramédicaux, ainsi que ceux des membres de la famille qui ont été invités à y participer (tout particulièrement les requérants qui ont

bénéficié de l'assistance d'un médecin librement choisi tout au long du processus) et parfaitement informés à chaque étape. La décision finale a, selon eux, été prise conformément aux processus légal et conventionnel énoncé par le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe.

γ) L'UNAFTC (Union nationale des associations de familles de traumatisés crâniens et de cérébro-lésés)

133. L'UNAFTC se fait l'écho des préoccupations des familles et établissements qu'elle fédère et fait valoir les points de vue suivants : les patients en état végétatif chronique et en état pauci-relationnel ne sont pas en fin de vie et ne sont pas maintenus artificiellement en vie ; lorsque le pronostic vital n'est pas engagé, l'alimentation et l'hydratation artificielles ne doivent pas être considérées comme un traitement susceptible d'être arrêté. L'UNAFTC considère que la volonté d'un patient ne peut être reconstituée à partir de propos oraux rapportés par une partie des membres de la famille, soutient que le doute doit toujours profiter à la vie et qu'en tout état de cause, en l'absence de directives anticipées et d'une personne de confiance, une décision d'arrêt de traitement ne peut être prise en l'absence de consensus familial.

δ) Amréso-Bethel

134. L'association Amréso-Bethel, qui gère une unité de soins accueillant des patients en état de conscience minimale ou en état végétatif chronique, expose la façon dont ces patients sont pris en charge.

ε) La Clinique des droits de l'homme

135. Au vu de la pluralité des conceptions entourant la fin de vie dans le monde et des différences quant aux conditions dans lesquelles l'euthanasie passive peut être pratiquée, la Clinique des droits de l'homme considère que les États devraient bénéficier d'une marge d'appréciation pour opérer un équilibre entre l'autonomie personnelle du patient et la protection de sa vie.

b) Appréciation de la Cour

i. Considérations générales

α) Sur l'état de la jurisprudence

136. La Cour n'a jamais statué sur la question qui fait l'objet de la présente requête, mais elle a eu à connaître d'un certain nombre d'affaires qui portaient sur des problèmes voisins.

137. Dans un premier groupe d'affaires, les requérants ou leurs proches invoquaient le droit de mourir en se fondant sur différents articles de la Convention.

Dans la décision *Sanles Sanles*, précitée, la requérante faisait valoir au nom de son beau-frère, tétraplégique souhaitant mettre fin à ses jours avec l'assistance de tiers et décédé avant l'introduction de la requête, le droit à une mort digne, en invoquant les articles 2, 3, 5, 6, 8, 9 et 14 de la Convention. La Cour a rejeté la requête comme incompatible *ratione personae* avec les dispositions de la Convention.

Dans l'affaire *Pretty*, précitée, la requérante souffrait d'une maladie neurodégénérative incurable au stade terminal et se plaignait, en invoquant les articles 2, 3, 8, 9 et 14 de la Convention, que son mari ne puisse l'aider à se suicider sans faire l'objet de poursuites de la part des autorités britanniques. La Cour a conclu qu'il n'y avait pas violation de ces articles.

Les affaires *Haas* et *Koch*, précitées, portaient sur le suicide assisté et les requérants invoquaient l'article 8 de la Convention. Dans l'affaire *Haas*, dans laquelle le requérant, souffrant de longue date d'un grave trouble affectif bipolaire, souhaitait mettre fin à ses jours et se plaignait de ne pouvoir se procurer sans ordonnance médicale la substance létale nécessaire à cette fin, la Cour a conclu qu'il n'y avait pas violation de l'article 8. Dans l'affaire *Koch*, le requérant alléguait que le refus d'autoriser son épouse (paralysée et sous ventilation artificielle) à se procurer une dose mortelle de médicaments pour lui permettre de mettre fin à ses jours avait porté atteinte au droit de celle-ci, ainsi qu'à son propre droit, au respect de leur vie privée et familiale. Il se plaignait également du refus des juridictions nationales d'examiner ses griefs au fond et la Cour n'a conclu à la violation de l'article 8 que sur ce point.

138. Dans un second groupe d'affaires, les requérants contestaient l'administration ou l'arrêt d'un traitement.

Dans l'affaire *Glass*, précitée, les requérants se plaignaient de l'administration sans leur consentement de diamorphine à leur enfant malade par les médecins de l'hôpital, ainsi que de la mention « ne pas réanimer » figurant dans son dossier. Dans sa décision précitée du 18 mars 2003, la Cour a déclaré manifestement mal fondé leur grief tiré de l'article 2 de la Convention et, dans son arrêt du 9 mars 2004, elle a conclu à la violation de l'article 8 de la Convention.

Dans l'affaire *Burke c. Royaume-Uni* ((déc.), n° 19807/06, 11 juillet 2006), le requérant souffrait d'une maladie neurodégénérative incurable et craignait que les directives applicables au Royaume-Uni ne puissent conduire le moment venu à l'arrêt de son hydratation et de sa nutrition artificielles. La Cour a déclaré irrecevable pour défaut manifeste de fondement sa requête, fondée sur les articles 2, 3 et 8 de la Convention.

Enfin, dans la décision *Ada Rossi et autres*, précitée, la Cour a déclaré incompatible *ratione personae* la requête présentée par des personnes physiques

et associations qui se plaignaient, sous l'angle des articles 2 et 3 de la Convention, des effets négatifs que pourrait avoir à leur égard l'exécution d'un arrêt de la Cour de cassation italienne autorisant l'arrêt de l'hydratation et de la nutrition artificielles d'une jeune fille en état végétatif[2].

139. La Cour rappelle qu'à l'exception des violations de l'article 8 dans les arrêts *Glass* et *Koch*, précités, elle n'a conclu à la violation de la Convention dans aucune de ces affaires[3].

β) Sur le contexte

140. L'article 2 impose à l'État l'obligation de prendre les mesures nécessaires à la protection de la vie des personnes relevant de sa juridiction (*L.C.B.*, précité, § 36, et *Powell*, décision précitée) ; dans le domaine de la santé publique, ces obligations positives impliquent la mise en place par l'État d'un cadre réglementaire imposant aux hôpitaux, qu'ils soient privés ou publics, l'adoption de mesures propres à assurer la protection de la vie des malades (*Calvelli et Ciglio c. Italie* [GC], n° 32967/96, § 49, CEDH 2002-I, *Glass*, décision précitée, *Vo c. France* [GC], n° 53924/00, § 89, CEDH 2004-VIII, et *Centre de ressources juridiques au nom de Valentin Câmpeanu*, précité, § 130).

141. La Cour souligne qu'elle n'est pas saisie dans la présente affaire de la question de l'euthanasie, mais de celle de l'arrêt de traitements qui maintiennent artificiellement la vie (paragraphe 124 ci-dessus).

142. La Cour a rappelé dans l'arrêt *Haas* (précité, § 54) que la Convention doit être lue comme un tout (voir, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) c. Suisse (n° 2)* [GC], n° 32772/02, § 83, CEDH 2009). Dans l'affaire *Haas* (*ibidem*), la Cour a estimé que, dans le cadre de l'examen d'une éventuelle violation de l'article 8, il convenait de se référer à l'article 2 de la Convention. La Cour considère que l'inverse est également vrai : dans une affaire telle que celle de l'espèce il faut se référer, dans le cadre de l'examen d'une éventuelle violation de l'article 2, à l'article 8 de la Convention, et au droit au respect de la vie privée ainsi qu'à la notion d'autonomie personnelle qu'il inclut. La Cour a déclaré dans l'arrêt *Pretty* (précité, § 67) ne pouvoir exclure que le fait d'empêcher par la loi la requérante d'exercer son choix d'éviter ce qui, à ses yeux, constituera une fin de vie indigne et pénible représente une atteinte au droit de l'intéressée au respect de sa vie privée, au sens de l'article 8 § 1 de la Convention. Dans l'arrêt *Haas* (précité, § 51), elle a affirmé que le droit d'un individu de

2. Ce paragraphe a été rectifié conformément à l'article 81 du règlement de la Cour.
3. Ce paragraphe a été rectifié conformément à l'article 81 du règlement de la Cour.

décider de quelle manière et à quel moment sa vie doit prendre fin était l'un des aspects du droit au respect de sa vie privée.

La Cour renvoie particulièrement aux paragraphes 63 et 65 de l'arrêt *Pretty*, où elle s'est ainsi exprimée :

> « 63. (…) En matière médicale, le refus d'accepter un traitement particulier pourrait, de façon inéluctable, conduire à une issue fatale, mais l'imposition d'un traitement médical sans le consentement du patient s'il est adulte et sain d'esprit s'analyserait en une atteinte à l'intégrité physique de l'intéressé pouvant mettre en cause les droits protégés par l'article 8 § 1 de la Convention. Comme l'a admis la jurisprudence interne, une personne peut revendiquer le droit d'exercer son choix de mourir en refusant de consentir à un traitement qui pourrait avoir pour effet de prolonger sa vie (…)
>
> 65. La dignité et la liberté de l'homme sont l'essence même de la Convention. Sans nier en aucune manière le principe du caractère sacré de la vie protégé par la Convention, la Cour considère que c'est sous l'angle de l'article 8 que la notion de qualité de la vie prend toute sa signification. À une époque où l'on assiste à une sophistication médicale croissante et à une augmentation de l'espérance de vie, de nombreuses personnes redoutent qu'on ne les force à se maintenir en vie jusqu'à un âge très avancé ou dans un état de grave délabrement physique ou mental aux antipodes de la perception aiguë qu'elles ont d'elles-mêmes et de leur identité personnelle. »

143. La Cour tiendra compte de ces considérations dans l'examen du respect par l'État de ses obligations positives découlant de l'article 2. Elle rappelle aussi que, lorsqu'elle a été saisie de la question de l'administration ou du retrait de traitements médicaux dans les affaires *Glass* et *Burke*, précitées, elle a pris en compte les éléments suivants :

– l'existence dans le droit et la pratique internes d'un cadre législatif conforme aux exigences de l'article 2 (*Glass*, décision précitée) ;

– la prise en compte des souhaits précédemment exprimés par le requérant et par ses proches, ainsi que l'avis d'autres membres du personnel médical (*Burke*, décision précitée) ;

– la possibilité d'un recours juridictionnel en cas de doute sur la meilleure décision à prendre dans l'intérêt du patient (*ibidem)*.

La Cour prendra ces éléments en considération pour l'examen de la présente affaire. Elle tiendra également compte des critères posés par le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe (paragraphes 60-68 ci-dessus).

γ) Sur la marge d'appréciation

144. La Cour rappelle que l'article 2 figure parmi les articles primordiaux de la Convention, qu'aucune dérogation au titre de l'article 15 n'y est autorisée en temps de paix et qu'elle interprète strictement les exceptions qu'il définit (voir notamment *Giuliani et Gaggio c. Italie* [GC], n° 23458/02, §§ 174-177, CEDH 2011). Toutefois, dans le contexte des obligations posi-

tives de l'État, lorsqu'elle a été saisie de questions scientifiques, juridiques et éthiques complexes portant en particulier sur le début ou la fin de la vie et en l'absence de consensus entre les États membres, la Cour a reconnu à ces derniers une certaine marge d'appréciation.

Tout d'abord, la Cour rappelle que, lorsqu'elle a examiné sous l'angle de l'article 2 de la Convention le point de départ du droit à la vie dans l'affaire *Vo* précitée (qui concernait la relaxe du chef d'homicide involontaire du médecin responsable de la mort *in utero* de l'enfant de la requérante), elle a conclu que cette question relevait de la marge d'appréciation qui doit être reconnue aux États dans ce domaine. Elle a tenu compte de l'absence tant d'une solution commune entre les États contractants que d'un consensus européen sur la définition scientifique et juridique des débuts de la vie (§ 82).

Elle a réitéré cette approche, notamment dans l'affaire *Evans c. Royaume-Uni* ([GC], nº 6339/05, §§ 54-56, CEDH 2007-I, concernant le fait que le droit interne autorise le retrait par l'ex-compagnon de la requérante de son consentement à la conservation et à l'utilisation des embryons qu'ils avaient créés conjointement) et dans l'affaire *A, B et C c. Irlande* ([GC], nº 25579/05, § 237, CEDH 2010, dans laquelle les requérantes contestaient pour l'essentiel, sous l'angle de l'article 8 de la Convention, l'interdiction en Irlande de l'avortement pour motifs de santé ou de bien-être).

145. S'agissant de la question du suicide assisté, la Cour a relevé, dans le contexte de l'article 8 de la Convention, qu'il n'y avait pas de consensus au sein des États membres du Conseil de l'Europe quant au droit d'un individu de décider de quelle manière et à quel moment sa vie doit prendre fin et en a conclu que la marge d'appréciation des États dans ce domaine était « considérable » (*Haas*, précité, § 55, et *Koch*, précité, § 70).

146. Par ailleurs, la Cour a énoncé de façon générale, dans l'affaire *Ciechońska c. Pologne* (nº 19776/04, § 65, 14 juin 2011), qui concernait la responsabilité des autorités dans le décès accidentel du mari de la requérante, que le choix par l'État des moyens pour assumer ses obligations positives découlant de l'article 2 relève en principe de sa marge d'appréciation.

147. La Cour constate qu'il n'existe pas de consensus entre les États membres du Conseil de l'Europe pour permettre l'arrêt d'un traitement maintenant artificiellement la vie, même si une majorité d'États semblent l'autoriser. Bien que les modalités qui encadrent l'arrêt du traitement soient variables d'un État à l'autre, il existe toutefois un consensus sur le rôle primordial de la volonté du patient dans la prise de décision, quel qu'en soit le mode d'expression (...)

148. En conséquence, la Cour considère que, dans ce domaine qui touche à la fin de la vie, comme dans celui qui touche au début de la vie,

il y a lieu d'accorder une marge d'appréciation aux États, non seulement quant à la possibilité de permettre ou pas l'arrêt d'un traitement maintenant artificiellement la vie et à ses modalités de mise en œuvre, mais aussi quant à la façon de ménager un équilibre entre la protection du droit à la vie du patient et celle du droit au respect de sa vie privée et de son autonomie personnelle (voir, *mutatis mutandis*, *A, B et C c. Irlande*, précité, § 237). Cette marge d'appréciation n'est toutefois pas illimitée (*ibidem*, § 238), la Cour se réservant de contrôler le respect par l'État de ses obligations découlant de l'article 2.

ii. Application au cas d'espèce

149. Les requérants soulèvent l'absence de clarté et de précision de la loi Leonetti et contestent le processus qui a abouti à la décision du médecin du 11 janvier 2014. À leurs yeux, ces déficiences résulteraient d'un manquement des autorités nationales aux obligations de protection que leur impose l'article 2 de la Convention.

α) Le cadre législatif

150. Les requérants se plaignent du manque de précision et de clarté de la loi, dont ils estiment qu'elle ne s'applique pas au cas de Vincent Lambert, qui n'est ni malade ni en fin de vie. Ils considèrent également que les notions d'obstination déraisonnable et de traitement pouvant être arrêté ne sont pas définies par la loi avec suffisamment de précision.

151. La Cour renvoie au cadre législatif tracé par le code de la santé publique (ci-après « le code »), tel que modifié par la loi Leonetti (paragraphes 52-54 ci-dessus). Elle rappelle par ailleurs que l'interprétation est inhérente à l'exercice de la fonction juridictionnelle (voir, entre autres, *Nejdet Şahin et Perihan Şahin c. Turquie* [GC], nº 13279/05, § 85, 20 octobre 2011). Elle observe qu'avant les décisions rendues dans la présente affaire, les juridictions françaises n'avaient encore jamais été appelées à interpréter les dispositions de la loi Leonetti, qui était pourtant en vigueur depuis neuf ans. En l'espèce, le Conseil d'État a été amené à préciser le champ d'application de la loi, et à définir les notions de « traitements » et d'« obstination déraisonnable » (voir ci-dessous).

– *Le champ d'application de la loi*

152. Dans sa décision du 14 février 2014, le Conseil d'État s'est prononcé sur le champ d'application de la loi : il a jugé qu'il résultait des termes mêmes des articles applicables, ainsi que des travaux parlementaires préalables à l'adoption de la loi, que ces dispositions étaient de portée

générale et qu'elles étaient applicables à tous les usagers du système de santé, que le patient soit ou non en fin de vie (paragraphe 33 ci-dessus).

153. La Cour observe que, dans ses observations au Conseil d'État, M. Jean Leonetti, rapporteur de la loi du 22 avril 2005, a précisé dans ses observations en qualité d'*amicus curiae* que la loi s'appliquait à des patients cérébro-lésés, et donc atteints d'une maladie grave et incurable dans un état avancé de leur maladie, mais qui ne sont pas obligatoirement « en fin de vie », ce qui avait amené le législateur à intituler la loi « droits des malades *et* fin de vie » et non pas « droits des malades *en* fin de vie » (voir dans le même sens au paragraphe 44 ci-dessus les observations de l'Académie nationale de médecine).

– *La notion de traitements*

154. Dans sa décision du 14 février 2014, le Conseil d'État a interprété la notion de traitements susceptibles d'être limités ou arrêtés. Il a considéré, au vu des dispositions des articles L. 1110-5 et 1111-4 précités et des travaux parlementaires, que le législateur avait entendu inclure dans lesdits traitements l'ensemble des actes qui tendent à assurer de façon artificielle le maintien des fonctions vitales du patient et que l'alimentation et l'hydratation artificielles faisaient partie de ces actes. Les observations remises au Conseil d'État au titre d'*amicus curiae* convergent sur ce point.

155. La Cour note que le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe aborde ces questions : le guide précise que les traitements recouvrent non seulement les interventions visant à améliorer l'état de santé d'un patient en agissant sur les causes de la maladie, mais également celles qui n'agissent pas sur l'étiologie de la maladie mais sur des symptômes, ou qui répondent à une insuffisance fonctionnelle. Le guide relève que la nutrition et l'hydratation artificielles sont apportées au patient en réponse à une indication médicale et supposent le choix d'une procédure et d'un dispositif médical (perfusion, sonde entérale). Le guide observe qu'il existe des différences d'approche selon les pays : certains les considèrent comme des traitements susceptibles d'être limités ou arrêtés dans les conditions et selon les garanties prévues par le droit interne ; les questions posées les concernant sont alors celles de la volonté du patient et celle du caractère approprié du traitement dans la situation considérée. Dans d'autres pays, elles sont considérées comme des soins répondant à des besoins essentiels de la personne que l'on ne peut arrêter à moins que le patient, en phase terminale de sa fin de vie, en ait exprimé le souhait (paragraphe 61 ci-dessus).

– La notion d'obstination déraisonnable

156. Aux termes de l'article L. 1110-5 du code, un traitement est constitutif d'une obstination déraisonnable lorsqu'il est inutile, disproportionné ou qu'il n'a « d'autre effet que le seul maintien artificiel de la vie » (paragraphe 53 ci-dessus). C'est ce dernier critère qui a été appliqué dans la présente affaire, et que les requérants estiment imprécis.

157. Dans ses observations au Conseil d'État en qualité d'*amicus curiae,* M. Leonetti a précisé que cette formulation, plus stricte que celle initialement envisagée de traitement « qui prolonge artificiellement la vie », était plus restrictive et faisait référence au maintien artificiel de la vie « au sens purement biologique, avec la double caractéristique qu'il s'agit d'un patient présentant des lésions cérébrales majeures et irréversibles et que son état ne présente plus de possibilité de conscience de soi et de vie relationnelle » (paragraphe 44 ci-dessus). Dans le même sens, le Conseil national de l'ordre des médecins a souligné l'importance de la notion de temporalité, en retenant qu'en présence d'un état pathologique devenu chronique, entraînant une détérioration physiologique de la personne et une perte de ses facultés cognitives et relationnelles, l'obstination pourrait être considérée comme déraisonnable dès lors qu'aucun signe d'amélioration n'apparaîtrait (*ibidem*).

158. Dans sa décision du 24 juin 2014, le Conseil d'État a détaillé les éléments à prendre en compte par le médecin pour apprécier si les conditions de l'obstination déraisonnable étaient réunies, tout en indiquant que chaque situation devait être appréhendée dans sa singularité : les éléments médicaux (dont il a indiqué qu'ils devaient couvrir une période suffisamment longue, être analysés collégialement et porter notamment sur l'état du patient, sur l'évolution de son état, sur sa souffrance et sur le pronostic clinique) et les éléments non médicaux, à savoir la volonté du patient, quel qu'en soit le mode d'expression, à laquelle le médecin doit « accorder une importance toute particulière », et l'avis de la personne de confiance, de la famille ou des proches.

159. La Cour relève que le Conseil d'État a énoncé deux importantes garanties dans cette décision : il a tout d'abord affirmé que « la seule circonstance qu'une personne soit dans un état irréversible d'inconscience ou, à plus forte raison, de perte d'autonomie la rendant tributaire d'un tel mode d'alimentation et d'hydratation ne saurait caractériser, par elle-même, une situation dans laquelle la poursuite de ce traitement apparaîtrait injustifiée au nom du refus de l'obstination déraisonnable ». Par ailleurs, il a souligné qu'au cas où la volonté du patient ne serait pas connue, elle ne pourrait être présumée consister en un refus d'être maintenu en vie (paragraphe 48 ci-dessus).

160. Au terme de cette analyse, la Cour ne peut suivre l'argumentation des requérants. Elle considère que les dispositions de la loi Leonetti, telle qu'interprétées par le Conseil d'État, constituent un cadre législatif suffisamment clair, aux fins de l'article 2 de la Convention, pour encadrer de façon précise la décision du médecin dans une situation telle que celle de la présente affaire. La Cour conclut dès lors que l'État a mis en place un cadre réglementaire propre à assurer la protection de la vie des patients (paragraphe 140 ci-dessus).

β) Le processus décisionnel

161. Les requérants contestent le processus décisionnel, dont ils estiment qu'il aurait dû être véritablement collégial ou à tout le moins prévoir une médiation en cas de désaccord.

162. La Cour relève tout d'abord que ni l'article 2, ni sa jurisprudence ne peuvent se lire comme imposant des obligations quant à la procédure à suivre pour arriver à un éventuel accord. Elle rappelle que, dans l'affaire *Burke*, précitée, elle a estimé conforme à l'article 2 la procédure consistant à rechercher les souhaits du patient et consulter ses proches, ainsi que d'autres membres du personnel médical (paragraphe 143 ci-dessus).

163. La Cour observe que, si la procédure en droit français est appelée « collégiale » et qu'elle comporte plusieurs phases de consultation (de l'équipe soignante, d'au moins un autre médecin, de la personne de confiance, de la famille ou des proches), c'est au seul médecin en charge du patient que revient la décision. La volonté du patient doit être prise en compte. La décision elle-même doit être motivée et elle est versée au dossier du patient.

164. Dans ses observations en qualité d'*amicus curiae*, M. Jean Leonetti a rappelé que la loi fait porter la responsabilité de la décision d'arrêt de traitement au seul médecin et n'a pas voulu transférer cette responsabilité à la famille, pour éviter tout sentiment de culpabilité et pour que la personne qui a pris la décision soit identifiée.

165. Il résulte des éléments de droit comparé dont la Cour dispose que, dans les États qui permettent l'arrêt des traitements et en l'absence de directives anticipées du patient, il existe une grande variété de modalités quant à la façon dont est prise la décision finale d'arrêt des traitements : elle peut l'être par le médecin (c'est le cas le plus fréquent), de façon conjointe par le médecin et la famille, par la famille ou le représentant légal, ou par les tribunaux (...)

166. La Cour observe que la procédure collégiale dans la présente affaire a duré de septembre 2013 à janvier 2014 et que, à tous les stades, sa mise en œuvre a été au-delà des conditions posées par la loi : alors que la procédure prévoit la consultation d'un autre médecin et éventuellement d'un

second, le Dr Kariger a consulté six médecins, dont l'un désigné par les requérants ; il a réuni la presque totalité de l'équipe soignante et convoqué deux conseils de famille auxquels ont participé l'épouse, les parents et les huit frères et sœurs de Vincent Lambert. À l'issue de ces réunions, l'épouse de Vincent Lambert et six de ses frères et sœurs se sont déclarés favorables à l'arrêt des traitements, ainsi que cinq des six médecins consultés, alors que les requérants s'y sont opposés. Le médecin s'est également entretenu avec François Lambert, le neveu de Vincent Lambert. Sa décision, longue de treize pages (dont une version abrégée de sept pages a été lue à la famille) est très motivée. Le Conseil d'État a conclu, dans sa décision du 24 juin 2014, qu'elle n'avait été entachée d'aucune irrégularité (paragraphe 50 ci-dessus).

167. Le Conseil d'État a estimé que le médecin avait satisfait à l'obligation de consulter la famille et qu'il avait pu légalement prendre sa décision en l'absence d'une opinion unanime de cette dernière. La Cour note qu'en son état actuel, le droit français prévoit la consultation de la famille (et non sa participation à la prise de décision), mais n'organise pas de médiation en cas de désaccord entre ses membres. Il ne précise pas non plus l'ordre dans lequel prendre en compte les opinions des membres de la famille, contrairement à ce qui est prévu dans certains autres États.

168. La Cour relève l'absence de consensus en la matière (paragraphe 165 ci-dessus) et considère que l'organisation du processus décisionnel, y compris la désignation de la personne qui prend la décision finale d'arrêt des traitements et les modalités de la prise de décision, s'inscrivent dans la marge d'appréciation de l'État. Elle constate que la procédure a été menée en l'espèce de façon longue et méticuleuse, en allant au-delà des conditions posées par la loi, et estime que, même si les requérants sont en désaccord avec son aboutissement, cette procédure a respecté les exigences découlant de l'article 2 de la Convention (paragraphe 143 ci-dessus).

γ) Les recours juridictionnels

169. La Cour examinera enfin les recours dont ont bénéficié les requérants dans la présente affaire. Elle observe que le Conseil d'État, qui était saisi pour la première fois d'un recours contre une décision d'arrêt des traitements en vertu de la loi Leonetti, a apporté d'importantes précisions dans ses décisions des 14 février et 24 juin 2014 quant à l'étendue du contrôle exercé par le juge des référés administratifs dans un cas tel que celui de l'espèce.

170. Les requérants avaient saisi le tribunal administratif d'une requête en référé liberté sur le fondement de l'article L. 521-2 du code de justice administrative, qui prévoit que le juge « saisi d'une demande en ce sens justifiée par une urgence particulière, peut ordonner toutes mesures nécessaires

à la sauvegarde d'une liberté fondamentale à laquelle une autorité administrative aurait porté une atteinte grave et manifestement illégale ». Lorsqu'il est saisi sur ce fondement, le juge administratif des référés statue en principe seul, dans l'urgence, et peut prendre des mesures provisoires sur un critère d'évidence (l'illégalité *manifeste*).

171. La Cour relève que, tel que son office a été défini par le Conseil d'État (paragraphe 32 ci-dessus), le juge des référés se trouve investi, non seulement du pouvoir de suspendre la décision du médecin, mais encore de procéder à un contrôle de légalité complet de cette décision (et non pas sur le seul critère de son illégalité manifeste), si nécessaire en formation collégiale, et au besoin après avoir ordonné une expertise médicale et demandé des avis au titre d'*amicus curiae*.

172. Le Conseil d'État a également précisé, dans sa décision du 24 juin 2014, qu'eu égard à l'office particulier qui était le sien dans un tel cas, le juge devait – outre les moyens tirés de la non-conformité de la décision à la loi – examiner les moyens tirés de l'incompatibilité des dispositions législatives dont il était fait application avec la Convention.

173. La Cour relève que le Conseil d'État a examiné l'affaire dans sa formation plénière (l'assemblée du contentieux, composée de dix-sept membres), ce qui est très inhabituel pour une procédure de référé. Dans sa décision du 14 février 2014, il a indiqué que le bilan effectué au centre hospitalier universitaire de Liège remontait à deux ans et demi et a estimé nécessaire de disposer des informations les plus complètes sur l'état de santé de Vincent Lambert. Il a donc ordonné une expertise médicale confiée à trois spécialistes en neurosciences reconnus. Par ailleurs, vu l'ampleur et la difficulté des questions posées par l'affaire, il a demandé à l'Académie nationale de médecine, au Comité consultatif national d'éthique, au Conseil national de l'ordre des médecins et à M. Jean Leonetti de lui fournir en qualité d'*amicus curiae* des observations générales de nature à l'éclairer, notamment sur les notions d'obstination déraisonnable et de maintien artificiel de la vie.

174. La Cour constate que l'expertise a été menée de façon très approfondie : les experts ont examiné Vincent Lambert à neuf reprises, procédé à une série d'examens, pris connaissance de la totalité du dossier médical, consulté également toutes les pièces du dossier contentieux utiles pour l'expertise et rencontré entre le 24 mars et le 23 avril 2014 toutes les parties concernées (famille, équipe médicale et soignante, médecins-conseils et représentants de l'UNAFTC et du centre hospitalier).

175. Dans sa décision du 24 juin 2014, le Conseil d'État a tout d'abord examiné la compatibilité des dispositions pertinentes du code de la santé publique avec les articles 2, 8, 6 et 7 de la Convention (paragraphe 47 ci-dessus), puis la conformité de la décision prise par le D[r] Kariger avec les

dispositions du code (paragraphes 48-50 ci-dessus). Son contrôle a porté sur la régularité de la procédure collégiale et sur le respect des conditions de fond posées par la loi, dont il a estimé, en particulier au vu des conclusions du rapport d'expertise, qu'elles étaient réunies. Il a notamment relevé qu'il ressortait des conclusions des experts que l'état clinique de Vincent Lambert correspondait à un état végétatif chronique, qu'il avait subi des lésions graves et étendues, dont la sévérité, ainsi que le délai de cinq ans et demi écoulé depuis l'accident conduisaient à estimer qu'elles étaient irréversibles, avec un « mauvais pronostic clinique ». Le Conseil d'État a estimé que ces conclusions confirmaient celles qu'avait faites le D[r] Kariger.

176. La Cour observe ensuite que le Conseil d'État, après avoir souligné « l'importance toute particulière » que le médecin doit accorder à la volonté du malade (paragraphe 48 ci-dessus), s'est attaché à établir quels étaient les souhaits de Vincent Lambert. Ce dernier n'ayant ni rédigé de directives anticipées, ni nommé de personne de confiance, le Conseil d'État a tenu compte du témoignage de son épouse, Rachel Lambert. Il a relevé que son mari et elle, tous deux infirmiers ayant notamment l'expérience de personnes en réanimation ou polyhandicapées, avaient souvent évoqué leurs expériences professionnelles et qu'à ces occasions Vincent Lambert avait à plusieurs reprises exprimé le souhait de ne pas être maintenu artificiellement en vie dans un état de grande dépendance (paragraphe 50 ci-dessus). Le Conseil d'État a considéré que ces propos – dont la teneur était confirmée par un frère de Vincent Lambert – étaient datés et rapportés de façon précise par Rachel Lambert. Il a également tenu compte de ce que plusieurs des autres frères et sœurs avaient indiqué que ces propos correspondaient à la personnalité, à l'histoire et aux opinions de leur frère et a noté que les requérants n'alléguaient pas qu'il aurait tenu des propos contraires. Le Conseil d'État a enfin relevé que la consultation de la famille prévue par la loi avait eu lieu (*ibidem*).

177. Les requérants soutiennent, en invoquant l'article 8 de la Convention, que le Conseil d'État n'aurait pas dû tenir compte des observations orales de Vincent Lambert, qu'ils estiment trop générales.

178. La Cour rappelle tout d'abord que le patient, même hors d'état d'exprimer sa volonté, est celui dont le consentement doit rester au centre du processus décisionnel, qu'il en est le sujet et acteur principal. Le « Guide sur le processus décisionnel relatif aux traitements médicaux dans les situations de fin de vie » du Conseil de l'Europe préconise qu'il soit intégré au processus décisionnel par l'intermédiaire des souhaits qu'il a pu précédemment exprimer, dont il prévoit qu'ils peuvent avoir été confiés oralement à un membre de la famille ou à un proche (paragraphe 63 ci-dessus).

179. La Cour relève également que, selon les éléments de droit comparé dont elle dispose, dans un certain nombre de pays, en l'absence de directives anticipées ou « testament biologique », la volonté présumée du patient doit être recherchée selon des modalités diverses (déclarations du représentant légal, de la famille, autres éléments témoignant de la personnalité, des convictions du patient, etc.).

180. La Cour rappelle enfin que, dans l'arrêt *Pretty* (précité, § 63), elle a affirmé le droit de toute personne à refuser de consentir à un traitement qui pourrait avoir pour effet de prolonger sa vie. Dans ces conditions, elle est d'avis que le Conseil d'État a pu estimer que les témoignages qui lui étaient soumis étaient suffisamment précis pour établir quels étaient les souhaits de Vincent Lambert quant à l'arrêt ou au maintien de son traitement.

δ) Considérations finales

181. La Cour est pleinement consciente de l'importance des problèmes soulevés par la présente affaire, qui touche à des questions médicales, juridiques et éthiques de la plus grande complexité. Dans les circonstances de l'espèce, la Cour rappelle que c'est en premier lieu aux autorités internes qu'il appartenait de vérifier la conformité de la décision d'arrêt des traitements au droit interne et à la Convention, ainsi que d'établir les souhaits du patient conformément à la loi nationale. Le rôle de la Cour a consisté à examiner le respect par l'État de ses obligations positives découlant de l'article 2 de la Convention.

Selon cette approche, la Cour a considéré conformes aux exigences de cet article le cadre législatif prévu par le droit interne, tel qu'interprété par le Conseil d'État, ainsi que le processus décisionnel, mené en l'espèce d'une façon méticuleuse. Par ailleurs, quant aux recours juridictionnels dont ont bénéficié les requérants, la Cour est arrivée à la conclusion que la présente affaire avait fait l'objet d'un examen approfondi où tous les points de vue avaient pu s'exprimer et tous les aspects avaient été mûrement pesés, au vu tant d'une expertise médicale détaillée que d'observations générales des plus hautes instances médicales et éthiques.

En conséquence, la Cour arrive à la conclusion que les autorités internes se sont conformées à leurs obligations positives découlant de l'article 2 de la Convention, compte tenu de la marge d'appréciation dont elles disposaient en l'espèce.

ε) Conclusion

182. Il s'ensuit qu'il n'y aurait pas violation de l'article 2 de la Convention en cas de mise en œuvre de la décision du Conseil d'État du 24 juin 2014.

(...)

PAR CES MOTIFS, LA COUR

1. *Déclare*, à l'unanimité, la requête recevable quant au grief tiré par les requérants de l'article 2 en leur propre nom ;
2. *Déclare*, par douze voix contre cinq, la requête irrecevable pour le surplus ;
3. *Rejette*, à l'unanimité, la demande de Rachel Lambert visant à représenter Vincent Lambert en qualité de tiers intervenant ;
4. *Dit*, par douze voix contre cinq, qu'il n'y aurait pas violation de l'article 2 de la Convention en cas de mise en oeuvre de la décision du Conseil d'État du 24 juin 2014 ;

(...)

Fait en français et en anglais, puis prononcé en audience publique au Palais des droits de l'homme, à Strasbourg, le 5 juin 2015.

Erik Fribergh
Greffier

Dean Spielmann
Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion séparée des juges Hajiyev, Šikuta, Tsotsoria, De Gaetano et Griţco.

D.S.
E.F.

OPINION EN PARTIE DISSIDENTE COMMUNE AUX JUGES HAJIYEV, ŠIKUTA, TSOTSORIA, DE GAETANO ET GRIȚCO

(Traduction)

1. Nous regrettons de devoir nous dissocier du point de vue de la majorité exprimé aux points 2, 4 (…) du dispositif de l'arrêt en l'espèce. Après mûre réflexion, nous pensons que, à présent que tout a été dit et écrit dans cet arrêt, à présent que les distinctions juridiques les plus subtiles ont été établies et que les cheveux les plus fins ont été coupés en quatre, ce qui est proposé revient ni plus ni moins à dire qu'une personne lourdement handicapée, *qui est dans l'incapacité de communiquer ses souhaits quant à son état actuel*, peut, sur la base de plusieurs affirmations contestables, être privée de deux composants essentiels au maintien de la vie, à savoir la nourriture et l'eau, et que de plus la Convention est inopérante face à cette réalité. Nous estimons non seulement que cette conclusion est effrayante mais de plus – et nous regrettons d'avoir à le dire – qu'elle équivaut à un pas en arrière dans le degré de protection que la Convention et la Cour ont jusqu'ici offert aux personnes vulnérables.

2. Pour parvenir à la conclusion au paragraphe 112 de l'arrêt, la majorité commence par passer en revue les affaires dans lesquelles les organes de la Convention ont admis qu'un tiers puisse, dans des circonstances exceptionnelles, agir au nom et pour le compte d'une personne vulnérable, même si celle-ci n'avait pas expressément émis le souhait d'introduire une requête. La majorité déduit de cette jurisprudence qu'il existe deux critères principaux à appliquer à de telles affaires : le risque que les droits de la victime directe soient privés d'une protection effective et l'absence de conflit d'intérêts entre la victime et le requérant (paragraphe 102 de l'arrêt). Tout en souscrivant à ces deux critères en tant que tels, nous sommes en complet désaccord avec la façon dont la majorité les applique dans les circonstances particulières de l'espèce.

En ce qui concerne le premier critère, il est vrai que les requérants peuvent invoquer l'article 2 pour leur propre compte, ce qu'ils ont fait. Toutefois, dès lors que la Cour a reconnu qualité à une organisation non-gouvernementale pour représenter une personne décédée (*Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie* [GC], nº 47848/08, CEDH 2014), nous ne voyons aucune raison valable de ne pas suivre la même approche en ce qui concerne les requérants en l'espèce. En effet, en tant que parents proches de Vincent Lambert, ils ont même *a fortiori* une justification encore plus forte pour agir au nom de celui-ci devant la Cour.

Quant au second critère, la majorité, considérant que les décisions internes litigieuses se fondaient sur la certitude que Vincent Lambert n'aurait pas souhaité être maintenu en vie dans l'état dans lequel il se trouve à présent, juge qu'il n'est pas « établi qu'il y ait convergence d'intérêts entre ce qu'expriment les requérants et ce qu'aurait souhaité Vincent Lambert » (paragraphe 104 de l'arrêt). Or cette affirmation serait exacte seulement si – et dans la mesure où – les requérants alléguaient une violation du droit de Vincent Lambert à l'autonomie personnelle en vertu de l'article 8 de la Convention, qui, selon la jurisprudence de la Cour, comprend le droit d'un individu de décider de quelle manière et à quel moment sa vie doit prendre fin (*Haas c. Suisse*, nº 31322/07, § 51, CEDH 2011). Toutefois, si les requérants invoquent bien l'article 8, ils le font dans un contexte complètement différent : c'est l'intégrité physique de Vincent Lambert, et non son autonomie personnelle, qu'ils cherchent à défendre devant la Cour. Les principaux griefs qu'ils soulèvent pour le compte de Vincent Lambert sont fondés sur les articles 2 et 3 de la Convention. Au contraire de l'article 8, qui protège un éventail extrêmement large d'actions humaines fondées sur des choix personnels et allant dans diverses directions, les articles 2 et 3 de la Convention sont clairement unidirectionnels, en ce qu'ils n'impliquent aucun aspect négatif. L'article 2 protège le droit à la vie mais non le droit de mourir (*Pretty c. Royaume-Uni*, nº 2346/02, §§ 39-40, CEDH 2002-III). De même, l'article 3 garantit un droit positif de ne pas être soumis à de mauvais traitements, mais aucun « droit » quelconque à renoncer à ce droit et à être, par exemple, battu, torturé ou affamé jusqu'à la mort. Pour dire les choses simplement, les articles 2 et 3 sont des « voies à sens unique ». Le droit de ne pas être affamé jusqu'à la mort étant le seul droit que Vincent Lambert lui-même aurait pu valablement revendiquer sous l'angle des articles 2 et 3, nous ne voyons pas en quoi il est logiquement possible de conclure à l'absence de « convergence d'intérêts » entre lui et les requérants en l'espèce, ou même d'avoir le moindre doute à cet égard.

Dans ces conditions, nous sommes convaincus que les requérants avaient bien qualité pour agir au nom et pour le compte de Vincent Lambert, et que leurs différents griefs auraient dû être déclarés compatibles *ratione personae* avec les dispositions de la Convention.

3. Nous voudrions préciser d'emblée que, s'il s'était agi d'une affaire où la personne en question (Vincent Lambert en l'espèce) avait expressément émis le souhait qu'il lui soit permis de ne pas continuer de vivre en raison de son lourd handicap physique et de la souffrance associée, ou qui, au vu de la situation, aurait clairement refusé toute nourriture et boisson, nous n'aurions eu aucune objection à l'arrêt ou la non-mise en place de l'alimentation et de l'hydratation dès lors que la législation interne le prévoyait (et sous

réserve, dans tous les cas, du droit des membres du corps médical de refuser de participer à cette procédure pour des motifs d'objection de conscience). On peut ne pas être d'accord avec une telle loi, mais en pareil cas deux droits protégés par la Convention se trouvent pour ainsi dire opposés l'un à l'autre : d'une part le droit à la vie (avec l'obligation correspondante pour l'État de protéger la vie) – article 2 – et, d'autre part, le droit à l'autonomie personnelle, protégé par l'article 8. Face à un tel conflit, on peut être d'accord pour faire prévaloir le respect de « la dignité et de la liberté de l'homme » (souligné dans l'affaire *Pretty*, précitée, § 65). Mais telle n'est pas la situation de Vincent Lambert.

4. Selon les éléments disponibles, Vincent Lambert se trouve dans un état végétatif chronique, en état de conscience minimale, voire inexistante. Toutefois, il n'est pas en état de mort cérébrale – il y a un dysfonctionnement à un niveau du cerveau mais pas à tous les niveaux. En fait, il peut respirer seul (sans l'aide d'un respirateur artificiel) et peut digérer la nourriture (la voie gastro-intestinale est intacte et fonctionne), mais il a des difficultés pour déglutir, c'est-à-dire pour faire progresser des aliments solides dans l'œsophage. Plus important, rien ne prouve, de manière concluante ou autre, qu'il ressente de la douleur (à distinguer de l'inconfort évident découlant du fait d'être en permanence alité ou dans un fauteuil roulant). Nous sommes particulièrement frappés par une considération développée par les requérants devant la Cour dans leurs observations du 16 octobre 2014 sur la recevabilité et le fond (paragraphes 51-52). Cette considération, qui n'est pas réellement contestée par le Gouvernement, est la suivante :

> « La Cour doit savoir que [Vincent Lambert], comme toutes les personnes en état de conscience gravement altérée, est néanmoins susceptible d'être levé, habillé, placé dans un fauteuil, sorti de sa chambre. De nombreuses personnes dans un état similaire à celui de Monsieur Lambert, sont habituellement résidentes dans un établissement de soins spécialisé, et peuvent passer le week-end ou quelques vacances en famille (...). Et, précisément, leur alimentation entérale permet cette forme d'autonomie.
>
> Le D[r] Kariger avait d'ailleurs donné son accord en septembre 2012 pour que ses parents puissent emmener Monsieur Vincent Lambert en vacances dans le sud de la France. C'était six mois avant sa première décision de lui supprimer son alimentation... et alors que son état de santé n'avait pas changé ! »

Il ressort des éléments soumis à la Cour que l'alimentation par voie entérale occasionne une atteinte minimale à l'intégrité physique, ne cause aucune douleur au patient et, avec un peu d'entraînement, pareille alimentation peut être administrée par la famille ou les proches de M. Lambert (et les requérants se sont proposés pour le faire), même si la préparation alimentaire doit être élaborée dans une clinique ou dans un hôpital. En ce sens, l'alimentation et l'hydratation par voie entérale (indépendamment,

pour le moment, du fait de savoir s'il convient de les désigner sous le terme « traitement » ou « soins », ou simplement « alimentation ») sont entièrement *proportionnée*s à la situation dans laquelle Vincent Lambert se trouve. Dans ce contexte, nous ne comprenons pas, même après avoir entendu les plaidoiries dans cette affaire, pourquoi le transfert de Vincent Lambert dans une clinique spécialisée (la maison de santé Bethel[1]) où l'on pourrait s'occuper de lui (et donc soulager l'hôpital universitaire de Reims de ce devoir) a été bloqué par les autorités.

En d'autres termes, Vincent Lambert est *vivant* et l'on s'occupe de lui. Il est également nourri – et l'eau et la nourriture représentent deux éléments basiques essentiels au maintien de la vie et intimement liés à la dignité humaine. Ce lien intime a été affirmé à maintes reprises dans de nombreux documents internationaux[2]. Nous posons donc la question : qu'est-ce qui peut justifier qu'un État autorise un médecin (le D[r] Kariger ou, depuis que celui-ci a démissionné et a quitté l'hôpital universitaire de Reims[3], un autre médecin), en l'occurrence non pas à « débrancher » Vincent Lambert (celui-ci n'est pas branché à une machine qui le maintiendrait artificiellement en vie) *mais plutôt à cesser ou à s'abstenir de le nourrir et de l'hydrater, de manière à, en fait, l'affamer jusqu'à la mort* ? Quelle est la raison impérieuse, dans les circonstances de l'espèce, qui empêche l'État d'intervenir *pour protéger la vie* ? Des considérations financières ? Aucune n'a été avancée en l'espèce. La douleur ressentie par Vincent Lambert ? Rien ne prouve qu'il souffre. Ou est-ce parce qu'il n'a plus d'utilité ou d'importance pour la société, et qu'en réalité il n'est plus une personne mais seulement une « vie biologique » ?

5. Ainsi que nous l'avons déjà souligné, il n'y a pas d'indications claires ou certaines concernant ce que Vincent Lambert souhaite (ou même souhaitait) réellement quant à la poursuite de l'alimentation et de l'hydratation dans la situation où il se trouve à présent. Certes, il était infirmier avant l'accident qui l'a réduit à son état actuel, mais il n'a jamais formulé aucune « directive anticipée » ni nommé une « personne de confiance » aux fins des diverses dispositions du code de la santé publique. Le Conseil d'État, dans sa décision du 24 juin 2014, a fait grand cas des conversations évidemment informelles que Vincent Lambert a eues avec son épouse (et, apparemment en une occasion, également avec son frère Joseph Lambert) et est parvenu à la conclusion que le docteur Kariger « ne peut être regardé comme ayant procédé à une interprétation inexacte des souhaits manifestés par le patient

1. Voir les observations du tiers intervenant, l'association Amréso-Bethel.
2. Il suffit ici de renvoyer à l'Observation générale n° 12 et à l'Observation générale n° 15 du Comité des droits économiques, sociaux et culturels des Nations unies, adoptées respectivement à ses vingtième et vingt-neuvième sessions.
3. Voir les observations des requérants (paragraphe 164).

avant son accident »[4]. Or, pour des questions d'une telle gravité, il ne faut rien moins qu'une certitude absolue. Une « interprétation » *a posteriori* de ce que les personnes concernées peuvent avoir dit ou ne pas avoir dit des années auparavant (alors qu'elles étaient en parfaite santé) dans le cadre de conversations informelles expose clairement le système à de graves abus. Même si, aux fins du débat, on part du principe que Vincent Lambert avait bien exprimé son refus d'être maintenu dans un état de grande dépendance, pareille déclaration ne peut, à notre avis, offrir un degré suffisant de certitude concernant son souhait d'être privé de nourriture et d'eau. Comme les requérants le relèvent aux paragraphes 153-154 de leurs observations – ce qui, encore une fois, n'a pas été nié ou contredit par le Gouvernement :

> « Si réellement M. Vincent Lambert avait eu la volonté ferme de ne plus vivre, si réellement il avait « lâché » psychologiquement, si réellement il avait eu le désir profond de mourir, M. Vincent Lambert serait déjà, à l'heure actuelle, mort. Il n'aurait en effet pas tenu 31 jours sans alimentation (entre le premier arrêt de son alimentation, le 10 avril 2013, et la première ordonnance rendue par le tribunal administratif de Châlons-en-Champagne, le 11 mai 2013 ordonnant la remise en place de son alimentation) s'il n'avait pas trouvé en lui une force intérieure l'appelant à se battre pour rester en vie. Nul ne sait quelle est cette force de vie. Peut-être est-ce, inconsciemment, sa paternité et le désir de connaître sa fille ? Peut-être est-ce autre chose. Mais il est incontestable que, par ses actes, Monsieur Vincent Lambert a manifesté une force de vie qu'il ne serait pas acceptable d'occulter.
>
> À l'inverse, tous les soignants de patients en état de conscience altérée le disent : une personne dans son état qui se laisse aller meurt en dix jours. Ici, sans manger, et avec une hydratation réduite à 500 ml par jour, il a survécu 31 jours. »

Toutefois, l'accent qui est mis sur la volonté ou les intentions présumées de Vincent Lambert détourne le débat d'une autre question importante, à savoir le fait qu'en vertu de la loi française applicable en l'espèce, c'est-à-dire au cas d'un patient inconscient et n'ayant pas rédigé de directives anticipées, la volonté de celui-ci et les points de vue ou souhaits de sa famille ne font que *compléter* l'analyse de ce que le médecin en charge perçoit comme une réalité médicale. En d'autres termes, les souhaits du patient ne sont en pareil cas *absolument pas déterminants pour l'issue finale*. Les trois critères prévus à l'article L. 1110-5 du code de la santé publique – c'est-à-dire les cas où les actes médicaux apparaissent inutiles, disproportionnés ou ayant pour seul effet le maintien artificiel de la vie – sont les seuls critères pertinents. Ainsi que l'a souligné le Conseil d'État, il faut prendre en compte les souhaits que le patient a pu exprimer et accorder une importance toute particulière à sa volonté (paragraphes 47-48 de l'arrêt), mais cette volonté n'est jamais déterminante. En d'autres termes, une fois que le médecin en charge a, comme

4. Paragraphe 30 de la décision du Conseil d'État (reproduit au paragraphe 50 de l'arrêt).

en l'espèce, décidé que le troisième critère s'appliquait, les dés sont jetés et la procédure collective se résume pour l'essentiel à une simple formalité.

6. En aucun cas on ne peut dire que Vincent Lambert se trouve dans une situation « de fin de vie ». De manière regrettable, il se retrouvera bientôt dans cette situation lorsqu'on cessera ou qu'on s'abstiendra de le nourrir et de l'hydrater. Des personnes se trouvant dans une situation encore pire que celle de Vincent Lambert *ne sont pas en stade terminal* (sous réserve qu'ils ne souffrent pas en même temps d'une autre pathologie). Leur alimentation – qu'elle soit considérée comme un traitement ou comme des soins – a pour but de les maintenir en vie et, dès lors, demeure un moyen *ordinaire* de maintien de la vie qui doit en principe être poursuivi.

7. Les questions relatives à l'alimentation et à l'hydratation sont souvent qualifiées par le terme « artificiel », ce qui entraîne une confusion inutile, comme cela a été le cas en l'espèce. Toute forme d'alimentation – qu'il s'agisse de placer un biberon dans la bouche d'un bébé ou d'utiliser des couverts dans un réfectoire pour amener de la nourriture à sa bouche – est dans une certaine mesure artificielle, puisque l'ingestion de la nourriture passe par un intermédiaire. Mais dans le cas d'un patient se trouvant dans l'état de Vincent Lambert, la véritable question à se poser (dans le contexte des notions de proportionnalité et de caractère raisonnable qui découlent de la notion d'obligation positive de l'État au regard de l'article 2) est celle-ci : l'hydratation et l'alimentation produisent-elles un bénéfice pour le patient sans lui causer une douleur ou une souffrance indue ou une dépense excessive de ressources ? Dans l'affirmative, il y a une obligation positive de préserver la vie. Si la charge excède les bénéfices, alors l'obligation de l'État peut, dans des cas appropriés, cesser. Dans ce contexte, nous ajouterons en outre que la marge d'appréciation d'un État, évoquée au paragraphe 148 de l'arrêt, n'est pas illimitée et que, aussi large qu'elle puisse être, elle doit toujours être considérée à la lumière des valeurs qui sous-tendent la Convention, dont la principale est la valeur de la vie. La Cour a souvent déclaré que la Convention doit être lue comme un tout (un principe rappelé au paragraphe 142 de l'arrêt) et interprétée (et nous ajouterons appliquée) de manière à promouvoir sa cohérence interne et l'harmonie entre ses diverses dispositions et valeurs (voir, quoique dans des contextes différents, *Stec et autres c. Royaume-Uni* (déc.) [GC], n^os^ 65731/01 et 65900/01, § 48, CEDH 2005-X, et *Austin et autres c. Royaume-Uni* [GC], n^os^ 39692/09, 40713/09 et 41008/09, § 54, CEDH 2012). Pour évaluer cette marge d'appréciation dans les circonstances de l'espèce et la méthode choisie par les autorités françaises pour « mettre en balance » les intérêts concurrents en présence, la Cour aurait donc dû donner plus d'importance à la valeur de la vie. Il convient également de rappeler que nous ne sommes pas ici

dans une situation où l'on peut légitimement dire qu'il peut y avoir certains doutes quant à l'existence d'une vie ou d'une « vie humaine » (comme dans les affaires traitant des questions de fertilité et impliquant des embryons humains c'est-à-dire touchant à la question de savoir « quand commence la vie humaine »). De même, il n'y a aucun doute en l'espèce que Vincent Lambert est vivant. À notre sens, toute personne se trouvant dans l'état de Vincent Lambert a une dignité humaine fondamentale et doit donc, conformément aux principes découlant de l'article 2, recevoir des soins ou un traitement ordinaires et proportionnés, ce qui inclut l'apport d'eau et de nourriture.

8. À l'instar des requérants, nous estimons que la loi en question manque de clarté[5] : sur ce qui constitue un traitement ordinaire et un traitement extraordinaire, sur ce qui constitue une obstination déraisonnable et, plus important, sur ce qui prolonge (ou maintient) la vie *artificiellement*. Certes, il appartient au premier chef aux juridictions internes d'interpréter et d'appliquer la loi mais, pour nous, il ressort clairement de la décision rendue le 24 juin 2014 par le Conseil d'État que celui-ci a adopté inconditionnellement l'interprétation donnée par M. Leonetti et, en outre, a traité de manière superficielle la question de la compatibilité du droit interne avec les articles 2 et 8 de la Convention (paragraphe 47 de l'arrêt), attachant de l'importance seulement au fait que « la procédure avait été respectée ». Certes, la Cour ne doit pas agir en tant que juridiction de quatrième instance et doit respecter le principe de subsidiarité, mais pas jusqu'à s'abstenir d'affirmer la valeur de la vie et la dignité inhérente même aux personnes qui sont dans un état végétatif, lourdement paralysées et dans l'incapacité de communiquer leurs souhaits à autrui.

9. Nous sommes d'accord sur le fait que, conceptuellement, une distinction légitime doit être établie entre l'euthanasie et le suicide assisté d'une part, et l'abstention thérapeutique d'autre part. Toutefois, eu égard à la manière dont le droit interne a été interprété et appliqué aux faits de l'espèce soumis à l'examen de la Cour, nous sommes en complet désaccord avec ce qui est dit au paragraphe 141 de l'arrêt. Cette affaire est une affaire d'euthanasie qui ne veut pas dire son nom. En principe, il n'est pas judicieux d'utiliser des adjectifs ou des adverbes forts dans des documents judiciaires, mais en l'espèce il est certainement extrêmement contradictoire pour le gouvernement défendeur de souligner que le droit français interdit l'euthanasie et que donc l'euthanasie n'entre pas en ligne de compte dans cette affaire. Nous ne pouvons être que d'un autre avis dès lors que, manifestement, les

5. Le paragraphe 56 de l'arrêt y fait également allusion [voir la version intégrale de l'arrêt, disponible sur Hudoc].

critères de la loi Leonetti, tels qu'interprétés par la plus haute juridiction administrative, dans les cas où ils sont appliqués à une personne inconsciente et soumise à un « traitement » qui n'est pas réellement thérapeutique mais simplement une question de soins, ont en réalité pour résultat de précipiter un décès *qui ne serait pas survenu autrement dans un avenir prévisible*.

10. Le rapporteur public devant le Conseil d'État (paragraphes 31 et 122 de l'arrêt) aurait déclaré (citant les propos tenus par le ministre de la santé aux sénateurs qui examinaient le projet de loi Leonetti) que « [s]i le geste d'arrêter un traitement (...) entraîne la mort, l'intention du geste [n'est pas de tuer : elle est] de restituer à la mort son caractère naturel et de soulager. C'est particulièrement important pour les soignants, dont le rôle n'est pas de donner la mort ». Tant le Conseil d'État que la Cour ont accordé beaucoup d'importance à cette déclaration. Nous ne sommes pas de cet avis. Indépendamment du fait que, ainsi que nous l'avons déjà dit, rien ne prouve en l'espèce que M. Lambert ressente une quelconque souffrance, cette déclaration ne serait exacte que si une distinction était convenablement établie entre des soins (ou un traitement) ordinaires et des soins (ou un traitement) extraordinaires. Le fait d'alimenter une personne, même par voie entérale, est un acte de soins et si l'on cesse ou l'on s'abstient de lui fournir de l'eau et de la nourriture, la mort s'ensuit inévitablement (alors qu'elle ne s'ensuivrait pas autrement dans un futur prévisible). On peut ne pas avoir la volonté de donner la mort à la personne en question mais, en ayant la volonté d'accomplir l'action ou l'omission dont on sait que selon toutes probabilités elle conduira à cette mort, on a bien l'intention de tuer cette personne. Il s'agit bien là, après tout, de la notion d'intention positive *indirecte*, à savoir l'un des deux aspects de la notion de dol en droit pénal.

11. En 2010, pour célébrer son 50e anniversaire, la Cour a accepté le titre de *Conscience de l'Europe* en publiant un ouvrage ainsi intitulé. À supposer, aux fins du débat, qu'une institution, par opposition aux personnes composant cette institution, puisse avoir une conscience, pareille conscience doit non seulement être bien informée mais doit également se fonder sur de hautes valeurs morales ou éthiques. Ces valeurs devraient toujours être le phare qui nous guide, quelle que soit « l'ivraie juridique » pouvant être produite au cours du processus d'analyse d'une affaire. Il ne suffit pas de reconnaître, comme la Cour le fait au paragraphe 181 de l'arrêt, qu'une affaire « touche à des questions médicales, juridiques et éthiques de la plus grande complexité » ; il est de l'essence même d'une conscience, fondée sur la *recta ratio*, de permettre que les questions éthiques façonnent et guident le raisonnement juridique jusqu'à sa conclusion finale. C'est précisément cela, avoir une conscience. Nous regrettons que la Cour, avec cet arrêt, ait perdu le droit de porter le titre ci-dessus.

LAMBERT AND OTHERS v. FRANCE
(Application no. 46043/14)

GRAND CHAMBER

JUDGMENT OF 5 JUNE 2015[1]

1. Judgment delivered by the Grand Chamber following relinquishment of jurisdiction by a Chamber in accordance with Article 30 of the Convention. Extracts.

SUMMARY[1]

Discontinuation of life-sustaining artificial nutrition and hydration in the case of a person in a wholly dependent state

In examining the complaints from the standpoint of the State's positive obligations, the following considerations are taken into account: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2; whether account was taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel; and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests (see paragraph 143 of the judgment). While no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, there is nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed (see paragraph 147 of the judgment).

Article 2

Life – Positive obligations – Discontinuation of life-sustaining artificial nutrition and hydration in the case of a person in a state of complete dependency – Standing to act – Distinction between intentional taking of life and therapeutic abstention – Existence of an appropriate legal framework – Consideration of the wishes of patients and those close to them – Consideration of the opinions of the medical personnel – Existence of a judicial remedy – Consensus as to the paramount importance of patients' wishes – Margin of appreciation – Balance between protection of patients' right to life and right to respect for private life and personal autonomy – "Unreasonable obstinacy" – Disagreement between family members

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Facts

The applicants are the parents, a half-brother and a sister of Vincent Lambert, who sustained head injuries in a road-traffic accident in September 2008 which left him tetraplegic and in a state of complete dependency. He receives artificial nutrition and hydration which is administered enterally. In September 2013 the doctor in charge of Vincent Lambert initiated the consultation procedure provided for by the Law of 22 April 2005 on patients' rights and end-of-life issues ("Leonetti

1. This summary by the Registry does not bind the Court.

Act"). He consulted six doctors, one of whom had been chosen by the applicants, convened a meeting with almost the entire care team, and held two meetings with the family which were attended by Vincent Lambert's wife, parents and eight siblings. Following those meetings, Vincent Lambert's wife, Rachel, and six of his brothers and sisters argued in favour of withdrawing treatment, as did five of the six doctors consulted, while the applicants opposed such a move. The doctor also held discussions with François Lambert, Vincent Lambert's nephew. On 11 January 2014 the doctor in charge of Vincent Lambert decided to discontinue his artificial nutrition and hydration.

The *Conseil d'État*, hearing the case on the basis of an urgent application, observed that the last assessment of the patient dated from two and a half years previously, and considered it necessary to have the fullest information possible on Vincent Lambert's state of health. It therefore ordered an expert medical report, which it entrusted to three recognised specialists in neuroscience. Furthermore, in view of the scale and difficulty of the issues raised by the case, it requested the National Medical Academy, the National Ethics Advisory Committee, the National Medical Council and Mr Jean Leonetti to submit general observations to it as *amici curiae*, in order to clarify in particular the concepts of unreasonable obstinacy and sustaining life artificially. The experts examined Vincent Lambert on nine occasions, conducted a series of tests and familiarised themselves with the entire medical file and with all the items in the judicial file of relevance for their report. They also met all the parties concerned. On 24 June 2014 the *Conseil d'État* held that the decision taken by Vincent Lambert's doctor on 11 January 2014 to withdraw artificial nutrition and hydration had been lawful. Following a request for application of Rule 39 of the Rules of Court, the Court decided to indicate that execution of the *Conseil d'État* judgment should be stayed for the duration of the proceedings before it. On 4 November 2014 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

The applicants submitted in particular that the withdrawal of Vincent Lambert's artificial nutrition and hydration was in breach of the State's obligations under Article 2.

Law

(1) Admissibility:

(a) *Standing to act in the name and on behalf of Vincent Lambert –*

(i) Regarding the applicants: A review of the case-law revealed two main criteria: the risk that the direct victim would be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant. Regarding the first criterion, the Court did not discern any risk that Vincent Lambert would be deprived of effective protection of his rights since it was open to the applicants, as Vincent Lambert's close relatives, to invoke before the Court on their own behalf the right to life protected by Article 2. As to the second criterion, the Court noted that one of the key aspects of the domestic

proceedings had consisted precisely in determining Vincent Lambert's wishes. In those circumstances it was not established that there was a convergence of interests between the applicants' assertions and what Vincent Lambert would have wished. Accordingly, the applicants did not have standing to raise the complaints under Article 2 in the name and on behalf of Vincent Lambert.

(ii) Regarding Rachel Lambert (Vincent Lambert's wife): No provision of the Convention permitted a third-party intervener to represent another person before the Court. Furthermore, according to Rule 44 § 3 (a) of the Rules of Court, a third-party intervener was any person concerned "who [was] not the applicant". Accordingly, Rachel Lambert's request had to be refused.

(b) *Whether the applicants had victim status* – The next-of-kin of a person whose death allegedly engaged the responsibility of the State could claim to be victims of a violation of Article 2. Although Vincent Lambert was still alive, there was no doubt that if artificial nutrition and hydration were withdrawn, his death would occur within a short time. Accordingly, even if the violation was a potential or future one, the applicants, in their capacity as Vincent Lambert's close relatives, were entitled to rely on Article 2.

(2) Article 2: Both the applicants and the Government made a distinction between the intentional taking of life and "therapeutic abstention", and stressed the importance of that distinction. In the context of the French legislation, which prohibited the intentional taking of life and permitted life-sustaining treatment to be withdrawn or withheld only in certain specific circumstances, the Court considered that the present case did not involve the State's negative obligations under Article 2, and decided to examine the applicants' complaints solely from the standpoint of the State's positive obligations.

In order to do this, the following factors were taken into account: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2; whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel; and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests. The Court also took account of the criteria laid down in the Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations".

No consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appeared to allow it. While the detailed arrangements governing the withdrawal of treatment varied from one country to another, there was nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes were expressed. Accordingly, States should be afforded a margin of appreciation, not just as to whether or not

to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as to the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy.

(a) *The legislative framework* – The provisions of the "Leonetti Act", as interpreted by the *Conseil d'État*, constituted a legal framework which was sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case, by defining the concepts of "treatment that could be withdrawn or limited" and "unreasonable obstinacy" and by detailing the factors to be taken into account in the decision-making process. Accordingly, the State had put in place a regulatory framework apt to ensure the protection of patients' lives.

(b) *The decision-making process* – Although the procedure under French law was described as "collective" and included several consultation phases (with the care team, at least one other doctor, the person of trust, the family or those close to the patient), it was the doctor in charge of the patient alone who took the decision. The patient's wishes had to be taken into account and the decision itself had to be accompanied by reasons and was added to the patient's medical file.
The collective procedure in the present case had lasted from September 2013 to January 2014 and, at every stage of its implementation, had exceeded the requirements laid down by law. The doctor's decision, which ran to thirteen pages, had provided very detailed reasons and the *Conseil d'État* had held that it was not tainted by any irregularity.
French law as it currently stood provided for the family to be consulted (and not for it to participate in taking the decision), but did not make provision for mediation in the event of disagreement between family members. Likewise, it did not specify the order in which family members' views should be taken into account, unlike in some other countries. In the absence of consensus on this subject the organisation of the decision-making process, including the designation of the person who took the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fell within the State's margin of appreciation. The procedure in the present case had been lengthy and meticulous, exceeding the requirements laid down by the law and, although the applicants disagreed with the outcome, that procedure had satisfied the requirements flowing from Article 2.

(c) *Judicial remedies* – The *Conseil d'État* had examined the case sitting as a full court, which was highly unusual in injunction proceedings. The expert report had been prepared in great depth. In its judgment of 24 June 2014, the *Conseil d'État* had begun by examining the compatibility of the relevant provisions of the Public Health Code with Articles 2, 8, 6 and 7 of the Convention, before assessing whether the decision taken by Vincent Lambert's doctor had complied with the provisions of the Code. Its review had encompassed the lawfulness of the collective

procedure and compliance with the substantive conditions laid down by law, which it considered – particularly in the light of the findings of the expert report – to have been satisfied. The *Conseil d'État* noted in particular that it was clear from the experts' findings that Vincent Lambert's clinical condition corresponded to a chronic vegetative state, that he had sustained serious and extensive injuries whose severity, coupled with the period of five and a half years that had passed since the accident, led to the conclusion that it was irreversible and that there was a "poor clinical prognosis". In the view of the *Conseil d'État*, these findings confirmed those made by the doctor in charge. After stressing "the particular importance" which the doctor must attach to the patient's wishes, the *Conseil d'État* also sought to ascertain what Vincent Lambert's wishes had been. As the latter had not drawn up any advance directives or designated a person of trust, the *Conseil d'État* took into consideration the testimony of his wife, Rachel Lambert. It noted that she and her husband, who were both nurses with experience of patients in resuscitation and those with multiple disabilities, had often discussed their professional experiences and that on several such occasions Vincent Lambert had voiced the wish not to be kept alive artificially in a highly dependent state. The *Conseil d'État* found that those remarks – the tenor of which was confirmed by one of Vincent Lambert's brothers – had been reported by Rachel Lambert in precise detail and with the corresponding dates. It also took account of the fact that several of Vincent Lambert's other siblings had stated that these remarks were in keeping with their brother's personality, past experience and views, and noted that the applicants had not claimed that he would have expressed remarks to the contrary. Lastly, the *Conseil d'État* observed that the consultation of the family, prescribed by law, had taken place.

It was the patient who was the principal party in the decision-making process and whose consent must remain at its centre; this was true even where the patient was unable to express his or her wishes. The Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" recommended that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend. Furthermore, in the absence of advance directives or of a "living will", a number of countries required that efforts be made to ascertain the patient's presumed wishes, by a variety of means (statements of the legal representative or the family, other factors testifying to the patient's personality and beliefs, and so forth).

In those circumstances, the *Conseil d'État* had been entitled to consider that the testimony submitted to it was sufficiently precise to establish what Vincent Lambert's wishes had been with regard to the withdrawal or continuation of his treatment.

(d) *Final considerations* – The Court found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*, and the decision-making process, which had been conducted in meticulous fashion in the present case, to be

compatible with the requirements of Article 2. As to the judicial remedies that had been available to the applicants, the Court reached the conclusion that the present case had been the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects had been carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the domestic authorities had complied with their positive obligations flowing from Article 2, in view of the margin of appreciation left to them in the present case.

Conclusion: no violation (twelve votes to five).

Case-law cited by the Court

A, B and C v. Ireland [GC], no. 25579/05, ECHR 2010
A.K. and L. v. Croatia, no. 37956/11, 8 January 2013
Ada Rossi and Others v. Italy (dec.), nos. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08 and 58424/08, 16 December 2008
Burke v. the United Kingdom (dec.), no. 19807/06, 11 July 2006
Calvelli and Ciglio v. Italy [GC], no. 32967/96, ECHR 2002-I
Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, ECHR 2014
Ciechońska v. Poland, no. 19776/04, 14 June 2011
Diamante and Pelliccioni v. San Marino, no. 32250/08, 27 September 2011
Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I
Giuliani and Gaggio v. Italy [GC], no. 23458/02, ECHR 2011
Glass v. the United Kingdom (dec.), no. 61827/00, 18 March 2003
Haas v. Switzerland, no. 31322/07, ECHR 2011
İlhan v. Turkey [GC], no. 22277/93, ECHR 2000-VII
Koch v. Germany, no. 497/09, 19 July 2012
L.C.B. v. the United Kingdom, 9 June 1998, *Reports of Judgments and Decisions* 1998-III
McCann and Others v. the United Kingdom, 27 September 1995, Series A no. 324
Nejdet Şahin and Perihan Şahin v. Turkey [GC], no. 13279/05, 20 October 2011
Nencheva and Others v. Bulgaria, no. 48609/06, 18 June 2013
Post v. the Netherlands (dec.), no. 21727/08, 20 January 2009
Powell v. the United Kingdom (dec.), no. 45305/99, ECHR 2000-V
Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III
Raw and Others v. France, no. 10131/11, 7 March 2013
S.P., D.P. and A.T. v. the United Kingdom, no. 23715/94, Commission decision of 20 May 1996, unreported
Sanles Sanles v. Spain (dec.), no. 48335/99, ECHR 2000-XI
Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII
Šneersone and Kampanella v. Italy, no. 14737/09, 12 July 2011

Tauira and 18 Others v. France, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports 83-B
Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2) [GC], no. 32772/02, ECHR 2009
Vo v. France [GC], no. 53924/00, ECHR 2004-VIII
Y.F. v. Turkey, no. 24209/94, ECHR 2003-IX

In the case of Lambert and Others v. France,

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

Dean Spielmann, *President*,
Guido Raimondi,
Mark Villiger,
Isabelle Berro,
Khanlar Hajiyev,
Ján Šikuta,
George Nicolaou,
Nona Tsotsoria,
Vincent A. De Gaetano,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki,
Helena Jäderblom,
Aleš Pejchal,
Valeriu Griţco,
Egidijus Kūris, *judges*,
and Erik Fribergh, *Registrar*,

Having deliberated in private on 7 January and 23 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 46043/14) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four French nationals, Mr Pierre Lambert, Mrs Viviane Lambert, Mr David Philippon and Mrs Anne Tuarze ("the applicants"), on 23 June 2014.

2. The applicants were represented by Mr J. Paillot, a lawyer practising in Strasbourg, and Mr J. Triomphe, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of Foreign Affairs and International Development.

3. The applicants alleged, in particular, that the withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's obligations under Article 2 of the Convention, that it would constitute

ill-treatment amounting to torture within the meaning of Article 3 of the Convention and that it would infringe his physical integrity, in breach of Article 8 of the Convention.

4. The application was assigned to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 24 June 2014 the relevant Chamber decided to apply Rule 39, to give notice of the application to the Government and to grant it priority.

5. On 4 November 2014 a Chamber of the Fifth Section composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Vincent A. De Gaetano, André Potocki, Helena Jäderblom and Aleš Pejchal, judges, and Stephen Phillips, 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.

7. The applicants and the Government each filed observations on the admissibility and merits of the case.

8. Observations were also received from Rachel Lambert, François Lambert and Marie-Geneviève Lambert, the wife, nephew and half-sister respectively of Vincent Lambert, and from the National Union of Associations of Head Injury and Brain Damage Victims' Families, the association Amréso-Bethel and the Human Rights Clinic of the International Institute of Human Rights, to all of whom the President had given leave to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)). Rachel Lambert, François Lambert and Marie-Geneviève Lambert were also given leave to take part in the hearing.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 January 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. Alabrune, Director of Legal Affairs, Ministry of Foreign Affairs and International Development, *Agent*,

Ms E. Jung, Drafting Officer, Human Rights Section, Ministry of Foreign Affairs and International Development,

Mr R. Féral, Drafting Officer, Human Rights Section, Ministry of Foreign Affairs and International Development,

Ms S. Rideau, Adviser, Legal Affairs Directorate,
Ministry of Social Affairs, Health and Women's Rights,
Ms I. Erny, Legal Adviser, Users' Rights,
Legal and Ethical Affairs Division, Ministry
of Social Affairs, Health and Women's Rights,
Ms P. Rouault-Chalier, Deputy Director
of Litigation and Legal Affairs, Ministry
of Justice,
Ms M. Lambling, Drafting Officer, Individual
Rights and Family Law Office, Ministry of Justice, *Advisers*;

(b) *for the applicants*
Mr J. Paillot, lawyer,
Mr J. Triomphe, lawyer, *Counsel*,
Mr G. Puppinck,
Prof. X. Ducrocq,
Dr B. Jeanblanc, *Advisers*;

(c) *for Rachel Lambert, third-party intervener*
Mr L. Pettiti, lawyer, *Counsel*,
Dr Oportus,
Dr Simon, *Advisers*;

(d) *for François and Marie-Geneviève Lambert, third-party interveners*
Mr M. Munier-Apaire, member of the
Conseil d'État and the Court of Cassation Bar,
Mr B. Lorit, lawyer, *Advisers*.

The applicants, with the exception of the first applicant, also attended, as did Rachel Lambert, François Lambert and Marie-Geneviève Lambert, third-party interveners.

The Court heard addresses by Mr Alabrune, Mr Paillot, Mr Triomphe, Mr Munier-Apaire and Mr Pettiti, as well as the answers given by Mr Alabrune and Mr Paillot to the questions put by one of the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants, who are all French nationals, are Mr Pierre Lambert and his wife Mrs Viviane Lambert, who were born in 1929 and 1945

respectively and live in Reims, Mr David Philippon, who was born in 1971 and lives in Mourmelon, and Mrs Anne Tuarze, who was born in 1978 and lives in Milizac. They are the parents, a half-brother and a sister respectively of Vincent Lambert, who was born on 20 September 1976.

11. Vincent Lambert sustained serious head injuries in a road-traffic accident on 29 September 2008, which left him tetraplegic and in a state of complete dependency. According to the expert medical report ordered by the *Conseil d'État* on 14 February 2014, he is in a chronic vegetative state (see paragraph 40 below).

12. From September 2008 to March 2009 he was hospitalised in the resuscitation wing, and subsequently the neurology ward, of Châlons-en-Champagne Hospital. From March to June 2009 he was cared for in the heliotherapy centre in Berck-sur-Mer, before being moved on 23 June 2009 to the unit in Reims University Hospital providing follow-up and rehabilitative care to patients in a vegetative or minimally conscious state, where he remains to date. The unit accommodates eight patients. Vincent Lambert receives artificial nutrition and hydration which is administered enterally, that is, via a gastric tube.

13. In July 2011 Vincent Lambert was assessed by a specialised unit of Liège University Hospital, the Coma Science Group, which concluded that he was in a chronic neuro-vegetative state characterised as "minimally conscious plus". In line with the recommendations of the Coma Science Group he received daily sessions of physiotherapy from September 2011 to the end of October 2012, which yielded no results. He also received eighty-seven speech and language therapy sessions between March and September 2012, in an unsuccessful attempt to establish a code of communication. Attempts were also made to sit the patient in a wheelchair.

A. First decision taken under the Law of 22 April 2005 on patients' rights and end-of-life issues

14. As Vincent Lambert's carers had observed increasing signs in 2012 of what they believed to be resistance on his part to daily care, the medical team initiated in early 2013 the collective procedure provided for by the Law of 22 April 2005 on patients' rights and end-of-life issues (the so-called "Leonetti Act" – see paragraph 54 below). Rachel Lambert, the patient's wife, was involved in the procedure.

15. The procedure resulted in a decision by Dr Kariger, the doctor in charge of Vincent Lambert and head of the department in which he is hospitalised, to withdraw the patient's nutrition and reduce his hydration. The decision was put into effect on 10 April 2013.

B. Injunction of 11 May 2013

16. On 9 May 2013 the applicants applied to the urgent-applications judge of the Châlons-en-Champagne Administrative Court on the basis of Article L. 521-2 of the Administrative Courts Code (urgent application for protection of a fundamental freedom (*référé liberté*)), seeking an injunction ordering the hospital, subject to a coercive fine, to resume feeding and hydrating Vincent Lambert normally and to provide him with whatever care his condition required.

17. In an order dated 11 May 2013, the urgent-applications judge granted their requests. The judge held that, since no advance directives had been drawn up by Vincent Lambert, and in the absence of a person of trust within the meaning of the relevant provisions of the Public Health Code, the collective procedure should be continued with his family, despite the fact that the latter was divided as to what should become of the patient. The judge noted that, while Vincent Lambert's wife had been involved in the procedure, it was clear from examination of the case that his parents had not been informed that it had been applied, and that the decision to withdraw nutrition and limit hydration, the nature of and reasons for which had not been disclosed to them, had not respected their wishes.

18. The judge held accordingly that these procedural shortcomings amounted to a serious and manifestly unlawful breach of a fundamental freedom, namely the right to respect for life, and ordered the hospital to resume feeding and hydrating Vincent Lambert normally and to provide him with whatever care his condition required.

C. Second decision taken under the Leonetti Act

19. In September 2013 a fresh collective procedure was initiated. Dr Kariger consulted six doctors, including three from outside the hospital (a neurologist, a cardiologist and an anaesthetist with experience in palliative medicine) chosen by Vincent Lambert's parents, his wife and the medical team respectively. He also had regard to a written contribution from a doctor in charge of a specialised extended-care facility within a nursing home.

20. Dr Kariger also convened two meetings with the family, on 27 September and 16 November 2013, which were attended by Vincent Lambert's wife and parents and his eight siblings. Rachel Lambert and six of the eight brothers and sisters spoke in favour of discontinuing artificial nutrition and hydration, while the applicants were in favour of continuing it.

21. On 9 December 2013 Dr Kariger called a meeting of all the doctors and almost all the members of the care team. Following that meeting

Dr Kariger and five of the six doctors consulted stated that they were in favour of withdrawing treatment.

22. On completion of the consultation procedure Dr Kariger announced on 11 January 2014 his intention to discontinue artificial nutrition and hydration on 13 January, subject to an application to the administrative court. His decision, comprising a reasoned thirteen-page report, a seven-page summary of which was read out to the family, observed in particular that Vincent Lambert's condition was characterised by irreversible brain damage and that the treatment appeared to be futile and disproportionate and to have no other effect than to sustain life artificially. According to the report, the doctor had no doubt that Vincent Lambert had not wished, before his accident, to live under such conditions. Dr Kariger concluded that prolonging the patient's life by continuing his artificial nutrition and hydration amounted to unreasonable obstinacy.

D. Administrative Court judgment of 16 January 2014

23. On 13 January 2014 the applicants made a further urgent application to the Châlons-en-Champagne Administrative Court for protection of a fundamental freedom under Article L. 521-2 of the Administrative Courts Code, seeking an injunction prohibiting the hospital and the doctor concerned from withdrawing Vincent Lambert's nutrition and hydration, and an order for his immediate transfer to a specialised extended-care facility in Oberhausbergen run by the association Amréso-Bethel (see paragraph 8 above). Rachel Lambert and François Lambert, Vincent Lambert's nephew, intervened in the proceedings as third parties.

24. The Administrative Court, sitting as a full court of nine judges, held a hearing on 15 January 2014. In a judgment of 16 January 2014, it suspended the implementation of Dr Kariger's decision of 11 January 2014.

25. The Administrative Court began by observing that Article 2 of the Convention did not prevent States from making provisions for individuals to object to potentially life-prolonging treatment, or for a doctor in charge of a patient who was unable to express his or her wishes and whose treatment the doctor considered, after implementing a series of safeguards, to amount to unreasonable obstinacy, to withdraw that treatment, subject to supervision by the Medical Council, the hospital's ethics committee, where applicable, and the administrative and criminal courts.

26. The Administrative Court went on to find that it was clear from the relevant provisions of the Public Health Code, as amended following the Leonetti Act and as elucidated by the parliamentary proceedings, that artificial enteral nutrition and hydration – which were subject, like medication, to the distribution monopoly held by pharmacies, were

designed to supply specific nutrients to patients with impaired functions and which required recourse to invasive techniques to administer them – constituted a form of treatment.

27. Observing that Dr Kariger's decision had been based on the wish apparently expressed by Vincent Lambert not to be kept alive in a highly dependent state, and that the latter had not drawn up any advance directives or designated a person of trust, the Administrative Court found that the views he had confided to his wife and one of his brothers had been those of a healthy individual who had not been faced with the immediate consequences of his wishes, and had not constituted the formal manifestation of an express wish, irrespective of his professional experience with patients in a similar situation. The court further found that the fact that Vincent Lambert had had a conflictual relationship with his parents, since he did not share their moral values and religious commitment, did not mean that he could be considered to have expressed a clear wish to refuse all forms of treatment, and added that no unequivocal conclusion as to his desire or otherwise to be kept alive could be drawn from his apparent resistance to the care provided. The Administrative Court held that Dr Kariger had incorrectly assessed Vincent Lambert's wishes.

28. The Administrative Court also noted that, according to the report drawn up in 2011 by Liège University Hospital (see paragraph 13 above), Vincent Lambert was in a minimally conscious state, implying the continuing presence of emotional perception and the existence of possible responses to his surroundings. Accordingly, the administering of artificial nutrition and hydration was not aimed at keeping him alive artificially. Lastly, the court considered that, as long as the treatment did not cause any stress or suffering, it could not be characterised as futile or disproportionate. It therefore held that Dr Kariger's decision had constituted a serious and manifestly unlawful breach of Vincent Lambert's right to life. It issued an order suspending the implementation of the decision while rejecting the request for the patient to be transferred to the specialised extended-care facility in Oberhausbergen.

E. *Conseil d'État* ruling of 14 February 2014

29. In three applications lodged on 31 January 2014, Rachel Lambert, François Lambert and Reims University Hospital appealed against that judgment to the urgent-applications judge of the *Conseil d'État*. The applicants lodged a cross-appeal, requesting Vincent Lambert's immediate transfer to the specialised extended-care facility. The National Union of Associations of Head Injury and Brain Damage Victims' Families (UNAFTC, see paragraph 8 above) sought leave to intervene as a third party.

30. At the hearing on the urgent application held on 6 February 2014, the President of the Judicial Division of the *Conseil d'État* decided to refer the case to the full court, sitting as a seventeen-member Judicial Assembly.

31. The hearing before the full court took place on 13 February 2014. In his submissions to the *Conseil d'État*, the public rapporteur cited, *inter alia*, the remarks made by the Minister of Health to the members of the Senate examining the bill known as the "Leonetti Bill":

> "While the act of withdrawing treatment ... results in death, the intention behind the act [is not to kill; it is] to allow death to resume its natural course and to relieve suffering. This is particularly important for care staff, whose role is not to take life."

32. The *Conseil d'État* delivered its ruling on 14 February 2014. After joining the applications and granting UNAFTC leave to intervene, the *Conseil d'État* defined in the following terms the role of the urgent-applications judge called upon to rule on the basis of Article L. 521-2 of the Administrative Courts Code.

> "Under [Article L. 521-2], the urgent-applications judge of the administrative court, when hearing an application of this kind justified by particular urgency, may order any measures necessary to safeguard a fundamental freedom allegedly breached in a serious and manifestly unlawful manner by an administrative authority. These legislative provisions confer on the urgent-applications judge, who normally decides alone and who orders measures of an interim nature in accordance with Article L. 511-1 of the Administrative Courts Code, the power to order, without delay and on the basis of a 'plain and obvious' test, the necessary measures to protect fundamental freedoms.
>
> However, the urgent-applications judge must exercise his or her powers in a particular way when hearing an application under Article L. 521-2 ... concerning a decision taken by a doctor on the basis of the Public Health Code which would result in treatment being discontinued or withheld on grounds of unreasonable obstinacy and the implementation of which would cause irreversible damage to life. In such circumstances the judge, sitting where applicable as a member of a bench of judges, must take the necessary protective measures to prevent the decision in question from being implemented where it may not be covered by one of the situations provided for by law, while striking a balance between the fundamental freedoms in issue, namely the right to respect for life and the patient's right to consent to medical treatment and not to undergo treatment that is the result of unreasonable obstinacy. In such a case, the urgent-applications judge or the bench to which he or she has referred the case may, as appropriate, after temporarily suspending the implementation of the measure and before ruling on the application, order an expert medical report and, under Article R. 625-3 of the Administrative Courts Code, seek the opinion of any person whose expertise or knowledge are apt to usefully inform the court's decision."

33. The *Conseil d'État* found that it was clear from the very wording of the relevant provisions of the Public Health Code (Articles L. 1110-5, L. 1111-4 and R. 4127-37) and from the parliamentary proceedings that the provisions in question were general in scope and applied to Vincent

Lambert just as they did to all users of the health service. The *Conseil d'État* stated as follows.

> "It is clear from these provisions that each individual must receive the care most appropriate to his or her condition and that the preventive or exploratory acts carried out and the care administered must not subject the patient to disproportionate risks in relation to the anticipated benefits. Such acts must not be continued with unreasonable obstinacy and may be discontinued or withheld where they appear to be futile or disproportionate or to have no other effect than to sustain life artificially, whether or not the patient is in an end-of-life situation. Where the patient is unable to express his or her wishes, any decision to limit or withdraw treatment on the ground that continuing it would amount to unreasonable obstinacy may not be taken by the doctor, where such a measure is liable to endanger the life of the patient, without the collective procedure defined in the Code of Medical Ethics and the rules on consultation laid down in the Public Health Code having been followed. If the doctor takes such a decision he or she must in any event preserve the patient's dignity and dispense palliative care.
>
> Furthermore, it is clear from the provisions of Articles L. 1110-5 and L. 1111-4 of the Public Health Code, as elucidated by the parliamentary proceedings prior to the passing of the Law of 22 April 2005, that the legislature intended to include among the forms of treatment that may be limited or withdrawn on grounds of unreasonable obstinacy all acts which seek to maintain the patient's vital functions artificially. Artificial nutrition and hydration fall into this category of acts and may accordingly be withdrawn where continuing them would amount to unreasonable obstinacy."

34. The *Conseil d'État* went on to find that its task was to satisfy itself, having regard to all the circumstances of the case, that the statutory conditions governing any decision to withdraw treatment whose continuation would amount to unreasonable obstinacy had been met. To that end it needed to have the fullest information possible at its disposal, in particular concerning Vincent Lambert's state of health. Accordingly, it considered it necessary before ruling on the application to order an expert medical report to be prepared by practitioners with recognised expertise in neuroscience. The experts – acting on an independent and collective basis, after examining the patient, meeting the medical team and the care staff and familiarising themselves with the patient's entire medical file – were to give their opinion on Vincent Lambert's current condition and provide the *Conseil d'État* with all relevant information as to the prospect of any change.

35. The *Conseil d'État* decided to entrust the expert report to a panel of three doctors appointed by the President of the Judicial Division on proposals from the President of the National Medical Academy, the Chair of the National Ethics Advisory Committee and the President of the National Medical Council respectively. The remit of the panel of experts, which was to report within two months of its formation, read as follows.

"(i) To describe Mr Lambert's current clinical condition and how it has changed since the review carried out in July 2011 by the Coma Science Group of Liège University Hospital;

(ii) To express an opinion as to whether the patient's brain damage is irreversible and as to the clinical prognosis;

(iii) To determine whether the patient is capable of communicating, by whatever means, with those around him;

(iv) To assess whether there are any signs to suggest at the present time that Mr Lambert reacts to the care being dispensed to him and, if so, whether those reactions can be interpreted as a rejection of that care, as suffering, as a desire for the life-sustaining treatment to be withdrawn or, on the contrary, as a desire for the treatment to be continued."

36. The *Conseil d'État* also considered it necessary, in view of the scale and the difficulty of the scientific, ethical and deontological issues raised by the case and in accordance with Article R. 625-3 of the Administrative Courts Code, to request the National Medical Academy, the National Ethics Advisory Committee and the National Medical Council, together with Mr Jean Leonetti, the rapporteur for the Law of 22 April 2005, to submit general written observations by the end of April 2014 designed to clarify for it the application of the concepts of unreasonable obstinacy and sustaining life artificially for the purposes of Article L. 1110-5, with particular regard to individuals who, like Vincent Lambert, were in a minimally conscious state.

37. Lastly, the *Conseil d'État* rejected the applicants' request for Vincent Lambert to be transferred to a specialised extended-care facility (see paragraph 29 above).

F. Expert medical report and general observations

1. Expert medical report

38. The experts examined Vincent Lambert on nine occasions. They familiarised themselves with the entire medical file, and in particular the report of the Coma Science Group in Liège (see paragraph 13 above), the treatment file and the administrative file, and had access to all the imaging tests. They also consulted all the items in the judicial case file of relevance for their expert report. In addition, between 24 March and 23 April 2014, they met all the parties (the family, the medical and care team, the medical consultants and representatives of UNAFTC and the hospital) and carried out a series of tests on Vincent Lambert.

39. On 5 May 2014 the experts sent their preliminary report to the parties for comments. Their final report, submitted on 26 May 2014, provided the following replies to the questions asked by the *Conseil d'État*.

(a) Vincent Lambert's clinical condition and how it had changed

40. The experts found that Vincent Lambert's clinical condition corresponded to a vegetative state, with no signs indicating a minimally conscious state. Furthermore, they stressed that he had difficulty swallowing and had seriously impaired motor functions of all four limbs, with significant retraction of the tendons. They noted that his state of consciousness had deteriorated since the assessment carried out in Liège in 2011.

(b) Irreversible nature of the brain damage and clinical prognosis

41. The experts pointed out that the two main factors to be taken into account in assessing whether or not brain damage was irreversible were, firstly, the length of time since the accident which had caused the damage and, secondly, the nature of the damage. In the present case they noted that five and a half years had passed since the initial head injury and that the imaging tests showed severe cerebral atrophy testifying to permanent neuron loss, near-total destruction of strategic regions such as both parts of the thalamus and the upper part of the brain stem, and serious damage to the communication pathways in the brain. They concluded that the brain damage was irreversible. They added that the lengthy period of progression, the patient's clinical deterioration since July 2011, his current vegetative state, the destructive nature and extent of the brain damage and the results of the functional tests, coupled with the severity of the motor impairment of all four limbs, pointed to a poor clinical prognosis.

(c) Vincent Lambert's capacity to communicate with those around him

42. In the light of the tests carried out, and particularly in view of the fact that the course of speech and language therapy carried out in 2012 had not succeeded in establishing a code of communication, the experts concluded that Vincent Lambert was not capable of establishing functional communication with those around him.

(d) Existence of signs suggesting that Vincent Lambert reacted to the care provided, and interpretation of those signs

43. The experts observed that Vincent Lambert reacted to the care provided and to painful stimuli, but concluded that these were non-conscious responses. In their view, it was not possible to interpret them as conscious

awareness of suffering or as the expression of any intent or wish with regard to the withdrawal or continuation of treatment.

2. General observations

44. On 22 and 29 April and 5 May 2014 the *Conseil d'État* received the general observations of the National Medical Council, Mr Jean Leonetti, rapporteur for the Law of 22 April 2005, the National Medical Academy and the National Ethics Advisory Committee.

The National Medical Council made clear in particular that, in using the expression "no other effect than to sustain life artificially" in Article L. 1110-5 of the Public Health Code, the legislature had sought to address the situation of patients who not only were being kept alive solely by the use of methods and techniques replacing key vital functions, but also, and above all, whose cognitive and relational functions were profoundly and irreversibly impaired. It emphasised the importance of the notion of temporality, stressing that where a pathological condition had become chronic, resulting in the person's physiological deterioration and the loss of his or her cognitive and relational faculties, obstinacy in administering treatment could be regarded as unreasonable if no signs of improvement were apparent.

Mr Leonetti stressed that the Law of 22 April 2005 was applicable to patients who had brain damage and thus suffered from a serious condition which, in the advanced stages, was incurable, but who were not necessarily "at the end of life". Accordingly, the legislature had referred in its title to "patients' rights *and* end-of-life issues" rather than "patients' rights *in* end-of-life situations". He outlined the criteria for unreasonable obstinacy and the factors used to assess it and stated that the reference to treatment having "no other effect than to sustain life artificially", which was stricter than the wording originally envisaged (namely, treatment "which prolongs life artificially") was more restrictive and referred to artificially sustaining life "in the purely biological sense, in circumstances where, firstly, the patient has major irreversible brain damage and, secondly, his or her condition offers no prospect of a return to awareness of self or relationships with others". He pointed out that the Law of 22 April 2005 gave the doctor sole responsibility for the decision to withdraw treatment and that it had been decided not to pass that responsibility on to the family, in order to avoid any feelings of guilt and to ensure that the person who took the decision was identified.

The National Medical Academy reiterated the fundamental prohibition barring doctors from deliberately taking another's life, which formed the basis for the relationship of trust between doctor and patient. The Academy

reiterated its long-standing position according to which the Leonetti Act was applicable not only to the various "end-of-life" situations, but also to situations raising the very difficult ethical issue of the "ending of life" in the case of patients in "survival" mode, in a minimally conscious or chronic vegetative state.

The National Ethics Advisory Committee conducted an in-depth analysis of the difficulties surrounding the notions of unreasonable obstinacy, treatment and sustaining life artificially, summarised the medical data concerning minimally conscious states, and addressed the ethical issues arising out of such situations. It recommended, in particular, a process of reflection aimed at ensuring that the collective discussions led to a genuine collective decision-making process and that, where no consensus could be reached, there was a possibility of mediation.

G. *Conseil d'État* judgment of 24 June 2014

45. A hearing took place on 20 June 2014 before the *Conseil d'État*. In his submissions the public rapporteur stressed, in particular, the following:

> "... [T]he legislature did not wish to impose on those in the caring professions the burden of bridging the gap which exists between allowing death to take its course when it can no longer be prevented and actively causing death by administering a lethal substance. By discontinuing treatment, a doctor is not taking the patient's life, but is resolving to withdraw when there is nothing more to be done."

The *Conseil d'État* delivered its judgment on 24 June 2014. After granting leave to Marie-Geneviève Lambert, Vincent Lambert's half-sister, to intervene as a third party, and reiterating the relevant provisions of domestic law as commented on and elucidated in the general observations received, the *Conseil d'État* examined in turn the applicants' arguments based on the Convention and on domestic law.

46. On the first point the *Conseil d'État* reiterated that, where the urgent-applications judge was called on to hear an application under Article L. 521-2 of the Administrative Courts Code (urgent application for protection of a fundamental freedom) concerning a decision taken by a doctor under the Public Health Code which would result in treatment being discontinued or withheld on the ground of unreasonable obstinacy, and implementation of that decision would cause irreversible damage to life, the judge was required to examine any claim that the provisions in question were incompatible with the Convention (see paragraph 32 above).

47. In the case before it the *Conseil d'État* replied in the following terms to the arguments based on Articles 2 and 8 of the Convention.

> "Firstly, the disputed provisions of the Public Health Code defined a legal framework reaffirming the right of all persons to receive the most appropriate care, the right to

respect for their wish to refuse any treatment and the right not to undergo medical treatment resulting from unreasonable obstinacy. Those provisions do not allow a doctor to take a life-threatening decision to limit or withdraw the treatment of a person incapable of expressing his or her wishes, except on the dual, strict condition that continuation of that treatment would amount to unreasonable obstinacy and that the requisite safeguards are observed, namely that account is taken of any wishes expressed by the patient and that at least one other doctor and the care team are consulted, as well as the person of trust, the family or another person close to the patient. Any such decision by a doctor is open to appeal before the courts in order to review compliance with the conditions laid down by law.

Hence the disputed provisions of the Public Health Code, taken together, in view of their purpose and the conditions attaching to their implementation, cannot be said to be incompatible with the requirements of Article 2 of the Convention ..., or with those of Article 8 ..."

The *Conseil d'État* also rejected the applicants' arguments based on Articles 6 and 7 of the Convention, finding that the role entrusted to the doctor under the provisions of the Public Health Code was not incompatible with the duty of impartiality flowing from Article 6, and that Article 7, which applied to criminal convictions, was not relevant to the case before it.

48. Regarding the application of the relevant provisions of the Public Health Code, the *Conseil d'État* held as follows.

"Although artificial nutrition and hydration are among the forms of treatment which may be withdrawn in cases where their continuation would amount to unreasonable obstinacy, the sole fact that a person is in an irreversible state of unconsciousness or, *a fortiori*, has lost his or her autonomy irreversibly and is thus dependent on such a form of nutrition and hydration, does not by itself amount to a situation in which the continuation of treatment would appear unjustified on grounds of unreasonable obstinacy.

In assessing whether the conditions for the withdrawal of artificial nutrition and hydration are met in the case of a patient with severe brain damage, however caused, who is in a vegetative or minimally conscious state and is thus unable to express his or her wishes, and who depends on such nutrition and hydration as a means of life support, the doctor in charge of the patient must base his or her decision on a range of medical and non-medical factors whose relative weight cannot be determined in advance but will depend on the circumstances of each patient, so that the doctor must assess each situation on its own merits. In addition to the medical factors – which must cover a sufficiently long period, be assessed collectively and relate in particular to the patient's current condition, the change in that condition since the accident or illness occurred, his or her degree of suffering and the clinical prognosis – the doctor must attach particular importance to any wishes the patient may have expressed previously, whatever their form or tenor. In that regard, where such wishes remain unknown, they cannot be assumed to consist in a refusal by the patient to be kept alive in the current conditions. The doctor must also take into account the views of the person of trust, where the patient has designated such a person, of the members of the patient's

family or, failing this, of another person close to the patient, while seeking to establish a consensus. In assessing the patient's particular situation, the doctor must be guided primarily by a concern to act with maximum beneficence towards the patient ..."

49. The *Conseil d'État* went on to find that it was its task, in the light of all the circumstances of the case and the evidence produced in the course of the adversarial proceedings before it, in particular the expert medical report, to ascertain whether the decision taken by Dr Kariger on 11 January 2014 had complied with the statutory conditions imposed on any decision to withdraw treatment whose continuation would amount to unreasonable obstinacy.

50. In that connection the *Conseil d'État* ruled as follows.

"Firstly, it is clear from the examination of the case that the collective procedure conducted by Dr Kariger ..., prior to the taking of the decision of 11 January 2014, was carried out in accordance with the requirements of Article R. 4127-37 of the Public Health Code and involved the consultation of six doctors, although that Article simply requires that the opinion of one doctor and, where appropriate, of a second be sought. Dr Kariger was not legally bound to allow the meeting of 9 December 2013 to be attended by a second doctor designated by Mr Lambert's parents in addition to the one they had already designated. Nor does it appear from the examination of the case that some members of the care team were deliberately excluded from that meeting. Furthermore, Dr Kariger was entitled to speak with Mr François Lambert, the patient's nephew. The fact that Dr Kariger opposed a request for him to withdraw from Mr Lambert's case and for the patient to be transferred to another establishment, and the fact that he expressed his views publicly, do not amount, having regard to all the circumstances of the present case, to a failure to comply with the obligations implicit in the principle of impartiality, which Dr Kariger respected. Accordingly, contrary to what was argued before the Châlons-en-Champagne Administrative Court, the procedure preceding the adoption of the decision of 11 January 2014 was not tainted by any irregularity.

Secondly, the experts' findings indicate that 'Mr Lambert's current clinical condition corresponds to a vegetative state', with 'swallowing difficulties, severe motor impairment of all four limbs, some signs of dysfunction of the brainstem' and 'continued ability to breathe unaided'. The results of the tests carried out from 7 to 11 April 2014 to assess the patient's brain structure and function ... were found to be consistent with such a vegetative state. The experts found that the clinical progression, characterised by the disappearance of the fluctuations in Mr Lambert's state of consciousness recorded during the assessment carried out in July 2011 by the Coma Science Group at Liège University Hospital and by the failure of the active therapies recommended at the time of that assessment, were suggestive of 'a deterioration in the [patient's] state of consciousness since that time'.

Furthermore, according to the findings set out in the experts' report, the exploratory tests which were carried out revealed serious and extensive brain damage, as evidenced in particular by 'severe impairment of the structure and metabolism of the sub-cortical regions of crucial importance for cognitive function' and 'major structural

dysfunction of the communication pathways between the regions of the brain involved in consciousness'. The severity of the cerebral atrophy and of the damage observed, coupled with the five-and-a-half-year period that had elapsed since the initial accident, led the experts to conclude that the brain damage was irreversible.

Furthermore, the experts concluded that 'the lengthy period of progression, the patient's clinical deterioration since 2011, his current vegetative state, the destructive nature and the extent of the brain damage, the results of the functional tests and the severity of the motor impairment of all four limbs' pointed to a 'poor clinical prognosis'.

Lastly, while noting that Mr Lambert was capable of reacting to the care administered and to certain stimuli, the experts indicated that the characteristics of those reactions suggested that they were non-conscious responses. The experts did not consider it possible to interpret these behavioural reactions as evidence of 'conscious awareness of suffering' or as the expression of any intent or wish with regard to the withdrawal or continuation of the treatment keeping the patient alive.

These findings, which the experts reached unanimously following a collective assessment in the course of which the patient was examined on nine separate occasions, thorough cerebral tests were performed, meetings were held with the medical team and care staff involved and the entire file was examined, confirm the conclusions drawn by Dr Kariger as to the irreversible nature of the damage and Mr Lambert's clinical prognosis. The exchanges which took place in the adversarial proceedings before the *Conseil d'État* subsequent to submission of the experts' report do nothing to invalidate the experts' conclusions. While it can be seen from the experts' report, as just indicated, that Mr Lambert's reactions to care are not capable of interpretation and thus cannot be regarded as expressing a wish as to the withdrawal of treatment, Dr Kariger in fact indicated in the impugned decision that the behaviour concerned was open to various interpretations, all of which needed to be treated with great caution, and did not include this aspect in the reasons for his decision.

Thirdly, the provisions of the Public Health Code allow account to be taken of a patient's wishes expressed in a form other than advance directives. It is apparent from the examination of the case, and in particular from the testimony of Mrs Rachel Lambert, that she and her husband, both nurses, had often discussed their respective professional experiences in dealing with patients under resuscitation and those with multiple disabilities, and that Mr Lambert had on several such occasions clearly voiced the wish not to be kept alive artificially if he were to find himself in a highly dependent state. The tenor of those remarks, reported by Mrs Rachel Lambert in precise detail and with the corresponding dates, was confirmed by one of Mr Lambert's brothers. While these remarks were not made in the presence of Mr Lambert's parents, the latter did not claim that their son could not have made them or that he would have expressed wishes to the contrary, and several of Mr Lambert's siblings stated that the remarks concerned were in keeping with their brother's personality, past experience and personal opinions. Accordingly, in stating among the reasons for the decision at issue his certainty that Mr Lambert did not wish, before his accident, to live under such conditions, Dr Kariger cannot be regarded as having incorrectly interpreted the wishes expressed by the patient before his accident.

Fourthly, the doctor in charge of the patient is required, under the provisions of the Public Health Code, to obtain the views of the patient's family before taking any decision to withdraw treatment. Dr Kariger complied with this requirement in consulting Mr Lambert's wife, parents and siblings in the course of the two meetings referred to earlier. While Mr Lambert's parents and some of his brothers and sisters opposed the discontinuing of treatment, Mr Lambert's wife and his other siblings stated their support for the proposal to withdraw treatment. Dr Kariger took these different opinions into account. In the circumstances of the case, he concluded that the fact that the members of the family were not unanimous as to what decision should be taken did not constitute an impediment to his decision.

It follows from all the above considerations that the various conditions imposed by the law before any decision can be taken by the doctor in charge of the patient to withdraw treatment which has no effect other than to sustain life artificially, and whose continuation would thus amount to unreasonable obstinacy, may be regarded, in the case of Mr Vincent Lambert and in the light of the adversarial proceedings before the *Conseil d'État*, as having been met. Accordingly, the decision taken by Dr Kariger on 11 January 2014 to withdraw the artificial nutrition and hydration of Mr Vincent Lambert cannot be held to be unlawful."

51. Accordingly, the *Conseil d'État* set aside the Administrative Court's judgment and dismissed the applicants' claims.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Public Health Code

52. Under Article L. 1110-1 of the Public Health Code ("the Code"), all available means must be used to secure to each individual the fundamental right to protection of health. Article L. 1110-2 of the Code provides that the patient has the right to respect for his or her dignity, while Article L. 1110-9 guarantees to everyone whose condition requires it the right to palliative care. This is defined in Article L. 1110-10 as active and ongoing care intended to relieve pain, ease psychological suffering, preserve the patient's dignity and support those close to him or her.

53. The Law of 22 April 2005 on patients' rights and end-of-life issues, known as the "Leonetti Act" after its rapporteur, Mr Jean Leonetti (see paragraph 44 above), amended a number of Articles of the Code. The Act was passed following the work of a parliamentary commission chaired by Mr Leonetti and tasked with exploring the full range of end-of-life issues and considering possible legislative or regulatory amendments. In the course of its work the parliamentary commission heard evidence from a great many individuals. It submitted its report on 30 June 2004. The Act was passed unanimously by the National Assembly on 30 November 2004 and by the Senate on 12 April 2005.

The Act does not authorise either euthanasia or assisted suicide. It allows doctors, in accordance with a prescribed procedure, to discontinue treatment only if continuing it would demonstrate unreasonable obstinacy (in other words, if it would mean taking it to unreasonable lengths (*acharnement thérapeutique*)).

The relevant Articles of the Code, as amended by the Act, read as follows.

Article L. 1110-5

"Every individual, regard being had to his or her state of health and the urgency of the treatment required, shall be entitled to receive the most appropriate care and to be given the safest treatment known to medical science at the time to be effective. Preventive or exploratory acts or care must not, as far as medical science can guarantee, subject the patient to disproportionate risks in relation to the anticipated benefits.

Such acts must not be continued with unreasonable obstinacy. Where they appear to be futile or disproportionate or to have no other effect than to sustain life artificially, they may be discontinued or withheld. In such cases, the doctor shall preserve the dignity of the dying patient and ensure his or her quality of life by dispensing the care referred to in Article L. 1110-10 ...

Everyone shall be entitled to receive care intended to relieve pain. That pain must in all cases be prevented, assessed, taken into account and treated.

Health-care professionals shall take all the measures available to them to allow each individual to live a life of dignity until his or her death ..."

Article L. 1111-4

"Each individual shall, together with the health-care professional and in the light of the information provided and the recommendations made by the latter, take the decisions concerning his or her own health.

The doctor must respect the individual's wishes after informing him or her of the consequences of the choices made ...

No medical act or treatment may be administered without the free and informed consent of the patient, which may be withdrawn at any time.

Where the individual is unable to express his or her wishes, no intervention or examination may be carried out, except in cases of urgency or impossibility, without the person of trust referred to in Article L. 1111-6, the family or, failing this, a person close to the patient having been consulted.

Where the individual is unable to express his or her wishes, no decision to limit or withdraw treatment, where such a measure would endanger the patient's life, may be taken without the collective procedure defined in the Code of Medical Ethics having been followed and without the person of trust referred to in Article L. 1111-6, the family or, failing this, a person close to the patient having been consulted, and without any advance directives issued by the patient having been examined. The decision to

limit or withdraw treatment, together with the reasons for it, shall be recorded in the patient's file ..."

Article L. 1111-6

"All adults may designate a person of trust, who may be a relative, another person close to the adult, or his or her usual doctor, and who will be consulted in the event that the patient is unable to express his or her wishes and to receive the necessary information for that purpose. The designation shall be made in writing and may be revoked at any time. Should the patient so wish, the person of trust may provide support and attend medical consultations with the patient in order to assist him or her in making decisions.

Whenever he or she is admitted to a health-care establishment, the patient shall be offered the possibility of designating a person of trust in the conditions laid down in the preceding paragraph. The designation shall be valid for the duration of the patient's hospitalisation, unless he or she decides otherwise ..."

Article L. 1111-11

"All adults may draw up advance directives in case they should become unable to express their wishes. These shall indicate the wishes of the individual concerned as regards the conditions in which treatment may be limited or withdrawn in an end-of-life situation. They may be revoked at any time.

Provided they were drawn up less than three years before the individual became unconscious, the doctor shall take them into account in any decision to carry out examinations, interventions or treatment in respect of the person concerned ..."

54. The collective procedure provided for in the fifth paragraph of Article L. 1111-4 of the Code is described in detail in Article R. 4127-37, which forms part of the Code of Medical Ethics and reads as follows:

"I. The doctor shall at all times endeavour to alleviate suffering by the means most appropriate to the patient's condition, and provide moral support. He or she shall refrain from any unreasonable obstinacy in carrying out examinations or treatment and may decide to withhold or discontinue treatment which appears futile or disproportionate or the only purpose or effect of which is to sustain life artificially.

II. In the cases contemplated in the fifth paragraph of Article L. 1111-4 and the first paragraph of Article L. 1111-13, the decision to limit or withdraw the treatment administered may not be taken unless a collective procedure has first been implemented. The doctor may set the collective procedure in motion on his or her own initiative. He or she shall be required to do so in the light of any advance directives given by the patient and submitted by one of the persons in possession of them mentioned in Article R. 1111-19, or at the request of the person of trust, the family or, failing this, another person close to the patient. The persons in possession of the patient's advance directives, the person of trust, the family or, where appropriate, another person close to the patient shall be informed as soon as the decision has been taken to implement the collective procedure.

The decision to limit or withdraw treatment shall be taken by the doctor in charge of the patient, after consultation with the care team where this exists, and on the basis of the reasoned opinion of at least one doctor acting as a consultant. There must be no hierarchical link between the doctor in charge of the patient and the consultant. The reasoned opinion of a second consultant shall be sought by these doctors if either of them considers it necessary.

The decision to limit or withdraw treatment shall take into account any wishes previously expressed by the patient, in particular in the form of advance directives, if drawn up, the views of the person of trust the patient may have designated and those of the family or, failing this, of another person close to the patient.

...

Reasons shall be given for any decision to limit or withdraw treatment. The opinions received, the nature and tenor of the consultations held within the care team and the reasons for the decision shall be recorded in the patient's file. The person of trust, if one has been designated, the family or, failing this, another person close to the patient, shall be informed of the nature of and the reasons for the decision to limit or withdraw treatment.

III. Where it has been decided to limit or withdraw treatment under Article L. 1110-5 and Article L. 1111-4 or L. 1111-13, in the circumstances provided for in points I and II of the present Article, the doctor, even if the patient's suffering cannot be assessed on account of his or her cerebral state, shall put in place the necessary treatment, in particular pain relief and sedation, to support the patient in accordance with the principles and conditions laid down in Article R. 4127-38. He or she shall also ensure that the persons close to the patient are informed of the situation and receive the support they require."

55. Article R. 4127-38 of the Code provides:

"The doctor must support the dying person until the moment of death, ensure, through appropriate treatment and measures, the quality of life as it nears its end, preserve the patient's dignity, and comfort those close to him or her.

Doctors do not have the right to take life intentionally."

...

III. COUNCIL OF EUROPE MATERIALS

...

B. The "Guide on the decision-making process regarding medical treatment in end-of-life situations"

60. This Guide was drawn up by the Committee on Bioethics of the Council of Europe in the course of its work on patients' rights and with the intention of facilitating the implementation of the principles enshrined in the Convention for the protection of Human Rights and Dignity of the

Human Being with regard to the Application of Biology and Medicine (Oviedo Convention).

Its aims are to propose reference points for the implementation of the decision-making process regarding medical treatment in end-of-life situations, to bring together both normative and ethical reference works and elements relating to good medical practice which may be useful to health-care professionals dealing with the implementation of the decision-making process, and to contribute, through the clarification it provides, to the overall discussion on the subject.

61. The Guide cites as the ethical and legal frames of reference for the decision-making process the principles of autonomy (free, informed and prior consent of the patient), beneficence and non-maleficence, and justice (equitable access to health care). It specifies that doctors must not dispense treatment which is needless or disproportionate in view of the risks and constraints it entails. They must provide patients with treatment that is proportionate and suited to their situation. They also have a duty to take care of their patients, ease their suffering and provide them with support.

Treatment covers interventions which aim to improve a patient's state of health by acting on the causes of the illness, but also interventions which have no bearing on the aetiology of the illness but act on the symptoms, or which are responses to an organ dysfunction. Under the heading "Disputed issues", the Guide states as follows.

> "**The question of limiting, withdrawing or withholding artificial hydration and nutrition**
>
> Food and drink given to patients who are still able to eat and drink themselves are external contributions meeting physiological needs, which should always be satisfied. They are essential elements of care which should be provided unless the patient refuses them.
>
> Artificial nutrition and hydration are given to a patient following a medical indication and imply choices concerning medical procedures and devices (perfusion, feeding tubes).
>
> Artificial nutrition and hydration are regarded in a number of countries as forms of treatment, which may therefore be limited or withdrawn in the circumstances and in accordance with the guarantees stipulated for limitation or withdrawal of treatment (refusal of treatment expressed by the patient, refusal of unreasonable obstinacy or disproportionate treatment assessed by the care team and accepted in the framework of a collective procedure). The considerations to be taken into account in this regard are the wishes of the patient and the appropriate nature of the treatment in the situation in question.
>
> In other countries, however, it is considered that artificial nutrition and hydration do not constitute treatment which can be limited or withdrawn, but a form of care

> meeting the individual's basic needs, which cannot be withdrawn unless the patient, in the terminal phase of an end-of-life situation, has expressed a wish to that effect.
>
> The question of the appropriate nature, in medical terms, of artificial nutrition and hydration in the terminal phase is itself a matter of debate. Some take the view that implementing or continuing artificial hydration and nutrition are necessary for the comfort of a patient in an end-of-life situation. For others, the benefit of artificial hydration and nutrition for the patient in the terminal phase, taking into account research in palliative care, is questionable."

62. The Guide concerns the decision-making process regarding medical treatment as it applies to end-of-life situations (including its implementation, modification, adaptation, limitation or withdrawal). It does not address the issues of euthanasia or assisted suicide, which some national legislations authorise.

63. While other parties are involved in the decision-making process, the Guide stresses that the principal party is the patient himself or herself. When the patient cannot or can no longer take part in making decisions, they will be taken by a third party according to the procedures laid down in the relevant national legislation. However, the patient should nonetheless be involved in the decision-making process by means of any previously expressed wishes. The Guide lists the various forms these may take: the patient may have confided his or her intentions orally to a family member, a close friend or a person of trust designated as such; or they may be set down formally, in advance directives or a living will or as powers granted to another person, sometimes referred to as powers of future protection (*mandat de protection future*).

64. Other persons involved in the decision-making process may include the patient's legal representative or a person granted a power of attorney, family members and close friends, and the carers. The Guide stresses that doctors have a vital, not to say primary, role because of their ability to appraise the patient's situation from a medical viewpoint. Where patients are not, or are no longer, able to express their wishes, doctors are the people who, in the context of the collective decision-making process, having involved all the health-care professionals concerned, will take the clinical decision guided by the best interests of the patient. To this end, they will have taken note of all the relevant elements (consultation of family members, close friends, the person of trust, and so on) and taken into account any previously expressed wishes. In some systems the decision is taken by a third party, but in all cases doctors are the ones to ensure that the decision-making process is properly conducted.

65. The Guide reiterates that the patient should always be at the centre of any decision-making process, which takes on a collective dimension when

the patient is no longer willing or able to participate in it directly. The Guide identifies three main stages in the decision-making process: an individual stage (each party forms his or her arguments on the basis of the information gathered), a collective stage (the various parties take part in exchanges and discussions) and a concluding stage (when the actual decision is taken).

66. The Guide points out that sometimes, where positions diverge significantly or the question is highly complex or specific, there may be a need to make provision to consult third parties either to contribute to the debate, to overcome a problem or to resolve a conflict. The consultation of a clinical ethics committee may, for example, be appropriate. At the end of the collective discussion, agreement must be reached. A conclusion must be drawn and validated collectively and then formalised in writing.

67. If the decision is taken by the doctor, it should be taken on the basis of the conclusions of the collective discussion and be announced, as appropriate, to the patient, the person of trust and/or the entourage of the patient, the care team and the third parties concerned who have taken part in the process. The decision should also be formalised (in the form of a written summary of the reasons) and kept in an identified place.

68. The Guide highlights the disputed nature of the use of deep sedation in the terminal phase, which may have the effect of shortening the time left to live. Lastly, it suggests an evaluation of the decision-making process after its application.

...

THE LAW

I. STANDING TO ACT IN THE NAME AND ON BEHALF OF VINCENT LAMBERT

80. The applicants submitted that the withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's obligations under Article 2 of the Convention. In their view, depriving him of nutrition and hydration would constitute ill-treatment amounting to torture within the meaning of Article 3 of the Convention. They further argued that the lack of physiotherapy since October 2012 and the lack of therapy to restore the swallowing reflex amounted to inhuman and degrading treatment in breach of that provision. Lastly, they submitted that the withdrawal of nutrition and hydration would also infringe Vincent Lambert's physical integrity, in breach of Article 8 of the Convention.

81. Articles 2, 3 and 8 of the Convention read as follows.

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ..."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"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 applicants' standing to act in the name and on behalf of Vincent Lambert

1. The parties' submissions

(a) The Government

82. The Government observed that the applicants had not stated that they wished to act on Vincent Lambert's behalf, and considered the question whether they could apply to the Court on his behalf to be devoid of purpose.

(b) The applicants

83. The applicants submitted that any individual, irrespective of his or her disability, should be able to benefit from the guarantees afforded by the Convention, including where he or she had no representative. They stressed that their standing or interest in bringing proceedings had never been challenged before the domestic courts, as French law gave the family of a person whose treatment it was proposed to withdraw the right to express a view on the measure in question. This necessarily entailed standing to act in court proceedings not only on their own behalf but also on behalf of the patient.

84. Citing the criteria established by the Court in *Koch v. Germany* (no. 497/09, §§ 43 et seq., 19 July 2012), the applicants submitted that those criteria were satisfied in the present case because the case concerned a matter of general interest and because of their close family ties and their personal interest in the proceedings. They stressed that they had applied to the domestic courts and then to the Court in order to assert Vincent

Lambert's fundamental rights under Articles 2 and 3 which he himself was unable to do and which his wife could not either since she had accepted the medical decision in issue.

(c) The individual third-party interveners

85. Rachel Lambert, Vincent Lambert's wife, submitted that the applicants did not have standing to act on behalf of Vincent Lambert. She pointed out that the Court had been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to "respect for human rights" and the person concerned, as heir, had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights. However, in *Sanles Sanles v. Spain* ((dec.), no. 48335/99, ECHR 2000-XI), the Court had found that the rights asserted by the applicant under Articles 2, 3, 5 and 8 of the Convention belonged to the category of non-transferable rights and had held that the applicant, who was the sister-in-law and legitimate heir of the deceased, could not claim to be the victim of a violation on her late brother-in-law's behalf.

86. On the issue of representation, she observed that it was essential for representatives to demonstrate that they had received specific and explicit instructions from the alleged victim. This was not the case of the applicants, who had received no specific and explicit instructions from Vincent Lambert, whereas the examination of the case by the *Conseil d'État* had highlighted the fact that she herself had been taken into her husband's confidence and informed of his wishes, as corroborated by statements produced before the domestic courts.

87. François Lambert and Marie-Geneviève Lambert, Vincent Lambert's nephew and half-sister, submitted that the applicants lacked standing to act on his behalf. Firstly, the violations of Articles 2, 3 and 8 of the Convention alleged by the applicants concerned non-transferable rights to which they could not lay claim on their own behalf; secondly, the applicants were not the legal representatives of Vincent Lambert, who was an adult born in 1976; and, thirdly, their application contravened Vincent Lambert's freedom of conscience and his own right to life and infringed his privacy. François Lambert and Marie-Geneviève Lambert observed that, although the Court had, by way of an exception, accepted that parents might act on behalf and in the place of a victim in arguing a breach of Article 3 of the Convention, this was only in the case of the victim's disappearance or death and in certain specific circumstances. Those conditions were not met in the present case, making the application inadmissible. They argued that the Court had had occasion to reaffirm this inadmissibility in end-of-life cases

similar to the present one (they referred to *Sanles Sanles*, cited above, and *Ada Rossi and Others v. Italy* (dec.), nos. 55185/08, 55483/08, 55516/08, 55519/08, 56010/08, 56278/08, 58420/08 and 58424/08, 16 December 2008).

88. Lastly, they argued that the applicants could not in fact "legitimately" challenge the *Conseil d'État*'s judgment, since the position they defended was directly opposed to Vincent Lambert's beliefs. The doctors and the judges had taken account of the latter's wishes, which he had confided to his wife – with whom he had had a very close relationship – in full knowledge of the facts, in view of his professional experience as a nurse.

2. The Court's assessment

(a) Recapitulation of the principles

89. In the recent cases of *Nencheva and Others v. Bulgaria* (no. 48609/06, 18 June 2013) and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, ECHR 2014), the Court reiterated the following principles.

In order to rely on Article 34 of the Convention, an applicant must be able to claim to be a victim of a violation of the Convention. According to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see *Nencheva and Others*, cited above, § 88). The individual concerned must be able to show that he or she was "directly affected" by the measure complained of (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 96, with further references).

90. An exception is made to this principle where the alleged violation or violations of the Convention are closely linked to a death or disappearance in circumstances allegedly engaging the responsibility of the State. In such cases the Court has recognised the standing of the victim's next-of-kin to submit an application (see *Nencheva and Others*, cited above, § 89, and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, §§ 98-99, with further references).

91. Where the application is not lodged by the victims themselves, Rule 45 § 3 of the Rules of Court requires a written authority to act, duly signed, to be produced. It is essential for representatives to demonstrate that they have received specific and explicit instructions from the alleged victim on whose behalf they purport to act before the Court (see *Post v. the Netherlands* (dec.), no. 21727/08, 20 January 2009; *Nencheva and Others*, cited above, § 83; and *Centre for Legal Resources on behalf of Valentin*

Câmpeanu, cited above, § 102). However, the Convention institutions have held that special considerations may arise in the case of victims of alleged breaches of Articles 2, 3 and 8 of the Convention at the hands of the national authorities. Applications lodged by individuals on behalf of the victim or victims, even though no valid form of authority was presented, have thus been declared admissible (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 103).

92. Particular consideration has been shown with regard to the victims' vulnerability on account of their age, sex or disability, which rendered them unable to lodge a complaint on the matter with the Court, due regard also being paid to the connections between the person lodging the application and the victim (ibid.).

93. For instance, in *S.P., D.P. and A.T. v. the United Kingdom* (no. 23715/94, Commission decision of 20 May 1996, unreported), which concerned, *inter alia*, Article 8 of the Convention, the Commission declared admissible an application lodged by a solicitor on behalf of children whom he had represented in the domestic proceedings, in which he had been instructed by the guardian *ad litem*, after noting in particular that their mother had displayed no interest, that the local authorities had been criticised in the application and that there was no conflict of interests between the solicitor and the children.

In *İlhan v. Turkey* ([GC], no. 22277/93, §§ 54-55, ECHR 2000-VII), where the direct victim, Abdüllatif İlhan, had suffered severe injuries as a result of ill-treatment at the hands of the security forces, the Court held that his brother could be regarded as having validly introduced the application, based on Articles 2 and 3 of the Convention, since it was clear from the facts that Abdüllatif İlhan had consented to the proceedings, there was no conflict of interests between himself and his brother, who had been closely concerned with the incident, and he was in a particularly vulnerable position because of his injuries.

In *Y.F. v. Turkey* (no. 24209/94, § 31, ECHR 2003-IX), in which a husband alleged under Article 8 of the Convention that his wife had been forced to undergo a gynaecological examination following her detention in police custody, the Court found that it was open to the applicant, as a close relative of the victim, to make a complaint concerning allegations by her of violations of the Convention, in particular having regard to her vulnerable position in the special circumstances of the case.

94. Still in the context of Article 8 of the Convention, the Court has also accepted on several occasions that parents who did not have parental rights could apply to it on behalf of their minor children (see, in particular, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, §§ 138-39,

ECHR 2000-VIII; *Šneersone and Kampanella v. Italy*, no. 14737/09, § 61, 12 July 2011; *Diamante and Pelliccioni v. San Marino*, no. 32250/08, §§ 146-47, 27 September 2011; *A.K. and L. v. Croatia*, no. 37956/11, §§ 48-50, 8 January 2013; and *Raw and Others v. France*, no. 10131/11, §§ 51-52, 7 March 2013). The key criterion for the Court in these cases was the risk that some of the children's interests might not be brought to its attention and that they would be denied effective protection of their Convention rights.

95. Lastly, the Court recently adopted a similar approach in *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, concerning a young man of Roma origin, seriously disabled and HIV-positive, who died in hospital before the application was lodged and had no known next-of-kin and no State-appointed representative. In view of the exceptional circumstances of the case and the seriousness of the allegations, the Court recognised that the Centre for Legal Resources had standing to represent Valentin Câmpeanu. The Court emphasised that to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level (ibid., § 112).

(b) Application to the present case

96. The applicants alleged on Vincent Lambert's behalf a violation of Articles 2, 3 and 8 of the Convention (see paragraph 80 above).

97. The Court considers at the outset that the case-law concerning applications lodged on behalf of deceased persons is not applicable in the present case, since Vincent Lambert is not dead but is in a state described by the expert medical report as vegetative (see paragraph 40 above). The Court must therefore ascertain whether the circumstances before it are of the kind in which it has previously held that an application could be lodged in the name and on behalf of a vulnerable person without him or her having issued either a valid authority to act or instructions to the person purporting to act for him or her (see paragraphs 93-95 above).

98. It notes that none of the cases in which it has accepted, by way of an exception, that an individual may act on behalf of another is comparable to the present case. The case in *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, is to be distinguished from the present case in so far as the direct victim was dead and had no one to represent him. In the present case, while the direct victim is unable to express his wishes, several members of his close family wish to express themselves on his behalf, while defending diametrically opposed points of view. The applicants mainly

rely on the right to life protected by Article 2, the "sanctity" of which was stressed by the Court in *Pretty v. the United Kingdom* (no. 2346/02, § 65, ECHR 2002-III), whereas the individual third-party interveners (Rachel Lambert, François Lambert and Marie-Geneviève Lambert) rely on the right to respect for private life and in particular the right of each individual, encompassed in the notion of personal autonomy (ibid., § 61), to decide in which way and at which time his or her life should end (ibid., § 67; see also *Haas v. Switzerland*, no. 31322/07, § 51, ECHR 2011, and *Koch*, cited above, § 52).

99. The applicants propose that the Court should apply the criteria set forth in *Koch* (cited above, § 44), which, in their submission, they satisfy on account of their close family ties, the fact that they have a sufficient personal or legal interest in the outcome of the proceedings and the fact that they have previously expressed an interest in the case.

100. However, the Court observes that in *Koch*, cited above, the applicant argued that his wife's suffering and the circumstances of her death had affected him to the extent of constituting a violation *of his own rights* under Article 8 of the Convention (§ 43). Thus, it was on that point that the Court was required to rule, and it was against that background that it considered that account should also be taken of the criteria developed in its case-law allowing a relative or heir to bring an action before it on the deceased person's behalf (§ 44).

101. In the Court's view, these criteria are not applicable in the present case since Vincent Lambert is not dead and the applicants are seeking to raise complaints *on his behalf*.

102. A review of the cases in which the Convention institutions have accepted that a third party may, in exceptional circumstances, act in the name and on behalf of a vulnerable person (see paragraphs 93-95 above) reveals the following two main criteria: the risk that the direct victim will be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant.

103. Applying these criteria to the present case, the Court does not discern any risk, firstly, that Vincent Lambert will be deprived of effective protection of his rights since, in accordance with its consistent case-law (see paragraphs 90 above and 115 below), it is open to the applicants, as Vincent Lambert's close relatives, to rely before the Court, on their own behalf, on the right to life protected by Article 2.

104. As regards the second criterion, the Court must next ascertain whether there is a convergence of interests between the applicants and Vincent Lambert. In that connection it notes that one of the key aspects of the domestic proceedings consisted precisely in determining Vincent

Lambert's wishes, given that Dr Kariger's decision of 11 January 2014 was based on the certainty that Vincent Lambert "had not wished, before his accident, to live under such conditions" (see paragraph 22 above). In its judgment of 24 June 2014, the *Conseil d'État* found, in the light of the testimony of Vincent Lambert's wife and one of his brothers and the statements of several of his other siblings, that in basing his decision on that ground Dr Kariger "[could not] be regarded as having incorrectly interpreted the wishes expressed by the patient before his accident" (see paragraph 50 above). Accordingly, the Court does not consider it established that there is a convergence of interests between the applicants' assertions and what Vincent Lambert would have wished.

105. The Court concludes that the applicants do not have standing to raise the complaints under Articles 2, 3 and 8 of the Convention in the name and on behalf of Vincent Lambert.

106. It follows that these complaints are incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.

B. Rachel Lambert's standing to act in the name and on behalf of Vincent Lambert

1. The parties' submissions

107. In a letter from her lawyer dated 9 July 2014, Rachel Lambert requested leave to represent her husband Vincent Lambert as a third-party intervener in the procedure. In support of her request she furnished a judgment of the Châlons-en-Champagne guardianship judge, dated 17 December 2008, giving her authority to represent her husband in matters arising out of their matrimonial regime, as well as two statements from a sister and half-brother of Vincent Lambert. According to those statements, Vincent Lambert would not have wished a decision in his case to be taken by his parents, from whom he was morally and physically estranged, but rather by his wife, who was his person of trust. She also produced a statement by her stepmother, who said that she had accompanied Rachel Lambert in July 2012 to a consultation with a professor of medicine at Liège University Hospital which was also attended by the first two applicants. During the consultation she and Rachel Lambert had stated Vincent Lambert's wish not to live in an incapacitated state if such a situation should arise, and the second applicant had reportedly said that, if the question of euthanasia should arise, she would leave the decision to Rachel Lambert. In her observations, Rachel Lambert submitted that, since she was informed of her husband's wishes, as corroborated by the statements she had produced,

she alone had legal standing to act on behalf of Vincent Lambert and to represent him.

108. The Government did not make any submissions on this point.

109. The applicants submitted that the ruling of the guardianship judge produced by Rachel Lambert did not give her general authority to represent her husband, but merely authority to represent him in property-related matters. She could not therefore claim to be the only person to represent her husband before the Court. The applicants further maintained that the statements she had produced had no legal value; they also disputed the content of the statement by Rachel Lambert's stepmother. They noted that Vincent Lambert had not designated a person of trust, and concluded that, as French law currently stood and in the absence of a full or partial guardianship order, Vincent Lambert was not represented by anyone in proceedings concerning him personally.

2. The Court's assessment

110. The Court notes that no provision of the Convention permits a third-party intervener to represent another person before the Court. Furthermore, according to Rule 44 § 3 (a) of the Rules of Court, a third-party intervener is any person concerned "who is not the applicant".

111. Accordingly, the Court cannot but refuse Rachel Lambert's request.

C. Conclusion

112. The Court has found that the applicants lacked standing to allege a violation of Articles 2, 3 and 8 of the Convention in the name and on behalf of Vincent Lambert (see paragraphs 105-06 above), and has also rejected Rachel Lambert's request to represent her husband as a third-party intervener (see paragraphs 110-11 above).

Nevertheless, the Court emphasises that, notwithstanding the findings it has just made regarding admissibility, it will examine below all the substantive issues arising in the present case under Article 2 of the Convention, given that they were raised by the applicants on their own behalf.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

113. The applicants submitted that the withdrawal of Vincent Lambert's artificial nutrition and hydration would be in breach of the State's obligations under Article 2 of the Convention. They maintained that the Leonetti Act lacked clarity and precision, and complained of the process culminating in the doctor's decision of 11 January 2014.

114. The Government contested that argument.

A. Admissibility

115. The Court reiterates its case-law to the effect that the next-of-kin of a person whose death allegedly engages the responsibility of the State may claim to be victims of a violation of Article 2 of the Convention (see paragraph 90 above). Although Vincent Lambert is still alive, there is no doubt that if artificial nutrition and hydration were withdrawn, his death would occur within a short time. Accordingly, even if the violation is a potential or future one (see *Tauira and 18 Others v. France*, no. 28204/95, Commission decision of 4 December 1995, Decisions and Reports 83-B, p. 112, at p. 131), the Court considers that the applicants, in their capacity as Vincent Lambert's close relatives, may rely on Article 2.

116. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other ground. The complaint must therefore be declared admissible.

B. Merits

1. The applicable rule

117. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324), enjoins the State not only to refrain from the "intentional" taking of life (negative obligations), but also to take appropriate steps to safeguard the lives of those within its jurisdiction (positive obligations) (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

118. The Court will address these two aspects in turn and will begin by examining whether the present case involves the State's negative obligations under Article 2.

119. While the applicants acknowledged that the withdrawal of nutrition and hydration might be legitimate in cases of unreasonable obstinacy, and accepted that a legitimate distinction existed between, on the one hand, euthanasia and assisted suicide and, on the other hand, "therapeutic abstention", consisting in withdrawing or withholding treatment that had become unreasonable, they nevertheless argued repeatedly in their observations that, since these criteria were not met in their view, the present case concerned the intentional taking of life; they referred in this regard to the notion of "euthanasia".

120. The Government stressed that the aim of the medical decision was not to put an end to life, but to discontinue a form of treatment which had been refused by the patient or – where the patient was unable to express his or her wishes – which constituted, in the doctor's view based on medical and non-medical factors, unreasonable obstinacy. They quoted the public rapporteur before the *Conseil d'État*, who in his submissions of 20 June 2014 had noted that, in discontinuing treatment, a doctor was not taking the patient's life but was resolving to withdraw when there was nothing more to be done (see paragraph 45 above).

121. The Court observes that the Leonetti Act does not authorise either euthanasia or assisted suicide. It allows doctors, in accordance with a prescribed procedure, to discontinue treatment only if continuing it demonstrates unreasonable obstinacy. In its observations to the *Conseil d'État*, the National Medical Academy reiterated the fundamental prohibition barring doctors from deliberately taking another's life, which formed the basis for the relationship of trust between doctor and patient. That prohibition is laid down in Article R. 4127-38 of the Public Health Code, which states that doctors may not take life intentionally (see paragraph 55 above).

122. At the hearing of 14 February 2014 before the *Conseil d'État*, the public rapporteur cited the remarks made by the Minister of Health to the members of the Senate examining the Leonetti Bill:

> "While the act of withdrawing treatment ... results in death, the intention behind the act [is not to kill; it is] to allow death to resume its natural course and to relieve suffering. This is particularly important for care staff, whose role is not to take life."

123. In the case of *Glass v. the United Kingdom* ((dec.), no. 61827/00, 18 March 2003), the applicants complained under Article 2 of the Convention that a potentially lethal dose of diamorphine had been administered to their son, without their consent, by doctors in the hospital where he was being treated. The Court noted that the doctors had not deliberately sought to kill the child or to hasten his death, and examined the parents' complaints from the standpoint of the authorities' positive obligations (see also *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

124. The Court notes that both the applicants and the Government make a distinction between the intentional taking of life and "therapeutic abstention" (see paragraphs 119-20 above), and stresses the importance of that distinction. In the context of the French legislation, which prohibits the intentional taking of life and permits life-sustaining treatment to be withdrawn or withheld only in certain specific circumstances, the Court considers that the present case does not involve the State's negative

obligations under Article 2, and will examine the applicants' complaints solely from the standpoint of the State's positive obligations.

2. Whether the State complied with its positive obligations

(a) The submissions of the parties and the third-party interveners

(i) The applicants

125. The applicants submitted first of all that the Leonetti Act was not applicable to Vincent Lambert, who, in their view, was neither sick nor at the end of life, but was severely disabled. They complained of the "confusion" arising from the Act on the following points: the notion of unreasonable obstinacy (and in particular the criterion concerning treatment having "no other effect than to sustain life artificially", which they considered to be extremely imprecise), and the classification of artificial nutrition and hydration as treatment rather than care. In their submission, Vincent Lambert's enteral feeding was not a form of treatment that could be withdrawn, and the notion of unreasonable obstinacy did not apply to his medical situation.

126. They argued that the process leading to the doctor's decision of 11 January 2014 was incompatible with the State's obligations flowing from Article 2 of the Convention. In their view, the procedure was not truly collective as it involved seeking opinions on a purely consultative basis, with the doctor alone taking the decision. They maintained that alternative systems were possible which would allow other doctors or the members of the family, in the absence of a person of trust, to participate in the decision-making process. Lastly, they argued that the legislation should take into account the possibility of disagreement between family members and make provision at the very least for mediation.

(ii) The Government

127. The Government submitted that the Leonetti Act struck a balance between the right to respect for life and patients' right to consent to or refuse treatment. The definition of unreasonable obstinacy was based on the ethical principles of beneficence and non-maleficence reiterated in the Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations". In accordance with those principles, health-care professionals had an obligation to deliver only appropriate treatment and had to be guided solely by the benefit to the patient, which was to be assessed in overall terms. In that regard both

medical and non-medical factors, and in particular the patient's wishes, were to be taken into account. They pointed out that when the bill had been debated in Parliament, an amendment seeking to exclude artificial nutrition and hydration from the scope of treatment had been rejected. They stressed that treatment also encompassed methods and interventions responding to a functional deficiency in the patient and involving the use of intrusive medical techniques.

128. The Government emphasised that the French legislation provided for a number of procedural safeguards: consideration of the patient's wishes and of the views of the person of trust, the family or those close to the patient, and implementation of a collective procedure in which the family and those close to the patient were involved. Lastly, the doctor's decision was subject to review by a judge.

(iii) The third-party interveners

(α) Rachel Lambert

129. Rachel Lambert submitted that the Leonetti Act subjected the doctor's decision to numerous safeguards and balanced each individual's right to receive the most suitable care with the right not to undergo treatment in circumstances amounting to unreasonable obstinacy. She stressed that the legislature had not sought to limit the recognition of patients' previously expressed wishes to cases in which they had designated a person of trust or drawn up advance directives; where this was not the case, the views of the family were sought in order, first and foremost, to establish what the patient would have wanted.

130. Referring to the collective procedure implemented in the present case, she pointed out that Dr Kariger had consulted six doctors (three of them from outside the hospital), had convened a meeting with virtually all the care staff and all the doctors and had held two meetings with the family. His decision had been reasoned at length and bore witness to the professionalism of his approach.

(β) François Lambert and Marie-Geneviève Lambert

131. François Lambert and Marie-Geneviève Lambert submitted that the doctor's decision had been taken in accordance with the Leonetti Act, the provisions of which they recapitulated. They stressed that the data emerging from the expert medical report ordered by the *Conseil d'État* were fully consistent with the notion of treatment serving solely to sustain life artificially, observing that it was Vincent Lambert's inability to eat and drink

by himself, without medical assistance in the form of enteral nutrition and hydration, that would cause his death.

132. They submitted that the decision-making process in the present case had been particularly lengthy, meticulous and respectful of the rights of all concerned, of the medical and paramedical opinions sought and of the views of the family members who had been invited to participate (especially the applicants, who had been assisted by a doctor of their choosing throughout the process) and who had been kept fully informed at every stage. In their view, the final decision had been taken in accordance with the process required by law and by the Convention, as set out in the Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations".

(γ) National Union of Associations of Head Injury and Brain Damage Victims' Families (UNAFTC)

133. UNAFTC echoed the concerns of the families and establishments it represented, and argued that patients in a chronic vegetative or minimally conscious state were not in an end-of-life situation and were not being kept alive artificially, and that where a person's condition was not life-threatening, artificial feeding and hydration could not be deemed to constitute treatment that could be withdrawn. UNAFTC submitted that a patient's wishes could not be established on the basis of spoken remarks reported by some of the family members, and when in doubt, life should take precedence. At all events, in the absence of advance directives and of a person of trust, no decision to withdraw treatment could be taken in the absence of consensus within the family.

(δ) Amréso-Bethel

134. The association Amréso-Bethel, which runs a care unit for patients in a minimally conscious or chronic vegetative state, provided details of the care dispensed to its patients.

(ε) Human Rights Clinic

135. In view of the multitude of approaches across the world to end-of-life issues and the differences regarding the circumstances in which passive euthanasia was permitted, the Human Rights Clinic submitted that States should be allowed a margin of appreciation in striking a balance between patients' personal autonomy and the protection of their lives.

(b) The Court's assessment

(i) General considerations

(α) Existing case-law

136. The Court has never ruled on the question which is the subject of the present application, but it has examined a number of cases concerning related issues.

137. In a first group of cases, the applicants or their relatives invoked the right to die, relying on various Articles of the Convention.

In *Sanles Sanles*, cited above, the applicant asserted, on behalf of her brother-in-law, who was tetraplegic and wished to end his life with the assistance of third parties and who died before the application was lodged, the right to die with dignity, relying on Articles 2, 3, 5, 6, 8, 9 and 14 of the Convention. The Court rejected the application as being incompatible *ratione personae* with the provisions of the Convention.

In *Pretty*, cited above, the applicant was in the terminal stages of an incurable neurodegenerative disease and complained, relying on Articles 2, 3, 8, 9 and 14 of the Convention, that her husband could not help her to commit suicide without facing prosecution by the United Kingdom authorities. The Court found no violation of the provisions in question.

Haas and *Koch*, cited above, concerned assisted suicide, and the applicants relied on Article 8 of the Convention. In *Haas*, the applicant, who had been suffering for a long time from a serious bipolar affective disorder, wished to end his life and complained of being unable to obtain the lethal substance required for that purpose without a medical prescription; the Court held that there had been no violation of Article 8. In *Koch*, the applicant alleged that the refusal to allow his wife (who was paralysed and needed artificial ventilation) to acquire a lethal dose of medication so that she could take her own life had breached her right, and his, to respect for their private and family life. He also complained of the domestic courts' refusal to examine his complaints on the merits, and the Court found a violation of Article 8 on that point only.

138. In a second group of cases, the applicants took issue with the administering or withdrawal of treatment.

In *Glass*, cited above, the applicants complained that diamorphine had been administered to their sick child by hospital doctors without their consent, and of the "do not resuscitate" order entered in his medical notes. In its decision of 18 March 2003, cited above, the Court found that their complaint under Article 2 of the Convention was manifestly ill-founded;

in its judgment of 9 March 2004 it held that there had been a violation of Article 8 of the Convention.

In *Burke v. the United Kingdom* ((dec.), no. 19807/06, 11 July 2006), the applicant suffered from an incurable degenerative brain condition and feared that the guidance applicable in the United Kingdom could lead in due course to the withdrawal of his artificial nutrition and hydration. The Court declared his application, lodged under Articles 2, 3 and 8 of the Convention, inadmissible as being manifestly ill-founded.

Lastly, in its decision in *Ada Rossi and Others*, cited above, the Court declared incompatible *ratione personae* an application lodged by individuals and associations complaining, under Articles 2 and 3 of the Convention, of the potentially adverse effects for them of execution of a judgment of the Italian Court of Cassation authorising the discontinuation of the artificial nutrition and hydration of a young girl in a vegetative state.[1]

139. The Court observes that, with the exception of the violations of Article 8 in *Glass* and *Koch*, cited above, it did not find a violation of the Convention in any of these cases.[2]

(β) The context

140. Article 2 requires the State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, cited above, § 36, and the decision in *Powell*, cited above); in the public-health sphere, these positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I; *Glass*, cited above; *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII; and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 130).

141. The Court stresses that the issue before it in the present case is not that of euthanasia, but rather the withdrawal of life-sustaining treatment (see paragraph 124 above).

142. In *Haas* (cited above, § 54), the Court reiterated that the Convention had to be read as a whole (see, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 83, ECHR 2009). In *Haas* (cited above, § 54) the Court considered that it was appropriate, in the context of examining a possible violation of Article 8, to refer to Article 2 of the Convention. The Court considers that the converse also applies: in a case such as the present one reference

1. This paragraph has been rectified under Rule 81 of the Rules of Court.
2. This paragraph has been rectified under Rule 81 of the Rules of Court.

should be made, in examining a possible violation of Article 2, to Article 8 of the Convention and to the right to respect for private life and the notion of personal autonomy which it encompasses. In *Pretty* (cited above, § 67) the Court was not prepared to exclude that preventing the applicant by law from exercising her choice to avoid what she considered would be an undignified and distressing end to her life constituted an interference with her right to respect for her private life as guaranteed under Article 8 § 1 of the Convention. In *Haas* (cited above, § 51), it asserted that an individual's right to decide in which way and at which time his or her life should end was one of the aspects of the right to respect for private life.

The Court refers in particular to paragraphs 63 and 65 of the judgment in *Pretty*, where it stated as follows.

> "63. ... In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention. As recognised in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life ...
>
> 65. The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."

143. The Court will take these considerations into account in examining whether the State complied with its positive obligations flowing from Article 2. It further observes that, in addressing the question of the administering or withdrawal of medical treatment in *Glass* and *Burke*, cited above, it took into account the following factors:

(a) the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2 (see *Glass*, cited above);

(b) whether account had been taken of the applicant's previously expressed wishes and those of the persons close to him or her, as well as the opinions of other medical personnel (see *Burke*, cited above);

(c) the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests (ibid.).

The Court will take these factors into consideration in examining the present case. It will also take account of the criteria laid down in the Council

of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" (see paragraphs 60-68 above).

(γ) The margin of appreciation

144. The Court reiterates that Article 2 ranks as one of the most fundamental provisions in the Convention, one which, in peace time, admits of no derogation under Article 15, and that it construes strictly the exceptions defined therein (see, among other authorities, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 174-77, ECHR 2011). However, in the context of the State's positive obligations, when addressing complex scientific, legal and ethical issues concerning, in particular, the beginning or the end of life, and in the absence of consensus among the member States, the Court has recognised that the latter have a certain margin of appreciation.

First of all the Court observes that in *Vo* (which concerned the acquittal on a charge of unintentional homicide of the doctor responsible for the death of the applicant's unborn child), in examining the point at which life begins from the standpoint of Article 2 of the Convention, it concluded that this matter came within the States' margin of appreciation in this sphere. It took into consideration the absence of a common approach among the Contracting States and of a European consensus on the scientific and legal definition of the beginning of life (cited above, § 82).

The Court reiterated this approach in, *inter alia*, *Evans v. the United Kingdom* ([GC], no. 6339/05, §§ 54-56, ECHR 2007-I, concerning the fact that domestic law permitted the applicant's former partner to withdraw his consent to the storage and use of embryos created jointly by them) and in *A, B and C v. Ireland* ([GC], no. 25579/05, § 237, ECHR 2010, in which the applicants essentially complained under Article 8 of the Convention of the prohibition on abortion in Ireland for health and well-being reasons).

145. On the question of assisted suicide the Court noted, in the context of Article 8 of the Convention, that there was no consensus among the member States of the Council of Europe as to an individual's right to decide in which way and at which time his or her life should end, and therefore concluded that the States' margin of appreciation in this area was "considerable" (see *Haas*, cited above, § 55, and *Koch*, cited above, § 70).

146. The Court also stated, in general terms, in *Ciechońska v. Poland* (no. 19776/04, § 65, 14 June 2011), concerning the authorities' responsibility for the accidental death of the applicant's husband, that the choice of means for ensuring the positive obligations under Article 2 was in principle a matter that fell within the State's margin of appreciation.

147. The Court notes that no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it. While the detailed arrangements governing the withdrawal of treatment vary from one country to another, there is nevertheless consensus as to the paramount importance of the patient's wishes in the decision-making process, however those wishes are expressed ...

148. Accordingly, the Court considers that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy (see, *mutatis mutandis*, *A, B and C v. Ireland*, cited above, § 237). However, this margin of appreciation is not unlimited (ibid., § 238) and the Court reserves the power to review whether or not the State has complied with its obligations under Article 2.

(ii) Application to the present case

149. The applicants alleged that the Leonetti Act lacked clarity and precision, and complained of the process culminating in the doctor's decision of 11 January 2014. In their view, these shortcomings were the result of the national authorities' failure to fulfil their duty of protection under Article 2 of the Convention.

(α) The legislative framework

150. The applicants complained of a lack of precision and clarity in the legislation, which, in their submission, was not applicable to the case of Vincent Lambert, who was neither sick nor at the end of his life. They further maintained that the legislation did not define with sufficient precision the concepts of unreasonable obstinacy and treatment that could be withdrawn.

151. The Court has regard to the legislative framework established by the Public Health Code (hereinafter "the Code") as amended by the Leonetti Act (see paragraphs 52-54 above). It further reiterates that interpretation is inherent in the work of the judiciary (see, among other authorities, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 85, 20 October 2011). It observes that, prior to the rulings given in the present case, the French courts had never been called upon to interpret the provisions of the Leonetti Act, although it had been in force for nine years. In the present case the *Conseil d'État* had the task of clarifying the scope of application of the

Act and defining the concepts of "treatment" and "unreasonable obstinacy" (see below).

The scope of application of the Leonetti Act

152. In its ruling of 14 February 2014, the *Conseil d'État* determined the scope of application of the Act. It held that it was clear from the very wording of the applicable provisions, and from the parliamentary proceedings prior to enactment of the legislation, that the provisions in question were general in scope and were applicable to all users of the health system, whether or not the patient was in an end-of-life situation (see paragraph 33 above).

153. The Court notes that in his observations to the *Conseil d'État* Mr Jean Leonetti, the rapporteur for the Act, stated in his capacity as *amicus curiae* that it was applicable to patients who had brain damage and thus suffered from a serious condition that was incurable in the advanced stages, but who were not necessarily "at the end of life". For that reason the legislature, in the title of the Act, had referred to "patients' rights *and* end-of-life issues" rather than "patients' rights *in* end-of-life situations" (see, to similar effect, the observations of the National Medical Academy, paragraph 44 above).

The concept of treatment

154. The *Conseil d'État*, in its ruling of 14 February 2014, interpreted the concept of treatment that could be withdrawn or limited. It held, in the light of Articles L. 1110-5 and 1111-4 of the Code, cited above, and of the parliamentary proceedings, that the legislature had intended to include among such forms of treatment all acts seeking to maintain the patient's vital functions artificially, and that artificial nutrition and hydration fell into that category of acts. The *amicus curiae* submissions to the *Conseil d'État* agreed on this point.

155. The Court notes that the Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" addresses these issues. The Guide specifies that treatment covers not only interventions whose aim is to improve a patient's state of health by acting on the causes of the illness, but also interventions which have a bearing only on the symptoms and not on the aetiology of the illness, or which are responses to an organ dysfunction. According to the Guide, artificial nutrition and hydration are given to a patient following a medical indication and imply choices concerning medical procedures and devices (perfusion, feeding tubes). The Guide observes that differences in approach exist between countries. Some regard artificial nutrition and hydration as a form of treatment that may be limited or withdrawn in the circumstances

and in accordance with the guarantees provided for in domestic law. The considerations to be taken into account in this regard are the patient's wishes and whether or not the treatment is appropriate in the situation in question. In other countries they are regarded as a form of care meeting the individual's basic needs which cannot be withdrawn unless the patient, in the terminal phase of an end-of-life situation, has expressed a wish to that effect (see paragraph 61 above).

The concept of unreasonable obstinacy

156. Under the terms of Article L. 1110-5 of the Code, treatment will amount to unreasonable obstinacy if it is futile or disproportionate or has "no other effect than to sustain life artificially" (see paragraph 53 above). It is this last criterion which was applied in the present case and which the applicants consider to be imprecise.

157. In his observations to the *Conseil d'État* in an *amicus curiae* capacity, Mr Leonetti stated that this wording, which was stricter than the wording originally envisaged (treatment "which prolongs life artificially") was more restrictive and referred to artificially sustaining life "in the purely biological sense, in circumstances where, firstly, the patient has major irreversible brain damage and, secondly, his or her condition offers no prospect of a return to awareness of self or relationships with others" (see paragraph 44 above). In the same vein, the National Medical Council emphasised the importance of the notion of temporality, observing that where a pathological condition had become chronic, resulting in the person's physiological deterioration and the loss of his or her cognitive and relational faculties, obstinacy in administering treatment could be regarded as unreasonable if no signs of improvement were apparent (ibid.)

158. In its judgment of 24 June 2014, the *Conseil d'État* detailed the factors to be taken into account by the doctor in assessing whether the criteria for unreasonable obstinacy were met, while making clear that each situation had to be considered on its own merits. These were: the medical factors (which had to cover a sufficiently long period, be assessed collectively and relate in particular to the patient's current condition, the change in that condition, his or her degree of suffering and the clinical prognosis) and the non-medical factors, namely the patient's wishes, however expressed, to which the doctor had to "attach particular importance", and the views of the person of trust, the family or those close to the patient.

159. The Court notes that the *Conseil d'État* established two important safeguards in that judgment. Firstly, it stated that "the sole fact that a person is in an irreversible state of unconsciousness or, *a fortiori*, has lost his or her autonomy irreversibly and is thus dependent on such a form of

nutrition and hydration, does not by itself amount to a situation in which the continuation of treatment would appear unjustified on grounds of unreasonable obstinacy". Secondly, it stressed that where a patient's wishes were not known, they could not be assumed to consist in a refusal to be kept alive (see paragraph 48 above).

160. On the basis of this analysis, the Court cannot subscribe to the applicants' arguments. It considers that the provisions of the Leonetti Act, as interpreted by the *Conseil d'État*, constitute a legal framework which is sufficiently clear, for the purposes of Article 2 of the Convention, to regulate with precision the decisions taken by doctors in situations such as that in the present case. The Court therefore concludes that the State put in place a regulatory framework apt to ensure the protection of patients' lives (see paragraph 140 above).

(β) The decision-making process

161. The applicants complained of the decision-making process, which, in their view, should have been genuinely collective or at the very least have provided for mediation in the event of disagreement.

162. The Court notes at the outset that neither Article 2 nor its case-law can be interpreted as imposing any requirements as to the procedure to be followed with a view to securing a possible agreement. It points out that in *Burke*, cited above, it found the procedure consisting in determining the patient's wishes and consulting those close to him or her as well as other medical personnel to be compatible with Article 2 (see paragraph 143 above).

163. The Court observes that, although the procedure under French law is described as "collective" and includes several consultation phases (with the care team, at least one other doctor, the person of trust, the family or those close to the patient), it is the doctor in charge of the patient alone who takes the decision. The patient's wishes must be taken into account and the decision itself must be accompanied by reasons and is added to the patient's medical file.

164. In his observations as *amicus curiae*, Mr Jean Leonetti pointed out that the Act gave the doctor sole responsibility for the decision to withdraw treatment and that it had been decided not to pass that responsibility on to the family, in order to avoid any feelings of guilt and to ensure that the person who took the decision was identified.

165. It is clear from the comparative-law materials available to the Court that in those countries which authorise the withdrawal of treatment, and where the patient has not drawn up any advance directives, there exists

a great variety of arrangements governing the taking of the final decision to withdraw treatment. It may be taken by the doctor (this is the most common situation), jointly by the doctor and the family, by the family or legal representative, or by the courts ...

166. The Court observes that the collective procedure in the present case lasted from September 2013 to January 2014 and that, at every stage of its implementation, it exceeded the requirements laid down by law. Whereas the procedure provides for the consultation of one other doctor and, where appropriate, a second one, Dr Kariger consulted six doctors, one of whom was designated by the applicants. He convened a meeting of virtually the entire care team and held two meetings with the family which were attended by Vincent Lambert's wife, his parents and his eight siblings. Following those meetings Vincent Lambert's wife and six of his brothers and sisters argued in favour of withdrawing treatment, as did five of the six doctors consulted, while the applicants opposed such a move. The doctor also held discussions with François Lambert, Vincent Lambert's nephew. His decision, which ran to thirteen pages (an abridged seven-page version of which was read out to the family) provided very detailed reasons. The *Conseil d'État* held in its judgment of 24 June 2014 that it was not tainted by any irregularity (see paragraph 50 above).

167. The *Conseil d'État* found that the doctor had complied with the requirement to consult the family and that it had been lawful for him to take his decision in the absence of unanimity among the family members. The Court notes that French law as it currently stands provides for the family to be consulted (and not for it to participate in taking the decision), but does not make provision for mediation in the event of disagreement between family members. Likewise, it does not specify the order in which family members' views should be taken into account, unlike in some other countries.

168. The Court notes the absence of consensus on this subject (see paragraph 165 above) and considers that the organisation of the decision-making process, including the designation of the person who takes the final decision to withdraw treatment and the detailed arrangements for the taking of the decision, fall within the State's margin of appreciation. It notes that the procedure in the present case was lengthy and meticulous, exceeding the requirements laid down by the law, and considers that, although the applicants disagree with the outcome, that procedure satisfied the requirements flowing from Article 2 of the Convention (see paragraph 143 above).

(γ) Judicial remedies

169. Lastly, the Court will examine the remedies that were available to the applicants in the present case. It observes that the *Conseil d'État*, called upon for the first time to rule on an appeal against a decision to withdraw treatment under the Leonetti Act, provided some important clarifications in its rulings of 14 February and 24 June 2014 concerning the scope of the review carried out by the urgent-applications judge of the administrative court in cases such as the present one.

170. The applicants had lodged an urgent application with the administrative court for protection of a fundamental freedom under Article L. 521-2 of the Administrative Courts Code. This Article provides that the judge, "when hearing an application of this kind justified by particular urgency, may order any measures necessary to safeguard a fundamental freedom allegedly breached in a serious and manifestly unlawful manner by an administrative authority". When dealing with an application on this basis, the urgent-applications judge of the administrative court normally rules alone and as a matter of urgency, and may order interim measures on the basis of a "plain and obvious" test (*manifest* unlawfulness).

171. The Court notes that, as defined by the *Conseil d'État* (see paragraph 32 above), the role of the urgent-applications judge entails the power not only to suspend implementation of the doctor's decision but also to conduct a full review of its lawfulness (and not just apply the test of manifest unlawfulness), if necessary sitting as a member of a bench of judges and, if needs be, after ordering an expert medical report and seeking the opinions of persons acting in an *amicus curiae* capacity.

172. The *Conseil d'État* also specified in its judgment of 24 June 2014 that the particular role of the judge in such cases meant that he or she had to examine – in addition to the arguments alleging that the decision in question was unlawful – any arguments to the effect that the legislative provisions that had been applied were incompatible with the Convention.

173. The Court notes that the *Conseil d'État* examined the case sitting as a full court (the seventeen-member Judicial Assembly), which is highly unusual in injunction proceedings. In its ruling of 14 February 2014, it stated that the assessment carried out at Liège University Hospital dated from two and a half years previously, and considered it necessary to have the fullest information possible on Vincent Lambert's state of health. It therefore ordered an expert medical report, which it entrusted to three recognised specialists in neuroscience. Furthermore, in view of the scale and difficulty of the issues raised by the case, it requested the National Medical Academy,

the National Ethics Advisory Committee, the National Medical Council and Mr Jean Leonetti to submit general observations to it as *amici curiae*, in order to clarify in particular the concepts of unreasonable obstinacy and sustaining life artificially.

174. The Court notes that the expert report was prepared in great depth. The experts examined Vincent Lambert on nine occasions, conducted a series of tests and familiarised themselves with the entire medical file and with all the items in the judicial file of relevance for their report. Between 24 March and 23 April 2014 they also met all the parties concerned (the family, the medical and care team, the medical consultants and representatives of UNAFTC and the hospital).

175. In its judgment of 24 June 2014, the *Conseil d'État* began by examining the compatibility of the relevant provisions of the Public Health Code with Articles 2, 8, 6 and 7 of the Convention (see paragraph 47 above), before assessing the conformity of Dr Kariger's decision with the provisions of the Code (see paragraphs 48-50 above). Its review encompassed the lawfulness of the collective procedure and compliance with the substantive conditions laid down by law, which it considered – particularly in the light of the findings of the expert report – to have been satisfied. It noted in particular that it was clear from the experts' findings that Vincent Lambert's clinical condition corresponded to a chronic vegetative state, that he had sustained serious and extensive injuries whose severity, coupled with the period of five and a half years that had passed since the accident, led to the conclusion that it was irreversible and that there was a "poor clinical prognosis". In the view of the *Conseil d'État*, these findings confirmed those made by Dr Kariger.

176. The Court further observes that the *Conseil d'État*, after stressing "the particular importance" which the doctor must attach to the patient's wishes (see paragraph 48 above), sought to ascertain what Vincent Lambert's wishes had been. As the latter had not drawn up any advance directives or designated a person of trust, the *Conseil d'État* took into consideration the testimony of his wife, Rachel Lambert. It noted that she and her husband, who were both nurses with experience of patients in resuscitation and those with multiple disabilities, had often discussed their professional experiences and that on several such occasions Vincent Lambert had voiced the wish not to be kept alive artificially in a highly dependent state (see paragraph 50 above). The *Conseil d'État* found that those remarks – the tenor of which was confirmed by one of Vincent Lambert's brothers – had been reported by Rachel Lambert in precise detail and with the corresponding dates. It also took account of the fact that several of Vincent Lambert's other siblings had

stated that these remarks were in keeping with their brother's personality, past experience and views, and noted that the applicants did not claim that he would have expressed remarks to the contrary. The *Conseil d'État* observed, lastly, that the consultation of the family, prescribed by law, had taken place (ibid.).

177. The applicants submitted, relying on Article 8 of the Convention, that the *Conseil d'État* should not have taken into consideration Vincent Lambert's spoken remarks, which they considered to be too general.

178. The Court points out first of all that it is the patient who is the principal party in the decision-making process and whose consent must remain at its heart; this is true even where the patient is unable to express his or her wishes. The Council of Europe's "Guide on the decision-making process regarding medical treatment in end-of-life situations" recommends that the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend (see paragraph 63 above).

179. The Court also observes that, according to the comparative-law materials available to it, in the absence of advance directives or of a "living will", a number of countries require that efforts be made to ascertain the patient's presumed wishes, by a variety of means (statements of the legal representative or the family, other factors testifying to the patient's personality and beliefs, and so forth).

180. Lastly, the Court points out that in its judgment in *Pretty* (cited above, § 63), it recognised the right of each individual to decline to consent to treatment which might have the effect of prolonging his or her life. Accordingly, it takes the view that the *Conseil d'État* was entitled to consider that the testimony submitted to it was sufficiently precise to establish what Vincent Lambert's wishes had been with regard to the withdrawal or continuation of his treatment.

(δ) Final considerations

181. The Court is keenly aware of the importance of the issues raised by the present case, which concerns extremely complex medical, legal and ethical matters. In the circumstances of the case, the Court reiterates that it was primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention, and to establish the patient's wishes in accordance with national law. The Court's role consisted in ascertaining whether the State had fulfilled its positive obligations under Article 2 of the Convention.

On the basis of that approach, the Court has found both the legislative framework laid down by domestic law, as interpreted by the *Conseil d'État*,

and the decision-making process, which was conducted in meticulous fashion in the present case, to be compatible with the requirements of Article 2. As to the judicial remedies that were available to the applicants, the Court has reached the conclusion that the present case was the subject of an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Consequently, the Court concludes that the domestic authorities complied with their positive obligations flowing from Article 2 of the Convention, in view of the margin of appreciation left to them in the present case.

(ε) Conclusion

182. It follows that there would be no violation of Article 2 of the Convention in the event of implementation of the *Conseil d'État* judgment of 24 June 2014.

...

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible as regards the applicants' complaint raised under Article 2 on their own behalf;
2. *Declares*, by twelve votes to five, the remainder of the application inadmissible;
3. *Rejects*, unanimously, Rachel Lambert's request to represent Vincent Lambert as a third-party intervener;
4. *Holds*, by twelve votes to five, that there would be no violation of Article 2 of the Convention in the event of implementation of the *Conseil d'État* judgment of 24 June 2014;

...

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 June 2015.

Erik Fribergh
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Hajiyev, Šikuta, Tsotsoria, De Gaetano and Griţco is annexed to this judgment.

D.S.
E.F.

JOINT PARTLY DISSENTING OPINION OF JUDGES HAJIYEV, ŠIKUTA, TSOTSORIA, DE GAETANO AND GRIȚCO

1. We regret that we have to dissociate ourselves from the majority's view expressed in points 2, 4 ... of the operative provisions of the judgment in this case. After considerable reflection, we believe that once all is said and written in this judgment, after all the subtle legal distinctions are made and all the fine hairs split, what is being proposed is nothing more and nothing less than that a severely disabled person *who is unable to communicate his wishes about his present condition* may, on the basis of a number of questionable assumptions, be deprived of two basic life-sustaining necessities, namely food and water, and moreover that the Convention is impotent in the face of this reality. We find that conclusion not only frightening but – and we very much regret having to say this – tantamount to a retrograde step in the degree of protection which the Convention and the Court have hitherto afforded to vulnerable people.

2. In reaching the conclusion in paragraph 112 of the present judgment, the majority proceed to review the existing cases in which the Convention institutions have accepted that a third party may, in exceptional circumstances, act in the name and on behalf of a vulnerable person, even if the latter has not expressly stated his or her wish to submit an application. The majority deduce from that case-law two main criteria to be applied in such cases: the risk that the direct victim will be deprived of effective protection of his or her rights, and the absence of a conflict of interests between the victim and the applicant (see paragraph 102 of the present judgment). While we agree with these two criteria as such, we completely disagree with the way in which the majority apply them in the particular circumstances of the present case.

With regard to the first criterion, it is true that the applicants can, and did, rely on Article 2 on their own behalf. However, now that the Court has recognised the *locus standi* of a non-governmental organisation to represent a deceased person (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014), we do not see any valid reason not to follow the same approach in respect of the applicants in the instant case. In fact, as close relatives of Vincent Lambert, they have, *a fortiori*, even stronger justification for acting on his behalf before the Court.

As regards the second criterion, the majority consider that, since the impugned domestic decisions were based on the certainty that Vincent Lambert would not have wished to be kept alive under the conditions in

which he now finds himself, it is not "established that there is a convergence of interests between the applicants' assertions and what Vincent Lambert would have wished" (see paragraph 104 of the present judgment). This statement would be correct only if – and in so far as – the applicants alleged a violation of Vincent Lambert's right to personal autonomy under Article 8 of the Convention, which, according to our Court's case-law, comprises the individual's right to decide in which way and at which time his or her life should end (see *Haas v. Switzerland*, no. 31322/07, § 51, ECHR 2011). However, although the applicants do rely on Article 8, they do so in a completely different context; it is Vincent Lambert's physical integrity, and not his personal autonomy, that they seek to defend before the Court. Their main complaints raised on behalf of Vincent Lambert are based on Articles 2 and 3 of the Convention. Unlike Article 8, which protects an extremely wide panoply of human actions based on personal choices and going in various directions, Articles 2 and 3 of the Convention are clearly unidirectional in that they do not involve any negative aspect. Article 2 protects the right to life but not the right to die (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 39-40, ECHR 2002-III). Likewise, Article 3 guarantees a positive right not to be subjected to ill-treatment, but no "right" whatsoever to waive this right and to be, for example, beaten, tortured or starved to death. To put it simply, both Article 2 and Article 3 are "one-way avenues". The right not to be starved to death being the only right that Vincent Lambert himself could have validly claimed under Articles 2 and 3, we fail to see how it is logically possible to find any lack of "convergence of interests" between him and the applicants in the present case, or even entertain the slightest doubt on this point.

In these circumstances, we are convinced that the applicants did have standing to act in the name and on behalf of Vincent Lambert, and that their respective complaints should have been declared compatible *ratione personae* with the provisions of the Convention.

3. We would like to make it clear from the outset that had this been a case where the person in question – Vincent Lambert in this case – had clearly expressed his wish not to be allowed to continue to live because of his severe physical disability and the pain associated therewith, or, in view of that situation, had clearly refused food and water, we would have found no objection to hydration and feeding being stopped or withheld if domestic legislation provided for that (and save always the right of members of the medical profession to refuse to be party to that procedure on the ground of conscientious objection). One may not agree with such a law, but in such a situation two Convention rights are, as it were, pitted against each other: the right to life (with the corresponding duty of the State to protect life)

on the one hand – Article 2 – and the right to personal autonomy which is subsumed under Article 8. In such a contest one can agree that "respect for human dignity and human freedom" (emphasised in *Pretty*, cited above, § 65) may prevail. But that is not Vincent Lambert's situation.

4. Vincent Lambert is, according to the available evidence, in a persistent vegetative state, with minimal, if any, consciousness. He is not, however, brain dead – there is a failure of function at one level of the brain but not at all levels. In fact, he can breathe on his own (without the aid of a life-support machine) and can digest food (the gastro-intestinal tract is intact and functioning), but has difficulty in swallowing, in moving solid food down the oesophagus. More critically, there is no evidence, cogent or otherwise, that he is in pain (as distinguished from the evident discomfort of being constantly in bed or in a wheelchair). We are particularly struck by a submission made by the applicants before this Court in their observations of 16 October 2014 on the admissibility and merits (see paragraphs 51 and 52), and which has not really been contested by the Government, to the following effect:

> "The Court must realise that, like any person in a state of severely diminished consciousness, Mr Lambert can be got out of bed, dressed, put in a wheelchair and taken out of his room. Many patients in a condition comparable to his reside in a specialised nursing home and are able to spend weekends and some holidays with their families ... and it is precisely the enteral method used to feed them that makes this form of autonomy possible.
>
> In September 2012 Doctor Kariger agreed to let Vincent Lambert's parents take him on holiday to the south of France. That was six months before the first decision to stop feeding him was taken ... and there had been no change in his condition in the interim."

From the evidence submitted before this Court, enteral feeding involves minimal physical invasion, causes the patient no pain, and, with minimal training, such feeding can continue to be administered by the family or relatives of Mr Lambert (and the applicants have offered to do so) – although the food mixture to be administered is still something that has to be prepared in a clinic or hospital. In this sense enteral feeding and hydration (irrespective for the moment of whether this is termed "treatment" or "care" or just "feeding") is entirely *proportionate* to the situation in which Vincent Lambert finds himself. In this context we are none the wiser, even after hearing oral submissions in this case, as to why the transfer of Vincent Lambert to a specialised clinic – the Bethel[1] nursing home – where he can be cared for (thereby relieving the Reims University Hospital of that duty) has been blocked by the authorities.

1. See the observations of the third-party intervener association, Amréso-Bethel.

In other words, Vincent Lambert *is alive* and being cared for. He is also being fed – and food and water are two basic life-sustaining necessities, and are intimately linked to human dignity. This intimate link has been repeatedly stated in numerous international documents[2]. What, we therefore ask, can justify a State in allowing a doctor – Dr Kariger or, since he has resigned and left Reims University Hospital[3], some other doctor – in this case not so much to "pull the plug" (Vincent Lambert is not on any life-support machine) *as to withdraw or discontinue feeding and hydration so as to, in effect, starve Vincent Lambert to death*? What is the overriding reason, in the circumstances of the present case, justifying the State in not intervening *to protect life*? Is it financial considerations? None has been advanced in this case. Is it because the person is in considerable pain? There is no evidence to that effect. Is it because the person is of no further use or importance to society, indeed is no longer a person and has only "biological life"?

5. As has already been pointed out, there is no clear or certain indication of what Vincent Lambert's wishes really are (or even were) regarding the continuance or otherwise of his feeding and hydration in the situation in which he now finds himself. Although he was a member of the nursing profession before the accident which reduced him to his present state, he never formulated any "advance directives" nor appointed "a person of trust" for the purposes of the various provisions of the Public Health Code. The *Conseil d'État*, in its decision of 24 June 2014, made much of the evidently casual conversations that Vincent Lambert had had with his wife (and apparently on one occasion also with his brother, Joseph Lambert) and came to the conclusion that "Dr Kariger [could not] be regarded as having incorrectly interpreted the wishes expressed by the patient before the accident"[4]. In matters of such gravity nothing short of absolute certainty should have sufficed. "Interpreting" *ex post facto* what people may or may not have said years before (and when in perfect health) in casual conversations clearly exposes the system to grave abuse. Even if, for the sake of argument, Vincent Lambert had indeed expressed the view that he would have refused to be kept in a state of great dependency, such a statement does not in our view offer a sufficient degree of certainty regarding his desire to be deprived of food and water. As the applicants note in paragraphs 153 and 154 of their observations – something which again has not been denied or contradicted by the respondent Government:

2. It suffices to refer to General Comment No. 12 and General Comment No. 15 adopted by the United Nations Committee on Economic, Social and Cultural Rights at its twentieth and twenty-ninth sessions respectively.

3. See the applicants' observations, paragraph 164.

4. See paragraph 30 of that decision, cited in paragraph 50 of the present judgment.

> "If Mr Vincent Lambert had really wanted his life to end, if he had really 'given up' psychologically, if he had really and truly wanted to die, [he] would already be dead by now. He would not have survived for thirty-one days without food (between the first time his nutrition was stopped on 10 April 2013 and the first order of the Châlons-en-Champagne Administrative Court, of 11 May 2013, ordering the resumption of his nutrition) if something inside him, an inner force, had not made him fight to stay alive. No one knows what this force of life is. Perhaps, unconsciously, it is the fact that he is a father, and the desire to see his daughter? Perhaps it is something else. What is undeniable is that by his actions Mr Vincent Lambert has shown a will to live that it would be wrong to ignore.
>
> Conversely, any person who works with patients in a state of impaired consciousness will tell you that a person in his condition who gives up on life dies within ten days. In the instant case, Mr Lambert survived for thirty-one days with no food and only 500 ml of liquid per day."

However, all this emphasis on the presumed wishes or intentions of Vincent Lambert detracts from another important issue, namely the fact that, under the French law applicable in the instant case, where a patient is unconscious and has made no advance directives, his wishes and the views or wishes of his family only *complement* the analysis of what the doctor in charge of the patient perceives to be a medical reality. In other words, the patient's wishes are, in such a situation, *in no way determinative of the final outcome*. The three criteria set out in Article L. 1110-5 of the Public Health Code – futility, disproportion and sustaining life artificially – are the only relevant criteria. As the *Conseil d'État* has stated, account must be taken of any wishes expressed by the patient and particular importance must be attached to those wishes (see paragraphs 47-48 of the present judgment), but those wishes are never decisive. In other words, once the doctor in charge has, as in the instant case, decided that the third criterion applies, the die is cast and the collective procedure is essentially a mere formality.

6. By no stretch of the imagination can Vincent Lambert be deemed to be in an "end-of-life" situation. Regrettably, he will be in that situation soon, after feeding and hydration are withdrawn or withheld. Persons in an even worse plight than Vincent Lambert are *not in an imminently terminal condition* (provided there is no other concurrent pathology). Their nutrition – regardless of whether it is considered as treatment or as care – is serving a life-sustaining purpose. It therefore remains an *ordinary* means of sustaining life and should, in principle, be continued.

7. Questions relative to the supplying of nutrition and hydration are often qualified by the term "artificial", and this, as has happened in this case, leads to unnecessary confusion. Every form of feeding – whether it is placing a feeding bottle in a baby's mouth, or using cutlery in the refectory to put food in one's mouth – is, to some extent, artificial, as the ingestion

of the food is being mediated. But when it comes to a patient in Vincent Lambert's condition, the real question that must be asked (in the context of the concepts of proportionality and reasonableness that underpin the notion of the State's positive obligations under Article 2) is this: is the hydration and nutrition of benefit to the person without causing any undue burden of pain or suffering or excessive expenditure of resources? If the answer is yes, then there is a positive obligation to preserve life. If the burdens surpass the benefits, then the State's obligation may, in appropriate cases, cease. In this context we would add, moreover, that a State's margin of appreciation, referred to in paragraph 148 of the present judgment, is not unlimited, and, broad as it may be, must always be viewed in the light of the values underpinning the Convention, chief among which is the value of life. The Court has often stated that the Convention must be read as a whole (a principle referred to in paragraph 142) and interpreted (and we would say also applied) in such a way as to promote internal consistency and harmony between its various provisions and the various values enshrined therein (see, albeit in different contexts, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012). In assessing this margin of appreciation in the circumstances of the instant case, and the method chosen by the French authorities to "balance" any competing interests, the Court should therefore have given more weight to the value of life. It should also be recalled that we are not in a situation here where one can legitimately say that there may be some doubt as to whether or not there is life or "human life" (such as in cases dealing with fertility and human embryos – the "when does human life begin" question). Nor is it a case where there is any doubt as to whether or not Vincent Lambert is alive. To our mind, a person in Vincent Lambert's condition is a person with fundamental human dignity and must therefore, in accordance with the principles underpinning Article 2, receive ordinary and proportionate care or treatment which includes the administering of water and food.

8. We agree with the applicants that the law in question lacks clarity[5]: on what is ordinary and extraordinary treatment, on what amounts to unreasonable obstinacy, and, more critically, on what amounts to prolonging (or sustaining) life *artificially*. It is true that it is primarily for the domestic courts to interpret and apply the law, but it is also clear to us that the *Conseil d'État*, in its judgment of 24 June 2014, adopted uncritically the interpretation given by Mr Leonetti and, moreover,

5. There is also a hint of this in paragraph 56 [see full text of judgment, available in Hudoc].

disposed in a perfunctory way of the issue of the compatibility of domestic law with Articles 2 and 8 of the Convention (see paragraph 47 of the present judgment), attaching importance only to the fact that the "procedure had been observed". It is true that this Court should not act as a fourth-instance court and that the principle of subsidiarity must be respected, but not to the point of refraining from affirming the value of life and the inherent dignity even of persons who are in a vegetative state, severely paralysed and who cannot communicate their wishes to others.

9. We agree that, conceptually, there is a legitimate distinction between euthanasia and assisted suicide on the one hand, and therapeutic abstention on the other. However, because of the manner in which domestic law has been interpreted and the way it has been applied to the facts of the case under examination, we strongly disagree with what is stated in paragraph 141 of the present judgment. The case before this Court is one of euthanasia, even if under a different name. In principle it is never advisable to use strong adjectives or adverbs in judicial documents, but in the instant case it certainly is utterly contradictory for the respondent Government to insist that French law prohibits euthanasia and that therefore euthanasia does not enter into the equation in this case. We cannot hold otherwise when it is clear that the criteria of the Leonetti Act, as interpreted by the highest administrative court, when applied to a person who is unconscious and undergoing "treatment" which is not really therapeutic but simply a matter of nursing care, actually results in precipitating death *which would not otherwise occur in the foreseeable future*.

10. The public rapporteur before the *Conseil d'État* is reported (in paragraphs 31 and 122 of the present judgment) as having said (citing the Minister of Health while the Leonetti Bill was being piloted in the Senate) that "[w]hile the act of withdrawing treatment ... results in death, the intention behind the act [is not to kill; it is] to allow death to resume its natural course and to relieve suffering. This is particularly important for care staff, whose role is not to take life". Much has been made of this statement both by the *Conseil d'État* and by this Court. We beg to differ. Apart from the fact that, as we have already said, there is no evidence in the instant case that Mr Lambert is suffering in any way, that statement would be correct if, and only if, a proper distinction were made between ordinary care (or treatment) and extraordinary care (or treatment). Feeding a person, even enterally, is an act of ordinary care, and by withholding or withdrawing food and water death inevitably follows (which would not otherwise have occurred in the foreseeable future). One may not will the death of the subject in question, but by willing the act or omission which one knows will in all likelihood lead to that death, one actually intends to kill that subject nonetheless. This

is, after all, the whole notion of positive *indirect* intent as one of the two limbs of the notion of *dolus* in criminal law.

11. In 2010, to mark its 50th anniversary, the Court accepted the title of *The Conscience of Europe* when publishing a book with that very title. Assuming, for the sake of argument, that an institution, as opposed to the individuals who make up that institution, can have a conscience, such a conscience must not only be well informed but must also be underpinned by high moral or ethical values. These values should always be the guiding light, irrespective of all the legal chaff that may be tossed about in the course of analysing a case. It is not sufficient to acknowledge, as is done in paragraph 181 of the present judgment, that a case "concerns extremely complex medical, legal and ethical matters"; it is of the very essence of a conscience, based on *recta ratio*, that ethical matters should be allowed to shape and guide the legal reasoning to its proper final destination. That is what conscience is all about. We regret that the Court has, with this judgment, forfeited the above-mentioned title.

CHIRAGOV AND OTHERS v. ARMENIA
(Application no. 13216/05)

GRAND CHAMBER

JUDGMENT OF 16 JUNE 2015[1]

1. Judgment delivered by the Grand Chamber following relinquishment of jurisdiction by a Chamber in accordance with Article 30 of the Convention.

SUMMARY[1]

Loss of homes and property by persons displaced in the context of the Nagorno-Karabakh conflict

For the purposes of Article 1, a State will be considered to exercise effective control and therefore to have extraterritorial jurisdiction in respect of a self-proclaimed "republic" over which it has a significant and decisive influence and which survives by virtue of the military, political, financial and other support given to it by the State (see paragraph 186 of the judgment).

The mere fact of participating in ongoing peace negotiations on issues relating to displaced persons does not provide legal justification for interference with property rights under Article 1 of Protocol No. 1 or absolve the State from taking other measures, especially when negotiations have been pending for a long time. Guidance as to which measures to take can be derived from relevant international standards. A particularly important step would be the establishment of a property-claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing those concerned to have their property rights restored and to obtain compensation for the loss of their enjoyment (see paragraphs 198-99 of the judgment).

Article 1

Jurisdiction of States – Jurisdiction of Armenia as regards Nagorno-Karabakh and the adjacent occupied territories – Armenia's military, political and financial support to the "Nagorno-Karabakh Republic" – Particular evidentiary value of statements by high-ranking officials

Article 8

Respect for family life – Respect for private life – Respect for home – Denial of access to homes to Azerbaijani citizens displaced in the context of the Nagorno-Karabakh conflict – Lack of compensation

Article 13

Effective remedy – Lack of effective remedy in respect of loss of homes and property by persons displaced in the context of the Nagorno-Karabakh conflict

1. This summary by the Registry does not bind the Court.

Article 1 of Protocol No. 1

Positive obligations – Armenia's failure to take measures to secure property rights of Azerbaijani citizens displaced in the context of the Nagorno-Karabakh conflict – Possessions – Flexible approach regarding the evidence in respect of loss of property and home in situations of international or internal armed conflict – Right of use in respect of land under Soviet law – Peaceful enjoyment of possessions – Access to property impossible – Lack of compensation – Necessity to establish easily accessible property-claims mechanism operating with flexible evidentiary standards – Assistance provided to internally displaced Armenians incapable of exempting the State from its obligations towards Azerbaijanis who also fled the conflict

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* *

Facts

The applicants are Azerbaijani Kurds who lived in the district of Lachin, in Azerbaijan. They stated that they were unable to return to their homes and property there, after being forced to leave in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

At the time of the dissolution of the Soviet Union in December 1991, the Nagorno-Karabakh Autonomous Oblast ("the NKAO") was an autonomous region (*oblast*) landlocked within the Azerbaijan Soviet Socialist Republic ("the Azerbaijan SSR"). There was no common border between the NKAO and the Armenian Soviet Socialist Republic ("the Armenian SSR"), which were separated by Azerbaijani territory, the district of Lachin being the shortest distance between them. In 1989 the NKAO had a population of approximately 77% ethnic Armenians and 22% ethnic Azeris. In the district of Lachin, the majority of the population were Kurds and Azeris; only 5-6% were Armenians. Armed hostilities in Nagorno-Karabakh started in 1988. In September 1991 – shortly after Azerbaijan had declared its independence from the Soviet Union – the Regional Council of the NKAO announced the establishment of the "Nagorno-Karabakh Republic" (the "NKR"), consisting of NKAO territory and the Shahumyan district of Azerbaijan. Following a referendum in December 1991 – boycotted by the Azeri population – in which 99.9% of those participating voted in favour of the secession of the NKR from Azerbaijan, the "NKR" reaffirmed its independence from Azerbaijan in January 1992. Thereafter, 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. The conflict resulted in hundreds of thousands of internally-displaced people and refugees on both sides. In May 1994 the parties to the conflict signed a ceasefire agreement, which holds to this day. Negotiations for a peaceful solution have been carried out under the

auspices of the Organization for Security and Co-operation in Europe (OSCE). However, no final political settlement of the conflict has so far been reached. The self-proclaimed independence of the "NKR" has not been recognised by any State or international organisation. Prior to their accession to the Council of Europe in 2001, Armenia and Azerbaijan both gave undertakings to the Committee of Ministers and the Parliamentary Assembly, committing themselves to the peaceful settlement of the Nagorno-Karabakh conflict.

The district of Lachin, where the applicants lived, was attacked many times during the war. The applicants alleged that troops of both Nagorno-Karabakh and Armenia were at the origin of the attacks. The Armenian Government maintained, however, that Armenia did not participate in the events, but that military action was carried out by the defence forces of Nagorno-Karabakh and volunteer groups. In mid-May 1992 Lachin was subjected to aerial bombardment, during which many houses were destroyed. The applicants were forced to flee from Lachin to Baku. Since then they have not been able to return to their homes and properties because of Armenian occupation. In support of their claims that they had lived in Lachin for most of their lives until their forced displacement, and that they had houses and land there, the applicants submitted various documents to the Court. In particular, all six applicants submitted: official certificates ("technical passports") indicating that houses and plots of land in the district of Lachin had been registered in their names; birth certificates, including those of their children, and/or marriage certificates; and written statements from former neighbours confirming that the applicants had lived in the district of Lachin.

Law

(1) Preliminary objections:

(a) *Exhaustion of domestic remedies* – The Government had not shown that there was a remedy – whether in Armenia or in the "NKR" – capable of providing redress in respect of the applicants' complaints. The legal provisions referred to by them were of a general nature and did not address the specific situation of dispossession of property as a result of armed conflict or in any other way relate to a situation similar to that of the applicants. None of the domestic judgments submitted related to claims concerning the loss of homes or property by persons displaced in the context of the Nagorno-Karabakh conflict. Furthermore, given that the Government had denied that their authorities had been involved in the events giving rise to the applicants' complaints or that Armenia exercised jurisdiction over Nagorno-Karabakh and the surrounding territories, it would not have been reasonable to expect the applicants to bring claims for restitution or compensation before the Armenian authorities. Finally, as no political solution to the conflict had been reached and military build-up in the region had escalated in recent years, it was unrealistic to consider that any possible remedy in the unrecognised "NKR" could in practice provide redress to displaced Azerbaijanis.

Conclusion: preliminary objection dismissed (fourteen votes to three).

(b) *Victim status* – The Court's case-law had developed a flexible approach regarding the evidence to be provided by applicants who claimed to have lost their property and homes in situations of international or internal armed conflict. A similar approach was reflected in the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). The most significant pieces of evidence supplied by the applicants were the technical passports. Being official documents, they all contained drawings of houses and stated their sizes, measurements, etc. The sizes of the plots of land in question were also indicated. The passports were dated between 1985 and 1990 and contained the applicants' names. They also included references to the respective land allocation decisions. In the circumstances, they provided prima facie evidence of title to property equal to that which had been accepted by the Court in many previous cases. The applicants had submitted further prima facie evidence with regard to property, including statements by former neighbours. The documents concerning the applicants' identities and residence also lent support to their property claims. Moreover, while all but the sixth applicant had failed to present title deeds or other primary evidence, regard had to be had to the circumstances in which they had been compelled to leave the district, abandoning it when it had come under military attack. Accordingly, the applicants had sufficiently substantiated their claims that they had lived in the district of Lachin for major parts of their lives until being forced to leave and that they had been in possession of houses and land at the time of their flight.
Under the Soviet legal system, there was no private ownership of land, but citizens could own residential houses. Plots of land could be allocated to citizens for special purposes such as farming or the construction of individual houses. In such event, the citizen had a "right of use", limited to the specific purpose, which was protected by law and could be inherited. There was therefore no doubt that the applicants' rights in respect of the houses and land represented a substantive economic interest. In conclusion, at the time they had had to leave the district of Lachin, the applicants had held rights to land and houses which constituted "possessions" within the meaning of Article 1 of Protocol No. 1. There was no indication that those rights had been extinguished afterwards. Their proprietary interests were thus still valid. Moreover, their land and houses also had to be considered their "homes" for the purposes of Article 8.
Conclusion: preliminary objection dismissed (fifteen votes to two).

(c) *Jurisdiction of Armenia* – In the Court's view, it was hardly conceivable that Nagorno-Karabakh – an entity with a population of less than 150,000 ethnic Armenians – would have been able, without substantial military support from Armenia, to set up a defence force in early 1992 – against Azerbaijan and its population of seven million – capable of establishing control of the former NKAO and of conquering before the end of 1993 the whole or major parts of seven surrounding Azerbaijani districts. In any event, Armenia's military involvement

in Nagorno-Karabakh was, in several respects, formalised in 1994 through the Agreement on Military Cooperation between the Governments of the Republic of Armenia and the "Republic of Nagorno-Karabakh" which provided, in particular, that conscripts of Armenia and the "NKR" could do their military service in the other entity. The Court also noted that numerous reports and public statements, including from current and former members of the Armenian Government, demonstrated that Armenia, through its military presence and by providing military equipment and expertise, had been significantly involved in the Nagorno-Karabakh conflict from an early stage. Statements by high-ranking officials who had played a central role in the dispute in question were of particular evidentiary value when they acknowledged facts or conduct which appeared to go against the official stance that the Armenian armed forces had not been deployed in the "NKR" or the surrounding territories, and could therefore be construed as a form of admission. Armenia's military support had continued to be a decisive factor for control over the territories in question. Furthermore, it was evident from the facts established in the case that Armenia had given the "NKR" substantial political and financial support; its citizens were moreover required to acquire Armenian passports to travel abroad, as the "NKR" was not recognised by any State or international organisation. In conclusion, Armenia and the "NKR" were highly integrated in virtually all important matters and the "NKR" and its administration survived by virtue of the military, political, financial and other support given to it by Armenia. Armenia thus exercised effective control over Nagorno-Karabakh and the surrounding territories. *Conclusion*: preliminary objection dismissed (fourteen votes to three).

(2) Merits:

(a) *Article 1 of Protocol No. 1* – The applicants held rights to land and to houses which constituted "possessions" for the purposes of that provision. While the applicants' forced displacement from Lachin fell outside the Court's temporal jurisdiction, the Court had to examine whether they had been denied access to their property after the entry into force of the Convention in respect of Armenia in April 2002 and whether they had thereby suffered a continuing violation of their rights. There had been no legal remedy, in Armenia or the "NKR", available to the applicants in respect of their complaints. Consequently, they had not had access to any legal means by which to obtain compensation for the loss of their property or to gain physical access to the property and homes they had left behind. Moreover, in the Court's view, it was not realistic in practice for Azerbaijanis to return to Nagorno-Karabakh and the surrounding territories in the circumstances which had prevailed for more than twenty years after the ceasefire agreement. Those circumstances included in particular a continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the Line of Contact, an overall hostile relationship between Armenia and Azerbaijan, and so far no prospect of a political solution. There had accordingly been a continuing interference with the applicants' right to the peaceful enjoyment of their possessions.

As long as access to the property was not possible, the State had a duty to take alternative measures to secure property rights, as was acknowledged by the relevant international standards issued by the United Nations and the Council of Europe. The fact that peace negotiations under the auspices of the OSCE were ongoing – which included issues relating to displaced persons – did not free the Government from their duty to take other measures, especially having regard to the fact that the negotiations had been ongoing for over twenty years. It would therefore be important to establish a property-claims mechanism which would be easily accessible and provide procedures operating with flexible evidentiary standards to allow the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of the enjoyment of their rights. While the government of Armenia had had to provide assistance to hundreds of thousands of Armenian refugees and internally displaced persons, the protection of that group did not exempt the Government from their obligations towards Azerbaijani citizens such as the applicants, who had had to flee as a result of the conflict. In conclusion, as concerns the period under consideration, the Government had not justified their denying the applicants access to their property without compensation. There had accordingly been a continuing violation of the applicants' rights under Article 1 of Protocol No. 1.
Conclusion: violation (fifteen votes to two).

(b) *Article 8* – All the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there for all or major parts of their lives. Almost all of them had married and had children in the district. Moreover, they had earned their livelihood there and their ancestors had lived there. They had built and owned houses there in which they lived. It was thus clear that the applicants had long-established lives and homes in the district. They had not voluntarily taken up residence anywhere else, but lived as internally displaced persons in Baku and elsewhere out of necessity. In the circumstances of the case, their forced displacement and involuntary absence from the district of Lachin could not be considered to have broken their links with the district, notwithstanding the length of time that had passed since their flight. For the same reasons as those which led to its findings under Article 1 of Protocol No. 1, the Court found that the denial of access to the applicants' homes constituted a continuing unjustified interference with their right to respect for their private and family lives and their homes.
Conclusion: violation (fifteen votes to two).

(c) *Article 13* – The Armenian Government had failed to prove that a remedy capable of providing redress to the applicants in respect of their Convention complaints and offering reasonable prospects of success was available.
Conclusion: violation (fourteen votes to three).
Article 41: reserved.

Case-law cited by the Court

Akdivar and Others v. Turkey, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV
Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, ECHR 2011
Catan and Others v. the Republic of Moldova and Russia, [GC], nos. 43370/04 and 2 others, 19 October 2012
Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV
Damayev v. Russia, no. 36150/04, 29 May 2012
Demopoulos and Others v. Turkey (dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010
Doğan and Others v. Turkey, nos. 8803/02 and 14 others, ECHR 2004-VI
El-Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, ECHR 2012
Elsanova v. Russia (dec.), no. 57952/00, 15 November 2005
Ilaşcu and Others v. Moldova and Russia, [GC], no. 48787/99, ECHR 2004-VII
Kazali and Others v. Cyprus (dec.), nos. 49247/08 and 8 others, 6 March 2012
Kerimova and Others v. Russia, nos. 17170/04 and 5 others, 3 May 2011
Loizidou v. Turkey (merits), 18 December 1996, *Reports* 1996-VI
Lordos and Others v. Turkey, no. 15973/90, 2 November 2010
Öneryıldız v. Turkey [GC], no. 48939/99, ECHR 2004-XII
Orphanides v. Turkey, no. 36705/97, 20 January 2009
Prokopovich v. Russia, no. 58255/00, ECHR 2004-XI
Saveriades v. Turkey, no. 16160/90, 22 September 2009
Solomonides v. Turkey, no. 16161/90, 20 January 2009
Xenides-Arestis v. Turkey, no. 46347/99, 22 December 2005
Zalyan, Sargsyan and Serobyan v. Armenia (dec.), nos. 36894/04 and 3521/07, 11 October 2007

In the case of Chiragov and Others v. Armenia,

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

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

and Michael O'Boyle, *Deputy Registrar*,

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

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

PROCEDURE

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

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

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

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

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

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

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

8. On 14 December 2011 the application was declared admissible by a Grand Chamber composed of Nicolas Bratza, President, 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, judges, and Michael O'Boyle, Deputy Registrar.

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

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

There appeared before the Court:

(a) *for the Government*

Mr	G. Kostanyan,	*Agent*,
Mr	G. Robertson QC,	*Counsel*,
Mr	E. Babayan,	
Mr	T. Collis,	*Advisers*;

(b) *for the applicants*

Mr	M. Muller QC,	
Mr	M. Ivers,	
Mr	S. Swaroop,	
Ms	M. Butler,	*Counsel*,
Ms	C. Vine,	
Ms	B. Poynor,	
Ms	S. Karakaş,	
Ms	A. Evans,	*Advisers*;

(c) *for the Azerbaijani Government*

Mr	Ç. Asgarov,	*Agent*,
Mr	M.N. Shaw QC,	
Mr	G. Lansky,	*Counsel*,
Mr	O. Gvaladze,	
Mr	H. Tretter,	
Ms	T. Urdaneta Wittek,	
Mr	O. Ismayilov,	*Advisers*.

The applicants, Mr Hasanof and Mr Pashayev, were also present.

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

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

12. At the time of the demise of the Union of Soviet Socialist Republics (USSR), the Nagorno-Karabakh Autonomous Oblast (NKAO) was an autonomous region (*oblast*) 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 the 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, the district of Lachin being the shortest distance between them, including a strip of land often referred to as the "Lachin corridor", less than 10 km wide.

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

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

15. Throughout 1988 the demonstrations calling for unification continued. The district of Lachin was subjected to roadblocks and attacks. The clashes led to many casualties, and refugees, numbering in the 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, control of the region was returned to Azerbaijan. A few days later, on 1 December, the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh Regional Council adopted a Joint Resolution on the reunification of Nagorno-Karabakh with Armenia. As a result of this Resolution, a joint budget for the two entities was established in January 1990 and a decision was taken to include Nagorno-Karabakh in the Armenian elections, which were to take place in the spring of that year.

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

17. On 30 August 1991 Azerbaijan declared independence from the Soviet Union. This was subsequently formalised by the adoption of the Constitutional Act on the State Independence of the Republic of Azerbaijan

of 18 October. On 2 September the Soviet of the NKAO announced the establishment of the "Republic of Nagorno-Karabakh" (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 the Azerbaijani Parliament abolished the autonomy previously enjoyed by Nagorno-Karabakh. In a referendum organised in Nagorno-Karabakh on 10 December, 99.9% of those participating voted in favour of secession. However, the Azeri population boycotted the referendum. In the same month, the Soviet Union was dissolved and Soviet troops began to withdraw from the region. Military control of Nagorno-Karabakh was rapidly being handed over to the Karabakh Armenians. On 6 January 1992 the "NKR", having regard to the results of the referendum, reaffirmed its independence from Azerbaijan.

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

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

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

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

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

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

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

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

B. Current situation

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

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

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

29. Several proposals for a peaceful solution of the conflict have failed. Negotiations have been carried out under the auspices of the Organization for Security and Co-operation in Europe (OSCE) and its so-called Minsk Group. In Madrid in November 2007, the Group's three Co-Chairs – France, Russia and the United States of America – presented to Armenia and Azerbaijan a set of Basic Principles for a settlement. The Basic Principles, which have since been updated, call, *inter alia*, for the return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security

and self-governance; a corridor linking Armenia to Nagorno-Karabakh; a future determination of the final legal status of Nagorno-Karabakh through a legally binding referendum; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation. The idea is that the endorsement of these principles by Armenia and Azerbaijan would enable the drafting of a comprehensive and detailed settlement. Following intensive shuttle diplomacy by Minsk Group diplomats and a number of meetings between the Presidents of the two countries in 2009, the process lost momentum in 2010. So far the parties to the conflict have not signed a formal agreement on the Basic Principles.

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

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

documents. The Co-Chairs intend to undertake further missions to other areas affected by the NK conflict, and to include in such missions experts from relevant international agencies that would be involved in implementing a peace settlement."

31. On 18 June 2013 the Presidents of the Co-Chair countries of the Minsk Group issued a Joint Statement on the Nagorno-Karabakh Conflict.

"We, the Presidents of the OSCE Minsk Group Co-Chair countries – France, the Russian Federation, and the United States of America – remain committed to helping the parties to the Nagorno-Karabakh conflict reach a lasting and peaceful settlement. We express our deep regret that, rather than trying to find a solution based upon mutual interests, the parties have continued to seek one-sided advantage in the negotiation process.

We continue to firmly believe that the elements outlined in the statements of our countries over the last four years must be the foundation of any fair and lasting settlement to the Nagorno-Karabakh conflict. These elements should be seen as an integrated whole, as any attempt to select some elements over others would make it impossible to achieve a balanced solution.

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

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

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

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

1. Mr Elkhan Chiragov

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

34. On 27 February 2007, together with the applicants' reply to the Government's observations, he submitted an official certificate ("technical passport") dated 19 July 1985, according to which a two-storey, twelve-bedroom dwelling house with a total area of 408 sq. m (living area of 300 sq. m and subsidiary area of 108 sq. m) and a storehouse of 60 sq. m, situated on a plot of land of 1,200 sq. m, had been registered in his name.

35. He also presented a statement by three former neighbours, who affirmed that he owned a two-storey, sixteen-room dwelling house of 260 sq. m and a car, as well as a statement by A. Jafarov and A. Halilov, representatives of the Lachin City Executive Power of the Republic of Azerbaijan, who stated that Mr Elkhan Chiragov used to live in Chiragli.

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

2. Mr Adishirin Chiragov

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

38. On 27 February 2007 he submitted a technical passport dated 22 April 1986, according to which a two-storey, eight-bedroom dwelling house with a total area of 230.4 sq. m (living area of 193.2 sq. m and subsidiary area of 37.2 sq. m) and a storehouse of 90 sq. m, situated on a plot of land of 1,200 sq. m, had been registered in his name.

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

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

3. Mr Ramiz Gebrayilov

41. Mr Ramiz Gebrayilov was born in Chiragli in 1960. In 1988 he graduated with a degree in engineering from the Baku Polytechnical Institute. In 1983, while still studying in Baku, he visited the town of Lachin and was given a 5,000 sq. m plot of land by the State. He claimed that he had built a six-bedroom house with a garage on it and lived there with his wife and children until he was forced to leave in 1992. There were also some cattle sheds. He also owned a car repair business called "Auto Service", a shop and a café, which were situated on a further 5,000 sq. m of land that he owned. In addition, he had 12 cows, 70 lambs and 150 sheep.

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

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

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

45. Before the Grand Chamber, the applicant submitted, *inter alia*, a birth certificate and a marriage certificate according to which he was born

in Chiragli and married there in 1982, birth certificates for his daughter and two sons, all born in Lachin in 1982, 1986 and 1988 respectively, as well as an army book issued in 1979.

4. Mr Akif Hasanof

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

47. On 27 February 2007 he submitted a technical passport dated 13 September 1985, according to which a two-storey, nine-bedroom dwelling house with a total area of 448.4 sq. m (living area of 223.2 sq. m and subsidiary area of 225.2 sq. m) and a storehouse of 75 sq. m, situated on a plot of land of 1,600 sq. m, had been registered in his name.

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

49. Before the Grand Chamber, the applicant submitted a birth certificate, a USSR passport issued in 1976 and an employment book issued by the Lachin District Educational Department, indicating that he was born in Aghbulag and had worked as a teacher and school director in that village between 1981 and 1988.

5. Mr Fekhreddin Pashayev

50. Mr Fekhreddin Pashayev was born in 1956 in the village of Kamalli in the district of Lachin. After graduating with a degree in engineering from the Baku Polytechnical Institute in 1984, he returned to the town of Lachin where he was employed as an engineer and, from 1986, as chief engineer at the Ministry of Transport. He claimed that he owned and lived in a two-storey, three-bedroom house in Lachin which he had built himself. The house was situated at no. 50, 28 Aprel Kucesi, Lachin Seheri, Lachin Rayonu. Mr Pashayev submitted that the current market value of the house would be 50,000 United States dollars (USD). He also owned the land around his house and had a share (about 10 ha) in a collective farm in Kamalli. Furthermore, he owned some land through "collective ownership".

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

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

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

6. Mr Qaraca Gabrayilov

54. Mr Qaraca Gabrayilov was born in the town of Lachin in 1940 and died on 19 June 2005. On 6 April 2005, at the time of submitting the present application, he stated that, when he was forced to leave on 17 May 1992, he had been living at holding no. 580, N. Narimanov Street, flat 128a in the town of Lachin, a property he owned and which included a two-storey residential family house built in 1976 with a surface of 187.1 sq. m and a yard area of 453.6 sq. m. He also claimed that he owned a further site of 300 sq. m on that street. Annexed to the application was a technical passport dated August 1985, according to which a two-storey house with a yard, of the mentioned sizes, had been registered in his name.

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

the applicant, and several invoices for animal feed, building materials and building subsidies allegedly used during the construction of his properties.

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

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

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

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

1. Military aspects

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

Resolution 822 (1993), 30 April 1993, S/RES/822 (1993)

> "The Security Council,
>
> ...
>
> Noting with alarm the escalation in armed hostilities and, in particular, the latest invasion of the Kelbadjar district of the Republic of Azerbaijan by local Armenian forces,
>
> ...
>
> 1. Demands the immediate cessation of all hostilities and hostile acts with a view to establishing a durable cease-fire, as well as immediate withdrawal of all occupying forces from the Kelbadjar district and other recently occupied areas of Azerbaijan,
>
> ..."

Resolution 853 (1993), 29 July 1993, S/RES/853 (1993)

> "The Security Council,
>
> ...

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

...

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

...

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

...

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

..."

Resolution 874 (1993), 14 October 1993, S/RES/874 (1993)

"The Security Council,

...

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

...

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

..."

Resolution 884 (1993), 12 November 1993, S/RES/884 (1993)

"The Security Council,

...

Noting with alarm the escalation in armed hostilities as [a] consequence of the violations of the cease-fire and excesses in the use of force in response to those violations, in particular the occupation of the Zangelan district and the city of Goradiz in the Azerbaijani Republic,

...

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

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

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

The HRW report presents several pieces of information which point to an involvement of the Armenian army in Nagorno-Karabakh and the surrounding territories (see Chapter VII. The Republic of Armenia as a Party to the Conflict). Allegedly, Armenia had even sent members of its police force to perform police duties in the occupied territories. HRW spent two days in April 1994 interviewing Armenian uniformed soldiers on the streets of Yerevan. 30% of them were draftees in the Armenian army who had either fought in Karabakh, had orders to go to Karabakh or had ostensibly volunteered for service there. Moreover, on a single day in April 1994 HRW researchers had counted five buses holding an estimated 300 soldiers of the Armenian army entering Nagorno-Karabakh from Armenia. Other western journalists had reported to HRW researchers that they had seen eight more buses full of Armenian army soldiers heading for Azerbaijani territory from Armenia. According to HRW, as a matter of law, Armenian army troop involvement in Azerbaijan made Armenia a party to the conflict and made the war an international armed conflict between Armenia and Azerbaijan.

61. Several proposals for a solution to the conflict have been presented within the Minsk Group. A "package deal" proposal of July 1997 set out, under the heading "Agreement I – The end of armed hostilities", a two-stage

process of the withdrawal of armed forces. The second stage included the provision that "[t]he armed forces of Armenia [would] be withdrawn to within the borders of the Republic of Armenia".

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

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

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

Moreover, Mr Vazgen Manukyan, Armenian Minister of Defence from 1992 to 1993, admitted in an interview with British journalist and writer, Thomas de Waal, in October 2000 that the public declarations stating that the Armenian army had not taken any part in the war had been purely for foreign consumption:[1]

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

63. The annual report of the International Institute for Strategic Studies (IISS), "The Military Balance", for the years 2002, 2003 and 2004 assessed that, of the 18,000 troops in Nagorno-Karabakh, 8,000 were personnel from Armenia. The 2013 report stated, *inter alia*, that "since 1994, Armenia has controlled most of Nagorno-Karabakh, and also seven adjacent regions of Azerbaijan, often called the 'occupied territories'".[2]

64. Mr David Atkinson, rapporteur of the Parliamentary Assembly of the Council of Europe (PACE), stated in November 2004 in his second report to the Political Affairs Committee on "The Conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference" concerning Nagorno-Karabakh (Doc. 10364, 29 November 2004) as follows.

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

1. Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, New York University Press, 2003, p. 210.
2. IISS, "The Military Balance", 2002, p. 66; 2003, p. 66; 2004, p. 82; and 2013, p. 218.

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

Based on this report, the Parliamentary Assembly adopted on 25 January 2005 Resolution 1416 (2005) on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference in which it noted, *inter alia*, as follows.

"1. The Parliamentary Assembly regrets that, more than a decade after the armed hostilities started, the conflict over the Nagorno-Karabakh region remains unsolved. Hundreds of thousands of people are still displaced and live in miserable conditions. Considerable parts of the territory of Azerbaijan are still occupied by Armenian forces, and separatist forces are still in control of the Nagorno-Karabakh region.

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

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

"[Nagorno-Karabakh] may be the world's most militarized society. The highly trained and equipped Nagorno-Karabakh Defence Army is primarily a ground force, for which Armenia provides much of the backbone. A Nagorno-Karabakh official told Crisis Group it has some 20,000 soldiers, while an independent expert [U.S. military analyst Richard Giragosian, July 2005] estimated 18,500. An additional 20,000 to 30,000 reservists allegedly could be mobilised. Based on its population, Nagorno-Karabakh cannot sustain such a large force without relying on substantial numbers of outsiders. According to an independent assessment [by Mr Giragosian], there are 8,500 Karabakh Armenians in the army and 10,000 from Armenia. ...

Nevertheless, many conscripts and contracted soldiers from Armenia continue to serve in [Nagorno-Karabakh]. The (de facto) minister of defence admits his forces have 40 per cent military contract personnel, including citizens of Armenia. He claims that no Armenian citizens are unwillingly conscripted and says 500,000 Armenians of Nagorno-Karabakh descent live in Armenia, some of whom serve in the Nagorno-Karabakh forces. Former conscripts from Yerevan and other towns in Armenia have told Crisis Group they were seemingly arbitrarily sent to Nagorno-Karabakh and the occupied districts immediately after presenting themselves to the recruitment bureau. They deny that they ever volunteered to go to Nagorno-Karabakh or the adjacent occupied

territory. They were not paid a bonus for serving outside Armenia, and they performed military service in Nagorno-Karabakh uniform, under Nagorno-Karabakh military command. Young Armenian recruits' opposition to serving in Nagorno-Karabakh has increased, which may help explain an apparent decrease in the numbers being sent to [Nagorno-Karabakh].

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

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

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

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

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

67. On 14 March 2008 the UN General Assembly adopted a Resolution on the situation in the occupied territories of Azerbaijan (A/RES/62/243). Recalling the 1993 Security Council Resolutions (see paragraph 59 above), it contains the following passages.

"The General Assembly,

...

2. *Demands* the immediate, complete and unconditional withdrawal of all Armenian forces from all occupied territories of the Republic of Azerbaijan;

3. *Reaffirms* the inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes, and stresses the necessity of creating appropriate conditions for this return, including the comprehensive rehabilitation of the conflict-affected territories;

..."

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

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

69. In Resolution 2009/2216(INI) of 20 May 2010 on the need for an EU strategy for the South Caucasus, the European Parliament expressed, *inter alia*, the following:

> "The European Parliament,
>
> ...
>
> 8. is seriously concerned that hundreds of thousands of refugees and IDPs who fled their homes during or in connection with the Nagorno-Karabakh war remain displaced and denied their rights, including the right to return, property rights and the right to personal security; calls on all parties to unambiguously and unconditionally recognise these rights, the need for their prompt realisation and for a prompt solution to this problem that respects the principles of international law; demands, in this regard, the withdrawal of Armenian forces from all occupied territories of Azerbaijan, accompanied by deployment of international forces to be organised with respect of the UN Charter in order to provide the necessary security guarantees in a period of transition, which will ensure the security of the population of Nagorno-Karabakh and allow the displaced persons to return to their homes and further conflicts caused by homelessness to be prevented; calls on the Armenian and Azerbaijani authorities and leaders of relevant communities to demonstrate their commitment to the creation of peaceful inter-ethnic relations through practical preparations for the return of displaced persons; considers that the situation of the IDPs and refugees should be dealt with according to international standards, including with regard to the recent PACE Recommendation 1877(2009), 'Europe's forgotten people: protecting the human rights of long-term displaced persons'."

70. On 18 April 2012 the European Parliament passed Resolution 2011/2315(INI) containing the European Parliament's recommendations to the Council, the Commission and the European External Action Service on the negotiations of the EU-Armenia Association Agreement which, *inter alia*, noted that "deeply concerning reports exist of

illegal activities exercised by Armenian troops on the occupied Azerbaijani territories, namely regular military manoeuvres, renewal of military hardware and personnel and the deepening of defensive echelons". The European Parliament recommended that negotiations on the EU-Armenia Association Agreement be linked to commitments regarding "the withdrawal of Armenian forces from occupied territories surrounding Nagorno-Karabakh and their return to Azerbaijani control" and "call[ed] on Armenia to stop sending regular army conscripts to serve in Nagorno-Karabakh".

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

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

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

> Security of Artsakh is not a matter of prestige for us; it is a matter of life and death in the most direct sense of these words. The entire world must know and realize that we, the power structures of Armenia and Artsakh stand against the army which pays wages to the murderers, if that horde can be called army in the first place."

73. In an opinion drawn up at the request of the Government, Dr Hari Bucur-Marcu, a military expert of Romanian nationality, stated that he had found nothing in the Armenian military policy that envisaged any form of control over "NKR" forces or any indication on the ground that Armenian forces were present or active in the "NKR". He further concluded that there was no evidence that Armenia exercised any control or authority over the "NKR" or its defence force, or that Armenian forces exercised any control over the government or governance of the "NKR". The Government stated that Dr Bucur-Marcu had been given the opportunity to interview senior military officers in Armenia and access their records. Furthermore, by arrangement with the "NKR" Ministry of Foreign Affairs, he had been able to travel there and talk to military and political officials, as well as examine documents.

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

> "The Government of the Republic of Armenia and the Government of the Republic of Nagorno-Karabakh ('the Parties'),
>
> having regard to mutual interest in the field of military cooperation, to the need to develop bilateral relationships and mutual trust through cooperation between the armed forces of the States of the Parties, seeking to strengthen the military and military-technical cooperation,
>
> agreed on the following:
>
> ...
>
> **Article 3**
>
> Both Parties shall engage in the military cooperation in the following areas:
>
> 1. establishment of the army and reform of the armed forces;
> 2. military science and education;
> 3. military legislation;
> 4. logistics of the armed forces;
> 5. medical rehabilitation of military personnel and their family members;
> 6. cultural and sports activities and tourism.

The Parties shall agree in writing whether they wish to cooperate in other areas.

Article 4

The Parties shall cooperate through:

1. visits and working meetings at the level of Ministers of Defence, Chiefs of General Staff or other representatives authorised by the Ministers of Defence;

2. consultations, exchanges of experience, military staff training and skills enhancement;

3. implementation of mutual military exercises;

4. participation in conferences, consultations and seminars;

5. exchanges of information, documents and services in accordance with specific arrangements;

6. cultural events;

7. provision of military services;

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

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

Within the framework of cooperation under this Agreement, the Parties shall agree that conscripts from Armenia and the NKR have the right to serve their fixed-term military service in Nagorno-Karabakh and Armenia respectively. In such cases, the conscripts concerned shall be considered exempt from the fixed-term military service in the territory of that State the person shall be considered exempt from the fixed-term military service in the country of their citizenship.

Article 5

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

1. should an Armenian citizen serving fixed-term military service in the NKR commit a military crime, the criminal prosecution and trial against him or her shall be conducted on Armenian territory by Armenian authorities in accordance with the procedure established under Armenian legislation;

2. should a citizen of the NKR serving fixed-term military service in Armenia commit a military crime, the criminal prosecution and trial against him or her shall be conducted on the territory of the NKR by the authorities of the NKR in accordance with the procedure established under NKR legislation.

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

Concluding agreements with those performing activities on armament and recovery and maintenance of military equipment, as well as ensuring the living conditions of the

representatives of manufacturing enterprises in the territory of the States of the Parties shall be carried out by the Ministry of Defence of the client State.

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

..."

75. The Government asserted that the Armenian conscripts who, pursuant to Article 4 of the Agreement, performed their service in the "NKR" were mainly in the lower ranks and comprised no more than 5% (up to 1,500 persons) of the "NKR" defence force. However, the Government did not rule out the possibility that some Armenian nationals may have served in the "NKR" defence force on a contractual and voluntary basis. Among those serving in the "NKR" defence force, side by side with inhabitants of Nagorno-Karabakh, were also volunteers of Armenian origin from various countries where there is an Armenian diaspora. Allegedly, the Armenian soldiers serving in the "NKR" were under the direct command of the "NKR" defence force, which was the only armed force operational in the "NKR". The Government maintained that the Armenian conscripts serving in the "NKR" under the Agreement did so of their own accord (see, however, the ICG report, paragraph 65 above).

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

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

with murder and the criminal trial against them commenced in November 2004 at the Syunik Regional Court's seat in Stepanakert. The applicants were present at the trial. On 18 May 2005 the court found the applicants guilty of murder and sentenced them to fifteen years' imprisonment.

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

2. Political and judicial connections

78. Several prominent Armenian politicians have held, at different times, high positions in both Armenia and the "NKR", or have had close ties to Nagorno-Karabakh. The first Armenian President, Mr Levon Ter-Petrosyan, was a member of the Armenian "Karabakh Committee" which, in the late 1980s, led the movement for unification of Nagorno-Karabakh with Armenia. In April 1998 he was succeeded as Armenian President by Mr Robert Kocharyan, who had previously served as Prime Minister of the "NKR" from August 1992 to December 1994, as President of the "NKR" from December 1994 to March 1997 and as Armenian Prime Minister from March 1997 to April 1998. In April 2008 Mr Serzh Sargsyan became the third Armenian President. In August 1993 he had been appointed Armenian Minister of Defence after serving from 1989 to 1993 as Chairman of the "Self-Defense Forces Committee of the Republic of Nagorno-Karabakh". Furthermore, in 2007 Mr Seyran Ohanyan switched from being the Minister of Defence of the "NKR" to becoming the Commander-in-Chief of the Armenian armed forces. In April 2008 he was appointed Armenian Minister of Defence.

79. The applicants claimed that Armenian law applies in the "NKR". However, according to the Government, between January 1992 and August 2006 the "NKR" adopted 609 different laws, one of the first being the Law on the basis of the State independence of the "Republic of Nagorno-Karabakh". Article 2 of this Law provides that the "NKR decides independently all issues concerning the Republic's political, economic, social and cultural, construction, administrative and territorial division policies". Furthermore, in January 1992 bodies of executive and judicial power were created, including the Council of Ministers (its government), the Supreme Court and first-instance courts of the "NKR", as well as the "NKR" prosecutor's office. The "NKR" also has its own President, Parliament and police force,

as well as local self-government bodies, including administrations governing the territories surrounding the "NKR", whose representatives are appointed by "NKR" authorities. It also holds its own presidential and parliamentary elections. While several laws have been adopted from Armenian legislation, the Government maintained that they did not apply automatically, that is, by decisions of Armenian courts, but were independently interpreted and applied by "NKR" courts, whether in the district of Lachin or elsewhere.

3. Financial and other support

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

> "The economy of Nagorno-Karabakh was previously integrated into [that of] Soviet Azerbaijan but was largely destroyed by the war. Today it is closely tied to Armenia and highly dependent on its financial inputs. All transactions are done via Armenia, and products produced in Nagorno-Karabakh often are labelled 'made in Armenia' for export. Yerevan provides half the budget. ...
>
> Nagorno-Karabakh is highly dependent on external financial support, primarily from Armenia but also from the U.S. and the world-wide diaspora. It cannot collect sufficient revenue to meet its budgetary needs, and in absolute terms is receiving increasing external support. The 2005 budget totalled 24.18 billion drams (some $53.73 million). Locally collected revenues are expected to total 6.46 billion drams (about $14.35 million), 26.7 per cent of expenditures.
>
> Since 1993 Nagorno-Karabakh has benefited from an Armenian 'inter-state loan'. According to the Armenian prime minister, this will be 13 billion drams ($28.88 million) in 2005, a significant increase from 2002 when it was 9 billion drams ($16.07 million). However, Nagorno-Karabakh's (de facto) prime minister argues that part of this loan – 4.259 billion drams (about $9.46 million) – is in fact Armenia's repayment of VAT, customs and excise duties that Armenia levies on goods that pass through its territory, destined for Nagorno-Karabakh. The remainder of the loan has a ten-year repayment period at nominal interest. Though Armenia has provided such loans since 1993, nothing has been repaid. According to the Armenian prime minister, Stepanakert 'is not yet in a position to repay ... . In the coming years we will need to continue providing this loan to help them continue building their infrastructure ... we do not envision that they will be able to go ahead on their own anytime soon'.
>
> The U.S. is the only other state that provides direct governmental assistance. In 1998 Congress for the first time designated Nagorno-Karabakh a recipient of humanitarian aid distinct from Azerbaijan. The U.S. money is administered by its Agency for International Development (USAID), which has distributed it to such NGOs as the Fund for Armenian Relief, Save the Children, and the International Committee of the Red Cross. Through September 2004, the U.S. had pledged $23,274,992 to Nagorno-Karabakh and had spent $17,831,608. Armenian lobby groups have been influential in making these allocations possible."

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

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

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

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

The Fund's 2012 annual report includes messages from Mr Serzh Sargsyan, Armenian President, and Mr Bako Sahakyan, "President of the Republic of Artsakh", which, *inter alia*, contain the following statements.

> Mr Sargsyan:
>
> "The Hayastan All-Armenian Fund is an embodiment of the unity between Armenia, Artsakh and the diaspora. As such, the fund is consistently, resolutely, and before our very eyes transforming our pan-national inner strength into tangible power."
>
> Mr Sahakyan:
>
> "The year 2012 was a jubilee year for the Armenian people. As a nation, we celebrated the 20th anniversary of the founding of the NKR Defense Army and the liberation of Shushi, a magnificent victory which was made possible by the united efforts and indestructible will of the entire Armenian people, the selfless bravery and daring of its valiant sons and daughters."

The Fund has twenty-five affiliates in twenty-two different countries. Its resources come from individual donations, mainly from members of the Armenian diaspora. It now raises about USD 21 million annually.

The Board of Trustees is the Fund's supreme governing body. Under the Fund's Charter, the Armenian President is *ex officio* the President of the Board of Trustees. The Board, which during its existence has had between twenty-two and thirty-seven members, includes many prominent individuals and representatives of political, non-governmental, religious and humanitarian institutions from Armenia and the diaspora. In 2013 the Board, in addition to the Armenian President, Mr Sargsyan, comprised the former Armenian President, Mr Kocharyan; the Armenian Prime

Minister, as well as the Ministers of Foreign Affairs, Finance and Diaspora; the President, former President and Prime Minister of the "NKR"; the Chairmen of the Armenian Constitutional Court, National Assembly and Central Bank; four Armenian religious leaders; three representatives of Armenian political parties; a representative of the Union of Manufacturers and Businessmen (Employers) of Armenia; and representatives of four non-governmental organisations incorporated in the United States of America and Canada. The remainder of the thirty-seven person Board was made up of thirteen individuals from the Armenian diaspora. The composition of the Board has been similar since the Fund's creation.

The Fund has financed and overseen numerous projects since its establishment, including the construction and renovation of roads, housing, schools, hospitals, as well as water and gas networks. In the mid to late 1990s it constructed the highway linking the town of Goris in Armenia with Lachin and with Shusha/Shushi and Stepanakert in Nagorno-Karabakh. In 2001 it financed the construction of the north-south highway in Nagorno-Karabakh. According to the Fund's 2005 annual report, it had paid approximately USD 11 million during the year for various projects, of which about USD 6.1 million had gone to projects in Nagorno-Karabakh. According to figures provided by the Government, the not fully complete expenditure for 2012 amounted to USD 10.7 million in Nagorno-Karabakh and USD 3.1 million in Armenia. Also according to Government figures, in 1995-2012 the fund allocated about USD 111 million in total – or about USD 6 million annually – to projects in Nagorno-Karabakh. In 1992-2012 it allocated USD 115 million to projects in Armenia.

83. The applicants and the Azerbaijani Government claimed that residents of the "NKR" and the surrounding territories are routinely issued with Armenian passports. In its 2005 report (see paragraph 65 above), the ICG stated that "Armenia has given a majority of the inhabitants its passports for travel abroad" (at p. 5). The Azerbaijani Government also pointed to the possibility for residents of the mentioned territories to acquire Armenian citizenship. They referred to section 13 ("Citizenship by Naturalisation") of the Law of the Republic of Armenia on citizenship of the Republic of Armenia, which provides as follows.

> "Any person who is eighteen or older and capable of working that is not an RA citizen may apply for RA citizenship, if he/she:
>
> (1) has been lawfully residing on the territory of the Republic of Armenia for the preceding three years;
>
> (2) is proficient in the Armenian language; and
>
> (3) is familiar with the Constitution of the Republic of Armenia.

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

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

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

Regulations on the application of this Agreement were also issued in 1999 and provide that an Armenian passport shall be issued to an "NKR" resident only in exceptional cases where the purpose for going abroad is medical, educational or concerns another personal matter. The Government asserted that fewer than 1,000 persons had been issued with a passport under the 1999 Agreement.

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

85. The Azerbaijani Government pointed out that the National Atlas of Armenia, published in 2007 by the State Committee of the Real Estate

Cadastre, adjunct to the Armenian Government, and thus allegedly an official publication, consistently incorporated the "NKR" and the surrounding occupied territories within the boundaries of the Republic of Armenia on various types of maps.

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

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

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

The Report further stated.

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

II. THE JOINT UNDERTAKING OF ARMENIA AND AZERBAIJAN

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

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

"10. The Assembly takes note of the letter from the President of Armenia in which he undertakes to respect the cease-fire agreement until a final solution is found to the conflict [in Nagorno-Karabakh] and to continue the efforts to reach a peaceful negotiated settlement on the basis of compromises acceptable to all parties concerned.

...

13. The Parliamentary Assembly takes note of the letters from the President of Armenia, the speaker of the parliament, the Prime Minister and the chairmen of the political parties represented in the parliament, and notes that Armenia undertakes to honour the following commitments:

...

13.2 the conflict in Nagorno-Karabakh:

a. to pursue efforts to settle this conflict by peaceful means only;

b. to use its considerable influence over the Armenians in Nagorno-Karabakh to foster a solution to the conflict;

c. to settle international and domestic disputes by peaceful means and according to the principles of international law (an obligation incumbent on all Council of Europe member states), resolutely rejecting any threatened use of force against its neighbours;

..."

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

III. RELEVANT DOMESTIC LAW

A. The laws of the Azerbaijan SSR

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

1. The 1978 Constitution

89. The relevant provisions of the Constitution stated as follows.

Article 13

"The basis of the personal property of citizens of the Azerbaijan SSR is their 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 the

construction of individual housing. Citizens are required to use their land rationally. State and collective farms provide assistance to citizens for their smallholdings.

Personal property or property to which they have a right of use may not be used to make unearned income to the detriment of public interest."

2. The 1970 Land Code

90. The relevant provisions of the Land Code stated as follows.

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 shall be certified by a State certificate on the right of use.

The form of the certificate shall be 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 shall be 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 on the right of temporary use of land shall be issued to collective farms, State farms, other State, cooperative and public institutions, agencies and organisations, as well as to 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 shall be 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 purposes, as well as other valuable properties of a land.

Article 126-1
Right of use of land in case of inheritance of ownership rights 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 the 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, on land belonging to cities and urban settlements; on village land not being used by collective farms, State farms or other agricultural enterprises; on land of the State reserve; and on 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 the 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 the form of stand-alone residential districts or settlements."

3. The 1983 Housing Code

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

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

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

92. The 1985 Instructions, in Article 2, listed the documents that served as evidence of title to a residential house. The Instructions were approved by the USSR Central Statistics Department through Order no. 380 of

15 July 1985. Article 2.1 listed 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 where they contain an exact reference to possession by the owner of duly formalised documents certifying his or her right to the residential house".

B. The laws of Azerbaijan

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

1. The 1991 Law on property

94. The 1991 Law on property in Azerbaijan came 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 appliances and items for private use;
>
> – shares, bonds and other securities;
>
> – mass-media facilities;
>
> – enterprises and property complexes for the production of goods destined for the consumer, social and cultural markets, with the exception of certain types of property, which, by law, 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 of his own will: to sell, bequeath, give away, rent or take other action in so far as it is not in contravention of the law."

2. The 1992 Land Code

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

Article 10
Private ownership of plots of land

"Plots of land shall be allocated for private ownership to Azerbaijani citizens 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 farming activities and activities of other organisations involved in the production of agricultural products for sale;

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

(4) for construction connected to business activities;

(5) for traditional ethnic production activities.

Under the legislation 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 shall be 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 shall be transferred into their name.

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 may 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

"Plots of land 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 examining a request for the allocation or seizure of a plot of land, including the seizure of a plot of land for State or public needs, shall be determined by the Cabinet of Ministers of Azerbaijan.

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

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

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

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

Article 31
Formalisation of the right of temporary use of land

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

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

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

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

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

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

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

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

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

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

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

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

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

(11) death of the possessor or user.

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

IV. RELEVANT INTERNATIONAL LAW

96. Article 42 of the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 ("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.[3] 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[4], that is, occupation is not conceivable without "boots on the

3. See, for example, E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), p. 43; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff Publishers, 2009), pp. 5-8; Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press, 2009), at pp. 42-45, §§ 96-102; and A. Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", *American Journal of International Law*, vol. 100:580 (2006), pp. 585-86.

4. Most experts consulted by the International Committee of the Red Cross 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, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory" (Geneva: ICRC, 2012), pp. 10, 17 and 33; see also E. Benvenisti, cited above, pp. 43 et seq.; and V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris: Éditions Pedone, 2010), pp. 35-41.

ground", therefore forces exercising naval or air control through a naval or air blockade do not suffice[5].

97. The rules of international humanitarian law do not explicitly address the issue of preventing access to homes or property. However, Article 49 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 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 in *Customary International Humanitarian Law* by the International Committee of the Red Cross (ICRC)[6]) that applies to any kind of territory.

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

V. RELEVANT UNITED NATIONS AND COUNCIL OF EUROPE MATERIAL

A. United Nations

98. The UN 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), known as the Pinheiro Principles, are the most complete standards on the issue. 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

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

1. Parliamentary Assembly of the Council of Europe (PACE) Resolution 1708 (2010) on solving property issues of refugees and displaced persons

100. The Parliamentary Assembly noted in paragraph 2 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. It underlined the importance of restitution as follows.

"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. PACE Resolution 1497 (2006) on refugees and displaced persons in Armenia, Azerbaijan and Georgia

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

> "12.1. to focus all their efforts on finding a peaceful settlement of the conflicts in the region with a view to creating conditions for the voluntary return of refugees and displaced persons to their places of origin, safely and with dignity;
>
> ...
>
> 12.4. to make the return of the displaced persons a priority and do everything possible in their negotiations so as to enable these people to return in safety even before an overall settlement;
>
> ...
>
> 12.15. to develop practical co-operation as regards the investigation of the fate of missing persons and to facilitate the return of identity documents and the restitution of property in particular, making use of the experience of handling similar problems in the Balkans."

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

102. The Committee of Ministers recommended notably the following:

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

THE LAW

I. INTRODUCTION

103. By its decision of 14 December 2011, the Court declared the applicants' complaints admissible. It also examined the six preliminary objections raised by the Government under Article 35 of the Convention. Three of them – concerning the question whether the matter had already been submitted to another procedure of international investigation or settlement, the lack of jurisdiction *ratione temporis* and the failure to respect the six-month rule – were rejected. The other three objections were joined to the merits and will be examined below in the following order: exhaustion of domestic remedies, the applicants' victim status, and the Government's jurisdiction over the territory in question.

II. EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

1. The applicants

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

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

106. The applicants further maintained that the Government bore the burden of proof to show that a remedy existed and that it was effective both in theory and in practice and, in particular, that it had been successfully used by litigants in a position similar to theirs. They argued that the Government had failed to discharge this burden. More specifically, none of the examples of cases given by the Government in their observations to the Chamber in July 2007 related to the right to return to enjoy properties or private and family life. Only in their July 2012 observations had the Government pointed to some constitutional remedies in Armenia and the "NKR" and claimed that the applicants had always been able to enter the disputed territories, at least for the purpose of exercising their legal rights. Read in conjunction with the Government's previous observations, where these remedies had not been mentioned and where the return of and compensation to displaced persons were conditioned on a comprehensive and final conflict-resolution agreement, the 2012 submissions lacked credibility. Furthermore, they had not contained any examples of redress actually offered to Azerbaijani nationals for breaches of the type of rights referred to in the present case.

2. The Government

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

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

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

3. The Azerbaijani Government, third-party intervener

110. According to the Azerbaijani Government, the respondent Government had failed to fulfil their obligation to specify which remedies

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

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

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

B. The Court's assessment

1. Admissibility of additional submissions

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

114. On 22 January 2014 the President of the Court, after consulting the Grand Chamber, decided, in accordance with Rules 38 § 1 and 71 § 1 of the Rules of Court, that the above-mentioned documents should not be included in the case file, because of their late submission. The Government had not given a satisfactory explanation as to why the documents could

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

2. General principles on exhaustion of domestic remedies

115. The Court reiterates that it is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV). The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdiction (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010, and *Kazali and Others v. Cyprus* (dec.), nos. 49247/08 and 8 others, § 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 deleted).

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

Article 13 of the Convention – with which it has close affinity –, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ...

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

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

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

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

69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article [35] must be applied with some degree of flexibility and without excessive formalism ... It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in

reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case ... This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."

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

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

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

119. It should also be noted that Armenia has denied that its armed forces or other authorities have been involved in the events giving rise to the complaints in the present case, or that Armenia exercises – or has at any point in time exercised – jurisdiction over Nagorno-Karabakh and the surrounding territories. Given such a denial of involvement or jurisdiction, it would not be reasonable to expect the applicants to bring claims for

restitution or compensation before the Armenian courts and authorities. Regard must further be had to the political and general context. As a consequence of the war, virtually all Azerbaijanis have left the disputed territories. No political solution of the conflict has been reached. Rather, the hostile rhetoric between the leaders of Armenia and Azerbaijan appears to have intensified, ceasefire breaches are recurrent and the military build-up in the region has escalated in recent years. In these circumstances, it is not realistic that any possible remedy in the unrecognised "NKR" entity could in practice afford displaced Azerbaijanis effective redress.

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

III. THE APPLICANTS' VICTIM STATUS

A. The parties' submissions

1. The applicants

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

papers with them. Furthermore, there had not been a centralised land register at the time from which they could have obtained further documents.

122. The applicants claimed that, under the 1970 Land Code and the 1983 Housing Code of the Azerbaijan SSR, still in force at the time of their flight, a citizen had a right of ownership to his individual house and an inheritable right to use a plot of land in line with the purposes for which it had been allocated. Both rights allegedly constituted possessions within the meaning of Article 1 of Protocol No. 1. Moreover, the 1991 Law on property in Azerbaijan made reference to a land plot as the object of individual ownership and thus gave the applicants a legitimate expectation of becoming owners of land.

2. The Government

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

124. The Government further questioned whether the applicants had ever held a right to the alleged properties that had been recognised under the law in force in 1992 or certified by the appropriate authority. In particular, under the socialist system of the USSR before 1991, land was under the exclusive ownership of the State. While the 1991 Law on property recognised the possibility of private ownership, it did not transfer ownership of land occupied by individuals to them. With respect to individual land users and lessees, the legislation set out that their rights were formalised through a

certificate, which was registered in a land register kept by the local Soviet of People's Deputies. Thus, no rights to land could be asserted without such a registered certificate. Furthermore, the Azerbaijani 1992 Land Code stipulated that the rights of a user or lessee could be extinguished following a failure to use the land for a period of two years. As the applicants had not returned to the district of Lachin since 1992, the Government presumed that their alleged rights had been terminated before Armenia became subject to the jurisdiction of the Court in 2002. Furthermore, the applicants' claimed legitimate expectation to become owners of land was no longer a realistic expectation in 2002. Furthermore, before that date, the applicants' alleged property had been allocated to other individuals, with their names recorded on the land register in accordance with the laws of the "NKR". Thus, the applicants had no "existing possessions" but were merely claimants seeking to have their property restored or to receive compensation. The Government maintained that no domestic legislation or judicial decision existed which gave rise to a legitimate expectation of such restitution or compensation. However, in the same observations, the Government stated that the "NKR" had not adopted any legal act that deprived the applicants of the right to enter the territory of Lachin or of the right to peacefully enjoy their property.

3. The Azerbaijani Government, third-party intervener

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

126. The Azerbaijani Government further stated that, at the time of the applicants' flight, private ownership of individual houses was protected by the laws of the Azerbaijan SSR, as in force at the material time. No private ownership existed, however, in regard to land, which was exclusively owned by the State. All land transactions were prohibited, but plots of land were allotted by decision of the local authority, the Soviet of People's Deputies,

to citizens for their use for a definite or indefinite period of time, free of charge. The right of use, which was an inheritable title, was granted for purposes such as individual housing, namely the construction of privately owned houses, as well as pasture, haymaking and farming. Furthermore, the 1991 Law on property in Azerbaijan, while not yet enforceable at the relevant time, had added a legitimate expectation for the applicants to become owners of land.

B. The Court's assessment

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

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

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

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

130. In a number of cases related to the above-mentioned conflict, the Court has established the applicants' "possession" within the meaning of Article 1 of Protocol No. 1 on the basis of prima facie evidence which

the Government failed convincingly to rebut, including copies of original title deeds, registration certificates, purchase contracts and affirmations of ownership issued by the Republic of Cyprus. As explained by the applicant in *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 Cypriot authorities 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 in issue, and continued (§ 18):

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

131. In *Doğan and Others v. Turkey* (nos. 8803/02 and 14 others, 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 Government raised the objection that some of the applicants had not submitted title deeds attesting that they had owned property in the village in question. The Court considered that it was not necessary to decide whether or not in the absence of title deeds the applicants had rights of property under domestic law. The question was rather whether the overall economic activities carried out by the applicants constituted "possessions" coming within the scope of Article 1 of Protocol No. 1. Answering the question in the affirmative, it stated as follows (§ 139):

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

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

> "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 was of a sufficient nature to constitute a possession within the meaning of Article 1 of Protocol No. 1.

133. The question whether the applicants had substantiated their claim under Article 1 of Protocol No. 1 has also arisen 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 and 5 others, §§ 292-93, 3 May 2011), the Court accepted the claim of ownership by some of the applicants on the basis of extracts from a housing inventory issued by the town administration after the attack which showed that the applicants were the owners of their houses. As regards the applicants who had submitted no proof of title, the Court established their property right on the basis of other evidence, such as a certificate of residence issued by the town administration. The Court also considered it likely that any documents confirming the applicants' title to the houses had been destroyed during the attack.

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

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

135. However, if an applicant does not produce any evidence of title to property or of residence, his complaints are bound to fail (see, for example, *Lordos and Others v. Turkey*, no. 15973/90, § 50, 2 November 2010, where the Court declared a complaint incompatible *ratione materiae* in the absence of evidence of ownership; see also the conclusion as to some applicants in *Kerimova and Others*, cited above). 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, §§ 108-11, 29 May 2012), it considered that an applicant complaining of the destruction of his home should provide at least a brief description of the property in question. Since no documents or detailed claims were submitted, his complaint was found to be unsubstantiated. As further examples of prima facie evidence of ownership of or residence on property, the Court has mentioned documents such as land or property titles, extracts from land or tax registers, documents from the local administration, plans, photographs and maintenance receipts as well as proof of mail deliveries, statements of witnesses or any other relevant evidence (see, for instance, *Prokopovich v. Russia*, no. 58255/00, § 37, ECHR 2004-XI, and *Elsanova v. Russia* (dec.), no. 57952/00, 15 November 2005).

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

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

(a) Proof of identity and place of residence

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

of any evidence to the contrary – they must be deemed to have still lived there with their families at the time when they fled on 17 May 1992.

(b) Proof of possessions

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

139. Originally, only the sixth applicant submitted a document relating to property, a so-called technical passport. The other applicants presented such evidence only when they replied to the Government's first observations. In addition to technical passports, they all submitted witness statements from former neighbours who affirmed that the applicants owned houses in the respective villages, as well as statements by representatives of an Azerbaijani administration for Lachin. The sixth applicant also presented a decision on land allocation taken by the Lachin District Soviet of People's Deputies as well as invoices for animal feed, building materials and building subsidies.

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

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

142. It is noteworthy that, except for the fifth and sixth applicants, there are discrepancies between the applicants' initial descriptions of their houses

and the figures contained in the technical passports presented later in the proceedings. For example, the first applicant originally stated that he owned a 250 sq. m house. The technical passport submitted, however, concerns a house of a total area of 408 sq. m and 300 sq. m living area (and a 60 sq. m storehouse, not previously mentioned). Similarly, the fourth applicant originally claimed that his house had a 165 sq. m area, whereas the house described in the passport measures 448 sq. m in total and has a 223 sq. m living area (and a 75 sq. m storehouse, not previously mentioned). The applicants have stated that it is the information contained in the technical passports that is correct and that their original statements were made from memory at a brief meeting with their representative when they did not have access to the documents.

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

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

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

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

145. First, it should be noted that, although the land legislation enacted shortly after Azerbaijan's independence acknowledged for the first time the right of private ownership of land, a procedure whereby land could be privatised had not been introduced at the relevant time, that is, in May 1992. In any event, it is undisputed that no application had been made by the applicants to become owners of land. As, moreover, the rights acquired by individuals under the old legislation were not rescinded by the enactment of the 1991/92 property laws, the applicants' legal rights to the houses and land that they possessed at the time of their flight must be assessed with reference to the laws of the Azerbaijan SSR.

146. Under the Soviet legal system, citizens had a right to own residential houses, but there was no private ownership of land, which instead was considered State property. For the Azerbaijan SSR (including Nagorno-Karabakh and the district of Lachin and the other surrounding territories now under occupation), these rules were laid down in the 1978 Constitution as well as the 1970 Land Code and the 1983 Housing Code. Article 10.3 of the Housing Code provided for the ownership of houses, and the Land Code, notably Articles 4, 25, 27 and 28, laid down the rules and procedures for the allocation of land to individuals for their use. Consequently, the houses that the applicants inhabited in the district of Lachin were part of their personal property, whereas they only had a "right of use" of the plots of land on which these houses stood. As has already been mentioned (see paragraph 138), the moveable property – livestock, carpets, cars – that the applicants claimed to have possessed (the rights to which were also protected by the laws of the Azerbaijan SSR) is likely to have been destroyed during the military attack on Lachin or in the subsequent years. It is further unclear whether their houses have been destroyed or are still partly or wholly intact. Consequently, it is of crucial importance to examine the significance of the "right of use".

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

There is no doubt, therefore, that the "right of use" conferred on the applicants was a strong and protected right which represented a substantive economic interest. While there is no indication that the applicants' rights

were of a temporary nature, the Court notes, for the sake of completeness, that this conclusion is applicable to both indefinite and temporary "rights of use". Having regard to the autonomous meaning of Article 1 of Protocol No. 1, the "right of use" of land thus constituted a "possession" under that provision. This conclusion applies also to the rights held by individuals to residential houses and moveable property.

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

In regard to the Government's first contention, the Court notes that terminating land rights under Article 32 of the 1992 Land Code necessitated a decision to that effect by the local Soviet of People's Deputies and, moreover, required that the failure to use the land was without good reason. The latter can hardly be said to be the case here in view of the military presence in the relevant territories since 1992/93. In these circumstances, the claim, which amounts to no more than speculation, must be rejected. As to the Government's second contention, it is unclear to which land or possessors the submitted land-registry documents refer. Moreover, the claim seems to contradict the statement that the "NKR" had not adopted any legal act that deprived the applicants of the right to the peaceful enjoyment of their property. In any event, this issue has already been examined at the admissibility stage in regard to the Court's jurisdiction *ratione temporis* following a similar claim by the Government. The claim was rejected on the following grounds (see *Chiragov and Others v. Armenia* (dec.), no. 13216/05, § 102, 12 February 2012).

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

149. In conclusion, at the time of their leaving the district of Lachin, the applicants held rights to land and houses which constituted "possessions"

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

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

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

IV. ARMENIA'S JURISDICTION

A. The parties' submissions

1. The applicants

152. The applicants submitted that Armenia exercised effective control over Nagorno-Karabakh and the surrounding territories, in particular the district of Lachin, and that the matters complained of therefore fell within the jurisdiction of Armenia in accordance with Article 1 of the Convention. Alternatively, such jurisdiction derived from Armenia's authority or control over the area in question through its agents operating there. The applicants asserted that the Court's case-law on this issue was settled and referred, *inter alia*, to *Loizidou* (cited above), *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, ECHR 2004-VII) and *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, ECHR 2011). As regards the burden of proof, they maintained that the test was not "beyond reasonable doubt"; instead, in the present case, there was a presumption of fact that Armenia had jurisdiction over the mentioned territories, a presumption that the Government had failed to rebut.

153. The applicants claimed that Armenia's military participation in the Nagorno-Karabakh conflict had been considerable and that the evidence to that effect was overwhelming. They submitted, *inter alia*, that Armenian conscripts had served in Nagorno-Karabakh. According to the above-mentioned 1994 HRW report, Armenian conscripts had been sent to Nagorno-Karabakh and the surrounding Azerbaijani provinces, and military forces from Armenia had taken part in the fighting in Azerbaijan. The applicants also referred to statements by various political leaders and

observers which point towards the involvement of the Armenian army, including the above-mentioned statements by Mr Robert Kocharyan and Mr Vazgen Manukyan (see paragraph 62 above).

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

155. In addition to committing troops to the conflict, Armenia had, according to the applicants, provided material aid to Nagorno-Karabakh. Allegedly, the country supplied as much as 90% of the enclave's budget in the form of interest-free credits. These credits constituted financial assistance which contributed to Armenia's effective control over Nagorno-Karabakh and the surrounding territories. As to the Hayastan All-Armenian Fund, the applicants submitted that it could not be seen as a distinct body independent of the government, as it had been established by presidential decree, its Charter designated the Armenian President as President of the Board of Trustees, and that Board otherwise included several of the highest-ranking representatives of the Armenian authorities, Parliament, Constitutional Court and Central Bank. Furthermore, its mission was to support sustainable development in both Armenia and Nagorno-Karabakh.

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

157. The applicants further submitted that, in Nagorno-Karabakh, many Armenian laws were applied and the Armenian dram was the main

currency in use. Moreover, people from Nagorno-Karabakh were issued with Armenian passports for the purpose of travelling abroad.

2. The Government

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

159. The Government asserted that Armenia had not participated in the military conflict in question. The attack on Lachin from 17 to 18 May 1992 – as well as the capture of Shusha/Shushi on 9 May – had been conducted by the "NKR" defence force, of which 90% was made up of people from Nagorno-Karabakh. The military actions were actually against the interests of the Government, which was at the time negotiating a ceasefire agreement with the Azerbaijani leaders; a meeting had been held from 8 to 9 May in Tehran. Nonetheless, the capture of these two towns had been deemed necessary by the "NKR" forces in order to stop Azerbaijani war crimes and open up a humanitarian corridor to Armenia.

160. The Government further maintained that Armenia had not taken part in any subsequent military actions either. This was allegedly shown by the fact that there was not a single mention in any international document of Armenian army participation. Instead, these documents talked about "local Armenian forces". Furthermore, the Armenian authorities had not adopted any legal acts or programmes or taken other official steps to get

involved in the military actions, which had been entirely carried out by the "NKR" defence force, established in early 1992 following the enactment of the "NKR" Law on conscription. It had been assisted by the Armenian population in Nagorno-Karabakh and the surrounding territories as well as volunteers of Armenian origin from various countries. Armenia had only been involved in the war in so far as it had defended itself against Azerbaijani attacks on its territory within the recognised borders of Armenia. However, as Armenia and the "NKR" had a common enemy, their armed forces cooperated in various ways.

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

162. The Government further submitted that the "NKR", since its formation, had carried out its political, social and financial policies independently. Armenia had not given any economic help to the "NKR" other than, for several years, providing the "NKR" with long-term loans for the implementation of specific projects, including the rebuilding of schools and other educational institutions and the provision of financial assistance to the families of soldiers killed in action. Such help had been provided by other countries as well. Moreover, the Fund played a great role in the development of the "NKR". Its main mission was to provide financial assistance to Armenia and the "NKR", using resources collected by the Armenian diaspora. While there were Armenian representatives on

the Board of Trustees, the majority of the Board's members were from the Armenian diaspora and the "NKR". The Fund's agenda was not set by the government; often the donors themselves decided to which projects their money should go. The only governmental assistance to the Fund was the provision of rent-free offices in a government building in Yerevan. Thus, it was not an instrument of control, but a non-political, charitable organisation, which had provided USD 111 million to the "NKR" for building schools and hospitals, reconstructing roads and villages, assisting with cultural events and subsidising work and education for the poor. Resources were also provided by other funds and international organisations. Charity and international investments in the "NKR" annually accounted for USD 20-30 million and 30-40 million respectively.

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

164. The Government also asserted that the only facts relevant for the Court's examination of the jurisdiction issue were those dating from May 1992 ("the causation question") and post-April 2002 ("the jurisdiction question"). Evidence since 2002 demonstrated that Armenia and the "NKR" were friendly countries, with much in common and with close economic and social links, a military alliance and a shared ethnicity. Armenia had had some influence in so far as it had, from time to time, given financial and other assistance to the "NKR". Furthermore, as a good neighbour and ally, it had helped to maintain, from its end, the humanitarian corridor in the district of Lachin. However, the Republic of Armenia and the "NKR" were different countries.

3. The Azerbaijani Government, third-party intervener

165. The Azerbaijani Government agreed with the applicants that Armenia exercised effective control of Nagorno-Karabakh and the surrounding territories, including the Lachin area. They invoked statements by various international and non-governmental organisations and the US Department of State, as well as many political leaders in claiming that, at the beginning of the 1990s, Armenian forces, fighting beside separatist Karabakhi forces, had occupied Nagorno-Karabakh as well as Lachin and the other surrounding territories and that these territories continued to be occupied by Armenia, which had soldiers stationed there. In the latter respect, they referred to *Harutyunyan v. Armenia* (no. 36549/03, ECHR 2007-III) and *Zalyan, Sargsyan and Serobyan v. Armenia* ((dec.), nos. 36894/04 and 3521/07, 11 October 2007). The "NKR" was not an independent State, as claimed by the respondent Government, but a subordinate local administration surviving by virtue of the military and other support afforded by Armenia. Allegedly, it was not conceivable that the "NKR" defence force would exist in any recognisable form without the extensive support of Armenia, expressed, for example, in weapons, equipment, training and, above all, the constant provision of a highly significant percentage – if not an actual majority – of soldiers based in the occupied territories.

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

B. The Court's assessment

167. While a State's jurisdictional competence is primarily territorial, the concept of jurisdiction within the meaning of Article 1 of the Convention is

not restricted to the national territory of the High Contracting Parties, and the State's responsibility can be involved because of acts and omissions of their authorities producing effects outside their own territory.

Article 1 of the Convention reads as follows:

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

1. General principles on extraterritorial jurisdiction

168. The Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when this State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government. The principles have been set out in several cases, including *Ilaşcu and Others* (cited above, §§ 311-19), *Al-Skeini and Others* (cited above, §§ 130-39) and *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 and 2 others, 19 October 2012). The relevant passages of *Catan and Others* read as follows.

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

circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts (see *Al-Skeini and Others*, cited above, § 132).

106. One exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV; *Banković and Others*, cited above, § 70; *Ilaşcu and Others*, cited above, §§ 314-16; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Al-Skeini and Others*, cited above, § 138). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Cyprus v. Turkey*, cited above, §§ 76-77, and *Al-Skeini and Others*, cited above, § 138).

107. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaşcu and Others*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu and Others*, cited above, §§ 388-94, and *Al-Skeini and Others*, cited above, § 139).

...

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

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

169. The Court first considers that the situation pertaining in Nagorno-Karabakh and the surrounding territories is not one of Armenian State agents exercising authority and control over individuals abroad, as alternatively argued by the applicants. Instead, the issue to be determined on the facts of the case is whether Armenia exercised and continues to exercise

effective control over the mentioned territories and as a result may be held responsible for the alleged violations. As noted by the Court in *Catan and Others* (cited above, § 107), this assessment will primarily depend on military involvement, but other indicators, such as economic and political support, may also be of relevance.

170. While the applicants used to live in the district of Lachin, the issue of jurisdiction does not concern solely this area. In fact, Lachin is one of the parts of the mentioned territories that is situated farthest away from the Line of Contact with Azerbaijan. The district is sheltered by Nagorno-Karabakh to the east, by the districts of Kelbajar as well as Gubadly and Jebrayil to the north and south and by Armenia to the west. To determine whether Armenia has jurisdiction in the present case, it is thus necessary to assess whether it exercises effective control over Nagorno-Karabakh and the surrounding territories as a whole.

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

(a) Military involvement

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

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

Armenian armed forces at this point in time. Furthermore, the Armenian Minister of Defence from 1992 to 1993, Mr Vazgen Manukyan, acknowledged this state of affairs (see paragraph 62 above).

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

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

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

177. As the Court stated in *El-Masri v. the former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, § 163, ECHR 2012), it will, in principle, treat with caution statements given by government ministers or other high officials, since they would tend to be in favour of the government that they represent or represented. However, statements from high-ranking officials, even former ministers and officials, who have played a central role in the

dispute in question are of particular evidentiary value when they acknowledge facts or conduct that place the authorities in an unfavourable light. They may then be construed as a form of admission (see in this context, *mutatis mutandis*, the judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)* (Merits) *Judgment*, *ICJ Reports* 1986, § 64).

178. Accordingly, it is striking to take note of the statements by Armenian representatives which appear to go against the official stance that the Armenian armed forces have not been deployed in the "NKR" or the surrounding territories. The statement by Mr Manukyan, the former Minister of Defence, has already been mentioned (see paragraph 62 above). Of even greater significance is the speech given by the incumbent President of Armenia, Mr Serzh Sargsyan, in January 2013, to leaders of the Ministry of Defence, in which he declared that the goal of Armenian foreign policy was to achieve legal recognition of the victory attained by "our Army" in the Nagorno-Karabakh war (see paragraph 72 above). It should be noted as well that the Government in the present case have acknowledged, with reference to the 1994 Military Agreement, that the Armenian army and the "NKR" defence force cooperate in a defence alliance.

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

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

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

(b) Other support

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

182. The Government have claimed that the "NKR" has its own legislation and its own independent political and judicial bodies. However, its political dependence on Armenia is evident not only from the interchange of prominent politicians, but also from the fact that its residents acquire Armenian passports for travel abroad as the "NKR" is not recognised by any State or international organisation (see paragraph 83 above). In regard to the legislation and the judiciary, there is further evidence of integration. The Government have acknowledged that several laws of the "NKR" have been adopted from Armenian legislation. More importantly, the facts of *Zalyan, Sargsyan and Serobyan* (see paragraph 76 above) show not only the presence of Armenian troops in Nagorno-Karabakh but also the operation of Armenian law-enforcement agents and the exercise of jurisdiction by Armenian courts on that territory. The case of Mr Grigoryan (see paragraph 77 above) provides a similar indication.

183. Finally, the financial support given to the "NKR" from or via Armenia is substantial. The ICG reported that, in the 2005 "NKR" budget, only 26.7% of expenditures were covered by locally collected revenues. An Armenian "inter-State loan" has provided the "NKR" with considerable amounts of money, throughout 2004 and 2005, totalling USD 51 million. According to the ICG, relying on official sources, the loan made up 67.3% of the "NKR" budget in 2001 and 56.9% in 2004. The loan has been in place since 1993, and in 2005, the year of the report, none of the loan had been repaid (see paragraphs 80-81 above).

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

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

(c) Conclusion

186. All of the above reveals that Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.

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

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

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

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

A. The parties' submissions

1. The applicants

189. The applicants submitted that their rights under Article 1 of Protocol No. 1 had been violated as a direct result of an exercise in governmental authority on the part of Armenia. They feared that their property had been destroyed or pillaged soon after they had been forced to flee the district of

Lachin. Nevertheless, their complaint concerned an interference with all of their property, including land which remained in Lachin and which they still owned or had the right to use. The applicants claimed that they had continuously been denied access to their property, and that this constituted an interference that was far from being in accordance with law. Moreover, whatever the aim of the occupation of Lachin, the total exclusion of the applicants from their property and the possible destruction of it without the payment of compensation could not be seen as proportionate to the achievement of that aim. The applicants did not see any prospect of being permitted to return to the properties or anywhere else in the occupied territories in the foreseeable future.

2. The Government

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

3. The Azerbaijani Government, third-party intervener

191. The Azerbaijani Government submitted that the applicants had not been expelled from the occupied territories in question by any legal act but had been forced to flee by virtue of the activities of the Armenian military forces. They were still physically prevented from entering the territories and enjoying their possessions, through the deployment of Armenian troops and

land mines on the Line of Contact, while Armenians were being offered incentives to settle in the territories. This state of affairs was further shown by Armenia's position in the Minsk Group negotiations on displaced persons returning home. Allegedly, the level and strength of Armenian sustenance of the subordinate local administration had not decreased but rather intensified over the years. The Azerbaijani Government therefore contended that Armenia was responsible for a continuing violation of the applicants' rights under Article 1 of Protocol No. 1.

B. The Court's assessment

192. The Court first refers to its above finding (see paragraph 149 above) that, while it is uncertain whether the applicants' houses still stand, they all have existing rights to their plots of land which constitute "possessions" within the meaning of Article 1 of Protocol No. 1. Given that the matters complained of come within the jurisdiction of Armenia (see paragraph 186 above), the question to be examined is whether Armenia is responsible for a violation of the applicants' rights to their possessions.

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

194. As has been mentioned above (see paragraphs 118-20), no effective domestic remedies, whether in Armenia or in the "NKR", have been identified. Consequently, the applicants have not had access to any legal means whereby they could obtain compensation for loss of property or – more importantly in the present context – whereby they could gain physical access to the places where they used to live and thus to the property and homes left behind. The continuing denial of access is further shown by the Government's assertion, albeit unproven, that the applicants' property – and, presumably, the property belonging to other displaced persons – had been allocated by the "NKR" administration to other individuals who had been recorded in the land register.

195. Moreover, twenty years after the ceasefire agreement, people displaced during the conflict have not been able to return to Nagorno-Karabakh and the surrounding territories. The Court notes in this respect the Resolutions passed by the UN General Assembly and the European Parliament (see paragraphs 67 and 69 above). In the Court's view, it is not realistic, let alone possible, in practice for Azerbaijanis to return

to these territories in the circumstances which have prevailed throughout this period and which include the continued presence of Armenian and Armenian-backed troops, ceasefire breaches on the Line of Contact, an overall hostile relationship between Armenia and Azerbaijan and no prospect of a political solution yet in sight.

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

197. The Government submitted that the capture of Lachin and the creation of a land link between Armenia and Nagorno-Karabakh involved a lawful act of self-defence. The Court takes note of the claims that the district of Lachin was of military-strategic importance and that there was a need to deliver food, medicine and other supplies into Nagorno-Karabakh. However, whether or not these circumstances could constitute a justification for interfering with the individual rights of residents in the area, the capture of Lachin in May 1992 has no direct bearing on the issue under examination which is whether the applicants' inability to return there and the consequent continuous denial of access to their property could be seen as justified.

198. Furthermore, the Court does not find that the ongoing negotiations within the Minsk Group on the issues relating to displaced persons provide a legal justification for the interference with the applicants' rights. These negotiations do not absolve the Government from taking other measures, especially when negotiations have been pending for such a long time (see, *mutatis mutandis*, *Loizidou* (merits), cited above, § 64, and *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 or the status of a particular territory" (see paragraph 100 above).

199. Guidance as to which measures the Government could and should take in order to protect the applicants' property rights can be derived from relevant international standards, in particular from the Pinheiro Principles (see paragraph 98 above) and the above-mentioned Resolution. At the present stage, and pending a comprehensive peace agreement, it would appear particularly important to establish a property-claims mechanism,

which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.

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

201. In conclusion, as concerns the period under scrutiny, that is, from 26 April 2002, no aim has been indicated which could justify the denial of access of the applicants to their property and the lack of compensation for this interference. Consequently, the Court finds that there has been and continues to be a breach of the applicants' rights under Article 1 of Protocol No. 1 for which Armenia is responsible.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

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

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

A. The parties' submissions

1. The applicants

203. The basis for the applicants' complaint was much the same as for the one submitted under Article 1 of Protocol No. 1: they maintained that the continuing refusal of the Government to allow them to return to the district of Lachin also violated their rights under Article 8 of the

Convention. In this respect, they referred to *Cyprus v. Turkey* (cited above). Distinguishing their case from the situation in *Loizidou* (cited above), the applicants pointed out that, as opposed to Mrs Loizidou, they had all lived for many years in the Lachin area and had established homes and private and family lives there. There was allegedly no justification under Article 8 § 2 for the interference with their rights.

2. The Government

204. The Government's submissions also essentially mirrored their arguments under Article 1 of Protocol No. 1. In addition, they maintained that, since the houses and the other property allegedly owned by the applicants had been destroyed in 1992, the applicants could not claim to have had any private or family life or a home in the area in question after that date. To support this assertion, the Government likened the applicants' situation to *Loizidou* ((merits), cited above) and referred to the Court's finding in § 66 of the judgment:

> "[I]t would strain the meaning of the notion 'home' in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives."

In any event, the Government argued that the alleged interference was in accordance with the law and was necessary in a democratic society: by providing a "humanitarian corridor" linking the "NKR" with the outside world, control over the district of Lachin served the interests of national security, public safety and the economic well-being of the country.

3. The Azerbaijani Government, third-party intervener

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

B. The Court's assessment

206. The notions of "private life", "family life" and "home" under Article 8 are, like "possessions" under Article 1 of Protocol No. 1, autonomous concepts; their protection does not depend on their classification under domestic law, but on the factual circumstances of the case. As noted above (see paragraphs 137 and 150), all the applicants were born in the district of Lachin. Until their flight in May 1992 they had lived and worked there all, or for major parts, of their lives. Almost all of them married and had children in the district. Moreover, they earned their livelihood there and their ancestors had lived there. Furthermore, they had built and owned

houses in which they lived. It is thus clear that the applicants had long-established lives and homes in the district, and that their situation contrasts with that of Mrs Loizidou in *Loizidou* (cited above). The applicants have not voluntarily taken up residence anywhere else, but live, out of necessity, as internally displaced persons in Baku and elsewhere. In the circumstances of the case, their forced displacement and involuntary absence from the district of Lachin cannot be considered to have broken their link to the district, notwithstanding the length of time that has passed since their flight.

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

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

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

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

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

A. The parties' submissions

1. The applicants

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

2. The Government

211. The Government claimed that the applicants had had effective administrative and judicial remedies at their disposal, both in Armenia and the "NKR", which did not differentiate between displaced persons

and people of another status. As regards the remedies in the "NKR", the Government referred to the Court's conclusions in *Cyprus v. Turkey* (cited above, § 98) and maintained that the remedies of an internationally unrecognised entity should be exhausted unless their inexistence or ineffectiveness could be proved. The Government further referred to the arguments and the examples of cases presented in relation to the issue of exhaustion of the domestic remedies and asserted that the applicants had failed to make use of the available remedies and had not submitted any evidence that the remedies were inexistent or ineffective.

3. The Azerbaijani Government, third-party intervener

212. The Azerbaijani Government essentially agreed with the arguments submitted by the applicants. In addition, referring to *Doğan and Others* (cited above, § 106), they submitted that Armenia had not only failed to provide an effective remedy but had also failed to conduct an investigation to determine who was responsible for the refusal of access to property and homes.

B. The Court's assessment

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

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

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

VIII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

216. The applicants claimed that, in relation to the complaints set out above, they had been subjected to discrimination by the Government by

virtue of ethnic and religious affiliation. They relied on Article 14, which provides as follows:

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

A. The parties' submissions

1. The applicants

217. The applicants submitted that, if they had been ethnically Armenian and Christian rather than Azerbaijani Kurds and Muslim, they would not have been forcibly displaced from their homes by the Armenian-backed forces. They referred to the report by Mr David Atkinson and the Resolution of the Parliamentary Assembly, according to which "the military action, and the widespread ethnic hostilities which preceded it, led to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing" (see paragraph 64 above). Alternatively, the applicants submitted that they had been subjected to indirect discrimination by Armenia, since the actions taken by the Armenian military and the Armenian-backed Karabakh forces had disproportionately affected Azerbaijani Kurds, who were individuals belonging to an identifiable group.

2. The Government

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

3. The Azerbaijani Government, third-party intervener

219. The Azerbaijani Government contended that the military actions in the "NKR" and the surrounding districts had had the aim of creating a mono-ethnic area. They further submitted that the applicants and other

Azerbaijani internally displaced persons were still prevented from returning to their homes and possessions, while Armenians were being offered various incentives (including free housing, money, livestock and tax benefits) to settle in the territory, especially in Lachin. The third-party intervener also stated that the Azerbaijani Kurds are different from the Kurds living in Armenia in that the former are Muslims whereas the latter practise the Yazidi religion.

B. The Court's assessment

220. The Court's findings of violations of Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention in the present case relate to a general situation which involves the flight of practically all Azerbaijani citizens, presumably most of them Muslims, from Nagorno-Karabakh and the surrounding territories, and their inability to return to these territories. The applicants' complaint under Article 14 of the Convention is thus intrinsically linked to the other complaints. Consequently, in view of the violations found under the other provisions, the Court considers that no separate issue arises under Article 14 (see, for instance, *Cyprus v. Turkey*, cited above, § 199; *Xenides-Arestis v. Turkey*, no. 46347/99, § 36, 22 December 2005; and *Catan and Others*, cited above, § 160).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

221. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

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

223. The Government opposed all the applicants' claims.

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

FOR THESE REASONS, THE COURT

1. *Dismisses*, by fourteen votes to three, the Government's preliminary objection of non-exhaustion of domestic remedies;
2. *Dismisses*, by fifteen votes to two, the Government's preliminary objection concerning the applicants' victim status;
3. *Holds*, by fourteen votes to three, that the matters complained of are within the jurisdiction of Armenia and *dismisses* the Government's preliminary objection concerning jurisdiction;
4. *Holds*, by fifteen votes to two, that there has been a continuing violation of Article 1 of Protocol No. 1;
5. *Holds*, by fifteen votes to two, that there has been a continuing violation of Article 8 of the Convention;
6. *Holds*, by fourteen votes to three, that there has been a continuing violation of Article 13 of the Convention;
7. *Holds*, by sixteen votes to one, that no separate issue arises under Article 14 of the Convention;
8. *Holds*, by fifteen votes to two, that the question of the application of Article 41 is not ready for decision;
   accordingly,
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicants to submit, within twelve months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Grand Chamber the power to fix the same if need be.

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

Michael O'Boyle
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Motoc;
(b) partly concurring, partly dissenting opinion of Judge Ziemele;

(c) partly dissenting opinion of Judge Hajiyev;
(d) dissenting opinion of Judge Gyulumyan;
(e) dissenting opinion of Judge Pinto de Albuquerque.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE MOTOC

(Translation)

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

This judgment carries special weight on account of the context, the Nagorno-Karabakh conflict, and also raises the question as to whether it is a timely judgment. The legal, historical and political aspects of the Nagorno-Karabakh conflict are extremely complex.

> "What is the cause of historical events? Power. What is power? Power is the sum total of wills transferred to one person. On what condition are the wills of the masses transferred to one person? On condition that the person expresses the will of the whole people. That is, power is power. That is, power is a word the meaning of which we do not understand." (Leo Tolstoy, *War and Peace*)

How can we expect the Court to give a complete answer? Accordingly, the Court's judgments concerning the Nagorno-Karabakh conflict are going to be yet another example of the Court's empirical approach. "I am sitting with a philosopher in the garden; he says again and again 'I know that that's a tree', pointing to a tree that is near us. Someone else arrives and hears this, and I tell him: 'This fellow isn't insane. We are only doing philosophy'" – these are the words of the outstanding empiricist author, Ludwig Wittgenstein. The limits of the empiricist approach of the Court are really visible in the second judgment of the Court regarding the Nagorno-Karabakh conflict, *Sargsyan v. Azerbaijan* ([GC], no. 40167/06, ECHR 2015).

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

1. The question of proofs

In my view, there was no need for a fact-finding mission in this case. The paragraph of the judgment is quoting extensively the proofs, similar to the proofs required by the International Court of Justice (ICJ). The Court has made extensive references to the standards of proof used in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)* (Merits) Judgment, *ICJ Reports* 1986.

2. The question of jurisdiction

In the present case, in order to establish the exercise by Armenia of extraterritorial jurisdiction, the Court uses the concept of "effective control" and considers (see paragraph 186 of the present judgment) that the central element of the exercise of this jurisdiction lies in the fact that Armenia and Nagorno-Karabakh are "highly integrated":

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

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

Before proceeding to an analysis of the application by the Court of these different legal concepts, in particular that of "effective control", it is necessary to determine which concepts are applicable in the instant case. It is true that, as they are *lex specialis*, the various branches of international law have provided different legal answers to the question of interpretation of the concept of effective control. The Court itself had to clarify this matter in *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 and 2 others, ECHR 2012), paragraph 115 of which is cited in the present judgment. In order to outline the elements on the basis of which the Court's case-law could be made more systematic and consistent in the area of jurisdiction, these various answers need to be examined.

(a) General international law

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

Article 4
Conduct of organs of a State

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

Article 5
Conduct of persons or entities exercising elements of governmental authority

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

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

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

Article 7
Excess of authority or contravention of instructions

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

Article 8
Conduct directed or controlled by a State

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

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

The ICJ has established two criteria for determining the existence of extraterritorial jurisdiction. One of them is the "effective control" test.

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

entity. That partial dependence gives rise to the possibility for the external power to control the entity.

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

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

In *Nicaragua v. the United States of America*, the ICJ established three elements that had to be made out in order to establish strict control:

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

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

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

The secessionist entity must be "completely dependent on aid" from the external power for strict control to arise as a result of that complete dependence. Complete dependence means that the secessionist entity has "no real autonomy" and is "merely an instrument" or an "agent" of the

external power, which acts through it. Use of the same currency or the fact that a substantial portion of the population of the secessionist entity has had, has claimed, or can claim, nationality or citizenship of the external power, are not in themselves a sufficient basis on which to conclude that the secessionist entity is an "agent" of the external power. The same is true of the payment of salaries, pensions and other advantages that the leaders of the secessionist entity may receive. In general, neither close political, military, economic, ethnic or cultural relations between the external power and the secessionist entity nor the provision of logistic support in the form of weapons, training or financial assistance will enable the existence of a relationship of complete dependence to be established without other evidence, even where the secessionist entity and the support it receives from outside, be this largely military, are complementary or pursue the same political objectives.

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

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

(b) The European Convention on Human Rights

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

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

(c) Application of the principles

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

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

Agreement, convincingly shows that the armed forces of Armenia and the 'NKR' are highly integrated" (see paragraph 180 of the present judgment).

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

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

It is true that in the present case the Court did not examine the question of the attribution of the acts on account of which the applicants have been deprived of their possessions. However, the situation under general international law is not the same as in the earlier cases. Here, the Court has already established the existence of a high degree of integration between the two entities. A State may perhaps have been able to prove the involvement of the Armenian armed forces in the acts of the authorities of the "NKR", but for an individual wishing to assert their fundamental rights that would have been very difficult, if not impossible. That is why this *lex specialis* was introduced. The Court's logic is much easier to discern in the present case than in the earlier cases: even if it does not examine the question of attribution and does not seek to establish the actual participation of the Armenian forces in the acts that resulted in the applicants being deprived of their possessions, the exercise of jurisdiction by the defendant State has been convincingly established here.

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

3. The question of secession

The Armenian Government has invoked the fact that the "NKR" is a State. The Court is not in a position to decide on issues of the creation of a State and on secession in this case, or on self-determination. Judge Wildhaber expressed a similar view in his concurring opinion in *Loizidou* (cited above). Any statement of the Court in this respect will be pure speculation since

the Court has no arguments before it to judge the question of secession, whether remedial or not. The Court is not in a position to judge outside the framework of arguments and proofs brought before it and to develop theories of self-determination.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

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

2. The most complex issues in the case are yet again those of jurisdiction and attribution of responsibility. In *Jaloud v. the Netherlands* ([GC], no. 47708/08, ECHR 2014), with reference to *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 and 2 others, ECHR 2012), the Court attempted to further clarify the point that these concepts are not identical. They may overlap, but they may also be distinct. In paragraph 154 of that judgment the Court reiterated that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law (see *Catan and Others*, cited above, § 115)". In other words, the Court cannot assume that jurisdiction automatically leads to the responsibility of the State concerned for the alleged violations of their Convention obligations. At the same time, the absence of territorial jurisdiction does not mean that the State will never bear responsibility for those acts that it has generated, at least under general international law. The Court's case-law has been criticised for creating uncertainty or even confusion between those two concepts. The Court's argument has been that within the scope of Article 1 of the Convention it cannot proceed otherwise, since, according to the ordinary

meaning of Article 1, the precondition for its assessment of responsibility is the establishment of jurisdiction of the respondent State. Within this logic jurisdiction is a threshold criterion, as the Court has always emphasised.

3. The need to establish Armenia's jurisdiction over the district of Lachin so as to be able to assess whether Armenia has any obligations stemming from the Convention in relation to the applicants' properties is exactly the issue which makes this an impossible case. As stated above, while I think Armenia has important obligations, I have great difficulty in following the Court's reasoning in paragraphs 169 to 187 of the present judgment and therefore voted against establishing the jurisdiction of Armenia in the manner proposed in these paragraphs. Similarly, I cannot follow the inclusion in the section on Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October) and Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949). There is no further reference to these international texts in the Court's assessment. The proposed legal weight of the reference to the documents regulating belligerent occupation is not at all clear.

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

5. Unlike the particularly scrupulous establishment of the facts normally carried out by the International Court of Justice (ICJ) in cases concerning disputes over territories, jurisdiction and attribution of responsibility, the Court appears to be watering down certain evidentiary standards in highly controversial situations. Furthermore, even if Armenia does have jurisdiction over Nagorno-Karabkh it is necessary, in order to find violations of the Convention, to attribute those alleged violations to Armenia, so one needs to have evidence that Armenia prevents the applicants from accessing their property in Lachin. The Court may not need to do so if it adopts a different interpretation of jurisdiction and responsibility for the purposes of the Convention, even though it has always reiterated that it refers to the definition of jurisdiction traditionally employed in international law. As far as international law is concerned, the establishment of the fact of jurisdiction does not mean that Armenia (a) had specific obligations under the Convention and (b) committed an internationally wrongful act. In both respects a careful examination is needed.

6. The following passage from the Court's case-law does indeed indicate that it has developed its own interpretation of "jurisdiction and responsibility" for the purposes of compliance with Convention obligations. The Court has stated:

> "Where the fact of such domination over the territory [effective control] is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions" (see paragraph 168 of the present judgment, citing *Catan and Others*, § 106).

This approach contrasts with the methodology employed by the ICJ, which uses the standard of "complete dependence". Moreover, that is the standard for State responsibility irrespective of the issue of jurisdiction.

7. The ICJ reiterated its approach to the issue of the attribution of responsibility as concerns subordinate local administrations or similar groups in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007. It stated as follows.

> "391. The first issue raised ... is whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) (*Merits*, *Judgment*, *I.C.J.*

Reports 1986, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

> 'determine ... whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government' (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that 'there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf' (para. 109), and went on to conclude that 'the evidence available to the Court ... is insufficient to demonstrate [*the contras*'] complete dependence on United States aid', so that the Court was 'unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States' (pp. 62-63, para. 110)."

The ICJ summed up as follows.

> "392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.
>
> 393. However, *so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them*, a relationship which the Court's Judgment quoted above expressly described as 'complete dependence'" (emphasis added).

8. The ICJ's required standard of proof is high and it has, through several cases, developed a detailed methodology regarding different elements of evidence submitted by the parties. For example, in our case the applicants submitted to the Court statements allegedly made by high-ranking Armenian politicians. The Court has chosen to refer to *Nicaragua v. the United States of America* (cited above) in order to explain its decision to admit in evidence these statements, which, according to the Court's interpretation, show the high level of integration between the armed forces of Armenia and the NKR entity (see paragraphs 178-79 of the present judgment). The Court refers to paragraph 64 in *Nicaragua v. the United States of America*, which indeed explains that "the Court takes the view that statements of this kind,

emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value". At the same time, in paragraph 65 of that same judgment – to which the Court does not make reference – the ICJ explains the limits of such a method. It states:

> "However, it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the officia1 statement in question appeared in the language used by the author or on the basis of a translation (cf. *I.C.J. Reports* 1980, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably sometimes had to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact."

According to the facts of the present case, the applicants referred to statements by Armenian leaders and an interview which was published in the newspaper (see paragraphs 62 and 68 of the present judgment). In accordance with the principles stated by the ICJ in *Nicaragua v. the United States of America*, in such circumstances the principle of equality between the parties is of paramount importance as is a proper assessment of the source of such statements. The procedure followed by the Court concerning these pieces of information remains unclear and does not appear to have complied with the principles of fairness and caution.

9. As for the Agreement on Military Cooperation between the Governments of the Republic of Armenia and the "Republic of Nagorno-Karabakh" (see paragraphs 74 and 175 of the present judgment), there are many such agreements between two or more States. One would hope that they do not automatically result in the loss of jurisdiction or the acquisition of control over new territories for the purposes of international responsibility and do not in themselves represent a threat to the neighbouring countries. The letter, legal character and practical consequences of the agreement have to be examined carefully. It may well be that in terms of international law such an agreement between a State and a non-recognised entity does not have any legal value. It may also be that the international community, wishing to end the conflict in the region, does not appreciate such a document and condemns it. However, the manner in which the Court invokes the above-mentioned Agreement coupled with the assertion

that Armenia "has been significantly involved in the Nagorno-Karabakh conflict from an early date" (see paragraph 180 of the present judgment) makes one wonder what the scope of the case is. Is it really a case about the lack of access to property following the ratification of the Convention by Armenia or is it a case about the war in 1992 in Azerbaijan and its consequences (see paragraphs 18-20)?

10. There is no question but that the Court has many choices. It may or may not choose to pronounce on broader questions of international law, such as the war and its consequences. With this case it has chosen to make certain pronouncements. It has done so in earlier cases too, but such a choice is still unusual for the Court. I do not have a problem with an international court, such as the European Court of Human Rights, taking cognisance of the broader picture. On the contrary. However, in that case the Court has to be consistent and do so in all relevant cases. There have been cases in which the Court has, on the contrary, openly refused to take into consideration arguments deriving from international law. This point does not, however, answer the more difficult question as to whether the Court should apply a different standard of attribution of responsibility than the one in international law and whether more or less the same standard should determine jurisdiction. I have serious reservations in that regard.

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

12. However, in my view, it is essential that in this category of cases, as in other cases, a proper attribution of responsibility test be carried out after the Court has identified the nature of the Convention obligation at stake. The Court has already done this, for example in cases that have arisen following the dissolution of the Socialist Federal Republic of Yugoslavia and in particular in the so-called "bank savings" cases. The Court examined the question of attribution of responsibility with regard to the specific context of State succession (see *Kovačić and Others v. Slovenia* [GC], nos. 44574/98 and 2 others, 3 October 2008, and JudgeRess's concurring opinion therein). In the case at hand, the conclusion is that "the denial of access to the applicants' homes constitutes an unjustified interference with their right to respect for their private and family lives as well as their homes" (see paragraph 207 of the present judgment). It is not previously explained by what means Armenia has denied them access to their homes,

unless one considers that by the very fact that Armenia has, in the Court's view, jurisdiction over Nagorno-Karabakh it denies access to homes. It is with this in mind that I voted against finding a violation of Article 13 since in my view the Court did not have sufficient information regarding whether property claims were indeed not examined by local courts. As I have explained above, this approach fails to address the real issue in the case. To my mind, the question is whether, given that Armenia can influence the local Armenian government in Nagorno-Karabakh and that it is one of the parties to negotiations, it bears responsibility for not having taken positive steps for many years which would have permitted the return of displaced persons or compensation. I cannot qualify that as a denial of property rights. It is an issue of positive obligations having regard to the more general context of international law. For all these reasons I did not find that Armenia has jurisdiction over Nagorno-Karabakh in the manner indicated in the judgment but I did find that Armenia has failed to comply with its positive obligations under Article 1 of Protocol No. 1 and Article 8 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE HAJIYEV

The obvious fact of occupation of Nagorno-Karabakh and the surrounding region, constituting almost one fifth of the territory of Azerbaijan, by the Armenian Republic, has been politically recognised by four Resolutions of the United Nations Security Council, by Resolutions of the UN General Assembly, by the Parliament of the European Union, the Parliamentary Assembly of the Council of Europe and decisions of other international organisations. I note, with satisfaction, that with the present judgment the Court has confirmed this fact, once again, by a judicial decision. The Court has come to that conclusion on the basis of irrefutable evidence indicating that Armenia, through its military presence and provision of military equipment, has been significantly involved in the Nagorno-Karabakh conflict from an early date. The military support has been – and continues to be – decisive for the conquest of and continued control over the Azerbaijani territories. According to the Court, the evidence, not least the 1994 Agreement on Military Cooperation between the Governments of the Republic of Armenia and the "Republic of Nagorno-Karabakh", convincingly shows that the armed forces of Armenia and the "NKR" are highly integrated, that the so-called "NKR" is under the influence of Armenia and enjoys its military, financial and political support, and that Nagorno-Karabakh and all the surrounding occupied regions of Azerbaijan are under the direct control of Armenia. As rightly noted by T. Ferraro, effective control is the main characteristic of occupation as, under international humanitarian law, there cannot be occupation of a territory without effective control exercised therein by hostile foreign forces (see T. Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", *International Review of the Red Cross*, no. 885, March 2012, p. 140). The foregoing is fully consistent, in my opinion, with the requirements of Article 42 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), to which the Court refers in paragraph 96 of the present judgment:

> "[O]ccupation within the meaning of the Hague Regulations exists when a State exercises actual authority over the territory, or part of the territory, of an enemy State (see, for example, E. Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), p. 43; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2009), pp. 5-8; Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), at pp. 42-45, § 96-102; and A. Roberts, 'Transformative Military

> Occupation: Applying the Laws of War and Human Rights', *American Journal of International Law* vol. 100:580 (2006), pp. 585-86)."

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

In paragraph 174 of the present judgment, the Court rightly notes that

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

I would add that the occupation was accompanied by the forcible expulsion of almost 800,000 people, which in itself required substantial military force, military equipment and forcible retention. Accordingly, the continuing occupation requires no fewer human and material resources. Despite the frustration expressed by Armenian parents about their sons' military service in the occupied territories, which can be seen in the press (www.epress.am, news bulletin of 11 June 2014), the situation of occupation continues. As recently as November 2014, Armenia conducted military manoeuvres in the occupied territories under the symbolic name of "Unity" with the participation of 47,000 military personnel and a large quantity of military equipment (www.regnum.ru, news bulletin of 12 November 2014). The existing situation was contrary to the very essence of the Convention at the time of its ratification by Armenia and continues to be contrary to it today. The Convention declares in its Preamble that the States which sign the Convention and which are members of the Council of Europe must demonstrate a profound belief in those fundamental freedoms which are

the foundation of justice and peace in the world. This paradox has always reminded me of the words of Oscar Wilde: "I can believe in anything, provided that it is quite incredible".

The Council of Europe has reacted to the current situation in Resolution 1416 (2015) of the Parliamentary Assembly of the Council of Europe adopted on 25 January 2005, in which it was noted that

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

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

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

Thus, the applicants' loss of all control over, as well as any possibility to use, sell, bequeath, mortgage, develop or enjoy, their property; the Government's continued refusal to allow them to return to their homes in Lachin; and their failure to provide an effective or indeed any remedy to persons displaced from occupied territories are the result of discrimination and accordingly, in my opinion, are violations of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 and Articles 8 and 13 of the Convention. The Court has repeatedly indicated that Article 14 of the Convention does not prohibit all differences in treatment. According to the Court, it is necessary to develop criteria on the basis of which it can be determined whether a given difference in treatment in securing the human rights and freedoms guaranteed in the Convention is contrary to Article 14. Following the principles which can be inferred from the legal practices of the numerous democratic countries, the Court will find that the principle of equal treatment is violated where a difference of treatment has no objective and reasonable justification. A difference in treatment in securing the rights and freedoms guaranteed by the Convention must not only pursue a legitimate aim; Article 14 will also be violated if there is not

a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Rasmussen v. Denmark*, 28 November 1984, § 38, Series A no. 87, and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 177, Series A no. 102).

The above-mentioned legal approach of the Court, when applied to the circumstances of the present case, demonstrates an obvious inequality of treatment with regard to the applicants. This difference of treatment does not pursue a legitimate aim and has no objective and reasonable justification. The applicants stress, not without reason, that they have been subjected to discrimination because the actions taken by the Armenian military forces have disproportionately affected them. I also agree that when considering the applicants' Article 14 claim, the standard of proof which the Court adopts should not be equated with the criminal standard of proof applicable in common-law domestic courts. Other human rights tribunals do not require this high standard. Judge Mularoni, in her partly dissenting opinion in *Hasan İlhan v. Turkey*, no. 22494/93, 9 November 2004, noted:

> "I consider that as long as the Court persists in requiring in the context of Article 14 complaints of discrimination on grounds of racial or national origin a 'beyond reasonable doubt' standard of proof, this will result in the removal in practice of human rights protection guaranteed by Article 14 in areas where the highest level of protection, rather than the highest level of proof, should be the priority. There could be no more effective a tool for ensuring that the protection against discrimination on grounds of racial or national origin will become illusory and inoperative than to expect victims to submit themselves to such a high standard of proof. In reality, the application of such a high standard is tantamount to rendering it impossible for applicants to prove that there was a violation of Article 14. I would add that this high standard is not required by other leading human rights tribunals."

The given principle was recognised by the Court in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, ECHR 2005-VII). Where, as in this case, on the face of it there is clear evidence of differential treatment of two different ethnic groups, it should be for the State to show that such treatment is not discriminatory. This is because they have exclusive access to the reasons behind their actions and accordingly are aware of whether the apparently differential treatment has some other innocent explanation.

The evidence suggests not only that the expulsions were discriminatory but that the respondent State has since allowed the return of non-Azerbaijanis who were displaced. This is not only clear evidence of a discriminatory policy but illustrates the ongoing nature of the violations. Moreover, in support of a finding that the treatment of the applicants was discriminatory, we can add the fact that after the ethnic cleansing of non-Armenian inhabitants of the Lachin region, a policy of populating the region with Armenians from Armenia was pursued. Thus, according to the "Report of the OSCE

Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh", the FFM conducted interviews in the Lachin district with certain Lachin residents who had Armenian passports and claimed to take part in Armenian elections.

Accordingly, the applicants, who were expelled from Lachin more than twenty years ago and have no access to their homes in Lachin, are not in a position to assert their rights guaranteed under the Convention as they were discriminated against, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No.1 and Articles 8 and 13 of the Convention.

DISSENTING OPINION OF JUDGE GYULUMYAN

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

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

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

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

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

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

2. Thus, a State providing financial and any other form of assistance to another State would not be responsible for the acts of the latter, but only for the aid and assistance provided (Article 16 of the draft Articles of the International Law Commission (United Nations) on Responsibility of States for Internationally Wrongful Acts ("the ARS"), Report of the Commission

to the General Assembly on the work of its fifty-third session, *Yearbook of the International Law Commission* (ILC), 2001, vol. 2, p. 26), unless of course it is proven that the latter State acted under the direction and control (ASR, Article 17) or under the coercion (ARS, Article 18) of the former, which is extremely hard to prove. According to the ILC, "the term 'controls' refers to cases of domination over the commission of" conduct, whereas the term "directs" does not imply "mere incitement or suggestion but rather connotes actual direction of an operative kind" (Commentaries to the ARS, *Yearbook of the International Law Commission*, 2001, vol. 2, p. 69).

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

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

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

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

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

8. According to the classic formulation of statehood under the Montevideo Convention on the Rights and Duties of States, a State

> "as a person of international law should possess ... a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states" (Article 1, 26 December 1933, vol. 165, League of Nations Treaty Series 19).

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

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

Relevance of the right to self-determination of peoples

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

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

13. In this respect, the interpretation by the International Court of Justice (ICJ) of the Security Council's approach to certain declarations of independence, expressed in its Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ("*Kosovo Advisory Opinion*", *ICJ Reports* 2010, § 81), is of central relevance. In that opinion the ICJ indicated as follows.

> "Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security

Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council."

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

15. No such determination of illegality of conduct or call to the international community to refrain from recognition of the NKR was made in UN Security Council Resolutions 822, 853, 874 and 884 (1993), concerning the NKR conflict. Thus, the Security Council has left open the possibility for the NKR to become a full and legitimate member of the international community and to exercise its right to self-determination.

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

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

18. The concept of "remedial secession" denotes the possibility for certain cohesive groups of people to secede from a State in cases of gross human rights violations and repression by the latter or of incapability of materialising their right to self-determination internally (C. Tomuschat, "Secession and Self-

Determination", in *Secession: International Law Perspectives* (M. G. Kohen ed., Cambridge, Cambridge University Press 2006), p. 23-45; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995, p. 120).

19. The concept is based on an *a contrario* reading of the "safeguard clause" of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV), 24 October 1970) ("the Friendly Relations Declaration"), which was described by the ICJ as being reflective of customary international law (*Kosovo Advisory Opinion*, cited above, § 80) and is widely accepted by prominent scholars to constitute an authoritative interpretation of the UN Charter (G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law*, Aalphen an den Rijn, Sijthoff & Noordhoff, 1979, pp. 73-88, and I. Brownlie, *Principles of Public International Law*, 7th ed., New York, Oxford University Press, 2008, p. 581).

20. The Declaration states as follows:

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

21. The same "safeguard clause" is also used in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/23, § 2). The "safeguard clause" suggests that in situations where States do not adhere to the conduct described in the second part of the clause, they do not merit protection of their territorial integrity (D. Murswiek, "The Issue of a Right of Secession – Reconsidered", in *Modern Law of Self-Determination* (C. Tomuschat ed., Dodrecht, Martinus Nijhoff Publishers, 1993, pp. 21-39).

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

23. That right was implied in *Kevin Mgwanga Gunme et al v. Cameroon* (Communication No. 266/03 (2009), § 199) and in *Katangese Peoples' Congress v. Zaire* (Communication No. 75/92 (1995)) of the African Commission on Human and Peoples' Rights, which indicated that the

obligation to "exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire" exists absent "concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question" (*Katangese Peoples' Congress v. Zaire*, cited above, § 6).

24. The same approach was also reflected in the concurring opinion of Judges Wildhaber and Ryssdal in *Loizidou v. Turkey* ((merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI) and in *Reference re Secession of Quebec* of the Supreme Court of Canada, which proposed that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession" ([1998] 2 SCR 217, § 134).

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

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

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

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

29. The continuing policies of ethnic discrimination by Azerbaijan have also been recognised by the Committee on the Elimination of Racial

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

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

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

Exhaustion of Domestic Remedies

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

33. It is noteworthy that in *Demopoulos and Others v. Turkey* ((dec.) [GC], nos. 46113/99 and 7 others, ECHR 2010), the Court acknowledged the fact that even *de facto* entities may have effective remedies, and that it was the particularities of the remedies at hand that made them ineffective. Thus, the Court found that there was no direct, or automatic, correlation between the issue of recognition of the self-proclaimed State and its purported assumption of sovereignty over northern Cyprus on an international plane and the application of Article 35 § 1 of the Convention (ibid., § 100).

On the basis of the Court's findings in *Demopoulos and Others*, it has to be noted that the fact that the sovereign status of Nagorno-Karabakh is not recognised by any State does not exempt the applicants from the duty to exhaust domestic remedies within the NKR.

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

35. Borders, whether *de facto* or *de jure*, are not an obstacle to the exhaustion of domestic remedies. Thus, in *Pad and Others v. Turkey* ((dec.), no. 60167/00, § 69, 28 June 2007) concerning Iranian villagers shot in the border area by Turkish security forces, the Court upheld the Government's objection on grounds of non-exhaustion of domestic remedies and noted that, given the applicants' ability to instruct a lawyer in the United Kingdom, they could not claim that the judicial mechanism in Turkey – a foreign country – was physically and financially inaccessible to them. The fact that the applicants in the present case have successfully instructed English lawyers to act on their behalf shows that their abilities were not limited.

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

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

As can be seen from paragraphs 113 to 114 of the present judgment, the Government discharged their burden of proving that there was an effective remedy available to the applicants, but the President of the Court decided that the additional documentary material, including two judgments acknowledging the ownership rights of two displaced plaintiffs of Azeri ethnicity and delivered by the First Instance Court of the NKR, should not be included in the case file.

38. Absent any explicit provisions relating to the admissibility of evidence in the Convention, the Court, as a rule, takes a flexible approach, allowing itself an absolute discretion when it comes to the admissibility and evaluation of evidence. There are no procedural barriers to the admissibility of evidence, as the Grand Chamber of the Court reiterated in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). In some cases the Court has accepted new evidence even after the deliberations on the merits before the delivery of a judgment (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014, and *W.A. v. France* (dec.), no. 34420/07, 21 January 2014).

39. By a letter dated 7 June 2013, the Deputy Grand Chamber Registrar informed the Government Agent of the respondent State that the President of the Grand Chamber had decided to obtain the parties' oral submissions. Moreover, the "Notes for the guidance of persons appearing at hearings before the Court" enclosed with the above-mentioned letter enabled the parties to rely on "any additional documentary material" with the only condition being that it "should be submitted at least three weeks before the hearing *or be incorporated verbatim in their oral submissions*"(emphasis added). Following the Registrar's instruction on the possibilities of submitting evidence, the Government relied, in their oral submissions, on two judgments (incorporated verbatim) delivered by the NKR courts in favor of two Azeris.

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

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

Establishment of the facts

42. In the vast majority of cases the Court has been able to establish the facts from the documentary evidence before it. In view of the Convention

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

43. Moreover, the fact of the existence of Armenian armed forces on the territory of the NKR cannot be substantiated by the Court on the basis of the hearsay evidence referred to by the applicants' representatives and by dubious expert opinions. Fact-finding was therefore a precondition for, and an integral part of, any binding legal determination regarding the existence or non-existence of Armenian military control over the NKR. The only way for the Court to establish the facts of the case was therefore either to carry out a fact-finding mission, as in *Loizidou* (cited above) and *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, ECHR 2004-VII) or hear evidence from witnesses and conduct an investigation, as in *Georgia v. Russia (I)* ([GC], no. 13255/07, ECHR 2014). Article 19 of the Convention obliges the Court "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties", which requires the comprehensive scrutiny of each application's admissibility and merits. Where the facts cannot be established on the basis of the parties' written submissions, the right of the Court to initiate a fact-finding mission turns into a legal obligation to do so in order to be in line with its obligations under the Convention.

44. A fact-finding mission was necessary not only for a decision regarding the admissibility of the case, but also for the consideration of the merits. The Court cannot come to any reasonable decision as to the size of the houses and the land allegedly owned by the applicants purely on the basis of the contradictory documents submitted by them. In particular, concerning Mr Chiragov's alleged property, his representatives submitted that he used to have a house with a surface area of 250 sq. m. However, in the document submitted to prove the fact of his ownership of the house it

is stated that his house had a surface area of 260 sq. m. On the other hand, in the technical passport relating to the house it is stated that the house had a surface area of 408 sq. m. The Court referred in this regard to Article 15 § 7 of the UN 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, see paragraph 136 of the present judgment), which is not relevant because it concerns the non-existence of documentary evidence, whereas here we have conflicting documents concerning the same subject.

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

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

Jurisdiction and Attribution

47. Central to the present case is the question whether the applicants are to be regarded as being within the jurisdiction of Armenia for the purposes of Article 1 of the Convention. In my opinion, the previous jurisprudence of the Court on the issue of extraterritorial jurisdiction was in line with the generally accepted standards of responsibility of States for internationally wrongful acts as they have been codified by the ILC or applied and interpreted by the ICJ. The opinion expressed by the Court in the current case, however, is a new and – in my opinion – regrettable tendency.

48. The fundamental issue here lies in the method according to which the Court deems Armenia's jurisdiction to be established. As the Court states in paragraph 169 of the present judgment, it is not referring to the

agency exception, but to the "effective control over territory" exception. The Court indicates:

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

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

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

Thus, according to the majority, this case – like *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 and 2 others, ECHR 2012) – is a situation where the extraterritorial exercise of jurisdiction is based on the "effective control of an area" exception. How it is different, however, from other previous cases examined by the Court is that this control is allegedly exercised through "a subordinate local administration" (as I will indicate below, in the Cyprus cases such control was established on the basis of the direct involvement of the military forces of Turkey and not through "a subordinate local administration").

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

In *Catan and Others* (cited above), the Court claimed that it did not deal with attribution at all, indicating that "the test for establishing the existence of 'jurisdiction' under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law" (ibid., § 115, and *Jaloud v. the Netherlands* ([GC], no. 47708/08, § 154, ECHR 2014)). This, in my opinion, is a fatal oversimplification and the primary reason why the Court has come to the conclusion that Armenia is responsible for the events that have occurred in the territory of Lachin.

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

Jurisdiction cannot be established without attribution of conduct

52. In my opinion, the very concept of a "subordinate local administration" implies that the rules of attribution are necessarily involved (see, for example, A. Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, vol. 18, no. 4, (2007), p. 658, footnote 17).

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

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

These rules of attribution are – of course – to be found in the ARS, which have been favoured by General Assembly Resolution 56/83, 28 January 2002, A/56/589) and have been widely accepted as reflecting customary law on the matter. In particular, the ARS have also been referred to by the Court in a number of cases (see, *inter alia*, *Blečić v. Croatia* [GC], no. 59532/00, § 48, ECHR 2006-III, and *Ilaşcu and Others* (cited above), §§ 319-21).

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

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

57. Thus, it would not be redundant to emphasise once again that the concept of "effective overall control" used by the Court in the Cyprus cases is a jurisdictional test and qualifies the level of control exerted by the State over territories outside its recognised borders, whereas the notions of "effective control" or "overall control" are attribution tests and refer to the State's

control over individuals, groups or entities (see, for example, M. Milanović, "State Responsibility for Genocide", *European Journal of International Law*, vol. 17, no. 3 (2006), p. 586).

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

It would be relevant to state here once again that, despite the special character of the European Convention on Human Rights as a human rights treaty (see, *inter alia*, *McElhinney v. Ireland* [GC], no. 31253/96, § 36, 21 November 2001), the Court has indicated on a number of occasions that "the principles underlying the Convention cannot be interpreted and applied in a vacuum" and that the Court "must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, *determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part* ..." (see *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, § 122, 2 May 2007, emphasis added, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 57, ECHR 2001-XII).

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

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

60. As indicated above, the Court's previous case-law on the issue of extraterritorial jurisdiction was, in my opinion, in line with the generally accepted standards of responsibility of States for internationally wrongful acts as they have been codified by the ILC or applied and interpreted by the ICJ. Therefore, no support can be found for the Court's current position in that jurisprudence.

Starting with the Cyprus cases, despite the fact that the Court has indicated on a number of occasions that a State's effective overall control over a territory can be established through a subordinate local administration, until quite recently the Court had not had a clear-cut case where control could be established through such administration alone, and the Cyprus cases are not an exception. Indeed, in all cases examined by the Court, except for *Catan and Others* (cited above), the Contracting State was directly

involved either on account of its significant military presence (see *Loizidou*, cited above, § 56, and *Cyprus v. Turkey* [GC], no. 25781/94, § 77, ECHR 2001-IV) or through its direct involvement in the violations in issue (which is already a case of the "State agent authority" exception).

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

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

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

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

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

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

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

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

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

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

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

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

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

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

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

69. If Russia's support to the Transdniestrian authorities had in itself sufficed to qualify the latter as a "subordinate local administration" through which Russia exercised effective overall control over the territory, there would have been absolutely no need to establish the direct involvement of

the Russian forces in the arrest and subsequent treatment of the applicants in that case, since, as the Court has explained, the effective overall control over a territory engages the State's responsibility for all events occurring on that territory irrespective of the State's direct involvement, given that the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (see *Ilaşcu and Others*, cited above, § 316, and *Cyprus v. Turkey*, cited above, § 77).

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

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

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

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

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

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

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

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

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

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

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

77. The above wording used in *Soering* (cited above) clearly and manifestly shows that the mere fact that the responsibility of a State is engaged through certain acts has nothing to do with attribution. The contrary argument would bring us to the preposterous conclusion that the potential acts of the authorities of the United States of America were attributable to the United Kingdom. Thus, in *Soering*, too, we were in fact dealing with the responsibility for aiding and assisting.

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

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

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

81. However, at the time *Catan and Others* (cited above) was being deliberated, the Court had already examined *Ilaşcu and Others* (cited above). Thus, the findings of the Court can to a certain extent be explained by the

inclination of the Court to apply the same standards for the protection of all human rights in the same geopolitical situation.

The standard of attribution to be applied

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

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

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

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

86. The general rule is described under the ARS, namely in Article 8 ("Conduct directed or controlled by a State"), which provides as follows:

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

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

88. According to the ICJ's reasoning in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)* (Merits) *Judgment*, *ICJ Reports* 1986, § 115 (emphasis added),

> "[participation of a State], even if preponderant or decisive, in the financing, organizing, training, supplying and equipping [the non-state-actors] ... and the planning of the whole of its operation, is still insufficient in itself, ... for the purpose of attribut[ion] ... [E]ven the general control by the ... State over a force with a high degree of dependency on it would not in themselves mean, without further evidence, that the [State] direct[s] or enforce[s] the ... acts ... *For this conduct to give rise to legal responsibility of the [State], it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*."

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

90. In its most recent case relevant to the subject matter, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, §§ 410-11, the ICJ yet again confirmed its approach, denying the attribution of acts of the Republika Srpska to Serbia and Montenegro, despite the military, financial and logistical support provided by Serbia to the former, the active exchange of military personnel between the two entities, which was far greater than any support provided by Armenia to the NKR, and despite the fact that many of the high-ranking military officials in the Republika Srpska maintained simultaneous positions in Serbia and actually retired in Serbia, and despite the fact that, unlike in the Nicaragua and Congo cases, the forces of the Republika Srpska were in fact created by Serbia (see, for example, M. Milanović, "State Responsibility for Genocide", cited above, p. 598). In paragraph 400 of *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ noted as follows:

> "It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."

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

92. The concept of "overall control" has been developed and applied by the International Criminal Tribunal for the former Yugoslavia (Judgment of the ICTY in *Prosecutor v. Duško Tadić*, ICTY-94-1-A, 15 July 1999, § 137).

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

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

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

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

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

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

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

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

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

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

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

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

104. On the other hand, however, the ICJ has drawn attention to the "differences between Security Council resolutions and treaties [which

means] that the interpretation of Security Council resolutions also require that other factors be taken into account" (*Kosovo Advisory Opinion*, cited above, § 94). Therefore, according to the ICJ,

> "[t]he interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions".

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

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

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

107. Yet another document that Resolution 822 (1993) refers to in its preamble – the report of the Secretary-General dated 14 April 1993 ("Report of the Secretary-General pursuant to the statement of the President of the Security Council in connection with the situation relating to Nagorny-Karabakh", S/25600, §§ 7-8) – clearly indicates that, while the regions of Armenia adjacent to the border were subject to shelling from the Azerbaijani side, no hostile actions in response were taken by Armenia itself.

> "7. On his first field mission, from 9 to 10 April, the acting United Nations Representative in Armenia visited the southern provinces of Ararat and Goris. In several villages near the Azeri border the mission was shown evidence of substantial destruction, resulting from mortar shelling. While visiting the village of Khndzorask a mortar shell exploded only about 20 meters away from the United Nations vehicle, which was clearly marked as such. The mission also had to leave the village of Korndzor when tank fire began, apparently from the territory of Azerbaijan.

> 8. ... on 12 April ... the United Nations Representative was able to carry out a reconnaissance, from Armenian airspace, of the border between the Republic of Armenia and the Kelbadjar district of Azerbaijan. No sign of hostilities, military movements or presence of the armed forces of the Republic of Armenia was observed."

108. A follow-up speech made by the Permanent Representative of France after the adoption of Resolution 822 (1993) further confirmed this position. It emphasised that the preamble of the Resolution reflected "a reasonable balance between acknowledging that tension exist[ed] between Armenia and Azerbaijan, and recognizing the localized nature of the fighting" (Provisional Verbatim Record of the Three Thousand Two Hundred and Fifth Meeting of the Security Council, S/PV.3205, 30 April 1993, p. 11). It was further noted that the clashes should be prevented from turning into a conflict between States – meaning Armenia and Azerbaijan (ibid.).

109. Thus, nothing in the text of Resolution 822 (1993), the documents referred to therein or statements of the States Parties made in its respect, supports directly or indirectly the claim that the NKR forces were being controlled by Armenia and that Armenia exercised control over the region through the NKR forces. Moreover, at the time of adoption of the said Resolution, Lachin was already under the control of the NKR.

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

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

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

113. Yet another document, referred to in the preamble of Resolution 853 (1993) – the Report by the Chairman of the Minsk Conference on Security and Co-operation in Europe – further confirms the distinct political approaches present in the NKR and Armenia; according to this Report, whilst the President of Armenia reconfirmed his support for the OSCE (Organization for Security and Co-operation in Europe) Minsk Group timetable during the Chairmen's visit to Yerevan, the position of the leaders in the NKR was completely different ("In Nagorny Karabakh I found a completely different attitude on the part of the local Armenian community leaders", Report by the Chairman of the Minsk Conference on Security and Co-operation in Europe on Nagorny Karabakh to the President of the Security Council of 27 July 1993, S/26184, 28 July 1993, §§ 4-5.) This is yet one more indication that Armenia and the NKR were not guided by the same political will.

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

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

116. Another argument adduced in support of the claim of control of the NKR by Armenia is the so-called "exchange of officials" argument. In this respect it must first of all, and yet again, be noted that this is a factor applied by the ICTY in the context of the "overall control" test, namely, in determining the nature of a conflict and not in order to solve issues of attribution. The classic case in this regard is the Judgment of the ICTY in *Prosecutor v. Tihomir Blaškić* (ICTY-95-14-T, 3 March 2000), which dealt with the nature of the armed conflict between Bosnia and Herzegovina and the Croatian Defence Council of the so-called "Croatian Republic of Herceg-Bosna".

117. In *Blaškić*, however, the fact that Croatian military personnel served in the Croatian Defence Council's forces was not the sole factor determining the existence of overall control. In fact, the criteria of overall control were deemed by the Trial Chamber to be satisfied on account of the existence of a number of factors – these included, *inter alia*, (i) the exchange of personnel; (ii) the direct appointment of generals by Croatia; (iii) the

fact that the personnel continued to receive wages from Croatia; (iv) the fact that they received direct orders from Croatia; and (v) their receipt of financial and logistic support (ibid., §§ 100-20).

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

119. Furthermore, in *Blaškić* the exchange of personnel was circular in nature, with Croatian officers serving in the Croatian Defence Council for some time and then returning to serve in the Republic of Croatia (ibid., § 115). In those circumstances, it was obvious that service in the Croatian Defence Council was simply part of their service in the forces of the Republic of Croatia and part of the latter's political agenda. No such situation is present, however, in the case of the relations of Armenia and the NKR, and the few examples produced by the third-party intervener are not indicative of a political agenda of transferring State officials, but rather illustrate the peculiarities of the political careers of those few individuals, no matter how influential their positions.

120. Furthermore, these transfers have only been carried out from the NKR to Armenia and not vice versa, so I fail to see how this can contribute to the determination that Armenia controlled the NKR, even if we apply and adhere to the "overall control" standards used by the ICTY.

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

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

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

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

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

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

126. In any event, such statements are also far from being a sufficient basis on which to establish that Armenia in fact controls and directs the actions of the NKR and that the NKR is a subordinate local administration installed by Armenia.

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

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

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

I. Introduction

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

2. Adding to the complexity of these legal issues, the case has an extremely intricate factual basis, which has evolved over the last twenty years. The multiple weaknesses of the evidence presented by the parties, as well as the unfortunate rejection of both the taking of testimonial evidence and an on-site investigation by the European Court of Human Rights ("the Court"), only made it more difficult, indeed impossible, to establish most of the facts alleged by the parties. For that reason alone, and regardless of the legal problems related to the contested victim status of the applicants and the even more disputed jurisdiction of the respondent State over the territory where the alleged violations of the European Convention on Human Rights ("the Convention") took place, it is my inner conviction that a finding on the merits is premature. A finding on the merits without a thorough evaluation of the core facts of the case, conveniently replaced by a sample of highly uncertain factual assumptions, runs the risk of not seeing the wood for the trees, or even worse, for some of the trees.

II. Non-exhaustion of domestic remedies

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

3. The application fails already on the basis of the non-exhaustion of domestic remedies. Several reasons can be put forward to support this

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

conclusion. Firstly, there are no constitutional or legal provisions in the "NKR" which prohibit ownership of land or other property by people of Azeri or Kurdish ethnic origin.[2] Secondly, anyone enjoying legal residence status in the territory of the "NKR", regardless of nationality, has the right to return there.[3] Thus, people of Azeri or Kurdish ethnic origin may return to their places of former residence and claim their plots of land and homes, as well as compensation for wrongful actions of the "NKR" army.[4]

4. Even accepting that the "NKR" has not been recognised by the international community, the domestic means of redress of any alleged breaches of human rights must be exhausted if they are available to the applicants in the territory of Nagorno-Karabakh or the surrounding districts, including Lachin. The so-called "Namibia exception" has been enshrined in the Court's case-law, since the cases on the Turkish invasion of Cyprus, with the practical consequence that, when confronted with violations of Article 8 of the Convention and Article 1 of Protocol No. 1, the current and former inhabitants of a territory must exhaust the local remedies even in the case of a judicial system established by an unrecognised political regime, and even where they did not choose voluntarily to place themselves under its jurisdiction.[5] The State alleged to have breached its international obligations must first be given the opportunity to redress the wrong alleged by its own means and in its own legal system.[6]

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

B. The available domestic remedies

6. As a matter of fact, the competent court of Lachin is available to entertain the applicants' complaints regarding restitution of property

2. See Article 33 of the Constitution of the "Republic of Nagorno-Karabakh".
3. See Article 25 of the Constitution of the "Republic of Nagorno-Karabakh".
4. In *Cyprus v. Turkey* [GC], no. 25781/94, § 184, ECHR 2001-IV, the Court agreed with the Commission's analysis of the relevant constitutional provisions of the "TRNC". I fail to understand why the constitutional framework of the "NKR" has not been examined in the present case as well.
5. See *Loizidou v. Turkey* (merits), 18 December 1996, § 45, *Reports of Judgments and Decisions* 1996-VI, on the basis of the Advisory Opinion of the International Court of Justice (ICJ) on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports* 1971, § 125.
6. This is a well-established rule of customary international law (see *Interhandel Case,* Judgment, 21 March 1959, *ICJ Reports* 1959, and Article 14 of the Draft Articles on Diplomatic Protection of the International Law Commission (ILC)).
7. See *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 100, ECHR 2010.

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

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

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

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

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

9. A comparison of the present case with *Cyprus v. Turkey* (cited above) is revealing. In the inter-State case between Cyprus and Turkey, the Turkish

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

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

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

Government presented a list of cases brought by Greek Cypriots in Turkish Cypriot courts, which included cases relating to trespass by other persons and unlawful cultivation of land belonging to Greek Cypriot plaintiffs in the Karpas area, and where the claims of the plaintiffs were accepted by the competent courts of the "Turkish Republic of Northern Cyprus" (the "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, namely 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.[11] The same should apply in the present case.

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

11. The majority think it wise to close their assessment of the objection as to the non-exhaustion of domestic remedies with consideration of the

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

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

"political and general context" (paragraph 119 of the present judgment). Unfortunately, the Court embarks upon an unnecessary political assessment of the conflict, based on appearances ("appear to have intensified"). This exercise is not welcome, because the political overtone of some statements of the Court may give the impression, certainly unfounded, but in any case regrettable, that the Court is a player with its own political views on the Nagorno-Karabakh conflict.

12. In conclusion, I am not persuaded that any attempt to use the available domestic remedies was destined to fail. Had the *Cyprus v. Turkey* standard been observed, the majority would have had to conclude that there were domestic remedies in this case as well, in view of the domestic legal framework and the case-law presented by the respondent State. Furthermore, a domestic court is willing to entertain the applicants' complaints, and that could have happened, at least from 2006 onwards. Even if the Parliamentary Assembly of the Council of Europe has stated that Nagorno-Karabakh is one of the "geographical 'black holes' where the Council of Europe's human rights mechanisms cannot be fully implemented"[13], the existence of doubts as to the efficacy of domestic remedies does not absolve the applicant from the obligation to at least try to use them[14]. It is regrettable that this principle is not upheld in the present case. In other words, for the majority, subsidiarity plays no role in this part of Europe.

III. Lack of victim status

A. Victim status with regard to the applicants' houses

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

Regarding the applicants' houses, the Court does not have the means to know if they existed and, if so, when, how and by whom they were destroyed. Assuming that these houses were destroyed in 1992, the related complaints would be outside the temporal scope of the Convention, since Armenia only ratified it ten years later. Anticipating this objection, the applicants invoke not only their right to property, but also their permanent emotional link to the area where they used to live. The proof of this emotional link, let alone of emotions felt over a period of more than twenty years, is a herculean task that the applicants failed to fulfil. No evidence was brought to the Court to support the assertion that the applicants had – and still have – a

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

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

permanent emotional link to an area that they left more than twenty-two years ago. In any case, this purely fictional contention serves only to replace the unfounded complaint regarding the applicants' right to their homes by a vague "right to live in a village", thereby widening the ambit of Article 8 well beyond its known borders[15].

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

14. Regarding the applicants' rights in respect of the plots of land in question, the situation is no clearer. The applicants acknowledged that they had never had a right to property under the Constitution of the Union of Soviet Socialist Republics (USSR), the Azerbaijan SSR Constitution and Article 4 (State ownership of land) of the 1970 Land Code, but only a right to use the land. They claimed that they still had this right in 2005, when they lodged their complaints, although they had left Lachin thirteen years earlier, in 1992. No sufficient evidence of such a right, either documentary or testimonial, exists in the file.

The grave discrepancies between the different versions of the applicants' complaints given at the various stages of the proceedings, and between those versions and the documentary evidence, the so-called technical passports that they themselves presented to the Court, have not been convincingly dissipated.[16] The information contained in the technical passports deviated considerably from that given in the application forms. For example, the first applicant originally claimed that he owned a house of 250 sq. m, but his "technical passport" concerns a house of 408 sq. m and a storehouse of 60 sq. m not previously mentioned. Similarly, the fourth applicant originally stated that his house had an area of 165 sq. m, whereas the house described in the "technical passport" measures 448 sq. m to which, again, a previously unmentioned storehouse, of 75 sq. m, is added. The applicants have repeatedly been requested to submit further documentation on their property and to explain the divergences between the original statements and the "technical passports". No further documentation on the property allegedly owned by the applicants has been submitted, as the applicants said they were unable to obtain further documents. As to the above-mentioned discrepancies, the applicants have stated that when they met their representative in Baku in early 2005, owing to the brevity of the meeting, they gave him only general information and it was agreed that they

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

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

would submit copies of official documents by mail at a later date. Allegedly, the original statements were made from memory, without access to the documents, and it is therefore the information contained in the "technical passports" that should be taken into account.

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

15. The majority admit the "unclear" destiny of the houses and other moveable property claimed by the applicants.[17] With regard to the land, and in order to establish the existence of "private ownership" or "personal property" in respect thereof, the majority entangle themselves in a discussion on the interpretation of the 1970 Land Code and the 1983 Housing Code of the Azerbaijan SSR, without any reference to relevant national case-law or legal opinion. This virtual exercise becomes even more complex when the majority take into account the subsequent process of privatisation of the land which occurred in May 1992. The majority's dismissal of the legal force of this process, ultimately on the basis that it emanated from a non-recognised State and is therefore not legally valid, cannot be accepted, since it simply begs the question of the legitimacy of the privatisation process, based on the assumption of the international invalidity of all legislation of the "NKR", and thus contradicting, as mentioned above, previous positions of the Court on the validity of legislation approved by non-recognised States. There is no evidence in the file to justify the assumption that the privatisation law was enacted in order to entrench an advantageous position of ethnic Armenians or to prejudice citizens of Azeri and Kurdish ethnic origin. Finally, the majority seem to be oblivious of the rights of *bona fide* secondary occupants, whose legal position is also protected by international law, and namely by Principle 17 of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).

C. Preliminary conclusion: the limits of the Pinheiro Principles

16. When judicial authorities are confronted with undocumented property restitution claims from refugees and displaced people, a certain

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

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

IV. Lack of jurisdiction

A. The time frame of the Court's assessment

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

In the circumstances of the present case, the Court had to ascertain whether, as a matter of fact, Armenia exercised effective control over "NKR" territory and the surrounding districts, at least after 18 May 1992, that is, the date of the taking of Lachin and the flight of its inhabitants, and until the date of delivery of the present judgment[19]. As in *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, the military actions in the district of Lachin at the relevant time (18 May 1992) did not constitute "the source of the dispute"; instead, they were "the source of the rights claimed" by the

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

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. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, §§ 109 and 111, ECHR 2012.

applicants, and to that extent come under the jurisdiction *ratione temporis* of this Court.[20]

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

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

I will assess the objection as to the lack of jurisdiction on the basis of the available evidence, accepted by the majority, pertaining to different military, political, administrative and financial arguments advanced by the applicants to support the contention of existing effective control by Armenia over the "NKR". For that purpose I will review one by one all the items of evidence relied upon by the majority in the judgment.

B. The assessment of evidence of a military nature

(i) The 1994 Agreement on Military Cooperation between the Governments of Armenia and the "Republic of Nagorno-Karabakh" ("the 1994 Military Agreement")

19. The majority conclude that Armenia "has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been – and continues to be – decisive for the conquest of and continued control over the territories in issue" (see paragraph 180 of the present judgment). In fact, the majority's reasoning is built on a fallacious *argumentum ad ignorantum*, which draws a conclusion which is detrimental to the respondent State from the lack of information or incomplete or insufficient sources of information and the supposed impossibility of obtaining the necessary information (see paragraph 173: "and could not be expected to"), in order to argue that the applicants' allegations have been proven and the opposite allegations of the Government have not been

20. See *Šilih* (cited above), §§ 159-63. See for my interpretation of the Court's *ratione temporis* jurisdiction, my separate opinion in *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, ECHR 2014.

21. See *Catan and Others*, cited above, § 116.

proven. This reasoning subverts the basic principle of the *onus probandi*, by releasing in practical terms the persons who have laid charges from their burden of proof and placing on the respondent party the burden of reversing those charges.

20. Worse still, the highly speculative nature of the majority's overall assessment of the military reality (see paragraph 174 of the present judgment: "it is hardly conceivable that") shows clearly that the subsequent reasoning was aimed at proving a foregone conclusion. None of the subsequent three arguments of the majority adequately supports the said overall assessment, whose accuracy must be called into question. Neither the 1994 Military Agreement between Armenia and the "Republic of Nagorno-Karabakh" (see paragraph 175), nor the various political statements made by international organisations (see paragraph 176) and by Armenian politicians (paragraph 177) may be accepted as "decisive evidence" of the military control of the "NKR" by Armenia.

21. The above-mentioned 1994 Military Agreement provides, among other things, for "mutual military exercises" and "mutual technical support", including the possibility for Armenian conscripts to do their military service in the "NKR". The letter of the Agreement is clear, referring explicitly to the "right" of conscripts from Armenia to carry out their fixed-term military service in the Nagorno-Karabakh army, as well as the right of conscripts of the "NKR" to do their military service in the Armenian army (see paragraph 4 of the Agreement). The letter of the agreement should not therefore be misinterpreted as imposing a legal obligation on Armenian conscripts to serve in the "NKR". In addition, there is no evidence of a written or unwritten policy of mandatory military service of Armenian soldiers in the "NKR".[22] The exact number of conscripts of the Armenian Republic performing their service in the "NKR" was not revealed by the Government, arguing that it was a military secret. Since the Rules of Court have no specific regime of non-disclosure of evidence to the parties, the respondent State is clearly absolved from the obligation to provide the Court with highly confidential evidence that might be sensitive for national and military security, and it may not be censured for failing to do so.[23] In any

22. Reference to isolated cases evidently does not suffice. In fact, in paragraphs 76 and 182 of the present judgment, the majority refer to three cases (*Zalyan, Sargsyan and Serobyan v. Armenia* (dec.), nos. 36894/04 and 3521/07, 11 October 2007) that have not even been finalised yet, in spite of the time that has passed since the delivery of the admissibility decision. Another fourth case is mentioned, that of Mr Armen Grigoryan, of which the Court has no direct evidence.

23. Rule 33 of the Rules of Court provides for the possibility of restricting public access to certain documents in the interests of public order or national security. It does not contain any rule on the restriction of disclosure of evidence to one party. The General Instruction for the Registry on the treatment of internal secret documents approved by the President of the Court in March 2002 does not

event, the respondent State did provide some indicative information with regard to the military presence of Armenian conscripts pursuant to Article 4 of the 1994 Agreement (see paragraph 75 of the present judgment).

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

(ii) The language of international organisations

22. The majority admit that there is no "conclusive evidence" as to the composition of the armed forces that occupied and secured control of Nagorno-Karabakh and they even refer to the dubious language used in the UN Security Council Resolutions (see paragraph 173 of the present judgment). In fact, the wording of UN Security Council Resolutions 822 (1993) of 30 April 1993[25], 853 (1993) of 29 July 1993[26], 874 (1993) of 14 October 1993[27], and 884 (1993) of 12 November 1993[28], and of General Assembly Resolution 62/243, of 14 March 2008 on the situation in the occupied territories of Azerbaijan[29], does not lend support to the applicants' contention of direct military involvement of the Armenian State in Nagorno-Karabakh, namely its occupation of Azerbaijani territory. No explicit reference is made to Armenian State army troop involvement in Azerbaijan or to the war as being an international armed conflict between Armenia and Azerbaijan, the texts referring only to "tensions between the Republic of Armenia and the Azerbaijani Republic", which "would endanger peace and security in the region".

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apply to the evidence provided by the parties either. Finally, the Practice Direction on written pleadings issued by the President of the Court in November 2003 and amended in 2008 and 2014 ("Secret documents should be filed by registered post") is manifestly insufficient.

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

25. S/RES/822 (1993).

26. S/RES/853 (1993).

27. S/RES/874 (1993).

28. S/RES/884 (1993). The expressions used are "the local Armenian forces" (Resolution 822) and "Armenians of the Nagorno Karabakh region of Azerbaijan" (Resolutions 853 and 884).

29. A/RES/62/243. The expression used is "all Armenian forces". Thus, the reference to this Resolution in paragraph 176 of the present judgment is misleading, since the General Assembly does not refer to the withdrawal of armed forces of Armenia.

Moreover, UN Security Council Resolution 884 (1993) "[c]alls upon the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with Resolutions 822 (1993), 853 (1993) and 874 (1993)". By so doing, it admits that the previous resolutions were addressed primarily to "the Armenians of the Nagorny Karabakh region" as the opposing party and not to the Armenian State, which is portrayed as a third party to the conflict between the Armenians of Nagorno-Karabakh and the State of Azerbaijan.

23. The majority also refer to the "package deal" proposal of July 1997 and the "step-by-step" approach of December 1997 of the Minsk Group of the Organization for Security and Co-operation in Europe (OSCE) (see paragraph 176 of the present judgment), but omit important details of both proposals. Firstly, the "package deal" also included the following.

> "The armed forces of Nagorny Karabakh will be withdrawn to within the 1988 borders of the Nagorny Karabakh Autonomous Oblast (NKAO; with the exceptions detailed below in Clauses VIII and IX).
>
> The armed forces of Azerbaijan will be withdrawn to positions agreed in Appendix I on the basis of the High Level Planning Group's ['HLPG'] recommendations."

Secondly, the "step-by-step" approach of December 1997 and the "common state deal" proposal of November 1998 were even more detailed, with references to the Lachin corridor and the invasion of Armenia by Azerbaijan:

> "The armed forces of Nagorny Karabakh will be withdrawn to within the 1988 boundaries of the Nagorno Karabakh Autonomous Oblast (NKAO), with the exception of the Lachin corridor ...
>
> The armed foces of Azerbaijan will be withdrawn to the lines indicated in Appendix 1 on the basis of the HLPG's recommendations, and will be withdrawn from all territories of the Republic of Armenia."

These omitted aspects clearly show that the military situation in 1997 and 1998 was much more complicated than the oversimplified picture portrayed by the majority.

(iii) The political rhetoric of Armenian statesmen

24. The rhetorical political statements made by Armenian statesmen and public officials, to which reference is made in the judgment, should be approached with the utmost prudence, and this is for two reasons: firstly, because they are evidently not statements with legal force and, secondly, because when citing these political statements, hasty generalisations and faulty deductions are a strong temptation that should be resisted. The temptation becomes even stronger when these statements are decontextualised. An

unfortunate example is the citation of the speech of Mr Serzh Sargsyan (see paragraph 178 of the present judgment). It is misleading to quote only the words "our Army" and relate this to the Nagorno-Karabakh conflict, as if those words had been used by the speaker in that connection. They were not so used, as is confirmed simply by reading the speaker's previous sentences.

The subsequent use of an *ad hominem* argument to discredit the opinion of Dr Bucur-Marcu, because of his supposed lack of independence (see paragraph 179 of the present judgment), without questioning the expert in person or giving him at least the opportunity to respond to the Court's doubts, further adds to the general picture of an ill-balanced assessment of the file's evidence.

25. Ultimately, the majority do not have the slightest idea of how many soldiers from Armenia have allegedly served, or are still serving, in the "NKR" and the surrounding districts (paragraph 180 of the present judgment: "The Court need not solve this issue"). Yet these facts are crucial. A comparison with the Court's relevant precedents could, here again, have shed some light on the matter under discussion. The present case cannot be assimilated with the Turkish invasion of Cyprus, where the Court did establish that a 30,000-strong Turkish military force had invaded and occupied Northern Cyprus[30], nor with the Transdniestrian conflict, where the Court also established that separatists were armed and supported by military units of the USSR 14th Army deployed in Transdniestria and which received direct orders from Moscow[31]. That is not the case here, where there was no evidence of Armenian units stationed in the "NKR", massive transfer to "NKR" defence forces of arms and ammunition, direct orders from Yerevan to the forces on the ground in the "NKR", or direct attacks organised by the Armenian military force in order to support the separatists.

C. The assessment of evidence of a political nature

(i) The official position of the United Nations

26. The majority argue that the "NKR" is not recognised formally by any UN member State, including Armenia (see paragraph 182 of the

30. See paragraph 16 of *Loizidou*, cited above, for a detailed establishment of the facts.

31. In *Ilaşcu and Others* (cited above, § 26) the Grand Chamber found it established "beyond reasonable doubt" that the support provided to the separatists by the troops of the 14th Army and the massive transfer to them of arms and ammunition from the 14th Army's stores put the Moldovan army in a position of inferiority that prevented it from regaining control of Transdniestria. On 1 April 1992 the Russian President officially transferred the 14th Army to Russian command, and it thereafter became the "Russian Operational Group in the Transdniestrian region of Moldova" ("the ROG"). The Court went on to describe the military activities of the ROG in support of the separatists. The same evidential criterion has been applied in *Cyprus v. Turkey*, cited above, § 113, and in *Catan and Others*, cited above, §§ 19 and 118.

present judgment).[32] Moreover, the above-mentioned UN Security Council Resolutions (822 (1993), 853 (1993), 874 (1993), and 884 (1993)), and General Assembly Resolution 62/243 of 14 March 2008, referred to Nagorno-Karabakh as a region of the Azerbaijani Republic. However, none of the Security Council Resolutions were passed under Chapter VII of the Charter of the United Nations[33] and the General Assembly Resolution was approved with a very weak majority, a considerable number of abstentions and the opposition of the countries involved in the peace negotiation process, such as the United States of America, France and Russia[34]. The two previous General Assembly Resolutions, 48/114 of 23 March 1994 on emergency international assistance to refugees and displaced persons in Azerbaijan[35], and 60/285 of 7 September 2006 on the situation in the occupied territories of Azerbaijan[36], did not even refer to Nagorno-Karabakh.

Furthermore, neither the UN Security Council nor the General Assembly identified the Armenian State as an "occupying force" or "aggressor". The primary concern of both UN organs being the "serious humanitarian emergency in the region", they called on all parties to refrain from all violations of international humanitarian law and allow unimpeded access for international humanitarian relief efforts in all areas affected by the conflict. They also reaffirmed the sovereignty and territorial integrity not only of Azerbaijan, but also of "all other States in the region", and therefore condemned the "violations of cease-fire", "hostilities", "attacks on civilians and bombardments" and urged "all States in the region" to refrain from any hostile acts and from any interference or intervention which would lead to the widening of the conflict and undermine peace and security in the region.

32. Nonetheless, it has been recognised by Transdniestria, Abkhazia and South Ossetia, which themselves have limited international recognition.

33. This does not necessarily call into question their binding force (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, cited above, § 113). The language used in these Resolutions is indicative that they are not mere recommendations or exhortations, but legally binding decisions. For the dispute over the legal force of the Security Council acts approved outside the scope of Chapter VII, see for example the comments of Hervé Cassan and Suy/Angelet, in J.-P. Cot et al., *La Charte des Nations Unies, Commentaire article par article*, I, 3rd edition, Paris, Economica, 2005, pp. 896-97 and 912-15, respectively.

34. The Resolution was voted on as follows: 39 States in favour, 7 against and 100 abstentions. The three Co-Chairs opposed the "unilateral text" of the draft Resolution, because it "threatened to undermine the peace process". The majority of the Grand Chamber did refer to this document in the "Facts" part, but omitted the result of the vote taken, and did not use the reference thereto in the "Law" part. No mention was made in the present judgment of the two previous General Assembly Resolutions taken without a vote.

35. A/RES/48/114.

36. A/RES/60/285.

(ii) The official position of the Council of Europe

27. In 1994 the Parliamentary Assembly welcomed the agreement signed on 26 July 1994 by the Ministers of Defence of Armenia and Azerbaijan and the Commander of the army of Nagorno-Karabakh. Most important of all, it urgently called on Azerbaijan and Turkey "to immediately end the blockade of their means of communication with Armenia" and called on the parties to the conflict to organise the return home of refugees on an urgent basis and to respect minority rights as advocated in its Recommendation 1201 (1993).[37]

In 1997 the Assembly stressed that the political settlement of the conflict had to be negotiated by all parties involved, drawing in particular on the following principles, based upon the 1975 Helsinki Final Act and the 1990 Charter of Paris for a New Europe: inviolability of borders; guaranteed security for all peoples in the areas concerned, particularly through multinational peacekeeping forces; extensive autonomy status for Nagorno-Karabakh to be negotiated by all the parties concerned; right of return of refugees and displaced persons and their reintegration respecting human rights.[38]

In 2002 the Assembly acknowledged and welcomed "the undeniable efforts Armenia has made to maintain regular high-level contacts with Azerbaijan and the positive influence that they have on the Armenians in Nagorno-Karabakh with a view to arriving at a suitable peaceful solution".[39]

After stating that "[c]onsiderable parts of the territory of Azerbaijan [were] still occupied by Armenian forces, and separatist forces [were] still in control of the Nagorno-Karabakh region", the Assembly reaffirmed, in 2005, that "independence and secession of a regional territory from a state [might] only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the de facto annexation of such territory to another state"[40]. The Assembly reiterated that the occupation of foreign territory by a member State constituted a grave violation of that State's obligations as a member of the Council of Europe and reaffirmed the right of displaced persons from the area of

37. PACE Resolution 1047 (1994) on the conflict in Nagorno-Karabakh, and Recommendation 1251 (1994) on the conflict in Nagorno-Karabakh.

38. PACE Resolution 1119 (1997) on conflicts in Transcaucasia.

39. PACE Resolution 1304 (2002) on the honouring of obligations and commitments by Armenia.

40. The edited reference in paragraph 176 of the present judgment to this passage of PACE Resolution 1416 (2005) on the conflict over the Nagorno-Karabkh region dealt with by the OSCE Minsk Conference is misleading, because PACE does not mention the occupation of Azerbaijani territory by the Armenian army, nor the annexation of Azerbaijani territory by the State of Armenia. One should not read into the letter of the Resolution, something which it clearly does not say.

conflict to return to their homes safely and with dignity. It also referred to UN Security Council Resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993) and urged the parties concerned to comply with them, in particular by refraining from any armed hostilities and by withdrawing military forces from any occupied territories. The Assembly observed that both Armenia and Azerbaijan had committed themselves upon their accession to the Council of Europe in January 2001 to using only peaceful means for settling the conflict, by refraining from any threat of using force against their neighbours. At the same time, Armenia committed itself to using its considerable influence over Nagorno-Karabakh to foster a solution to the conflict. The Assembly urged both governments to comply with these commitments and refrain from using armed forces against each other and from propagating military action.[41]

(iii) The official position of the European Union

28. The European Union has four principal policy tools with which it seeks to address the conflict over the Nagorno-Karabakh territory: the European Neighbourhood Policy, developed and implemented by the European Commission through Action Plans[42], the EU Strategy for the South Caucasus[43], the Negotiations of the EU-Armenia Association Agreement[44] and the EU Special Representative for the South Caucasus, who operates under a mandate of the Council of the European Union.

According to these instruments, the position of the European Union is that the occupation by one country of the Eastern Partnership of the territory of another violates the fundamental principles and objectives of the Eastern Partnership and that the resolution to the Nagorno-Karabakh conflict should comply with UN Security Council Resolutions 822, 853, 874 and 884 of 1993 and the OSCE Minsk Group Basic Principles, enshrined in the "Aquila" joint statements. The European Union condemns

41. PACE Recommendation 1690 (2005) on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference and Resolution 1416 (2005) on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference.

42. See the European Parliament Resolutions of 19 January 2006 on the European Neighbourhood Policy (ENP), of 6 July 2006 on the European Neighbourhood and Partnership Instrument (ENPI), of 15 November 2007 on strengthening the ENP, of 7 April 2011 on the review of the European Neighbourhood Policy – Eastern Dimension, and, more recently, of 23 October 2013 on the European Neighbourhood Policy: towards a strengthening of the partnership. Position of the European Parliament on the 2012 reports.

43. See the European Parliament Resolution of 20 May 2010 on the Need for an EU Strategy for the South Caucasus.

44. European Parliament Resolution of 18 April 2012 containing the European Parliament's Recommendations to the Council, the Commission and the European Union External Action Service on the negotiations of the EU-Armenia Association Agreement.

the idea of a military solution and the heavy consequences of military force already used, and calls on both parties to avoid any further breaches of the 1994 ceasefire. It also calls for the withdrawal of "Armenian forces" from all occupied territories of Azerbaijan, accompanied by the deployment of international forces to be organised in accordance with the UN Charter in order to provide the necessary security guarantees in a period of transition, which will ensure the security of the population of Nagorno-Karabakh and allow the displaced persons to return to their homes, with further conflicts caused by homelessness thus being prevented. Finally, it calls on Armenia and Azerbaijan to undertake substantive measures for confidence-building, such as general demilitarisation and withdrawal of snipers from the Line of Contact.[45]

(iv) The official position of the Organization for Security and Co-operation in Europe

29. The OSCE has committed itself to working towards reaching an agreement based, in particular, upon the principles of the Helsinki Final Act: non-use of force or threat of force, territorial integrity, and the equal rights and self-determination of peoples. This effort has been without success thus far.

In 1992 the Conference on Security and Co-operation in Europe (CSCE) created the Minsk Group, with the purpose of encouraging a peaceful, negotiated resolution to the Nagorno-Karabakh conflict. At the OSCE Lisbon Summit in 1996, the member States laid out three principles as a legal basis for the peaceful settlement process. The principles were as follows: territorial integrity of Armenia and Azerbaijan; legal status of Nagorno-Karabakh, defined in an agreement based on self-determination, which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan; and guaranteed security for Nagorno-Karabakh and its population, including mutual obligations to ensure the compliance by other parties with the provisions of the settlement.

The following year, the Minsk Group "package" on a comprehensive agreement on the resolution of the Nagorno-Karabakh conflict provided the following measures concerning the Lachin corridor.

> "A. Azerbaijan will lease the corridor to the OSCE, which will conclude a contract on the exclusive use of the corridor by the Nagorny Karabakh authorities (with exceptions envisaged for transit, explained below in Clause E).

45. Thus, the reference in paragraph 176 of the present judgment to the 2012 European Parliament Resolution is misleading, since the European Parliament did not refer to the occupation of Azerbaijani territory by the army of the State of Armenia. The call on Armenia to stop sending conscripts to serve in Nagorno-Karabakh, which is based on the 1994 Agreement referred to above, must be understood in the framework of the EU proposal of general demilitarisation of the region.

B. The OSCE will observe security conditions in conjunction with the Nagorny Karabakh authorities.

C. The boundaries of the Lachin corridor are agreed in Appendix II with due consideration of the recommendations of the HLPG.

D. The OSCE will observe the construction of roads around the town of Lachin. Upon the completion of road construction the town of Lachin will be excluded from the Lachin corridor. It will return to Azerbaijani jurisdiction (as part of the division zone) and its former inhabitants will be able to return.

E. Permanent settlement or armed forces are not allowed in the corridor, with the exception of permitted security force contingents. Representatives of official bodies, observers and OSCE peacekeeping forces have the right of transit subject to prior notification, as do Azerbaijani inhabitants of the region in transit from the Lachin district to the Gubatly district or vice versa. Territory of the Lachin district lying outside of the corridor forms part of the division zone."

The Minsk Group "common state deal" proposal of November 1998 included the following proposal concerning the Lachin corridor:

"The question of the use of the Lachin corridor by Nagorny Karabakh for unimpeded communication between Nagorny Karabakh and Armenia is the subject of a separate agreement, if other decisions on a special regime in the Lachin district are not taken proceeding from the agreement between Azerbaijan and Nagorny Karabakh. The Lachin district must remain a permanently and fully demilitarized zone."

The OSCE Minsk Group Fact-Finding Mission (FFM) on settlements in the occupied territories of Azerbaijan (Agdam, Jebrayil, Fizuli, Zangilan, Gubadly, Kelbajar and Lachin), which took place from 30 January to 5 February 2005, concluded in its "Report to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK)" that

"[t]he FFM has seen no evidence of direct involvement by the authorities of Armenia in the territories, except for the provision of electricity to parts of the Jebrail and Kubatly Districts from Kapan, Armenia".

With regard specifically to the situation in Lachin,

"[t]he FFM conducted numerous interviews over the entire Lachin District which revealed that private initiative and not government action was the driving force prompting a move to Lachin. The FFM has found no evidence that the authorities, in a planned and organized manner, actually asked or selected people to settle in Lachin town. ... There was no evidence of non-voluntary resettlement or systematic recruitment. ... the FFM found no evidence of direct involvement of the government of Armenia in Lachin settlement."[46]

The ministers of the United States of America, France and Russia presented a preliminary version of the Basic Principles for a settlement to

46. The majority refer to this evidence in the "Facts" part, but do not take it into account in the "Law" part.

Armenia and Azerbaijan in November 2007 in Madrid. The Basic Principles called for, *inter alia*: a return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation.

On 20 July 2009 the Presidents of the OSCE Minsk Group's Co-Chair countries, France, the Russian Federation and the USA made a joint statement, reaffirming their commitment to support the leaders of Armenia and Azerbaijan as they finalised the Basic Principles for the Peaceful Settlement of the Nagorno-Karabakh conflict. They also instructed their mediators to present to the Presidents of Armenia and Azerbaijan an updated version of the Madrid document of November 2007.

The second OSCE Minsk Group Co-Chairs' Field Assessment Mission to the seven occupied territories of Azerbaijan surrounding Nagorno-Karabakh, which took place in October 2010, but its report was published only in March 2011, confirmed that there had been no significant growth in the population since 2005. The settlers, for the most part ethnic Armenians who were relocated to the territories from elsewhere in Azerbaijan, live in precarious conditions, with poor infrastructure, little economic activity and limited access to public services.

(v) The external representation of the "NKR"

30. The "NKR" was represented by its own representatives in the Bishkek Protocol of 5 May 1994, as well as the ceasefire agreement based on it and signed respectively by M. Mamedov in Baku on 9 May, S. Sargsyan in Yerevan on 10 May and S. Babayan in Stepanakert on 11 May 1994.[47] Moreover, Conclusion no. 9 of the Helsinki Additional Meeting of the CSCE Council of 24 March 1992 provided: "Elected and other representatives of Nagorno-Karabakh will be invited to the Conference as interested parties by the Chairman of the Conference after consultation with the States participating at the Conference." The representatives of Nagorno-Karabakh were an official party to the peace talks until Azerbaijan refused to continue negotiations with them in 1998.

47. See also the Zheleznovodsk Communiqué of 23 September 1991, the Sochi Agreement of 19 September 1992, the military-technical protocol on the implementation of the Sochi Agreement of 25 September 1992, and the Timetable of Urgent Steps proposed by the Chairman of the CSCE Minsk Group of September 1993, in which Nagorno-Karabakh appears as a party to the conflict for the first time.

The Committee on Relations with European Non-Member Countries of the Parliamentary Assembly has organised a series of hearings since 1992 with delegations from the Armenian and Azerbaijani Parliaments, the "leadership of Nagorno-Karabakh" and the "Azeri interested party of Nagorno-Karabakh".[48]

In 2005 the Parliamentary Assembly called on the government of Azerbaijan to establish contact, without preconditions, with the "political representatives of both communities from the Nagorno-Karabakh region" regarding the future status of the region. It added that it was prepared to provide facilities for such contacts in Strasbourg, recalling that it had done so in the form of a hearing on previous occasions with Armenian participation[49].

Thus, the external representation of the interests of the "NKR" by local representatives has been acknowledged by pivotal interlocutors. If Armenian statesmen and public officials also assume such tasks, this is not unusual in terms of diplomatic practice. Nor is it unusual that foreign nationals should be appointed to high-ranking positions in other States in eastern Europe, as in the case of the first and the third Ministers for Foreign Affairs of Armenia, who were both citizens of the United States of America. Thus, such practices may not *per se* be regarded as jeopardising the independence of the State concerned.

D. The assessment of evidence of a judicial, administrative and financial nature

(i) The independence of the judiciary

31. The control by a member State of the judicial, administrative and financial organisation of a territory of another member State, with the concurrent exercise of public powers, may entail jurisdiction of the former over the latter's territory.[50] In the present case, no "conclusive evidence" was presented to the Court of such control.

Armenian law does not apply automatically in the "NKR". So long as Armenian laws are voluntarily adopted and independently applied and interpreted, there can be no inference of control. Thus, the majority's argument that "several laws of the 'NKR' have been adopted from Armenian legislation" proves nothing (see paragraph 182 of the present judgment). Based on evidence from the Chief Justice of the Supreme Court and the

48. Recommendation 1251 (1994) on the conflict in Nagorno-Karabakh.

49. Resolution 1416 (2005) on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference.

50. See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 139, ECHR 2011.

head of the Bar Association of the "NKR" and other local judges and lawyers, which the applicants did not contradict and the majority preferred to ignore, it must be concluded that the "Republic" not only has a different court system from Armenia, but also does not accept Armenian court decisions as precedents or even as authorities. The courts of the "Republic" operate entirely independently and are not staffed by Armenian judges, prosecutors or clerks.

(ii) The autonomy of the administration

32. The provision of Armenian passports to citizens of the "NKR" is regulated by an international agreement of 24 February 1999 between the Armenian State and the "NKR", which allows for that possibility only in "exceptional" cases (see paragraph 83 of the present judgment). Neither the "exceptional" issuance of Armenian passports to citizens of the "NKR", nor the current use of the Armenian dram in the latter's territory prove that the State that issued the passports or currency controls the administration or territory of the "NKR". The best evidence of the autonomous character of the Nagorno-Karabakh administration is given by the two OSCE fact-finding missions to the territories under its control, which concluded that there was no evidence of direct involvement of the Armenian State in the administration of these territories.[51]

(iii) The external financial support

33. Even less credible is the contention that the financial support afforded to the "NKR" by the Armenian State and worldwide diaspora, or by US citizens and organisations of Armenian origin or sympathetic to Armenia's situation, legitimises a legal presumption of effective control of the relevant territory by Armenia. Taken separately or together, these various financial contributions do not provide a cogent argument in view of the contemporary practice of international financial cooperation.[52]

E. Preliminary conclusion: *Al-Skeini and Others* watered down

34. In *Al-Skeini and Others* (cited above), the Court summarised the state of its case-law, regarding "the strength of the State's military presence

51. See the references above to the 2005 OSCE mission, the result of which was confirmed by the 2010 mission.

52. For example, Armenia receives funding from the ENPI through a national programme. EU bilateral assistance to Armenia amounts to 157 million euros (EUR) for 2011-13 (compared to EUR 98.4 million for 2007-10). As a result of progress in reforms, governance and democracy, Armenia benefitted from additional EU allocations (EUR 15 million in 2012 and EUR 25 million in 2013) under the Eastern Partnership Integration and Cooperation programme, in the framework of the application of the "more for more" principle of the revised European Neighbourhood Policy. Armenia also benefits from a number of thematic programmes such as the European Instrument for Democracy and Human Rights. No one would pretend that Armenia is therefore under the effective control of the European Union.

in the area" as the "primary" element for assessing whether effective control existed over an area outside the national territory.[53] Other indicators, such as the "the extent to which its military, economic and political support for the local subordinate administration provide[d] it with influence and control over the region" were "relevant", but could evidently not replace the "primary" factor. That is exactly what has happened in the present case. The Court's criteria have thus been turned upside down. In the present judgment, the majority of the Grand Chamber give up the "primary factor" of "boots on the ground" and replace it with an unclear mix of other factors, involving "military support".[54] Entangled in their contradictions, they abandon the well-established criteria used by the Court in the past with regard to the military control of a foreign territory, turning a blind eye to the real size and strength of the military force serving on foreign ground. Such methodology opens the floodgates to a slippery slope without any foreseeable limits for the extension of the concept of "effective control" of a foreign territory.

"Boots on the ground", in the sense of the physical presence of the hostile army in the occupied territory, are no longer a *sine qua non* requirement of occupation. By admitting to a long-distance remote-controlled exercise of authority by the Armenian State in Nagorno-Karabakh, the majority depart also from long-established international humanitarian customary and treaty law, which, based on Article 42 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) affirms that there is no occupation without the unconsented physical presence of the foreign army on the ground and without it substituting its own authority for that of the local government[55].

53. See *Al-Skeini and Others*, cited above, § 139.

54. Ultimately, the majority contradict themselves, since in paragraph 96 of the present judgment they consider that military occupation always involves "the presence of foreign troops which are in a position to exercise effective control without the consent of the sovereign", and in paragraph 146 they refer explicitly to Nagorno-Karabakh, the district of Lachin and the other surrounding territories as "now under occupation", while in paragraph 180 they retract from the "boots on the ground" criterion in favour of a more complacent and slippery criterion of "significant involvement" based on military support in terms of equipment and expertise. The contrast of paragraph 180 of the present judgment with paragraphs 144 and 224 of *Sargsyan* is even more astonishing. In paragraph 144 of *Sargsyan v. Azerbaijan* ([GC], no. 40167/06, ECHR 2015), the majority return to "the presence of foreign troops" as the necessary criterion to establish occupation and in paragraph 224 they maintain that Azerbaijan "lost control over part of its territory as a result of war and occupation".

55. Thus, the test of effective control in international humanitarian law depends on the cumulative requirements of unconsented presence of hostile troops on the ground and substitution of local authority (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, § 173, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, § 78; see also T. Ferraro, "Determining the beginning and end of an occupation under international humanitarian law", *International Review of the Red Cross*,

35. At this stage, the Court simply does not have before it the evidence to establish with the required certainty the facts that support the applicants' claims. The Court cannot proceed on the basis of virtual assertions and unfounded allegations, without the benefit of either a judicial fact-finding mission or the taking of testimonial evidence, or even the prior assessment of the facts by the competent courts at national level. The majority of the Grand Chamber have refused to take such steps in spite of the fact that the Court, in cases of similar relevance, had shown its willingness to undertake enquiries, for example, "directed towards ascertaining the relevant facts in order to be able to determine whether Moldova and the Russian Federation had jurisdiction, particularly over the situation in Transdniestria, relations between Transdniestria, Moldova and the Russian Federation, and the applicants' conditions of detention" (*Ilaşcu and Others*, cited above, § 12), which even included the taking of evidence by the judges of the Court from witnesses belonging to the Russian armed forces at the headquarters of the Russian Operational Group in the Transdniestrian region of Moldova. Indeed, not even the possibility of hearing witnesses at the Court has been considered, as has happened in cases of a similar nature, and most notably in *Georgia v. Russia (I)* ([GC], no. 13255/07, ECHR 2014). The Court being a European Constitutional Court, and in view of the principle of subsidiarity, the task of fact-finding and taking of evidence should remain exceptional, reserved, for example, for cases with serious pan-European repercussions.[56] This was such a case.[57]

36. In sum, the Court simply does not know, as a result of its own omission, what is going on in the "NKR" territory and the surrounding districts today, and even less what has gone on there over the last twenty-

vol. 94, no. 885, 31 March 2012, pp. 143-48; V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Paris: Éditions Pedone, 2010, pp. 35-41; and E. Benvenisti, *The International Law of Occupation*, second edition, Oxford, 2012, pp. 43-54). The possibility of an "indirect administration" through various Congolese rebel factions was considered possible by the ICJ in the first case cited above, but rejected for lack of evidence. In any event, the specific actions of the non-State actor would have to be attributable to the foreign State in the sense of Article 8 of the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts.

56. On the nature of the Court as the European Constitutional Court, see my separate opinion in the case of *Fabris v. France* [GC], no. 16574/08, ECHR 2013.

57. It is difficult to understand why the present case did not deserve the same care and attention as others with fewer repercussions, such as *Davydov and Others v. Ukraine* (nos. 17674/02 and 39081/02, 1 July 2010), *Naumenko v. Ukraine* (no. 42023/98, 10 February 2004) and *Tekin Yıldız v. Turkey* (no. 22913/04, 10 November 2005), where such evidential investigations took place. The Court did not even give reasons for rejecting the evidential steps proposed by the parties. For example, in *McKerr v. the United Kingdom* (no. 28883/95, § 117, ECHR 2001-III) the Court rejected an investigation because it considered that a fact-finding exercise would duplicate the ongoing domestic procedure. That would not have been true in the present case, where precisely the lack of domestic procedures made additional evidential enquiries indispensable.

three years since 1992. The argument could be made that this case is about getting a general impression of the situation in the "NKR", based on an aggregated sample of different elements, and that even if one or more elements of this sample are proven false the whole impression remains intact. This line of reasoning should be emphatically rejected.

37. As a matter of principle, an international court should not decide based on impressions, but on facts, established preferably by domestic courts. It is stating the obvious that an uncoordinated bunch of doubtful evidential elements do not make out a case. Truth cannot be reached on the basis of a broad brush of dubious assertions of the alleged victims coupled with contradictory witness testimonies, vague factual assumptions from outsiders and tortuous inferences from the documentary evidence. The Court's long-standing evidential criterion of "facts established beyond reasonable doubt" must not be replaced by an impressionistic overview of the evidence. Concomitantly, the Court's substantive criterion of "effective control" must not be watered down for the convenience of the case. *Chiragov and Others* will thus be remembered as an unfortunate example of a negative correlation of judicial inertia, missing evidence, lack of facts and dilution of established legal criteria.

V. The right to remedial secession in international law

A. The presumption against secession

38. It was affirmed by the respondent State that the seizure of Lachin was justified under the laws of war, since it was obviously of great military strategic importance to create a land link between Nagorno-Karabakh and Armenia in order to transport military equipment, food and other supplies into Nagorno-Karabakh. In other words, the seizure of Lachin was a necessary military defence measure in order to avoid the blockade of the Nagorno-Karabakh region by the Azerbaijani military forces. Moreover, the respondent State pleaded for the right of secession of the Armenian population in the former Soviet Nagorno-Karabakh Autonomous Oblast in view of the alleged crimes against humanity committed against them, namely the attacks on Stepanakert and other places by the Azerbaijani population and army. These issues were ignored in the majority's judgment.[58]

58. Although the majority took note of the problem of the "justification for interfering with the individual rights of residents in the area" in paragraph 197 of the present judgment, they avoided the issue by simply assuming that the "justification" for the capture of Lachin in May 1992 and the creation of a land link between Armenia and Nagorno-Karabakh had no "direct bearing" on the events that followed or on today's situation. The majority failed to explain why. They have also neglected to justify why the current situation is no longer "an emergency situation" (see paragraph 200). This position is not coherent with the stance taken in paragraphs 231 to 232 of the *Sargsyan* judgment, where the

39. No word is pronounced on the problem of "self-defence" of the Armenian population in the Nagorno-Karabakh region and the closely related problem of remedial secession in international law, which has been extensively discussed not only in the literature[59], but also by national and international courts, especially after the 2010 Advisory Opinion of the ICJ on the unilateral declaration of independence of Kosovo[60] and the 1998 case of the Canadian Supreme Court on the right to unilateral secession of the Quebec province from the Canadian Confederation[61]. The Court's silence is even less understandable in the face of recent international practice acknowledging remedial secession as a right, most notably in the 1999 Agreement between Indonesia and Portugal for the acknowledgment of the rights to self-determination and remedial secession of East Timor

same majority discussed the relevance of international humanitarian law for the purposes of justifying deprivation of the Convention right. Unlike the majority in the present case, but like the majority in *Sargsyan*, I am convinced that only the assessment of the "justification" for the 1992 events can provide a solid legal basis for the evaluation of both today's situation and the situation during the time which elapsed in between, as will be demonstrated below. A similar methodological critique, according to which "it is impossible to separate the situation of the individual from a complex historical development and a no less complex current situation", can be found in the separate opinion of Judge Bernhardt, joined by Judge Lopes Rocha, in *Loizidou* (cited above) and in the separate opinion of Judge Kovler in *Ilaşcu and Others* (cited above).

59. See, among many voices in the literature in favour of a right to remedial secession, U.O. Umozurike, *Self-determination in International Law*, Hamden, 1972, p. 199; L.C. Buchheit, *Secession: the Legitimacy of Self-Determination*, New Haven, 1978, p. 332; B. Kingsbury, "Claims by Non-State Groups in International Law", *Cornell International Law Journal*, vol. 25 (1992), p. 503; F.L. Kirgis, "Degrees of Self-Determination in the United Nations Era", *American Journal of International Law*, vol. 88 (1994), p. 306; R. McCorquordale, "Self-Determination: A Human Rights Approach", *International and Comparative Law Quarterly*, vol. 43 (1994), pp. 860-61; A. Cassese, *Self-Determination of Peoples*, Cambridge, Cambridge University Press, 1995, pp. 112-18; O.C. Okafor, "Entitlement, Process, and Legitimacy in the Emergent International Law of Secession", *International Journal on Minority and Group Rights*, vol. 9 (2002), pp. 53-54; D. Raič, *Statehood and the Law of Self-Determination*, Leiden, Martinus Nijhoff Publishers, 2002, pp. 324-32; K. Doehring, in Simma (ed.), *The Charter of the United Nations*, 2002, Article 1, Annex: Self-Determination, notes 40 and 61; M. Novak, *UN Covenant on Civil and Political Rights Commentary*, CCPR, second revised edition, Kehl, 2005, pp. 19-24; M. Suski, "Keeping the Lid on the Secession Kettle: a Review of Legal Interpretations concerning Claims of Self-Determination by Minority Populations", in *International Journal on Minority and Group Rights*, vol. 12 (2005), p. 225; C. Tomuschat, "Secession and self-determination", in Kohen (ed.), *Secession, International Law Perspectives*, Cambridge, Cambridge University Press, 2006, pp. 41-45; J. Dugard and D. Raič, "The role of recognition in the law and practice of secession", in Kohen (ed), ibid., p. 103; J. Dugard, "The Secession of States and their Recognition in the Wake of Kosovo", *Collected Courses of the Hague Academy of International Law*, Leiden, 2013, pp. 116-17; and B. Saul et al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford, Oxford University Press, 2014, pp. 25-52.

60. Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* ("*Kosovo Advisory Opinion*", *ICJ Reports* 2010, p. 403).

61. [1998] 2 SCR 217.

through a popular consultation of the East Timorese people in the form of a referendum[62].

40. International law regulates the formation of new States, including that of secessionist States. Since the formation of States, by secession or any other means, is not a matter of pure politics, recognition is not a discretionary, let alone arbitrary, decision of each State.[63] There is a principle in international law of prohibition of non-consensual secession, which is derived from the principles of territorial integrity and sovereignty, as established by Article 10 of the Covenant of the League of Nations and Article 2 § 4 of the UN Charter. The presumption against secession is even more forceful if it came about by means of the use of force, since this contradicts the customary and treaty prohibition of the use of force acknowledged by the 1928 General Treaty for Renunciation of War, Articles 10 and 11 of the 1933 Montevideo Convention on the Rights and Duties of States and Article 2 § 4 of the UN Charter. The same applies for the use of "other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)".[64] *Ex injuria jus non oritur*.

62. The *erga omnes* nature of the right to self-determination was authoritatively confirmed by the ICJ in *East Timor (Portugal v. Australia)*, Judgment, *ICJ Reports* 1995, § 29. In this particular case, while Indonesian-controlled militiamen were massacring the East Timorese, Secretary-General Kofi Annan had to threaten the Indonesian government with international prosecution for crimes against humanity in exchange for cooperation with the international community and admission of the principle of self-determination of Timor Leste (see Secretary-General's Press Conference at the UN Headquarters, 10 September 1999). This is the reason why some have viewed Indonesia's position as a "coerced consent", which would make the East Timor secession a truly non-consensual secession (see G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, Brookings Institution Press, 2008, p. 63, and A.J. Bellami, *Responsibility to Protect*, London, 2009, pp. 147-48).

63. Like Sir Hersch Lauterpacht (*Recognition in International Law*, Cambridge, Cambridge University Press, 1947, p. 1), my point of departure is that recognition is not outside the orbit of international law and it depends on an objective legal appraisal of true facts. Although fraught with political implications, this issue does not fall within the purview of pure politics.

64. The ICJ has referred to UN Security Council Resolutions condemning some declarations of independence (see Resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council Resolution 541 (1983), concerning Northern Cyprus; and Security Council Resolution 787 (1992), concerning Republika Srpska) in order to conclude that "in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). … The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council." Pointing in the same direction, see Articles 40 and 41 of the ILC's Draft articles on Responsibility of States for Internationally Wrongful Acts.

B. Non-consensual secession as an expression of self-determination

(i) The factual and legal requirements of secession

41. Like colonised populations[65], non-colonised populations have a right to self-determination, as has been acknowledged by the two 1966 international covenants (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights)[66], UN General Assembly Resolution 2625 (XXV) of 24 October 1970 containing the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[67], and UN General Assembly Resolution 48/121 of 14 February 1994[68] endorsing the Declaration and Programme of Action of the Vienna Conference adopted by the UN World Conference on Human Rights[69]; in the African context, by Article 20 of the African Charter on Human and Peoples' Rights[70]; in the American context, by the Canadian Supreme Court *Reference re Secession of Quebec* (1998)[71]; and, finally, in the European context, by the Final Act of the 1975 Conference on Security and Co-operation in Europe (the Helsinki Accords)[72] and the 1991 European Community Guidelines on the recognition of new States in Eastern Europe and the Soviet Union[73].

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65. UN General Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/RES/1514 (XV), see also A/L.323 and Add.1-6 (1960)) and, in the constant case-law of the ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, cited above, § 52; *Western Sahara*, Advisory Opinion, *1CJ Reports* 1975, §§ 54-59; *East Timor (Portugal v. Australia),* cited above, § 29; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cited above, § 88.

66. The UN Human Rights Committee has affirmed that the principle of self-determination applies to all populations and not only to colonised populations (Concluding Comments on Azerbaijan, CCPR/C/79/Add.38, § 6, and also its General Comment No. 12 on the right to self-determination, § 7, which refers to General Assembly Resolution 2625 (XXV)).

67. A/RES/25/2625 (XXV) (see also A/8082 (1970)). Although adopted without a vote, the Declaration reflects customary international law (see *Nicaragua v. the United States of America*, cited above, §§ 191-93).

68. A/RES/48/121. The Resolution was adopted without a vote.

69. A/CONF.157/24 (Part I) at 20 (1993). The Vienna Declaration was adopted by consensus by representatives of 171 States.

70. See African Commission on Human and Peoples' Rights, *Katangese People's Congress v. Zaire*, Communication No. 75/92 (1995), and *Kevin Mgwanga Gunme et al v. Cameroon*, Communication No. 266/03 (2009), with two findings of no violation of Article 20 of the African Charter.

71. Paragraph 138: "the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development."

72. Given that the States Parties to the CSCE are exclusively European, the "equal rights of peoples and their right to self-determination" cannot be ascribed evidently to colonial peoples.

73. See also Opinion No. 2 of the Badinter Arbitration Commission on Yugoslavia.

42. In the pursuit of the right to self-determination, new States may be formed, by non-consensual secession[74], if and when they fulfil the following factual and legal requirements: (1) the Montevideo criteria for statehood, namely a permanent population, a defined territory, a government and the capacity to enter into relations with other States[75]; (2) prior to secession the seceding population were not allowed fair participation in a government that represented the whole population of the parent State; and (3) the seceding population were systematically treated by the government, or a part of the population of the parent State whose action was condoned by the government, in a discriminatory manner or in a manner disrespectful of their human rights. In these restrictive terms, the right to remedial secession by non-colonised populations has continuously gained support from evolving State practice and *opinio juris*, having crystallised into a norm of customary international law[76].

(ii) The Montevideo requirements of statehood

43. The discussion of the nature of the Armenian population of Nagorno-Karabakh as a "people" is superfluous, in view of its undisputed ethnic, religious, linguistic and cultural identity and its historical bond to that territory. If Kosovar Albanians constitute a "people", as the ICJ held[77],

74. The Committee on the Elimination of Racial Discrimination, General Recommendation 21 (1996), § 6, admitted "the possibility of arrangements reached by free agreements of all parties concerned".

75. See Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.

76. In addition to the references already made above, see in particular the Declaration on Principles of International Law concerning Friendly Relations, cited above, Principle V, paragraph 7, which requires the observance of the principles of equal rights and self-determination of peoples and a "government representing the whole people belonging to the territory without distinction as to race, creed or colour". *A contrario*, this "safeguard clause" must be understood in the sense that a government which discriminates against a part of its population on the basis of race, creed or colour does not represent the whole people and may not require from them respect for its territorial integrity. Both systematic and teleological interpretations of the Declaration reinforce this conclusion, having regard to the preamble and its acknowledgment of the paramount importance of the right of self-determination. The 1993 Vienna Declaration on Human Rights, cited above, extended the right to external self-determination on the basis of violations of human rights, referring to a "Government representing the whole people belonging to the territory without distinction of any kind" (A/CONF.157.24 (1993)). General Assembly Resolution 50/6 of 24 October 1995 which approved "by acclamation" the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (A/RES/50/6), reiterated the Vienna formulation. The historical predecessor of this right to secession is the position of the Committee of Rapporteurs appointed by the League of Nations to give an opinion on the Åland Islands dispute, which concluded as follows: "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees" (Report of the Commission of Rapporteurs, 16 April 1921, League of Nations Council Document B7 21/68/106 (1921)). For additional references to the practice, see also my separate opinion in *Sargsyan* (cited above).

77. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, cited above, § 109.

the Armenians of Nagorno-Karabakh must inevitably be considered as such as well. Additionally, if in the ICJ's logic "the principle of territorial integrity is confined to the sphere of relations between States", it must be inferred *a contrario* that the same principle does not limit the secession of non-State actors within a multinational State in a non-colonial context.[78] Under this light, the Montevideo population and territory criteria would pose no problem for the acknowledgment of the right to secession of the Armenian population of Nagorno-Karabakh. The available evidence of the other legal elements of statehood, namely government and capacity to enter into relations with other States, is also beyond dispute[79].

(iii) The lack of internal self-determination of the seceding population

44. A right to create a new, independent State (namely the right to external self-determination) arises whenever the seceding population do not have the legal and factual means to express their own political will within the constitutional structure of the parent State, namely when their right to internal self-determination has been disregarded.[80] The military actions in the district of Lachin at the heart of the case took place on 18 May 1992, eight months after the date of declaration of secession of 2 September 1991

78. ibid., § 80. Although timid, this is the main contribution of the ICJ to the quarrel over the right to secession in international law. With this narrow interpretation of the territorial integrity principle, the ICJ's position must be seen as endorsing tacitly that right for non-State actors in multinational States, which was also the position of Albania, Estonia, Finland, Germany, Ireland, Jordan, the Netherlands, Norway, Poland, Russia, Slovenia and Switzerland. The same line of argument could be drawn from Article 11 of the ILC's Draft Declaration on Rights and Duties of States ("Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9"). Judge Antônio Cançado Trindade expressed similar views in his convincing separate opinion appended to the ICJ's *Kosovo Advisory Opinion*, according to which the systematic violations of the human rights of the Kosovar Albanians gave rise to a right to external self-determination from the parent State (separate opinion of Judge Cançado Trindade, ibid., §§ 177-81). Judge Abdulqawi Ahmed Yusuf also accepted the existence of such a right, under which the ICJ should have examined the concrete facts of the case (separate opinion of Judge Yusuf, ibid., §§ 11-13). Identically, Judge Wildhaber admitted in his separate opinion in *Loizidou* (cited above, joined by President Rysdall) the existence of a "right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way".

79. On the structure of the State and its functioning, see the Constitution of the Republic, mentioned above, and the regular multi-party elections which take place in the territory. On the capacity to enter into relations with other States even before the May 1994 Bishkek Protocol ceasefire agreement, see the evidence mentioned above in the present opinion.

80. See the above-cited case of the Canadian Supreme Court as well as the African Commission cases *Katangese People's Congress v. Zaire* and *Kevin Mgwanga Gunme et al v. Cameroon* (cited above), where the populations of Quebec, Katanga and Southern Cameroon were denied the right to external self-determination in view of their internal self-determination. This stance was confirmed by Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 (13 September 2007, A/RES/61/295) by a majority of 143 States in favour, 4 votes against and 11 abstentions.

and two years before the signing of the Bishkek Protocol ceasefire agreement on 5 May 1994 and its implementation on 12 May 1994.

In order to clarify the alleged lack of internal self-determination of the Armenian population, the essential questions to be put are the following: prior to 2 September 1991 did the Azerbaijani Government represent the Armenian population of Nagorno-Karabakh? Did the Armenian population enjoy a constitutional status which allowed them to express their political will within the framework of the Azerbaijani State freely? Did the Armenian population exercise their right to internal self-determination within that framework?

(iv) The systematic attack on the human rights of the seceding population

45. A right of external self-determination further requires the occurrence of a systematic attack by the government of the parent State, or by part of its population whose actions are condoned by the government, against the human rights of the seceding population.[81] In the words of Grotius, a people has no right to secession, "unless it plainly appears that it is absolutely necessary for its own preservation."[82]

With a view to clarifying the existence of this requirement, the essential questions to be addressed relate to the clashes between the Armenian and Azerbaijani population of Azerbaijan prior to the critical date, and are the following: Did the Azerbaijani government commit, or condone the commission by private persons of, systematic attacks against the human rights of the Armenian population on the national territory? Did these attacks occur prior to or after the critical date of 2 September 1991?

46. Finally, in order to ascertain the possible international responsibility of the respondent State for acts occurring during the war of secession and in particular for the destruction of property and displacement of the civilian population, the following questions are of paramount importance: Did the Armenian State intervene militarily before the critical date of 2 September 1991 in Nagorno-Karabakh or the surrounding districts? Did the Armenian State intervene militarily in the opening of the Lachin corridor and the taking of that district and, if so, did it have any justification for that action, such as the blockade, aggression and imminent risk of extinction of the Armenian population in Nagorno-Karabakh? Did the Armenian State proceed with the destruction of civilian property, including that of the applicants, on that occasion or later and, if so, did it have any justification for

81. The acquiescence or connivance of the State in the acts of private individuals which violate Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention (see *Cyprus v. Turkey*, cited above, § 81, and *Ilaşcu and Others*, cited above, § 318).
82. Grotius, *De jure belli ac pacis, libri tres*, 2.6.5.

that action? Did the Armenian State expel or displace the local population, including the applicants, on that occasion or later and, if so, did it have any justification for that action? Did the Armenian State hinder the return of the local population, including the applicants, to the district of Lachin and, if so, did it have any justification for that action? Does this justification still hold true today?

47. Had the Armenian population been denied the right to internal self-determination within the Azerbaijani State and had the Azerbaijani government committed, or condoned the commission by private persons of, systematic attacks against the human rights of the Armenian population in the national territory prior to the critical date of 2 September 1991, the military intervention of the Armenian State after that date in favour of the Armenian population of Nagorno-Karabakh, including the opening of the Lachin corridor, if it were to take place, would have to be assessed in the light of the international community's humanitarian obligations and "responsibility to protect".[83]

C. Preliminary conclusion: the unanswered questions of the case

48. In my view, the fate of the present case is closely related to the answers to be given to the above-mentioned questions. Without a logically consistent intellectual roadmap for the assessment of the case, the Court's erratic output is not credible. By confining its deliberation to the narrowest of boundaries, the Court evades the full clarification of the premises of its reasoning, further discrediting that output. Even accepting that the applicants had lived in the area of Lachin and had owned property there, as they have claimed, but have not sufficiently proven, the case could not be resolved without a thorough analysis of the legality of the military actions in the district of Lachin at the relevant time (18 May 1992) in the context

83. At this juncture, it is worthwhile to recall the crucial importance of the Lachin corridor, as the Security Council and the CSCE/OSCE have explicitly recognised. Security Council Resolutions 822 (1993) and 853 (1993) thus reiterated: "Calls once again for unimpeded access for international humanitarian relief efforts in the region, in particular in all areas affected by the conflict, in order to alleviate the increased suffering of the civilian population and reaffirms that all parties are bound to comply with the principles and rules of international humanitarian law." Resolution 874 (1993) insisted: "Calls on all parties to refrain from all violations of international humanitarian law and renews its call in resolutions 822 (1993) and 853 (1993) for unimpeded access for international humanitarian relief efforts in all areas affected by the conflict." The Helsinki Additional Meeting of the CSCE Council (Summary of Conclusions, Helsinki, 24 March 1992, § 10) "urged all CSCE participating States and all concerned parties to take all necessary steps to ensure that humanitarian assistance is provided to all those in need through rapid and effective means including safe corridors under international control". It is clear from these calls that the situation at the relevant time did require urgent humanitarian intervention, if need be through the means of safe corridors. On humanitarian intervention, both as a right and a responsibility of the international community, see my separate opinion in *Sargsyan* (cited above).

of the secession of the "NKR", involving the opening of a humanitarian corridor between Nagorno-Karabakh and Armenia for the safeguarding of a threatened Armenian population and eventually the consecutive displacement of civilians and destruction of civilian property for that purpose.[84]

The full assessment of the legal implications of the opening of the Lachin corridor as a crucial military measure during the war of secession is evidently relevant for the purposes of deciding on the lawfulness and proportionality of the alleged continued restrictions of the applicants' rights to enjoy their property and family life in the district of Lachin. Thus, the Court should

84. A thorough reply to these questions would require attentive consideration of the available official evidence of violations of the human rights of the Armenian population in Azerbaijan at the relevant time, such as the European Parliament Resolutions of 7 July 1988 ("whereas the deteriorating political situation, which has led to anti-Armenian pogroms in Sumgait and serious acts of violence in Baku, is in itself a threat to the safety of the Armenians living in Azerbaijan … [the European Parliament c]ondemns the violence employed against Armenian demonstrators in Azerbaijan"), 18 January 1990 ("having regard to the resumption of anti-Armenian activities by the Azeris in Baku (an initial estimate talks of numerous victims, some of whom died in particularly horrific circumstances) and the attacks on Armenian villages outside Nagorno-Karabakh, such as Shaumyan and Getashen, … whereas the blockade of Nagorno-Karabakh has been reinstated by Azerbaijan as harshly as ever"), 15 March 1990 ("concerned at the human rights situation in Nagorno-Karabakh, which is administered by Azerbaijan against the will of the majority of its inhabitants, more than 75% of whom are Armenians, and at the continuing violence in Azerbaijan"), 14 March 1991 ("massacres of Armenians in Azerbaijan"), 16 May 1991 ("deploring the continual aggravation of violence in the Caucasus, particularly against Armenians in the autonomous region of Karabakh"), 13 February 1992 ("whereas the Armenian population living in Nagorno-Karabakh has been subjected to constant blockade and aggression for the last three years, whereas at the end of December 1991 Azerbaijan launched a huge and unprecedented offensive against Armenians living in Nagorno-Karabakh, whereas Armenian villages in Nagorno-Karabakh were bombarded with heavy artillery on 34 occasions during January 1992, with over 1,100 rockets and mortars fired at them, wounding about 100 civilians, including women and children, whereas the situation of the people of Nagorno-Karabakh with regard to food and health has worsened to the point of becoming untenable"), 21 January 1993 ("aware of the tragic situation of the 300,000 Armenian refugees who have fled the pogroms in Azerbaijan ... [the European Parliament t]akes the view that the relentless blockade carried out by Azerbaijan constitutes a violation of international law and insists that the Azerbaijani Government lift it forthwith"), and 10 February 1994 ("whereas the Azerbaijani air force has resumed its bombing of civilians, particularly in the town of Stepanakert"); section 907 of the United States Freedom Support Act of 24 October 1992, still in force ("United States assistance under this or any other Act (other than assistance under title V of this Act) may not be provided to the Government of Azerbaijan until the President determines, and so reports to the Congress, that the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno-Karabakh."); and the US Senate Resolution of 17 May 1991 ("Whereas Soviet and Azerbaijani forces have destroyed Armenian villages and depopulated Armenian areas in and around Nagorno-Karabakh in violation of internationally recognized human rights … [the US Senate] condemns the attacks on innocent children, women, and men in Armenian areas and communities in and around Nagorno-Karabakh and in Armenia; condemns the indiscriminate use of force, including the shelling of civilian areas, on Armenia's eastern and southern borders; calls for the end to the blockades and other uses of force and intimidation directed against Armenia and Nagorno-Karabakh"). The Court itself acknowledged the existence of "expulsions", accompanied by "arrests and violence", of the Armenian civilian population, committed by the "government forces" on Azerbaijan territory in April to May 1991 (*Sargsyan*, cited above, § 32).

not have adjudicated upon the alleged deprivation of these rights without assessing "the source of the rights claimed"[85].

49. To put it in Convention terms, the ultimate question that this case raises, which the majority chose to ignore, is the extent to which the "general principles of international law", including the law of secession of States and international humanitarian law, may restrict the enjoyment of the right to property under Article 1 of Protocol No. 1 (second sentence). The effect of such a *renvoi* is to render the application of Article 1 of Protocol No. 1 conditional upon the way the Court interprets *incidenter tantum* the law of secession and international humanitarian law. How can the provisions of the Convention and Protocol No. 1be reconciled with the imperatives of the law of secession of States and international humanitarian law? How can the human rights enshrined in the Convention and Protocol No. 1 be protected in the context of a remedial secession of a State and the military action carried out by the defence forces of a threatened ethnic and religious minority? These questions would have taken us to a very different approach to the case.

VI. Final conclusion

50. Self-determination is not *passé*. It is not a mere political rallying cry, but a legal right, which evolved from an historical anti-colonialist claim to a broader human rights based claim. As a matter of principle, the right to external self-determination is recognised in international law, not only in a colonial but also in a non-colonial context. Whenever a part of the population of a State is not represented by its government and the human rights of that population are systematically infringed by its own government, or by private agents whose action is condoned by that government, the victimised population may have recourse "as a last resort, to rebellion against tyranny and oppression", to use the powerful formulation of the preamble to the Universal Declaration of Human Rights.

51. This Court is competent *ratione materiae* to ascertain such human rights violations and the legal consequences that derive from them, namely in terms of the property rights of displaced civilians. Nevertheless, the present case should have been dismissed owing to non-exhaustion of domestic remedies, lack of victim status and lack of jurisdiction. Had the Court taken more seriously its role in the gathering of evidence, these objections could possibly have been overcome. Then, and only then, the Court would have been in a position to address fully the substantive issues at stake in this case. It did not do so. Those who suffer more from these omissions are precisely

85. See *Šilih*, cited above, §§ 159-63.

the Armenian and Azerbaijani women and men of good will who simply want to live in peace in Nagorno-Karabakh and the surrounding districts.

CHIRAGOV ET AUTRES c. ARMÉNIE
(Requête n° 13216/05)

GRANDE CHAMBRE

ARRÊT DU 16 JUIN 2015[1]

1. Arrêt rendu par la Grande Chambre après dessaisissement d'une chambre en vertu de l'article 30 de la Convention.

SOMMAIRE[1]

Perte par des personnes déplacées pendant le conflit du Haut-Karabagh de leur domicile et de leurs biens

Aux fins de l'article 1 de la Convention, on considère qu'un État exerce son contrôle effectif et, dès lors, sa juridiction extraterritoriale sur le territoire d'une « république » autoproclamée lorsque son influence sur cette entité est importante et déterminante et que l'entité survit grâce à l'appui militaire, politique, financier et autre qu'il lui apporte (paragraphe 186 de l'arrêt).
Le simple fait que l'État participe à des négociations de paix relatives aux questions concernant les personnes déplacées ne constitue pas une justification juridique à une ingérence dans l'exercice du droit au respect des biens garanti par l'article 1 du Protocole n° 1, et ne le dispense pas de prendre d'autres mesures, *a fortiori* lorsque les négociations en question durent depuis très longtemps. Pour ce qui est des mesures qu'il devrait prendre, l'État peut s'inspirer des normes internationales pertinentes. Il serait particulièrement important de mettre en place un mécanisme de revendication des biens qui soit aisément accessible et qui offre des procédures fonctionnant avec des règles de preuve souples, de manière à permettre aux personnes concernées d'obtenir le rétablissement de leurs droits sur leurs biens ainsi qu'une indemnisation pour la perte de jouissance de ces droits (paragraphes 198-199 de l'arrêt).

Article 1

Juridiction des États – Juridiction de l'Arménie à l'égard du Haut-Karabagh et des territoires occupés environnants – Soutien militaire, politique et financier de l'Arménie à la « République du Haut-Karabagh » – Valeur probante particulière des déclarations faites par des officiels de haut rang

Article 8

Respect de la vie familiale – Respect de la vie privée – Respect du domicile – Impossibilité faite aux citoyens azerbaïdjanais déplacés pendant le conflit du Haut-Karabagh d'accéder à leur domicile – Absence d'indemnisation

Article 13

Recours effectif – Personnes déplacées pendant le conflit du Haut-Karabagh ne disposant d'aucun recours effectif relativement à la perte de leur domicile et de leurs biens

1. Rédigé par le greffe, il ne lie pas la Cour.

Article 1 du Protocole nº 1

Obligations positives – Manquement de l'Arménie à prendre des mesures pour garantir le droit de citoyens azerbaïdjanais déplacés pendant le conflit du Haut-Karabagh au respect de leurs biens – Biens – Approche souple en matière d'administration de la preuve lorsque des biens ou un domicile ont été perdus dans le contexte d'un conflit armé interne ou international – Droit d'utiliser la terre dans le système soviétique – Droit au respect des biens – Accès aux biens impossible – Absence d'indemnisation – Nécessité de mettre en place un mécanisme de revendication des biens qui soit aisément accessible et qui offre des procédures fonctionnant avec des règles de preuve souples – L'assistance fournie par l'État aux déplacés internes arméniens ne l'exonère pas de ses obligations envers les Azerbaïdjanais qui ont eux aussi fui le conflit

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* *

En fait

Les requérants sont des Kurdes azerbaïdjanais originaires du district de Latchin, en Azerbaïdjan. Ils se plaignaient d'être dans l'impossibilité de regagner l'accès à leur domicile et à leurs biens, après avoir été contraints de fuir le district en 1992 pendant le conflit opposant l'Arménie à l'Azerbaïdjan au sujet du Haut-Karabagh.

Au moment de la dissolution de l'Union soviétique en décembre 1991, l'*oblast* autonome du Haut-Karabagh (« OAHK ») était une région autonome enclavée dans la République socialiste soviétique d'Azerbaïdjan. Il n'y avait pas de frontière commune entre l'OAHK et la République socialiste soviétique d'Arménie, qui étaient séparés par le territoire azerbaïdjanais ; la zone où ils étaient le plus rapprochés était le district de Latchin. En 1989, l'OAHK comptait environ 77 % d'Arméniens et 22 % d'Azéris. Dans le district de Latchin, la majorité de la population était d'ethnie kurde ou azérie. Seuls 5 à 6 % des habitants du district étaient d'ethnie arménienne. Les hostilités armées dans le Haut-Karabagh commencèrent en 1988. En septembre 1991 – peu après que l'Azerbaïdjan eut proclamé son indépendance à l'égard de l'Union soviétique – le soviet de l'OAHK annonça la fondation de la « République du Haut-Karabagh » (« RHK »), comprenant l'OAHK et le district azerbaïdjanais de Chahoumian. Lors d'un référendum organisé en décembre 1991, 99,9 % des votants se prononcèrent en faveur de la sécession. Toutefois, la population azérie avait boycotté la consultation. En janvier 1992, la « RHK », s'appuyant sur les résultats du référendum, réaffirma son indépendance à l'égard de l'Azerbaïdjan. Par la suite, le conflit dégénéra peu à peu en une véritable guerre. À la fin de l'année 1993, les troupes d'origine arménienne contrôlaient la quasi-totalité du territoire de l'ex-OAHK et sept régions azerbaïdjanaises limitrophes. Le conflit fit des centaines de milliers de déplacés internes et de réfugiés dans les deux camps. En mai 1994, les protagonistes signèrent un accord de cessez-le-feu, qui demeure valable. Des négociations ont été menées sous l'égide de l'Organisation pour la

sécurité et la coopération en Europe (OSCE) en vue de parvenir à un règlement pacifique du conflit. Toutefois, celui-ci n'est toujours pas réglé sur le plan politique. L'indépendance autoproclamée de la « RHK » n'a été reconnue par aucun État ni aucune organisation internationale. Avant leur adhésion au Conseil de l'Europe en 2001, l'Arménie et l'Azerbaïdjan se sont chacun engagés devant le Comité des Ministres et l'Assemblée parlementaire à régler pacifiquement le conflit du Haut-Karabagh.

Le district de Latchin, où vivaient les requérants, fut attaqué à plusieurs reprises pendant la guerre. Selon les requérants, ces attaques étaient le fait tant des troupes du Haut-Karabagh que de celles de la République d'Arménie. Le Gouvernement soutenait pour sa part que la République d'Arménie n'avait pas participé à ces événements et que les actions militaires avaient été menées par les forces de défense du Haut-Karabagh et par des groupes de volontaires. À la mi-mai 1992, Latchin subit des bombardements aériens qui causèrent la destruction de nombreuses maisons. Les requérants furent contraints de fuir le district pour se réfugier à Bakou. Depuis lors, ils ne peuvent regagner l'accès à leur domicile et à leurs biens, du fait de l'occupation arménienne. À l'appui de leurs allégations selon lesquelles ils ont passé à Latchin la majeure partie de leur vie jusqu'à leur déplacement forcé et ils y avaient des maisons et des terrains, ils ont communiqué à la Cour différents documents. En particulier, ils ont tous les six produit des certificats officiels (« passeports techniques ») indiquant que des maisons et des parcelles de terrain sises dans le district de Latchin étaient enregistrées à leur nom, des certificats de naissance (notamment ceux de leurs enfants) et/ou des certificats de mariage, et des déclarations écrites d'anciens voisins confirmant qu'ils avaient vécu dans le district de Latchin.

En droit

1. Sur les exceptions préliminaires :

a) *Épuisement des voies de recours internes* – Le Gouvernement n'a pas démontré qu'il existât, que ce fût en Arménie ou en « RHK », un recours propre à redresser les griefs des requérants. Les dispositions de loi qu'ils mentionnent sont de nature générale ; elles ne visent pas le cas particulier de la dépossession résultant d'un conflit armé et ne se rapportent par ailleurs nullement à des situations comparables à celle des requérants. En ce qui concerne les décisions de justice internes fournies à titre d'exemple, aucune d'elles n'a trait à des griefs de perte de domicile ou de biens émanant de personnes déplacées dans le cadre du conflit du Haut-Karabagh. De plus, la République d'Arménie niant toute participation de ses autorités aux événements qui sont à l'origine des griefs formulés en l'espèce et tout exercice de sa juridiction sur le Haut-Karabagh et les territoires environnants, il n'aurait pas été raisonnable d'attendre des requérants qu'ils introduisent une action en restitution ou en indemnisation devant les autorités arméniennes. Enfin, il n'a pas été trouvé de solution politique au conflit et la militarisation de la région est allée croissant ces dernières années. Dans ces conditions, il n'est pas réaliste de penser qu'un éventuel

recours ouvert en « RHK », entité non reconnue, aurait pu en pratique offrir un redressement effectif aux Azerbaïdjanais déplacés.
Conclusion : exception préliminaire rejetée (quatorze voix contre trois).

b) *Qualité de victime* – La Cour a développé dans sa jurisprudence une approche souple quant aux preuves à produire par les requérants qui se plaignent d'avoir perdu leurs biens et leur domicile dans le cadre d'un conflit armé interne ou international. Les principes des Nations unies concernant la restitution des logements et des biens dans le cas des réfugiés et des personnes déplacées (principes de Pinheiro) reflètent une approche similaire. Les éléments de preuve les plus importants communiqués par les requérants sont les passeports techniques. Il s'agit de documents officiels qui comprennent des plans des maisons et indiquent notamment leur surface, leurs dimensions, etc., ainsi que la superficie de la parcelle de terrain correspondante. Ils ont été émis entre 1985 et 1990 et portent le nom des requérants. De plus, ils contiennent des références aux décisions pertinentes d'attribution des terres. Dans ces conditions, ils constituent un commencement de preuve du droit de propriété des intéressés du même ordre que ce que la Cour a déjà admis en maintes occasions précédentes. Les requérants ont aussi communiqué d'autres éléments constituant un commencement de preuve de leurs droits de propriété, notamment des déclarations d'anciens voisins. Les documents qu'ils ont produits afin de prouver leur identité et leur lieu de résidence corroborent également leurs revendications. Par ailleurs, même si, à l'exception du sixième requérant, aucun d'eux n'a produit de titre de propriété ou d'autres preuves primaires, il faut tenir compte des circonstances dans lesquelles ils ont dû quitter le district, puisqu'ils l'ont abandonné alors qu'il était la cible d'une attaque militaire. En conséquence, la Cour conclut que les requérants ont suffisamment étayé leur allégation selon laquelle ils ont passé la majeure partie de leur vie dans le district de Latchin, jusqu'à ce qu'ils soient contraints d'en partir, et ils y possédaient des maisons et des terres au moment où ils ont pris la fuite.
Dans le système soviétique, les citoyens ne pouvaient détenir en propriété privée ni maisons ni terres, mais ils pouvaient posséder en propre une maison et se voir attribuer de la terre pour une période indéterminée à des fins précises telles que l'agriculture vivrière et l'habitation. En pareil cas l'individu avait un « droit d'usage ». Ce droit obligeait le bénéficiaire à utiliser la terre aux fins pour lesquelles elle lui avait été attribuée, mais il était protégé par la loi et il était transmissible par succession. Il ne fait donc aucun doute que les droits conférés aux requérants sur les maisons et les terrains étaient des droits protégés qui représentaient un intérêt économique substantiel. En conclusion, lorsqu'ils ont quitté le district de Latchin, les requérants avaient sur des terres et sur des maisons des droits qui constituaient des « biens » au sens de l'article 1 du Protocole n° 1. Rien n'indique que ces droits se soient éteints par la suite. Les droits de propriété des requérants sont donc toujours valides. De plus, leurs terres et leurs maisons doivent aussi être considérées comme constitutives de leur « domicile » aux fins de l'article 8 de la Convention.
Conclusion : exception préliminaire rejetée (quinze voix contre deux).

c) *Juridiction de l'Arménie* – La Cour n'estime guère concevable que le Haut-Karabagh – entité peuplée de moins de 150 000 individus d'ethnie arménienne – ait été capable, sans un appui militaire substantiel de l'Arménie, de mettre en place au début de l'année 1992 une force de défense qui, face à un pays comme l'Azerbaïdjan, peuplé de quelque sept millions d'habitants, allait non seulement prendre le contrôle de l'ex-OAHK mais encore conquérir avant la fin de 1993 la majeure partie sinon la totalité des sept districts azerbaïdjanais voisins. Quoi qu'il en soit, la présence militaire de l'Arménie dans le Haut-Karabagh a été à plusieurs égards officialisée en 1994 par l'« Accord de coopération militaire entre le gouvernement de la République d'Arménie et le gouvernement de la République du Haut-Karabagh », qui prévoit en particulier que les appelés de l'Arménie et ceux de la « RHK » peuvent accomplir leur service militaire dans l'une ou l'autre entité. La Cour note aussi que nombre de rapports et de déclarations publiques, notamment des déclarations de membres et d'anciens membres du gouvernement arménien, démontrent que l'Arménie, par sa présence militaire et par la fourniture de matériel et de conseils militaires, a participé très tôt et de manière significative au conflit du Haut-Karabagh. Les déclarations de hauts dirigeants ayant joué un rôle central dans le litige en question revêtent une valeur probante particulière lorsque les intéressés reconnaissent des faits ou un comportement qui paraissent contredire la thèse officielle selon laquelle les forces armées arméniennes n'ont pas été déployées en « RHK » ni dans les territoires voisins. Elles peuvent être interprétées comme une forme d'aveu. L'appui militaire de l'Arménie demeure déterminant pour la conservation du contrôle sur les territoires en cause. De plus, les faits établis dans l'affaire démontrent de manière convaincante que l'Arménie apporte à la « RHK » un appui politique et financier substantiel. Ainsi, les résidents de la « RHK » doivent se procurer des passeports arméniens pour se rendre à l'étranger, la « RHK » n'étant reconnue par aucun État ni aucune organisation internationale. En conclusion, l'Arménie et la « RHK » sont hautement intégrées dans pratiquement tous les domaines importants, et la « RHK » et son administration survivent grâce à l'appui militaire, politique, financier et autre que leur apporte l'Arménie, laquelle, dès lors, exerce un contrôle effectif sur le Haut-Karabagh et les territoires avoisinants.
Conclusion : exception préliminaire rejetée (quatorze voix contre trois).

2. Sur le fond :
a) *Article 1 du Protocole n° 1* – Les requérants ont des droits sur des terrains et des maisons qui constituent des « biens » au sens de cette disposition. Leur déplacement forcé depuis Latchin échappant à la compétence de la Cour *ratione temporis*, il reste à examiner s'ils ont été privés de l'accès à leurs biens après l'entrée en vigueur de la Convention à l'égard de l'Arménie (avril 2002) et s'ils subissent de ce fait une violation continue de leurs droits.
Il n'y a en République d'Arménie ou en « RHK » aucun recours interne effectif ouvert aux requérants à l'égard de leurs griefs. Les requérants n'ont donc accès à aucun moyen juridique d'obtenir une indemnisation pour la perte de leurs biens

ou de recouvrer l'accès aux biens et aux domiciles qu'ils ont abandonnés. De plus, la Cour considère que, dans les conditions qui prévalent encore plus de vingt ans après l'accord de cessez-le-feu (notamment la présence continue sur place de troupes arméniennes ou soutenues par l'Arménie, les violations du cessez-le-feu sur la ligne de contact, la relation globalement hostile entre l'Arménie et l'Azerbaïdjan et l'absence de perspective de solution politique à ce jour), le retour d'Azerbaïdjanais dans le Haut-Karabagh et les territoires environnants n'est pas envisageable de manière réaliste. Il y a donc ingérence continue dans l'exercice par les requérants de leur droit au respect de leurs biens.

Tant que l'accès aux biens est impossible, l'État a l'obligation de prendre d'autres mesures pour garantir le droit au respect des biens, comme cela est reconnu dans les normes internationales pertinentes établies par les Nations unies et le Conseil de l'Europe. Le fait que des négociations de paix soient en cours sous l'égide de l'OSCE – notamment sur la question des personnes déplacées – ne dispense pas le Gouvernement de prendre d'autres mesures, d'autant que ces négociations durent depuis plus de vingt ans. Il serait donc important de mettre en place un mécanisme de revendication des biens qui soit aisément accessible et qui offre des procédures fonctionnant avec des règles de preuve souples, de manière à permettre aux requérants et aux autres personnes qui se trouvent dans la même situation qu'eux d'obtenir le rétablissement de leurs droits sur leurs biens ainsi qu'une indemnisation pour la perte de jouissance de ces droits. Il est vrai que le Gouvernement a dû porter assistance à des centaines de milliers de déplacés et de réfugiés arméniens, mais la protection de ce groupe ne l'exonère pas totalement de ses obligations envers les citoyens azerbaïdjanais qui, comme les requérants, ont dû prendre la fuite pendant le conflit. En conclusion, pour ce qui est de la période considérée, le Gouvernement n'a pas justifié l'impossibilité faite aux requérants d'accéder à leurs biens et l'absence d'indemnisation pour cette ingérence. Partant, il y a violation continue à l'égard des requérants des droits garantis par l'article 1 du Protocole n° 1.

Conclusion : violation (quinze voix contre deux).

b) *Article 8* – Tous les requérants sont nés dans le district de Latchin. Avant leur fuite en mai 1992, ils y avaient vécu et travaillé pendant toute leur vie ou pendant la majeure partie de leur vie. Presque tous s'y étaient mariés et y avaient eu des enfants, comme leurs ancêtres avant eux. Ils y gagnaient leur vie et y vivaient dans des maisons qu'ils avaient bâties et dont ils étaient propriétaires. Il est donc clair qu'ils avaient depuis longtemps leur vie et leur domicile dans le district. Ils ne se sont pas volontairement établis ailleurs, ce sont des personnes déplacées qui habitent à Bakou ou autre part par nécessité. Dans ces conditions, on ne saurait considérer que leur déplacement forcé et leur absence involontaire du district de Latchin aient brisé leur lien avec ce lieu, nonobstant le temps qui s'est écoulé depuis leur départ. Pour les mêmes raisons que celles qui l'ont conduite à conclure à la violation continue de l'article 1 du Protocole n° 1, la Cour conclut que l'impossibilité faite aux requérants de regagner leurs domiciles respectifs constitue une ingérence injustifiée dans

l'exercice de leur droit au respect de leur vie privée et familiale et de leur droit au respect de leur domicile.
Conclusion : violation (quinze voix contre deux).

c) *Article 13* – Le Gouvernement ne s'est pas acquitté de la charge qui lui incombait de démontrer que les requérants disposaient d'un recours apte à remédier à la situation qu'ils critiquaient sur le terrain de la Convention et présentant des perspectives raisonnables de succès.
Conclusion : violation (quatorze voix contre trois).
Article 41 : question réservée.

Jurisprudence citée par la Cour

Akdivar et autres c. Turquie, 16 septembre 1996, *Recueil des arrêts et décisions* 1996-IV
Al-Skeini et autres c. Royaume-Uni [GC], n° 55721/07, CEDH 2011
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Demopoulos et autres c. Turquie (déc.) [GC], n^os^ 46113/99 et 7 autres, CEDH 2010
Doğan et autres c. Turquie, n^os^ 8803/02 et 14 autres, CEDH 2004-VI
El-Masri c. l'ex-République yougoslave de Macédoine [GC], n° 39630/09, CEDH 2012
Elsanova c. Russie (déc.), n° 57952/00, 15 novembre 2005
Ilaşcu et autres c. Moldova et Russie [GC], n° 48787/99, CEDH 2004-VII
Kazali et autres c. Chypre (déc.), n^os^ 49247/08 et 8 autres, 6 mars 2012
Kerimova et autres c. Russie, n^os^ 17170/04 et 5 autres, 3 mai 2011
Loizidou c. Turquie (fond), 18 décembre 1996, *Recueil* 1996-VI
Lordos et autres c. Turquie, n° 15973/90, 2 novembre 2010
Öneryıldız c. Turquie [GC], n° 48939/99, CEDH 2004-XII
Orphanides c. Turquie, n° 36705/97, 20 janvier 2009
Prokopovitch c. Russie, n° 58255/00, CEDH 2004-XI
Saveriades c. Turquie, n° 16160/90, 22 septembre 2009
Solomonides c. Turquie, n° 16161/90, 20 janvier 2009
Xenides-Arestis c. Turquie, n° 46347/99, 22 décembre 2005
Zalyan, Sargsyan et Serobyan c. Arménie (déc.), n^os^ 36894/04 et 3521/07, 11 octobre 2007

En l'affaire Chiragov et autres c. Arménie,

La Cour européenne des droits de l'homme, siégeant en une Grande Chambre composée de :

Dean Spielmann, *président*,
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, *juges*,

et de Michael O'Boyle, *greffier adjoint*,

Après en avoir délibéré en chambre du conseil les 22 et 23 janvier 2014 et le 22 janvier 2015,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 13216/05) dirigée contre la République d'Arménie et dont six ressortissants azerbaïdjanais, M. Elkhan Chiragov, M. Adishirin Chiragov, M. Ramiz Gebrayilov, M. Akif Hasanof, M. Fekhreddin Pashayev et M. Qaraca Gabrayilov (« les requérants ») ont saisi la Cour le 6 avril 2005 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »). Le sixième requérant est décédé en juin 2005. Son fils, M. Sagatel Gabrayilov, poursuit la procédure au nom de son père.

2. Les requérants, qui ont été admis au bénéfice de l'assistance judiciaire, ont été représentés par M^e^ M. Muller QC, M^e^ C. Vine, M^e^ M. Butler, M^e^ M. Ivers, M^e^ B. Poynor et M^e^ S. Swaroop, avocats à Londres, ainsi que par M. K. Yıldız. Le gouvernement arménien (« le Gouvernement ») a été représenté par son agent, M. G. Kostanyan, représentant de la République d'Arménie auprès de la Cour.

3. Les requérants alléguaient en particulier être empêchés de retourner dans le district de Latchin, situé en territoire occupé par le Gouvernement, et être de ce fait privés de la jouissance de leur domicile et de leurs biens situés dans ce district. Ils se plaignaient en outre de ne pas avoir été indemnisés du préjudice ainsi subi. Ils y voyaient des violations continues de l'article 1 du Protocole n° 1 et de l'article 8 de la Convention. Invoquant également l'article 13 de la Convention, ils estimaient de plus ne pas avoir disposé d'un recours effectif relativement à ces griefs. Enfin, pour tous les griefs exposés ci-dessus, ils s'estimaient victimes d'une discrimination fondée, au mépris de l'article 14 de la Convention, sur leur appartenance ethnique et religieuse.

4. La requête a été attribuée à la troisième section de la Cour (article 52 § 1 du règlement de la Cour, « le règlement »). Le gouvernement azerbaïdjanais, qui a exercé son droit d'intervention prévu à l'article 36 § 1 de la Convention, a été représenté par son agent, M. C. Asgarov.

5. Le 9 mars 2010, une chambre de la troisième section composée de Josep Casadevall, président, Elisabet Fura, Corneliu Bîrsan, Boštjan M. Zupančič, Alvina Gyulumyan, Egbert Myjer et Luis López Guerra, juges, ainsi que de Stanley Naismith, greffier adjoint de section, s'est dessaisie au profit de la Grande Chambre, ni l'une ni l'autre des parties ne s'y étant opposée (articles 30 de la Convention et 72 du règlement).

6. La composition de la Grande Chambre a été arrêtée conformément aux articles 26 §§ 4 et 5 de la Convention et 24 du règlement. Le président de la Cour a décidé que, dans l'intérêt d'une bonne administration de la justice, la présente affaire et l'affaire *Sargsyan c. Azerbaïdjan* (requête n° 40167/06) devaient être attribuées à la même formation de la Grande Chambre (articles 24, 42 § 2 et 71 du règlement).

7. Une audience sur la recevabilité et le fond de l'affaire a eu lieu en public au Palais des droits de l'homme, à Strasbourg, le 15 septembre 2010 (article 59 § 3 du règlement).

8. Le 14 décembre 2011, la requête a été déclarée recevable par une Grande Chambre composée de Nicolas Bratza, président, 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 et Luis López Guerra, juges, ainsi que de Michael O'Boyle, greffier adjoint.

9. La partie requérante et le Gouvernement ont chacun soumis des observations écrites complémentaires (article 59 § 1 du règlement) sur le fond de l'affaire. Par ailleurs, des observations ont été reçues du gouvernement azerbaïdjanais.

10. Une audience sur le fond de l'affaire a eu lieu en public au Palais des droits de l'homme, à Strasbourg, le 22 janvier 2014.

Ont comparu :

– *pour le Gouvernement*
MM. G. Kostanyan, *agent*,
G. Robertson, QC, *conseil*,
E. Babayan,
T. Collis, *conseillers* ;

– *pour les requérants*
MM. M. Muller, QC,
M. Ivers,
S. Swaroop,
M^mes^ M. Butler, *conseils*,
C. Vine,
B. Poynor,
S. Karakaş,
A. Evans, *conseillers* ;

– *pour le gouvernement azerbaïdjanais*
MM. C. Asgarov, *agent*,
M.N. Shaw, QC,
G. Lansky, *conseils*,
O. Gvaladze,
H. Tretter,
O. Ismayilov,
M^me^ T. Urdaneta Wittek, *conseillers*.

M. Hasanof et M. Pashayev, requérants, étaient également présents.

La Cour a entendu en leurs déclarations M. Muller, M. Swaroop, M. Ivers, M^me^ Butler, M. Robertson, M. Shaw et M. Lansky.

11. À l'issue de l'audience, la Cour a jugé qu'il n'y avait pas lieu, aux fins de l'examen de l'affaire, d'organiser de mission d'établissement des faits ni d'entendre de témoins.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

A. La genèse de l'affaire

12. À l'époque de l'effondrement de l'URSS, l'*oblast* autonome du Haut-Karabagh (« OAHK ») était une région autonome de la République

socialiste soviétique d'Azerbaïdjan (« la RSS d'Azerbaïdjan »). Situé sur le territoire de cette république, l'OAHK s'étendait sur une superficie de 4 388 km^2. À ce moment-là, il n'y avait pas de frontière commune entre le Haut-Karabagh (en arménien, Artsakh) et la République socialiste soviétique d'Arménie (« la RSS d'Arménie »), qui étaient séparés par le territoire azerbaïdjanais ; la zone où ils étaient le plus rapprochés était le district de Latchin, qui comprenait une bande de terre de moins de 10 km de largeur souvent appelée « corridor de Latchin ».

13. Selon le recensement soviétique de 1989, l'OAHK comptait environ 189 000 habitants, dont 77 % d'Arméniens, 22 % d'Azéris et quelques membres des minorités russe et kurde. Le district de Latchin présentait quant à lui une démographie différente, la grande majorité de la population (60 000 personnes environ) y étant d'ethnie kurde ou azérie. Seuls 5 à 6 % des habitants du district étaient d'ethnie arménienne.

14. Au début de l'année 1988, des manifestations eurent lieu à Stepanakert, la capitale régionale de l'OAHK, ainsi qu'à Erevan, la capitale arménienne. Les manifestants demandaient le rattachement du Haut-Karabagh à l'Arménie. Le 20 février, le soviet de l'OAHK présenta aux soviets suprêmes de la RSS d'Arménie, de la RSS d'Azerbaïdjan et de l'URSS une demande tendant à ce que cette région fût autorisée à se séparer de l'Azerbaïdjan et à être rattachée à l'Arménie. Le 23 mars, le soviet suprême de l'URSS rejeta cette demande. En juin, le soviet suprême d'Azerbaïdjan la rejeta à son tour, celui de l'Arménie votant de son côté en faveur de l'unification.

15. Tout au long de l'année 1988, les manifestations appelant à l'unification se succédèrent. Le district de Latchin fit l'objet d'attaques et de barrages routiers. De nombreuses personnes furent victimes d'affrontements et des réfugiés, qui se comptaient par centaines de milliers des deux côtés, passèrent d'Arménie en Azerbaïdjan et réciproquement. En conséquence, le 12 janvier 1989, l'URSS plaça l'OAHK sous le contrôle direct de Moscou. Puis, le 28 novembre de la même année, le contrôle de la région fut rendu à l'Azerbaïdjan. Quelques jours plus tard, le 1er décembre, le soviet suprême de la RSS d'Arménie et le conseil régional du Haut-Karabagh adoptèrent une résolution conjointe sur la réunification du Haut-Karabagh et de l'Arménie. En conséquence de cette résolution, un budget commun aux deux entités fut établi en janvier 1990 et, au printemps de la même année, il fut décidé que le Haut-Karabagh participerait aux élections arméniennes suivantes.

16. Au début de l'année 1990, le conflit s'étant aggravé, les troupes soviétiques investirent Bakou et le Haut-Karabagh, lequel fut placé sous état d'urgence. De violents affrontements, dans lesquels intervinrent parfois les

forces soviétiques, continuèrent cependant d'opposer les Arméniens et les Azéris.

17. Le 30 août 1991, l'Azerbaïdjan proclama son indépendance à l'égard de l'Union soviétique. Cette déclaration fut ensuite officialisée par l'adoption, le 18 octobre 1991, de la loi constitutionnelle sur l'indépendance nationale. Le 2 septembre 1991, le soviet de l'OAHK annonça la fondation de la « République du Haut-Karabagh » (« RHK »), comprenant l'OAHK et le district azerbaïdjanais de Chahoumian, et déclara que cette République ne relevait plus de la juridiction azerbaïdjanaise. Le 26 novembre 1991, le parlement azerbaïdjanais abolit l'autonomie dont bénéficiait jusque-là le Haut-Karabagh. Lors d'un référendum organisé dans cette région le 10 décembre 1991, 99,9 % des votants se prononcèrent en faveur de la sécession. Toutefois, la population azérie avait boycotté la consultation. Le même mois, l'Union soviétique fut dissoute et les troupes soviétiques commencèrent à se retirer de la région. Le contrôle militaire du Haut-Karabagh passa rapidement entre les mains des Arméniens du Karabagh. Le 6 janvier 1992, la « RHK », s'appuyant sur les résultats du référendum, réaffirma son indépendance à l'égard de l'Azerbaïdjan.

18. Au début de l'année 1992, le conflit dégénéra peu à peu en une véritable guerre. Le camp arménien prit plusieurs villages azéris, provoquant la mort de plusieurs centaines de personnes au moins et le départ de la population.

19. Le district de Latchin, et plus particulièrement la ville éponyme, furent attaqués à plusieurs reprises. Selon les requérants, ces attaques étaient le fait tant des troupes du Haut-Karabagh que de celles de la République d'Arménie. Le Gouvernement soutient pour sa part que la République d'Arménie n'a pas participé à ces événements et que les actions militaires ont été menées par les forces de défense du Haut-Karabagh et par des groupes de volontaires. En 1991, pendant près de huit mois, les routes menant à Latchin furent sous le contrôle de troupes d'origine arménienne, qui tenaient des postes de contrôle. La ville de Latchin se retrouva complètement isolée. À la mi-mai 1992, elle subit des bombardements aériens qui causèrent la destruction de nombreuses maisons.

20. Le 17 mai 1992, se rendant compte que les troupes se rapprochaient rapidement, les habitants de Latchin prirent la fuite. Le lendemain, la ville fut prise par des troupes d'origine arménienne. Il semble qu'elle ait été pillée et incendiée au cours des jours suivants. Selon les informations communiquées au Gouvernement par les autorités de la « RHK », la ville de Latchin et les villages environnants, Aghbulag, Chirag et Chiragli, furent complètement détruits pendant le conflit militaire.

21. En juillet 1992, le Parlement arménien décida qu'il ne signerait aucun accord international qui prévoirait que le Haut-Karabagh reste azerbaïdjanais.

22. Selon un rapport de Human Rights Watch de décembre 1994 intitulé « Azerbaïdjan : sept ans de conflit dans le Haut-Karabagh » (*Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh*), la prise du district de Latchin entraîna le déplacement d'environ 30 000 Azéris, dont beaucoup d'origine kurde.

23. Après avoir pris Latchin, les troupes d'origine arménienne conquirent quatre autres districts azerbaïdjanais situés autour du Haut-Karabagh (Kelbajar, Jabrayil, Gubadly et Zanguelan) ainsi que de grandes parties de deux autres districts (Agdam et Fizuli).

24. Le 5 mai 1994, à la suite d'une médiation de la Russie, l'Arménie, l'Azerbaïdjan et la « RHK » signèrent un accord de cessez-le-feu (le Protocole de Bichkek), qui devint effectif le 12 mai 1994.

25. Dans son rapport susmentionné, l'association Human Rights Watch estimait qu'entre 1988 et 1994, 750 000 à 800 000 Azéris avaient été contraints de quitter le Haut-Karabagh, l'Arménie et les sept districts azerbaïdjanais limitrophes du Haut-Karabagh. Selon des informations communiquées par les autorités arméniennes, le conflit a fait 335 000 réfugiés arméniens en provenance d'Azerbaïdjan et 78 000 personnes déplacées à l'intérieur de l'Arménie (ayant quitté des régions d'Arménie frontalières de l'Azerbaïdjan).

B. La situation actuelle

26. Selon le Gouvernement, la « RHK » contrôle 4 061 km² de l'ancien OAHK. Il y a controverse sur la superficie exacte qu'elle occupe dans les deux districts partiellement conquis, mais il apparaît que, dans les sept districts limitrophes, le territoire occupé représente une superficie totale de 7 500 km² environ.

27. Les estimations relatives au nombre actuel d'habitants dans le Haut-Karabagh se situent entre 120 000 et 145 000 personnes, dont 95 % d'ethnie arménienne. Il ne reste pratiquement plus d'Azerbaïdjanais. Le district de Latchin compte 5 000 à 10 000 Arméniens.

28. Le conflit n'est toujours pas réglé sur le plan politique. L'indépendance autoproclamée de la « RHK » n'a été reconnue par aucun État ni aucune organisation internationale. Des violations récurrentes de l'accord de cessez-le-feu de 1994 le long des frontières ont fait de nombreux morts et le discours des autorités demeure hostile. De plus, selon plusieurs rapports internationaux, la tension s'est accrue ces dernières années et les dépenses militaires ont fortement augmenté en Arménie comme en Azerbaïdjan.

29. Plusieurs propositions avancées en vue d'un règlement pacifique du conflit ont échoué. Des négociations ont été menées sous l'égide de l'Organisation pour la sécurité et la coopération en Europe (OSCE) et de son groupe de Minsk. À Madrid, en novembre 2007, les trois pays assurant la coprésidence du groupe – la France, la Russie et les États-Unis d'Amérique – ont présenté à l'Arménie et à l'Azerbaïdjan un ensemble de principes de base en vue d'un accord. Ces principes, qui ont été actualisés par la suite, appellent notamment au retour sous contrôle azerbaïdjanais des territoires entourant le Haut-Karabagh, à l'instauration dans le Haut-Karabagh d'un statut provisoire prévoyant des garanties en matière de sécurité et d'autonomie, à la mise en place d'un couloir reliant l'Arménie au Haut-Karabagh, à la définition ultérieure du statut définitif du Haut-Karabagh au moyen d'un référendum juridiquement contraignant, au droit pour toutes les personnes déplacées à l'intérieur de leur pays et pour tous les réfugiés de retourner là où ils résidaient précédemment et à la mise en place de garanties pour la sécurité internationale, au nombre desquelles devait figurer une opération de maintien de la paix. L'idée sous-jacente était que l'approbation de ces principes par l'Arménie et l'Azerbaïdjan permettrait de rédiger un accord complet et détaillé. Après un va-et-vient intense des diplomates du groupe de Minsk et un certain nombre de rencontres entre les présidents des deux pays en 2009, la dynamique s'est essoufflée en 2010. À ce jour, les parties au conflit n'ont pas signé d'accord formel sur les principes de base.

30. Le 24 mars 2011, le groupe de Minsk de l'OSCE a présenté un rapport sur la mission d'évaluation sur le terrain menée par les coprésidents du groupe dans les territoires occupés d'Azerbaïdjan entourant le Haut-Karabagh (*Report of the OSCE Minsk Group Co-Chairs' Field Assessment Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh*), dont le résumé apporte les informations suivantes :

> « Les coprésidents du groupe de Minsk de l'OSCE se sont rendus du 7 au 12 octobre 2010 en mission d'évaluation sur le terrain dans les sept territoires occupés d'Azerbaïdjan entourant le Haut-Karabagh afin d'y apprécier la situation générale, notamment sur le plan humanitaire. Ils étaient accompagnés du représentant personnel du président de l'OSCE en exercice et de son équipe, laquelle leur a apporté un appui logistique, ainsi que de deux experts du HCR et d'un membre de la mission d'enquête dépêchée sur place en 2005 par l'OSCE. Il s'agissait de la première mission menée par la communauté internationale dans ces territoires depuis 2005 ; c'était également la première fois depuis dix-huit ans que des représentants de l'ONU se rendaient sur place.
>
> En parcourant plus d'un millier de kilomètres dans ces territoires, les coprésidents ont pu constater à quel point les conséquences du conflit du Haut-Karabagh et de l'absence de règlement pacifique étaient désastreuses. Des villes et villages qui existaient avant le conflit ont été abandonnés et sont quasiment des champs de ruines. Il n'existe pas de chiffres fiables, mais selon des estimations approximatives, la population

totale est de 14 000 personnes, qui vivent dans de petites colonies et dans les villes de Latchin et de Kelbajar. Les coprésidents estiment qu'il n'y a pas eu d'accroissement significatif de la population depuis 2005. Les colons, pour la plupart des personnes d'ethnie arménienne provenant d'autres régions d'Azerbaïdjan et relogées dans les territoires, vivent dans des conditions précaires, avec une infrastructure rudimentaire, peu d'activité économique et un accès limité aux services publics. Beaucoup n'ont pas de pièces d'identité. Sur le plan administratif, les sept territoires, l'ancien *oblast* du Haut-Karabagh et d'autres régions ont été regroupés en huit districts nouveaux.

La constatation de la dureté de la situation qui prévaut dans les territoires a renforcé la conviction des coprésidents que le *statu quo* est inacceptable et que seul un règlement pacifique issu de négociations pourra donner la perspective d'un avenir meilleur et moins précaire aux anciens habitants de ces territoires comme aux nouveaux. Ils exhortent les dirigeants de toutes les parties à s'abstenir de mener sur ces territoires ou sur d'autres zones contestées des activités qui seraient préjudiciables à la conclusion d'un accord définitif ou qui modifieraient le caractère de ces régions. Ils recommandent également la prise de mesures pour préserver les cimetières et les lieux de culte situés dans ces territoires et pour clarifier la situation des colons qui n'ont pas de pièces d'identité. Ils ont l'intention de mener d'autres missions dans d'autres zones touchées par le conflit du Haut-Karabagh, en compagnie d'experts des institutions internationales compétentes susceptibles de participer à la mise en œuvre d'un accord de paix. »

31. Le 18 juin 2013, les présidents des pays exerçant la coprésidence du groupe de Minsk de l'OSCE ont publié une déclaration conjointe sur le conflit dans le Haut-Karabagh :

« Nous, présidents de la République française, de la Fédération de Russie et des États-Unis d'Amérique, pays exerçant la coprésidence du groupe de Minsk de l'OSCE, restons déterminés à aider les parties du conflit du Haut-Karabagh pour parvenir à un règlement pacifique et durable. Nous regrettons profondément que, plutôt que d'essayer de trouver une solution basée sur des intérêts mutuels, les parties ont continué à rechercher un avantage unilatéral dans le processus de négociation.

Nous continuons de croire fermement que les éléments décrits dans les déclarations de nos pays au cours des quatre dernières années doivent être le fondement de tout règlement juste et durable du conflit du Haut-Karabagh. Ces éléments doivent être considérés comme un tout intégré, aussi toute tentative de sélectionner certains éléments au détriment d'autres rendra impossible l'atteinte d'une solution équilibrée.

Nous réaffirmons que seul un règlement négocié peut mener à la paix, la stabilité et la réconciliation, ouvrant des opportunités pour le développement régional et la coopération. L'utilisation de la force militaire qui a déjà créé la situation actuelle de la confrontation et de l'instabilité ne résoudra pas le conflit. Une reprise des hostilités serait catastrophique pour la population de la région, entraînant des pertes de vie, plus de destruction, d'autres réfugiés, et d'énormes coûts financiers. Nous appelons instamment les dirigeants de tous les côtés à réaffirmer les principes d'Helsinki, en particulier ceux relatifs à la non-utilisation de la force ou de la menace de la force, à l'intégrité territoriale, à l'égalité des droits et à l'autodétermination des peuples. Nous les appelons aussi à s'abstenir de toute action ou déclaration susceptible de faire monter la tension

dans la région et de conduire à une escalade du conflit. Les dirigeants doivent préparer leur peuple à la paix, pas à la guerre.

Nos pays continueront à agir en lien étroit avec les parties. Toutefois, la responsabilité de mettre un terme au conflit du Haut-Karabagh reste à chacun d'eux. Nous croyons fermement que tarder plus à parvenir à un accord équilibré pour le cadre d'une paix globale est inacceptable, et nous exhortons les dirigeants de l'Azerbaïdjan et de l'Arménie à se concentrer avec une énergie renouvelée sur les questions qui restent non résolues. »

C. Les requérants et les biens qu'ils allèguent posséder dans le district de Latchin

32. Les requérants déclarent être des Kurdes azerbaïdjanais originaires du district de Latchin, où leurs ancêtres auraient vécu pendant des siècles. Le 17 mai 1992, ils auraient été contraints de fuir le district pour se réfugier à Bakou. En raison de l'occupation arménienne, il leur aurait été impossible depuis lors de rentrer chez eux et de reprendre possession de leurs biens.

1. M. Elkhan Chiragov

33. M. Elkhan Chiragov est né en 1950. Il vivait dans le district de Latchin. Alors qu'il avait été indiqué dans la requête qu'il habitait dans le village de Chirag, il ressort de la réponse des requérants aux observations du Gouvernement que son village était en fait Chiragli et qu'il y a exercé la profession d'enseignant pendant quinze ans. Il y aurait possédé une grande maison meublée de 250 m², 55 ruches, 80 têtes de petit bétail, 9 têtes de gros bétail et 5 tapis faits main.

34. Le 27 février 2007, il a communiqué avec la réponse des requérants aux observations du Gouvernement un certificat officiel (« passeport technique ») daté du 19 juillet 1985 et attestant qu'étaient enregistrées à son nom, sur un terrain de 1 200 m², une maison d'habitation de 12 pièces sur deux étages d'une surface totale de 408 m² (répartie en une surface d'habitation de 300 m² et une surface auxiliaire de 108 m²) ainsi qu'une remise de 60 m².

35. Il a également soumis une déclaration de trois anciens voisins affirmant qu'il possédait une maison d'habitation d'une surface de 260 m² composée de 16 pièces sur deux étages et une voiture, ainsi qu'une déclaration de MM. A. Jafarov et A. Halilov, représentants du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, attestant qu'il habitait précédemment le village de Chiragli.

36. Devant la Grande Chambre, il a produit notamment les documents suivants : un certificat de mariage attestant qu'il est né à Chiragli et s'y est marié en 1978, les certificats de naissance de son fils et de sa fille, nés à

Chiragli en 1979 et en 1990 respectivement, ainsi qu'une lettre de 1979 et un carnet de travail délivré en 1992 par la direction de l'enseignement du district de Latchin et attestant qu'il travaillait comme enseignant à Chiragli.

2. M. Adishirin Chiragov

37. M. Adishirin Chiragov est né en 1947. Il vivait dans le district de Latchin. Alors qu'il avait été indiqué dans la requête qu'il habitait dans le village de Chirag, il ressort de la réponse des requérants aux observations du Gouvernement que son village était en fait Chiragli et qu'il y a exercé la profession d'enseignant pendant vingt ans. Il y aurait possédé une grande maison meublée de 145 m², une voiture neuve de modèle « Niva », 65 têtes de petit bétail, 11 têtes de gros bétail et 6 tapis faits main.

38. Le 27 février 2007, il a communiqué un passeport technique daté du 22 avril 1986 et attestant qu'étaient enregistrées à son nom, sur un terrain de 1 200 m², une maison d'habitation de huit pièces sur deux étages d'une surface totale de 230,4 m² (répartie en une surface d'habitation de 193,2 m² et une surface auxiliaire de 37,2 m²) ainsi qu'une remise de 90 m².

39. Il a également produit une déclaration de trois anciens voisins affirmant qu'il possédait une maison d'habitation composée de huit pièces sur deux étages, ainsi qu'une déclaration de MM. A. Jafarov et A. Halilov, représentants du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, attestant qu'il habitait précédemment le village de Chiragli.

40. Devant la Grande Chambre, il a produit notamment les documents suivants : un certificat de mariage attestant qu'il est né à Chiragli et s'y est marié en 1975, les certificats de naissance de son fils et de ses deux filles, nés à Chiragli en 1977, 1975 et 1982 respectivement, ainsi qu'un passeport soviétique délivré en 1981 qui indique qu'il est né à Chiragli et porte un tampon d'enregistrement qui fait apparaître qu'il habitait à Chiragli en 1992.

3. M. Ramiz Gebrayilov

41. M. Ramiz Gebrayilov est né à Chiragli en 1960. Il aurait obtenu en 1988 un diplôme d'ingénieur de l'Institut polytechnique de Bakou. En 1983, pendant ses études à Bakou, il se serait rendu dans la ville de Latchin et y aurait reçu de l'État un terrain de 5 000 m². Il y aurait par la suite bâti une maison de six chambres à coucher et un garage et y aurait vécu avec sa femme et ses enfants jusqu'à son départ forcé en 1992. Il y aurait aussi eu plusieurs étables. Il aurait également possédé, sur un autre terrain de 5 000 m² lui appartenant également, un atelier de réparation automobile appelé « Auto Service », une boutique et un café, ainsi que 12 vaches, 70 agneaux et 150 moutons.

42. M. Gebrayilov n'aurait pas pu retourner à Latchin depuis son départ en 1992. Des amis arméniens qui seraient allés à Latchin en 2001 et auraient filmé l'état des maisons de la ville lui auraient fait visionner une vidéo montrant que sa maison avait été totalement détruite par un incendie. D'autres personnes, qui auraient quitté Latchin après lui, auraient aussi confirmé que sa maison avait été incendiée par les forces arméniennes quelques jours après son départ.

43. Le 27 février 2007, M. Gebrayilov a communiqué un passeport technique daté du 15 août 1986 et attestant qu'était enregistrée à son nom, sur un terrain de 480 m², une maison d'habitation de deux étages d'une surface totale de 203,2 m² (répartie en une surface d'habitation de 171,2 m² et une surface auxiliaire de 32 m²) comprenant huit chambres à coucher.

44. Il a également soumis une déclaration de trois anciens voisins affirmant qu'il possédait une maison d'habitation de huit pièces sur deux étages, ainsi qu'une déclaration de M. V. Maharramov, représentant du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, attestant qu'il habitait précédemment à Latchin une maison lui appartenant.

45. Devant la Grande Chambre, il a produit notamment les documents suivants : un certificat de naissance et un certificat de mariage attestant qu'il est né à Chiragli et s'y est marié en 1982, les certificats de naissance de sa fille et de ses deux fils, nés à Latchin en 1982, 1986 et 1988 respectivement, ainsi qu'un livret militaire délivré en 1979.

4. M. Akif Hasanof

46. M. Akif Hasanof est né en 1959 dans le village d'Aghbulag, dans le district de Latchin. Il y aurait exercé la profession d'enseignant pendant vingt ans et y aurait possédé une grande maison meublée de 165 m², une voiture neuve de modèle « Niva », 100 têtes de petit bétail, 16 têtes de gros bétail et 20 tapis faits main.

47. Le 27 février 2007, il a communiqué un passeport technique daté du 13 septembre 1985 et attestant qu'étaient enregistrées à son nom, sur un terrain de 1 600 m², une maison d'habitation de neuf pièces sur deux étages d'une surface totale de 448,4 m² (répartie en une surface d'habitation de 223,2 m² et une surface auxiliaire de 225,2 m²) ainsi qu'une remise de 75 m².

48. Il a également soumis une déclaration de trois anciens voisins affirmant qu'il possédait une maison d'habitation composée de neuf pièces sur deux étages, une étable et des dépendances, ainsi qu'une déclaration de M. V. Maharramov, représentant du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, attestant qu'il habitait précédemment à Aghbulag une maison lui appartenant.

49. Devant la Grande Chambre, il a produit notamment les documents suivants : un certificat de naissance, un passeport soviétique délivré en 1976 et un carnet de travail délivré par la direction de l'enseignement du district de Latchin et dont il ressort qu'il est né à Aghbulag et y a été enseignant et directeur d'école de 1981 à 1988.

5. M. Fekhreddin Pashayev

50. M. Fekhreddin Pashayev est né en 1956 dans le village de Kamalli, dans le district de Latchin. Après avoir obtenu un diplôme d'ingénieur de l'Institut polytechnique de Bakou en 1984, il serait retourné à Latchin, où il aurait travaillé au ministère des Transports comme ingénieur, puis, à partir de 1986, comme ingénieur-chef. Il aurait vécu dans la ville de Latchin, au n° 50 de la rue 28 Aprel (*28 Aprel Kucesi, Lachin Seheri, Lachin Rayonu*), dans une maison de deux étages comprenant trois chambres à coucher qui lui aurait appartenu et qu'il aurait construite lui-même. La valeur marchande actuelle de cette maison serait de 50 000 dollars américains (USD – « dollars »). M. Pashayev aurait également possédé le terrain entourant la maison, ainsi qu'une part (d'environ 10 ha) dans une ferme collective à Kamalli et des terrains en « propriété collective ».

51. Le 27 février 2007, il a communiqué un passeport technique daté d'août 1990 et attestant qu'était enregistrée à son nom, sur un terrain de 469,3 m², une maison d'habitation de deux étages d'une surface totale de 133,2 m² (répartie en une surface d'habitation de 51,6 m² et une surface auxiliaire de 81,6 m²).

52. Il a également soumis une déclaration de trois anciens voisins affirmant qu'il possédait une maison d'habitation composée de quatre pièces sur deux étages, ainsi qu'une déclaration de M. V. Maharramov, représentant du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, attestant qu'il habitait précédemment rue 28 Aprel à Latchin une maison lui appartenant.

53. Devant la Grande Chambre, il a produit notamment les documents suivants : un certificat de mariage attestant qu'il est né à Kamalli et s'y est marié en 1985, les certificats de naissance de ses deux filles, nées l'une à Kamalli en 1987 et l'autre à Latchin en 1991, le certificat de naissance de son fils indiquant que celui-ci est né à Kamalli en 1993, ainsi qu'un livret militaire délivré en 1978 et un carnet de travail daté de 2000. Il a expliqué que son fils était en fait né à Bakou, mais qu'il était normal dans le système soviétique de *propiska* d'inscrire comme lieu de naissance d'un enfant le lieu de résidence de ses parents.

6. M. Qaraca Gabrayilov

54. M. Qaraca Gabrayilov est né en 1940 dans la ville de Latchin et décédé le 19 juin 2005. Le 6 avril 2005, lors de l'introduction de la requête, il avait déclaré que le 17 mai 1992, date de son départ forcé, il vivait au nº 580 de la rue N. Narimanov à Latchin, dans l'appartement 128a, situé dans une maison familiale de deux étages construite en 1976 qui lui aurait appartenu. D'une surface de 187,1 m², la maison aurait été entourée d'un jardin de 453,6 m². Dans sa requête, M. Gabrayilov avait ajouté qu'il possédait en outre une parcelle de 300 m² dans la même rue. Il avait joint un passeport technique daté d'août 1985 et attestant qu'était enregistrée à son nom une maison de deux étages avec un jardin, dont les surfaces correspondent à celles susmentionnées.

55. Le 27 février 2007, ses représentants ont toutefois indiqué qu'il habitait au nº 41 de la rue H. Abdullayev à Latchin, mais qu'il possédait bien les deux propriétés susmentionnées dans la rue N. Narimanov. Ils ont joint à cette communication une déclaration de trois anciens voisins, ainsi qu'une déclaration de M. V. Maharramov, représentant du pouvoir exécutif de la République d'Azerbaïdjan dans la ville de Latchin, qui indiquent que M. Gabrayilov résidait dans sa maison de la rue H. Abdullayev. Étaient également jointes une décision du 29 janvier 1974 par laquelle le soviet des représentants du peuple du district de Latchin allouait au requérant le terrain de 300 m² susmentionné, ainsi que plusieurs factures de fourrage et de matériaux de construction et des pièces justificatives se rapportant aux subventions censées avoir été obtenues pour la construction de ses biens.

56. Le 21 novembre 2007, M. Sagatel Gabrayilov, le fils du requérant, a indiqué que la rue où avait habité la famille s'était appelée rue N. Narimanov, mais que, à une date non précisée, le nom et la numérotation de la rue avaient changé et que l'adresse familiale était ainsi devenue « rue H. Abdullayev ». Les deux adresses mentionnées auraient donc fait référence à la même propriété.

57. Devant la Grande Chambre, les représentants du requérant ont produit notamment les documents suivants : un certificat de naissance et un certificat de mariage attestant qu'il était né à Chiragli et s'y était marié en 1965, le certificat de naissance de son fils, né en 1970 à Alkhasli, un village du district de Latchin, et un livret militaire délivré en 1963.

D. Les relations entre la République d'Arménie et la « RHK »

58. Les requérants, le Gouvernement et le tiers intervenant (le gouvernement azerbaïdjanais) ont soumis de très nombreux documents et déclarations sur la question de savoir si la République d'Arménie exerce

son autorité ou son contrôle sur la « RHK » et les territoires avoisinants. Les informations qui ressortent de ces communications sont résumées ci-dessous dans la mesure où la Cour les juge pertinentes.

1. Aspects militaires

59. En 1993, le Conseil de sécurité des Nations unies a adopté quatre résolutions relatives au conflit dans le Haut-Karabagh. En leurs parties pertinentes, elles sont ainsi libellées :

Résolution 822 du 30 avril 1993 (S/RES/822 (1993))

« *Le Conseil de sécurité*,

(...)

Notant avec une très grande inquiétude l'intensification des affrontements armés, et en particulier l'invasion la plus récente du district de Kelbadjar, en République azerbaïdjanaise, par des forces arméniennes locales,

(...)

1. *Exige* la cessation immédiate de toutes les hostilités et de tous les actes d'hostilité afin que puisse s'instaurer un cessez-le-feu durable, ainsi que le retrait immédiat de toutes les forces occupant le district de Kelbadjar et les autres régions de l'Azerbaïdjan récemment occupées ;

(...) »

Résolution 853 du 29 juillet 1993 (S/RES/853 (1993))

« *Le Conseil de sécurité*,

(...)

Exprimant la vive préoccupation que lui inspirent la détérioration des relations entre la République d'Arménie et la République azerbaïdjanaise ainsi que les tensions entre elles,

(...)

Notant avec inquiétude l'escalade des hostilités armées et, en particulier, la prise du district d'Agdam dans la République azerbaïdjanaise,

(...)

3. *Exige* qu'il soit mis fin immédiatement à toutes les hostilités et que les forces d'occupation en cause se retirent immédiatement, complètement et inconditionnellement du district d'Agdam et de toutes les autres zones récemment occupées de la République azerbaïdjanaise ;

(...)

9. *Prie instamment* le gouvernement de la République d'Arménie de continuer d'exercer son influence afin d'amener les Arméniens de la région du Haut-Karabagh de

la République azerbaïdjanaise à appliquer la résolution 822 (1993) du Conseil ainsi que la présente résolution, et à accepter les propositions du groupe de Minsk de [l'OSCE] ;

(...) »

Résolution 874 du 14 octobre 1993 (S/RES/874 (1993))

« *Le Conseil de sécurité*,

(...)

Se déclarant gravement préoccupé de ce que la poursuite du conflit dans la région du Haut-Karabagh de la République azerbaïdjanaise et aux alentours, ainsi que les tensions entre la République d'Arménie et la République azerbaïdjanaise pourraient mettre en danger la paix et la sécurité dans la région,

(...)

5. *Demande* que soient immédiatement appliquées les mesures réciproques et urgentes que prévoit le « calendrier modifié » du groupe de Minsk de [l'OSCE], y compris le retrait des forces des territoires récemment occupés et la suppression de tous les obstacles aux communications et aux transports ;

(...) »

Résolution 884 du 12 novembre 1993 (S/RES/884 (1993))

« *Le Conseil de sécurité*,

(...)

Notant avec inquiétude l'escalade des hostilités armées, conséquence des violations du cessez-le-feu et de l'usage excessif de la force en réaction à ces violations, en particulier l'occupation du district de Zanguelan et de la ville de Goradiz dans la République azerbaïdjanaise,

(...)

2. *Demande* au gouvernement arménien d'user de son influence pour amener les Arméniens de la région du Haut-Karabagh de la République azerbaïdjanaise à appliquer les résolutions 822 (1993), 853 (1993) et 874 (1993), et de veiller à ce que les forces impliquées ne reçoivent pas les moyens d'étendre leur campagne militaire ;

(...)

4. *Exige* des parties concernées qu'elles cessent immédiatement les hostilités armées et les actes d'hostilité, que les forces d'occupation soient retirées unilatéralement du district de Zanguelan et de la ville de Goradiz et que les forces d'occupation soient retirées des autres zones récemment occupées de la République azerbaïdjanaise, conformément au « calendrier modifié » de mesures urgentes en vue d'appliquer les résolutions 822 (1993) et 853 (1993) du Conseil de sécurité (...), tel qu'il a été modifié lors de la réunion du groupe de Minsk de [l'OSCE] tenue à Vienne du 2 au 8 novembre 1993 ;

(...) »

60. Le rapport de décembre 1994 de Human Rights Watch (paragraphe 22 ci-dessus) comporte des descriptions du conflit dans le Haut-Karabagh. Il indique qu'une « offensive militaire menée en mai-juin 1992 par les Arméniens du Karabagh a abouti à la prise d'une grande partie de la province de Latchin », puis résume ainsi les événements survenus en 1993 et 1994 :

> « (...) les troupes arméniennes du Karabagh ont – souvent avec l'appui des forces de la République d'Arménie – pris le reste des provinces azerbaïdjanaises entourant le Haut-Karabagh (le reste de la province de Latchin et les provinces de Kelbajar, Agdam, Fizuli, Jebrayil, Qubatli et Zanguelan) et forcé les civils azéris à quitter les lieux. »

Ce document rapporte différents éléments qui semblent indiquer que l'armée de la République d'Arménie a participé aux opérations menées dans le Haut-Karabagh et les territoires avoisinants (chapitre VII « La république d'Arménie en tant que partie au conflit »). L'Arménie aurait même envoyé des membres de ses propres forces de police maintenir l'ordre dans les territoires occupés. Comme l'indique le rapport, les enquêteurs de Human Rights Watch ont, en avril 1994, passé deux jours à interroger des soldats portant l'uniforme arménien dans les rues d'Erevan. Trente pour cent de ces soldats auraient été des appelés de l'armée arménienne ayant combattu dans le Karabagh ou reçu l'ordre de s'y rendre ou encore demandés expressément à y accomplir leur service. En une seule journée du mois d'avril 1994, les enquêteurs de Human Rights Watch auraient vu cinq bus transportant quelque 300 soldats de l'armée arménienne entrer dans le Haut-Karabagh en provenance d'Arménie. Des journalistes occidentaux leur auraient dit par ailleurs qu'ils avaient vu huit autres bus remplis de soldats de l'armée arménienne venant d'Arménie se diriger vers le territoire azerbaïdjanais. Human Rights Watch estime donc que des soldats de l'armée arménienne ont participé aux opérations menées en Azerbaïdjan et que, d'un point de vue juridique, cela fait de l'Arménie une partie au conflit, lequel serait dès lors bel et bien un conflit armé international entre l'Arménie et l'Azerbaïdjan.

61. Plusieurs propositions de résolution du conflit ont été avancées au sein du groupe de Minsk de l'OSCE. En juillet 1997, une proposition de « plan global » prévoyait, sous le titre « Accord I – Fin des hostilités armées », un processus de retrait des forces armées en deux phases. Dans le cadre de la seconde phase, il était prévu que « les forces arméniennes se replient à l'intérieur des frontières de la République d'Arménie ».

La démarche « étape par étape » présentée en décembre 1997 prévoyait elle aussi un processus de retrait en deux phases avec, dans la seconde phase, un retrait de « toutes les forces arméniennes stationnées hors des frontières de la République d'Arménie vers des lieux situés à l'intérieur de ces fron-

tières ». La proposition d'« État commun » de novembre 1998 était pour l'essentiel formulée en des termes analogues.

Ces documents ont tous été examinés dans le cadre des négociations menées au sein du groupe de Minsk de l'OSCE, mais aucun d'entre eux n'a abouti à un accord entre l'Arménie et l'Azerbaïdjan.

62. Les requérants renvoient par ailleurs à des déclarations de différents dirigeants et observateurs politiques. Par exemple, en février 1994, M. Robert Kotcharian, alors Premier ministre de la « RHK », avait déclaré dans une interview accordée au journal arménien *Golos Armenii* que l'Arménie fournissait au Haut-Karabagh des armes anti-aériennes.

M. Vazguen Manoukian, ministre de la Défense de l'Arménie en 1992-1993, aurait quant à lui reconnu en octobre 2000 dans une interview accordée au journaliste et écrivain britannique Thomas de Waal que les déclarations publiques selon lesquelles l'armée arménienne n'avait pas participé à la guerre étaient exclusivement destinées à l'étranger[1] :

> « Vous pouvez être sûrs que, quelles qu'aient été nos déclarations politiques, les Arméniens du Karabagh et l'armée arménienne ont mené ensemble les actions militaires. Que quelqu'un fût du Karabagh ou d'Arménie, pour moi c'était la même chose. »

63. Les rapports annuels 2002, 2003 et 2004 de l'Institut international pour les études stratégiques (International Institute for Strategic Studies – IISS), intitulés « *The Military Balance* », indiquaient que, sur les 18 000 militaires stationnés dans le Haut-Karabagh, 8 000 appartenaient à l'armée arménienne. Dans le rapport 2013 de ce même institut, on pouvait notamment lire ceci : « depuis 1994, l'Arménie contrôle la plus grande partie du Haut-Karabagh, ainsi que les sept régions adjacentes d'Azerbaïdjan, souvent appelées les « territoires occupés »[2].

64. Dans son deuxième rapport à la commission des questions politiques sur le conflit du Haut-Karabakh (doc. 10364, 29 novembre 2004), le rapporteur de l'Assemblée parlementaire du Conseil de l'Europe (APCE), M. David Atkinson, indiquait ceci :

> « Selon les informations qui me sont parvenues, les Arméniens d'Arménie ont participé à des luttes armées dans la région du Haut-Karabagh aux côtés d'Arméniens locaux d'Azerbaïdjan. Aujourd'hui, l'Arménie a des soldats stationnés dans la région du Haut-Karabagh et les districts environnants, les personnes de cette région ont des passeports arméniens et le gouvernement arménien transfère d'importantes ressources budgétaires à cette zone. »

1. Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, New York University Press, 2003, p. 210.
2. IISS, « *The Military Balance* », 2002, p. 66, 2003, p. 66, 2004, p. 82, et 2013, p. 218.

Ce rapport à l'appui, l'Assemblée parlementaire a adopté le 25 janvier 2005 la résolution 1416 (2005) « Le conflit du Haut-Karabagh traité par la Conférence de Minsk de l'OSCE », où elle déclare notamment ceci :

> « 1. L'Assemblée parlementaire regrette que, plus de dix ans après le début des hostilités, le conflit du Haut-Karabagh ne soit toujours pas résolu. Des centaines de milliers de personnes sont encore déplacées et vivent dans des conditions misérables. Des parties importantes du territoire azerbaïdjanais demeurent occupées par les forces arméniennes et des forces séparatistes conservent le contrôle de la région du Haut-Karabagh.
>
> 2. L'Assemblée craint que les opérations militaires et les affrontements ethniques généralisés qui les ont précédées n'aient abouti à des expulsions ethniques massives et à la création de zones monoethniques, faisant resurgir le terrible concept de purification ethnique. L'Assemblée réaffirme que l'indépendance et la sécession d'un territoire qui fait partie d'un État ne peuvent être que l'aboutissement d'un processus légal et pacifique, fondé sur le soutien exprimé démocratiquement par les habitants du territoire en question ; elles ne sauraient être la conséquence d'un conflit armé débouchant sur des expulsions ethniques et sur l'annexion de fait du territoire concerné par un autre État. L'Assemblée rappelle que l'occupation d'un territoire étranger par un État membre constitue une grave violation des obligations qui incombent à cet État en sa qualité de membre du Conseil de l'Europe, et réaffirme le droit des personnes déplacées de la zone du conflit de retourner dans leur foyer dans la sécurité et la dignité. »

65. Dans son rapport du 14 septembre 2005 intitulé « Haut-Karabagh : le conflit vu du terrain » (*Nagorno-Karabakh: Viewing the Conflict from the Ground*), l'International Crisis Group (ICG) indique ceci à propos des forces armées de la « RHK » (pp. 9-10) :

> « [Le Haut-Karabagh] est probablement la société la plus militarisée au monde. L'armée de défense du Haut-Karabagh, hautement entraînée et équipée, est avant tout une force terrestre, dont l'armature est pour l'essentiel fournie par l'Arménie. Un responsable du Haut-Karabagh a déclaré à l'ICG que cette armée comptait environ 20 000 soldats, et un expert indépendant [Richard Giragosian, analyste militaire américain, en juillet 2005] a estimé ce nombre à 18 500. Il est avancé que 20 000 à 30 000 réservistes supplémentaires pourraient être mobilisés. Au regard de sa population, le Haut-Karabagh ne peut maintenir une force aussi importante sans l'apport d'un nombre élevé d'éléments extérieurs. Selon une évaluation indépendante [celle de M. Giragosian], l'armée compte 8 500 Arméniens originaires du Karabagh et 10 000 originaires d'Arménie. (...)
>
> Néanmoins, beaucoup d'appelés et d'engagés d'Arménie continuent de servir dans le Haut-Karabagh. Le ministre de fait de la Défense reconnaît que ses forces militaires comptent 40 % de personnel contractuel, dont un certain nombre de citoyens arméniens. Il affirme qu'aucun citoyen arménien ne fait l'objet d'une conscription forcée, et il indique que 500 000 Arméniens originaires du Haut-Karabagh vivent en Arménie et que certains d'entre eux servent dans les forces du Haut-Karabagh. Cependant, d'anciens appelés d'Erevan et d'autres villes arméniennes ont déclaré à l'ICG qu'ils avaient été envoyés de manière apparemment arbitraire dans le Haut-Karabagh et dans les districts occupés immédiatement après s'être présentés au bureau de recru-

tement. Ils nient s'être jamais portés volontaires pour aller dans le Haut-Karabagh ou les territoires occupés adjacents. Ils n'auraient perçu aucune prime pour effectuer leur service militaire hors d'Arménie, pendant lequel ils auraient porté l'uniforme du Haut-Karabagh et auraient été placés sous les ordres du commandement militaire du Haut-Karabagh. De plus en plus de jeunes recrues arméniennes refuseraient de servir dans le Haut-Karabagh, ce qui pourrait contribuer à expliquer l'apparente diminution du nombre d'individus envoyés sur place.

Les forces de l'Arménie et celles du Haut-Karabagh sont largement intégrées. De hauts responsables arméniens reconnaissent fournir au Haut-Karabagh beaucoup de matériel et d'armement. Les autorités du Haut-Karabagh reconnaissent également que des officiers arméniens leur fournissent une assistance à la formation et leur transmettent des compétences spécialisées. Pourtant, Erevan soutient que pas une seule unité militaire arménienne ne se trouve dans le Haut-Karabagh et les territoires occupés qui l'entourent. »

Le Gouvernement conteste le rapport de l'ICG, arguant que cette organisation n'a de bureau ni en Arménie ni en « RHK ». Il ajoute que la déclaration relative au nombre de militaires arméniens en « RHK » découle d'une communication électronique avec M. Giragosian, qu'il a contacté et qui lui a répondu en ces termes :

« Lorsque j'ai exprimé cette opinion, je ne voulais pas dire que les personnes servant dans les forces armées du Haut-Karabagh étaient des militaires. Je parlais du nombre approximatif de volontaires engagés dans les forces armées du Haut-Karabagh qui, selon mes calculs, étaient originaires d'Arménie et d'autres États. Je ne peux pas confirmer avec certitude que le nombre que j'ai donné est correct, parce qu'il s'agit d'informations confidentielles et que personne ne connaît les chiffres exacts. Mon opinion reposait sur l'impression que bon nombre d'Arméniens venant de différents endroits du monde sont engagés dans les forces d'autodéfense du Haut-Karabagh. »

66. Le 19 avril 2007, le journal autrichien *Der Standard* a publié une interview du ministre des Affaires étrangères arménien de l'époque, M. Vardan Oskanian. Évoquant les territoires contestés, M. Oskanian les aurait désignés par l'expression « les territoires qui sont aujourd'hui contrôlés par l'Arménie ».

Quelques jours après la parution de cette interview, l'ambassade d'Arménie en Autriche a publié un communiqué de presse indiquant que les propos de M. Oskanian avaient été mal interprétés et qu'en réalité il avait parlé des « territoires qui sont aujourd'hui contrôlés par les Arméniens ».

67. Le 14 mars 2008, l'Assemblée générale des Nations unies a adopté une résolution intitulée « La situation dans les territoires occupés de l'Azerbaïdjan » (A/RES/62/243), dans laquelle elle rappelle expressément les résolutions adoptées par le Conseil de sécurité des Nations unies en 1993 (paragraphe 59 ci-dessus). En ses passages pertinents, cette résolution est ainsi libellée :

« *L'Assemblée générale*,

(...)

2. *Exige* le retrait immédiat, complet et inconditionnel de toutes les forces arméniennes des territoires occupés de la République d'Azerbaïdjan ;

3. *Réaffirme* le droit inaliénable de la population qui a été expulsée des territoires occupés de la République d'Azerbaïdjan de retourner chez elle, et souligne qu'il est nécessaire de créer les conditions propices à son retour, notamment le relèvement global des territoires touchés par le conflit ;

(...) »

68. Dans le cadre d'une interview accordée au journal *Armenia Today* publiée le 29 octobre 2008, le politicien d'origine libanaise M. Jirair Sefilian, haut gradé de l'armée arménienne qui avait participé à la prise de Choucha/Chouchi au début du mois de mai 1992 et qui avait par la suite continué de servir à la fois dans les forces armées de la « RHK » et dans celles de l'Arménie, aurait tenu les propos suivants :

« Nous devons tourner la page de l'histoire : depuis 1991, nous considérons que le Karabagh est un État indépendant et nous disons qu'il doit mener lui-même les négociations. On ne trompe personne. Le monde entier sait que l'armée de la RHK fait partie des forces armées de l'Arménie, que le budget de la RHK est financé par le budget de l'Arménie, et que les responsables politiques de la RHK sont nommés par Erevan. Il est temps de considérer le Karabagh comme une partie de l'Arménie, comme l'une de ses régions. Dans les négociations, le territoire du Karabagh doit être considéré comme un territoire arménien, dont on ne cèdera pas un pouce. »

69. Dans la résolution 2009/2216(INI) du 20 mai 2010 sur la nécessité d'une stratégie de l'Union européenne en faveur du Caucase du Sud, le Parlement européen a notamment déclaré ceci :

« *Le Parlement européen*,

(...)

8. exprime ses vives préoccupations quant au fait que des centaines de milliers de réfugiés et de personnes qui ont fui leur foyer pendant la guerre du Haut-Karabagh ou à cause d'elle en restent éloignées et se voient privés de leurs droits, notamment leur droit au retour, à la propriété et à la sécurité individuelle ; demande à toutes les parties de reconnaître clairement et sans réserve ces droits et la nécessité de leur prompte concrétisation et d'une résolution rapide de ce problème, en assurant le respect des principes du droit international ; exige à cet effet le retrait des forces arméniennes de tous les territoires qu'elles occupent en Azerbaïdjan et parallèlement, le déploiement de forces internationales qui s'organisent, dans le respect de la charte des Nations unies, pour fournir les garanties de sécurité nécessaires pendant une période de transition, qui assurent la sécurité de la population du [Haut]-Karabagh et permettent aux personnes déplacées de réintégrer leurs foyers et d'éviter d'autres conflits qu'elles risqueraient d'occasionner ; invite les autorités de l'Arménie et de l'Azerbaïdjan, ainsi

que les dirigeants des communautés en présence, à démontrer leur volonté d'instaurer des relations interethniques pacifiques en prenant des mesures concrètes pour préparer le retour des personnes déplacées ; estime que la situation des personnes déplacées à l'intérieur de leur pays et des réfugiés doit être réglée conformément aux règles internationales en vigueur, entre autres la récente recommandation nº 1877 (2009) de l'APCE sur « Les peuples oubliés de l'Europe : protéger les droits fondamentaux des personnes déplacées de longue date » ;

(…) »

70. Le 18 avril 2012, le Parlement européen a adopté la résolution 2011/2315(INI) contenant les recommandations du Parlement européen au Conseil, à la Commission et au Service européen pour l'action extérieure sur les négociations concernant l'accord d'association UE-Arménie, dans laquelle il a notamment relevé qu'il existait « des notifications extrêmement préoccupantes concernant des activités illégales menées par des troupes arméniennes sur les territoires occupés de l'Azerbaïdjan, à savoir des manœuvres militaires régulières, le renouvellement de l'équipement et du personnel militaire et l'approfondissement des échelons défensifs ». Il a recommandé que la conclusion de l'accord d'association UE-Arménie soit conditionnée à des progrès substantiels vers « le retrait des forces arméniennes des territoires occupés dans la périphérie du Haut-Karabagh et le retour de ces territoires sous le contrôle de l'Azerbaïdjan » et que l'on « demand[e] à l'Arménie de cesser d'envoyer des appelés de l'armée régulière pour servir dans le Haut-Karabagh ».

71. Les requérants affirment que, à plusieurs reprises en 2012 et en 2013, le président de l'Arménie, son ministre de la Défense et des hauts responsables militaires arméniens se sont rendus dans les territoires contestés pour y inspecter les troupes, assister à des exercices militaires et rencontrer des militaires et d'autres responsables de la « RHK ». De même, en juillet 2013, des généraux et d'autres responsables militaires arméniens, dont le ministre de la Défense, auraient rencontré des commandants des forces armées de la « RHK » dans le Haut-Karabagh, afin, notamment, de discuter des mesures à prendre pour renforcer les effectifs militaires arméniens.

72. Le 15 janvier 2013, le président arménien, M. Serge Sargsian, a rencontré les responsables des branches législative, exécutive et judiciaire du ministère de la Défense de la République d'Arménie. Le discours qu'il a prononcé lors de cette rencontre a été publié le jour même sur le site Internet officiel de la présidence de la République d'Arménie. On pouvait notamment y lire ceci :

« Il s'est trouvé que dès les premières années de notre indépendance, l'armée a joué un rôle particulier dans notre société. Nous étions en guerre, et cela se ressentait dans toute l'Arménie – en certains endroits plus qu'ailleurs. En ce temps-là, chaque famille

avait un parent proche ou lointain dans l'armée arménienne, et l'armée était dans le cœur de chacun. Ce sentiment s'est trouvé renforcé lorsque notre armée est parvenue à la victoire, qui était si importante, qui était vitale.

(...)

Le but ultime de notre politique étrangère est la transcription définitive dans le droit de la victoire que nous avons remportée face à la guerre d'agression déclenchée par l'Azerbaïdjan contre l'Artsakh. La République du Haut-Karabagh doit être reconnue par la communauté internationale, car rien ne peut expliquer logiquement pourquoi le peuple, qui a exercé son droit à l'autodétermination et qui l'a ensuite protégé dans cette guerre déséquilibrée, devrait faire un jour partie de l'Azerbaïdjan. Pourquoi la destinée de ce peuple devrait-elle être définie par la décision illégale prise jadis par Staline ?

(...)

L'Arménie et l'Artsakh ne veulent pas la guerre ; mais chacun doit savoir que nous répondrons comme il se doit à toute provocation. Le peuple de l'Artsakh ne risquera plus jamais l'extermination, la République d'Arménie s'en porte garante.

(...)

La sécurité de l'Artsakh n'est pas pour nous une question de prestige ; c'est une question de vie ou de mort, au sens le plus immédiat de ces termes. Le monde entier doit savoir et comprendre que nous, les structures de pouvoir de l'Arménie et de l'Artsakh, résisterons à cette armée – si tant est que cette horde puisse être appelée une armée – qui rétribue des meurtriers. »

73. Dans un avis établi à la demande du Gouvernement, M. Hari Bucur-Marcu, expert militaire de nationalité roumaine, indiquait qu'il ne voyait rien dans la politique militaire arménienne qui pût être considéré comme une quelconque forme de volonté de contrôle sur les forces de la « RHK » ni aucun signe sur le terrain que les forces arméniennes fussent présentes ou actives en « RHK ». Il concluait que rien ne permettait de penser que l'Arménie exerçât son contrôle ou son autorité sur la « RHK » ou sur la force de défense de celle-ci ni que les forces arméniennes exerçassent quelque contrôle que ce fût sur le gouvernement ou les instances dirigeantes de la « RHK ». Le Gouvernement affirme que M. Bucur-Marcu avait eu la possibilité d'interroger de hauts responsables militaires arméniens et d'accéder à leurs dossiers. Grâce à un accord conclu avec le ministère des Affaires étrangères de la « RHK », il aurait en outre pu se rendre sur place, s'entretenir avec les responsables militaires et politiques et examiner un certain nombre de documents.

74. Le 25 juin 1994, la République d'Arménie et la « RHK » ont conclu un accord de coopération militaire (« l'accord de coopération militaire de 1994 »), qui prévoit notamment ceci :

« Le gouvernement de la République d'Arménie et le gouvernement de la République du Haut-Karabagh (ci-après dénommés « les Parties »),

Ayant égard à leur intérêt mutuel en matière de coopération militaire, tenant compte de la nécessité de développer leurs relations bilatérales et leur confiance mutuelle par une coopération entre les forces armées de leurs États respectifs, désireux de renforcer leur coopération militaire et militaro-technique,

Sont convenus de ce qui suit :

(...)

Article 3

Les deux Parties entretiendront une coopération militaire axée sur les domaines suivants :

1) établissement de l'armée et réforme des forces armées ;

2) science et instruction militaires ;

3) législation militaire ;

4) logistique des forces armées ;

5) encadrement médical des membres du personnel militaire et de leur famille ;

6) activités culturelles et sportives, tourisme.

La coopération pourra intervenir dans d'autres domaines sur accord écrit mutuel.

Article 4

Les Parties coopéreront par les moyens suivants :

1) visites et réunions de travail entre les ministres de la Défense, les chefs d'état-major ou d'autres représentants habilités par les ministres de la Défense ;

2) consultations, partage de l'expérience, formation du personnel militaire et renforcement des qualifications ;

3) organisation d'exercices militaires communs ;

4) participation à des conférences, des consultations et des séminaires ;

5) échange d'informations, de documents et de services sur la base d'arrangements spécifiques ;

6) manifestations culturelles ;

7) fourniture de services de nature militaire ;

8) mise en place des conditions propices à l'utilisation commune d'éléments de l'infrastructure des forces armées des Parties dans le cadre du présent accord ;

9) formation de spécialistes et de personnel militaire et technique hautement qualifiés.

Dans le cadre du présent accord de coopération, les Parties conviennent que les appelés de la République d'Arménie ont le droit d'effectuer leur service militaire à durée déterminée en République du Haut-Karabagh et que ceux de la République du Haut-Karabagh ont le droit d'effectuer le leur en République d'Arménie. Les appelés se trouvant en pareil cas seront exemptés de l'obligation d'effectuer leur service militaire à durée déterminée dans le pays dont ils ont la nationalité.

Article 5

Dans le cadre du présent accord, les Parties conviennent également que

1) si un citoyen de la République d'Arménie effectuant son service militaire à durée déterminée en République du Haut-Karabagh commet une infraction militaire, les poursuites pénales dirigées contre lui et le procès subséquent se tiendront sur le territoire de la République d'Arménie et seront menés par les autorités de la République d'Arménie conformément à la procédure prévue par la législation de la République d'Arménie ;

2) si un citoyen de la République du Haut-Karabagh effectuant son service militaire à durée déterminée en République d'Arménie commet une infraction militaire, les poursuites pénales dirigées contre lui et le procès subséquent se tiendront sur le territoire de la République du Haut-Karabagh et seront menés par les autorités de la République du Haut-Karabagh conformément à la procédure prévue par la législation de la République du Haut-Karabagh.

Dans le cadre du présent accord, les Parties s'apportent mutuellement un soutien technique en matière d'armement ainsi qu'en matière de récupération et d'entretien du matériel militaire.

La conclusion d'accords avec les professionnels de l'armement et de la récupération et de l'entretien du matériel militaire, de même que la prise en charge sur le territoire de chaque Partie des représentants des entreprises de fabrication, relèvent du ministère de la Défense de l'État client.

D'autres formes de coopération pourront être menées sur accord écrit mutuel.

(...) »

75. Le Gouvernement affirme que les appelés arméniens qui ont effectué leur service en « RHK » en vertu de l'article 4 de l'accord de coopération militaire de 1994 étaient pour l'essentiel des soldats non gradés qui ne représentaient pas plus de 5 % (1 500 individus au maximum) de l'armée de défense de la « RHK ». Toutefois, il n'exclut pas la possibilité que certains ressortissants arméniens se soient engagés dans l'armée de défense de la « RHK » sur une base contractuelle et volontaire. Parmi ceux qui serviraient dans cette armée, on trouverait, aux côtés d'habitants du Haut-Karabagh, des volontaires d'origine arménienne issus de la diaspora. Les soldats arméniens servant en « RHK » seraient sous le commandement direct de l'armée de défense de la « RHK », laquelle serait la seule force armée opérationnelle

dans l'enclave. Le Gouvernement affirme que les appelés arméniens qui ont servi en « RHK » en vertu de l'accord de coopération militaire de 1994 l'ont fait parce qu'ils le voulaient (voir, cependant, le rapport de l'ICG repris au paragraphe 65 ci-dessus).

Le Gouvernement ajoute que l'armée arménienne et l'armée de défense de la « RHK » entretiennent au sein d'une alliance de défense une coopération qui passe par des mesures telles que l'échange dans le domaine du renseignement, des rencontres entre hauts gradés, des séminaires, des exercices militaires communs, des défilés d'inspection, etc.

76. Le 11 octobre 2007, la Cour a rendu une décision partielle sur la recevabilité des requêtes de trois militaires qui faisaient grief aux autorités arméniennes de leur avoir fait subir des mauvais traitements et une détention irrégulière (*Zalyan, Sargsyan et Serobyan c. Arménie* (déc.), n^os^ 36894/04 et 3521/07, 11 octobre 2007). Dans l'affaire en question, les faits révélaient que les requérants avaient été enrôlés dans l'armée arménienne en mai 2003 et qu'ils avaient été affectés à l'unité militaire n^o^ 33651, stationnée près du village de Mataghis dans la région de Martakert, en « RHK ». En janvier 2004, deux militaires de la même unité que les requérants furent retrouvés morts. Dans le cadre de l'enquête qui fut menée par la suite, les requérants furent interrogés pendant plusieurs jours en avril 2004 dans le Haut-Karabagh – d'abord au sein de leur unité, puis au parquet militaire de la garnison de Martakert et enfin dans les locaux de la police militaire de Stepanakert – avant d'être transférés à Erevan pour la suite de la procédure. Parmi les officiers qui les interrogèrent dans le Haut-Karabagh se trouvaient deux enquêteurs du parquet militaire d'Arménie, un enquêteur du parquet militaire de la garnison de Martakert et un membre de la police militaire arménienne. Un chef de bataillon de l'unité militaire était aussi présent au premier interrogatoire. Les requérants furent finalement accusés de meurtre, et leur procès pénal s'ouvrit en novembre 2004 devant le tribunal régional de Syunik siégeant à Stepanakert. Les requérants assistèrent au procès. Le 18 mai 2005, le tribunal les jugea coupables de meurtre et les condamna à quinze ans d'emprisonnement.

77. D'autres cas ont été rapportés par les organisations de défense des droits de l'homme Forum 18 et Human Rights Watch. Celles-ci ont ainsi noté qu'en juin 2004, M. Armen Grigoryan, objecteur de conscience de nationalité arménienne, avait été transféré d'un bureau de recrutement militaire d'Erevan dans une unité militaire stationnée dans le Haut-Karabagh et que, après avoir fui cette unité, il avait été arrêté, puis reconnu coupable de refus d'exécuter le service militaire par un tribunal siégeant à Stepanakert le 9 juin 2005 et condamné à deux ans d'emprisonnement.

2. Liens politiques et judiciaires

78. Plusieurs personnalités politiques arméniennes de premier plan ont exercé, à différents moments, de hautes fonctions tant en République d'Arménie qu'en « RHK » ou ont eu, d'une autre manière, des liens étroits avec le Haut-Karabagh. Le premier président de la République d'Arménie, M. Levon Ter Petrossian, était membre du « Comité Karabagh » arménien qui, à la fin des années 1980, mena le mouvement pour l'unification du Haut-Karabagh avec l'Arménie. En avril 1998 lui succéda M. Robert Kotcharian, qui avait auparavant été Premier ministre de la « RHK » (d'août 1992 à décembre 1994), président de la « RHK » (de décembre 1994 à mars 1997) et Premier ministre de la République d'Arménie (de mars 1997 à avril 1998). En avril 2008, M. Serge Sargsian devint le troisième président de l'Arménie. En août 1993, il fut nommé ministre de la Défense de l'Arménie après avoir été, de 1989 à 1993, président du « Comité des forces d'autodéfense de la République du Haut-Karabagh ». Par ailleurs, M. Seyran Ohanian quitta en 2007 ses fonctions de ministre de la Défense de la « RHK » pour devenir commandant en chef des forces armées arméniennes. En avril 2008, il fut nommé ministre de la Défense de l'Arménie.

79. Les requérants soutiennent que les lois de la République d'Arménie s'appliquent en « RHK ». Le Gouvernement répond à cela que, entre janvier 1992 et août 2006, la « RHK » a adopté 609 lois différentes, l'une des premières étant la « loi sur le fondement de l'indépendance de l'État de la République du Haut-Karabagh », dont l'article 2 dispose que « la RHK tranche en toute indépendance toutes les questions qui concernent ses orientations politiques, économiques, sociales et culturelles ainsi que toutes les questions relatives à son aménagement, à son administration et à ses divisions territoriales ». Il ajoute que la « RHK » dispose de ses propres organes exécutifs et judiciaires, à savoir un gouvernement (le Conseil des ministres), des tribunaux (la Cour suprême et les tribunaux de première instance de la « RHK ») et un ministère public (le parquet de la « RHK »), tous instaurés en janvier 1992, et qu'elle a aussi ses propres président, parlement, force de police ainsi que des collectivités locales, y compris des administrations chargées de gérer les territoires qui l'entourent et dont elle nomme elle-même les représentants. Le Gouvernement indique par ailleurs que des élections présidentielles et législatives se tiennent en « RHK » et que si plusieurs lois ont effectivement été reprises de la législation arménienne, elles ne s'appliquent pas automatiquement, c'est-à-dire suivant les décisions des juridictions arméniennes, mais que les juridictions de la « RHK » les interprètent et les appliquent de manière indépendante, que ce soit dans le district de Latchin ou ailleurs.

3. Appui financier et autre

80. Dans son rapport de 2005 (paragraphe 65 ci-dessus), l'ICG indiquait ceci (pp. 12-13) :

> « L'économie du Haut-Karabagh était auparavant intégrée à celle de l'Azerbaïdjan soviétique, mais elle a été en grande partie détruite par la guerre. Aujourd'hui, elle est étroitement liée à l'Arménie, dont elle est fortement tributaire financièrement. Toutes les transactions passent par l'Arménie, et les produits originaires du Haut-Karabagh sont souvent étiquetés « produit en Arménie » pour l'exportation. Erevan fournit la moitié du budget. (...)
>
> Le Haut-Karabagh est lourdement tributaire de l'appui financier extérieur, qui provient principalement de l'Arménie, mais aussi des États-Unis et de la diaspora arménienne. Il n'est pas en mesure de prélever suffisamment de recettes pour faire face à ses besoins budgétaires et, en termes absolus, il reçoit un appui extérieur croissant. Le budget de 2005 s'élevait à 24,18 milliards de drams (environ 53,73 millions de dollars). Les recettes perçues localement devraient atteindre 6,46 milliards de drams (environ 14,35 millions de dollars), soit 26,7 % des dépenses.
>
> Depuis 1993, le Haut-Karabagh bénéficie d'un « prêt inter-États » de l'Arménie. Selon le Premier ministre arménien, ce prêt s'élèvera à 13 milliards de drams (28,88 millions de dollars) en 2005, soit une augmentation considérable par rapport à 2002, où le montant du prêt était de 9 milliards de drams (16,07 millions de dollars). Cependant, le Premier ministre (de fait) du Haut-Karabagh affirme qu'une partie de ce prêt (4,259 milliards de drams, soit environ 9,46 millions de dollars) constitue en fait le reversement des sommes que l'Arménie prélève au titre de la TVA et des droits de douane sur les biens destinés au Haut-Karabagh qui transitent par son territoire. Le reste de la somme est remboursable sur dix ans à un taux d'intérêt insignifiant. Toutefois, bien que l'Arménie accorde ces prêts depuis 1993, rien n'a encore été remboursé. Selon le Premier ministre arménien, Stepanakert « n'est pas encore en mesure de payer (...) Dans les années à venir, nous devrons renouveler ce prêt pour que le pays puisse continuer à bâtir ses infrastructures (...) nous ne pensons pas qu'il puisse se débrouiller seul dans un avenir proche ».
>
> Les États-Unis sont le seul autre pays qui apporte au Haut-Karabagh une assistance gouvernementale directe. Le Congrès a désigné le Haut-Karabagh comme bénéficiaire d'une aide humanitaire distincte de l'Azerbaïdjan pour la première fois en 1998. Les fonds américains sont gérés par l'Agence américaine pour le développement international (USAID), qui les verse à des ONG telles que *Fund for Armenian Relief*, *Save the Children* ou encore le Comité international de la Croix Rouge. De 1998 à septembre 2004, les États-Unis ont promis au Haut-Karabagh 23 274 992 dollars et lui en ont versé 17 831 608. Les groupes de pression arméniens ont joué un rôle important dans l'obtention de ces fonds. »

L'ICG indique également que le « prêt inter-États » arménien représentait 67,3 % du budget de la « RHK » en 2001 (selon l'annuaire statistique du Haut-Karabagh) et 56,9 % en 2004 (selon les informations communiquées à l'ICG par le directeur du Service national des statistiques de la « RHK »).

81. Le prêt consenti par la République d'Arménie à la « RHK » pour les années 2004 et 2005 se serait élevé à 51 millions de dollars. Sur cette somme, 40 millions auraient été utilisés pour reconstruire des établissements d'enseignement, et les 11 autres pour venir en aide aux familles de soldats tués.

82. Le Fonds arménien Hayastan a été créé par un décret présidentiel arménien du 3 mars 1992. Selon son site Internet, sa mission est la suivante :

> « [U]nir les Arméniens d'Arménie et de l'étranger pour surmonter les difficultés du pays et contribuer au développement durable de l'Arménie et de l'Artsakh. En plus de devoir régler les problèmes résultant de l'éclatement de l'Union soviétique, le gouvernement a dû faire face aux conséquences du tremblement de terre qui a frappé Spitak en 1988 et à un blocus économique, et il lui a fallu tenter de réhabiliter les zones touchées par le conflit dans l'Artsakh. »

Le rapport annuel du Fonds pour 2012 comprend des messages de M. Serge Sargsian, président de la République d'Arménie, et de M. Bako Sahakian, président de la « République de l'Artsakh », qui déclarent notamment ceci :

> M. Sargsian :
>
> « Le Fonds arménien Hayastan est l'incarnation de l'unité entre l'Arménie, l'Artsakh et la diaspora. En tant que tel, il transforme constamment, résolument et sous nos yeux notre force intérieure pan-nationale en pouvoir concret. »
>
> M. Sahakian :
>
> « L'année 2012 a été une année de célébration pour le peuple arménien. En tant que nation, nous avons célébré le vingtième anniversaire de la fondation de l'armée de défense de la RHK et de la libération de Chouchi, victoire magnifique qui a été rendue possible par les efforts conjoints et la volonté inébranlable de l'ensemble du peuple arménien, par la bravoure et l'audace altruistes de ses vaillants fils et filles. »

Le Fonds a 25 filiales dans 22 pays. Ses ressources proviennent de dons, versés principalement par des membres de la diaspora arménienne. Il récolte actuellement 21 millions de dollars par an environ.

Le Fonds a pour instance dirigeante suprême un conseil d'administration, qui, en vertu de ses statuts, est présidé d'office par le président de la République d'Arménie. Ce conseil d'administration, qui a compté de 22 à 37 membres selon les périodes, comprend de nombreuses personnalités et des représentants des institutions politiques, non gouvernementales, religieuses et humanitaires de l'Arménie et de la diaspora. En étaient membres en 2013, outre le président arménien en exercice, M. Serge Sargsian, son prédécesseur, M. Robert Kotcharian, le Premier ministre arménien, les ministres arméniens des Affaires étrangères, des Finances et de la Diaspora, le président, l'ancien président et le Premier ministre de la « RHK », le pré-

sident de la Cour constitutionnelle arménienne, le président de l'Assemblée nationale arménienne, le président de la Banque centrale arménienne, quatre responsables religieux arméniens, trois représentants de partis politiques arméniens, un représentant du syndicat des fabricants et des entrepreneurs (employeurs) d'Arménie et des représentants de quatre organisations non gouvernementales de droit américain ou canadien. Le reste des 37 membres était composé de 13 personnes issues de la diaspora arménienne. La composition du conseil d'administration n'a pas varié depuis la création du Fonds.

Depuis sa création, le Fonds arménien Hayastan a financé et supervisé de nombreux projets, parmi lesquels la construction ou la rénovation de routes, de logements, d'établissements scolaires, d'hôpitaux et de réseaux d'eau et de gaz. Du milieu à la fin des années 1990, il a construit l'autoroute reliant la ville arménienne de Goris à celles de Latchin et de Choucha/Chouchi et Stepanakert dans le Haut-Karabagh. En 2001, il a financé la construction de l'autoroute nord-sud dans le Haut-Karabagh. Selon son rapport annuel pour 2005, il a financé cette année-là différents projets pour un montant total de quelque 11 millions de dollars, dont environ 6,1 millions de dollars sont allés à des projets réalisés dans le Haut-Karabagh. Selon les chiffres fournis par le Gouvernement, ses dépenses pour 2012, qui n'étaient pas encore définitives, s'élevaient à 10,7 millions de dollars dans le Haut-Karabagh et 3,1 millions de dollars en Arménie. Toujours selon les chiffres du Gouvernement, le Fonds a alloué entre 1995 et 2012 un montant total de 111 millions de dollars – soit 6 millions de dollars par an environ – à des projets dans le Haut-Karabagh. Entre 1992 et 2012, il a alloué 115 millions de dollars à des projets en Arménie.

83. Les requérants et le gouvernement azerbaïdjanais affirment que les résidents de la « RHK » et des territoires avoisinants se voient couramment délivrer des passeports arméniens. Selon l'ICG, « l'Arménie a délivré un passeport arménien à la majorité des habitants afin qu'ils puissent se rendre à l'étranger » (rapport de 2005, susmentionné, p. 5). Le gouvernement azerbaïdjanais indique également que les résidents de ces territoires peuvent obtenir la nationalité arménienne. Il cite à cet égard l'article 13 de la loi de la République d'Arménie sur la citoyenneté de la République d'Arménie (« Acquisition de la citoyenneté par naturalisation »), qui est ainsi libellé :

> « Toute personne âgée d'au moins dix-huit ans et apte à travailler qui n'est pas citoyenne de la République d'Arménie peut en demander la citoyenneté :
>
> 1) si elle a résidé légalement sur le territoire de la République d'Arménie pendant les trois dernières années ;
>
> 2) si elle parle couramment arménien ; et
>
> 3) si elle connaît la Constitution de la République d'Arménie.

Une personne qui n'est pas citoyenne de la République d'Arménie peut obtenir la citoyenneté arménienne nonobstant les points 1) et 2) de la première partie du présent article :

1) si elle épouse un citoyen de la République d'Arménie ou a un enfant de nationalité arménienne ;

2) si ses parents ou au moins l'un de ses parents ont possédé la citoyenneté arménienne par le passé ou si elle est née sur le territoire de la République d'Arménie et a demandé la citoyenneté arménienne dans les trois ans suivant son dix-huitième anniversaire ;

3) si elle est d'origine arménienne (a des ancêtres arméniens) ; ou

4) si elle a renoncé à la citoyenneté arménienne de son plein gré après le 1er janvier 1995. »

Le Gouvernement indique pour sa part sur ce point que l'Arménie et la « RHK » ont l'une comme l'autre des dispositions prévoyant la double nationalité, et que par ailleurs, l'Arménie délivre des passeports aux résidents de la « RHK » dans certaines circonstances en vertu d'un accord bilatéral sur l'« organisation du système de passeports » conclu le 24 février 1999. L'article 1 de cet accord est ainsi libellé :

« Les Parties conviennent que leurs citoyens ont le droit de libre circulation et de libre établissement sur le territoire de chacune d'elles.

Dans le cadre du présent accord, jusqu'à ce que la République du Haut-Karabagh soit internationalement reconnue, les citoyens de celle-ci peuvent, lorsqu'ils souhaitent quitter son territoire ou celui de la République d'Arménie, solliciter la délivrance d'un passeport auprès de la République d'Arménie.

Les Parties conviennent que, dans le cadre du présent article, la délivrance à un citoyen de la République du Haut-Karabagh d'un passeport de la République d'Arménie ne lui confère pas la citoyenneté de la République d'Arménie. Ces passeports ne peuvent être utilisés par les citoyens de la République du Haut-Karabagh que pour quitter le territoire de la République d'Arménie ou celui de la République du Haut-Karabagh, et ils ne peuvent servir de pièce d'identité à usage interne ni en République du Haut-Karabagh ni en République d'Arménie. »

Un règlement d'application de cet accord a également été adopté en 1999. Il prévoit qu'il n'est délivré de passeport arménien à un résident de la « RHK » que dans des cas exceptionnels, lorsque le voyage à l'étranger est en relation avec un traitement médical, des études ou un autre motif personnel. Le Gouvernement affirme que moins de 1 000 personnes se sont vu délivrer un passeport dans le cadre de l'accord de 1999.

84. D'après les requérants et le gouvernement azerbaïdjanais, le dram arménien est la principale monnaie de la « RHK », tandis que d'après le Gouvernement les euros, les dollars américains, les livres sterling et même les dollars australiens y sont aussi acceptés.

85. Le gouvernement azerbaïdjanais indique que l'atlas national de l'Arménie publié en 2007 par le Comité national du cadastre incorpore systématiquement, dans les différents types de cartes, la « RHK » et les territoires occupés adjacents au territoire national de la République d'Arménie. Il ajoute que le Comité national du cadastre dépend du gouvernement de la République d'Arménie et que ledit atlas constitue donc une publication officielle.

86. Les requérants et le gouvernement azerbaïdjanais affirment que le gouvernement arménien mène une politique visant à inciter des colons originaires d'Arménie et, plus récemment, de Syrie, à s'installer en « RHK ».

En février 2005, l'OSCE a publié le rapport de sa mission d'enquête dans les territoires occupés de l'Azerbaïdjan entourant le Haut-Karabagh (« *Report of the OSCE Fact-Finding Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh* »). Le mandat de la mission était de déterminer s'il existait des colonies dans les territoires ; il excluait strictement les structures et le personnel militaires ainsi que les considérations politiques. Les conclusions formulées dans le rapport à l'égard des colonies dans le district de Latchin sont les suivantes :

> « D'une manière générale, les origines des colons installés à Latchin sont les mêmes que celles des colons installés dans les autres territoires. Ainsi, la grande majorité d'entre eux proviennent de différentes parties de l'Azerbaïdjan et sont pour la plupart arrivés à Latchin après avoir passé des années dans des abris temporaires en Arménie. Une minorité relativement faible d'entre eux sont des Arméniens venus d'Arménie, à la suite notamment du tremblement de terre. Ils ont entendu dire, de bouche à oreille, dans les médias ou par des membres d'ONG en Arménie et dans le Haut-Karabagh, qu'il était possible de s'installer à Latchin. Il n'y a aucun signe d'installation contrainte ou de recrutement systématique. »

Le rapport indiquait en outre ceci :

> « Il est incontesté que le Haut-Karabagh intervient directement dans le district de Latchin. Il en finance le budget et reconnaît ouvertement en être directement responsable. Les résidents de Latchin participent aussi bien aux élections locales qu'aux élections du Haut-Karabagh.
>
> Même si les liens entre le Haut-Karabagh et la République d'Arménie demeurent hors du champ du présent rapport, les membres de la mission précisent qu'ils n'ont constaté aucun signe d'implication directe du gouvernement arménien à Latchin, mais qu'ils se sont entretenus avec certains résidents de Latchin qui détenaient des passeports arméniens et affirmaient participer aux élections arméniennes. »

II. L'ENGAGEMENT CONJOINT DE L'ARMÉNIE ET DE L'AZERBAÏDJAN

87. Avant leur adhésion au Conseil de l'Europe, l'Arménie et l'Azerbaïdjan se sont engagés auprès du Comité des Ministres et de l'Assemblée

parlementaire à régler pacifiquement le conflit du Haut-Karabagh (avis nos 221 (2000) et 222 (2000) de l'Assemblée parlementaire et les résolutions Res(2000)13 et Res(2000)14 du Comité des Ministres).

Les paragraphes pertinents de l'avis no 221 (2000) de l'Assemblée parlementaire sur la demande d'adhésion de l'Arménie au Conseil de l'Europe sont les suivants :

> « 10. L'Assemblée prend note de la lettre du président de l'Arménie dans laquelle il s'engage à respecter l'accord de cessez-le-feu jusqu'à ce qu'une solution définitive au conflit [du Haut-Karabagh] soit trouvée et à poursuivre les efforts pour parvenir à son règlement pacifique et négocié, sur la base de compromis acceptables pour toutes les parties concernées.
>
> (...)
>
> 13. L'Assemblée parlementaire prend note des lettres du président de l'Arménie, du président du parlement, du Premier ministre, ainsi que des présidents des partis politiques représentés au parlement, et note que l'Arménie s'engage à respecter les engagements énumérés ci-dessous :
>
> (...)
>
> 13.2 en matière de conflit dans le Haut-Karabagh :
>
> a) à poursuivre les efforts pour résoudre ce conflit exclusivement par des moyens pacifiques ;
>
> b) à utiliser l'influence considérable qu'elle a sur les Arméniens du Haut-Karabagh pour encourager la résolution du conflit ;
>
> c) à régler les différends internationaux et internes par des moyens pacifiques et selon les principes de droit international (obligation qui incombe à tous les États membres du Conseil de l'Europe), en rejetant résolument toute menace d'employer la force contre ses voisins ;
>
> (...) »

La résolution Res(2000)13 du Comité des Ministres invitant l'Arménie à devenir membre du Conseil de l'Europe renvoie aux engagements pris par ce pays tels qu'ils figurent dans l'avis no 221 (2000) de l'Assemblée parlementaire et aux assurances pour leur mise en œuvre données par le gouvernement arménien.

III. LE DROIT INTERNE PERTINENT

A. Les lois de la RSS d'Azerbaïdjan

88. Les lois de la RSS d'Azerbaïdjan pertinentes pour déterminer si les requérants avaient des droits de propriété sur les biens revendiqués sont la Constitution de 1978, le code foncier de 1970 et le code du logement de 1983.

1. La Constitution de 1978

89. La Constitution de 1978 prévoyait ceci :

Article 13

« La base des biens personnels des citoyens de la RSS d'Azerbaïdjan est constituée du revenu de leur travail. Les biens personnels peuvent comprendre des biens d'équipement ménager, de consommation personnelle, de confort et d'utilité, une maison, et des revenus du travail économisés. Les biens personnels des citoyens et le droit d'en hériter sont protégés par l'État.

Les citoyens peuvent se voir attribuer des parcelles de terrain conformément à la loi aux fins de la pratique d'une agriculture vivrière (y compris l'élevage de bétail et de volaille), du jardinage et de la construction d'un logement individuel. Ils sont tenus d'utiliser cette terre de manière rationnelle. Les fermes d'État et les fermes collectives apportent aux citoyens une assistance pour l'exploitation de leurs petites parcelles.

Les citoyens ne peuvent, au détriment de l'intérêt public, tirer de leurs biens personnels ou de ceux dont ils ont la jouissance un revenu ne provenant pas du travail. »

2. Le code foncier de 1970

90. Les dispositions pertinentes du code foncier prévoyaient ceci :

Article 4
Propriété publique (du peuple) de la terre

« En vertu de la Constitution de l'URSS et de la Constitution de la RSS d'Azerbaïdjan, la terre appartient à l'État – elle est le bien commun de tout le peuple soviétique.

En URSS, la terre appartient exclusivement à l'État, qui n'en concède que l'usage. Tout agissement violant directement ou indirectement le droit de propriété de l'État sur la terre est interdit. »

Article 24
Documents certifiant le droit d'usage de la terre

« Le droit d'usage que détiennent les fermes collectives, les fermes d'État et d'autres [entités ou individus] sur les parcelles de terrain est attesté par un certificat de l'État.

La forme de ce certificat est déterminée par le soviet des ministres de l'URSS conformément à la législation foncière de l'URSS et des républiques de l'Union.

Le droit d'usage temporaire sur une terre est attesté par un certificat dont la forme est déterminée par le soviet des ministres de la RSS d'Azerbaïdjan. »

Article 25
Règles relatives à la délivrance des certificats attestant le droit d'usage de la terre

« Les certificats d'État relatifs au droit d'usage indéfini sur une terre et les certificats relatifs au droit d'usage temporaire sur une terre sont délivrés aux fermes collectives,

aux fermes d'État et à d'autres institutions, agences et organismes publics d'État ou coopératifs ainsi qu'aux citoyens par le Comité exécutif du soviet des représentants du peuple du district ou de la ville sur le territoire desquels se trouve la parcelle de terrain à attribuer (sous l'autorité de la République). »

Article 27
Utilisation de la terre aux fins indiquées

« Les utilisateurs de la terre ont le droit et l'obligation d'utiliser les parcelles de terrain qui leur sont attribuées dans le but pour lequel elles leur ont été attribuées. »

Article 28
Droits des utilisateurs de la terre
sur les parcelles qui leur ont été attribuées

« En fonction du but précisé pour l'utilisation de la terre attribuée, les utilisateurs de cette terre ont le droit d'y faire ce qui suit, dans le respect des règles applicables :

– construire des bâtiments d'habitation, des bâtiments industriels ou des bâtiments publics ainsi que d'autres types de bâtiments et de structures ;

– planter des espèces cultivables, boiser ou planter des arbres fruitiers, décoratifs ou autres ;

– utiliser les zones de cultures et de pâture et les autres terres agricoles ;

– utiliser les ressources naturelles souterraines abondantes, la tourbe et les étendues d'eau à des fins économiques et utiliser les autres ressources de la terre. »

Article 126-1
Droit d'utiliser la terre en cas d'héritage
d'un droit de propriété sur un bâtiment

« Si la propriété d'un bâtiment sis dans un village est transmise par succession et si les héritiers n'ont pas le droit d'acheter une parcelle pour le jardinage familial en vertu de la procédure applicable, il leur est attribué un droit d'usage sur la parcelle de terrain nécessaire pour qu'ils puissent conserver le bâtiment. La taille de cette parcelle est déterminée par le soviet des ministres de la RSS d'Azerbaïdjan. »

Article 131
Attribution de parcelles de terrain à des citoyens
aux fins de la construction de logements personnels

« Des parcelles de terrain destinées à la construction de logements individuels qui deviendront des biens personnels sont attribuées aux citoyens qui résident dans les agglomérations de la RSS d'Azerbaïdjan où la construction de logements personnels n'est pas interdite par la législation en vigueur. Ces parcelles sont prélevées sur les terres appartenant aux villes et aux agglomérations urbaines, sur les terres des villages qui ne sont pas utilisées par des fermes collectives, par des fermes d'État ou par d'autres entreprises agricoles, sur les terres de la réserve de l'État, ou sur les terres du fond forestier de l'État qui ne sont pas comprises dans les zones d'espaces verts des villes.

Elles sont attribuées dans un but précis conformément à la procédure prévue par (...) le présent code.

La construction de logements personnels dans les villes et les agglomérations ouvrières se fait sur des zones vides qui ne nécessitent pas de dépenses aux fins de leur usage ou de leur préparation technique et, en principe, près des voies de chemin de fer et des voies de circulation routière qui permettent un transit régulier, sous la forme de districts ou d'agglomérations indépendants. »

3. Le code du logement de 1983

91. L'article 10.3 du code du logement était ainsi libellé :

« Les citoyens ont le droit de détenir une maison en tant que bien personnel conformément à la législation de l'URSS et de la RSS d'Azerbaïdjan. »

4. L'instruction de 1985 sur les règles d'enregistrement des habitations

92. En son article 2, l'instruction de 1985, que le Service central des statistiques de l'URSS avait approuvée par l'ordonnance n° 380 du 15 juillet 1985, énumérait les documents servant à prouver les droits réels sur un bâtiment d'habitation. L'article 2.1 mentionnait les différents types de documents constituant une preuve directe de l'existence d'un droit de propriété. L'article 2.2 énonçait que, en l'absence de pareille preuve, le droit de propriété pouvait être démontré indirectement au moyen d'autres documents, parmi lesquels :

« des documents d'inventaire technique lorsqu'ils contiennent une référence exacte à la possession par le propriétaire d'un document dûment établi certifiant son droit sur le bâtiment d'habitation ».

B. Les lois de la République d'Azerbaïdjan

93. Après l'indépendance, la République d'Azerbaïdjan a adopté, le 9 novembre 1991, des lois sur les biens qui, pour la première fois, désignaient la terre comme objet de propriété privée. Ce n'est toutefois qu'en 1996 que la loi sur la réforme foncière a fixé des règles détaillées sur la privatisation des parcelles de terrain attribuées aux citoyens. Les requérants ayant quitté Latchin en 1992, ils n'ont donc pas pu demander à devenir propriétaires des terres dont ils avaient l'usage.

1. La loi de 1991 sur les biens

94. La loi de 1991 sur les biens en République d'Azerbaïdjan, entrée en vigueur le 1er décembre 1991, prévoyait notamment ceci :

Article 21
Objets de droits de propriété du citoyen

« 1. Un citoyen peut posséder :

– des parcelles de terrain ;

– des maisons, des appartements, des maisons de campagne, des garages, des équipements domestiques et des biens d'usage privé ;

– des actions, des obligations et d'autres titres financiers ;

– des médias de masse ;

– des entreprises et des complexes de production de biens de consommation et de biens destinés au marché social et au marché culturel, à l'exception de certains types de biens qui, en vertu de la loi, ne peuvent, pour des raisons de sûreté de l'État ou de sécurité publique ou en raison d'obligations internationales, être possédés par des citoyens.

(...)

5. Un citoyen qui possède un appartement, une maison d'habitation, une maison de campagne, un garage ou un autre bien immobilier a le droit d'en disposer à sa guise : il peut les vendre, les léguer, les donner, les louer ou prendre à leur égard toute autre mesure n'enfreignant pas la loi. »

2. Le code foncier de 1992

95. Le nouveau code foncier, entré en vigueur le 31 janvier 1992, contenait les dispositions suivantes :

Article 10
Propriété privée de parcelles de terrain

« Les parcelles de terrain sont attribuées en propriété privée aux citoyens de la République d'Azerbaïdjan conformément aux demandes formulées par les autorités exécutives locales en vertu de décisions du soviet des représentants du peuple du district ou de la ville aux fins visées ci-dessous :

1) construction de maisons privées et de dépendances et développement d'une agriculture vivrière, pour les personnes résidant de manière permanente sur le territoire ;

2) exploitation des fermes et des autres organismes participant à la production de produits agricoles destinés à la vente ;

3) construction de maisons de campagne privées ou collectives et de garages privés dans l'enceinte de la ville ;

4) construction de bâtiments liés à des activités commerciales ;

5) activités de production ethnique traditionnelle.

En vertu de la législation de la République d'Azerbaïdjan, des parcelles de terrain peuvent être attribuées en propriété privée à des citoyens à d'autres fins. »

Article 11
Conditions d'attribution de parcelles de terrain en propriété privée

« Aux fins prévues à l'article 10 du présent code, le droit de propriété sur une parcelle de terrain est concédé gratuitement.

Les parcelles de terrain attribuées à des citoyens avant la date d'entrée en vigueur du présent code pour qu'ils y érigent leur maison individuelle, leur maison de campagne ou leur garage deviennent leur propriété.

Un droit de propriété privée ou de jouissance perpétuelle transmissible par succession sur une parcelle de terrain ne peut être accordé aux personnes physiques ou morales étrangères.

Une parcelle de terrain ne peut être restituée à ses anciens propriétaires ni à leurs héritiers. Ceux-ci peuvent obtenir un droit de propriété sur la parcelle de terrain dans les conditions posées dans le présent code. »

Article 23
Attribution de parcelles de terrain

« Le droit de propriété, de jouissance, d'usage ou de location sur une parcelle de terrain est attribué aux citoyens, aux entreprises et aux organisations par décision du soviet des représentants du peuple du district ou de la ville conformément à la procédure d'attribution de terres et aux documents relatifs à l'utilisation des terres.

L'utilisation à laquelle est destinée la parcelle de terrain est indiquée dans le certificat d'attribution de la terre.

La procédure d'introduction et d'examen des demandes d'attribution ou de saisie de parcelles de terrain, y compris la saisie de parcelles de terrain pour des motifs de nécessité d'État ou de nécessité publique, est déterminée par le conseil des ministres de la République d'Azerbaïdjan.

Les demandes d'attribution de parcelles de terrain introduites par les citoyens sont examinées dans un délai de un mois au maximum. »

Article 30
Documents attestant le droit de propriété et le droit de jouissance et d'usage perpétuel sur des terres

« Le droit de propriété et le droit de jouissance et d'usage perpétuel sur des terres sont attestés par un certificat de l'État délivré par le soviet des représentants du peuple du district ou de la ville.

La forme dudit certificat d'État est approuvée par le conseil des ministres de la République d'Azerbaïdjan. »

Article 31
Officialisation du droit d'usage temporaire de terres

« Le droit d'usage temporaire de terres, y compris lorsqu'il résulte d'un bail, fait l'objet d'un accord écrit et d'un certificat. Ces documents sont enregistrés par le soviet

des représentants du peuple du district ou de la ville et sont délivrés au bénéficiaire du droit d'usage. La forme de l'accord écrit et du certificat est approuvée par le conseil des ministres de la République d'Azerbaïdjan. »

Article 32
Motifs de révocation du droit de propriété, du droit de jouissance et d'usage et du droit de location sur des terres

« Le soviet des représentants du peuple du district ou de la ville qui a attribué sur une parcelle de terrain ou sur une partie d'une parcelle un droit de propriété, un droit de jouissance et d'usage ou un droit de location peut révoquer ce droit dans les cas suivants :

1) abandon ou aliénation volontaires de la parcelle par son propriétaire ;

2) expiration de la période pour laquelle la parcelle avait été attribuée ;

3) cessation des activités de l'entreprise, de l'agence, de l'organisation ou de l'exploitation agricole ;

4) utilisation de la terre à des fins autres que celle à laquelle elle était destinée ;

5) fin de la relation de travail sur la base de laquelle la terre avait été attribuée, sauf dans les cas prévus par la loi ;

6) non-respect des termes du bail locatif ;

7) défaut de paiement pendant deux ans consécutifs, sans raison valable, de la taxe foncière prévue par la loi ou du loyer prévu par le bail ;

8) défaut, pendant un an et sans raison valable, d'utiliser la parcelle attribuée à des fins de production agricole ou défaut, pendant deux ans et sans raison valable, d'utiliser la parcelle attribuée à des fins de production non agricole ;

9) nécessité de saisir la parcelle pour des motifs de nécessité d'État ou de nécessité publique ;

10) transfert du droit de propriété ou du droit de gestion opérationnelle sur des bâtiments ou des structures ;

11) décès du bénéficiaire du droit de jouissance.

La législation de la République d'Azerbaïdjan peut prévoir d'autres motifs de révocation du droit de propriété, du droit de jouissance et d'usage et du droit de location attribués sur une parcelle de terrain. »

IV. LE DROIT INTERNATIONAL PERTINENT

96. L'article 42 du Règlement concernant les lois et coutumes de la guerre sur terre (La Haye, 18 octobre 1907, ci-après « le Règlement de La Haye de 1907 ») définit l'occupation belligérante comme suit :

« Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer. »

Il y a donc occupation au sens du Règlement de La Haye de 1907 lorsqu'un État exerce de fait son autorité sur le territoire ou sur une partie du territoire d'un État ennemi[3]. L'avis majoritaire est que l'on entend par « autorité de fait » un contrôle effectif.

On considère qu'un territoire ou une partie d'un territoire est sous occupation militaire lorsque l'on parvient à démontrer que des troupes étrangères y sont présentes et que ces troupes sont en mesure d'exercer un contrôle effectif, sans le consentement de l'autorité souveraine. La plupart des experts estiment que la présence physique de troupes étrangères est une condition *sine qua non* de l'occupation[4], autrement dit que l'occupation n'est pas concevable en l'absence de présence militaire sur le terrain ; ainsi, l'exercice d'un contrôle naval ou aérien par des forces étrangères opérant un blocus ne suffit pas[5].

97. Les règles du droit international humanitaire ne traitent pas expressément de la question de l'impossibilité pour des individus d'accéder à leur domicile ou à leurs biens, mais l'article 49 de la Convention IV de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre (« la quatrième Convention de Genève ») envisage le cas des déplacements forcés à l'intérieur des territoires occupés ou depuis ces territoires. Il est ainsi libellé :

« Les transferts forcés, en masse ou individuels, ainsi que les déportations de personnes protégées hors du territoire occupé dans le territoire de la Puissance occupante ou dans celui de tout autre État, occupé ou non, sont interdits, quel qu'en soit le motif.

Toutefois, la Puissance occupante pourra procéder à l'évacuation totale ou partielle d'une région occupée déterminée, si la sécurité de la population ou d'impérieuses

3. Voir, par exemple, E. Benvenisti, *The International Law of Occupation* (Oxford, Oxford University Press, 2012), p. 43, Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leyde, Martinus Nijhoff Publishers, 2009), pp. 5-8, Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press, 2009), pp. 42-45, §§ 96-102, et A. Roberts, « *Transformative Military Occupation: Applying the Laws of War and Human Rights* », *American Journal of International Law* vol. 100 (2006), p. 580, pp. 585-586.

4. La plupart des experts que le CICR a consultés dans le cadre de son projet relatif à l'occupation et aux autres formes d'administration d'un territoire étranger s'accordaient à dire qu'une présence militaire sur le terrain est nécessaire pour établir qu'il y a occupation – voir T. Ferraro, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (Genève, CICR, 2012), pp. 10, 17 et 33, E. Benvenisti, *op. cit.*, pp. 43 et suivantes, et V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris, éditions Pedone, 2010), pp. 35-41.

5. T. Ferraro, *op. cit.*, pp. 17 et 137, et Y. Dinstein, *op. cit.*, p. 44, § 100.

raisons militaires l'exigent. Les évacuations ne pourront entraîner le déplacement de personnes protégées qu'à l'intérieur du territoire occupé, sauf en cas d'impossibilité matérielle. La population ainsi évacuée sera ramenée dans ses foyers aussitôt que les hostilités dans ce secteur auront pris fin.

La Puissance occupante, en procédant à ces transferts ou à ces évacuations, devra faire en sorte, dans toute la mesure du possible, que les personnes protégées soient accueillies dans des installations convenables, que les déplacements soient effectués dans des conditions satisfaisantes de salubrité, d'hygiène, de sécurité et d'alimentation et que les membres d'une même famille ne soient pas séparés les uns des autres.

La Puissance protectrice sera informée des transferts et évacuations dès qu'ils auront eu lieu.

La Puissance occupante ne pourra retenir les personnes protégées dans une région particulièrement exposée aux dangers de la guerre, sauf si la sécurité de la population ou d'impérieuses raisons militaires l'exigent.

La Puissance occupante ne pourra procéder à la déportation ou au transfert d'une partie de sa propre population civile dans le territoire occupé par elle. »

L'article 49 de la quatrième Convention de Genève est applicable en territoire occupé en l'absence de règles spécifiques relatives au déplacement forcé sur le territoire d'une partie au conflit. Cependant, le droit des personnes déplacées « de regagner volontairement et dans la sécurité leur foyer ou leur lieu de résidence habituel dès que les causes de leur déplacement ont cessé d'exister » est considéré comme une règle de droit international coutumier (règle 132 de l'étude du Comité international de la Croix Rouge (CICR) sur le droit international humanitaire coutumier[6]), qui s'applique à tout type de territoire.

V. LES DOCUMENTS PERTINENTS DES NATIONS UNIES ET DU CONSEIL DE L'EUROPE

A. Nations unies

98. Les « Principes concernant la restitution des logements et des biens dans le cas des réfugiés et des personnes déplacées » (Nations unies, Commission des droits de l'homme, Sous-Commission de la promotion et de la protection des droits de l'homme, 28 juin 2005, E/CN.4/Sub.2/2005/17, Annexe), également dénommés « principes de Pinheiro », sont les normes les plus complètes existant sur la question. Ces principes, qui s'appuient sur les normes existantes du droit international des droits de l'homme et du droit international humanitaire, visent à fournir aux États, aux institutions

6. J.-M. Henckaerts et L. Doswald-Beck, *Le droit international humanitaire coutumier* (trad. D. Leveillé, Bruxelles, CICR/Bruylant, 2006).

des Nations unies et à la communauté internationale dans son ensemble des normes internationales et une orientation pratique quant à la manière de traiter au mieux les problèmes juridiques et techniques complexes que soulève la restitution de logements et de biens.

On y trouve notamment les normes suivantes :

2. Le droit à la restitution des logements et des biens

« 2.1 Tous les réfugiés et personnes déplacées ont le droit de se voir restituer tout logement, terre et/ou bien dont ils ont été privés arbitrairement ou illégalement, ou de recevoir une compensation pour tout logement, terre et/ou bien qu'il est matériellement impossible de leur restituer, comme établi par un tribunal indépendant et impartial.

2.2 Les États privilégient le droit à la restitution comme moyen de recours en cas de déplacement et comme élément clef de la justice réparatrice. Le droit à la restitution existe en tant que droit distinct, sans préjudice du retour effectif ou du non-retour des réfugiés ou des personnes déplacées ayant droit à la restitution de leur logement, de leurs terres et de leurs biens. »

3. Le droit de ne pas faire l'objet de discrimination

« 3.1 Toute personne a le droit d'être protégée contre la discrimination fondée sur la race, la couleur, le sexe, la langue, la religion, l'opinion politique ou toute autre opinion, l'origine nationale ou sociale, la pauvreté, l'incapacité, la naissance ou toute autre situation.

3.2 Les États veillent à ce que la discrimination pour les motifs susmentionnés soit interdite en droit et en fait et à ce que toutes les personnes, y compris les réfugiés et les personnes déplacées, soient égales devant la loi. »

12. Procédures, institutions et mécanismes nationaux

« 12.1 Les États devraient mettre en place en temps utile et soutenir des procédures, institutions et mécanismes équitables, indépendants, transparents et non discriminatoires en vue d'évaluer les demandes de restitution des logements, des terres et des biens et d'y faire droit. (...)

(...)

12.5 En cas d'effondrement général de l'État de droit, ou lorsque les États ne sont pas à même de mettre en œuvre les procédures, institutions et mécanismes nécessaires pour faciliter le processus de restitution des logements, des terres et des biens de façon équitable et en temps voulu, les États devraient demander l'assistance technique et la coopération des organismes internationaux compétents afin d'instituer des régimes transitoires qui permettraient aux réfugiés et aux personnes déplacées de disposer de recours utiles en vue de la restitution.

12.6 Les États devraient inclure des procédures, institutions et mécanismes de restitution des logements, des terres et des biens dans les accords de paix et les accords de rapatriement librement consenti. (...) »

13. Facilité d'accès aux procédures de traitement des demandes de restitution

« 13.1 Quiconque a été arbitrairement ou illégalement privé de son logement, de ses terres et/ou de ses biens devrait être habilité à présenter une demande de restitution et/ou d'indemnisation à un organe indépendant et impartial, qui se prononcera sur la demande et notifiera la décision à l'intéressé. Les États ne devraient pas subordonner le dépôt d'une demande de restitution à des conditions préalables.

(...)

13.5 Les États devraient s'efforcer de mettre en place des centres et bureaux de traitement des demandes de restitution dans toutes les régions touchées où résident des requérants potentiels. Les demandes devraient être présentées en personne, mais, afin que le processus soit accessible au plus grand nombre, elles devraient également pouvoir être soumises par courrier ou par procuration. (...)

(...)

13.7 Les États devraient veiller à ce que les formules de demande soient simples et faciles à comprendre (...)

(...)

13.11 Les États devraient veiller à ce qu'une assistance juridique adéquate soit fournie, si possible gratuitement (...)

(...) »

15. Registre des logements, des terres et des biens et documentation en la matière

« (...)

15.7 Dans les situations de déplacement massif, où il n'existe guère de justificatifs des titres de propriété ou de jouissance, les États peuvent présumer que les personnes qui ont fui leur foyer pendant une période marquée par des violences ou une catastrophe l'ont fait pour des raisons en rapport avec ces événements et ont donc droit à la restitution de leur logement, de leurs terres et de leurs biens. En pareil cas, les autorités administratives et judiciaires peuvent, de manière indépendante, établir les faits en rapport avec les demandes de restitution non accompagnées de pièces justificatives.

(...) »

21. Indemnisation

« 21.1 Tous les réfugiés et toutes les personnes déplacées ont droit à une indemnisation intégrale et effective en tant que partie intégrante du processus de restitution. L'indemnisation peut se faire en numéraire ou en nature. Afin de se conformer au principe de la justice réparatrice, les États veillent à ce qu'il ne soit procédé à une indemnisation en tant que moyen de recours que lorsque la restitution n'est pas possible dans les faits ou que la partie lésée accepte l'indemnisation en lieu et place de la

restitution, en connaissance de cause et de son plein gré, ou lorsque les termes d'un accord de paix négocié prévoient d'associer restitution et indemnisation.

(...) »

B. Conseil de l'Europe

99. Les organes du Conseil de l'Europe se sont exprimés à maintes reprises sur la problématique de la restitution de biens aux personnes déplacées à l'intérieur de leur propre pays (« personnes déplacées ») et aux réfugiés. Les résolutions et recommandations citées ci-dessous sont particulièrement pertinentes dans le contexte de la présente affaire.

1. « Résolution des problèmes de propriété des réfugiés et des personnes déplacées à l'intérieur de leur propre pays », Assemblée parlementaire du Conseil de l'Europe (APCE), résolution 1708 (2010)

100. Dans cette résolution, l'Assemblée parlementaire notait que pas moins de 2,5 millions de réfugiés et de personnes déplacées étaient confrontés à une situation de déplacement dans les États membres du Conseil de l'Europe, notamment dans les régions du Caucase du Sud et du Nord, dans les Balkans et en Méditerranée orientale, et qu'il s'agissait souvent d'un problème de longue durée, dans la mesure où nombre des personnes déplacées étaient dans l'incapacité de rentrer chez elles ou d'accéder à leur foyer et à leurs terres depuis les années 1990 et même avant (paragraphe 2 de la résolution). Elle soulignait en ces termes l'importance de la restitution :

« 3. La destruction, l'occupation et la confiscation des biens abandonnés portent atteinte aux droits des personnes concernées, perpétuent le déplacement et compliquent la réconciliation et le rétablissement de la paix. Par conséquent, la restitution des biens – c'est-à-dire le fait de restaurer les anciens occupants déplacés dans leurs droits et la possession physique de leurs biens – ou la compensation sont des formes de réparation nécessaires pour restaurer les droits individuels et l'État de droit.

4. L'Assemblée parlementaire considère la restitution comme une réponse optimale à la perte de l'accès aux logements, aux terres et aux biens – et des droits de propriété y afférents. C'est en effet la seule voie de recours qui donne le choix entre trois « solutions durables » au déplacement : le retour des personnes déplacées dans leur lieu de résidence d'origine, dans la sécurité et la dignité ; l'intégration dans le lieu où elles ont été déplacées ; ou la réinstallation dans un autre endroit du pays d'origine ou hors de ses frontières. »

L'Assemblée parlementaire faisait ensuite référence aux instruments de protection des droits de l'homme du Conseil de l'Europe (Convention européenne des droits de l'homme, Charte sociale européenne, Convention-cadre pour la protection des minorités nationales) et aux principes de

Pinheiro (Nations unies), et elle appelait les États membres à prendre un certain nombre de mesures :

« 9. Au vu de ce qui précède, l'Assemblée appelle les États membres à régler les problèmes postconflits liés aux droits de propriété des logements, des terres et des biens que rencontrent les réfugiés et les personnes déplacées, en tenant compte des principes de Pinheiro, des instruments pertinents du Conseil de l'Europe et de la recommandation Rec(2006)6 du Comité des Ministres.

10. Étant donné ces normes internationales applicables et l'expérience des programmes de restitution de biens et d'indemnisation qui ont été mis en œuvre en Europe à ce jour, les États membres sont invités :

10.1 à garantir une réparation effective, dans des délais raisonnables, pour la perte de l'accès aux logements, terres et biens – et des droits y afférents – abandonnés par les réfugiés et les personnes déplacées, sans attendre les négociations concernant le règlement des conflits armés ou le statut d'un territoire donné ;

10.2 à veiller à ce que la réparation se fasse sous forme de restitution, en confirmant les droits juridiques des réfugiés et des personnes déplacées sur leurs biens et en rétablissant leur accès physique, en toute sécurité, à ces biens, ainsi que leur possession. Lorsque la restitution n'est pas possible, il convient d'octroyer une compensation adéquate en confirmant les droits antérieurs sur les biens et en offrant une somme d'argent ou des biens d'une valeur raisonnablement proche de leur valeur marchande, ou selon toute autre modalité garantissant une juste réparation ;

10.3 à veiller à ce que les réfugiés et les personnes déplacées dont les droits n'étaient pas officiellement reconnus avant leur déplacement, mais qui bénéficiaient de fait d'un droit de jouissance de leur propriété validé par les autorités, se voient accorder un accès égal et effectif aux voies de recours, et le droit d'obtenir réparation de leur dépossession. Cela est particulièrement important lorsque les personnes concernées sont socialement vulnérables ou appartiennent à des groupes minoritaires ;

(...)

10.5 lorsque les titulaires des droits de location et d'occupation ont été contraints d'abandonner leur domicile, à veiller à ce que leur absence du logement soit réputée justifiée jusqu'à ce que les conditions d'un retour volontaire, dans la sécurité et la dignité, aient été rétablies ;

10.6 à mettre en place des procédures de demande de réparation rapides, faciles d'accès et efficaces. Lorsque le déplacement et la dépossession ont eu un caractère systématique, il convient de mettre en place des instances de décision habilitées à statuer sur ces demandes, qui appliqueront des procédures accélérées comprenant l'assouplissement des normes en matière de preuve et [la] facilitation de la procédure. Tous les régimes de propriété propres à assurer l'hébergement et la subsistance des personnes déplacées devraient relever de leur compétence, notamment les propriétés à usage résidentiel, agricole et commercial ;

10.7 à garantir l'indépendance, l'impartialité et l'expertise des instances de décision, notamment en établissant des règles appropriées relatives à leur composition, qui peuvent prévoir la présence de membres internationaux. (...)

(...) »

2. « Réfugiés et personnes déplacées en Arménie, Azerbaïdjan et Géorgie », APCE, résolution 1497 (2006)

101. Dans cette résolution, l'Assemblée appelait notamment l'Arménie, l'Azerbaïdjan et la Géorgie :

« 12.1 à concentrer tous leurs efforts sur la recherche d'un règlement pacifique des conflits de la région afin de créer les conditions pour le retour volontaire, chez eux, des réfugiés et des personnes déplacées en toute sécurité et dans la dignité ;

(...)

12.4 à faire du retour des personnes déplacées une priorité et à faire tout leur possible lors des négociations pour que ces personnes puissent effectuer ce retour en toute sécurité, avant même un règlement général ;

(...)

12.15 à développer une coopération pratique tendant à enquêter sur le sort des personnes disparues ainsi qu'à faciliter la restitution de documents ou de propriétés, en particulier en se servant de l'expérience des Balkans dans le traitement de problèmes similaires. »

3. Recommandation Rec(2006)6 du Comité des Ministres aux États membres relative aux personnes déplacées à l'intérieur de leur propre pays

102. Le Comité des Ministres recommandait notamment ceci :

« 8. Les personnes déplacées à l'intérieur de leur propre pays ont le droit de jouir de leurs biens, conformément aux droits de l'homme. Elles ont en particulier le droit de recouvrer les biens qu'elles ont laissés à la suite de leur déplacement. Lorsque les personnes déplacées à l'intérieur de leur propre pays sont privées de leur propriété, elles devraient se voir offrir un dédommagement adéquat ;

(…) »

EN DROIT

I. INTRODUCTION

103. Par une décision du 14 décembre 2011, la Cour a déclaré les griefs des requérants recevables. Après avoir examiné les six exceptions

préliminaires formulées par le Gouvernement sur le terrain de l'article 35 de la Convention, elle en a rejeté trois – concernant respectivement le point de savoir si la question avait déjà été soumise à une autre instance internationale d'enquête ou de règlement, l'incompétence de la Cour *ratione temporis* et le non-respect de la règle des six mois. Elle a joint au fond les trois autres exceptions, qu'elle examinera ci-dessous dans l'ordre suivant : épuisement des voies de recours internes, qualité de victime des requérants et juridiction de l'État défendeur sur le territoire en question.

II. ÉPUISEMENT DES VOIES DE RECOURS INTERNES

A. Thèses des parties

1. Les requérants

104. Les requérants soutiennent qu'ils sont des personnes déplacées que les autorités arméniennes empêchent de rentrer chez eux et que leur cas reflète une politique officielle reconnue et, dès lors, une pratique administrative. Dans ces conditions, ils n'auraient accès à aucun recours interne.

105. Les requérants ajoutent qu'il n'existe à leur connaissance, que ce soit en République d'Arménie ou en « RHK », aucune voie de recours susceptible d'être efficace relativement à leurs griefs. Selon eux, la teneur des discussions internationales sur le droit des personnes déplacées au retour dans leur propre pays forme la meilleure preuve de l'absence de recours internes. Constitutive de l'un des points de divergence majeurs entre les parties aux négociations menées au sein du groupe de Minsk de l'OSCE, cette question ne serait toujours pas résolue. Les requérants déclarent n'avoir introduit aucune « demande » de retour, mais ne croient pas qu'il existe une instance à laquelle ils auraient pu s'adresser. Ils considèrent en toute hypothèse qu'une telle demande serait entièrement vaine. En outre, arguant que la République d'Arménie nie toute participation aux événements liés au conflit du Haut-Karabagh, ils estiment qu'il est contradictoire de leur dire qu'ils auraient dû s'adresser aux autorités de la République d'Arménie.

106. Les requérants plaident également que c'est au Gouvernement qu'il incombe de démontrer l'existence d'un recours qui soit effectif tant en pratique qu'en théorie et ait déjà été exercé avec succès par des justiciables se trouvant dans une situation comparable à la leur. Or ils estiment que le Gouvernement ne s'est pas acquitté de cette obligation : en particulier, aucune des affaires qu'il a citées à titre d'exemple dans ses observations à la chambre de juillet 2007 ne concernerait le droit des personnes au retour en vue de jouir de leurs biens ou de leur vie privée et familiale. Ce ne serait par ailleurs que dans ses observations de juillet 2012 que le Gouvernement aurait indiqué différents recours constitutionnels ouverts en Arménie et en « RHK »

et soutenu que les requérants avaient toujours pu se rendre dans les territoires contestés, au moins pour y exercer leurs droits légaux. Lues au regard des précédentes observations du Gouvernement, qui n'auraient pas mentionné ces recours et desquelles il serait ressorti que le retour et l'indemnisation des personnes déplacées présupposaient un accord de résolution du conflit global et définitif, les observations de 2012 ne seraient pas crédibles. De plus, elles ne contiendraient aucun exemple réel de réparation offerte à des ressortissants azerbaïdjanais pour des violations de droits du type de ceux ici en cause.

2. Le Gouvernement

107. Estimant que les requérants n'ont pas montré avoir accompli la moindre démarche pour protéger ou rétablir leurs droits, le Gouvernement considère qu'ils n'ont pas satisfait à l'exigence d'épuisement des voies de recours internes. Il arguë en particulier qu'ils n'ont saisi aucune des instances judiciaires ou administratives de la République d'Arménie et que, par ailleurs, la « RHK » dispose de tous les organes judiciaires et administratifs aptes à protéger les droits individuels, précisant que, pour lui, les territoires en question sont sous la juridiction et le contrôle de cette dernière entité. Il déclare que les requérants auraient pu, d'une part, obtenir un visa pour l'Arménie ou pour la « RHK » afin d'y solliciter des conseils juridiques – lesquels auraient même pu selon lui leur être dispensés gratuitement par un « défenseur public » – et, d'autre part, engager une action en restitution ou en indemnisation contre l'armée et les autorités arméniennes ou contre la « RHK » devant des juridictions indépendantes et impartiales. En Arménie, ces possibilités existeraient depuis que le pays a ratifié la Convention en avril 2002. Les positions prises dans le cadre des négociations menées au sein du groupe de Minsk de l'OSCE concerneraient le retour de l'ensemble des personnes déplacées et seraient sans pertinence pour la situation des individus désireux d'exercer leurs droits légaux.

108. Le Gouvernement ajoute que les constitutions et lois respectives de l'Arménie et de la « RHK », en particulier leurs codes fonciers et leurs codes civils, protègent le droit des individus au respect de leurs biens, prévoient un régime de restitution ou d'indemnisation lorsque des personnes ont été dépossédées de leurs terres et ne font aucune distinction entre les droits des nationaux et ceux des étrangers.

109. Pour prouver l'effectivité des recours arméniens dans le cas des personnes d'ethnie kurde ou azérie, il a produit en juin 2007 trois décisions de justice, l'une concernant l'amnistie accordée à un condamné censé être de nationalité azerbaïdjanaise, une autre portant sur un règlement amiable conclu entre un Kurde et son employeur dans un litige relatif au non-paiement d'un salaire, et la dernière concernant un litige qui opposait

un autre Kurde et une administration locale arménienne relativement à la prolongation d'un bail foncier. Afin de démontrer l'existence de recours effectifs en « RHK », le Gouvernement a également produit trois décisions de justice rendues par les tribunaux de la région, deux d'entre elles traitant de la condamnation pénale de personnes d'ethnie arménienne résidant en « RHK » et la troisième concernant un litige en matière de succession opposant deux particuliers, d'ethnie arménienne apparemment.

3. Le gouvernement azerbaïdjanais, tiers intervenant

110. Le gouvernement azerbaïdjanais soutient que le Gouvernement a failli à l'obligation qui lui incombait d'indiquer quels recours existant en République d'Arménie ou en « RHK » seraient effectifs dans les circonstances et qu'il n'a pas non plus cité d'exemples d'affaires où une personne déplacée de nationalité azerbaïdjanaise aurait obtenu gain de cause après avoir exercé l'un des recours censés exister, mais au sujet desquels aucune précision n'aurait été fournie. Il affirme que ni le code foncier de l'Arménie ni celui de la « RHK » ne prévoient de règles ou de mécanismes en vertu desquels des personnes déplacées dans des circonstances analogues à celles que les requérants ont connues pourraient obtenir une restitution des biens dont ils ont été dépossédés ou une indemnisation pour cette dépossession.

111. De plus, le contexte général imposerait de conclure que, en raison de pratiques administratives ou de circonstances particulières, il n'est pas nécessaire d'épuiser les voies de recours internes : les tensions et les hostilités se poursuivraient dans la région, le Haut-Karabagh et les autres territoires occupés seraient sous loi martiale, et une politique délibérée inciterait des colons arméniens à s'installer, notamment, dans le district de Latchin.

112. Le gouvernement azerbaïdjanais plaide par ailleurs qu'aucun des recours que le Gouvernement dit être disponibles auprès des juridictions et organes arméniens ne peut par définition passer pour effectif compte tenu de la position officielle de l'Arménie selon laquelle la « RHK » constitue un État indépendant exerçant sa juridiction et son contrôle sur Latchin. Il ajoute que le cadre territorial correspondant à la « déclaration d'indépendance » proclamée par la « RHK » en septembre 1991 exclut les régions azerbaïdjanaises occupées après cette date, dont le district de Latchin, et sur lesquelles les tribunaux de la « RHK » ne pourraient donc pas, constitutionnellement, exercer leur juridiction.

B. Appréciation de la Cour

1. Sur la recevabilité des pièces supplémentaires

113. Il y a lieu de noter d'abord que le 20 janvier 2014 – soit deux semaines après l'expiration du nouveau délai fixé par la Cour pour la com-

munication de pièces supplémentaires – le Gouvernement a produit plusieurs documents, dont deux jugements du « tribunal de première instance de la République du Haut-Karabagh » rendus en 2003 et en 2005 respectivement et censés reconnaître les droits de propriété de deux plaignants déplacés de nationalité azerbaïdjanaise sur des maisons privées et sur les terres environnantes situées dans les territoires contestés.

114. Le 22 janvier 2014, le président de la Cour, après avoir consulté la Grande Chambre, a décidé, conformément aux articles 38 § 1 et 71 § 1 du règlement, que, ayant été communiqués après l'expiration du délai imparti et sans que soit avancée une explication satisfaisante quant à la cause de ce retard, ces documents ne devaient pas être versés au dossier. La Cour rappelle à cet égard que, le 8 juin 2006, le Gouvernement avait été invité à communiquer ses observations écrites sur l'affaire et que, à cette date et à nouveau par la suite, il lui avait été expressément demandé d'exposer ses arguments sur la question de l'épuisement des voies de recours internes. Il n'avait alors fait nulle mention des jugements de 2003 et 2005. En conséquence, il ne sera pas tenu compte de ces documents.

2. Les principes généraux en matière d'épuisement des voies de recours internes

115. La Cour rappelle que le mécanisme de sauvegarde instauré par la Convention revêt, aspect primordial, un caractère subsidiaire par rapport aux systèmes nationaux de garantie des droits de l'homme. Sa tâche à elle consiste à surveiller le respect par les États contractants de leurs obligations découlant de la Convention. Elle ne peut ni ne doit se substituer à leurs autorités, auxquelles il incombe de veiller à ce que les droits et libertés fondamentaux que consacre cet instrument soient respectés et protégés au niveau interne. La règle de l'épuisement des voies de recours internes est donc une partie indispensable du fonctionnement de ce mécanisme de protection. Les États n'ont pas à répondre de leurs actes devant un organisme international avant d'avoir eu la possibilité de redresser la situation dans leur ordre juridique interne. Les personnes désireuses de se prévaloir de la compétence de contrôle de la Cour relativement à des griefs dirigés contre un État ont l'obligation d'utiliser auparavant les recours qu'offre le système juridique de cet État (voir, parmi d'autres précédents, *Akdivar et autres c. Turquie*, 16 septembre 1996, § 65, *Recueil des arrêts et décisions* 1996-IV). La Cour ne saurait trop souligner qu'elle n'est pas une juridiction de première instance ; elle n'a pas la capacité, et il ne sied pas à sa fonction de juridiction internationale, de se prononcer sur un grand nombre d'affaires qui supposent d'établir les faits de base ou de calculer une compensation financière, deux tâches qui, par

principe et dans un souci d'effectivité, incombent aux juridictions internes (*Demopoulos et autres c. Turquie* (déc.) [GC], n^os^ 46113/99 et 7 autres, § 69, CEDH 2010, et *Kazali et autres c. Chypre* (déc.), n^os^ 49247/08 et 8 autres, § 132, 6 mars 2012).

116. La Cour a énoncé les principes généraux relatifs à l'épuisement des voies de recours internes dans plusieurs arrêts. Dans l'arrêt *Akdivar et autres* (précité), elle a dit ceci (références à la jurisprudence omises) :

> « 65. La Cour rappelle que la règle de l'épuisement des voies de recours internes énoncée à l'article [35] de la Convention impose aux personnes désireuses d'intenter contre l'État une action devant un organe judiciaire ou arbitral international l'obligation d'utiliser auparavant les recours qu'offre le système juridique [interne]. Les États n'ont donc pas à répondre de leurs actes devant un organisme international avant d'avoir eu la possibilité de redresser la situation dans leur ordre juridique interne. Cette règle se fonde sur l'hypothèse, objet de l'article 13 de la Convention – et avec lequel elle présente d'étroites affinités – que l'ordre interne offre un recours effectif quant à la violation alléguée, que les dispositions de la Convention fassent ou non partie intégrante du système interne. De la sorte, elle constitue un aspect important du principe voulant que le mécanisme de sauvegarde instauré par la Convention revête un caractère subsidiaire par rapport aux systèmes nationaux de garantie des droits de l'homme (...)
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> 66. Dans le cadre de l'article [35], un requérant doit se prévaloir des recours normalement disponibles et suffisants pour lui permettre d'obtenir réparation des violations qu'il allègue. Ces recours doivent exister à un degré suffisant de certitude, en pratique comme en théorie, sans quoi leur manquent l'effectivité et l'accessibilité voulues (...)
>
> L'article [35] impose aussi de soulever devant l'organe interne adéquat, au moins en substance et dans les formes et délais prescrits par le droit interne, les griefs que l'on entend formuler par la suite à Strasbourg ; il commande en outre l'emploi des moyens de procédure propres à empêcher une violation de la Convention (...)
>
> 67. Cependant, comme indiqué précédemment, rien n'impose d'user de recours qui ne sont ni adéquats ni effectifs. De plus, selon les « principes de droit international généralement reconnus », certaines circonstances particulières peuvent dispenser le requérant de l'obligation d'épuiser les recours internes qui s'offrent à lui (...) Cette règle ne s'applique pas non plus lorsqu'est prouvée l'existence d'une pratique administrative consistant en la répétition d'actes interdits par la Convention et la tolérance officielle de l'État, de sorte que toute procédure serait vaine ou ineffective (...)
>
> 68. L'article [35] prévoit une répartition de la charge de la preuve. Il incombe au Gouvernement excipant du non-épuisement de convaincre la Cour que le recours était effectif et disponible tant en théorie qu'en pratique à l'époque des faits, c'est-à-dire qu'il était accessible, était susceptible d'offrir au requérant le redressement de ses griefs et présentait des perspectives raisonnables de succès. Cependant, une fois cela démontré, c'est au requérant qu'il revient d'établir que le recours évoqué par le Gouvernement a en fait été employé ou bien, pour une raison quelconque, n'était ni adéquat ni effectif compte tenu des faits de la cause ou encore que certaines circonstances particulières le dispensaient de cette obligation (...) L'un de ces éléments peut être la passivité totale

des autorités nationales face à des allégations sérieuses selon lesquelles des agents de l'État ont commis des fautes ou causé un préjudice, par exemple lorsqu'elles n'ouvrent aucune enquête ou ne proposent aucune aide. Dans ces conditions, l'on peut dire que la charge de la preuve se déplace à nouveau, et qu'il incombe à l'État défendeur de montrer quelles mesures il a prises eu égard à l'ampleur et à la gravité des faits dénoncés.

69. La Cour souligne qu'elle doit appliquer cette règle en tenant dûment compte du contexte : le mécanisme de sauvegarde des droits de l'homme que les Parties contractantes sont convenues d'instaurer. Elle a ainsi reconnu que l'article [35] doit s'appliquer avec une certaine souplesse et sans formalisme excessif (...) Elle a de plus admis que la règle de l'épuisement des voies de recours internes ne s'accommode pas d'une application automatique et ne revêt pas un caractère absolu ; en en contrôlant le respect, il faut avoir égard aux circonstances de la cause (...) Cela signifie notamment que la Cour doit tenir compte de manière réaliste non seulement des recours prévus en théorie dans le système juridique de la Partie contractante concernée, mais également du contexte juridique et politique dans lequel ils se situent ainsi que de la situation personnelle des requérants. »

3. Application de ces principes aux faits de la cause

117. Tout en soutenant que la République d'Arménie n'exerce sa juridiction ni sur le Haut-Karabagh ni sur le district de Latchin, le Gouvernement affirme que les requérants auraient pu obtenir un redressement auprès des instances judiciaires et administratives d'Arménie ou de la « RHK ». Il cite des dispositions de loi de ces deux entités relatives aux litiges fonciers, notamment aux questions de restitution et d'indemnisation en cas d'appropriation illégale du bien d'autrui. Il produit aussi des déclarations émanant de juges et de responsables nationaux d'où il ressort que les juridictions de l'Arménie et de la « RHK » sont indépendantes et impartiales et qu'elles sont prêtes à connaître sans discrimination des affaires portées devant elles par des citoyens azerbaïdjanais. Les requérants et le gouvernement azerbaïdjanais, pour leur part, affirment que les lois de l'Arménie et de la « RHK » ne prévoient pas de redressement pour les personnes déplacées qui ont été dépossédées de leurs biens dans des circonstances analogues à celles que les requérants ont connues.

118. La Cour estime que, pour trancher la question de l'épuisement des voies de recours internes, elle n'a pas besoin de déterminer si la République d'Arménie peut être considérée comme exerçant sa juridiction sur le territoire en cause ni si une telle juridiction aurait un effet sur l'application des recours de son ordre juridique interne aux questions de restitution ou d'indemnisation relativement à des biens situés dans les territoires contestés. En effet, le Gouvernement n'a pas démontré qu'il existât, que ce fût en Arménie ou en « RHK », un recours propre à redresser les griefs des requérants. Les dispositions de loi qu'il mentionne sont de nature générale ; elles ne visent

pas le cas particulier de la dépossession résultant d'un conflit armé et ne se rapportent par ailleurs nullement à des situations comparables à celle des requérants. En ce qui concerne les décisions de justice internes fournies à titre d'exemple en juin 2007 (paragraphe 109 ci-dessus), aucune d'elles n'a trait à des griefs de perte de domicile ou de biens émanant de personnes déplacées dans le cadre du conflit du Haut-Karabagh.

119. Il y a lieu de noter également que la République d'Arménie nie toute participation de ses forces armées ou de telle ou telle autre de ses autorités aux événements qui sont à l'origine des griefs formulés en l'espèce. Elle nie aussi que l'Arménie exerce et ait jamais exercé sa juridiction sur le Haut-Karabagh et les territoires environnants. Vu ces prises de position, il ne serait pas raisonnable d'attendre des requérants qu'ils introduisent une action en restitution ou en indemnisation devant les juridictions ou les autorités arméniennes. Il faut par ailleurs tenir compte du contexte politique et général. En conséquence de la guerre, pratiquement tous les Azerbaïdjanais ont quitté les territoires contestés. Aucune solution politique au conflit n'a été trouvée. Au contraire, la rhétorique hostile qui oppose les dirigeants de l'Arménie et ceux de l'Azerbaïdjan semble s'être intensifiée, les violations du cessez-le-feu sont récurrentes, et la militarisation de la région est allée croissant ces dernières années. Dans ces conditions, il n'est pas réaliste de penser qu'un éventuel recours ouvert en « RHK », entité non reconnue, puisse en pratique offrir un redressement effectif aux Azerbaïdjanais déplacés.

120. Dans ces conditions, la Cour estime que le Gouvernement ne s'est pas acquitté de la charge qui lui incombait de démontrer que les requérants disposaient d'un recours apte à remédier à la situation dont ils tirent grief sur le terrain de la Convention et présentant des perspectives raisonnables de succès. Elle rejette donc l'exception de non-épuisement des voies de recours internes formulée par le Gouvernement.

III. SUR LA QUALITÉ DE VICTIME DES REQUÉRANTS

A. Thèses des parties

1. Les requérants

121. Les requérants estiment que les documents qu'ils ont communiqués avec leur requête et leurs observations constituent une preuve suffisante de leur identité, de leurs droits de propriété ou d'usage relativement à des biens déterminés situés sur le territoire en question et de ce qu'ils y résidaient au moment où ils ont dû fuir en mai 1992. Ils renvoient notamment aux passeports techniques, aux témoignages, aux factures de matériaux de construction et aux justificatifs de subventions à la construction qu'ils ont fournis. Ils soutiennent que les passeports techniques respectent en tous

points les exigences de forme posées par la législation interne en vigueur à l'époque et expliquent que si les indications figurant dans ces passeports diffèrent des déclarations contenues dans le formulaire de requête, c'est parce que celles-ci ont été recueillies par leur représentant pendant une brève rencontre qui s'est tenue à Bakou dans des conditions difficiles au début de l'année 2005. Ces premières déclarations auraient été faites de mémoire, sans accès aux documents, et ce seraient donc les informations figurant dans les passeports techniques qui seraient exactes et qui devraient être prises en compte. Les requérants voient par ailleurs dans les passeports techniques une preuve secondaire de leurs droits sur les biens litigieux. Au surplus, le sixième requérant aurait communiqué une preuve primaire, à savoir un résumé des actes de la session du soviet des représentants du peuple du district de Latchin du 29 janvier 1974 mentionnant la décision de lui attribuer une terre. Les requérants n'auraient pas eu le temps d'emporter tous leurs papiers lorsqu'ils ont fui la région. De plus, il n'y aurait pas eu à l'époque de registre foncier centralisé auprès duquel se procurer d'autres documents.

122. Les requérants soutiennent que, en vertu du code foncier de 1970 et du code du logement de 1983 de la RSS d'Azerbaïdjan, qui auraient encore été en vigueur au moment de leur fuite, les citoyens avaient un droit de propriété sur leur maison et un droit de jouissance transmissible par succession sur leur parcelle de terrain sous réserve qu'ils l'utilisassent conformément au but pour lequel elle leur avait été attribuée. Leurs parcelles et leurs maisons constitueraient donc des biens au sens de l'article 1 du Protocole n° 1. De plus, la loi de 1991 sur les biens en République d'Azerbaïdjan aurait fait des parcelles de terrain des objets de propriété individuelle et aurait ainsi conféré aux requérants l'espérance légitime de devenir pleinement propriétaires de leurs terres.

2. Le Gouvernement

123. Le Gouvernement souligne que, à l'exception du sixième d'entre eux, les requérants n'ont joint à leur requête aucun élément de nature à prouver qu'ils possédaient réellement des biens, et *a fortiori* que les biens qu'ils revendiquent étaient situés sur le territoire indiqué et se trouvaient en leur possession à l'époque considérée. Il estime singulier que les passeports techniques des cinq autres requérants aient par la suite surgi de nulle part alors que les requérants disent tous avoir fui sans rien emporter. De plus, les déclarations d'amis et de voisins communiquées à la Cour n'auraient qu'une valeur de témoignage par ouï-dire. En tout état de cause, aucun des requérants n'aurait prouvé « au-delà de tout doute raisonnable » qu'il est l'individu qu'il dit être, qu'il résidait dans les territoires mentionnés ou qu'il

possédait les biens en question. En particulier, les documents communiqués par les requérants contiendraient de nombreuses contradictions et inexactitudes. Par exemple, le deuxième requérant aurait d'abord prétendu avoir vécu dans le village de Chirag, puis il se serait corrigé en indiquant que son village s'appelait Chiragli. De plus, les passeports techniques produits à titre de preuves de propriété mentionneraient pour la plupart quant à la surface des maisons des chiffres différents de ceux avancés par les requérants eux-mêmes. Enfin, un passeport technique serait un simple document montrant l'état technique d'un bâtiment et rien de plus, à moins que son origine et sa provenance ne soient établies.

124. Le Gouvernement doute aussi que les requérants aient jamais détenu sur les biens qu'ils disent être les leurs un droit reconnu par la législation en vigueur en 1992 ou certifié par les autorités appropriées. Il arguë en particulier que, sous le régime socialiste soviétique en place avant 1991, la terre était la propriété exclusive de l'État. Selon lui, la loi de 1991 sur les biens a certes reconnu la possibilité de détenir des biens en propriété privée, mais elle n'a pas fait passer les terres occupées par des individus dans leur propriété privée. Selon cette loi, le droit d'usage et le droit de jouissance locative auraient été officialisés par un certificat inscrit au registre foncier tenu par le soviet des représentants du peuple local. On n'aurait donc pu prétendre à aucun droit sur une terre en l'absence d'un tel certificat enregistré. Le Gouvernement ajoute qu'en vertu du code foncier azerbaïdjanais de 1992, les droits d'usage ou de jouissance locative d'un terrain pouvaient s'éteindre si leur bénéficiaire n'utilisait pas le terrain pendant deux ans consécutifs. Les requérants n'étant pas retournés dans le district de Latchin depuis 1992, il présume donc que les droits qu'ils revendiquent s'étaient éteints avant que la juridiction de la Cour ne commence à s'exercer à l'égard de l'Arménie, soit en 2002. Il ajoute qu'à cette date l'espérance légitime de devenir propriétaires des terrains que les requérants prétendent avoir nourrie n'était plus réaliste et que, de surcroît, à ce moment-là, leurs biens allégués avaient déjà été attribués à d'autres particuliers dont les noms avaient été inscrits au registre foncier conformément aux lois de la « RHK ». Il considère donc que les requérants n'ont pas de « biens actuels », mais qu'ils sont de simples demandeurs cherchant à se voir restituer des biens ou à être indemnisés pour leur perte, ce sans qu'aucun texte de loi ni aucune décision de justice internes ne leur permettent d'espérer légitimement obtenir pareilles mesures de redressement. Dans les mêmes observations, le Gouvernement déclare toutefois que la « RHK » n'a adopté aucun acte juridique privant les requérants du droit d'entrer sur le territoire de Latchin ou du droit au respect de leurs biens.

3. Le gouvernement azerbaïdjanais, tiers intervenant

125. Le gouvernement azerbaïdjanais indique que pour pratiquement tous les déplacés, c'est à la hâte, sans avoir eu le temps de prendre leurs papiers avec eux, qu'ils ont dû fuir leur domicile dans les territoires occupés. Actuellement, il serait impossible pour eux d'obtenir des documents attestant de leurs droits de propriété. Les registres auraient en effet été tenus par les autorités locales, et les archives de celles-ci auraient selon toute vraisemblance été détruites. Néanmoins, le passeport technique, document « d'inventaire technique », permettrait à un individu d'établir indirectement son droit de propriété sur une maison individuelle en l'absence du document original. Il constituerait une preuve secondaire des droits sur une maison ou une parcelle de terrain dans les cas où son texte renverrait directement aux documents confirmant le droit de propriété. Or cette référence serait présente sur les passeports techniques des requérants. Ainsi, combinés aux déclarations des témoins et aux factures de construction également soumises par les requérants, les passeports techniques démontreraient que ceux-ci détenaient un droit de propriété sur leurs maisons et un droit d'usage sur les parcelles de terrain qui leur avaient été attribuées, droits qui perdureraient encore.

126. Le gouvernement azerbaïdjanais ajoute que, lorsque les requérants ont pris la fuite, la propriété privée des maisons individuelles était protégée par les lois de la RSS d'Azerbaïdjan, encore en application à l'époque. Il explique que la terre, qui était la propriété exclusive de l'État, ne pouvait être l'objet d'un droit de propriété privée ni d'aucune transaction, mais que l'autorité locale, à savoir le soviet des représentants du peuple, pouvait décider d'attribuer gratuitement à des citoyens un droit de jouissance de durée déterminée ou indéterminée sur des parcelles de terrain. Il indique que ce droit de jouissance, transmissible par succession, était accordé à des fins telles que la construction de maisons détenues en propriété privée (aux fins d'habitation individuelle), le pâturage, la fenaison et l'agriculture. Il ajoute que même si elle n'était pas encore applicable à l'époque, la loi de 1991 sur les biens en République d'Azerbaïdjan a conféré aux requérants l'espérance légitime de devenir pleinement propriétaires de leurs terres.

B. Appréciation de la Cour

127. L'examen de la question de savoir si les requérants ont la qualité de victime comprend deux volets. Il faut déterminer, d'abord, s'ils ont communiqué des preuves suffisantes de leur identité, de leur ancien lieu de résidence et de l'existence des biens qu'ils disent avoir laissés sur place, puis, dans l'affirmative, si les différentes valeurs patrimoniales qu'ils revendiquent constituent des « biens » et des « domiciles » au regard de la Convention.

Pour ce second volet, la qualification ou le sens juridiques que revêtent ces termes dans l'ordre interne sont importants.

1. Les principes généraux en matière d'appréciation des revendications posées sur des biens et des domiciles par des personnes déplacées

128. La Cour a déjà connu par le passé d'affaires relatives au droit de propriété et au droit au logement de personnes déplacées à cause d'un conflit armé interne ou international. Ces affaires étaient nées de l'occupation de la partie nord de Chypre, de l'action des forces de sécurité en Turquie et en Russie ou d'autres situations de conflit.

129. La Cour a examiné pour la première fois le droit des personnes déplacées au respect de leur domicile et de leurs biens dans l'affaire *Loizidou c. Turquie* ((fond), 18 décembre 1996, *Recueil* 1996-VI). Dans cette affaire, la requérante disait être propriétaire de plusieurs parcelles de terrain situées dans la partie nord de Chypre. Le gouvernement turc ne contestait pas la validité de son titre, mais arguait qu'elle avait perdu son droit de propriété sur ces terres en vertu de l'article 159 de la Constitution de 1985 de la « République turque de Chypre du Nord » (« RTCN »), qui déclarait propriété de la « RTCN » tous les biens immobiliers abandonnés. Tenant compte du fait que la communauté internationale n'avait pas reconnu la « RTCN » en tant qu'État, la Cour n'a attribué aucune validité juridique à la disposition invoquée par le gouvernement turc et elle a considéré que la requérante ne pouvait passer pour avoir perdu son droit sur ses biens par le jeu de cette disposition (*ibidem*, §§ 42-47).

130. Dans plusieurs affaires relatives à ce même conflit, la Cour a établi que les requérants avaient des « biens » au sens de l'article 1 du Protocole n° 1 en se fondant sur les commencements de preuve que le Gouvernement n'avait pas réfutés de manière convaincante, notamment une copie du titre de propriété original, un certificat d'enregistrement, un acte de vente, ou encore une déclaration de propriété émise par la République de Chypre. Dans l'affaire *Solomonides c. Turquie* (n° 16161/90, § 31, 20 janvier 2009), le requérant avait expliqué que son droit de propriété avait été enregistré au cadastre du district, mais que, au moment de l'intervention militaire turque, il avait été forcé de fuir et n'avait pas pu emporter ses titres de propriété. Il avait exposé que les autorités de la République de Chypre avaient ensuite reconstitué le registre foncier et délivré des certificats de déclaration de propriété, et que ces certificats étaient la meilleure preuve disponible en l'absence des registres et des documents originaux. Dans l'affaire *Saveriades c. Turquie* (n° 16160/90, 22 septembre 2009), la Cour a expressément tenu compte des raisons pour lesquelles le requérant n'avait pas pu produire ses

titres de propriété originaux : il avait expliqué qu'il avait dû quitter en toute hâte les locaux où se trouvaient ces documents et qu'il n'avait pas pu y retourner par la suite ni récupérer les titres d'une autre façon. La Cour a admis que les documents qu'il avait produits devant elle (un acte de vente, des certificats de propriété et un permis de construire) constituaient des commencements de preuve de son droit de propriété sur les biens en cause. Elle a déclaré ce qui suit (*ibidem*, § 18) :

> « (...) Le gouvernement défendeur n'ayant pas produit d'éléments convaincants propres à réfuter ceux du requérant, et compte tenu des circonstances dans lesquelles ce dernier a été contraint de quitter la partie nord de Chypre, la Cour considère qu'il avait un « bien » au sens de l'article 1 du Protocole n° 1. »

131. Dans l'affaire *Doğan et autres c. Turquie* (n^os^ 8803/02 et 14 autres, CEDH 2004-VI), qui concernait l'expulsion forcée de villageois intervenue dans la région du sud-est de la Turquie placée sous état d'urgence et le refus de les laisser y retourner qui avait perduré plusieurs années, le Gouvernement avait soulevé une exception d'irrecevabilité consistant à dire que certains des requérants n'avaient pas produit de titres de propriété attestant qu'ils possédaient des biens dans le village en question. La Cour a considéré qu'elle n'était pas appelée à décider si oui ou non les requérants avaient, nonobstant l'absence de titre, des droits de propriété au regard du droit interne, mais que la question était plutôt de savoir si les activités économiques menées de manière générale par les intéressés pouvaient être considérées comme des « biens » entrant dans le champ d'application de la garantie accordée par l'article 1 du Protocole n° 1. S'exprimant comme suit, elle a estimé que tel était le cas (*ibidem*, § 139) :

> « (...) La Cour constate à ce sujet qu'il ne prête pas à controverse que les requérants ont tous vécu à Boydaş jusqu'en 1994. Même s'ils ne possèdent pas de titre de propriété officiel sur les biens litigieux, ils avaient soit fait bâtir leurs propres demeures sur des terres appartenant à leurs ascendants soit vécu dans les maisons de leurs parents et cultivé la terre dont ceux-ci étaient propriétaires. La Cour observe en outre que les requérants avaient des droits incontestés sur les terrains communaux du village – tels que les terres de pacage, les zones de parcours et les fonds forestiers – et qu'ils gagnaient leur vie grâce à l'élevage et l'exploitation du bois. La Cour estime dès lors que l'ensemble de ces ressources économiques et les revenus que les intéressés en tiraient peuvent être qualifiés de « biens » aux fins de l'article 1 du Protocole n° 1. »

132. La Cour a dit dans plusieurs de ses arrêts et décisions que la notion de « biens » possède une portée autonome. Dans l'arrêt *Öneryıldız c. Turquie* ([GC], n° 48939/99, § 124, CEDH 2004-XII), elle s'est exprimée ainsi à cet égard :

> « La Cour rappelle que la notion de « biens » prévue par la première partie de l'article 1 du Protocole n° 1 a une portée autonome qui ne se limite pas à la propriété des biens corporels et qui est indépendante par rapport aux qualifications formelles

> du droit interne : ce qui importe c'est de rechercher si les circonstances d'une affaire donnée, considérées dans leur ensemble, peuvent passer pour avoir rendu le requérant titulaire d'un intérêt substantiel protégé par cette disposition (...) Ainsi, à l'instar des biens corporels, certains autres droits et intérêts constituant des actifs peuvent aussi être considérés comme des « droits de propriété », et donc comme des « biens » aux fins de cette disposition (...) La notion de « biens » ne se limite pas non plus aux « biens actuels » et peut également recouvrir des valeurs patrimoniales, y compris des créances, en vertu desquelles le requérant peut prétendre avoir au moins une « espérance légitime » et raisonnable d'obtenir la jouissance effective d'un droit de propriété (...) »

Dans cette affaire, la Cour a considéré qu'une habitation érigée illégalement sur un terrain public à côté d'une décharge d'ordures, où le requérant et sa famille vivaient en toute tranquillité, bien que sans autorisation, en payant la taxe d'habitation et les services publics, représentait un intérêt patrimonial que, *de facto*, les autorités avaient reconnu, et qui était suffisamment important pour constituer un bien au sens de l'article 1 du Protocole n° 1.

133. La question de savoir si le requérant avait suffisamment étayé le grief qu'il formulait sur le terrain de l'article 1 du Protocole n° 1 s'est également posée dans plusieurs affaires dirigées contre la Russie où les maisons des requérants ou d'autres de leurs biens avaient été détruits ou endommagés du fait d'attaques aériennes menées sur la localité où ils vivaient. Par exemple, dans l'affaire *Kerimova et autres c. Russie* (nos 17170/04 et 5 autres, §§ 292-293, 3 mai 2011), la Cour a admis la revendication de propriété formulée par certains des requérants en se fondant sur les extraits d'un inventaire immobilier délivré par les services municipaux après l'attaque et d'où il ressortait qu'ils étaient les propriétaires de leurs maisons respectives. Quant aux requérants qui n'avaient produit aucune preuve de leur droit sur les biens en cause, la Cour a établi la réalité de ce droit à partir d'autres éléments de preuve, par exemple un certificat de résidence délivré par les services municipaux. Elle a aussi jugé probable que les éventuels documents confirmant le droit des requérants sur leur maison eussent été détruits pendant l'attaque.

134. Dans des cas où il était établi que le requérant était le propriétaire de la maison, la Cour n'a pas exigé de preuves documentaires supplémentaires attestant qu'il y résidait pour juger démontré que la maison constituait un « domicile » au sens de l'article 8 de la Convention. C'est ainsi que dans l'arrêt *Orphanides c. Turquie* (n° 36705/97, § 39, 20 janvier 2009) elle s'est exprimée comme suit :

> « La Cour note que le Gouvernement n'a produit aucun élément susceptible de mettre en doute la déclaration du requérant selon laquelle, au moment de l'invasion turque, il résidait régulièrement dans sa maison à Lapithos et celle-ci était considérée par lui et par sa famille comme leur domicile. »

135. Cependant, si un requérant ne produit aucun élément attestant de son droit de propriété ou de son lieu de résidence, ses griefs sont voués à l'échec (voir, par exemple, *Lordos et autres c. Turquie*, nº 15973/90, § 50, 2 novembre 2010, où la Cour a déclaré un grief irrecevable *ratione materiae* en l'absence de preuve de la propriété ; voir aussi la conclusion à laquelle elle est parvenue à l'égard de certains des requérants dans l'affaire *Kerimova et autres*, précitée). Dans plusieurs affaires, la Cour a rappelé que les requérants doivent apporter un commencement de preuve suffisant à l'appui de leurs griefs. Dans l'affaire *Damayev c. Russie* (nº 36150/04, §§ 108-111, 29 mai 2012), elle a considéré qu'un requérant qui se plaint de la destruction de son domicile doit fournir au moins une brève description du bien en question. Le requérant n'ayant pas produit de documents ni fourni d'informations détaillées sur ses allégations, elle a jugé son grief insuffisamment étayé. La Cour a cité d'autres exemples de documents constituant un commencement de preuve de la propriété d'un bien ou du fait que celui-ci constitue le domicile du requérant : titres fonciers ou titres de propriété, extraits du registre foncier ou fiscal, documents émis par l'administration locale, plans, photographies et factures d'entretien, lettres reçues à l'adresse en cause, témoignages ou tout autre élément pertinent (voir, par exemple, *Prokopovitch c. Russie*, nº 58255/00, § 37, CEDH 2004-XI, et *Elsanova c. Russie* (déc.), nº 57952/00, 15 novembre 2005).

136. En bref, la Cour a développé dans sa jurisprudence une approche souple à l'égard des preuves que les requérants doivent fournir à l'appui d'allégations consistant à dire qu'ils ont perdu leurs biens et leur domicile dans des situations de conflit armé international ou interne. La Cour note que l'on retrouve une approche semblable à l'article 15.7 des principes de Pinheiro (paragraphe 98 ci-dessus).

2. Application de ces principes aux faits de la cause

a) Preuve de l'identité et du lieu de résidence des requérants

137. Si les requérants n'ont pas communiqué de documents attestant de leur identité et de leur lieu de résidence au moment où ils ont introduit leur requête, ils en ont fourni après que la Grande Chambre leur en eut fait la demande en avril 2010. Ils ont ainsi produit les certificats de naissance d'eux-mêmes et de leurs enfants, des certificats de mariage, des passeports soviétiques, des carnets de travail et des extraits de livrets militaires (voir, pour plus de détails, les paragraphes 33-57 ci-dessus). De l'avis de la Cour, ces documents démontrent que tous les requérants sont nés dans le district de Latchin et qu'ils y ont vécu et travaillé, au moins pendant une grande partie de leur vie. Eu égard à leurs propres déclarations et en l'absence de

toute preuve du contraire, il y a lieu de considérer qu'ils y vivaient encore avec leurs familles respectives lorsqu'ils ont pris la fuite le 17 mai 1992.

b) Preuve des droits sur les biens

138. Les requérants disent avoir été propriétaires ou bénéficiaires d'un droit de jouissance sur des terres, des maisons et un certain nombre de biens meubles qu'ils auraient été contraints d'abandonner en prenant la fuite. On ne sait pas si les maisons sont encore intactes, mais il est à peu près certain que les biens meubles ont disparu. Il reste donc essentiellement les parcelles de terrain.

139. À l'origine, seul le sixième requérant a communiqué un document relatif à ses biens allégués, à savoir un « passeport technique ». Les autres requérants n'ont produit de documents à cet égard que dans leur réponse aux premières observations du Gouvernement. Outre les passeports techniques, tous les requérants ont communiqué des témoignages d'anciens voisins qui affirmaient qu'ils possédaient des maisons dans les villages concernés, ainsi que des déclarations de représentants de l'administration azerbaïdjanaise à Latchin. Le sixième requérant a aussi produit une décision d'attribution de terre prise par le soviet des représentants du peuple du district de Latchin ainsi que des factures de fourrage et de matériaux de construction et des relevés de subventions versées aux fins de construction.

140. Les éléments de preuve les plus importants communiqués par les requérants sont les passeports techniques. Il s'agit de documents officiels qui comprennent des plans des maisons et indiquent notamment leur surface, leurs dimensions et le nombre de leurs pièces, ainsi que la superficie de la parcelle de terrain correspondante. Ils ont été émis entre juillet 1985 et août 1990 et portent le nom des requérants. De plus, il apparaît qu'ils contiennent des références aux décisions pertinentes d'attribution des terres.

141. Au vu des déclarations du gouvernement azerbaïdjanais, la Cour estime que les passeports techniques des requérants doivent être considérés comme des « documents d'inventaire technique » constitutifs d'une preuve indirecte des droits des intéressés sur les maisons et les terres et, en outre, conformes à l'article 2.2 de l'instruction de 1985 sur les règles d'enregistrement des habitations (paragraphe 92 ci-dessus). Par ailleurs, la décision d'attribution des terres fournie par le sixième requérant constitue une preuve primaire en vertu de l'article 2.1 de cette instruction. Si le Gouvernement conteste la valeur probante des passeports, affirmant qu'ils ne montrent que l'état technique des bâtiments concernés et rien de plus, la Cour observe qu'ils ne contiennent pas simplement des précisions sur les maisons en question, mais qu'y figure aussi le nom des requérants. Ils constituent dès lors

un commencement de preuve du droit de propriété des intéressés du même ordre que ce que la Cour a déjà admis en maintes occasions précédentes.

142. Il est à noter que, sauf dans le cas des cinquième et sixième requérants, il y a des différences entre la description que les requérants ont donnée à l'origine de leur maison et les chiffres qui figurent sur les passeports techniques produits à un stade ultérieur de la procédure. Par exemple, le premier requérant a initialement déclaré posséder une maison de 250 m², mais le passeport technique qu'il a produit concerne une maison de 408 m², dont 300 m² de surface d'habitation (ainsi qu'un entrepôt de 60 m² non mentionné auparavant). De même, le quatrième requérant avait déclaré à l'origine que sa maison avait une surface de 165 m², mais celle décrite dans le passeport technique fait au total 448 m², dont 223 m² de surface d'habitation (avec, là encore, un entrepôt de 75 m² non déclaré auparavant). Les requérants expliquent à cet égard que ce sont les informations figurant sur les passeports qui sont les bonnes, et que leurs premières déclarations ont été faites de mémoire lors d'une brève rencontre avec leur représentant au cours de laquelle ils n'avaient pas les documents à leur disposition.

La Cour peut admettre cette explication : compte tenu des circonstances, les écarts entre les premières déclarations des requérants et les passeports techniques ne sont pas de nature à faire douter de l'authenticité de ces documents, en particulier si l'on compare les chiffres avancés à l'origine par les requérants avec les surfaces d'habitation indiquées sur les passeports.

143. Les requérants ont communiqué d'autres éléments constituant un commencement de preuve de leurs droits de propriété, notamment des déclarations d'anciens voisins. De plus, les documents, examinés ci-dessus, qu'ils ont produits afin de prouver leur identité et leur lieu de résidence montrent qu'ils résidaient dans le district de Latchin et corroborent ainsi leurs revendications. Par ailleurs, même si, à l'exception du sixième requérant, aucun d'eux n'a produit de titre de propriété ou d'autres preuves primaires, il faut tenir compte des circonstances dans lesquelles ils ont dû quitter le district, puisqu'ils l'ont abandonné alors qu'il était la cible d'une attaque militaire. En conséquence, compte tenu de l'ensemble des éléments de preuve produits devant elle, la Cour conclut que les requérants ont suffisamment étayé leur allégation selon laquelle ils possédaient des maisons et des terres au moment où ils ont pris la fuite.

c) Applicabilité au cas des requérants des articles 1 du Protocole nº 1 et 8 de la Convention

144. Il reste à déterminer si les requérants avaient – et ont encore – des droits de propriété protégés par l'article 1 du Protocole nº 1 et si, envisagés à la lumière de la situation personnelle des requérants dans son ensemble,

les biens concernés constituaient pour eux un domicile au sens de l'article 8 de la Convention. Comme la Cour l'a rappelé plus haut (paragraphe 132 ci-dessus), la notion de « biens » visée à l'article 1 du Protocole nº 1 a une portée autonome qui est indépendante des qualifications formelles du droit interne. Pour trancher la question, il faut toutefois commencer par établir si le droit et la pratique internes conféraient ou reconnaissaient des droits protégés par la Convention.

145. Il y a lieu de noter tout d'abord que, même si la législation foncière adoptée peu après l'indépendance de l'Azerbaïdjan reconnaissait pour la première fois le droit de propriété privée sur la terre, il n'avait pas encore été mis en place à l'époque pertinente, en mai 1992, de procédure par laquelle la terre pouvait être privatisée. Il n'est d'ailleurs pas contesté que les requérants n'avaient pas introduit de demande afin de devenir propriétaires des terres en question. Étant donné, ensuite, que les droits acquis par les individus en vertu de l'ancienne législation n'ont pas été annulés par l'adoption des lois de 1991 et de 1992 sur les biens, les droits légaux des requérants sur les maisons et les terres qu'ils possédaient au moment de leur départ doivent être appréciés au regard des lois de la RSS d'Azerbaïdjan.

146. Dans le système soviétique, les citoyens avaient le droit de posséder une habitation, mais il n'existait pas de propriété privée des terres, qui étaient considérées comme des biens de l'État. En RSS d'Azerbaïdjan (qui englobait le Haut-Karabagh, le district de Latchin et les territoires environnants actuellement occupés), ces règles étaient énoncées dans la Constitution de 1978, dans le code foncier de 1970 et dans le code du logement de 1983. Le droit de posséder une maison était prévu par l'article 10.3 du code du logement, et les règles et procédures régissant l'attribution à des individus d'un droit d'usage portant sur des terres étaient fixées par le code foncier, notamment par ses articles 4, 25, 27 et 28. En conséquence, les maisons que les requérants habitaient dans le district de Latchin faisaient partie de leurs biens personnels tandis qu'ils n'avaient qu'un « droit d'usage » sur les parcelles de terrain où elles étaient érigées. Comme cela a déjà été mentionné (paragraphe 138 ci-dessus), les biens meubles – bêtes, tapis, véhicules – que les requérants disent avoir possédés (biens dont les droits des particuliers y relatifs étaient aussi protégés par les lois de la RSS d'Azerbaïdjan) ont probablement été détruits au cours de l'attaque militaire sur Latchin ou dans les années qui ont suivi. On ne sait d'ailleurs pas si les maisons des requérants ont été détruites ou si elles sont encore partiellement ou totalement intactes. Il est donc d'une importance cruciale d'examiner la portée du « droit d'usage ».

147. Le « droit d'usage » était le seul droit réel qu'un individu pouvait acquérir sur une terre. Il était octroyé par le soviet des représentants du

peuple local et pouvait être accordé à différentes fins, dont le pâturage, l'agriculture et, élément capital dans le cadre de la présente affaire, la construction de bâtiments. Les bénéficiaires étaient tenus d'utiliser les parcelles aux seules fins pour lesquelles elles leur avaient été attribuées. Le « droit d'usage » pouvait être conféré à titre indéfini ou à titre temporaire. Ainsi, le titulaire d'un « droit d'usage » perpétuel qui respectait le but pour lequel ce droit lui avait été conféré pouvait utiliser la terre à vie. En outre, ce droit était transmissible par succession.

Il ne fait donc aucun doute que le « droit d'usage » conféré aux requérants était un droit fort et protégé qui représentait un intérêt économique substantiel. À des fins d'exhaustivité, et bien que rien n'indique que les droits des requérants fussent de nature temporaire, la Cour note que cette conclusion s'applique aussi bien au droit d'usage temporaire qu'au droit d'usage perpétuel. Eu égard à la portée autonome de l'article 1 du Protocole n° 1, le « droit d'usage » sur des terres constituait ainsi un « bien » au sens de cette disposition. Cette conclusion vaut aussi pour les droits détenus par des individus sur des bâtiments d'habitation ou des biens meubles.

148. Dans ses observations du 11 juillet 2012, le Gouvernement arguë qu'il faut présumer que les droits des requérants sur les terres en cause se sont éteints par l'effet de l'article 32 §§ 1 à 8 du code foncier de 1992, les intéressés n'y étant pas retournés depuis mai 1992 et étant ainsi restés en défaut de les utiliser pendant deux ans consécutifs. Il ajoute qu'en tout état de cause la terre a été attribuée à d'autres individus conformément aux lois de la « RHK ». À l'appui de cette affirmation, il produit un certain nombre d'extraits du registre foncier de la « RHK » datant de 2000 et 2001.

En ce qui concerne le premier argument du Gouvernement, la Cour note qu'en vertu de l'article 32 du code foncier de 1992, les droits fonciers ne pouvaient être révoqués que par une décision du soviet local des représentants du peuple et que, de plus, une telle décision ne pouvait être prise qu'en cas de non-utilisation de la terre sans raison valable. Eu égard à la présence militaire dans les territoires en cause depuis 1992-1993, on ne peut guère considérer que tel soit le cas en l'espèce. Cet argument, d'ordre purement spéculatif, doit donc être écarté. En ce qui concerne le second argument, la Cour observe qu'on ne sait ni à quelles terres ni à quels bénéficiaires les extraits du registre foncier communiqués par le Gouvernement se réfèrent. De plus, cet argument semble aller à l'encontre de celui consistant à dire que la « RHK » n'a adopté aucun acte juridique privant les requérants du droit au respect de leurs biens. En toute hypothèse, la question a déjà été tranchée au stade de la recevabilité dans le cadre de l'examen d'un argument analogue formulé par le Gouvernement pour contester la compétence de

la Cour *ratione temporis*. Cet argument a été rejeté pour les motifs suivants (*Chiragov et autres c. Arménie* (déc.), n° 13216/05, § 102, 12 février 2012) :

> « À un stade avancé de la procédure, le gouvernement arménien a présenté un nouvel argument, consistant à dire que les autorités de la « RHK » avaient adopté en 1998 une loi sur la privatisation et un code foncier qui avaient frappé d'extinction les droits fonciers des requérants et des autres personnes ayant fui les territoires occupés. Quoi qu'il en soit, la Cour, à qui ces textes n'ont pas été communiqués, note que la « RHK » n'est reconnue par aucun pays ni aucune organisation internationale comme un État au regard du droit international. Dans ces conditions, on ne saurait considérer que les lois invoquées sont juridiquement valides aux fins de la Convention ni qu'elles ont privé les requérants de leurs droits allégués sur les terres en question (*Loizidou* (arrêt au principal), précité, §§ 42-47). »

149. En conclusion, lorsqu'ils ont quitté le district de Latchin, les requérants avaient sur des terres et sur des maisons des droits qui constituaient des « biens » au sens de l'article 1 du Protocole n° 1. Rien n'indique que ces droits sur les terres et sur les maisons se soient éteints par la suite par l'effet de mesures légitimes ou non, que ce soit avant ou après la ratification de la Convention par l'Arménie. Les droits de propriété des requérants sont donc toujours valides. Puisque, dès lors, ils ont des biens actuels, il n'est pas nécessaire d'examiner leur argument consistant à dire qu'ils avaient l'« espérance légitime » de devenir officiellement propriétaires de leurs terres à la suite de l'adoption du code foncier de 1992.

150. De plus, la Cour ayant conclu ci-dessus que, lorsqu'ils ont fui la région, les requérants vivaient dans le district de Latchin avec leurs familles respectives et y gagnaient leur vie, leurs terres et leurs maisons doivent aussi être considérées comme constitutives de leur « domicile » aux fins de l'article 8 de la Convention.

151. Partant, la Cour rejette l'exception soulevée par le Gouvernement quant à la qualité de victime des requérants.

IV. SUR LA JURIDICTION DE LA RÉPUBLIQUE D'ARMÉNIE

A. Thèses des parties

1. Les requérants

152. Les requérants soutiennent que la République d'Arménie exerce un contrôle effectif sur le Haut-Karabagh et les territoires avoisinants, en particulier sur le district de Latchin, et que les faits dénoncés par les requérants relèvent donc de la juridiction de ce pays au sens de l'article 1 de la Convention. À titre subsidiaire, ils avancent que cette juridiction découle de l'autorité ou du contrôle que l'Arménie exerce selon eux sur la région par l'intermédiaire de ses agents sur place. Ils arguent que la jurispru-

dence de la Cour à cet égard est constante et invoquent, entre autres, les affaires *Loizidou* (arrêt précité), *Ilaşcu et autres c. Moldova et Russie* ([GC], nº 48787/99, CEDH 2004-VII) et *Al-Skeini et autres c. Royaume-Uni* ([GC], nº 55721/07, CEDH 2011). En ce qui concerne la charge de la preuve, ils considèrent que le critère à employer n'est pas celui de la preuve « au-delà de tout doute raisonnable » : ils plaident qu'il existe en l'espèce une présomption de fait selon laquelle l'Arménie exerce sa juridiction sur les territoires mentionnés et que le Gouvernement n'a pas réfuté cette présomption.

153. Les requérants soutiennent que la participation militaire de l'Arménie au conflit du Haut-Karabagh a été considérable et que les preuves en ce sens sont surabondantes. Ils affirment notamment que des appelés arméniens y ont accompli leur service militaire. Ils renvoient au rapport de Human Rights Watch de 1994, d'où il ressortirait que des appelés arméniens ont été envoyés dans le Haut-Karabagh et les provinces azerbaïdjanaises limitrophes et que des troupes de la République d'Arménie ont pris part aux combats en Azerbaïdjan. Enfin, ils citent des déclarations dans lesquelles différents responsables et observateurs politiques évoquent la participation de l'armée arménienne au conflit, notamment les déclarations susmentionnées de MM. Robert Kotcharian et Vazguen Manoukian (paragraphe 62 ci-dessus).

154. Les requérants voient encore une preuve de la participation aux combats de l'armée arménienne dans la capture d'un certain nombre de soldats arméniens par des unités azerbaïdjanaises et dans l'augmentation du nombre d'appelés arméniens à la même époque. Ils affirment que des appelés de l'armée arménienne sont encore envoyés dans le Haut-Karabagh, que les officiers et les soldats qui font leur service militaire dans cette région ont droit à une solde supérieure à celle qu'ils toucheraient s'ils servaient en Arménie et que les appelés ne peuvent pas choisir d'être affectés plutôt en Arménie ou plutôt dans le Haut-Karabagh. Pour étayer leur propos, ils citent notamment plusieurs procédures judiciaires et administratives qui auraient été ouvertes à Stepanakert contre des militaires arméniens et contre un objecteur de conscience arménien.

155. Selon les requérants, l'Arménie a non seulement engagé des troupes dans le conflit, mais elle a aussi fourni une assistance matérielle au Haut-Karabagh, auquel elle aurait accordé, sous la forme de prêts sans intérêts, une aide financière qui constituerait 90 % du budget de l'enclave. Grâce notamment à ces prêts, elle exercerait un contrôle effectif sur le Haut-Karabagh et sur les territoires voisins. Quant au Fonds arménien Hayastan, il ne pourrait être considéré comme un organe distinct, indépendant du gouvernement arménien : il aurait été créé par un décret du président arménien, auquel les statuts du Fonds attribueraient la fonction de président du

conseil d'administration, organe qui comprendrait par ailleurs plusieurs des membres les plus éminents du gouvernement, du Parlement, de la Cour constitutionnelle et de la Banque centrale d'Arménie. En outre, le Fonds aurait pour mission de soutenir le développement durable tant en Arménie que dans le Haut-Karabagh.

156. De surcroît, la République d'Arménie aurait fourni et continuerait de fournir au Haut-Karabagh un soutien politique. De nombreuses personnalités de premier plan de la vie politique arménienne entretiendraient des liens étroits avec la sphère politique du Haut-Karabagh, et continueraient d'y jouer un rôle. C'est ainsi qu'en août 1993 l'exécutif arménien aurait nommé ministre de la Défense de l'Arménie M. Serge Sargsian, jusque-là ministre de la Défense du Haut-Karabagh, et qu'en 1998 M. Robert Kotcharian serait devenu président de l'Arménie, après avoir été Premier ministre, puis président du Haut-Karabagh. Par ailleurs, la « RHK » n'étant toujours pas reconnue par la communauté internationale, elle dépendrait du soutien politique de l'Arménie, notamment pour pouvoir entrer en relation avec d'autres États.

157. Les requérants arguent encore que bon nombre de lois arméniennes sont appliquées dans le Haut-Karabagh et que la principale devise utilisée y est le dram arménien. De plus, les résidents du Haut-Karabagh souhaitant se rendre à l'étranger se verraient délivrer des passeports arméniens.

2. Le Gouvernement

158. Le Gouvernement soutient que la juridiction de la République d'Arménie ne s'étend pas au territoire du Haut-Karabagh ni aux territoires avoisinants : l'Arménie n'exercerait ni ne pourrait exercer un contrôle effectif ou la moindre parcelle de sa puissance publique sur ces territoires. Selon le Gouvernement, l'exercice d'un contrôle effectif impliquerait de diriger ou de contrôler précisément des opérations spécifiques de l'entité contrôlée et d'avoir la capacité de les engager et de les arrêter ainsi que de déterminer leur orientation. Soulignant que la juridiction extraterritoriale constitue une exception au principe selon lequel les États n'exercent leur juridiction que sur leur propre territoire, il soutient que c'est aux requérants qu'il incombe de prouver l'existence d'un tel contrôle, que le niveau de preuve requis est élevé, et qu'en l'espèce les requérants n'ont pu s'acquitter de cette charge, les éléments de preuve démontrant plutôt, selon lui, que l'Arménie n'exerce pas d'influence, et encore moins de contrôle, sur la « RHK ». Le Gouvernement considère que l'arrêt *Al-Skeini et autres* (précité) n'est pas pertinent dans les circonstances de l'espèce : il reposerait sur l'exercice « d'une autorité et d'un contrôle par les agents de l'État », ce qui ne serait pas le cas en l'espèce. Par ailleurs, le rôle joué par l'Arménie à l'égard de la « RHK » – un simple rôle

de soutien d'après lui – serait fondamentalement différent de celui que la Turquie aurait joué dans la partie septentrionale de Chypre, où elle aurait envoyé un nombre important de soldats (*Loizidou*, précité), ou de celui que la Russie aurait joué en Transnistrie, où elle aurait entreposé un important arsenal militaire (*Ilaşcu et autres*, précité), et il ne pourrait selon aucune définition raisonnable être assimilé à un contrôle effectif.

159. Le Gouvernement affirme que l'Arménie n'a pas participé au conflit militaire en question. L'attaque menée contre Latchin les 17 et 18 mai 1992 et la prise de Choucha/Chouchi le 9 mai de la même année auraient été le fait de la force de défense de la « RHK », qui aurait été composée à 90 % de personnes issues du Haut-Karabagh. Selon le Gouvernement, les actions militaires menées dans la région allaient en réalité à l'encontre des intérêts de la République d'Arménie, qui aurait à l'époque participé avec les dirigeants azerbaïdjanais à des négociations en vue d'un accord de cessez-le-feu ; une rencontre aurait d'ailleurs eu lieu à cette fin les 8 et 9 mai à Téhéran. Nonobstant ces négociations, les forces de la « RHK » auraient pour leur part estimé la prise de ces deux villes nécessaire pour mettre fin aux crimes de guerre azerbaïdjanais et pour ouvrir un couloir humanitaire vers l'Arménie.

160. Le Gouvernement ajoute que l'Arménie n'a pas non plus participé aux actions militaires menées ultérieurement. Les documents internationaux n'évoqueraient d'ailleurs nulle part une participation des forces de la République d'Arménie, mentionnant seulement les « forces arméniennes locales ». Les autorités arméniennes n'auraient adopté aucun acte ou programme juridique ni pris aucune mesure officielle à l'effet de participer auxdites actions. Celles-ci auraient été entièrement le fait de la force de défense de la « RHK » – qui aurait été constituée au début de l'année 1992 à la suite de l'adoption de la loi de la « RHK » sur la conscription – aidée de la population arménienne du Haut-Karabagh et des territoires limitrophes ainsi que de volontaires d'origine arménienne venus de différents pays. La participation de l'Arménie à la guerre se serait limitée à la défense du territoire situé à l'intérieur des frontières du pays internationalement reconnues contre des incursions azerbaïdjanaises. Cela étant, l'Arménie et la « RHK » ayant un ennemi commun, leurs forces armées coopéreraient de différentes manières.

161. L'Arménie n'aurait actuellement aucune présence militaire dans le Haut-Karabagh ni dans les territoires avoisinants. Aucun détachement, aucune unité ni aucun corps militaire n'y seraient stationnés. Il n'y aurait pas la moindre unité militaire dans le district de Latchin. Celui-ci serait en effet très éloigné de la frontière entre la « RHK » et l'Azerbaïdjan, ce qui rendrait inutile la présence de troupes sur place. Toutefois, le Gouvernement n'exclut pas la possibilité que certains ressortissants arméniens se soient engagés dans

la force de défense de la « RHK » sur une base contractuelle et volontaire. Il précise également qu'en vertu de l'accord de coopération militaire de 1994 signé par l'Arménie et la « RHK », les appelés arméniens peuvent, s'ils le souhaitent, effectuer leur service militaire en « RHK », et *vice versa*, et participer à des exercices militaires organisés en « RHK » ou en Arménie. Il y aurait une explication simple aux procédures judiciaires concernant des appelés arméniens ayant servi en « RHK » : en vertu de l'accord de coopération militaire de 1994, les accusations pénales dirigées contre des appelés arméniens relèveraient de la compétence des procureurs arméniens et les accusations pénales dirigées contre des appelés du Karabagh de celle des autorités de la « RHK ». Cela dit, seul un petit nombre d'appelés arméniens auraient servi dans le Haut-Karabagh, et ceux qui l'auraient fait auraient été sous le commandement direct de la force de défense de la « RHK ».

162. Le Gouvernement avance également que, depuis sa création, la « RHK » définit ses orientations politiques, sociales et financières en toute indépendance. L'Arménie ne lui apporterait aucune aide économique en dehors des prêts à long terme qu'elle lui consentirait depuis quelques années pour la mise en œuvre de projets particuliers tels que la reconstruction d'écoles et d'autres établissements d'enseignement ou l'octroi d'une assistance financière aux familles des soldats tués. D'autres pays auraient également fourni une aide du même type. Par ailleurs, le Fonds arménien Hayastan jouerait un rôle important dans le développement de la « RHK ». Sa mission principale consisterait à apporter une aide financière à l'Arménie et à la « RHK » grâce aux ressources réunies par la diaspora arménienne. Le conseil d'administration du Fonds comprendrait des représentants de l'Arménie, mais la majorité de ses membres seraient issus de la diaspora arménienne et de la « RHK ». Les objectifs du Fonds ne seraient pas fixés par le Gouvernement ; ce seraient souvent les donateurs eux-mêmes qui décideraient des projets à financer. La seule assistance apportée au Fonds par le Gouvernement résiderait dans la mise à disposition à titre gracieux de bureaux situés dans un bâtiment de l'État à Erevan. Le Fonds ne serait donc pas un instrument de contrôle, mais une organisation caritative apolitique, qui aurait versé 111 millions de dollars à la « RHK » pour la construction d'écoles et d'hôpitaux, la reconstruction de routes et de villages, l'organisation de manifestations culturelles et le financement d'œuvres caritatives et éducatives au bénéfice des pauvres. La « RHK » recevrait d'autres ressources de la part d'autres fonds et organisations internationales. Au total, les dons et les investissements en provenance de l'étranger destinés à cette entité seraient respectivement de 20 à 30 millions et de 30 à 40 millions de dollars par an.

163. Le Gouvernement considère que la « RHK » est un État souverain et indépendant, doté de tous les attributs d'un État indépendant au

sens du droit international, qui exerce son contrôle et sa juridiction sur le Haut-Karabagh et les territoires avoisinants. Seuls y seraient appliqués les textes de loi et autres actes juridiques adoptés par la « RHK », et il n'y aurait rien d'anormal à ce que celle-ci eût emprunté ou adopté certains textes arméniens. La « RHK » n'en aurait pas moins son propre système judiciaire, qui fonctionnerait en toute indépendance. Des élections politiques y seraient organisées, et le fait que certains individus eussent exercé de hautes responsabilités politiques tant en « RHK » qu'en Arménie n'aurait rien d'extraordinaire, compte tenu de ce que l'une et l'autre entité étaient indépendantes depuis peu. Le soutien politique apporté par l'Arménie à la « RHK » se limiterait à une participation aux négociations menées dans le cadre du groupe de Minsk de l'OSCE en vue de parvenir à un règlement du conflit du Haut-Karabagh. Les citoyens de la « RHK » – à qui leur citoyenneté conférerait des droits politiques et des obligations civiles – se verraient délivrer des passeports de la « RHK ». Il n'aurait été délivré de passeports arméniens qu'à certains résidents du Haut-Karabagh, afin de leur permettre de se rendre à l'étranger. Par ailleurs, plusieurs monnaies seraient utilisées en « RHK », et pas seulement le dram arménien.

164. Le Gouvernement estime aussi que les seuls faits dont la Cour doive tenir compte pour trancher la question de la juridiction sont ceux qui datent de mai 1992 au plus tôt (question de la causalité) et ceux postérieurs à avril 2002 (question de la juridiction). Il ajoute que les éléments disponibles à partir de 2002 montrent que la République d'Arménie et la « RHK » sont des pays amis qui ont beaucoup en commun : elles ont des liens socio-économiques étroits, elles sont alliées militairement et leurs populations partagent une même origine ethnique. Il reconnaît que l'Arménie a eu une certaine influence en « RHK » en ce qu'elle a de temps à autre apporté à celle-ci une assistance notamment financière et que, en bonne voisine et alliée, elle l'a aidée à entretenir à l'extrémité située sur son territoire le couloir humanitaire du district de Latchin. Cela étant, la République d'Arménie et la « RHK » seraient deux pays différents.

3. Le gouvernement azerbaïdjanais, tiers intervenant

165. Le gouvernement azerbaïdjanais pense comme les requérants que la République d'Arménie exerce un contrôle effectif sur le Haut-Karabagh et les territoires avoisinants, y compris la région de Latchin. S'appuyant sur les déclarations de différentes organisations internationales et non gouvernementales et sur celles du Département d'État américain et de plusieurs responsables politiques, il soutient que les forces arméniennes ont combattu aux côtés des forces séparatistes du Karabagh et ont pris le contrôle du Haut-Karabagh et de Latchin ainsi que des territoires voisins au début

des années 1990, et que ces territoires sont toujours occupés par l'Arménie, laquelle maintiendrait une présence militaire sur place. À cet égard, il renvoie aux affaires *Haroutyounian c. Arménie* (n° 36549/03, CEDH 2007-III) et *Zalyan, Sargsyan et Serobyan c. Arménie* ((déc.), n^os^ 36894/04 et 3521/07, 11 octobre 2007). Il ajoute que, contrairement à ce qu'affirme le Gouvernement, la « RHK » n'est pas un État indépendant, mais une administration locale subordonnée à l'Arménie qui survit grâce à l'appui, notamment militaire, offert par celle-ci. Selon lui, l'existence d'une force de défense de la « RHK » ressemblant de près ou de loin à ce qu'elle est aujourd'hui ne serait pas concevable sans un appui important de l'Arménie, sous la forme par exemple d'armes, de matériel, d'aide à la formation et, surtout, d'un apport constant de soldats constituant un pourcentage extrêmement significatif (voire la majorité) du contingent stationné dans les territoires occupés.

166. Le gouvernement azerbaïdjanais arguë aussi que la « RHK » ne pourrait pas survivre, que ce soit politiquement, économiquement ou militairement, sans l'important appui fourni par l'Arménie. Il indique qu'il existe notamment entre l'une et l'autre des liens politiques étroits, avec une forte intrication des plus hautes personnalités. Il ajoute que l'Arménie fournit à la « RHK » une aide économique qui revêt une importance capitale. Il cite le Fonds arménien Hayastan, qui doit selon lui être considéré comme un organe de l'État arménien s'agissant de l'aide apportée au Haut-Karabagh. Ce fonds aurait eu un impact considérable en « RHK », non seulement d'un point de vue financier mais aussi sur le plan social. Il serait porté par une volonté politique et renforcerait la dépendance économique du Haut-Karabagh envers l'Arménie et l'intégration à celle-ci de la « RHK ». Par ailleurs, les prêts accordés par l'État arménien formeraient la majeure partie du budget de la « RHK ». Enfin, des individus résidant dans le Haut-Karabagh et les territoires environnants détiendraient des passeports de la République d'Arménie.

B. Appréciation de la Cour

167. Si la compétence juridictionnelle d'un État est principalement territoriale, la notion de juridiction au sens de l'article 1 de la Convention ne se circonscrit pas au seul territoire national des Hautes Parties contractantes ; la responsabilité de l'État peut entrer en jeu à raison d'actes ou d'omissions imputables à ses organes et déployant leurs effets en dehors de son territoire national.

L'article 1 de la Convention est ainsi libellé :

> « Les Hautes Parties contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la (...) Convention. »

1. Les principes généraux en matière de juridiction extraterritoriale

168. La Cour a conclu à un exercice extraterritorial de sa juridiction par l'État contractant mis en cause dans des cas où, du fait du contrôle effectif qu'il exerçait sur le territoire étranger en cause et sur ses habitants en conséquence d'une occupation militaire ou en vertu du consentement, de l'invitation ou de l'acquiescement du gouvernement local, il assumait l'ensemble ou certaines des prérogatives de puissance publique normalement exercées par celui-ci. Les principes pertinents ont été énoncés dans plusieurs arrêts, dont *Ilaşcu et autres* (précité, §§ 311-319), *Al-Skeini et autres* (précité, §§ 130-139) et *Catan et autres c. République de Moldova et Russie* ([GC], nos 43370/04 et 2 autres, 19 octobre 2012). Les passages pertinents de l'arrêt *Catan et autres* sont ainsi libellés :

> « 103. La Cour a établi un certain nombre de principes clairs dans sa jurisprudence relative à l'article 1. Ainsi, aux termes de cette disposition, l'engagement des États contractants se borne à « reconnaître » (en anglais « *to secure* ») aux personnes relevant de leur « juridiction » les droits et libertés énumérés (*Soering c. Royaume-Uni*, 7 juillet 1989, § 86, série A no 161, *Banković et autres*, décision précitée, § 66). La « juridiction » au sens de l'article 1 est une condition *sine qua non*. Elle doit avoir été exercée pour qu'un État contractant puisse être tenu pour responsable des actes ou omissions à lui imputables qui sont à l'origine d'une allégation de violation des droits et libertés énoncés dans la Convention (*Ilaşcu et autres*, précité, § 311, *Al-Skeini et autres*, précité, § 130).
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> 104. La juridiction d'un État, au sens de l'article 1, est principalement territoriale (*Soering*, précité, § 86, *Banković et autres*, décision précitée, §§ 61 [et] 67, *Ilaşcu et autres*, précité, § 312, *Al-Skeini et autres*, précité, § 131). Elle est présumée s'exercer normalement sur l'ensemble du territoire de l'État (*Ilaşcu et autres*, précité, § 312, et *Assanidzé c. Géorgie* [GC], no 71503/01, § 139, CEDH 2004-II). À l'inverse, les actes des États contractants accomplis ou produisant des effets en dehors de leur territoire ne peuvent que dans des circonstances exceptionnelles s'analyser en l'exercice par eux de leur juridiction au sens de l'article 1 (*Banković et autres*, décision précitée, § 67, et *Al-Skeini et autres*, précité, § 131).
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> 105. À ce jour, la Cour a reconnu un certain nombre de circonstances exceptionnelles susceptibles d'emporter exercice par l'État contractant de sa juridiction à l'extérieur de ses propres frontières. Dans chaque cas, c'est au regard des faits particuliers de la cause qu'il faut apprécier l'existence de pareilles circonstances exigeant et justifiant que la Cour conclue à un exercice extraterritorial de sa juridiction par l'État (*Al-Skeini et autres*, précité, § 132).
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> 106. Le principe voulant que la juridiction de l'État contractant au sens de l'article 1 soit limitée à son propre territoire connaît une exception lorsque, par suite d'une action militaire – légale ou non –, l'État exerce un contrôle effectif sur une zone située en dehors de son territoire. L'obligation d'assurer dans une telle zone le respect des droits et libertés garantis par la Convention découle du fait de ce contrôle, qu'il

s'exerce directement, par l'intermédiaire des forces armées de l'État ou par le biais d'une administration locale subordonnée (*Loizidou c. Turquie* (exceptions préliminaires), 23 mars 1995, § 62, série A n° 310, *Chypre c. Turquie* [GC], n° 25781/94, § 76, CEDH 2001-IV, *Banković et autres*, décision précitée, § 70, *Ilaşcu et autres*, précité, §§ 314-316, *Loizidou c. Turquie* (fond), 18 décembre 1996, § 52, *Recueil des arrêts et décisions* 1996-VI, et *Al-Skeini et autres*, précité, § 138). Dès lors qu'une telle mainmise sur un territoire est établie, il n'est pas nécessaire de déterminer si l'État contractant qui la détient exerce un contrôle précis sur les politiques et actions de l'administration locale qui lui est subordonnée. Du fait qu'il assure la survie de cette administration grâce à son soutien militaire et autre, cet État engage sa responsabilité à raison des politiques et actions entreprises par elle. L'article 1 lui fait obligation de reconnaître sur le territoire en question la totalité des droits matériels énoncés dans la Convention et dans les Protocoles additionnels qu'il a ratifiés, et les violations de ces droits lui sont imputables (*Chypre c. Turquie*, précité, §§ 76-77, *Al-Skeini et autres*, précité, § 138).

107. La question de savoir si un État contractant exerce ou non un contrôle effectif sur un territoire hors de ses frontières est une question de fait. Pour se prononcer, la Cour se réfère principalement au nombre de soldats déployés par l'État sur le territoire en cause (*Loizidou* (fond), précité, §§ 16 et 56, et *Ilaşcu et autres*, précité, § 387). D'autres éléments peuvent aussi entrer en ligne de compte, par exemple la mesure dans laquelle le soutien militaire, économique et politique apporté par l'État à l'administration locale subordonnée assure à celui-ci une influence et un contrôle dans la région (*Ilaşcu et autres*, précité, §§ 388-394, *Al-Skeini et autres*, précité, § 139).

(...)

115. (...) Comme le montre le bref exposé de la jurisprudence de la Cour livré ci-dessus, les critères permettant d'établir l'existence de la « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un État concernant un fait internationalement illicite au regard du droit international. »

2. Application de ces principes aux faits de la cause

169. La Cour considère d'abord que, contrairement à ce que plaident les requérants à titre subsidiaire dans leur argumentation, il n'existe pas dans le Haut-Karabagh et les territoires avoisinants une situation où des agents de l'État arménien exerceraient une autorité et un contrôle sur des individus se trouvant hors des frontières de cet État. La question à trancher à partir des faits de la cause consiste plutôt à savoir si la République d'Arménie a exercé et continue d'exercer un contrôle effectif sur les territoires mentionnés et peut, de ce fait, être tenue pour responsable des violations alléguées. Comme la Cour l'a dit dans son arrêt *Catan et autres* (précité, § 107), la réponse à pareille question dépend avant tout de l'ampleur de la présence militaire de l'État sur place, mais d'autres indicateurs, tels que le soutien économique et politique éventuellement apporté, peuvent aussi avoir leur importance.

170. Si les requérants résidaient dans le district de Latchin, la question de la juridiction ne concerne pas uniquement ce territoire. De fait, le district de Latchin est l'une des zones des territoires mentionnés les plus éloignées de la ligne de contact avec l'Azerbaïdjan. Il est entouré par le Haut-Karabagh à l'est, par les districts de Kelbajar, de Gubadly et de Jabrayil au nord et au sud, et par l'Arménie à l'ouest. Pour trancher la question de la juridiction de l'Arménie en l'espèce, il faut donc déterminer si ce pays exerce un contrôle effectif sur le Haut-Karabagh et les territoires environnants dans leur ensemble.

171. De plus, si l'Arménie ne peut voir sa responsabilité engagée pour des violations qui tireraient leur origine d'événements antérieurs au 26 avril 2002, date à laquelle elle a ratifié la Convention, la Cour peut néanmoins tenir compte de faits se rapportant à des événements antérieurs s'ils sont révélateurs d'une situation continue ayant perduré après cette date.

a) Appui militaire

172. Le conflit dans le Haut-Karabagh a dégénéré en une véritable guerre en 1992, mais il avait commencé quelques années plus tôt, avec des appels à l'incorporation du Haut-Karabagh à l'Arménie provenant des deux entités. Ainsi, en décembre 1989, le soviet suprême de la RSS d'Arménie et le conseil régional du Haut-Karabagh avaient adopté une résolution conjointe sur la « réunification » des deux entités et, en janvier 1990, celles-ci avaient adopté un budget commun. Il est clair que, depuis le début du conflit, la RSS d'Arménie, puis la République d'Arménie ont fortement appuyé les revendications tendant à ce que le Haut-Karabagh soit incorporé à son propre territoire ou bien obtienne son indépendance de l'Azerbaïdjan.

173. Les documents dont la Cour dispose ne permettent pas – et ils ne pouvaient du reste guère permettre – de déterminer de manière certaine la composition des forces armées qui ont occupé et contrôlé le Haut-Karabagh et les sept districts voisins entre le moment, au début de l'année 1992, où la guerre a éclaté et celui, en mai 1994, où le cessez-le-feu a été conclu. Par exemple, les résolutions adoptées par le Conseil de sécurité des Nations unies en 1993, tout en exprimant une vive préoccupation relativement à la tension entre l'Arménie et l'Azerbaïdjan, mentionnaient une invasion et une occupation par « des forces arméniennes locales » et appelaient l'Arménie à exercer son influence sur « les Arméniens de la région du Haut-Karabagh » (paragraphe 59 ci-dessus). En revanche, le rapport de Human Rights Watch (paragraphe 60 ci-dessus) témoigne de l'implication des forces armées de la République d'Arménie à cette période. Le ministre arménien de la Défense en poste en 1992-1993, M. Vazguen Manoukian, a d'ailleurs lui-même reconnu cet état de choses (paragraphe 62 ci-dessus).

174. Au demeurant, la Cour n'estime guère concevable que le Haut-Karabagh – entité peuplée de moins de 150 000 individus d'ethnie arménienne – ait été capable, sans un appui militaire substantiel de l'Arménie, de mettre en place au début de l'année 1992 une force de défense qui, face à un pays comme l'Azerbaïdjan, peuplé de quelque sept millions d'habitants, allait non seulement prendre le contrôle de l'ex-OAHK, mais encore conquérir, avant la fin de l'année 1993, la majeure partie sinon la totalité des sept districts azerbaïdjanais voisins.

175. Quoi qu'il en soit, la présence militaire de l'Arménie dans le Haut-Karabagh a été à plusieurs égards officialisée en juin 1994 par l'« Accord de coopération militaire entre le gouvernement de la République d'Arménie et le gouvernement de la République du Haut-Karabagh » (paragraphe 74 ci-dessus). Outre qu'il mentionne différentes questions militaires sur lesquelles les deux entités conviennent de coopérer, cet accord prévoit en particulier que les appelés de l'Arménie et ceux de la « RHK » peuvent accomplir leur service militaire dans l'une ou l'autre entité.

176. Des rapports et des déclarations ultérieurs confirment la participation des forces arméniennes au conflit. Par exemple, même s'ils n'ont pas abouti à un accord entre les parties, le « plan global » et l'approche « étape par étape » élaborés au sein du groupe de Minsk de l'OSCE en 1997 prévoyaient que les forces armées de l'Arménie se replient à l'intérieur des frontières de la République d'Arménie (paragraphe 61 ci-dessus). Des exigences analogues ont été exprimées par l'Assemblée générale des Nations unies en mars 2008 (paragraphe 67 ci-dessus) et par le Parlement européen en avril 2012 (paragraphe 70 ci-dessus). En janvier 2005, l'Assemblée parlementaire du Conseil de l'Europe, notant que des « parties importantes du territoire azerbaïdjanais » demeuraient occupées par les forces arméniennes, a réaffirmé que l'indépendance et la sécession d'un territoire ne devaient pas être la conséquence de « l'annexion de fait du territoire concerné par un autre État » (paragraphe 64 ci-dessus). Dans son rapport de septembre 2005, l'International Crisis Group (ICG) concluait, s'appuyant sur des déclarations de responsables et de soldats arméniens, que les forces de l'Arménie et celles du Haut-Karabagh étaient « largement intégrées » (paragraphe 65 ci-dessus). On trouve aussi dans des affaires portées devant la Cour ou devant d'autres juridictions des éléments qui indiquent que des soldats arméniens ont servi en « RHK » (paragraphes 76-77 ci-dessus).

177. Comme elle l'a déjà dit dans l'arrêt *El-Masri c. l'ex-République yougoslave de Macédoine* ([GC], n° 39630/09, § 163, CEDH 2012), la Cour considère en principe avec prudence les déclarations émanant de ministres ou de hauts fonctionnaires, ceux-ci pouvant être enclins à s'exprimer en faveur du gouvernement qu'ils représentent ou représentaient. Cependant,

elle estime aussi que les déclarations de hauts dirigeants – même s'il s'agit d'anciens ministres ou de hauts fonctionnaires – ayant joué un rôle central dans le litige en question revêtent une valeur probante particulière lorsque les intéressés reconnaissent des faits ou un comportement faisant apparaître les autorités sous un jour défavorable. Pareilles déclarations peuvent alors être interprétées comme une forme d'aveu (voir à cet égard, *mutatis mutandis*, Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique), fond, arrêt, CIJ Recueil 1986, § 64).

178. Dans ces conditions, elle juge frappantes les déclarations de certains représentants de la République d'Arménie qui paraissent contredire la thèse officielle selon laquelle les forces armées arméniennes n'ont pas été déployées en « RHK » ni dans les territoires voisins. La déclaration de l'ancien ministre de la Défense, M. Manoukian, a déjà été mentionnée ci-dessus (paragraphe 62 ci-dessus). Un élément plus important encore est le discours prononcé en janvier 2013 par le président arménien, M. Serge Sargsian, devant les responsables du ministère de la Défense auxquels il a déclaré que le but de la politique étrangère arménienne était d'obtenir la reconnaissance juridique de la victoire remportée dans le cadre de la guerre du Haut-Karabagh par ce qu'il appelait « notre armée » (paragraphe 72 ci-dessus). Il est à noter aussi que le Gouvernement a reconnu en l'espèce, relativement à l'accord de coopération militaire de 1994, que l'armée arménienne et la force de défense de la « RHK » coopéraient au sein d'une alliance de défense.

179. Par ailleurs, même si on ne peut considérer M. Jirair Sefilian comme un représentant officiel de la République d'Arménie, il n'en est pas moins un homme politique de premier plan et un ancien haut gradé de l'armée arménienne ayant servi pendant la guerre, et, à ce titre, la Cour tient compte des propos qu'il a tenus lors d'une interview accordée en octobre 2008 : « [l]e monde entier sait que l'armée de la RHK fait partie des forces armées de l'Arménie » (paragraphe 68 ci-dessus).

À l'inverse, la Cour note que l'avis de M. Bucur-Marcu (paragraphe 73 ci-dessus) a été établi à la demande du Gouvernement et doit donc être envisagé avec précaution dans les circonstances de l'espèce.

180. Le nombre de soldats arméniens servant en « RHK » est controversé : le Gouvernement affirme qu'il se monte à 1 500 personnes tout au plus, tandis que les requérants s'appuient sur les chiffres avancés par l'Institut international pour les études stratégiques (IISS) et l'ICG en 2002-2005, selon lesquels 8 000 à 10 000 militaires arméniens étaient alors déployés dans le Haut-Karabagh (paragraphes 63 et 65 ci-dessus). La Cour n'estime pas nécessaire de trancher cette question. En effet, de nombreux rapports et déclarations cités ci-dessus à l'appui, elle juge établi que la République d'Arménie, par sa présence militaire et par la fourniture de matériel et de

conseils militaires, a participé très tôt et de manière significative au conflit du Haut-Karabagh. Cet appui militaire a été et demeure déterminant pour la conquête et la conservation du contrôle sur les territoires en cause, et les éléments disponibles, en particulier l'accord de coopération militaire de 1994, démontrent de manière convaincante que les forces armées de l'Arménie et celles de la « RHK » sont largement intégrées.

b) Autre type d'appui

181. L'intégration des deux entités est en outre démontrée par le nombre d'hommes politiques qui ont exercé les plus hautes fonctions en Arménie après l'avoir fait en « RHK » (paragraphe 78 ci-dessus). L'appui politique apporté de manière générale par l'Arménie à la « RHK » est aussi mis en évidence par les déclarations susmentionnées relatives à la participation militaire de l'Arménie au conflit.

182. Le Gouvernement soutient que la « RHK » possède ses propres lois et ses propres organes politiques et judiciaires, lesquels seraient indépendants. Or la dépendance politique de la « RHK » à l'égard de l'Arménie apparaît flagrante non seulement à la lumière des transferts entre l'une et l'autre de personnalités politiques de premier plan, mais aussi parce que ses résidents se procurent des passeports arméniens pour se rendre à l'étranger, la « RHK » n'étant reconnue par aucun État ni aucune organisation internationale (paragraphe 83 ci-dessus). On trouve dans la législation et le système judiciaire d'autres signes d'intégration entre les deux entités. Le Gouvernement a reconnu que plusieurs lois de la « RHK » avaient été reprises de la législation arménienne. De manière plus importante, les circonstances de l'affaire *Zalyan, Sargsyan et Serobyan*, précitée, pendante devant la Cour (paragraphe 76 ci-dessus), montrent non seulement que des troupes arméniennes sont présentes dans le Haut-Karabagh, mais aussi que des agents des forces de l'ordre arméniennes y sont actifs et que les juridictions arméniennes exercent leur compétence sur ce territoire. Le cas de M. Grigoryan (paragraphe 77 ci-dessus) va dans le même sens.

183. Enfin, l'appui financier que l'Arménie apporte directement ou indirectement à la « RHK » est substantiel. L'ICG a rapporté que, dans le budget 2005 de cette entité, seuls 26,7 % des dépenses étaient couverts par des recettes de source locale. La « RHK » a reçu, dans le cadre d'un « prêt inter-États » consenti par l'Arménie, des sommes considérables, qui s'élevaient pour 2004 et 2005 à 51 millions de dollars au total. S'appuyant sur des sources officielles, l'ICG a estimé que ce prêt représentait jusqu'à 67,3 % du budget de la « RHK » en 2001 et 56,9 % en 2004. Bien qu'il fût en place depuis 1993, pas un centime n'en avait encore été remboursé en 2005 (paragraphes 80-81 ci-dessus).

184. La « RHK » reçoit également une aide du Fonds arménien Hayastan, qui, selon le Gouvernement, a alloué quelque 111 millions de dollars à des projets menés dans l'entité entre 1995 et 2012. Même si ce fonds n'est pas une institution gouvernementale et si ses ressources proviennent de dons individuels, il est à noter qu'il a été créé par décret présidentiel. De plus, le président arménien est nommé d'office président de son conseil d'administration, lequel compte parmi ses membres plusieurs présidents et ministres anciens ou actuels de l'Arménie et de la « RHK » ainsi que d'autres hauts responsables arméniens. Même si toutes ces personnalités n'y sont pas majoritaires, il ressort clairement de cette composition que les représentants officiels de l'Arménie – ainsi que leurs homologues de « RHK » – sont en mesure de peser d'un grand poids sur les activités du Fonds.

185. Il est vrai que la « RHK » reçoit aussi une assistance financière substantielle en provenance d'autres sources, notamment du gouvernement américain et de la diaspora arménienne. Néanmoins, les chiffres mentionnés ci-dessus montrent qu'elle ne pourrait pas subsister économiquement sans l'appui substantiel que lui apporte l'Arménie.

c) Conclusion

186. L'ensemble des éléments exposés ci-dessus révèlent que la République d'Arménie a exercé sur la « RHK » une influence importante et déterminante dès le début du conflit dans le Haut-Karabagh, que les deux entités sont hautement intégrées dans pratiquement tous les domaines importants et que cette situation perdure à ce jour. En d'autres termes, la « RHK » et son administration survivent grâce à l'appui militaire, politique, financier et autre que leur apporte l'Arménie, laquelle, dès lors, exerce un contrôle effectif sur le Haut-Karabagh et les territoires avoisinants, y compris le district de Latchin. Les faits dénoncés par les requérants relèvent donc de la juridiction de l'Arménie aux fins de l'article 1 de la Convention.

187. Partant, la Cour rejette l'exception du Gouvernement concernant la juridiction de la République d'Arménie sur le Haut-Karabagh et les territoires avoisinants.

V. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 1 DU PROTOCOLE N° 1

188. Les requérants se plaignent de la perte de tout contrôle sur leurs biens et de toute possibilité de les utiliser, vendre, léguer ou hypothéquer ou de les faire fructifier ou d'en jouir. Ils y voient une violation continue de l'article 1 du Protocole n° 1, ainsi libellé :

« Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »

A. Thèses des parties

1. Les requérants

189. Les requérants soutiennent qu'ils sont victimes d'une violation de leurs droits garantis par l'article 1 du Protocole n° 1 et que cette violation est la conséquence directe d'un exercice par la République d'Arménie de sa puissance publique. Ils craignent que leurs biens aient été détruits ou pillés peu après leur départ contraint du district de Latchin, mais ils soulignent que leur grief concerne une atteinte à l'ensemble de leurs biens restés à Latchin, y compris les terrains. Ils se plaignent de se voir opposer un refus continu d'accès à ces biens, à l'égard desquels ils disent être toujours titulaires de droits de propriété ou d'usage. Ils arguent, d'une part, que ce refus constitue une ingérence qui n'est nullement prévue par la loi et, d'autre part, que, quel que soit le but de l'occupation du district de Latchin, on ne peut considérer l'impossibilité totale qui leur est faite d'accéder à leurs biens et la destruction éventuelle de ceux-ci sans le versement de la moindre indemnité comme des mesures proportionnées à ce but. Enfin, ils déclarent n'avoir aucune chance d'obtenir l'autorisation de retourner chez eux – ou d'ailleurs où que ce soit dans les territoires occupés – dans un avenir prévisible.

2. Le Gouvernement

190. Le Gouvernement soutient, d'une part, que les requérants n'ont en fait jamais essayé de retourner dans la ville de Latchin ou dans les villages avoisinants depuis leur fuite alléguée et qu'ils ne peuvent donc passer pour avoir été empêchés d'y rentrer et, d'autre part, qu'ils n'ont jamais demandé aux autorités arméniennes ou à celles de la « RHK » de protéger ou de rétablir leurs droits. Il répète l'argument qu'il a avancé relativement à la question de l'épuisement des voies de recours internes : la position adoptée par l'Arménie dans le cadre des négociations menées au sein du groupe de Minsk de l'OSCE – à savoir que le retour des personnes déplacées ne pourra être envisagé qu'après l'adoption d'un accord de règlement définitif du statut de la « RHK » – concerne les déplacés en tant que groupe et ne vaut pas pour les individus, lesquels peuvent selon lui obtenir un visa d'entrée

s'ils ont une raison légitime d'aller en « RHK » ou en Arménie. Se rendre en « RHK » ne présenterait par ailleurs pas de danger : le seul point d'entrée ouvert serait situé sur la route d'Erevan à Stepanakert et se trouverait loin de la ligne de contact. Enfin, la prise de Latchin et de Choucha/Chouchi aurait été une mesure de légitime défense contre les crimes de guerre qui auraient été commis par l'Azerbaïdjan, en particulier les assauts militaires sur Stepanakert. Elle aurait permis de répondre à la nécessité d'ouvrir un « couloir humanitaire » vers l'Arménie vu le grand nombre d'habitants du Haut-Karabagh qui auraient été tués ou auraient risqué de mourir de faim. Répétant que la République d'Arménie n'est nullement responsable des actes dénoncés par les requérants, le Gouvernement soutient qu'il n'y a pas eu violation de l'article 1 du Protocole n° 1.

3. Le gouvernement azerbaïdjanais, tiers intervenant

191. Le gouvernement azerbaïdjanais plaide que les requérants n'ont pas été expulsés des territoires occupés par un acte juridique, mais qu'ils ont été contraints de prendre la fuite du fait des activités des forces militaires arméniennes, et que le déploiement de troupes arméniennes et de mines antipersonnelles sur la ligne de contact les empêche toujours de retourner sur place jouir de leurs biens tandis que les Arméniens bénéficient de mesures incitatives favorisant leur installation dans ces territoires. Il estime que la position adoptée par l'Arménie dans les négociations menées au sein du groupe de Minsk de l'OSCE quant au retour des personnes déplacées constitue une preuve supplémentaire de cet état de choses. Enfin, il affirme que le niveau et l'ampleur de l'appui apporté par l'Arménie à l'administration locale subordonnée n'ont pas diminué au fil des ans, mais se sont au contraire intensifiés. En conclusion, il soutient que la République d'Arménie est responsable d'une violation continue, à l'égard des requérants, des droits garantis par l'article 1 du Protocole n° 1.

B. Appréciation de la Cour

192. La Cour rappelle d'abord qu'elle a conclu (paragraphe 149 ci-dessus) que, s'il n'est pas certain que leurs maisons existent encore, les requérants ont tous des droits actuels sur leurs parcelles de terrain qui constituent des « biens » au sens de l'article 1 du Protocole n° 1. Étant donné que les faits de la cause relèvent de la juridiction de la République d'Arménie (paragraphe 186 ci-dessus), la question à trancher est celle de savoir si celle-ci est responsable d'une violation du droit des requérants au respect de leurs biens.

193. Les requérants ont été contraints de quitter Latchin lorsque le district a été attaqué en mai 1992. La Cour n'a pas pour tâche d'examiner

cet événement en tant que tel, mais de déterminer si les requérants ont été privés de l'accès à leurs biens après le 26 avril 2002, date à laquelle l'Arménie a ratifié la Convention, et s'ils subissent de ce fait une violation continue de leurs droits. Cela étant, les événements antérieurs peuvent être révélateurs d'une telle situation continue.

194. Comme indiqué ci-dessus (paragraphes 118-120), le Gouvernement n'a cité aucun recours interne effectif qui serait ouvert en République d'Arménie ou en « RHK ». Les requérants n'ont donc accès à aucun moyen juridique d'obtenir une indemnisation pour la perte de leurs biens ou – ce qui est plus important dans le présent contexte – d'être autorisés à retourner dans les villages où ils avaient vécu pour recouvrer l'accès aux biens et aux domiciles abandonnés par eux. Le refus continu de les laisser accéder à leurs biens est en outre démontré par l'affirmation du Gouvernement, dont la preuve n'a toutefois pas été apportée, selon laquelle leurs biens – et probablement ceux d'autres personnes déplacées – ont été attribués par l'administration de la « RHK » à d'autres individus, qui auraient été inscrits au registre foncier comme les nouveaux titulaires de ces biens.

195. De plus, vingt ans après l'accord de cessez-le-feu, les personnes déplacées pendant le conflit n'ont pas encore pu retourner dans le Haut-Karabagh et les territoires avoisinants. La Cour prend note à cet égard des résolutions adoptées par l'Assemblée générale des Nations unies et par le Parlement européen (paragraphes 67 et 69 ci-dessus). Elle considère que, dans les conditions qui prévalent depuis toutes ces années – notamment la présence continue sur place de troupes arméniennes ou soutenues par l'Arménie, les violations du cessez-le-feu sur la ligne de contact, la relation globalement hostile entre l'Arménie et l'Azerbaïdjan et l'absence de perspective de solution politique à ce jour –, le retour d'Azerbaïdjanais dans ces territoires n'est pas envisageable de manière réaliste et pratique.

196. Dès lors que les requérants se sont vu priver de manière continue de l'accès à leurs biens et qu'ils en ont perdu le contrôle ainsi que toute possibilité d'en user et d'en jouir, ils ont subi relativement à leurs droits découlant de l'article 1 du Protocole n° 1 (*Loizidou* (fond), précité, § 63) une ingérence qui s'analyse en une atteinte à leur droit au respect de leurs biens.

197. Le Gouvernement affirme que la prise de Latchin et la création d'une liaison terrestre entre l'Arménie et le Haut-Karabagh étaient des actes de légitime défense. La Cour entend l'argument selon lequel le district de Latchin revêtait une importance stratégique sur le plan militaire et il était nécessaire d'acheminer des vivres, des médicaments et d'autres fournitures vers le Haut-Karabagh. Cela étant, indépendamment de la question de savoir si ces circonstances pouvaient ou non justifier des atteintes aux droits

individuels des habitants de la région, la prise de Latchin en mai 1992 n'a pas d'incidence directe sur la question ici examinée, qui consiste à savoir si l'impossibilité pour les requérants de rentrer chez eux et, en conséquence, de recouvrer l'accès à leurs biens peut passer pour justifiée.

198. La Cour juge de même que la poursuite au sein du groupe de Minsk de l'OSCE des négociations relatives aux questions concernant les personnes déplacées ne constitue pas une justification juridique à l'ingérence incriminée. Ces négociations ne dispensent pas le Gouvernement de prendre d'autres mesures, d'autant qu'elles durent depuis de très nombreuses années (voir, *mutatis mutandis*, *Loizidou*, précité, § 64, et *Chypre c. Turquie*, précité, § 188). À cet égard, la Cour rappelle que dans sa résolution 1708 (2010), intitulée « Résolution des problèmes de propriété des réfugiés et des personnes déplacées à l'intérieur de leur propre pays », l'Assemblée parlementaire du Conseil de l'Europe, faisant référence aux normes internationales applicables, a invité les États membres à « garantir une réparation effective, dans des délais raisonnables, pour la perte de l'accès aux logements, terres et biens – et des droits y afférents – abandonnés par les réfugiés et les personnes déplacées, sans attendre les négociations concernant le règlement des conflits armés ou le statut d'un territoire donné » (paragraphe 100 ci-dessus).

199. Pour ce qui est des mesures qu'il pourrait et devrait prendre pour protéger le droit des requérants au respect de leurs biens, l'État défendeur peut s'inspirer des normes internationales pertinentes, notamment des principes de Pinheiro (paragraphe 98 ci-dessus) et de la résolution susmentionnée. Dans les conditions actuelles, où un accord de paix global n'a pas encore été trouvé, il paraît particulièrement important de mettre en place un mécanisme de revendication des biens qui soit aisément accessible et qui offre des procédures fonctionnant avec des règles de preuve souples, de manière à permettre aux requérants et aux autres personnes qui se trouvent dans la même situation qu'eux d'obtenir le rétablissement de leurs droits sur leurs biens ainsi qu'une indemnisation pour la perte de jouissance de ces droits.

200. La Cour a parfaitement conscience que le Gouvernement a dû porter assistance à des centaines de milliers de réfugiés et de déplacés arméniens. Toutefois, même si la nécessité de répondre aux besoins d'un nombre aussi important d'individus requiert des ressources considérables, la protection de ce groupe n'exonère pas le Gouvernement de ses obligations envers un autre groupe, en l'occurrence les citoyens azerbaïdjanais qui, comme les requérants, ont dû prendre la fuite pendant le conflit. À cet égard, il y a lieu de rappeler le principe de non-discrimination énoncé à l'article 3 des principes de Pinheiro. Enfin, la Cour observe que la situation en cause n'est plus une situation d'urgence mais une situation qui s'est installée dans la durée.

201. En conclusion, pour ce qui est de la période considérée, à savoir celle postérieure au 26 avril 2002, aucun but n'a été invoqué qui serait susceptible de justifier l'impossibilité faite aux requérants d'accéder à leurs biens et l'absence d'indemnisation pour cette ingérence. Partant, la Cour estime qu'il y a eu et qu'il continue d'y avoir violation à l'égard des requérants des droits garantis par l'article 1 du Protocole n° 1, et que la République d'Arménie est responsable de cette violation.

VI. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 8 DE LA CONVENTION

202. Les requérants soutiennent que l'impossibilité dans laquelle ils se trouvent de retourner dans le district de Latchin s'analyse de surcroît en une violation continue de leur droit au respect de leur domicile et de leur vie privée et familiale. Ils invoquent l'article 8, ainsi libellé :

> « 1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.
>
> 2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. »

A. Thèses des parties

1. Les requérants

203. Reprenant essentiellement les mêmes éléments que ceux sur lesquels ils fondent le grief qu'ils tirent de l'article 1 du Protocole n° 1, les requérants soutiennent que le refus continu du Gouvernement de les laisser retourner dans le district de Latchin emporte aussi violation de leurs droits garantis par l'article 8 de la Convention. Ils invoquent à cet égard l'affaire *Chypre c. Turquie* (arrêt précité). Ils considèrent que leur cas se distingue de l'affaire *Loizidou* (arrêt précité), arguant que, contrairement à M^me^ Loizidou, ils ont tous vécu pendant de nombreuses années dans la région de Latchin et y avaient leur domicile et leur vie privée et familiale. Ils ajoutent que l'atteinte à leurs droits dont ils se plaignent n'est justifiée par aucun des motifs autorisés cités à l'article 8 § 2.

2. Le Gouvernement

204. Le Gouvernement reprend lui aussi pour l'essentiel les arguments qu'il a déjà exposés sous l'angle de l'article 1 du Protocole n° 1. Il ajoute que

les maisons et autres biens revendiqués par les requérants ont été détruits en 1992 et que les intéressés ne peuvent donc pas prétendre avoir mené une vie privée ou familiale ou avoir eu leur domicile dans la région en cause après cette date. Il arguë à cet égard que la situation des requérants est comparable à celle qui était en cause dans l'affaire *Loizidou* (arrêt précité), et il rappelle la conclusion formulée par la Cour à l'époque (*ibidem*, § 66) :

> « Ce serait forcer la notion de « domicile » figurant à l'article 8 que de l'étendre de manière à inclure un bien-fonds sur lequel on envisage d'édifier une maison à des fins d'habitation. Ce terme ne peut pas davantage s'interpréter comme couvrant la région d'un État où l'on a grandi et où la famille a ses racines mais où l'on ne vit plus. »

Le Gouvernement ajoute que, en toute hypothèse, l'ingérence alléguée était prévue par la loi et nécessaire dans une société démocratique : parce qu'il constituerait un « couloir humanitaire » reliant la « RHK » au monde extérieur, le district de Latchin devrait être contrôlé dans l'intérêt de la sécurité nationale, de la sûreté publique et du bien-être économique du pays.

3. Le gouvernement azerbaïdjanais, tiers intervenant

205. Le gouvernement azerbaïdjanais appuie la thèse des requérants.

B. Appréciation de la Cour

206. Comme la notion de « biens » au sens de l'article 1 du Protocole n° 1, les concepts de « vie privée », de « vie familiale » et de « domicile » visés à l'article 8 de la Convention revêtent une portée autonome qui ne dépend pas des qualifications du droit interne, mais des circonstances factuelles. Comme la Cour l'a constaté ci-dessus (paragraphes 137 et 150), tous les requérants sont nés dans le district de Latchin. Avant leur fuite en mai 1992, ils y avaient vécu et travaillé pendant toute leur vie ou pendant la majeure partie de leur vie. Presque tous s'y étaient mariés et y avaient eu des enfants, comme leurs ancêtres avant eux. Ils y gagnaient leur vie et y vivaient dans des maisons qu'ils avaient bâties et dont ils étaient propriétaires. Il est donc clair qu'ils avaient depuis longtemps leur vie et leur domicile dans le district lorsqu'ils l'ont quitté, et que leur situation se distingue dès lors de celle de la requérante dans l'affaire *Loizidou* (arrêt précité). Les requérants ne se sont pas volontairement établis ailleurs, ce sont des personnes déplacées qui habitent à Bakou ou autre part par nécessité. Dans les circonstances de l'espèce, on ne saurait considérer que leur déplacement forcé et leur absence involontaire du district de Latchin aient brisé leur lien avec ce lieu, nonobstant le temps qui s'est écoulé depuis leur départ.

207. Pour les mêmes raisons que celles exposées sous l'angle de l'article 1 du Protocole n° 1, la Cour conclut que l'impossibilité faite aux requérants

de regagner leurs domiciles respectifs constitue une ingérence injustifiée dans l'exercice de leur droit au respect de leur vie privée et familiale et de leur droit au respect de leur domicile.

208. Elle conclut donc qu'il y a eu et qu'il continue d'y avoir violation à l'égard des requérants des droits garantis par l'article 8 de la Convention, et que la République d'Arménie est responsable de cette violation.

VII. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 13 DE LA CONVENTION

209. Les requérants allèguent l'absence de tout recours effectif relativement aux griefs formulés par eux. Ils invoquent l'article 13, ainsi libellé :

> « Toute personne dont les droits et libertés reconnus dans la (...) Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

A. Thèses des parties

1. Les requérants

210. Les requérants se plaignent qu'aucun recours n'ait été prévu pour les personnes déplacées des territoires occupés. Ils allèguent que dès lors qu'ils ne sont pas d'origine arménienne, toute démarche de leur part visant à obtenir un redressement auprès des autorités de la République d'Arménie ou de la « RHK » serait totalement vaine. Ils estiment ne disposer d'aucun recours, ni en théorie ni en pratique, pour faire valoir leurs griefs. L'absence de recours internes apparaît selon eux de manière plus évidente encore à la lumière de la question du droit au retour des personnes déplacées à l'intérieur de leur propre pays : celle-ci constituerait l'un des points de divergence majeurs entre les parties aux négociations de paix en cours et n'aurait en conséquence toujours pas été résolue.

2. Le Gouvernement

211. Le Gouvernement plaide pour sa part que les requérants disposent de recours administratifs et judiciaires effectifs tant en République d'Arménie qu'en « RHK », où les autorités ne feraient pas de distinction entre les personnes déplacées et les autres. En ce qui concerne les recours existant en « RHK », il soutient, en invoquant les conclusions auxquelles la Cour est parvenue dans l'affaire *Chypre c. Turquie* (arrêt précité, § 98), que dans le cas d'une entité non reconnue au niveau international il y a lieu d'exercer les recours offerts par elle, sauf à prouver leur inexistence ou leur caractère inopérant. Renvoyant par ailleurs aux arguments et aux exemples d'affaires

présentés par lui dans le cadre de l'examen de la question de l'épuisement des voies de recours internes, il arguë que les requérants n'ont ni exercé les recours disponibles ni avancé le moindre élément tendant à prouver que ceux-ci seraient inexistants ou ineffectifs.

3. Le gouvernement azerbaïdjanais, tiers intervenant

212. Le gouvernement azerbaïdjanais appuie pour l'essentiel la thèse des requérants. Se référant à l'arrêt *Doğan et autres* (précité, § 106), il ajoute que l'Arménie est restée en défaut non seulement d'offrir un recours effectif, mais aussi d'enquêter pour établir les responsabilités relativement à l'impossibilité de recouvrer l'accès à leur domicile et à leurs biens invoquée par les requérants.

B. Appréciation de la Cour

213. La Cour a déjà conclu à la violation de l'article 1 du Protocole n° 1 et de l'article 8 de la Convention à raison de l'impossibilité continue faite aux requérants d'accéder à leurs biens et à leurs domiciles. Les griefs des intéressés sont donc « défendables » aux fins de l'article 13 (voir, par exemple, *Doğan et autres*, précité, § 163).

214. Le présent grief comporte des éléments identiques ou similaires à ceux déjà examinés dans le cadre de l'exception de non-épuisement des voies de recours internes soulevée par le Gouvernement. La Cour répète sa conclusion précédente selon laquelle le Gouvernement ne s'est pas acquitté de la charge qui lui incombait de démontrer que les requérants disposaient d'un recours apte à remédier à la situation critiquée par eux sur le terrain de la Convention et présentant des perspectives raisonnables de succès (paragraphe 120 ci-dessus). Pour les mêmes raisons, elle conclut à l'absence de tout recours effectif disponible quant à l'impossibilité faite aux requérants d'accéder à leurs biens et à leur domicile dans le district de Latchin.

215. La Cour conclut donc qu'il y a eu et qu'il continue d'y avoir violation à l'égard des requérants des droits garantis par l'article 13 de la Convention, et que la République d'Arménie est responsable de cette violation.

VIII. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 14 DE LA CONVENTION

216. Les requérants arguent que, relativement aux griefs exposés ci-dessus, ils ont subi de la part des autorités de l'État défendeur une discrimination fondée sur leur appartenance ethnique et religieuse. Ils invoquent l'article 14, ainsi libellé :

« La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

A. Thèses des parties

1. Les requérants

217. Affirmant avoir été chassés de chez eux par des forces armées appuyées par l'Arménie, les requérants soutiennent que s'ils avaient été Arméniens d'origine et chrétiens plutôt que Kurdes azerbaïdjanais et musulmans, ils n'auraient pas subi le même sort. Ils renvoient au rapport de M. David Atkinson et à la résolution de l'Assemblée parlementaire du Conseil de l'Europe, selon laquelle « les opérations militaires et les affrontements ethniques généralisés qui les ont précédées [ont] abouti à des expulsions ethniques massives et à la création de zones monoethniques, faisant resurgir le terrible concept de purification ethnique » (paragraphe 64 ci-dessus). À titre subsidiaire, ils soutiennent que les actions menées par l'armée arménienne et par les forces du Karabagh appuyées par l'Arménie ont touché de manière disproportionnée les Kurdes azerbaïdjanais, qui appartiendraient à un groupe identifiable, et qu'ils ont donc subi une discrimination indirecte.

2. Le Gouvernement

218. Considérant qu'il n'y a pas eu violation des autres articles invoqués par les requérants, le Gouvernement soutient qu'aucune question ne se pose sur le terrain de l'article 14 de la Convention. Il ajoute qu'en tout état de cause les requérants n'ont subi aucune discrimination : selon lui, les actions militaires menées à Latchin visaient simplement à ouvrir un couloir humanitaire entre l'Arménie et le Haut-Karabagh et n'étaient pas dirigées contre les habitants du district, quelle que fût leur appartenance ethnique ou religieuse. Par ailleurs, les Kurdes n'auraient jamais subi de discrimination, ni en République d'Arménie ni en « RHK », et les quelque 1 500 Kurdes vivant actuellement en Arménie participeraient activement à la vie sociale et politique du pays et y jouiraient pleinement de tous leurs droits.

3. Le gouvernement azerbaïdjanais, tiers intervenant

219. Le gouvernement azerbaïdjanais considère pour sa part que les actions militaires menées en « RHK » et dans les territoires limitrophes avaient pour but de créer une zone monoethnique. Il ajoute que les requérants et les autres Azerbaïdjanais déplacés sont toujours empêchés de reprendre posses-

sion de leurs domiciles et de leurs biens, alors que les Arméniens se verraient offrir différents avantages (dont des logements gratuits, des aides financières, du bétail et des avantages fiscaux) visant à les inciter à s'installer dans les territoires en cause, en particulier à Latchin. Il précise également que, à la différence des Kurdes azerbaïdjanais, les Kurdes vivant en Arménie ne sont pas musulmans, mais yézidis.

B. Appréciation de la Cour

220. Les constats de violation de l'article 1 du Protocole nº 1 et des articles 8 et 13 de la Convention auxquels la Cour est parvenue en l'espèce ont trait à une situation générale qui se caractérise par le départ du Haut-Karabagh et des territoires avoisinants de la quasi-totalité des citoyens azerbaïdjanais, pour la plupart, très certainement, musulmans, et l'impossibilité pour eux d'y retourner. Le grief que les requérants tirent de l'article 14 de la Convention est donc intrinsèquement lié à leurs autres griefs. Dès lors, au vu de ses constats de violation relatifs aux autres dispositions de la Convention, la Cour considère qu'aucune question distincte ne se pose sur le terrain de l'article 14 (voir, par exemple, *Chypre c. Turquie*, précité, § 199, *Xenides-Arestis c. Turquie*, nº 46347/99, § 36, 22 décembre 2005, et *Catan et autres*, précité, § 160).

IX. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

221. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

222. Les requérants réclament pour dommage matériel des sommes s'échelonnant par individu de 808 950 à 2 093 050 manats azerbaïdjanais (nouveaux) (AZN), soit un montant total pour les six requérants de 8 386 600 AZN (7 900 000 euros (EUR) environ). Ils sollicitent en outre 50 000 EUR chacun pour dommage moral. Enfin, ils déclarent qu'au 6 octobre 2013 leurs frais et dépens s'élevaient à 41 703,37 livres sterling (GBP). À l'audience du 22 janvier 2014, toutefois, leurs représentants ont demandé qu'un expert soit désigné pour évaluer le préjudice subi par leurs clients.

223. Le Gouvernement s'oppose à toutes les demandes des requérants.

224. Eu égard à la nature exceptionnelle de la présente affaire, la Cour dit que la question de l'application de l'article 41 ne se trouve pas en état. Elle décide donc de la réserver de même que la procédure ultérieure.

PAR CES MOTIFS, LA COUR

1. *Rejette*, par quatorze voix contre trois, l'exception préliminaire de non-épuisement des voies de recours internes formulée par le Gouvernement ;
2. *Rejette*, par quinze voix contre deux, l'exception préliminaire formulée par le Gouvernement quant à la qualité de victime des requérants ;
3. *Dit*, par quatorze voix contre trois, que les faits dénoncés par les requérants relèvent de la juridiction de la République d'Arménie et *rejette* l'exception préliminaire formulée par le Gouvernement quant à la juridiction ;
4. *Dit*, par quinze voix contre deux, qu'il y a violation continue de l'article 1 du Protocole n° 1 ;
5. *Dit*, par quinze voix contre deux, qu'il y a violation continue de l'article 8 de la Convention ;
6. *Dit*, par quatorze voix contre trois, qu'il y a violation continue de l'article 13 de la Convention ;
7. *Dit*, par seize voix contre une, qu'aucune question distincte ne se pose sur le terrain de l'article 14 de la Convention ;
8. *Dit*, par quinze voix contre deux, que la question de l'application de l'article 41 ne se trouve pas en état ;

   en conséquence,

   a) la *réserve* ;

   b) *invite* le Gouvernement et les requérants à lui soumettre, dans un délai de douze mois à compter de la date de la notification du présent arrêt, leurs observations écrites sur la question et, en particulier, à la tenir informée de tout accord auquel ils pourraient parvenir ;

   c) *réserve* la procédure ultérieure et *délègue* au président de la Cour le pouvoir de la fixer au besoin.

Fait en français et en anglais, puis prononcé en audience publique au Palais des droits de l'homme à Strasbourg, le 16 juin 2015.

Michael O'Boyle
Greffier adjoint

Dean Spielmann
Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé des opinions séparées suivantes :

– opinion concordante de la juge Motoc ;

– opinion en partie concordante et en partie dissidente de la juge Ziemele ;
– opinion en partie dissidente du juge Hajiyev ;
– opinion dissidente de la juge Gyulumyan ;
– opinion dissidente du juge Pinto de Albuquerque.

D.S.
M.O'B.

OPINION CONCORDANTE DE LA JUGE MOTOC

La Cour, invitée ici à se prononcer sur l'un des éléments d'un différend multiforme et complexe en excluant les autres éléments, est inévitablement placée dans une situation difficile. Néanmoins, elle doit trancher exclusivement l'objet du litige tel qu'il a été circonscrit par les requérants. Une juridiction internationale ne peut refuser de trancher pour cause de contexte politique difficile ou de négociations de Minsk pendantes ; *non liquet* ne saurait être accepté.

Cet arrêt a un poids particulier compte tenu du contexte (le conflit du Haut-Karabagh) et pose aussi la question de l'opportunité. Les aspects juridiques, historiques et politiques du conflit dans le Haut-Karabagh sont extrêmement complexes.

> « Quelle est la cause des événements historiques ? – Le pouvoir. – Qu'est-ce que le pouvoir ? – La somme des volontés reportées sur un seul personnage. – À quelles conditions se fait ce report ? – À la condition que le personnage choisi exprime la volonté de tous. Autrement dit le pouvoir est le pouvoir. Autrement dit le pouvoir est un mot dont le sens nous échappe. » (Léon Tolstoï, *La Guerre et la Paix*)

Comment pourrions-nous attendre que la Cour fournisse une réponse complète ? Ainsi, les arrêts de la Cour relatifs au conflit dans le Haut-Karabagh viennent une fois encore démontrer l'empirisme dont elle fait preuve. « Je suis assis avec un philosophe dans le jardin ; il dit à maintes reprises : « Je sais que ceci est un arbre », tout en désignant un arbre près de nous. Une tierce personne arrive et entend cela, et je lui dis : « Non, cet homme n'est pas fou. Nous faisons de la philosophie » sont les mots de l'extraordinaire auteur empiriste Ludwig Wittgenstein. Les limites de l'approche empiriste de la Cour sont bien visibles dans le deuxième arrêt de la Cour concernant le conflit du Haut-Karabagh, *Sargsyan c. Azerbaïdjan* ([GC], n° 40167/06, CEDH 2015).

Clarifions rapidement trois questions : 1) la question des preuves, 2) la question de la juridiction, et 3) la question de la sécession.

1. La question des preuves

À mon avis, il n'était nullement nécessaire d'effectuer une mission sur place dans cette affaire. Le paragraphe de l'arrêt cite largement les preuves, similaires à celles exigées par la Cour internationale de justice (CIJ). La Cour s'est largement référée dans son arrêt aux normes de preuve utilisées dans l'arrêt Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique) (fond, arrêt, CIJ Recueil 1986).

2. La question de la juridiction

En l'espèce, pour établir l'exercice par l'Arménie d'une juridiction extraterritoriale, la Cour utilise la notion de « contrôle effectif » et considère (paragraphe 186 de l'arrêt) que l'élément central de l'exercice de cette juridiction réside dans le fait que l'Arménie et le Haut-Karabagh sont « hautement intégrés » :

> « (...) la République d'Arménie a exercé sur la « RHK » une influence importante et déterminante dès le début du conflit dans le Haut-Karabagh (...) les deux entités sont hautement intégrées dans pratiquement tous les domaines importants et (...) cette situation perdure à ce jour. (...) la « RHK » et son administration survivent grâce à l'appui militaire, politique, financier et autre que leur apporte l'Arménie, laquelle, dès lors, exerce un contrôle effectif sur le Haut-Karabagh et les territoires avoisinants, y compris le district de Latchin. »

La Cour emploie aussi une autre notion d'une haute signification juridique, celle de l'occupation et de la présence militaire.

Avant de passer à l'analyse de l'application faite par la Cour de ces différentes notions juridiques, en particulier celle de « contrôle effectif », il faut déterminer quelles notions sont applicables en l'espèce. Il est vrai que, du fait de leur caractère de *lex specialis*, les différentes disciplines du droit international ont apporté des réponses juridiques différentes à la question de l'interprétation de la notion de contrôle effectif. La Cour elle-même a eu à élucider cette question dans l'arrêt *Catan et autres c. République de Moldova et Russie* ([GC], n^os^ 43370/04 et 2 autres, CEDH 2012), dont le paragraphe 115 est cité dans l'arrêt. Afin d'esquisser les éléments permettant de parvenir à une systématisation et à une meilleure cohérence de la jurisprudence de la Cour dans le domaine de la juridiction, il faut examiner ces différentes réponses.

a) Le droit international général

Les règles applicables en matière d'imputation à une puissance extérieure d'une responsabilité internationale pour les agissements d'une entité sécessionniste sont prévues aux articles 4 à 8 et 11 du projet d'articles de la Commission du droit international (Nations unies) sur la responsabilité de l'État pour fait internationalement illicite. En leurs parties pertinentes, ces articles sont ainsi libellés :

Article 4
Comportement des organes de l'État

> « 1. Le comportement de tout organe de l'État est considéré comme un fait de l'État d'après le droit international, que cet organe exerce des fonctions législative, exécutive, judiciaire ou autres, quelle que soit la position qu'il occupe dans l'organisation de

l'État, et quelle que soit sa nature en tant qu'organe du gouvernement central ou d'une collectivité territoriale de l'État.

(...) »

Article 5
Comportement d'une personne ou d'une entité exerçant des prérogatives de puissance publique

« Le comportement d'une personne ou entité qui n'est pas un organe de l'État au titre de l'article 4, mais qui est habilitée par le droit de cet État à exercer des prérogatives de puissance publique, pour autant que, en l'espèce, cette personne ou entité agisse en cette qualité, est considéré comme un fait de l'État d'après le droit international. »

Article 6
Comportement d'un organe mis à la disposition de l'État par un autre État

« Le comportement d'un organe mis à la disposition de l'État par un autre État, pour autant que cet organe agisse dans l'exercice de prérogatives de puissance publique de l'État à la disposition duquel il se trouve, est considéré comme un fait du premier État d'après le droit international. »

Article 7
Excès de pouvoir ou comportement contraire aux instructions

« Le comportement d'un organe de l'État ou d'une personne ou entité habilitée à l'exercice de prérogatives de puissance publique est considéré comme un fait de l'État d'après le droit international si cet organe, cette personne ou cette entité agit en cette qualité, même s'il outrepasse sa compétence ou contrevient à ses instructions. »

Article 8
Comportement sous la direction ou le contrôle de l'État

« Le comportement d'une personne ou d'un groupe de personnes est considéré comme un fait de l'État d'après le droit international si cette personne ou ce groupe de personnes, en adoptant ce comportement, agit en fait sur les instructions ou les directives ou sous le contrôle de cet État. »

Pour que la responsabilité internationale d'une puissance externe pour le comportement internationalement illicite d'une entité sécessionniste soit établie, il doit être démontré que le champ d'application de l'obligation internationale de la puissance extérieure s'étend, au-delà de son propre territoire, à celui de l'entité sécessionniste, c'est-à-dire que l'obligation internationale en question peut s'appliquer de manière extraterritoriale et que les actes ou omissions de l'entité sécessionniste qui violent cette obligation sont attribuables à la puissance extérieure.

La CIJ a élaboré deux critères de détermination de l'existence d'une juridiction extraterritoriale. L'un de ces deux critères est celui de « contrôle effectif ».

Le critère du « contrôle effectif » s'applique lorsqu'il existe des preuves d'une « dépendance partielle » de l'entité sécessionniste par rapport à la puissance extérieure. Une telle dépendance partielle peut être présumée, notamment, lorsque la puissance extérieure fournit à l'entité sécessionniste une assistance financière, logistique et militaire ainsi que des informations relevant du renseignement, et qu'elle sélectionne et paie les dirigeants de cette entité. De cette dépendance partielle découle la possibilité pour la puissance extérieure de contrôler l'entité.

Cependant, contrairement à la dépendance complète, la dépendance partielle ne permet pas à la Cour de considérer les autorités de l'entité sécessionniste comme des organes *de facto* de la puissance extérieure et de dire que la conduite globale de ces autorités peut être considérée comme des actes de cette puissance : la responsabilité d'un comportement donné doit être déterminée au cas par cas. La responsabilité des autorités de la puissance extérieure ne peut alors naître purement et simplement du comportement des autorités de l'entité sécessionniste, elle doit être imputable au comportement des organes de cette puissance agissant en vertu du droit de celle-ci. En outre, le contrôle considéré n'est plus celui exercé sur l'entité sécessionniste, mais celui exercé sur les activités ou les opérations qui donnent lieu au fait internationalement illicite.

À quelques exceptions près, la doctrine et la jurisprudence internationale ne se réfèrent qu'à un seul des critères de la CIJ, celui du « contrôle effectif ». Or la CIJ a en fait appliqué deux critères de contrôle différents dans les deux arrêts de principe qu'elle a rendus sur ce sujet : Nicaragua c. États-Unis d'Amérique, précité, et Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, CIJ Recueil 2007. La première affaire concernait la responsabilité des États-Unis d'Amérique pour les actes des *contras*, un groupe d'opposition armé opérant au Nicaragua, la deuxième portait sur la responsabilité de la Serbie-et-Monténégro pour les activités de la Republika Srpska, une entité sécessionniste qui avait été créée en 1992 avec l'aide de la République fédérale de Yougoslavie (RFY) sur le territoire de la Bosnie-Herzégovine et qui avait « bénéficié d'une certaine indépendance ».

Dans l'affaire du Nicaragua c. États-Unis d'Amérique, la CIJ a dégagé trois éléments devant être réunis pour qu'il y ait un contrôle strict :

– l'entité sécessionniste doit être complètement dépendante de la puissance extérieure ;

– cette dépendance complète doit s'étendre à tous les domaines d'activité de l'entité sécessionniste ;

– le pouvoir extérieur doit avoir fait effectivement usage du potentiel de contrôle lié à cette dépendance complète, c'est-à-dire qu'il doit avoir effectivement exercé un degré de contrôle particulièrement élevé.

L'entité sécessionniste doit être « complètement à la charge » de la puissance externe pour que soit possible un contrôle strict découlant de cette dépendance complète. La dépendance complète signifie que l'entité sécessionniste est « dépourvue de toute réelle autonomie » et qu'elle est « simplement un instrument » ou un « agent » de la puissance extérieure, qui agit à travers elle. L'utilisation de la même monnaie ou le fait qu'une partie importante de la population de l'entité sécessionniste ait eu, ait ou puisse revendiquer la nationalité ou la citoyenneté de la puissance externe ne sont pas, en eux-mêmes, des éléments suffisants pour permettre de dire que l'entité sécessionniste est un « agent » de la puissance extérieure. Il en va de même pour ce qui est du paiement des salaires, des pensions et d'autres avantages que peuvent percevoir les dirigeants de l'entité sécessionniste. En général, ni des relations politiques, militaires, économiques, ethniques ou culturelles étroites entre le pouvoir extérieur et l'entité sécessionniste ni la fourniture d'un soutien logistique sous la forme d'armes, de formation ou d'une aide financière ne permettent d'établir, sans autre preuve, l'existence d'une relation de complète dépendance, quand bien même l'entité sécessionniste et l'appui qu'elle reçoit de l'extérieur, fût-il largement militaire, seraient complémentaires ou poursuivraient les mêmes objectifs politiques.

Dans l'affaire du Nicaragua c. États-Unis d'Amérique, précitée, la CIJ a dégagé deux facteurs dont elle a estimé que l'on pouvait déduire l'existence d'une « dépendance totale ». Le fait que la puissance extérieure ait conçu, créé et organisé l'entité sécessionniste ou le groupe d'opposition armé qui a créé l'entité sécessionniste semble établir à ses yeux une forte présomption que l'entité sécessionniste est complètement dépendante de la puissance extérieure – dont elle serait la création – et n'est autre que son instrument ou agent. En revanche, il ne suffit pas que la puissance extérieure ait profité de l'existence d'un mouvement sécessionniste et l'ait utilisé dans ses politiques vis-à-vis de l'État parent. Pour que la dépendance à l'égard de la puissance extérieure soit complète, il faut également que celle-ci fournisse une assistance qui prenne des formes multiples (aide financière, soutien logistique, communication d'informations relevant du renseignement) et qui soit cruciale pour la poursuite des activités de l'entité sécessionniste. En d'autres termes, l'entité sécessionniste est complètement dépendante de la puissance extérieure si elle ne peut mener ses activités que grâce à l'appui multiforme que celle-ci lui apporte, de sorte que le retrait de cette aide se traduirait par la cessation des activités de l'entité.

Dans l'affaire du Nicaragua c. États-Unis d'Amérique, la CIJ a opéré une distinction entre l'aide que les États-Unis avaient apportée aux *contras* les premières années et celle qu'ils leur avaient apportée par la suite. Elle a estimé que les *contras* étaient complètement dépendants des États-Unis au départ, mais que ce n'avait plus été le cas ensuite, l'activité des *contras* s'étant poursuivie bien qu'ils ne reçoivent plus d'aide militaire des États-Unis. Pour cette deuxième période, la CIJ a donc conclu que les États-Unis n'exerçaient pas de « contrôle effectif » au Nicaragua, celui-ci n'ayant pas démontré que les États-Unis aient dirigé sur le terrain chaque activité des *contras*.

b) La Convention européenne des droits de l'homme

Il est inutile de répéter ici la jurisprudence de notre Cour : on trouvera dans l'arrêt les références aux précédents pertinents. Ainsi, il est rappelé au paragraphe 168 de l'arrêt que la Cour a conclu à un exercice extraterritorial de sa juridiction par l'État contractant mis en cause dans des cas où, du fait du contrôle effectif qu'il exerçait sur le territoire étranger en cause et sur ses habitants en conséquence d'une occupation militaire ou en vertu du consentement, de l'invitation ou de l'acquiescement du gouvernement local, il assumait l'ensemble ou certaines des prérogatives de puissance publique normalement exercées par celui-ci. Sont ensuite cités les passages pertinents de l'arrêt *Catan et autres*, précité, où la jurisprudence de la Cour en la matière est récapitulée et illustrée par un certain nombre d'exemples. En revanche, l'arrêt rendu en l'espèce ne cite ni les paragraphes de la décision *Banković et autres c. Belgique et autres* ((déc.) [GC], nº 52207/99, CEDH 2001-XII) qui s'appuient largement sur le droit international ni le paragraphe 152 de l'arrêt *Jaloud c. Pays-Bas* ([GC], nº 47708/08, CEDH 2014), dans lequel la Cour a examiné pour la première fois la notion d'« attribution » au sens du droit international.

Donc, même si l'on peut parler de *lex specialis* à l'égard de la jurisprudence de la Cour, cette *lex specialis* établit, sauf dans l'arrêt *Jaloud* (précité, § 154), un lien automatique entre le contrôle et la juridiction.

c) L'application des principes

La Cour utilise en l'espèce plusieurs notions juridiques : occupation, présence militaire, puis finalement contrôle effectif.

On peut dire que, dans la présente affaire, la Cour relève le seuil de contrôle effectif qu'elle avait établi dans de précédentes affaires. Dans l'affaire *Loizidou c. Turquie* ((fond), 18 décembre 1996, *Recueil des arrêts et décisions* 1996-VI), elle a relevé le nombre important de militaires présents à Chypre – critère qu'elle a repris dans l'affaire *Issa et autres c. Turquie*

(n° 31821/96, 16 novembre 2004), où elle a conclu que la Turquie n'exerçait pas sa juridiction. En l'espèce, en revanche, elle note que « [l]e nombre de soldats arméniens servant en « RHK » est controversé », mais elle « n'estime pas nécessaire de trancher cette question. En effet, de nombreux rapports et déclarations cités [dans l'arrêt] à l'appui, elle juge établi que la République d'Arménie, par sa présence militaire et par la fourniture de matériel et de conseils militaires, a participé très tôt et de manière significative au conflit du Haut-Karabagh ». Elle considère que « [c]et appui militaire a été et demeure déterminant pour la conquête et la conservation du contrôle sur les territoires en cause », et que « les éléments disponibles, en particulier l'accord de coopération militaire de 1994, démontrent de manière convaincante que les forces armées de l'Arménie et celles de la « RHK » sont largement intégrées » (paragraphe 180 de l'arrêt).

Jugeant que le « haut degré » d'intégration entre la « RHK » et l'Arménie – critère qu'elle utilise ici pour la première fois – s'applique aussi dans le domaine politique et juridictionnel, la Cour conclut que la seconde exerce sur la première un « contrôle effectif ».

Pour autant, elle n'estime pas nécessaire d'établir une distinction entre le contrôle effectif et le type de contrôle qu'elle avait établi dans l'affaire *Ilaşcu et autres c. Moldova et Russie* ([GC], n° 48787/99, CEDH 2004-VII).

Il est vrai qu'en l'espèce, la Cour n'a pas examiné la question de l'attribution des actes du fait desquels les requérants ont été privés de leurs biens. Toutefois, la situation au regard du droit international général n'est pas la même que dans les précédentes affaires. Ici, la Cour a déjà établi l'existence d'un haut degré d'intégration entre les deux entités. Un État aurait peut-être pu prouver l'implication des forces armées arméniennes dans les actes des autorités de la « RHK », mais pour un individu souhaitant faire valoir ses droits fondamentaux, cela aurait été très difficile, voire impossible. C'est la raison pour laquelle cette *lex specialis* a été introduite. Dans cette affaire, on voit bien mieux la logique de la Cour que dans les affaires précédentes : même si elle n'examine pas la question de l'attribution et ne cherche pas à établir la contribution effective des forces arméniennes aux faits en conséquence desquels les requérants ont été privés de leur biens, l'exercice par l'État défendeur de sa juridiction est ici établi de manière convaincante.

À cet égard, la présente affaire se rapproche à mon sens davantage du critère de contrôle effectif imposé par la CIJ. Bien que les mots « contrôle complet » ne soient pas utilisés par la Cour, elle utilise bien les mots « occupation » et « haut degré d'intégration ». Le raisonnement de la Cour suit les résolutions du Conseil de sécurité des Nations unies qui utilise les mots « les forces locales arméniennes » et donne des indications à la manière particulière du Conseil de sécurité (I. Motoc, *Interpréter la guerre : les exceptions de*

l'article 2 § 4 de la Charte de l'ONU dans la pratique du Conseil de sécurité). À mon sens, le présent arrêt représente l'un des retours les plus marqués au droit international général ou, pour l'exprimer d'une manière plastique, au « monde d'Oppenheim ».

3. La question de la sécession

Le Gouvernement a avancé l'argument que la « RHK » est un État. La Cour n'est pas en mesure de se prononcer elle-même sur les questions de la création d'un État et sur la sécession dans cette affaire ou sur l'autodétermination. Le juge Wildhaber a exprimé un point de vue similaire dans son opinion concordante dans l'affaire *Loizidou*, précitée. Toute affirmation de la Cour à ce sujet serait une pure spéculation puisque la Cour n'a pas d'arguments devant elle afin de trancher la question de la sécession, en tant que remède ou pas. La Cour n'est pas en mesure de décider en dehors du cadre des arguments et des preuves présentés devant elle et de développer des théories sur l'autodétermination.

OPINION EN PARTIE CONCORDANTE, EN PARTIE DISSIDENTE DE LA JUGE ZIEMELE

(Traduction)

1. Selon moi, le message contenu dans cet arrêt n'est pas très clair. Cette difficulté tient en partie à la méthodologie que la majorité a choisi de suivre dans une affaire qui, par essence, concerne un conflit international comportant trop de dimensions ouvertes et cachées pour que la Cour européenne des droits de l'homme puisse l'examiner dans le cadre de sa compétence classique. Si le message à transmettre est que l'Arménie doit faire le maximum pour s'engager réellement avec l'Azerbaïdjan à trouver une solution au conflit par le biais du processus de Minsk ou de tout autre processus, je peux approuver le constat de violation de l'article 8 de la Convention et de l'article 1 du Protocole n° 1. C'est d'ailleurs avec cette idée en tête que j'ai voté en ce sens avec la majorité. Il ne fait aucun doute que des personnes telles que les requérants qui ne peuvent ni accéder à leurs biens ni être indemnisés du préjudice ainsi subi doivent pouvoir le faire. À mon sens, cependant, la responsabilité de l'Arménie réside dans les obligations positives qui découlent pour elle de ces articles. La Cour n'a pas compétence *ratione temporis* pour déterminer comment les biens en cause ont été perdus ou endommagés à l'époque. La seule chose que peut faire la Cour aujourd'hui, c'est examiner si, à l'époque où les requérants ont introduit leur requête devant elle, l'Arménie avait fait tout ce qui relevait de sa responsabilité en vue de normaliser la situation de ces personnes. Il s'agit selon moi d'une obligation de nature positive.

2. Les questions les plus complexes qui se posent en l'espèce sont une fois encore celles de la juridiction et de l'attribution des responsabilités. Dans l'affaire *Jaloud c. Pays-Bas* ([GC], n° 47708/08, CEDH 2014), qui fait référence à l'arrêt *Catan et autres c. République de Moldova et Russie* ([GC], n^os^ 43370/04 et 2 autres, CEDH 2012), la Cour a cherché à mieux expliquer en quoi ces concepts ne sont pas identiques. Ils peuvent se chevaucher, mais ils peuvent aussi être distincts. Au paragraphe 154 de l'arrêt *Jaloud*, la Cour réaffirme que « les critères permettant d'établir l'existence d'une « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un État concernant un fait internationalement illicite au regard du droit international général (*Catan et autres*, précité, § 115) ». En d'autres termes, la Cour ne peut partir du principe qu'un État ayant juridiction est automatiquement responsable à raison des violations alléguées des exigences de la Convention. À l'inverse, l'absence de juridiction territoriale ne signifie pas que l'État ne

portera jamais de responsabilité s'agissant des actes qu'il a provoqués, au moins au regard du droit international général. La jurisprudence de la Cour a été critiquée parce qu'elle créerait une incertitude, voire une confusion entre ces deux concepts. L'argument de la Cour a été de dire qu'elle ne peut procéder autrement dans le cadre de l'article 1 de la Convention, car, selon le sens ordinaire de cette disposition, la condition préalable à remplir pour qu'elle recherche s'il y a responsabilité est qu'il soit établi que l'État défendeur a juridiction. Dans cette logique, la juridiction est une condition *sine qua non*, comme la Cour l'a toujours souligné.

3. La nécessité d'établir que l'Arménie a juridiction sur le district de Latchin avant de pouvoir déterminer si elle a des obligations découlant de la Convention relativement aux biens des requérants est précisément la question qui rend cette affaire impossible. Comme indiqué plus haut, si je pense que l'Arménie a d'importantes obligations, j'ai beaucoup de mal à suivre le raisonnement de la Cour exposé aux paragraphes 169 à 187 de l'arrêt ; c'est pourquoi j'ai voté contre la manière d'établir la juridiction de l'Arménie qui est proposée dans ces paragraphes. De même, je n'approuve pas la mention du Règlement de La Haye de 1907 et de la Convention IV de Genève dans la partie relative au droit international pertinent, car ces textes ne sont pas repris par la Cour dans son appréciation. On ne voit pas du tout clairement quel poids juridique est censée revêtir la référence à des textes régissant l'occupation belligérante.

4. La Cour a eu auparavant à connaître d'affaires telles que *Loizidou c. Turquie* ((fond), 18 décembre 1996, *Recueil des arrêts et décisions* 1996-VI), ou *Ilaşcu et autres c. Moldova et Russie* ([GC], n° 48787/99, CEDH 2004-VII), dans lesquelles il y avait une présence évidente et considérable de forces armées respectivement turques et russes dans les territoires contestés ou occupés. La situation dans la partie nord de Chypre a été clairement définie comme contraire à la Charte des Nations unies. La situation régnant après la chute de l'URSS, la 14e armée de celle-ci étant restée sur le territoire de la Transnistrie, ne laissait guère place au doute quant au contrôle de ce territoire. Pour ce qui est de l'affaire qui nous occupe, toutefois, nous disposons d'informations quelque peu controversées. La Cour n'a pas accepté la proposition d'organiser une mission d'enquête sur place qui, comme dans l'affaire *Ilaşcu et autres*, précitée, aurait pu lui permettre de se procurer les éléments de preuve indispensables. Selon moi, la Cour aurait dû accorder un poids convenable à l'appréciation du Conseil de sécurité des Nations unies. Aux termes des résolutions de ce dernier, les « forces arméniennes locales » sont bien organisées et ont créé leurs propres instances dirigeantes dans les territoires qu'elles occupent. Il ressort également de ces résolutions que l'Arménie est en mesure d'exercer une influence sur les Arméniens du

Haut-Karabagh. Reste la question de savoir si cela est suffisant pour établir la juridiction de l'Arménie sur les territoires contestés et pour conclure qu'il existe une forte intégration entre l'Arménie et la « RHK » sur quasiment toutes les questions importantes.

5. Contrairement à la Cour internationale de justice (CIJ), qui procède normalement à un établissement des faits particulièrement scrupuleux dans les affaires concernant des litiges portant sur des territoires, la juridiction et l'attribution des responsabilités, la Cour paraît diluer certains critères de preuve applicables dans des situations hautement controversées. De plus, même si l'Arménie a bien juridiction sur le Haut-Karabagh, il faut, pour pouvoir conclure à la violation de la Convention, que les violations alléguées lui soient attribuées. Il faut donc disposer de preuves que l'Arménie empêche les requérants d'accéder à leurs biens à Latchin. La Cour n'a peut-être pas besoin de procéder ainsi si elle adopte une interprétation différente des notions de juridiction et de responsabilité aux fins de la Convention, bien qu'elle ait toujours dit qu'elle se référait à la définition de la juridiction traditionnellement employée en droit international. Pour ce qui est du droit international, établir que l'Arménie a juridiction ne signifie pas que ce pays a) a des obligations spécifiques au titre de la Convention et b) a commis un fait internationalement illicite. Il faut procéder à ces deux égards à un examen attentif.

6. Le passage suivant de la jurisprudence de la Cour indique bien que celle-ci a élaboré sa propre interprétation de « la juridiction et la responsabilité » aux fins du respect des obligations découlant de la Convention. La Cour a en effet déclaré :

> « Dès lors qu'une telle mainmise [c'est-à-dire un contrôle effectif] sur un territoire est établie, il n'est pas nécessaire de déterminer si l'État contractant qui la détient exerce un contrôle précis sur les politiques et actions de l'administration locale qui lui est subordonnée. Du fait qu'il assure la survie de cette administration grâce à son soutien militaire et autre, cet État engage sa responsabilité à raison des politiques et actions entreprises par elle. » (paragraphe 168 du présent arrêt, citant le paragraphe 106 de l'arrêt *Catan et autres*, précité)

Cette approche diffère de la méthodologie employée par la CIJ, qui utilise la norme de « dépendance complète ». En outre, telle est la norme pour établir la responsabilité d'un État indépendamment de la question de la juridiction.

7. La CIJ a rappelé son approche en matière d'attribution des responsabilités s'agissant d'administrations locales subordonnées ou de groupes similaires en l'affaire relative à l'Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro) (arrêt, CIJ Recueil 2007). Elle y déclare :

« 391. La première question (...) est de savoir si un État peut, en principe, se voir attribuer les comportements de personnes – ou de groupes de personnes – qui, sans avoir le statut légal d'organes de cet État, agissent en fait sous un contrôle tellement étroit de ce dernier qu'ils devraient être assimilés à des organes de celui-ci aux fins de l'attribution nécessaire à l'engagement de la responsabilité de l'État pour fait internationalement illicite. En vérité, la Cour a déjà abordé cette question, et lui a donné une réponse de principe, dans son arrêt du 27 juin 1986 en l'affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique) (fond, arrêt, CIJ Recueil 1986, pp. 62-64). Au paragraphe 109 de cet arrêt, la Cour a indiqué qu'il lui appartenait de

> « déterminer si les liens entre les *contras* et le gouvernement des États-Unis étaient à tel point marqués par la dépendance d'une part et l'autorité de l'autre qu'il serait juridiquement fondé d'assimiler les *contras* à un organe du gouvernement des États-Unis ou de les considérer comme agissant au nom de ce gouvernement » (...)

Puis, examinant les faits à la lumière des informations dont elle disposait, la Cour a relevé qu'« il n'[était] pas clairement établi que [les États-Unis] exer[çai]ent en fait sur les *contras* dans toutes leurs activités une autorité telle qu'on [pût] considérer les *contras* comme agissant en leur nom » (...), avant de conclure que « les éléments dont [elle] dispos[ait] (...) ne suffis[ai]ent pas à démontrer [la] totale dépendance [des *contras*] par rapport à l'aide des États-Unis », si bien qu'« il lui [était] (...) impossible d'assimiler, juridiquement parlant, la force *contra* aux forces des États-Unis » (...) »

La CIJ a ensuite résumé la situation en déclarant (italique ajouté) :

« 392. Il résulte des passages précités que, selon la jurisprudence de la Cour, une personne, un groupe de personnes ou une entité quelconque peuvent être assimilés – aux fins de la mise en œuvre de la responsabilité internationale – à un organe de l'État même si une telle qualification ne résulte pas du droit interne, lorsque cette personne, ce groupe ou cette entité agit en fait sous la « totale dépendance » de l'État, dont il n'est, en somme, qu'un simple instrument. En pareil cas, il convient d'aller au-delà du seul statut juridique, pour appréhender la réalité des rapports entre la personne qui agit et l'État auquel elle se rattache si étroitement qu'elle en apparaît comme le simple agent : toute autre solution permettrait aux États d'échapper à leur responsabilité internationale en choisissant d'agir par le truchement de personnes ou d'entités dont l'autonomie à leur égard serait une pure fiction.

393. Cependant, *une telle assimilation aux organes de l'État de personnes ou d'entités auxquelles le droit interne ne confère pas ce statut ne peut que rester exceptionnelle ; elle suppose, en effet, que soit établi un degré particulièrement élevé de contrôle de l'État sur les personnes ou entités en cause*, que l'arrêt précité de la Cour a caractérisé précisément comme une « totale dépendance ». (...) »

8. Selon la CIJ, le niveau de preuve est élevé et, au fil de plusieurs affaires, elle a élaboré une méthodologie précise au sujet des différents éléments de preuve soumis par les parties. Par exemple, dans notre affaire, les requérants ont soumis à la Cour des déclarations qui émaneraient de hauts dirigeants arméniens. La Cour a décidé de se référer à l'arrêt de la

CIJ Nicaragua c. États-Unis d'Amérique, précité, pour expliquer sa décision d'admettre comme preuves ces déclarations qui, selon elle, montrent le haut niveau d'intégration entre les forces armées de l'Arménie et celles de la « RHK » (paragraphes 178-179 de l'arrêt). La Cour renvoie au paragraphe 64 de l'arrêt relatif au Nicaragua, où la CIJ déclare effectivement que « des déclarations de cette nature, émanant de personnalités politiques officielles de haut rang, parfois même du rang le plus élevé, possèdent une valeur probante particulière ». Parallèlement, au paragraphe 65 de ce même arrêt, que la Cour ne mentionne pas, la CIJ explique les limites d'une telle méthode :

> « Il est cependant tout aussi naturel que la Cour traite ces déclarations avec prudence, et cela qu'elles émanent des autorités de l'État défendeur ou de celles de l'État demandeur. Ni l'article 53 du Statut, ni aucune autre base, n'aurait pu justifier une attitude sélective, qui aurait porté atteinte à la cohérence de la démarche et au devoir élémentaire d'assurer l'égalité entre les Parties. La Cour doit tenir compte de la manière dont ces déclarations ont été rendues publiques ; elle ne peut leur accorder de toute évidence la même valeur selon que le texte de la déclaration officielle considérée figure dans une publication officielle, nationale ou internationale, dans un ouvrage ou dans un organe de presse, ou selon qu'il est paru dans la langue utilisée par l'auteur ou dans une traduction (voir CIJ Recueil 1980, p. 10, § 13). Un autre élément pertinent est de savoir si de telles déclarations ont pu être portées à la connaissance de la Cour par des communications officielles déposées en conformité avec les règles pertinentes du Statut et du Règlement. En outre la Cour, inévitablement, a dû parfois interpréter des déclarations pour vérifier dans quelle mesure exacte elles reconnaissaient un fait. »

Selon les faits de la présente cause, les requérants se sont appuyés sur des déclarations de dirigeants arméniens et sur une interview publiée dans un journal (paragraphes 62 et 68 de l'arrêt). Conformément aux principes énoncés par la CIJ dans l'affaire relative au Nicaragua, il est de la plus haute importance dans ce genre de circonstances de respecter le principe d'égalité entre les parties et d'apprécier correctement la source de telles déclarations. La procédure suivie par la Cour au sujet de ces informations demeure obscure et ne paraît pas respectueuse des principes d'équité et de prudence.

9. Pour ce qui est de l'accord de coopération militaire entre l'Arménie et le Haut-Karabagh de 1994 (paragraphes 74 et 175 de l'arrêt), il existe de nombreux accords de ce genre entre deux ou plus de deux États. On espère qu'ils ne conduisent pas automatiquement à la perte de la juridiction ou à l'acquisition d'un contrôle sur de nouveaux territoires aux fins de la responsabilité internationale et qu'ils ne représentent pas en eux-mêmes une menace pour les pays voisins. Le libellé, la nature juridique et les conséquences pratiques de l'accord doivent être examinés avec soin. Il se peut qu'au regard du droit international pareil accord entre un État et une entité non reconnue n'ait aucune valeur juridique. Il se peut aussi que la com-

munauté internationale, souhaitant mettre fin au conflit dans la région, n'apprécie pas un tel document et le condamne. Quoi qu'il en soit, la façon dont la Cour invoque l'accord de coopération militaire de 1994, jointe à l'affirmation selon laquelle la République d'Arménie « a participé très tôt et de manière significative au conflit du Haut-Karabagh » (paragraphe 180 de l'arrêt), fait que l'on se demande quelle est la portée de l'affaire. S'agit-il vraiment d'une affaire portant sur l'impossibilité d'accéder à des biens après la ratification de la Convention par l'Arménie ou d'une affaire portant sur la guerre de 1992 en Azerbaïdjan et ses conséquences (paragraphes 18-20) ?

10. Nul doute que la Cour dispose de plusieurs possibilités. Elle peut décider ou non de se prononcer sur des questions plus larges de droit international, comme la guerre et ses conséquences. Dans cette affaire, elle a choisi de faire certaines déclarations. Elle a agi ainsi dans certaines affaires antérieures, mais cela demeure inhabituel pour elle. Cela ne me pose aucun problème qu'une juridiction internationale telle que la Cour européenne des droits de l'homme prenne connaissance de l'ensemble de la situation, bien au contraire. Néanmoins, la Cour doit en ce cas faire preuve de cohérence et agir de cette manière dans toutes les affaires qui s'y prêtent. Or il y a des cas où la Cour a ouvertement refusé de prendre en compte des arguments découlant du droit international. Ce point ne permet toutefois pas de répondre à la question plus difficile de savoir si la Cour européenne des droits de l'homme doit appliquer pour l'attribution des responsabilités un critère différent de celui utilisé en droit international et s'il faut déterminer la juridiction au moyen d'un critère plus ou moins semblable. J'ai de sérieuses réserves à cet égard.

11. La Cour a désormais établi que l'Arménie contrôle la « RHK » tout comme la Turquie contrôle le nord de Chypre ou la Russie la Transnistrie. À partir de là, il semble que l'on présumera que les violations alléguées des droits de l'homme commises en « RHK » doivent être imputées à l'Arménie. Il ne fait aucun doute que l'on ne doit pas tolérer un vide dans l'application de la Convention en Europe. Je ne pense pas que le Haut-Karabagh constitue un tel vide. Les affaires concernant cette région doivent à l'évidence être jugées.

12. Toutefois, il est essentiel à mes yeux que, dans cette catégorie d'affaires comme dans d'autres affaires, la Cour utilise pour l'attribution des responsabilités un critère adéquat après qu'elle a identifié la nature de l'obligation découlant de la Convention en jeu. La Cour a déjà procédé ainsi, par exemple dans les affaires qui ont été introduites à la suite de la dissolution de la République socialiste fédérative de Yougoslavie, notamment celles portant sur les « épargnes bancaires ». Dans l'affaire *Kovačić et autres c. Slovénie* ([GC], n^os^ 44574/98 et 2 autres, 3 octobre 2008), la Cour a examiné la question de

l'attribution des responsabilités dans le contexte spécifique de la succession d'États (voir le texte de l'arrêt ainsi que l'opinion concordante du juge Ress qui y est jointe). En l'espèce, la Cour conclut que « l'impossibilité faite aux requérants de regagner leurs domiciles respectifs constitue une ingérence injustifiée dans l'exercice de leur droit au respect de leur vie privée et familiale et de leur droit au respect de leur domicile » (paragraphe 207 de l'arrêt). Or il n'est pas expliqué auparavant par quels moyens l'Arménie a rendu impossible l'accès aux domiciles sauf à considérer que le simple fait que l'Arménie ait aux yeux de la Cour juridiction sur le Haut-Karabagh signifie que ce pays rend impossible l'accès aux domiciles. C'est avec cela en tête que j'ai voté pour la non-violation de l'article 13, car, selon moi, la Cour ne dispose pas de suffisamment d'informations quant au point de savoir si les tribunaux locaux n'ont effectivement pas examiné de réclamations immobilières. Comme je l'ai expliqué plus haut, cette approche passe à côté de la véritable question soulevée en l'espèce. À mon avis, la question est de savoir si, sachant que l'Arménie peut influencer le gouvernement arménien local du Haut-Karabagh et qu'elle est l'une des parties aux négociations, elle porte la responsabilité de ne pas avoir pris pendant de nombreuses années des mesures positives aptes à permettre aux personnes déplacées de rentrer chez elles ou d'obtenir une indemnisation. Je ne saurais qualifier cela de déni du droit de propriété. Il s'agit d'une question d'obligations positives eu égard au contexte plus général du droit international. Pour toutes ces raisons, je ne peux conclure que l'Arménie a juridiction sur le Haut-Karabagh de la manière indiquée dans l'arrêt, mais je pense en revanche que l'Arménie n'a pas respecté les obligations positives qui lui incombent au titre de l'article 1 du Protocole n° 1 et de l'article 8 de la Convention.

OPINION EN PARTIE DISSIDENTE DU JUGE HAJIYEV

(Traduction)

L'occupation par la République d'Arménie du Haut-Karabagh et de la région avoisinante, soit presque un cinquième du territoire de l'Azerbaïdjan, qui est un fait d'évidence, est reconnue sur le plan politique par quatre résolutions du Conseil de sécurité des Nations unies, par des résolutions de l'Assemblée générale des Nations unies, par le Parlement de l'Union européenne, l'Assemblée parlementaire du Conseil de l'Europe et par des décisions d'autres organisations internationales. Je note avec satisfaction que, dans le présent arrêt, la Cour européenne des droits de l'homme confirme une nouvelle fois ce fait par une décision de justice. La Cour est parvenue à cette conclusion en se fondant sur des éléments de preuve irréfutables établissant que la République d'Arménie, par sa présence militaire et par la fourniture de matériel militaire, a participé très tôt et de manière significative au conflit du Haut-Karabagh. Cet appui militaire a été et demeure déterminant pour la conquête et la conservation du contrôle sur les territoires en cause. Selon la Cour, les éléments de preuve, en particulier l'accord de coopération militaire de 1994, démontrent de façon convaincante que les forces armées de l'Arménie et celles de la « RHK » sont largement intégrées, que la « RHK » est sous l'influence de l'Arménie et bénéficie de son appui militaire, financier et politique et que le Haut-Karabagh et toutes les régions occupées qui l'entourent situées en Azerbaïdjan se trouvent sous le contrôle direct de l'Arménie. Ainsi que l'observe à juste titre T. Ferraro, le contrôle effectif est la principale caractéristique de l'occupation, car, en droit international humanitaire, il ne peut y avoir occupation d'un territoire sans qu'un contrôle effectif y soit exercé par des forces étrangères hostiles (T. Ferraro, « Comment déterminer le début et la fin d'une occupation au sens du droit international humanitaire », *Revue internationale de la Croix Rouge*, nº 885, mars 2012, p. 140). Ce qui précède est parfaitement conforme, selon moi, aux exigences de l'article 42 du Règlement concernant les lois et coutumes de la guerre sur terre (La Haye, 18 octobre 1907), que la Cour cite au paragraphe 96 de l'arrêt :

> « Il y a donc occupation au sens du Règlement de La Haye de 1907 lorsqu'un État exerce de fait son autorité sur le territoire ou sur une partie du territoire d'un État ennemi (voir, par exemple, E. Benvenisti, *The International Law of Occupation* (Oxford, Oxford University Press, 2012), p. 43, Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leyde, Martinus Nijhoff Publishers, 2009), pp. 5-8, Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge

University Press, 2009), pp. 42-45, §§ 96-102, et A. Roberts, « *Transformative Military Occupation: Applying the Laws of War and Human Rights* », *American Journal of International Law*, vol. 100 (2006), p. 580, pp. 585-586). »

L'avis majoritaire est que l'on entend par « autorité de fait » un contrôle effectif. On considère qu'un territoire ou une partie d'un territoire est sous occupation militaire lorsque l'on parvient à démontrer que des troupes étrangères y sont présentes et que ces troupes sont en mesure d'exercer un contrôle effectif, sans le consentement de l'autorité souveraine. La plupart des experts estiment que la présence physique de troupes étrangères est une condition *sine qua non* de l'occupation (la plupart des experts que le Comité international de la Croix Rouge (CICR) a consultés dans le cadre de son projet relatif à l'occupation et aux autres formes d'administration d'un territoire étranger s'accordaient à dire qu'une présence militaire sur le terrain est nécessaire pour établir qu'il y a occupation – voir T. Ferraro, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (Genève, CICR, 2012), pp. 10, 17 et 33, E. Benvenisti, *op. cit.*, pp. 43 et suivantes, et V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris, éditions Pedone, 2010), pp. 35-41).

Au paragraphe 174 de l'arrêt, la Cour note à juste titre :

> « [qu'elle] n'estime guère concevable que le Haut-Karabagh – entité peuplée de moins de 150 000 individus d'ethnie arménienne – ait été capable, sans un appui militaire substantiel de l'Arménie, de mettre en place au début de l'année 1992 une force de défense qui, face à un pays comme l'Azerbaïdjan, peuplé de quelque sept millions d'habitants [plus de neuf millions à l'heure actuelle], allait non seulement prendre le contrôle de l'ex-OAHK, mais encore conquérir, avant la fin de l'année 1993, la majeure partie sinon la totalité des sept districts azerbaïdjanais voisins ».

J'ajoute que l'occupation s'est accompagnée de l'expulsion forcée de près de 800 000 personnes, ce qui en soi a nécessité une force militaire importante, du matériel militaire et des rétentions forcées. Dès lors, la poursuite de l'occupation ne demande pas moins de ressources humaines et matérielles. En dépit des protestations exprimées par les parents de jeunes Arméniens effectuant leur service militaire dans les territoires occupés, que l'on peut lire dans la presse (www.epress.am, article du 11 juin 2014), l'occupation continue. À une date aussi récente que novembre 2014, l'Arménie a effectué dans les territoires occupés des manœuvres militaires dans le cadre d'une opération symboliquement dénommée « Unité », avec la participation de 47 000 militaires et une grande quantité de matériel militaire (www.regnum.ru, article du 12 novembre 2014). La situation qui régnait à l'époque où la République d'Arménie a ratifié la Convention européenne des droits de l'homme était contraire à l'essence même de ce traité, et cela reste vrai aujourd'hui. La Convention déclare dans son préambule que les

États signataires, membres du Conseil de l'Europe, doivent démontrer leur profond attachement à ces libertés fondamentales qui constituent les assises mêmes de la justice et de la paix dans le monde. Ce paradoxe m'a toujours fait penser aux mots d'Oscar Wilde : « Je peux croire n'importe quoi, pourvu que ce soit absolument incroyable. »

Le Conseil de l'Europe a réagi à la situation actuelle dans la résolution n° 1416 (2005) de l'Assemblée parlementaire, adoptée le 25 janvier 2005, où il est noté :

> « L'Assemblée craint que les opérations militaires et les affrontements ethniques généralisés qui les ont précédées n'aient abouti à des expulsions ethniques massives et à la création de zones monoethniques, faisant resurgir le terrible concept de purification ethnique. L'Assemblée réaffirme que l'indépendance et la sécession d'un territoire qui fait partie d'un État ne peuvent être que l'aboutissement d'un processus légal et pacifique, fondé sur le soutien exprimé démocratiquement par les habitants du territoire en question ; elles ne sauraient être la conséquence d'un conflit armé débouchant sur des expulsions ethniques et sur l'annexion de fait du territoire concerné par un autre État. L'Assemblée rappelle que l'occupation d'un territoire étranger par un État membre constitue une grave violation des obligations qui incombent à cet État en sa qualité de membre du Conseil de l'Europe, et réaffirme le droit des personnes déplacées de la zone du conflit de retourner dans leur foyer dans la sécurité et la dignité. »

Comme il ressort de la résolution précitée, l'Assemblée, en décrivant la situation existante, mentionne le caractère ethnique de l'expulsion des personnes de leur pays natal.

Prenant en compte les circonstances et les arguments avancés par les requérants auxquels, selon moi, il fallait apporter une réponse adéquate, je ne partage pas la conclusion de la majorité selon laquelle il ne se pose aucune question distincte sous l'angle de l'article 14 de la Convention.

Ainsi, la perte par les requérants de tout contrôle sur leurs biens et de toute possibilité de les utiliser, vendre, léguer ou hypothéquer ou de les faire fructifier ou d'en jouir, le refus continu du Gouvernement de les laisser retourner chez eux à Latchin ainsi que la non-fourniture par lui d'un recours effectif, ou d'ailleurs de tout recours aux personnes déplacées des territoires occupés, sont le résultat d'une discrimination et donc, à mon avis, emportent violation de l'article 14 combiné avec l'article 1 du Protocole n° 1 et des articles 8 et 13 de la Convention. La Cour a dit à maintes reprises que l'article 14 de la Convention n'interdit pas toute différence de traitement. D'après elle, il est nécessaire de mettre au point des critères à partir desquels on peut déterminer si une différence de traitement donnée dans la reconnaissance des droits et libertés garantis par la Convention est contraire à l'article 14. Appliquant les principes qui se déduisent des pratiques juridiques suivies dans de nombreux pays démocratiques, la Cour juge que le principe d'égalité de traitement est violé lorsqu'une différence de traitement

ne repose pas sur une justification objective et raisonnable. Une différence de traitement dans la reconnaissance des droits et libertés garantis par la Convention doit non seulement viser un but légitime, mais conduira aussi à une violation de l'article 14 s'il n'y a pas de « rapport raisonnable de proportionnalité entre les moyens employés et le but visé » (voir, par exemple, *Rasmussen c. Danemark*, 28 novembre 1984, § 38, série A n° 87, et *Lithgow et autres c. Royaume-Uni*, 8 juillet 1986, § 177, série A n° 102).

L'approche juridique de la Cour susmentionnée, lorsqu'elle est appliquée aux circonstances de l'espèce, montre une inégalité de traitement évidente à l'égard des requérants. Cette différence de traitement ne vise pas un but légitime et n'a pas de justification objective et raisonnable. Les requérants soulignent, non sans raison, qu'ils ont subi une discrimination au motif que les actions des forces militaires arméniennes les ont visés de manière disproportionnée. J'admets aussi que le critère de preuve que la Cour adopte pour examiner le grief des requérants sous l'angle de l'article 14 ne doit pas être assimilé à celui qui est applicable en matière pénale par les tribunaux internes dans les pays de *common law*. Les autres juridictions connaissant des droits de l'homme n'ont pas besoin d'un critère aussi élevé. Dans son opinion en partie dissidente jointe à l'arrêt *Hasan İlhan c. Turquie* (n° 22494/93, 9 novembre 2004), la juge Mularoni a déclaré :

> « Je considère que le fait que la Cour persiste à exiger, dans le contexte de griefs de discrimination fondée sur l'origine raciale ou nationale tirés de l'article 14, l'emploi du critère de la preuve « au-delà de tout doute raisonnable » aura pour effet pratique de supprimer la protection des droits de l'homme garantie par l'article 14 dans des domaines où il convient de prévoir en priorité le plus haut niveau de protection plutôt que le plus haut niveau de preuve. Il ne saurait y avoir de moyen plus efficace d'obtenir que la protection contre la discrimination fondée sur l'origine raciale ou nationale devienne illusoire et inopérante que de demander aux victimes de se soumettre à un niveau de preuve aussi élevé. En réalité, l'application d'une norme aussi exigeante revient à mettre les requérants dans l'impossibilité de prouver qu'il y a eu violation de l'article 14. J'ajoute que cette norme élevée n'est pas exigée par les principales autres juridictions s'occupant des droits de l'homme. »

Ce principe a été reconnu par la Cour dans l'affaire *Natchova et autres c. Bulgarie* ([GC], n^os^ 43577/98 et 43579/98, CEDH 2005-VII). Lorsque, comme en l'espèce, des éléments de preuve manifestes d'une différence de traitement entre deux groupes ethniques apparaissent au premier coup d'œil, c'est à l'État qu'il devrait incomber de démontrer que pareil traitement n'est pas discriminatoire. En effet, lui seul connaît les raisons qui motivent ses actions et sait si un traitement en apparence différent s'explique par d'autres motifs innocents.

Les éléments de preuve donnent à penser non seulement que les expulsions étaient discriminatoires, mais aussi que l'État défendeur a autorisé

depuis lors le retour de personnes déplacées autres que des Azéris. Cela constitue non seulement une preuve manifeste d'une politique discriminatoire, mais illustre également le caractère continu des violations. De plus, à l'appui du constat selon lequel les requérants ont subi un traitement discriminatoire, ajoutons que, après le nettoyage ethnique de la région de Latchin, c'est-à-dire après qu'elle a été vidée de ses habitants non arméniens, a été menée une politique consistant à peupler la région avec des Arméniens venant de la République d'Arménie. Ainsi, d'après le rapport de la mission d'enquête de l'OSCE dans les territoires occupés de l'Azerbaïdjan entourant le Haut-Karabagh, celle-ci a mené des entretiens dans le district de Latchin avec des habitants qui possédaient des passeports arméniens et affirmaient voter en Arménie.

Dès lors, les requérants, qui ont été chassés de Latchin il y a plus de vingt ans et ne peuvent plus accéder à leurs domiciles dans ce district, ne sont pas en mesure de faire valoir leurs droits garantis par la Convention, car ils ont fait l'objet d'une discrimination contraire à l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1 et avec les articles 8 et 13 de la Convention.

OPINION DISSIDENTE DE LA JUGE GYULUMYAN

(Traduction)

C'est à regret que je fais part de mon profond désaccord avec l'arrêt rendu par la Grande Chambre dans la présente affaire et ne peux souscrire ni au raisonnement ni aux conclusions de la majorité, et ce pour plusieurs raisons.

Premièrement, en ne traitant pas la question de la personnalité juridique internationale de la RHK (questions de l'autodétermination et de la qualité d'État), la Cour a trop simplifié le problème juridique qui se pose. Je pense qu'en concluant que les violations alléguées relevaient de la juridiction de la République d'Arménie, la Cour a confondu deux notions de droit international totalement différentes – la juridiction et l'attribution – et elle a créé en pratique un amalgame entre elles. Ce faisant, elle a indirectement abaissé comme jamais auparavant le seuil de responsabilité des États à raison d'actes commis par des tiers et a aussi contribué à la fragmentation du droit international.

Deuxièmement, à mes yeux, les éléments de preuve à la disposition de la Cour n'étaient pas suffisants pour satisfaire au critère de preuve élevé qui doit être appliqué dans une affaire aussi sensible que celle-ci. De plus, la façon dont la Cour a examiné la recevabilité et procédé à l'appréciation des éléments de preuve est inacceptable et reflète l'application de critères différents dans différentes affaires, ce qui est regrettable. Je trouve difficile d'admettre l'approche sélective adoptée par la majorité concernant les résolutions d'organisations internationales : elle a admis celles qui sont favorables aux requérants et au tiers intervenant et totalement ignoré celles qui sont favorables à l'État défendeur.

Je vais exposer ci-dessous mon propre point de vue sur quelques questions importantes afin que les raisons de mon désaccord soient claires.

Questions de l'existence en tant qu'État et du droit des peuples à disposer d'eux-mêmes : statut de la RHK en droit international

1. La Cour n'a même pas effleuré la question du statut de la RHK. Or cette question est selon moi de la plus haute importance eu égard aux différentes règles d'attribution et aux différents critères régissant la responsabilité des États qui s'appliquent aux actions commises par des acteurs et groupes non étatiques, d'une part, et par des États (reconnus ou non), d'autre part.

2. Ainsi, un État fournissant une assistance financière ou toute autre forme d'assistance à un autre État ne sera pas responsable des actes de ce

dernier mais seulement de l'aide et de l'assistance fournies (article 16 du projet d'articles de la Commission du droit international sur la responsabilité de l'État pour fait internationalement illicite (« les articles de la CDI »), rapport de la Commission à l'Assemblée générale sur les travaux de sa cinquante-troisième session, *Annuaire de la Commission du droit international*, 2001, vol. 2, p. 69), sauf bien entendu s'il est prouvé que ce dernier État a agi sous les directives et le contrôle (article 17) ou la contrainte (article 18) du premier, ce qui est extrêmement difficile à démontrer. D'après la CDI, le terme « contrôle » renvoie à « l'exercice d'une domination sur un comportement », et l'expression « donne des directives » n'englobe pas « une simple incitation ou suggestion [mais] sous-entend une direction effective opérationnelle » (commentaire relatif à l'article 17, *Annuaire de la Commission du droit international*, 2001, vol. 2, p. 73).

3. Partant, si la RHK est un État, toute aide ou assistance qui lui est fournie par la République d'Arménie ne fera pas passer les territoires contrôlés par elle sous la juridiction de l'Arménie, sauf s'il est prouvé que les actes accomplis par la RHK le sont sous la domination et sous la direction opérationnelle de la République d'Arménie.

4. Il est important d'établir une distinction entre la présente affaire et les autres situations examinées précédemment par la Cour afin de montrer pourquoi la question du statut importe ici alors qu'elle n'avait pas réellement d'importance dans les affaires précédentes. Ainsi, dans le cas de la prétendue « République turque de Chypre du Nord » – la « RTCN », le Conseil de sécurité avait adopté des résolutions « déplorant » expressément la déclaration d'indépendance de la « RTCN », la considérant comme « juridiquement nulle », ainsi que « condamnant » la sécession de la « RTCN » en général et appelant la communauté internationale à ne pas la reconnaître (résolution 541, S/RES/541, 18 novembre 1983, et résolution 550, S/RES/550, 11 mai 1984).

5. Dans les affaires chypriotes, il n'était tout simplement pas nécessaire d'établir le statut de la « RTCN », puisque la question avait déjà été tranchée par le Conseil de sécurité, qui avait qualifié cette entité de régime illégal. Le statut de la « RTCN » n'avait aucun rôle à jouer dans la détermination de la responsabilité de la Turquie, car il n'avait tout bonnement pas d'importance juridique.

6. En l'espèce, toutefois, la situation est totalement différente. Le Conseil de sécurité des Nations unies n'a jamais déclaré que le mouvement du Haut-Karabagh était juridiquement nul. De plus, le simple fait que le processus de paix se poursuive tend aussi à indiquer que la question du statut de la RHK n'est toujours pas réglée et qu'elle demeure l'objet d'une négociation politique (paragraphe 29 de l'arrêt).

7. Dès lors, l'absence de condamnation internationale et d'invalidation de la RHK et de sa déclaration d'indépendance signifie que sa reconnaissance future en tant qu'État par la communauté internationale est du domaine du possible. Cela dit, il importe de définir la notion de qualité d'État.

8. D'après la définition classique de la qualité d'État donnée par la Convention de Montevideo sur les droits et devoirs des États :

> « L'État comme personne de droit international doit réunir (...) : a) population permanente ; b) territoire déterminé ; c) gouvernement ; d) capacité d'entrer en relations avec les autres États. » (article premier, 26 décembre 1933, Société des Nations, *Recueil des traités*, vol. 165)

9. Cette définition de la qualité d'État est largement admise par les spécialistes de droit international (S. Rosenne, « *The Perplexities of Modern International Law* », Hague Recueil, vol. 291 (2001), p. 262, A.A.C. Trindade, « *International Law for Humankind. Towards a New Jus Gentium* », Hague Recueil, vol. 316 (2005), p. 205), par différentes institutions internationales (rapport du groupe de travail sur les immunités juridictionnelles des États et de leurs biens, annexe au rapport de la Commission du droit international sur les travaux de sa cinquante et unième session, A/54/10 (1999), p. 157) et même par des tribunaux (*Deutsche Continental Gas-Gesellschaft v. Polish State*, [1929] CDI, vol. 5, p. 13). En outre, les États ont constamment et invariablement invoqué ces critères au moment de déterminer leur politique de reconnaissance (voir, par exemple, compte rendu de la 383e réunion du Conseil de sécurité, S/PV.383, 2 décembre 1948).

10. La RHK possède un gouvernement, une population permanente et elle est capable d'entrer en relation avec les autres États, comme en témoigne le fait qu'elle dispose de représentations dans plusieurs États. La RHK contrôle aussi un territoire. La question centrale est toutefois celle de savoir si elle a droit à la totalité ou à une partie de ce territoire. C'est à cet égard que la question de l'autodétermination prend toute son importance.

Pertinence du droit des peuples à disposer d'eux-mêmes

11. La conclusion de la Cour selon laquelle la RHK et la République d'Arménie sont hautement intégrées empiète en réalité sur la détermination du statut et de la personnalité juridique de la RHK, ce que même le Conseil de sécurité s'est abstenu de faire.

12. En particulier, et comme on l'a déjà dit, la déclaration d'indépendance de la RHK n'a jamais été critiquée ni invalidée par le Conseil de sécurité, contrairement aux déclarations similaires de la Rhodésie-du-Sud, du nord de Chypre ou de la Republika Srpska.

13. À cet égard, l'interprétation par la Cour internationale de justice (CIJ) de l'approche adoptée par le Conseil de sécurité face à certaines

déclarations d'indépendance, exposée dans son avis consultatif relatif à la Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo (CIJ Recueil 2010, § 81 – « l'avis consultatif sur le Kosovo »), revêt une importance cruciale. La CIJ y déclare :

> « Plusieurs participants ont invoqué des résolutions par lesquelles le Conseil de sécurité a condamné certaines déclarations d'indépendance : voir, notamment, les résolutions 216 (1965) et 217 (1965) du Conseil de sécurité concernant la Rhodésie-du-Sud, la résolution 541 (1983) du Conseil de sécurité concernant le nord de Chypre et la résolution 787 (1992) du Conseil de sécurité concernant la Republika Srpska.
>
> La Cour relève cependant que, dans chacun de ces cas, le Conseil de sécurité s'est prononcé sur la situation telle qu'elle se présentait concrètement lorsque les déclarations d'indépendance ont été faites ; l'illicéité de ces déclarations découlait donc non de leur caractère unilatéral, mais du fait que celles-ci allaient ou seraient allées de pair avec un recours illicite à la force ou avec d'autres violations graves de normes de droit international général, en particulier de nature impérative (*jus cogens*). Or, dans le cas du Kosovo, le Conseil de sécurité n'a jamais pris une telle position. Selon la Cour, le caractère exceptionnel des résolutions susmentionnées semble confirmer qu'aucune interdiction générale des déclarations unilatérales d'indépendance ne saurait être déduite de la pratique du Conseil de sécurité. »

14. Ainsi, les résolutions du Conseil de sécurité examinées par la CIJ étaient des manifestations de la doctrine de la non-reconnaissance collective, à savoir des situations où le Conseil de sécurité a appelé la communauté internationale à s'abstenir de reconnaître de nouvelles entités comme des États, eu égard au fait que le processus de création de ces entités s'était accompagné de violations d'obligations internationales fondamentales (voir, par exemple, J. Dugard et D. Raič, « *The Role of Recognition in the Law and Practice of Secession* », dans *Secession: International Law Perspectives*, sous la direction de M. G. Kohen, Cambridge, Cambridge University Press, 2006, pp. 100-101).

15. Or, dans ses résolutions 822, 853, 874 et 884 (1993) portant sur le conflit du Haut-Karabagh, le Conseil de sécurité n'a nullement conclu à l'illicéité du comportement ni appelé la communauté internationale à s'abstenir de reconnaître la RHK. Dès lors, le Conseil de sécurité a laissé ouverte la possibilité que la RHK devienne un membre à part entière et légitime de la communauté internationale et exerce son droit à l'autodétermination.

16. En dépit de ce qui précède, et se démarquant en cela fortement de l'approche du Conseil de sécurité, la Cour a introduit des réserves qui sont au contraire préjudiciables à l'exercice de ce droit et ne reconnaissent donc pas que la création de la RHK et sa perpétuation ne sont pas seulement l'expression de la volonté de la population locale, mais qu'elles s'inscrivent aussi dans le contexte des politiques de discrimination menées par l'Azerbaïdjan.

17. À cet égard, les récentes évolutions du droit des peuples à disposer d'eux-mêmes et la manifestation de ce droit, que l'on tend de plus en plus à qualifier de droit à la « sécession-remède », revêtent une importance cruciale.

18. La notion de sécession-remède correspond à la possibilité pour certains groupes unis de faire sécession d'un État lorsqu'ils sont victimes de graves violations des droits de l'homme et de répression de la part de cet État ou sont dans l'incapacité de concrétiser leur droit à l'autodétermination sur le plan interne (C. Tomuschat, « *Secession and Self-Determination* », dans *Secession: International Law Perspectives*, sous la direction de M. G. Kohen, Cambridge, Cambridge University Press, 2006, pp. 23-45, et A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995, p. 120).

19. Cette notion se fonde sur une lecture *a contrario* de la « clause de sauvegarde » contenue dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations unies (résolution de l'Assemblée générale 2625 (XXV), 24 octobre 1970 – « la déclaration sur les relations amicales »), document dont la CIJ a déclaré qu'il reflétait le droit international coutumier (avis consultatif sur le Kosovo, § 80) et qui est largement considéré par les plus grands spécialistes comme constituant une interprétation de la Charte des Nations unies faisant autorité (G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of Sources of International Law*, Alphen-sur-le-Rhin, Sijthoff & Noordhoff, 1979, pp. 73-88, et I. Brownlie, *Principles of Public International Law*, 7e édition, New-York, Oxford University Press, 2008, p. 581).

20. Cette déclaration est ainsi libellée dans son passage pertinent :

> « Rien dans les paragraphes (...) [qui traitent du droit des peuples à disposer d'eux-mêmes] ne sera interprété comme autorisant ou encourageant une action, quelle qu'elle soit, qui démembrerait ou menacerait, totalement ou partiellement, l'intégrité territoriale ou l'unité politique de tout État souverain et indépendant se conduisant conformément au principe de l'égalité de droits et du droit des peuples à disposer d'eux-mêmes (...) et doté ainsi d'un gouvernement représentant l'ensemble du peuple appartenant au territoire sans distinction de race, de croyance ou de couleur. »

21. La même « clause de sauvegarde » est aussi employée dans la Déclaration et le programme d'action de Vienne, adoptés lors de la conférence mondiale sur les droits de l'homme (A/CONF.157/23, § 2, 25 juin 1993). La « clause de sauvegarde » sous-entend que, dans les cas où les États ne respectent pas le comportement décrit dans la seconde partie de cette clause, ils ne méritent pas que leur intégrité territoriale soit protégée (D. Murswiek, « *The Issue of a Right of Secession – Reconsidered* », dans *Modern Law of Self-Determination*, sous la direction de C. Tomuschat, Dordrecht, Martinus Nijhoff Publishers, 1993, p. 21-39).

22. L'interprétation selon laquelle les violations des droits de l'homme donnent lieu à des situations où un groupe persécuté a de ce fait le droit de créer son propre État est par ailleurs confortée par un nombre important de décisions adoptées par des institutions nationales et internationales.

23. Ce droit était implicitement contenu dans les décisions adoptées par la Commission africaine des droits de l'homme et des peuples dans les affaires Kevin Mgwanga Gunme *et al.* c. Cameroun (communication n° 266/03 (2009), § 199) et Congrès du peuple katangais c. Zaïr (communication n° 75/92 (1995)). Il est indiqué au paragraphe 6 de cette dernière que l'obligation « d'user d'une forme d'autodétermination qui soit compatible avec la souveraineté et l'intégrité territoriale du Zaïre » existe en l'absence « de preuve tangible à l'appui des violations des droits de l'homme à tel point qu'il faille mettre en cause l'intégrité territoriale du Zaïre ».

24. On retrouve la même approche dans l'opinion concordante des juges Wildhaber et Ryssdal jointe à l'arrêt *Loizidou c. Turquie* ((fond), 18 décembre 1996, *Recueil des arrêts et décisions* 1996-VI) ainsi que dans le jugement de la Cour suprême du Canada en l'affaire du Renvoi relatif à la sécession du Québec, où il est indiqué que « lorsqu'un peuple est empêché d'exercer utilement son droit à l'autodétermination à l'interne, il a alors le droit, en dernier recours, de l'exercer par la sécession » ([1998] 2 RCS 217, § 134).

25. Ce droit à la sécession-remède a en outre été reconnu par beaucoup d'éminents spécialistes de droit international, tels Thomas Franck (« *Postmodern Tribalism and the Right to Secession* », sous la direction de C. Brölmann et autres, *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, 1993, pp. 13-14) ou James Crawford (*The Creation of States in International Law*, 2e édition, Oxford, Clarendon Press 2006, p. 126).

26. Cette approche ressort aussi clairement de la pratique des États. Ainsi, deux ans à peine après l'adoption de la déclaration sur les relations amicales, 47 États avaient reconnu l'État du Bangladesh en raison des violences qui étaient dirigées contre la population locale, alors que le Pakistan n'a reconnu ce pays qu'en 1976. À ce jour, 110 États ont reconnu le Kosovo.

27. Ainsi, le droit à la sécession-remède est désormais largement reconnu par les instruments internationaux, les arrêts et décisions des institutions et juridictions internationales, la pratique des États et la théorie du droit international.

28. Eu égard à ce qui précède, il faut noter que les violences perpétrées contre les Arméniens à Soumgaït en février 1988, les persécutions contre les Arméniens à Bakou en janvier 1990, l'opération « Ring » du printemps 1991, qui a vidé de sa population plus de vingt villages arméniens, sont tous

des événements antérieurs à la déclaration d'indépendance de la RHK, qui n'était qu'une réponse logique à ceux-ci. Il faut aussi noter que tous ces événements ont été reconnus par des organisations indépendantes de défense des droits de l'homme, des organes de l'Union Européenne et des Nations unies (voir, par exemple, le rapport intitulé « *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh* » de Human Rights Watch, 1994, le rapport du Comité pour l'élimination de la discrimination à l'égard des femmes intitulé « Examen des rapports présentés par les États parties conformément à l'article 18 de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes : Arménie », CEDAW/C/ARM/1/Corr.1, 11 février 1997).

29. Le Comité pour l'élimination de la discrimination raciale a lui aussi reconnu que l'Azerbaïdjan continue aujourd'hui de mener des politiques de discrimination ethnique (observations finales sur l'Azerbaïdjan, CERD/C/AZE/CO/4, 14 avril 2005), tout comme la Commission européenne contre le racisme et l'intolérance du Conseil de l'Europe dans ses trois rapports sur l'Azerbaïdjan (adoptés respectivement le 28 juin 2002, le 15 décembre 2006 et le 23 mars 2011), et le Comité consultatif de la Convention-cadre pour la protection des minorités nationales (avis sur l'Azerbaïdjan, ACFC/INF/OP/I(2004)001, 22 mai 2003, et deuxième avis sur l'Azerbaïdjan, ACFC/OP/II(2007)007, 9 novembre 2007).

30. La propagande de haine ethnique visant les Arméniens menée au niveau de l'État est corroborée par les destructions continues du patrimoine culturel arménien – la destruction de la nécropole de Djougha en étant la manifestation la plus barbare – ou encore par la glorification de l'officier azerbaïdjanais déclaré coupable d'avoir assassiné un collègue arménien en Hongrie dans son sommeil.

31. C'est à la lumière de ce contexte qu'il faut examiner la question de l'autodétermination de la population de la RHK, étant donné que c'était pour elle le seul moyen d'assurer sa protection contre ces politiques discriminatoires, et c'est ce contexte que la Cour a totalement ignoré lorsqu'elle a exercé sa compétence. Ce contexte est en particulier un contexte de droits de l'homme et la Cour, qui a pour fonction de protéger les droits de l'homme, a en fait rendu un arrêt qui, je l'ai indiqué plus haut, est effectivement préjudiciable à l'exercice du droit à l'autodétermination et donc aux libertés et droits fondamentaux de la population de la RHK.

Épuisement des voies de recours internes

32. Une question étroitement liée à la question de la personnalité juridique internationale de la RHK est celle de l'épuisement des voies de recours internes. En rejetant l'exception de non-épuisement formulée

par le Gouvernement, la Cour a déclaré qu'il n'était pas réaliste de penser qu'un éventuel recours ouvert « en « RHK », entité non reconnue », puisse en pratique offrir un redressement effectif aux Azerbaïdjanais déplacés (paragraphe 119 de l'arrêt). Or cette approche est en contradiction avec la jurisprudence établie.

33. Il y a lieu de noter que, dans l'affaire *Demopoulos et autres c. Turquie* ((déc.) [GC], n^os^ 46113/99 et 7 autres, CEDH 2010), la Cour a reconnu que même les entités de fait peuvent offrir des recours effectifs, et que si ceux examinés en l'occurrence ne l'étaient pas, c'était en raison de leurs particularités. Partant, la Cour a dit qu'il n'y avait pas de corrélation directe ou automatique entre la question de la reconnaissance de la « RTCN » et de la prise prétendue par celle-ci de la souveraineté sur le nord de Chypre au plan international, d'une part, et l'application de l'article 35 § 1 de la Convention, d'autre part (*ibidem*, § 100). Si l'on se fonde sur les conclusions auxquelles la Cour est parvenue dans cette affaire, il y a lieu de noter que le fait que la souveraineté du Haut-Karabagh ne soit reconnue par aucun État ne dispense pas les requérants de l'obligation d'épuiser les voies de recours internes offertes par la RHK.

34. Il ne fait absolument aucun doute qu'il existe au sein du Haut-Karabagh un système judiciaire qui fonctionne. Or les requérants n'ont jamais fait la moindre tentative pour introduire une requête devant les tribunaux de la RHK et ils n'ont pas fourni le moindre élément de preuve attestant l'existence d'obstacles insurmontables les empêchant de saisir ces tribunaux. Le fait que les requérants vivent en dehors du territoire de la RHK ne leur donne aucune raison valable de ne pas se prévaloir de ces recours.

35. Les frontières, *de facto* ou *de jure*, ne constituent pas un obstacle en matière d'épuisement des voies de recours internes. Ainsi, dans l'affaire *Pad et autres c. Turquie* ((déc.), n° 60167/00, § 69, 28 juin 2007), dans laquelle des Iraniens habitant un village proche de la frontière turque furent abattus par des membres des forces de sécurité turques, la Cour a accueilli l'exception de non-épuisement des voies de recours internes formulée par le Gouvernement, notant que les requérants avaient été en mesure de choisir un avocat au Royaume-Uni et qu'ils ne pouvaient donc pas dire que le mécanisme judiciaire turc – la Turquie étant pour eux un pays étranger – était hors de leur portée physiquement et financièrement. Le fait que les requérants en l'espèce aient pu désigner des avocats anglais pour les défendre montre qu'ils n'avaient pas des capacités limitées.

36. Le seul obstacle empêchant les requérants d'exercer les recours à leur disposition en RHK a été dressé par leur propre gouvernement. En effet, l'Azerbaïdjan a annoncé son intention de « punir » les personnes qui se

rendraient en RHK sans sa permission en les déclarant *persona non grata* et en leur refusant le droit de rentrer en Azerbaïdjan s'ils s'y rendaient quand même. Sur la « liste noire » figurent des députés britanniques, allemands, français et russes et de plusieurs autres pays d'Europe, ainsi que de pays aussi lointains que l'Australie et l'Uruguay. Voilà peut-être la raison pour laquelle les avocats des requérants n'ont pas cherché à introduire de requête devant les tribunaux de la RHK.

37. La conclusion de la majorité selon laquelle le Gouvernement ne s'est pas acquitté de la charge qui lui incombait de prouver que les requérants disposaient d'un recours approprié et effectif résulte de lacunes procédurales.

Ainsi qu'il ressort des paragraphes 113 et 114 de l'arrêt, le Gouvernement s'est bien acquitté de la charge qui lui incombait de prouver que les requérants disposaient d'un recours effectif, mais le président de la Cour a décidé qu'il ne fallait pas verser au dossier les documents supplémentaires, dont deux jugements rendus par le tribunal de première instance de la RHK reconnaissant les droits de propriété de deux plaignants déplacés d'ethnie azérie.

38. En l'absence dans la Convention de disposition explicite relative à la recevabilité des preuves, la Cour adopte en principe une approche souple et se réserve une complète latitude concernant la recevabilité et l'évaluation des preuves. Il n'existe aucun obstacle procédural à la recevabilité d'éléments de preuve, ainsi que la Grande Chambre de la Cour l'a rappelé dans l'arrêt *Natchova et autres c. Bulgarie* ([GC], n^os^ 43577/98 et 43579/98, § 147, CEDH 2005-VII). Dans certaines affaires, la Cour a admis de nouvelles preuves même après les délibérations sur le fond et avant le prononcé de l'arrêt (*Vučković et autres c. Serbie* (exception préliminaire) [GC], n^os^ 17153/11 et 29 autres, 25 mars 2014, et *W.A. c. France* (déc.), n^o^ 34420/07, 21 janvier 2014).

39. Par une lettre du 7 juin 2013, le greffier adjoint de la Grande Chambre a informé l'agent du gouvernement de l'État défendeur que le président de la Grande Chambre avait décidé de demander aux parties d'exprimer des observations orales. De plus, la « note à l'intention des personnes appelées à comparaître lors d'une audience de la Cour européenne des droits de l'homme », jointe à cette lettre, permet aux parties de se fonder sur « des documents ou textes qui ne figurent pas encore au dossier », à la seule condition que ces documents parviennent « au greffe au moins trois semaines avant l'audience, **ou [soient] incorporés intégralement dans un exposé oral** » (gras ajouté). Conformément à l'instruction du greffier sur les possibilités de présentation des preuves, le Gouvernement a cité (intégralement) dans ses observations orales deux jugements rendus par les tribunaux de la RHK en faveur de deux Azéris.

40. Eu égard à la pratique établie de la Cour en matière de recevabilité des preuves qui lui sont soumises, et sachant l'importance que les deux jugements susmentionnés revêtent pour l'examen de la présente affaire et que ces preuves ont été soumises en temps voulu par le Gouvernement, au moins oralement, le refus d'admettre des preuves cruciales en raison de leur tardiveté n'est pas convaincant et donne l'impression que la Cour a simplement supprimé des preuves qui gênaient ses conclusions. J'espère que c'est la première et la dernière fois que la Cour européenne des droits de l'homme omet de garantir que justice soit faite au vu et au su de tous.

41. Compte tenu des considérations qui précèdent, je ne peux partager l'avis de la majorité de la Grande Chambre selon lequel les requérants n'étaient pas tenus d'exercer les voies de recours internes.

Établissement des faits

42. Dans la grande majorité des affaires, la Cour a été en mesure d'établir les faits à partir des preuves documentaires à sa disposition. La Convention exigeant que les voies de recours internes aient été épuisées avant l'introduction d'une requête devant la Cour, dans la plupart des cas, les faits importants ne sont plus controversés une fois que les juridictions internes ont rendu leurs jugements. Dans des cas exceptionnels tels que l'espèce, où les autorités nationales n'ont pas pu procéder à l'établissement des faits parce que les requérants ne les ont pas saisies de leurs griefs, il appartient à la Cour d'établir les circonstances de la cause. Il existait à l'évidence des divergences fondamentales quant aux faits entre les parties à la présente affaire, divergences qu'il n'était pas possible de surmonter par le seul examen des documents soumis. Les requérants ont présenté des dizaines de déclarations et éléments de preuve contradictoires dont la fiabilité ne peut être vérifiée qu'au moyen de mesures d'enquête. Il vaut la peine d'observer que les requérants ont produit des déclarations contradictoires quant à la taille des terrains et maisons en cause et qu'ils ont fourni par la suite des passeports techniques faisant état de chiffres sensiblement différents.

43. Par ailleurs, la Cour ne peut établir la présence de forces armées arméniennes sur le territoire de la RHK à partir des preuves par ouï-dire invoquées par les représentants des requérants et figurant dans des expertises douteuses. C'est pourquoi une décision juridique contraignante sur l'existence ou non d'un contrôle militaire arménien sur la RHK ne pouvait être prise indépendamment de l'établissement des faits, qui en constituait à la fois une condition préalable et un élément indissociable. Dès lors, la seule manière pour la Cour d'établir les faits était de conduire une mission d'enquête comme dans les affaires *Loizidou*, précitée, et *Ilaşcu et autres c. Moldova et Russie* ([GC], n° 48787/99, CEDH 2004-VII) ou d'entendre les témoins

et mener des investigations comme dans l'affaire *Géorgie c. Russie (I)* ([GC], nº 13255/07, CEDH 2014). L'article 19 de la Convention oblige la Cour à « assurer le respect des engagements résultant pour les Hautes Parties contractantes de la (...) Convention », ce qui implique de procéder à un examen complet de la recevabilité et du bien-fondé de chaque requête. Lorsque les faits ne peuvent être établis au moyen d'observations écrites des parties, le droit pour la Cour de lancer une mission d'enquête devient une obligation juridique, ce pour qu'elle puisse respecter ses obligations au titre de la Convention.

44. Il était nécessaire de mener une mission d'enquête non seulement pour parvenir à une décision sur la recevabilité de l'affaire mais également pour l'examen au fond. La Cour ne peut parvenir à une décision raisonnable quant à la taille des maisons et des terrains que les requérants allèguent posséder en se fondant exclusivement sur les documents contradictoires fournis par ces derniers. En particulier, s'agissant des biens dont M. Chiragov dit être propriétaire, les représentants de ce dernier ont déclaré que sa maison avait une surface de 250 m². Or le document fourni pour prouver son titre de propriété fait état d'une surface de 260 m², tandis que le passeport technique mentionne une surface de 408 m². La Cour renvoie à cet égard à l'article 15.7 des principes de Pinheiro (paragraphe 136 de l'arrêt), qui ne sont toutefois pas pertinents, car ils concernent des cas où il n'existe pas de preuve documentaire, tandis qu'en l'espèce nous avons affaire à des documents qui se contredisent.

45. À cet égard, et pour ce qui est des faits, la Cour n'avait pas d'autre solution que d'en passer par une procédure d'établissement des faits ou de prendre d'autres mesures d'instruction, comme indiqué à l'article A1 de l'annexe à son règlement, aux fins d'une bonne administration de la justice. N'ayant suivi ni l'une ni l'autre de ces procédures, la Cour n'a pas été en mesure de parvenir à une conclusion définitive, en tout cas s'agissant de l'appréciation de la qualité de victime des requérants (critère de recevabilité) et du fond de la requête.

46. Il est aussi pour le moins étrange que la Cour ait admis les résolutions de certaines organisations internationales en les tenant pour des faits, alors qu'elle en a totalement ignoré d'autres. À cet égard, il est important de prendre note du rapport de la mission d'enquête de l'OSCE, où il est dit très clairement : « les membres de la mission précisent qu'ils n'ont constaté aucun signe d'implication directe du gouvernement arménien à Latchin ». Les résolutions du Conseil de sécurité des Nations unies que je cite ci-dessous forment un autre ensemble de documents qui revêtent de l'importance et qui, bien que mentionnés dans l'arrêt, ne sont pas repris par la Cour dans son appréciation.

Juridiction et attribution

47. La question de savoir si les requérants doivent être considérés comme relevant de la juridiction de la République d'Arménie aux fins de l'article 1 de la Convention est au centre de la présente espèce. À mon avis, la jurisprudence antérieure de la Cour au sujet de la juridiction extraterritoriale était conforme aux critères communément admis en matière de responsabilité de l'État pour fait internationalement illicite tels qu'ils ont été codifiés par la CDI ou appliqués et interprétés par la CIJ. Or l'avis exprimé par la Cour dans la présente affaire représente une tendance nouvelle et – selon moi – regrettable.

48. Le problème fondamental tient ici à la méthode employée par la Cour pour juger que la juridiction de l'Arménie est établie. Comme la Cour l'indique au paragraphe 169 de l'arrêt, elle ne se réfère pas à l'exception fondée sur l'intervention d'agents de l'État arménien mais à celle fondée sur l'exercice d'« un contrôle effectif sur un territoire ». Elle dit :

> « La question à trancher à partir des faits de la cause consiste plutôt à savoir si la République d'Arménie a exercé et continue d'exercer un contrôle effectif sur les territoires mentionnés et peut, de ce fait, être tenue pour responsable des violations alléguées. »

49. Le cœur du raisonnement sur la question de la juridiction se trouve exposé au paragraphe 180 de l'arrêt, où la Cour dit :

> « (...) de nombreux rapports et déclarations cités ci-dessus à l'appui, elle juge établi que la République d'Arménie, par sa présence militaire et par la fourniture de matériel et de conseils militaires, a participé très tôt et de manière significative au conflit du Haut-Karabagh. Cet appui militaire a été et demeure déterminant pour la conquête et la conservation du contrôle sur les territoires en cause, et les éléments disponibles, en particulier l'accord de coopération militaire de 1994, démontrent de manière convaincante que les forces armées de l'Arménie et celles de la « RHK » sont largement intégrées. »

Ainsi, d'après la majorité, cette affaire – tout comme l'affaire *Catan et autres c. République de Moldova et Russie* ([GC], nos 43370/04 et 2 autres, CEDH 2012) – correspond à une situation où l'exercice extraterritorial de la juridiction se fonde sur l'exception relative au « contrôle effectif d'une région ». Cependant, à la différence des autres précédents examinés par la Cour, ce contrôle est censé être exercé par le biais d'une « administration locale subordonnée » (comme je l'indique ci-après, dans les affaires chypriotes, ce contrôle a été établi à cause d'une participation directe des forces militaires de la Turquie et non en raison de l'intervention d'une « administration locale subordonnée »).

50. Le problème fondamental vient de ce que la Cour ne fait pas de distinction entre les situations où le contrôle sur le territoire est établi par le

biais d'une « administration locale subordonnée » et celles où il l'est par « les propres forces armées de l'État contractant ». Il ne s'agit pas là d'une simple différence de fait ; c'est une différence sur le plan du droit, car les deux situations sont régies par des règles d'attribution différentes.

Dans l'affaire *Catan et autres*, précitée, la Cour a dit qu'elle ne s'occupait nullement de l'attribution, déclarant : « les critères permettant d'établir l'existence de la « juridiction » au sens de l'article 1 de la Convention n'ont jamais été assimilés aux critères permettant d'établir la responsabilité d'un État concernant un fait internationalement illicite au regard du droit international » (*ibidem*, § 115, voir aussi *Jaloud c. Pays-Bas* [GC], n° 47708/08, § 154, CEDH 2014). Or cette simplification exagérée et fatale est pour moi la raison principale qui a conduit la Cour à conclure que l'Arménie était responsable des événements qui se sont produits sur le territoire de Latchin.

51. Cette simplification excessive est également la principale raison qui fait que je ne peux souscrire à l'avis de la Cour. Je vais m'efforcer d'expliquer ci-dessous précisément pourquoi.

La juridiction ne peut être établie sans l'attribution du comportement

52. Selon moi, la notion même d'« administration locale subordonnée » signifie que les règles d'attribution entrent nécessairement en jeu (voir, par exemple, A. Cassese, « *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia* », *European Journal of International Law*, vol. 18, n° 4 (2007), p. 658, note 17).

53. Le contrôle sur un territoire par une administration locale, aussi effectif ou évident soit-il, ne peut avoir de conséquences sur la responsabilité d'un État contractant que si les actes de cette administration locale sont imputables à cet État ou – pour reprendre la terminologie employée par la Cour – si cette administration locale est « subordonnée » à l'État. En l'absence d'une telle attribution (ou « subordination »), il n'y a pas de contrôle sur le territoire par l'État ; sa juridiction ne peut donc pas être établie et, par voie de conséquence, sa responsabilité ne peut être engagée.

54. En fait, l'attribution entre aussi en jeu lorsque le contrôle est exercé par le biais des « propres forces armées de l'État contractant ». La seule différence tient à la règle d'attribution applicable.

Ces règles d'attribution se trouvent bien entendu exposées dans les articles de la CDI, articles que l'Assemblée générale a approuvés (résolution 56/83 sur le rapport A/56/589, 28 janvier 2002), et qui sont communément admis comme reflétant le droit coutumier en la matière. La Cour s'est notamment référée aux articles de la CDI dans un certain nombre d'af-

faires (voir, entre autres, *Blečić c. Croatie* [GC], nº 59532/00, § 48, CEDH 2006-III, voir aussi *Ilaşcu et autres*, précité, §§ 319-321).

55. Ainsi, lorsque le contrôle sur un territoire est exercé par le biais des « propres forces armées de l'État contractant », la règle régissant l'attribution d'un comportement à l'État est celle énoncée à l'article 4 des articles de la CDI, intitulé « Comportement des organes de l'État », tandis qu'en cas de contrôle sur un territoire exercé par une « administration locale subordonnée », c'est celle énoncée à l'article 8, « Comportement sous la direction ou le contrôle de l'État », qui trouve à s'appliquer.

56. Dès lors, l'attribution entre toujours en jeu. La différence entre les deux cas de figure est que l'attribution à un État du comportement de ses propres forces armées va de soi, tandis que l'attribution des actes d'une administration locale doit résulter d'une démonstration et que le niveau de contrôle requis pour cela doit être déterminé (sachant que le débat est en cours sur la question dans la théorie du droit international).

57. Partant, il n'est pas inutile de souligner une fois encore que la notion de « contrôle global effectif » utilisée par la Cour dans les affaires chypriotes est un critère servant à déterminer la juridiction et qui qualifie le niveau de contrôle exercé par l'État sur des territoires situés en dehors de ses frontières reconnues, tandis que les notions de « contrôle effectif » ou de « contrôle global » sont des critères relatifs à l'attribution qui renvoient au contrôle de l'État sur des individus, groupes ou entités (voir, par exemple, M. Milanović, « *State Responsibility for Genocide* », *European Journal of International Law*, vol. 17, nº 3 (2006), p. 586).

58. L'assimilation pure et simple de ces deux notions est une opération inacceptable qui est menée pour tenter de montrer qu'il suffit de prouver un seul des deux éléments et non les deux.

Il est pertinent de répéter ici une fois de plus que, en dépit du caractère particulier de la Convention européenne des droits de l'homme en sa qualité de traité relatif aux droits de l'homme (voir, entre autres, *McElhinney c. Irlande* [GC], nº 31253/96, § 36, 21 novembre 2001), la Cour a indiqué à de nombreuses occasions que « les principes qui sous-tendent la Convention ne peuvent s'interpréter et s'appliquer dans le vide » et qu'elle doit « aussi prendre en compte toute règle pertinente du droit international lorsqu'elle se prononce sur des différends concernant sa compétence et, par conséquent, **déterminer la responsabilité des États en harmonie avec les principes du droit international, dont [la Convention] fait partie** (...) » (*Behrami et Behrami c. France et Saramati c. France, Allemagne et Norvège* (déc.) [GC], nºs 71412/01 et 78166/01, § 122, 2 mai 2007, gras ajouté, voir aussi *Banković et autres c. Belgique et autres* (déc.) [GC], nº 52207/99, § 57, CEDH 2001-XII).

59. Dans ces conditions, l'approche suivie par la Cour en l'espèce consiste seulement à contourner et à ignorer les règles du droit international général. Cette approche conduit à confondre et fusionner les notions de juridiction et d'attribution et crée un critère en matière de responsabilité, ce qui est sans équivalent dans la pratique des cours et tribunaux internationaux et revient précisément à faire ce contre quoi la Cour a mis en garde précédemment : appliquer la Convention dans le vide.

La jurisprudence antérieure de la Cour s'accorde implicitement avec l'application différenciée des règles d'attribution et de juridiction

60. Comme indiqué plus haut, la jurisprudence antérieure de la Cour relative à la question de la juridiction extraterritoriale est à mon avis conforme aux critères généralement admis en matière de responsabilité de l'État pour fait internationalement illicite tels qu'ils ont été codifiés par la CDI ou appliqués et interprétés par la CIJ. Dès lors, la Cour ne peut fonder sa position actuelle sur cette jurisprudence.

Pour commencer par les affaires chypriotes, alors même que la Cour a indiqué à maintes reprises qu'un État peut exercer son contrôle effectif sur un territoire par le biais d'une administration locale subordonnée, elle n'avait jusqu'à récemment pas encore examiné d'affaire où il était indiscutable que ce contrôle était établi par le seul biais de pareille administration, les affaires chypriotes ne constituant de ce point de vue pas une exception. De fait, dans toutes les affaires dont la Cour a eu à connaître, à l'exception de l'affaire *Catan et autres*, précitée, l'État contractant était directement impliqué soit en raison d'une présence militaire importante (*Loizidou*, précité, § 56, et *Chypre c. Turquie* [GC], n° 25781/94, § 77, CEDH 2001-IV) soit en raison de sa participation directe aux violations dénoncées (ce qui constitue déjà un cas d'exception due à l'« autorité d'agents de l'État »).

À cet égard, les affaires chypriotes constituent un point de repère important. La Cour a certes indiqué tant dans l'affaire *Loizidou* que dans l'affaire *Chypre c. Turquie*, précitées, que le « contrôle global effectif sur un territoire » peut s'exercer par l'intermédiaire d'une administration locale subordonnée (*Loizidou c. Turquie* (exceptions préliminaires), 23 mars 1995, § 62, série A n° 310, et *Loizidou* (fond), précité, § 52). Toutefois, la Cour a en fin de compte établi qu'il y avait contrôle non pas en raison du contrôle exercé sur le territoire de la « RTCN », mais à cause de l'importante présence militaire de la Turquie dans le nord de Chypre et de la participation directe de ce pays tant à l'occupation du nord de l'île qu'aux actions empêchant la requérante d'accéder à sa propriété (*Loizidou* (exceptions préliminaires), précité, § 63). La Cour a conclu dans l'arrêt *Loizidou* (fond), précité, § 56 :

> « Le grand nombre de soldats [turcs] participant à des missions actives dans le nord de Chypre (...) atteste que l'armée turque exerce en pratique un contrôle global sur cette partie de l'île. »

La Cour en a tiré la conclusion que la responsabilité de la Turquie était engagée à raison des actes de la « RTCN » tout en constatant que le facteur décisif n'était pas le niveau de contrôle sur la « RTCN » mais le contrôle direct exercé sur le territoire lui-même.

61. Cela signifie que le niveau de contrôle exercé sur l'administration locale subordonnée ne revêtait pas pour la Cour une importance réelle, car, indépendamment du degré de contrôle sur la « RTCN » elle-même, le fait que la Turquie exerçait un contrôle direct sur l'île par le biais de sa propre armée était de nature à imposer à la Turquie de s'acquitter de ses obligations positives et négatives s'agissant du respect des droits de l'homme.

62. C'est donc l'article 4 des articles de la CDI, intitulé « Comportement des organes de l'État », qui a trouvé à s'appliquer dans ces affaires :

> « 1. Le comportement de tout organe de l'État est considéré comme un fait de l'État d'après le droit international, que cet organe exerce des fonctions législative, exécutive, judiciaire ou autres, quelle que soit la position qu'il occupe dans l'organisation de l'État, et quelle que soit sa nature en tant qu'organe du gouvernement central ou d'une collectivité territoriale de l'État.
>
> 2. Un organe comprend toute personne ou entité qui a ce statut d'après le droit interne de l'État. »

Ainsi, les forces turques, dont le comportement est à l'évidence imputable à la Turquie, étaient le moyen par lequel le contrôle était exercé sur le territoire.

63. Comme la Cour l'a indiqué dans l'arrêt *Chypre c. Turquie* (précité, § 77) :

> « Étant donné que la Turquie exerce en pratique un contrôle global sur le nord de Chypre, sa responsabilité ne saurait se circonscrire aux actes commis par ses soldats ou fonctionnaires dans cette zone mais s'étend également aux actes de l'administration locale (...) »

Dès lors, le contrôle s'exerçait sur le territoire de la partie nord de Chypre (question de juridiction) et non sur la « RTCN » (question d'attribution d'un comportement) ; à cet égard, le fait que l'administration locale survive grâce au soutien de la Turquie ou non ou le degré de contrôle exercé par la Turquie sur cette administration sont des questions secondaires ; c'est en effet le contrôle direct exercé par la Turquie sur le territoire qui compte (ce pourquoi l'argument du tiers intervenant selon lequel le critère d'attribution découlant du « contrôle global » se fonde sur ces affaires est dénué de fondement).

64. On ne peut pas non plus s'appuyer sur le raisonnement suivi dans les affaires chypriotes pour établir qu'un État exerce un contrôle indirect sur un territoire par le biais d'une administration locale subordonnée, puisque, dans ces affaires, ce n'était pas pareille administration, mais bien l'armée turque, qui permettait d'exercer un contrôle global effectif sur le territoire.

65. Au cours des audiences, tant les représentants des requérants que ceux du tiers intervenant ont cité l'affaire *Ilaşcu et autres* (précitée) comme exemple de contrôle exercé par l'État sur une administration locale subordonnée.

66. Je pense pour ma part que cette affaire ne concernait pas un contrôle global effectif sur un territoire – qu'il soit exercé directement ou indirectement – mais une situation où s'appliquait l'exception due à l'autorité d'agents de l'État, ce qui est un cas de figure totalement différent de l'espèce et donc non pertinent.

67. On ne trouve nulle part dans l'analyse de la juridiction extraterritoriale de la Russie effectuée par la Cour dans l'affaire *Ilaşcu et autres* (précitée, §§ 379-394) des termes tels que « contrôle global effectif sur un territoire », « État fantoche » ou « administration locale subordonnée » ; ces termes ne sont utilisés par la Cour que lorsqu'elle décrit de manière générale les situations où l'on peut établir qu'il y a juridiction extraterritoriale de l'État (examen de la législation sur cette question), et non lorsqu'elle applique cette législation aux faits de la cause.

68. Le raisonnement de la Cour était fondé sur un lien de causalité entre les actes des forces russes et la privation ultérieure de liberté des requérants par l'administration locale. Alors que cette dernière recevait bien un certain soutien politique et militaire de la part de la Fédération de Russie, ce soutien n'a pas joué un rôle décisif pour déterminer la responsabilité de la Russie.

69. Si le soutien apporté par la Russie aux autorités de Transnistrie avait en soi suffi pour qualifier celles-ci d'« administration locale subordonnée » par le biais de laquelle la Russie exerçait un contrôle global effectif sur ce territoire, il n'y aurait eu nulle nécessité d'établir que les forces russes avaient participé directement à l'arrestation et aux traitements infligés ultérieurement aux requérants dans cette affaire, car, comme la Cour l'a expliqué, le contrôle global effectif sur un territoire engage la responsabilité de l'État à raison de tous les événements se produisant sur ce territoire indépendamment d'une participation directe de l'État, étant donné que l'article 1 fait obligation à l'État qui exerce le contrôle de reconnaître sur le territoire en question la totalité des droits matériels énoncés dans la Convention et dans les Protocoles additionnels qu'il a ratifiés, et les violations de ces droits lui sont imputables (*Ilaşcu et autres*, précité, § 316, et *Chypre c. Turquie*, précité, § 77).

70. Ainsi, la Cour n'a pas déclaré dans l'arrêt *Ilaşcu et autres* que tous les actes des autorités de Transnistrie étaient imputables à la Fédération de Russie ; elle a seulement dit que, en raison du soutien fourni à ces autorités, « la responsabilité de la Fédération de Russie [était] **engagée** pour les actes illégaux **commis par les séparatistes transnistriens**, eu égard au soutien militaire et politique qu'elle leur a accordé pour établir le régime séparatiste et à **la participation de ses militaires aux combats** » (*ibidem*, § 382, gras ajouté).

71. Sur le plan du droit international, il ne s'agit pas de l'attribution d'actes des autorités de Transnistrie à la Fédération de Russie en tant que telle (ce qui reviendrait à qualifier la République moldave de Transnistrie d'« État fantoche »), mais de l'établissement de la responsabilité d'un État pour avoir fourni aide et assistance à une autre entité. L'article 16 des articles de la CDI, intitulé « Aide ou assistance dans la commission du fait internationalement illicite », dispose :

> « L'État qui aide ou assiste un autre État dans la commission du fait internationalement illicite par ce dernier est internationalement responsable pour avoir agi de la sorte dans le cas où :
>
> a) ledit État agit ainsi en connaissance des circonstances du fait internationalement illicite ; et
>
> b) le fait serait internationalement illicite s'il était commis par cet État. »

72. Pareille responsabilité ne peut toutefois pas être établie *in abstracto*, mais doit être reliée à chacun des actes ou violations précis en cause, d'où la nécessité prévue à l'article 16 a) que l'État qui porte aide et assistance ait « connaissance des circonstances du fait internationalement illicite ». La Cour s'inscrivait manifestement dans le droit fil de ce raisonnement lorsqu'elle a établi que les autorités russes avaient participé directement à la détention des requérants et souligné qu'elles avaient connaissance des événements qui allaient se produire après qu'elles eurent remis ceux-ci aux autorités de Transnistrie (*ibidem*, § 384, gras ajouté) :

> « (...) sont à considérer comme faits générateurs de la responsabilité de la Fédération de Russie non seulement les actes auxquels des agents de cet État ont participé, comme l'arrestation et la détention des requérants, mais également leur transfert aux mains de la police et du régime transnistrien et, par la suite, les mauvais traitements qui leur ont été infligés par cette police, car, en agissant de la sorte, les agents de la Fédération de Russie avaient pleinement conscience de les remettre à un régime illégal et anticonstitutionnel.
>
> **De surcroît, compte tenu des faits reprochés aux requérants, les agents du gouvernement russe connaissaient, ou tout au moins auraient dû connaître, le sort qui leur était réservé**. »

73. Ainsi, la Cour n'a pas conclu que les actes des autorités de Transnistrie étaient imputables à la Fédération de Russie, ce qui serait une déduction logique si ces autorités avaient été considérées comme un « État fantoche », mais elle s'est bornée à dire que la responsabilité de la Fédération de Russie était engagée à raison d'actes spécifiques, ce qui est la formulation particulière utilisée dans le cadre de la responsabilité de l'État qui porte aide et assistance (*ibidem*, § 385) :

> « De l'avis de la Cour, l'ensemble des actes commis par les militaires russes à l'égard des requérants, y compris leur transfert aux mains du régime séparatiste, dans le contexte d'une collaboration des autorités russes avec ce régime illégal, sont de nature à engendrer une responsabilité quant aux conséquences pas trop lointaines des actes de ce régime. »

74. Dès lors, c'est le cumul de plusieurs éléments, à savoir la collaboration de la Russie avec les autorités de Transnistrie (et non son contrôle sur celles-ci), la connaissance du sort qui attendait les victimes et la participation directe des agents de la Fédération de Russie aux événements en cause, qui a engendré la responsabilité de cette dernière. Ces éléments sont en complet accord avec la règle précitée de responsabilité de l'État qui a fourni aide et assistance pour la commission d'actes illégaux.

75. Il existe dans cette affaire un autre facteur important : le lien de causalité entre les actes des agents de la Fédération de Russie et le traitement ultérieurement subi par les victimes.

76. Cela a été défini par la Cour pour la première fois non pas dans l'affaire *Ilaşcu et autres*, précitée, mais dans l'affaire plus ancienne *Soering c. Royaume-Uni* (7 juillet 1989, § 88, série A n° 161), le même langage étant utilisé dans les deux cas :

> « Reste à savoir si l'extradition d'un fugitif vers un autre État où il subira ou risquera de subir la torture ou des peines ou traitements inhumains ou dégradants engage par elle-même la responsabilité d'un État contractant (...) Un État contractant se conduirait d'une manière incompatible avec les valeurs sous-jacentes à la Convention, ce « patrimoine commun d'idéal et de traditions politiques, de respect de la liberté et de prééminence du droit » auquel se réfère le Préambule, s'il remettait consciemment un fugitif – pour odieux que puisse être le crime reproché – à un autre État où il existe des motifs sérieux de penser qu'un danger de torture menace l'intéressé. »

77. La formulation ci-dessus, utilisée dans l'arrêt *Soering*, précité, montre très clairement que le simple fait que la responsabilité d'un État soit engagée à raison de certains actes n'a rien à voir avec l'attribution d'un comportement. Affirmer le contraire conduirait à la conclusion absurde que les actes potentiels des autorités américaines étaient imputables au Royaume-Uni. Ainsi, dans l'arrêt *Soering*, nous avons aussi affaire à la responsabilité d'un État qui a fourni aide et assistance.

78. Dans l'affaire *Ilaşcu et autres*, précitée, la responsabilité de la Fédération de Russie a été établie en raison du cumul de plusieurs facteurs :

1) la participation directe des troupes russes à la détention des requérants, 2) la remise des requérants par les troupes russes aux autorités de Transnistrie et leur connaissance du sort qui attendait les requérants, 3) le soutien fourni par les autorités russes à la Transnistrie. Dès lors, dans cette affaire, la responsabilité de l'État a été établie en raison de l'aide et de l'assistance qu'il avait apportées au groupe qui avait perpétré les actes illicites, tandis qu'il était satisfait au critère relatif à l'exercice extraterritorial de la juridiction au moyen de l'exception relative à l'intervention d'agents de l'État, et nullement par le biais de celle relative au « contrôle global effectif sur un territoire », comme cela ressort à l'évidence du fait que la Cour s'est fondée sur le lien de causalité entre les actes des troupes russes, d'une part, et le traitement et la privation de liberté subis par la suite par les requérants, d'autre part.

79. L'affaire *Ilaşcu et autres*, précitée, ne fournit donc pas non plus de fondement à la position adoptée par la Cour dans la présente affaire, car elle s'en distingue complètement. En l'absence de preuve directe de la participation de l'armée de la République d'Arménie à la privation des requérants de leurs biens ou de preuve que de très gros effectifs de cette armée contrôlent directement les territoires en cause, la seule manière de montrer que l'Arménie exerce une juridiction extraterritoriale consiste à prouver que la RHK est subordonnée à l'Arménie, auquel cas la RHK doit être l'intermédiaire par lequel le contrôle est exercé sur le territoire.

80. À première vue, on peut relever un écart par rapport à cette approche dans l'arrêt *Catan et autres*, précité, où la Cour a indiqué que l'affaire ne portait en rien sur la question de l'attribution (*ibidem*, § 115). La Cour a toutefois conclu : « le degré élevé de dépendance de la « RMT » à l'égard du soutien russe constitue un élément solide permettant de considérer que la Russie exerçait un contrôle effectif et une influence décisive sur l'administration de la « RMT » à l'époque de la crise des écoles » (*ibidem*, § 122). Ainsi, contrairement à ce qui est dit dans les affaires chypriotes, il ne s'agit pas là d'un contrôle sur un territoire (juridiction) mais d'un contrôle sur une entité.

81. Cependant, à l'époque où l'affaire *Catan et autres*, précitée, a été jugée, la Cour avait déjà statué sur l'affaire *Ilaşcu et autres*, précitée. Ainsi, les conclusions de la Cour peuvent s'expliquer dans une certaine mesure par le fait qu'elle était encline à appliquer les mêmes critères pour la protection de l'ensemble des droits de l'homme dans la même situation géopolitique.

Le critère d'attribution à appliquer

82. Après avoir indiqué qu'il est indispensable de traiter la question de l'attribution avant de déterminer s'il y a exercice extraterritorial de la juridiction par le biais d'une administration locale subordonnée, il faut ensuite aborder la question du choix du critère d'attribution, c'est-à-dire le critère

d'attribution qui doit être utilisé pour décider si l'administration locale est ou non subordonnée ou, en d'autres termes, si l'administration locale peut passer pour un organe *de facto* de l'État défendeur.

83. Pour choisir ce critère, nous devons garder à l'esprit qu'il fait partie du droit international général sur la responsabilité de l'État et doit donc se trouver dans la pratique des États. Il faut également tenir compte de l'obligation qui pèse sur toute juridiction internationale d'éviter de contribuer à la fragmentation du droit international, ou plutôt à un cas particulier de ce phénomène, à savoir lorsque les mêmes notions de droit international sont interprétées différemment par différentes instances.

84. Ainsi que la CDI l'a indiqué dans son rapport sur la fragmentation du droit international, il existe une forte présomption contre les conflits normatifs en droit international. La CDI a en outre précisé que « [d]es conceptions antagoniques relatives au contenu du droit général (...) réduisent la sécurité juridique » et que « les sujets de droit se trouvent placés dans une position inégale l'un vis-à-vis de l'autre [étant donné que les] droits dont ils jouissent dépendent de la juridiction appelée à les faire respecter » (« Fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international », A/CN.4/L.682, § 52).

85. Au demeurant, l'uniformité dans l'interprétation et l'application du droit international par les différents tribunaux et autres institutions constitue une condition *sine qua non* de la justice internationale et de l'ordre juridique. Cela dit, il faut aussi prendre en compte la pratique des autres institutions internationales.

86. La règle générale est énoncée dans les articles de la CDI, précisément à l'article 8, intitulé « Comportement sous la direction ou le contrôle de l'État », lequel dispose :

> « Le comportement d'une personne ou d'un groupe de personnes est considéré comme un fait de l'État d'après le droit international si cette personne ou ce groupe de personnes, en adoptant ce comportement, agit en fait sur les instructions ou les directives ou sous le contrôle de cet État. »

87. La question pertinente est donc celle de savoir quel type de contrôle doit être exercé par un État pour que les actes d'une personne ou d'un groupe de personnes (voire d'une entité ayant toutes les caractéristiques d'un État) lui soient attribués.

88. D'après le raisonnement suivi par la CIJ dans l'affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique), fond, arrêt, CIJ Recueil 1986, § 115, gras ajouté) :

> « (...) même prépondérante ou décisive, la participation [de l'État] à l'organisation, à la formation, à l'équipement, au financement et à l'approvisionnement [d'acteurs

> non étatiques], (...) et à la planification de toutes leurs opérations demeure insuffisante en elle-même (...) pour que puissent être attribués (...) les actes commis (...) et même le contrôle général exercé par [l'État] sur une force extrêmement dépendante à [son] égard, ne signifieraient pas par eux-mêmes, sans preuve complémentaire, que [l'État] ai[t] ordonné ou imposé la perpétration des actes (...) **Pour que la responsabilité juridique de [l'État] soit engagée, il devrait en principe être établi qu'[il] avai[t] le contrôle effectif des opérations militaires ou paramilitaires au cours desquelles les violations en question se seraient produites**. »

89. Il est significatif de noter que la CIJ n'a jamais dévié de la règle du « contrôle effectif » et qu'elle l'a appliquée avec constance dans toutes les affaires similaires. Ainsi, dans l'affaire des Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, CIJ Recueil 2005, § 160, la CIJ n'a pas attribué à l'Ouganda les actes du prétendu Mouvement de libération du Congo alors qu'il était établi que l'Ouganda accordait un soutien financier et dispensait un entraînement à ce mouvement, le facteur déterminant étant que le Mouvement de libération du Congo n'avait pas été créé par l'Ouganda et que ce pays ne contrôlait pas la manière dont l'assistance fournie était utilisée.

90. Dans son affaire la plus récente sur la question, celle de l'Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, CIJ Recueil 2007, §§ 410-411, la CIJ a une nouvelle fois confirmé cette approche, refusant d'attribuer à la Serbie-et-Monténégro les actes de la Republika Srpska, en dépit du soutien militaire, financier et logistique fourni à celle-ci par la Serbie, des échanges actifs de militaires entre les deux entités – ce qui allait beaucoup plus loin que le soutien que la République d'Arménie a pu fournir à la République du Haut-Karabagh –, malgré le fait que de nombreux militaires de haut rang de la Republika Srpska avaient conservé en même temps des postes en Serbie et ont ensuite pris leur retraite en Serbie et, enfin, malgré le fait que, contrairement aux affaires relatives au Nicaragua et au Congo, les forces de la Republika Srpska avaient été créées par la Serbie (voir, par exemple, M. Milanović, « *State Responsibility for Genocide* », précité, p. 598). Dans cet arrêt, la CIJ a déclaré au paragraphe 400 :

> « (...) Mais, d'autre part, il est nécessaire de démontrer que ce « contrôle effectif » s'exerçait, ou que ces instructions ont été données, à l'occasion de chacune des opérations au cours desquelles les violations alléguées se seraient produites, et non pas en général, à l'égard de l'ensemble des actions menées par les personnes ou groupes de personnes ayant commis lesdites violations. »

91. On voit que la pratique de la CIJ – le principal organe judiciaire traitant de la responsabilité des États – est dans ce domaine parfaitement cohérente. Cependant, le tiers intervenant ayant plaidé à titre subsidiaire que « le contrôle global est suffisant », il faut aussi examiner cette question.

92. La notion de « contrôle global » a été élaborée et appliquée par le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) (Le procureur c. Duško Tadić, affaire n° IT-94-1-A, arrêt de la chambre d'appel du 15 juillet 1999, § 137).

93. Toutefois, le TPIY ne connaît pas de la responsabilité des États mais de la responsabilité pénale internationale d'individus. Dès lors, lorsqu'il emploie le critère de « contrôle global », son but principal (ou plutôt son unique but) est de déterminer la nature du conflit armé en cause, c'est-à-dire en l'occurrence de prouver, le cas échéant, la participation de la Serbie-et-Monténégro au conflit qui avait lieu sur le territoire de la Bosnie-Herzégovine, et non de déterminer s'il y avait lieu d'attribuer à la Serbie-et-Monténégro les actes commis par les forces serbes locales.

94. La CIJ a expressément exclu la possibilité d'appliquer le critère de « contrôle global » lorsqu'il est question de responsabilité de l'État (Bosnie-Herzégovine c. Serbie-et-Monténégro, arrêt précité, § 403). D'après la CIJ, le critère de « contrôle global » peut s'appliquer, par exemple, lorsqu'il s'agit de déterminer si un conflit présente ou non un caractère international, mais non pour trancher la question de la responsabilité de l'État (*ibidem*, § 404). Dans ces conditions, la référence faite par le tiers intervenant au critère de « contrôle global » est selon moi dénuée de pertinence.

95. Eu égard à ce qui précède, pour déterminer si l'Arménie exerce une juridiction extraterritoriale sur le territoire de Latchin, il faut selon moi trancher auparavant la question de savoir si l'Arménie exerce un contrôle effectif sur les forces du Haut-Karabagh, lesquelles contrôlent effectivement le territoire en cause.

Application du critère de contrôle effectif aux relations entre la République d'Arménie et la République du Haut-Karabagh

96. Pour résumer, l'application du critère de contrôle effectif tel que décrit plus haut exige la preuve que le comportement a lieu sous la direction ou la surveillance de l'État. Il faut non seulement que l'État fournisse une assistance matérielle, mais aussi qu'il soit prouvé qu'il contrôle la manière dont cette assistance est utilisée. En outre, les preuves attestant que l'État a lui-même créé l'entité en cause peuvent contribuer à établir l'existence d'un contrôle effectif de l'État sur cette entité. Or en l'espèce rien de tout cela n'est établi.

97. Ce que nous savons, en revanche, c'est que i) l'Arménie a fourni des fonds à la RHK, mais qu'elle n'est pas le seul État à l'avoir fait ; ii) quelques fonctionnaires de haut rang ont poursuivi leur carrière politique en Arménie après avoir mené une telle carrière en RHK ; iii) plusieurs fonctionnaires ont prononcé des déclarations au sujet de l'unité du peuple de la République

d'Arménie et du peuple de la RHK. À mon avis, cela n'est guère de nature à prouver que la RHK est subordonnée à la République d'Arménie.

98. La Cour a jugé établi que la République d'Arménie et le Fonds arménien avaient fourni une assistance financière. Rien dans cette affaire ne vient au soutien de la thèse selon laquelle l'Arménie aurait concrètement influé en quoi que ce soit sur la manière dont cette aide financière a été utilisée par la RHK.

99. Toutefois, avant d'aborder la question plus en détail, il faut tout d'abord souligner la raison pour laquelle cette assistance est fournie, raison que la Cour oublie. Ce que l'arrêt ne mentionne pas est que cette assistance est fournie pour remédier aux conditions inhumaines dans lesquelles vit la population de la RHK en raison du blocus et des attaques militaires continus dont son seul autre voisin, l'Azerbaïdjan, est l'auteur.

100. La question principale, cependant, est bien entendu celle de savoir si la République d'Arménie est capable de diriger, ou a en fait dirigé, les actes de la RHK. Selon moi, les résolutions pertinentes du Conseil de sécurité et autres documents des Nations unies revêtent une importance majeure pour juger de la question.

101. Si l'on commence par l'interprétation des résolutions pertinentes du Conseil de sécurité, il faut signaler que ces documents, comme tout document juridique, sont soumis à des règles d'interprétation strictes et précises.

102. Ces règles d'interprétation sont contenues dans le droit international général. Ainsi que l'a dit la CDI, « [l]orsque l'on cherche à déterminer les relations mutuelles entre deux normes ou plus, il convient d'interpréter ces normes conformément à, ou par analogie avec, la Convention de Vienne sur le droit des traités, en particulier les dispositions de ses articles 31 à 33 relatives à l'interprétation des traités » (Rapport de la CDI, chapitre XII « La fragmentation du droit international : difficultés découlant de la diversification et de l'expansion du droit international », A/61/10, § 251).

103. En conséquence, ces règles fournissent des directives pour l'interprétation des résolutions du Conseil de sécurité, qui doivent donc être interprétées de bonne foi suivant le sens ordinaire à attribuer aux termes des résolutions dans leur contexte et à la lumière de leur objet et de leur but (article 31 de la Convention de Vienne sur le droit des traités, RTNU vol. 1155, 23 mai 1969).

104. En revanche, la CIJ a attiré l'attention sur les « différences qui existent entre les instruments conventionnels et les résolutions du Conseil de sécurité, [ce qui veut dire que] d'autres éléments doivent aussi être pris en considération aux fins de l'interprétation de ces dernières » (avis consultatif sur le Kosovo, précité, § 94). Ainsi, d'après la CIJ :

> « (...) Pour interpréter les résolutions du Conseil de sécurité, la Cour peut être amenée à examiner certaines déclarations faites par les représentants d'États membres du Conseil de sécurité à l'époque de leur adoption ou d'autres résolutions de ce dernier ayant trait à la même question, ainsi qu'à se pencher sur la pratique ultérieure des organes pertinents de l'Organisation des Nations unies et des États à l'égard desquels les résolutions en question ont une incidence. »

105. Dès lors, les dispositions pertinentes des résolutions du Conseil de sécurité doivent aussi être interprétées dans leur contexte et en tenant compte de tous les développements – déclarations, rapports, etc. – qui ont accompagné les délibérations du Conseil de sécurité à l'époque.

106. La première des résolutions du Conseil de sécurité sur la question – la résolution 822 du 30 avril 1993 – se réfère expressément dans son préambule à « l'invasion (...) du district de Kelbadjar, en République azerbaïdjanaise, par des forces arméniennes locales » (S/RES/822 (1993), gras ajouté), et non par la République d'Arménie. La même distinction entre la République d'Arménie et les forces arméniennes locales se retrouve dans la note du président du Conseil de sécurité, citée dans le préambule de la résolution, où le président, s'exprimant au nom du Conseil, établit une distinction nette entre la question des relations entre l'Arménie et l'Azerbaïdjan, d'une part, et les hostilités sur le terrain, d'autre part (note du président du Conseil de sécurité, S/25539, 6 avril 1993) :

> « Le Conseil de sécurité exprime sa vive préoccupation face à la détérioration des relations entre la République d'Arménie et la République azerbaïdjanaise et face à l'augmentation des actions hostiles dans le conflit du Haut-Karabagh, et notamment l'invasion du district azerbaïdjanais de Kelbadjar par les forces arméniennes locales. »

107. Un autre document auquel renvoie le préambule de la résolution 822 (1993), à savoir le rapport du Secrétaire général du 14 avril 1993 (rapport du Secrétaire général établi à la suite de la déclaration du président du Conseil de sécurité concernant la situation relative au Haut-Karabagh, document S/25600), indique clairement que, alors que les régions de la République d'Arménie voisines de la frontière avaient essuyé des tirs provenant du côté azerbaïdjanais, aucune action hostile n'avait été entreprise en réaction par la République d'Arménie elle-même :

> « 7. Lors de sa première mission sur le terrain les 9 et 10 avril, le représentant par intérim des Nations unies en Arménie s'est rendu dans les provinces méridionales d'Ararat et de Goris. Dans plusieurs villages situés à proximité de la frontière azérie, la mission a pu relever des preuves de destructions considérables causées par des tirs de mortier. Alors qu'elle visitait le village de Korndzorask, un obus de mortier a explosé à une vingtaine de mètres à peine du véhicule des Nations unies, pourtant clairement identifié. La mission a aussi dû quitter le village de Korndzor quand un char a commencé à ouvrir le feu, apparemment en provenance du territoire azerbaïdjanais.

> 8. (...) le 12 avril (...) le représentant des Nations unies a pu procéder à une reconnaissance, à partir de l'espace aérien arménien, de la frontière séparant la République d'Arménie du district azerbaïdjanais de Kelbadjar. Il n'a décelé aucun signe d'hostilités, de mouvements militaires ou d'une présence des forces armées de la République d'Arménie. »

108. Un discours prononcé par le représentant permanent de la France juste après l'adoption de la résolution 822 (1993) confirme encore cette position. Il y est souligné que le préambule de la résolution « reflète un équilibre raisonnable entre la reconnaissance que des tensions existent entre l'Arménie et l'Azerbaïdjan et le constat du caractère localisé des combats » (compte rendu intégral provisoire de la 3205e réunion du Conseil de sécurité, S/PV.3205, 30 avril 1993, p. 11). Il y est également noté qu'il faudrait éviter que les affrontements ne se transforment en un conflit entre États, à savoir l'Arménie et l'Azerbaïdjan.

109. Ainsi, rien dans le texte de la résolution 822 (1993), les documents qui y sont cités ou les déclarations des États parties à cet égard ne vient corroborer directement ou indirectement la thèse selon laquelle les forces de la RHK étaient contrôlées par la République d'Arménie et celle-ci exerçait un contrôle sur la région par le biais des forces de la RHK. De plus, au moment de l'adoption de ladite résolution, Latchin était déjà sous le contrôle de la RHK.

110. La même chose est vraie des trois autres résolutions du Conseil de sécurité. La résolution 853 cite les « Arméniens de la région du Haut-Karabagh » comme étant la partie devant appliquer les résolutions 822 et 853 (résolution 853 du 29 juillet 1993, S/RES/853 (1993), § 9).

111. Par ailleurs, cette résolution prie instamment « le gouvernement de la République d'Arménie de continuer d'exercer son influence afin d'amener les Arméniens de la région du Haut-Karabagh de la République azerbaïdjanaise à appliquer la résolution 822 (1993) du Conseil ainsi que la présente résolution » (*ibidem*). Reconnaître qu'un État a une influence n'équivaut toutefois nullement à dire qu'il exerce un contrôle de fait. Les termes « continuer d'exercer » sont donc dénués d'ambiguïté et ne peuvent être interprétés que d'une seule façon : 1) l'Arménie avait une influence sur la RHK et 2) l'Arménie avait déjà exercé son influence sur la RHK pour l'amener à appliquer des résolutions.

112. De même, dans leurs discours faisant suite à l'adoption de la résolution, des membres du Conseil de sécurité – France, Russie, États-Unis d'Amérique, Brésil, Espagne et Venezuela – ont fait référence de manière claire et non ambiguë aux « Arméniens du Haut-Karabagh », à la « communauté arménienne du Haut-Karabagh » ou aux « forces arméniennes locales » (compte rendu intégral provisoire de la 3259e réunion du Conseil

de sécurité, S/PV.3259, 29 juillet 1993). Le seul pays à avoir parlé de la participation de l'Arménie est le Pakistan, mais cet État n'a toujours pas reconnu la République d'Arménie.

113. Un autre document cité dans le préambule de la résolution 853 (1993) – le rapport du président du groupe de Minsk de l'OSCE – confirme également la différence entre les approches politiques en RHK et en Arménie. D'après ce rapport, alors que le président arménien avait réaffirmé son soutien au calendrier du groupe de Minsk lors de la visite des présidents à Erevan, les dirigeants de la RHK avaient une position totalement différente (« dans le Haut-Karabagh, j'ai constaté que les dirigeants des communautés arméniennes locales avaient une attitude totalement différente », rapport du président du groupe de Minsk de l'OSCE sur le Haut-Karabagh au président du Conseil de sécurité du 27 juillet 1993, S/26184, 28 juillet 1993, §§ 4-5). Cela constitue une indication de plus de ce que l'Arménie et la RHK n'étaient pas mues par la même volonté politique.

114. Les résolutions 874 (1993) et 884 (1993) du Conseil de sécurité ne diffèrent pas des précédentes. La première maintient la même distinction entre le « conflit dans la région du Haut-Karabagh de la République azerbaïdjanaise et aux alentours », d'une part, et les « tensions entre la République d'Arménie et la République azerbaïdjanaise », d'autre part (préambule de la résolution 874 du 14 octobre 1993, S/RES/874 (1993)), tandis que la seconde, reprenant la formulation utilisée dans la résolution 853 (1993), demande « au gouvernement arménien d'user de son influence pour amener les Arméniens de la région du Haut-Karabagh de la République azerbaïdjanaise à (...) » (résolution 884 du 12 novembre 1993, S/RES/884 (1993), § 2).

115. Ainsi, rien dans les quatre résolutions du Conseil de sécurité ne vient corroborer la thèse d'un contrôle exercé sur la RHK par la République d'Arménie.

116. Un autre argument, avancé au soutien de la thèse du contrôle de la RHK par la République d'Arménie, est désigné par l'expression « échange de fonctionnaires ». À cet égard, il faut avant tout, et une fois encore, noter qu'il s'agit d'un facteur qui est appliqué par le TPIY dans le contexte du critère de « contrôle global », c'est-à-dire celui utilisé pour déterminer la nature d'un conflit et non pour résoudre des questions d'attribution. L'affaire classique en la matière est Le procureur c. Tihomir Blaškić (affaire n° IT-95-14-T, jugement de la chambre de première instance, 3 mars 2000), qui traitait de la nature du conflit armé entre la Bosnie-Herzégovine et le Conseil de défense croate de la prétendue « République croate de l'Herceg-Bosna ».

117. Cependant, dans l'affaire Le procureur c. Tihomir Blaškić, le fait que des militaires croates servaient dans les forces du Conseil de défense croate n'était pas le seul facteur à déterminer l'existence d'un contrôle

global. En fait, les critères exigés pour qu'il y ait contrôle global ont été jugés remplis par la chambre de première instance en raison de l'existence d'un certain nombre de facteurs, parmi lesquels, entre autres : i) l'échange de militaires, ii) la nomination directe de généraux par la Croatie, iii) le fait que les militaires continuaient à être payés par la Croatie, iv) le fait qu'ils recevaient directement leurs ordres de Croatie, et v) l'obtention d'un soutien financier et logistique (*ibidem*, §§ 100-120).

118. Or rien de tel n'est prouvé s'agissant des relations entre les forces de la République d'Arménie et celles de la RHK. Les faits de la cause ne permettent pas de prouver qu'il y ait des nominations directes par l'Arménie, que des salaires soient versés directement par l'Arménie ni que des ordres proviennent d'Arménie. Au lieu de cela, la Cour a adopté le concept général de haute intégration.

119. De surcroît, dans l'affaire Le procureur c. Tihomir Blaškić, l'échange de militaires se faisait dans les deux sens, avec des militaires croates servant dans le Conseil de défense croate pendant quelque temps, puis reprenant du service en République de Croatie (*ibidem*, § 115). Dans ces conditions, il était évident que, pour ces militaires, servir dans le Conseil de défense croate s'inscrivait dans le cadre de leur service au sein des forces de la République de Croatie et faisait partie du programme politique de cette dernière. Or rien de tel n'existe dans le cas des relations entre la République d'Arménie et la RHK, et les quelques exemples produits par le tiers intervenant ne montrent pas l'existence d'un programme politique consistant à transférer des fonctionnaires de l'État, mais illustrent plutôt les particularités de la carrière politique de ces quelques individus, aussi haut placés soient-ils.

120. De plus, ce mouvement s'est effectué de la RHK vers la République d'Arménie et non dans l'autre sens ; je ne vois donc pas comment cela peut conduire à conclure que la République d'Arménie contrôle la RHK, même si l'on applique et approuve le critère de « contrôle global » utilisé par le TPIY.

121. Il est un autre facteur qui, selon la Cour, prouve la « haute intégration » des forces de la République d'Arménie et celles de la RHK et avec lequel, je le répète une fois de plus, je ne peux être en accord : les déclarations de fonctionnaires de l'État.

Comme la Cour l'indique au paragraphe 177 de l'arrêt, « les déclarations de hauts dirigeants – même s'il s'agit d'anciens ministres ou de hauts fonctionnaires – ayant joué un rôle central dans le litige en question revêtent une valeur probante particulière lorsque les intéressés reconnaissent des faits ou un comportement faisant apparaître les autorités sous un jour défavorable » (voir aussi *El-Masri c. l'ex-République yougoslave de Macédoine* [GC], n° 39630/09, § 175, CEDH 2012). Ce raisonnement reprend mot pour mot celui de la CIJ dans l'arrêt Nicaragua c. États-Unis d'Amérique (précité, § 64).

122. Or à mon avis, la Cour a appliqué la logique de la CIJ de manière fondamentalement différente de celle-ci et de façon incorrecte.

123. En effet, la CIJ a utilisé les déclarations de fonctionnaires pour évaluer des allégations relatives aux faits (comme le point de savoir si les États-Unis avaient envoyé une aide aux *contras* du Nicaragua ou non) et non pour apprécier les allégations au sujet du droit (point de savoir si les actes des *contras* étaient imputables ou non aux États-Unis).

124. Or les questions de juridiction, d'attribution de comportements, de « haute intégration » des forces, de subordination d'une administration locale, etc. sont des questions de droit que la Cour doit déterminer en s'appuyant sur des faits et non des déclarations de fonctionnaires de l'État. Pareilles déclarations ne peuvent être utilisées que pour prouver des faits sur lesquels on peut alors fonder la détermination des questions juridiques. Pareille détermination ne saurait se fonder directement sur des déclarations générales.

125. Ce que la Cour a en outre négligé de prendre en compte est que ces déclarations peuvent être dictées par des considérations patriotiques et politiques internes tout autant qu'externes. Ainsi, la CIJ a également noté qu'elle devait « *interpréter* des déclarations pour vérifier dans quelle mesure exacte elles reconnaissaient un fait » (Nicaragua c. États-Unis d'Amérique, précité, § 65, italique ajouté). Or je ne vois pas que la Cour ait procédé à ce type d'évaluation en l'espèce.

126. Quoi qu'il en soit, de telles déclarations sont loin de constituer une base suffisante sur laquelle établir que la République d'Arménie contrôle et dirige en fait les actions de la RHK et que la RHK est une administration locale subordonnée créée par la République d'Arménie.

127. Dès lors, je conclus que la Cour n'a pas interprété ces déclarations dans leur contexte et qu'il était en outre erroné de les utiliser comme preuve directe de l'intégration des forces armées de l'Arménie et de celles de la RHK au lieu de s'en servir pour prouver des faits, lesquels auraient pu à leur tour être utilisés pour prouver une telle intégration.

128. Eu égard à ce qui précède, je ne peux souscrire au constat de la Cour selon lequel la République d'Arménie exerce sa juridiction sur les territoires contrôlés par la RHK et que la République d'Arménie est responsable des violations des droits de l'homme qui peuvent se produire sur ces territoires.

OPINION DISSIDENTE DU JUGE PINTO DE ALBUQUERQUE

(Traduction)

I. Introduction

1. Le présent arrêt est une occasion manquée de traiter le plus important problème de droit international public du début du XXIe siècle, à savoir la reconnaissance d'un droit à la sécession-remède dans un contexte non colonial. Le cœur de cette affaire concerne la licéité au regard du droit international de la sécession de la « République du Haut-Karabagh », proclamée après l'indépendance de la République d'Azerbaïdjan à l'égard de l'Union soviétique, et ses conséquences quant aux droits et obligations des personnes alléguant avoir été déplacées de la nouvelle « République » issue de cette sécession, en particulier quant à leur droit au respect de leurs biens et de leur vie familiale dans le district de Latchin et à l'obligation pour eux d'épuiser les recours internes offerts par la « République du Haut-Karabagh »[1].

2. Pour ajouter à la complexité de ces questions juridiques, l'affaire s'inscrit dans un contexte factuel extrêmement compliqué, qui a évolué au cours des vingt dernières années. Les multiples points faibles des éléments de preuve produits par les parties, ainsi que le choix malheureux qu'a fait la Cour européenne des droits de l'homme (« la Cour ») de renoncer à la fois à entendre des témoins et à envoyer sur place une mission d'établissement des faits, ont rendu encore plus difficile, voire impossible, de déterminer la véracité de la plupart des faits allégués par les parties. Pour cette seule raison, et indépendamment des problèmes juridiques liés à la qualité de victime des requérants, elle-même contestée, et à la question encore plus contestée de la juridiction de l'État défendeur sur le territoire où auraient eu lieu les violations de la Convention européenne des droits de l'homme (« la Convention »), mon intime conviction est qu'il est prématuré de se prononcer sur le fond de l'affaire. Une conclusion au fond prononcée en l'absence d'appréciation approfondie des faits qui se trouvent au cœur de l'affaire, faits commodément remplacés par un ensemble de présomptions hautement incertaines, expose au risque de voir l'arbre plutôt que la forêt, ou pire encore, de ne voir que certains arbres.

1. Le nom Haut-Karabagh (Nagorno-Karabakh ou Nagorno-Karabagh selon les translittérations) est d'origine russe, perse et turque. Nagorno signifie « montagneux » en russe. Kara vient du turc et bakh/bagh du persan. Karabakh/Karabagh peut se traduire par « jardin noir ». Le nom arménien de ce même territoire est Artsakh. Dans un souci de cohérence avec l'arrêt de la majorité, j'utiliserai dans cette opinion le terme Haut-Karabagh.

II. Non-épuisement des voies de recours internes

A. Le cadre constitutionnel et légal de la « République du Haut-Karabagh »

3. La première raison de conclure que la requête ne tient pas est que les requérants n'ont pas épuisé les voies de recours internes. On peut avancer plusieurs motifs à l'appui de cette conclusion. Premièrement, aucune disposition constitutionnelle ou légale de la « République du Haut-Karabagh » n'interdit aux personnes d'origine ethnique azérie ou kurde[2] de posséder des terres ou d'autres biens. Deuxièmement, toute personne ayant le droit de résider sur le territoire de la « République du Haut-Karabagh » a le droit d'y retourner, quelle que soit sa nationalité[3]. Ainsi, les personnes d'origine ethnique azérie ou kurde peuvent retourner sur leur ancien lieu de résidence et y réclamer leur terrain et leur domicile ainsi qu'une indemnisation pour les actes illicites commis par l'armée de la « République du Haut-Karabagh »[4].

4. Même si l'on admet que la « République du Haut-Karabagh » n'a pas été reconnue par la communauté internationale, il n'en reste pas moins que les voies internes de réparation de violations alléguées des droits de l'homme doivent être exercées si elles sont ouvertes aux requérants dans le Haut-Karabagh ou les districts environnants, y compris à Latchin. Ce qu'on a appelé l'« exception namibienne » a été consacré dans la jurisprudence de la Cour, depuis les affaires relatives à l'invasion de Chypre par la Turquie, avec la conséquence pratique que, face à des violations de l'article 8 de la Convention ou de l'article 1 du Protocole n° 1, les habitants et les anciens habitants d'un territoire doivent épuiser les recours internes lorsqu'un système judiciaire a été mis en place par un régime politique non reconnu, et ce même s'ils n'ont pas choisi de leur plein gré d'être soumis à sa juridiction[5]. L'État dont il est allégué qu'il a manqué à ses obligations internationales doit d'abord se voir offrir l'occasion de réparer le tort allégué par ses propres moyens et dans son propre ordre juridique[6].

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2. Article 33 de la Constitution de la « République du Haut-Karabagh ».
3. Article 25 de la Constitution de la « République du Haut-Karabagh ».
4. Dans l'affaire *Chypre c. Turquie* ([GC], n° 25781/94, § 184, CEDH 2001-IV), la Cour a souscrit à l'analyse faite par la Commission des dispositions constitutionnelles pertinentes de la « RTCN ». Je ne comprends pas pourquoi le cadre constitutionnel de la « République du Haut-Karabagh » n'a pas été lui aussi examiné dans la présente affaire.
5. *Loizidou c. Turquie* (fond), 18 décembre 1996, § 45, *Recueil des arrêts et décisions* 1996-VI, sur la base de l'avis consultatif de la Cour internationale de justice (CIJ) sur les Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, CIJ Recueil 1971, § 125.
6. C'est là une règle bien établie du droit international coutumier (Affaire de l'Interhandel, arrêt du 21 mars 1959, CIJ Recueil 1959, et l'article 14 du projet d'articles sur la protection diplomatique de la Commission du droit international (CDI)).

5. Cela dit, étant donné qu'il n'y a pas de corrélation entre la reconnaissance internationale d'un État et l'article 35 de la Convention, demander aux requérants d'épuiser les voies de recours internes offertes dans le Haut-Karabagh ne revient évidemment pas à reconnaître la « République du Haut-Karabagh »[7]. Les requérants doivent épuiser les recours disponibles dans la « République du Haut-Karabagh » pour la simple raison qu'il y a dans ce territoire un système judiciaire opérant *de facto* susceptible de leur offrir une réparation effective.

B. Les recours internes disponibles

6. Le fait est que le tribunal compétent de Latchin offre un recours pour les griefs des requérants relatifs à la restitution de biens aux personnes d'origine azérie ou kurde déplacées internationalement et peut leur octroyer le cas échéant une indemnisation pour la perte de ces biens. Le juge de ce tribunal a fourni lui-même la preuve de la disponibilité de ce recours, en déclarant clairement que, en vertu du cadre juridique de la « République du Haut-Karabagh », il pouvait ordonner que les victimes d'un déplacement forcé se voient restituer leurs biens et octroyer le versement d'une satisfaction équitable. L'authenticité factuelle et la force juridique de ce témoignage n'ayant pas été réfutées par les requérants, la Cour ne peut l'écarter[8]. Or les requérants n'ont jamais tenté de porter leurs griefs devant le tribunal compétent.

7. De plus, en ce qui concerne le refus allégué des autorités du Haut-Karabagh de permettre aux personnes d'origine ethnique azérie ou kurde de reprendre possession de leurs biens se trouvant dans le Haut-Karabagh ou les districts environnants, il faut observer qu'il n'a été cité aucun cas concret d'individu ayant été empêché de le faire. En toute hypothèse, compte tenu du fait que les requérants ont été en mesure de mandater un avocat au Royaume-Uni, ils ne sauraient prétendre que le système judiciaire de la « République du Haut-Karabagh » leur était matériellement et financièrement inaccessible[9].

8. Ainsi, la justification succincte avancée par la majorité à l'appui du rejet de l'exception soulevée par le Gouvernement n'est absolument pas convaincante. La majorité ne présente que deux arguments au paragraphe 118 de l'arrêt – le cadre juridique interne serait insuffisant et il n'y

7. *Demopoulos et autres c. Turquie* (déc.) [GC], nos 46113/99 et 7 autres, § 100, CEDH 2010.

8. Il est extrêmement regrettable que ce témoignage, qui figure au dossier depuis 2006, ait été purement et simplement ignoré par la majorité. Aux paragraphes 117 et 118 de l'arrêt, elle n'accorde aucune attention à l'argument qu'en tire l'État défendeur.

9. *Pad et autres c. Turquie* (déc.), no 60167/00, § 69, 28 juin 2007, et le troisième rapport sur la protection diplomatique de la CDI (A/CN.4/523), § 83.

aurait pas de décisions de justice internes portant exactement sur la question en cause en l'espèce. De plus, elle écarte l'applicabilité aux revendications des requérants de normes « de nature générale » relatives à la propriété des biens, sous-entendant ainsi sans expliquer pourquoi que l'appréciation des faits de la cause ne peut reposer sur ces normes, et présumant donc ce qui devait être démontré. Le caractère fallacieux de cette logique est patent. *Circulus in demonstrando !*

Par cette démarche, la majorité impose sa propre appréciation du droit interne : elle se comporte comme un tribunal de première instance et ne laisse pas aux juridictions nationales l'occasion d'exprimer leur propre jugement sur l'application du droit interne à une affaire qui soulève des points de droit nouveaux, et qui pourrait avoir des conséquences juridiques importantes au niveau systémique compte tenu du nombre estimé de personnes déplacées[10].

C. Conclusion préliminaire : la majorité s'écarte de la jurisprudence *Chypre c. Turquie*

9. Une comparaison de la présente affaire avec l'affaire *Chypre c. Turquie* (précitée) serait révélatrice. Dans l'affaire interétatique qui a opposé Chypre à la Turquie, le gouvernement turc présentait une liste d'affaires portées par des Chypriotes grecs devant les juridictions chypriotes turques, parmi lesquelles se trouvaient un certain nombre d'affaires relatives à des atteintes aux biens perpétrées par des tiers et à la culture illicite de terres appartenant à des demandeurs chypriotes grecs dans la région de Karpas, et dans lesquelles les juridictions compétentes de la « République turque de Chypre du Nord » (« RTCN ») avaient fait droit aux prétentions des demandeurs. Le gouvernement chypriote arguait que quels que fussent les recours qui pouvaient exister en Turquie ou en « RTCN », ils n'étaient pas concrets et effectifs pour les Chypriotes grecs résidant dans la région contrôlée par le gouvernement défendeur et ils étaient ineffectifs pour les Chypriotes grecs enclavés étant donné la nature particulière des griefs et le cadre légal et administratif établi au nord de Chypre. Il soutenait que la jurisprudence des tribunaux de la « RTCN » invoquée par le gouvernement turc concernait des situations différentes de celles dénoncées dans la requête, c'est-à-dire des litiges entre des particuliers et non des critiques de la législation et de l'action administrative. On sait quel sort ont connu ces arguments du gouvernement chypriote : la Cour a considéré que le Gouvernement n'avait pas réfuté les éléments de

10. J'ai déjà relevé cette façon critiquable de procéder dans une affaire où les personnes susceptibles d'être intéressées par l'issue de la procédure étaient moins nombreuses (voir mon opinion séparée dans l'affaire *Vallianatos et autres c. Grèce* [GC], n^os^ 29381/09 et 32684/09, CEDH 2013).

preuve qui avaient été produits devant la Commission pour étayer la thèse selon laquelle les Chypriotes grecs lésés avaient accès aux juridictions locales et pouvaient y faire valoir leurs revendications civiles contre ceux qui leur avaient porté préjudice, et elle a conclu qu'aucune violation de l'article 13 de la Convention n'était établie quant aux ingérences de particuliers dans les droits des Chypriotes grecs vivant dans le nord de Chypre au titre des articles 8 de la Convention et 1 du Protocole n° 1[11]. Les mêmes considérations devraient s'appliquer en l'espèce.

10. La Cour ne devrait pas pratiquer une justice à deux poids et deux mesures, suivre un raisonnement pour Chypre et le raisonnement contraire pour l'Arménie. Dans l'affaire interétatique chypriote, elle n'a pas exigé que les affaires jugées par les tribunaux de la « RTCN » dans la partie occupée de Chypre concernent précisément la restitution de biens. Il a suffi que les actions civiles engagées par des Chypriotes grecs aient été jugées par les tribunaux de la « RTCN » pour qu'elle conclue que ces tribunaux offraient une voie de recours devant être exercée. En l'espèce, le gouvernement arménien a produit des éléments à l'appui de son affirmation selon laquelle des recours judiciaires étaient disponibles et il a mis en avant les actions introduites avec succès par plusieurs justiciables azéris et kurdes devant les juridictions arméniennes et les tribunaux de la « République du Haut-Karabagh » dans des affaires civiles et pénales[12]. Ces éléments de preuve qui n'ont pas été réfutés auraient dû suffire pour que la Cour admette l'exception d'irrecevabilité soulevée par le Gouvernement.

11. La majorité croit sage de clore son appréciation de l'exception de non-épuisement des voies de recours internes par un examen du « contexte politique et général » (paragraphe 119 de l'arrêt). Malheureusement, elle engage ainsi la Cour dans une inutile appréciation politique du conflit, reposant sur des apparences (« semble s'être intensifiée »). Cet exercice est malvenu, car la connotation politique de certaines des déclarations de la Cour risque de donner l'impression, certainement infondée mais en tout cas regrettable, qu'elle est un acteur avec ses propres opinions politiques sur le conflit du Haut-Karabagh.

12. En conclusion, je ne suis pas persuadé que toute tentative d'exercer les voies de recours internes disponibles était vouée à l'échec. Si elle avait

11. *Chypre c. Turquie*, précité, § 324.

12. Même si la majorité ne tient pas compte des décisions de justice définitives produites par le Gouvernement lors de l'audience devant la Grande Chambre, décisions qui concernent des griefs semblables à ceux formulés par les requérants en l'espèce, il y a d'autres affaires judiciaires relevant du droit pénal, du droit du travail et du droit foncier dans lesquelles des personnes d'origine azérie ou kurde ont obtenu gain de cause devant des juridictions arméniennes ou des tribunaux de la « République du Haut-Karabagh », dont une concernait les revendications sur un héritage portées par une personne d'origine kurde devant un tribunal de la « République du Haut-Karabagh ».

appliqué la norme découlant de l'affaire *Chypre c. Turquie*, précitée, la majorité aurait dû conclure en l'espèce aussi, au vu du cadre juridique et de la jurisprudence internes présentés par l'État défendeur, que des recours internes existaient. De plus, un tribunal interne est disposé à examiner les griefs des requérants, et cela aurait pu se faire, au moins, depuis 2006. Même si l'Assemblée parlementaire a dit que le Haut-Karabagh était un des « trous noirs » géographiques où les mécanismes du Conseil de l'Europe en matière de droits de l'homme ne peuvent être pleinement mis en œuvre »[13], l'existence de doutes quant à l'efficacité de recours internes ne dispense pas le requérant de l'obligation d'essayer tout au moins de s'en prévaloir[14]. Il est regrettable que ce principe n'ait pas été appliqué en l'espèce. C'est à croire que pour la majorité, la subsidiarité n'a pas sa place dans cette partie de l'Europe.

III. Défaut de qualité de victime

A. Qualité de victime relativement aux maisons des requérants

13. Les requérants se plaignaient d'avoir été privés de la possibilité d'accéder à leurs domiciles et à leurs terres et d'en jouir. Je traiterai ces questions séparément.

En ce qui concerne les maisons des requérants, la Cour n'a pas les moyens de savoir si elles ont existé ni, si tel est le cas, quand, comment et par qui elles ont été détruites. Si elles avaient été détruites en 1992, les griefs correspondants échapperaient à la portée temporelle de la Convention, l'Arménie n'ayant ratifié cet instrument que dix ans plus tard. Anticipant cette exception, les requérants invoquent non seulement leur droit au respect de leurs biens, mais aussi un lien affectif permanent avec la région dans laquelle ils ont vécu. Mais prouver l'existence de ce lien affectif, et *a fortiori* de sentiments ressentis pendant plus de vingt ans, était une tâche herculéenne, qu'ils ne sont pas parvenus à accomplir. Il n'a été produit devant la Cour aucun élément à l'appui de la thèse selon laquelle ils auraient eu – et auraient toujours – un lien affectif permanent avec une région qu'ils ont quittée il y a plus de vingt-deux ans. En tout état de cause, cette affirmation qui relève de la pure fiction ne sert qu'à remplacer le grief infondé relatif à leur droit au respect de leur domicile par un vague « droit de vivre dans un village », qui élargit le champ d'application de l'article 8 bien au-delà de ses frontières connues[15].

13. Résolution 1547 (2007) de l'Assemblée parlementaire du Conseil de l'Europe (APCE) sur la situation des droits de l'homme et de la démocratie en Europe.

14. Voir, par exemple, *Sardinas Albo c. Italie* (déc.), n° 56271/00, CEDH 2004-I, et *Brusco c. Italie* (déc.), n° 69789/01, CEDH 2001-IX.

15. Au paragraphe 66 de l'arrêt *Loizidou* (fond), précité, la Cour, interprétant la notion de « domicile » au sens de l'article 8, a dit ceci : « Ce terme ne peut pas davantage s'interpréter comme couvrant la région

B. Qualité de victime relativement aux parcelles de terrain des requérants

14. En ce qui concerne le droit des requérants sur les parcelles de terrain en cause, la situation n'est pas plus claire. Les intéressés ont reconnu qu'ils n'avaient jamais eu de droit de propriété sur ces terrains, que ce fût en vertu de la Constitution de l'URSS, de la Constitution de la République soviétique d'Azerbaïdjan ou de l'article 4 (propriété publique de la terre) du code foncier de 1970, mais qu'ils avaient seulement eu un droit d'utiliser la terre. Ils soutenaient devant la Cour qu'ils étaient toujours titulaires de ce droit en 2005 (année d'introduction de leur requête), alors qu'ils avaient quitté Latchin treize ans plus tôt, en 1992. Cependant, il n'y a dans le dossier aucune preuve suffisante de ce droit, qu'elle soit documentaire ou testimoniale.

Les graves divergences entre les différentes versions des griefs des requérants avancées aux différents stades de la procédure, et entre ces versions et les preuves documentaires – les « passeports techniques » qu'ils ont produits devant la Cour – n'ont pas été élucidées de manière convaincante[16]. Les informations figurant dans les passeports techniques s'écartent considérablement de celles figurant dans le formulaire de requête. Par exemple, le premier requérant disait à l'origine avoir possédé une maison de 250 m², mais son « passeport technique » concerne une maison de 408 m² et une remise de 60 m² non mentionnée précédemment. De même, le quatrième requérant a déclaré à l'origine que la surface de sa maison était de 165 m², alors que celle décrite dans le « passeport technique » mesure 448 m², auxquels, là encore, vient s'ajouter une remise non mentionnée précédemment d'une surface de 75 m². Il a été demandé aux requérants à plusieurs reprises de soumettre des documents complémentaires sur leurs biens et d'expliquer les divergences entre leurs premières déclarations et les « passeports techniques ». Or ils n'ont communiqué aucun document complémentaire relativement aux biens qu'ils disaient avoir possédé, affirmant ne pas être en mesure d'obtenir de tels documents. Pour expliquer les divergences entre leurs premières déclarations et les documents produits, ils ont déclaré que lorsqu'ils avaient rencontré leur représentant à Bakou au début de l'année 2005, ils ne lui avaient donné que des informations générales en raison de la brièveté de leur entrevue et il avait été convenu qu'ils lui enverraient des copies des documents officiels par la poste à une date ultérieure. Les

d'un État où l'on a grandi et où la famille a ses racines mais où l'on ne vit plus. »

16. La majorité elle-même reconnaît ces différences au paragraphe 142 de l'arrêt, mais elle les accepte « compte tenu de l'ensemble des éléments de preuve produits devant elle », c'est-à-dire des déclarations d'anciens voisins et des documents justificatifs de l'identité des requérants.

premières déclarations auraient été faites de mémoire, sans accès aux documents, et ce seraient donc les informations figurant dans les « passeports techniques » qu'il faudrait prendre en compte.

Les explications avancées par les requérants ne sont pas convaincantes, car leurs premières déclarations n'étaient pas de nature générale, elles décrivaient de manière assez détaillée l'étendue de leurs propriétés alléguées, y compris la surface des terres et des maisons. De plus, ces premières déclarations – modifiées par la suite avec la communication des « passeports techniques » – avaient dans certains cas été confirmées par des déclarations d'anciens voisins. Les déclarations de témoins qui n'ont pas fait l'objet d'un contre-interrogatoire ne sauraient combler les lacunes des éléments de preuve produits par les requérants, face à des contradictions aussi flagrantes.

15. La majorité admet qu'« on ne sait pas » ce qu'il est advenu des maisons et des biens meubles que les requérants disent avoir possédé[17]. En ce qui concerne la terre, elle s'enlise, pour établir l'existence d'une « propriété privée » ou de « biens personnels », dans un débat sur l'interprétation du code foncier de 1970 et du code du logement de 1983 de la République soviétique d'Azerbaïdjan, sans aucune référence à la jurisprudence nationale ou à des avis juridiques pertinents. Cet exercice virtuel devient encore plus complexe lorsque la majorité tient compte du processus de privatisation des terres qui a eu lieu par la suite en mai 1992. Son rejet de la force juridique de ce processus – rejet opéré essentiellement sur le fondement du fait que ledit processus émanait d'un État non reconnu et ne serait donc pas juridiquement valable – est inacceptable, car, pour y parvenir, elle élude tout simplement la question de la légitimité du processus de privatisation, en présumant que tout acte normatif émis par la « République du Haut-Karabagh » est internationalement non valable, et en allant ainsi, comme indiqué ci-dessus, à l'encontre de la position prise par la Cour en différentes occasions par le passé quant à la validité de textes de loi approuvés par des États non reconnus. Il n'y a dans le dossier aucun élément justifiant la présomption que la loi sur la privatisation a été adoptée pour ancrer une position avantageuse des personnes d'ethnie arménienne ou porter préjudice aux citoyens d'origine ethnique azérie ou kurde. Enfin, la majorité semble ignorer les droits des occupants secondaires de bonne foi, dont la situation juridique est aussi protégée par le droit international, en particulier par le principe 17 des principes de Pinheiro.

17. Paragraphes 146 et 149 de l'arrêt. En conséquence, la simple question de l'existence même des maisons, qui a été laissée ouverte dans la décision rendue par la Cour sur la recevabilité de l'affaire, n'est toujours pas tranchée à ce jour.

C. Conclusion préliminaire : les limites des principes de Pinheiro

16. En vertu des principes de Pinheiro[18], lorsque des réfugiés ou des personnes déplacées présentent des demandes de restitution de biens non accompagnées de pièces justificatives, une certaine souplesse de la part des autorités judiciaires peut être requise. En effet, dans les situations de déplacement forcé massif, il peut être impossible pour les victimes d'apporter la preuve formelle de leur ancien domicile, de leurs droits sur un terrain ou sur des biens, ou même de leur ancien lieu de résidence habituelle. Cela étant, même si une certaine souplesse peut être admise en ce qui concerne le niveau de preuve exigé par la Cour en matière de revendications sur des biens faites par des personnes particulièrement vulnérables, telles que des réfugiés ou des personnes déplacées, cette souplesse devrait rester dans des limites raisonnables, l'expérience montrant que les déplacements massifs facilitent les revendications abusives sur des biens faites par des opportunistes espérant tirer profit du chaos. En l'absence de telles limites, la souplesse illimitée discréditera l'appréciation des faits opérée par la Cour. N'ayant pas satisfait aux exigences requises en matière de preuve, les requérants ont justement compté sur la souplesse de la Cour, souplesse qui en l'espèce a dépassé toutes les limites du raisonnable, puisque l'on a admis des témoignages et des pièces documentaires clairement contradictoires comme s'il s'était agi de preuves solides et fiables. Des contradictions aussi flagrantes donnent pourtant à penser que la version des faits présentée par les requérants est fausse, ce qui met en doute leur qualité de victime.

IV. Défaut de juridiction

A. La portée temporelle de l'appréciation de la Cour

17. Le dossier des requérants présente par ailleurs une faille plus grave encore que toutes celles mentionnées plus haut : le défaut de juridiction de l'État défendeur, point que celui-ci n'a pas manqué de soulever. Au vu des éléments du dossier, on ne peut établir sérieusement que l'État arménien exerce un contrôle effectif sur le territoire de la « République du Haut-Karabagh ». On ne peut pas non plus affirmer avec certitude qu'il exerce son autorité et son contrôle sur les agents publics de cette entité. Pareilles conclusions sont tout simplement dépourvues de base factuelle en l'état du dossier.

Dans les circonstances de la présente affaire, la Cour devait déterminer si, dans les faits, l'Arménie avait exercé un contrôle effectif sur le territoire de la « République du Haut-Karabagh » et ses environs pendant la période

18. Article 15.7 des principes de Pinheiro, cité dans l'arrêt. Le degré considérable de souplesse appliqué par la Cour en l'espèce est visible aux paragraphes 142 (dernière phrase) et 143 de l'arrêt.

commençant au moins le 18 mai 1992, date de la prise de Latchin et de la fuite de ses habitants, et prenant fin à la date du prononcé de l'arrêt[19]. Comme dans l'affaire *Šilih c. Slovénie* ([GC], n° 71463/01, 9 avril 2009), les opérations militaires menées dans la région de Latchin à l'époque pertinente (18 mai 1992) ne constituaient pas « la source du litige », mais « la source des droits revendiqués » par les requérants, et, dans cette mesure, relèvent de la compétence de la Cour *ratione temporis*[20].

En fait, la majorité a bien admis les éléments de preuve relatifs aux événements qui ont eu lieu avant l'entrée en vigueur de la Convention à l'égard de l'Arménie, au motif que « les événements antérieurs peuvent être révélateurs d'une telle situation continue » (paragraphe 193 de l'arrêt). Mais elle n'a tenu compte de ces éléments que dans la mesure où ils lui permettaient de conclure à une « violation continue » comme le soutenaient les requérants, et non dans la mesure où ils pouvaient « justifier » les atteintes aux droits des intéressés comme le soutenait l'État défendeur (paragraphe 197). Je ne puis admettre ce traitement déséquilibré des preuves.

18. Pour déterminer si l'État défendeur exerçait un contrôle effectif sur le territoire en cause, la Cour pouvait s'appuyer sur l'ensemble des éléments qui lui avaient été fournis ou, au besoin, sur des éléments recueillis d'office[21]. Malheureusement, les lacunes dans les preuves fournies par les requérants n'ont pas été comblées par une quelconque initiative de recueil d'autres preuves que la Cour aurait prise de son propre chef.

J'apprécierai cette exception de défaut de juridiction sur le fondement des éléments disponibles admis par la majorité, qui tiennent à différents arguments militaires, politiques, administratifs et financiers avancés par les requérants à l'appui de leur thèse selon laquelle l'Arménie exercerait un contrôle effectif sur la « République du Haut-Karabagh ». À cette fin, j'examinerai un par un tous les éléments de preuve utilisés par la majorité dans l'arrêt.

B. L'appréciation des éléments de preuve de nature militaire

i. L'accord de coopération militaire conclu en 1994 entre l'Arménie et la « République du Haut-Karabagh » (« l'accord de coopération militaire de 1994 »)

19. La majorité conclut que la République d'Arménie « a participé très tôt et de manière significative au conflit du Haut-Karabagh » et que « [c]et

19. Dans l'affaire *Ilaşcu et autres c. Moldova et Russie* ([GC], n° 48787/99, §§ 330 et 392, CEDH 2004-VII), la Cour a apprécié l'existence d'un contrôle effectif jusqu'à la date du prononcé de l'arrêt de Grande Chambre. Elle a fait de même dans l'affaire *Catan et autres c. République de Moldova et Russie* ([GC], n°s 43370/04 et 2 autres, §§ 109 et 111, CEDH 2012).

20. *Šilih*, précité, §§ 159-163. On trouvera mon interprétation de la compétence de la Cour *ratione temporis* dans mon opinion séparée en l'affaire *Mocanu et autres c. Roumanie* ([GC], n°s 10865/09 et 2 autres, CEDH 2014).

21. *Catan et autres*, précité, § 116.

appui militaire a été et demeure déterminant pour la conquête et la conservation du contrôle sur les territoires en cause » (paragraphe 180 de l'arrêt). En fait, son raisonnement repose sur la logique fallacieuse de l'*argumentum ad ignorantiam* : en se fondant sur le fait qu'il lui manque certaines informations et que celles dont elle dispose sont incomplètes ou insuffisantes et en supposant qu'il lui est impossible d'obtenir les informations nécessaires (paragraphe 173 de l'arrêt : « ils ne pouvaient du reste guère permettre »), elle conclut que les allégations des requérants ont été prouvées et que les allégations contraires du Gouvernement ne l'ont pas été, pour finalement statuer en la défaveur de celui-ci. Ce raisonnement subvertit le principe fondamental de l'*onus probandi*, en délestant en pratique la partie demanderesse de la charge de la preuve pour la faire reposer sur la partie défenderesse.

20. Pire encore, la nature hautement spéculative de l'appréciation globale de la réalité militaire faite par la majorité (paragraphe 174 de l'arrêt : « la Cour n'estime guère concevable ») montre clairement que le raisonnement subséquent ne visait qu'à prouver une conclusion établie d'avance. Aucun des trois arguments développés ensuite par la majorité n'étaie de manière satisfaisante cette appréciation globale, dont l'exactitude est sujette à caution. Ni l'accord de coopération militaire de 1994 (paragraphe 175) ni les différentes déclarations politiques émanant d'organisations internationales (paragraphe 176) ou de politiciens arméniens (paragraphe 177) ne peuvent être admis comme des « preuves déterminantes » d'un contrôle militaire exercé par l'Arménie sur la « République du Haut-Karabagh ».

21. L'accord de coopération militaire de 1994 susmentionné prévoit, entre autres choses, des « exercices militaires communs » et un « soutien technique mutuel », notamment la possibilité pour les appelés arméniens d'effectuer leur service militaire en « République du Haut-Karabagh ». Le libellé de l'accord est clair, il vise clairement le « droit » pour les appelés de la République d'Arménie d'effectuer leur service militaire à durée déterminée dans l'armée du Haut-Karabagh et le droit pour ceux de la « République du Haut-Karabagh » d'effectuer le leur dans l'armée arménienne (article 4 de l'accord). Il ne faut donc pas mésinterpréter la lettre de l'accord en considérant qu'il impose aux appelés arméniens l'obligation juridique d'effectuer leur service en « République du Haut-Karabagh ». De plus, rien n'indique qu'il y ait une politique écrite ou non écrite en vertu de laquelle les soldats arméniens devraient obligatoirement servir en « République du Haut-Karabagh »[22]. Le nombre exact d'appelés de la République d'Arménie effectuant leur service en « République du Haut-Karabagh » n'a pas été révélé par

22. Il ne suffit évidemment pas de citer des cas isolés. Le fait est que, aux paragraphes 76 et 182 de l'arrêt, la majorité cite trois cas (ceux de l'affaire *Zalyan, Sargsyan et Serobyan c. Arménie* (déc.), nos 36894/04 et 3521/07, 11 octobre 2007) sur lesquels la Cour ne s'est pas encore prononcée quant au fond, malgré le temps qui s'est écoulé depuis qu'elle a rendu sa décision sur la recevabilité dans cette affaire. Le quatrième cas cité est celui de M. Armen Grigoryan, sur lequel la Cour n'a aucun élément de preuve direct.

le Gouvernement, qui a indiqué que cette information relevait du secret militaire. Le règlement de la Cour ne prévoyant pas de régime spécifique de non-divulgation de preuves aux parties, il est clair que l'État défendeur n'a pas l'obligation de divulguer des éléments hautement confidentiels qui sont peut-être d'une grande importance pour la sécurité nationale et militaire, et on ne saurait lui reprocher de ne pas les avoir communiqués à la Cour[23]. Quoi qu'il en soit, il a bel et bien fourni des indications relatives à la présence militaire d'appelés arméniens stationnés sur place en vertu de l'article 4 de l'accord de coopération militaire de 1994 (paragraphe 75 de l'arrêt).

Cela étant dit, il n'y a dans l'accord de coopération militaire en question rien d'exceptionnel en soi. Des milliers de soldats d'autres nations européennes ont accompli leur service militaire en terre étrangère, aux côtés des forces militaires locales, en vertu d'accords internationaux entre les États d'accueil et les États déployeurs, parfois avec l'appui des Nations unies[24]. Dans aucun de ces cas, même dans ceux où la coopération faisait intervenir des ressources humaines et financières considérables, on n'a déduit d'une telle situation que l'État déployeur contrôlait l'État d'accueil.

ii. Les termes employés par les organisations internationales

22. La majorité admet que les documents dont la Cour dispose ne permettent pas de déterminer « de manière certaine » la composition des forces armées qui ont occupé et contrôlé le Haut-Karabagh, et elle relève même le doute que laissent planer les termes employés dans les résolutions du Conseil de sécurité des Nations unies (paragraphe 173 de l'arrêt). En fait, le libellé des résolutions 822 (1993) du 30 avril 1993[25], 853 (1993) du 29 juillet 1993[26], 874 (1993) du 14 octobre 1993[27] et 884 (1993) du 12 novembre 1993[28] du Conseil de sécurité et de la résolution 62/243 du

23. L'article 33 du règlement de la Cour prévoit la possibilité de restreindre l'accès public à certains documents dans l'intérêt de l'ordre public ou de la sécurité nationale. Il ne contient aucune disposition prévoyant de restriction quant aux éléments divulgués à l'une des parties. L'instruction générale à l'intention du greffe relative au traitement des documents secrets internes approuvée par le président de la Cour en mars 2002 ne s'applique pas non plus aux éléments de preuve communiqués par les parties. Enfin, l'instruction pratique relative aux plaidoiries écrites émise par le président de la Cour en novembre 2003 et modifiée en 2008 et 2014 (« Les documents secrets doivent être envoyés par courrier recommandé ») est manifestement insuffisante.

24. On trouvera des exemples de tels accords sur Internet, aux adresses suivantes : www.army.mod.uk/operations-deployments/22753.aspx, www.defense.gouv.fr/operations/rubriques_complementaires/carte-des-operations-exterieures et www.emgfa.pt/pt/operacoes/estrangeiro.

25. S/RES/822 (1993).

26. S/RES/853 (1993).

27. S/RES/874 (1993).

28. S/RES/884 (1993). Les expressions employées sont « forces arméniennes locales » (résolution 822) et « Arméniens de la région du Haut-Karabagh de la République azerbaïdjanaise » (résolutions 853 et 884).

14 mars 2008 de l'Assemblée générale des Nations unies, intitulée « La situation dans les territoires occupés de l'Azerbaïdjan »[29], ne corrobore pas la thèse des requérants selon laquelle l'État arménien serait directement impliqué militairement dans le Haut-Karabagh, c'est-à-dire qu'il occuperait le territoire azerbaïdjanais. Il n'est pas fait expressément référence dans ces résolutions à une implication des troupes de l'armée de l'État arménien en Azerbaïdjan et il n'y est pas dit que la guerre dont il s'agit est un conflit armé international entre l'Arménie et l'Azerbaïdjan ; les textes ne parlent que de « tensions entre la République d'Arménie et la République azerbaïdjanaise » et du « fait que cette situation met en danger la paix et la sécurité dans la région ».

De plus, dans sa résolution 884 (1993), le Conseil de sécurité « [d]emande au gouvernement arménien d'user de son influence pour amener les Arméniens de la région du Haut-Karabagh de la République azerbaïdjanaise à appliquer les résolutions 822 (1993), 853 (1993) et 874 (1993) ». Ce faisant, il admet que les résolutions précédentes étaient adressées d'abord aux « Arméniens de la région du Haut-Karabagh » et que c'étaient eux qui étaient partie au conflit, et non l'État arménien, qui est désigné comme un tiers à un conflit opposant les Arméniens du Haut-Karabagh à l'État d'Azerbaïdjan.

23. La majorité mentionne aussi (paragraphe 176 de l'arrêt) la proposition de « plan global » de juillet 1997 et la démarche « étape par étape » de décembre 1997 du groupe de Minsk de l'Organisation pour la sécurité et la coopération en Europe (OSCE), mais elle omet des détails importants de ces deux propositions. Premièrement, le « plan global » prévoyait aussi ceci :

> « Les forces armées du Haut-Karabagh se replieront à l'intérieur des frontières de 1988 de l'*oblast* autonome du Haut-Karabagh (OAHK), avec les exceptions énoncées aux clauses VIII et IX ci-dessous.
>
> Les forces armées de l'Azerbaïdjan se retireront sur les positions convenues (Annexe I) sur la base des recommandations du Groupe de planification de haut niveau (GPHN). »

Deuxièmement, la démarche « étape par étape » de décembre 1997 et la proposition d'« État commun » de novembre 1998 étaient encore plus détaillées, puisqu'elles mentionnaient directement le corridor de Latchin et l'invasion de l'Arménie par l'Azerbaïdjan :

> « Les forces du Haut-Karabagh se retireront vers des lieux situés à l'intérieur des frontières de 1988 de l'*oblast* autonome du Haut-Karabagh (OAHK), à l'exception du corridor de Latchin (...)

29. A/RES/62/243. L'expression employée est « toutes les forces arméniennes ». La référence faite à cette résolution au paragraphe 176 de l'arrêt est donc trompeuse, puisque l'Assemblée générale ne parle pas d'un retrait des forces armées de la République d'Arménie.

> Les forces armées azerbaïdjanaises se replieront sur la ligne indiquée en Annexe I sur la base des recommandations du GPHN, et elles se retireront de tous les territoires arméniens. »

Ces éléments omis montrent clairement que la situation militaire en 1997 et 1998 était bien plus compliquée que le tableau simplifié à l'excès qu'en brosse la majorité.

iii. La rhétorique politique des hommes d'État arméniens

24. Les déclarations politiques rhétoriques de responsables et d'agents de l'État arméniens auxquelles il est fait référence dans l'arrêt devraient être prises avec la plus grande circonspection, et ce pour deux raisons : premièrement, il ne s'agit pas à l'évidence de déclarations ayant une force juridique, deuxièmement, face à ces déclarations politiques, les généralisations hâtives et les déductions erronées sont une tentation forte à laquelle il faut résister. La tentation devient plus forte encore lorsque ces déclarations sont citées hors contexte. Un exemple malheureux est la citation du discours de M. Serge Sargsian (paragraphe 178 de l'arrêt). Il est trompeur de ne citer que les mots « notre armée » et de relier cette citation au conflit du Haut-Karabagh, comme si M. Sargsian avait prononcé ces mots dans ce contexte. Tel n'était pas le cas, comme le confirme simplement la lecture des phrases précédentes de son discours.

L'utilisation subséquente d'un argument *ad hominem* pour discréditer l'avis de M. Bucur-Marcu, en raison de son manque supposé d'indépendance (paragraphe 179 de l'arrêt), sans interroger cet expert en personne ni lui donner au moins l'occasion de lever les doutes de la Cour, vient s'ajouter à ce tableau général d'appréciation déséquilibrée des éléments de preuve du dossier.

25. En définitive, la majorité n'a pas la moindre idée du nombre de soldats de la République d'Arménie qui auraient servi, ou qui serviraient encore, en « République du Haut-Karabagh » et dans les districts environnants (paragraphe 180 de l'arrêt : « [l]a Cour n'estime pas nécessaire de trancher cette question »). Or cet élément factuel est crucial. Une comparaison avec les précédents pertinents de la Cour aurait pu, là encore, éclairer le point en question. La présente affaire ne peut être assimilée au cas de l'invasion de Chypre par la Turquie, où la Cour a effectivement établi qu'une force militaire turque composée de 30 000 hommes avait envahi et occupé le nord de Chypre[30], ni avec le conflit transnistrien, où la Cour a établi que les séparatistes étaient armés et appuyés par des unités militaires de la 14e armée de l'URSS déployées en Transnistrie et recevant leurs ordres

30. Voir le paragraphe 16 de l'arrêt *Loizidou* (précité) pour un exposé des faits détaillé.

directement de Moscou[31]. Tel n'est pas le cas en l'espèce, où aucun élément de preuve ne tend à prouver que des unités arméniennes seraient stationnées en « République du Haut-Karabagh », qu'il y aurait eu un transfert massif d'armes et de munitions en direction des forces de défense de la « République du Haut-Karabagh », que les forces déployées sur le terrain en « République du Haut-Karabagh » prendraient leurs ordres directement d'Erevan, ou que les forces militaires arméniennes auraient organisé des attaques directes pour soutenir les séparatistes.

C. L'appréciation des éléments de preuve de nature politique

i. La position officielle des Nations unies

26. La majorité relève que la « République du Haut-Karabagh » n'est officiellement reconnue par aucun État membre des Nations unies, pas même par l'Arménie (paragraphe 182 de l'arrêt)[32]. Il est vrai aussi que les résolutions susmentionnées du Conseil de sécurité des Nations unies (822 (1993), 853 (1993), 874 (1993) et 884 (1993)) et la résolution 62/243 du 14 mars 2008 de l'Assemblée générale des Nations unies désignent le Haut-Karabagh comme une région de la République azerbaïdjanaise. Cela étant, aucune de ces résolutions du Conseil de sécurité n'a été adoptée en vertu du chapitre VII de la Charte des Nations unies[33], et la résolution de l'Assemblée générale a été approuvée à une très faible majorité, avec un nombre considérable d'abstentions et malgré l'opposition d'un certain nombre de pays participant aux négociations de paix, dont la France, la Russie et les États-

31. Dans l'arrêt *Ilaşcu et autres* (précité), la Grande Chambre a estimé établi « au-delà de tout doute raisonnable » (*ibidem*, § 26) que le soutien manifesté par les troupes de la 14e armée aux forces séparatistes et le transfert massif d'armes et de munitions de l'arsenal de la 14e armée aux séparatistes plaçaient l'armée moldave dans une situation d'infériorité l'empêchant de reprendre le contrôle de la Transnistrie. Elle a noté que le 1er avril 1992, le président de la Fédération de Russie avait officiellement transféré la 14e armée sous le commandement de la Fédération de Russie, la 14e armée devenant ainsi le « Groupement opérationnel des forces russes dans la région transnistrienne de la Moldova » (GOR). Elle a ensuite décrit les activités militaires menées par le GOR pour soutenir les séparatistes. Le même critère de preuve a été appliqué dans les arrêts *Chypre c. Turquie* (précité, § 113) et *Catan et autres* (précité, §§ 19 et 118).

32. Elle a toutefois été reconnue par la Transnistrie, l'Abkhazie et l'Ossétie-du-Sud, qui elles-mêmes ne sont pas reconnues par l'ensemble de la communauté internationale.

33. Cela ne remet pas nécessairement en question leur force contraignante (avis consultatif de la CIJ sur les Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, précité, § 113). Le libellé de ces résolutions indique qu'il ne s'agit pas de simples recommandations ou exhortations, mais de décisions juridiquement contraignantes. Sur la question de la force juridique des actes du Conseil de sécurité approuvés hors du champ du chapitre VII, voir, par exemple, les commentaires de Hervé Cassan et de Eric Suy et Nicolas Angelet dans J.-P. Cot *et al.*, la Charte des Nations unies, Commentaire article par article, t. I, 3e édition, Paris, Economica, 2005, respectivement pp. 896-897 et 912-915.

Unis[34]. Les deux précédentes résolutions de l'Assemblée générale (48/114 du 23 mars 1994, « Assistance internationale d'urgence aux réfugiés et personnes déplacées en Azerbaïdjan »[35], et 60/285 du 7 septembre 2006, « La situation dans les territoires azerbaïdjanais occupés »[36]) ne mentionnaient même pas le Haut-Karabagh.

De plus, ni le Conseil de sécurité ni l'Assemblée générale n'ont qualifié l'État arménien de « puissance occupante » ou d'« agresseur ». La préoccupation première de ces deux organes des Nations unies étant « la gravité de la situation humanitaire d'urgence dans la région », ils ont demandé à toutes les parties de s'abstenir de toute violation du droit international humanitaire et de permettre le libre accès des secours humanitaires internationaux dans toutes les zones touchées par le conflit. Ils ont également réaffirmé la souveraineté et l'intégrité territoriale non seulement de l'Azerbaïdjan, mais aussi « de tous les autres États de la région », et ils ont donc condamné les « violations du cessez-le-feu », les « hostilités » et « les attaques contre les civils et les bombardements », et prié instamment « tous les États de la région » de s'abstenir de tout acte d'hostilité et de toute ingérence ou intervention qui auraient pour effet d'élargir le conflit et de porter atteinte à la paix et à la sécurité dans la région.

ii. La position officielle du Conseil de l'Europe

27. En 1994, l'Assemblée parlementaire du Conseil de l'Europe s'est réjouie de l'accord signé le 26 juillet 1994 par les ministres de la Défense d'Arménie et d'Azerbaïdjan et le commandant de l'armée du Haut-Karabagh. Surtout, elle a lancé un appel urgent à l'Azerbaïdjan et à la Turquie pour qu'ils « mettent immédiatement fin au blocus de leurs voies de communication avec l'Arménie » et un appel aux parties au conflit pour qu'elles organisent de manière urgente le retour des réfugiés et le respect des droits des minorités dans l'esprit de sa recommandation 1201 (1993)[37].

En 1997, l'Assemblée a insisté pour que le règlement politique du conflit soit négocié entre toutes les parties concernées et repose notamment sur les principes suivants, qui découlent de l'Acte final d'Helsinki de 1975 et

34. Pour cette résolution, les voix se répartissaient comme suit : 39 États pour, 7 contre et 100 abstentions. Les trois coprésidents se sont opposés au texte « unilatéral » du projet de résolution, considéré comme « nuisible » au processus de paix. La majorité de la Grande Chambre a cité ce document dans la partie « En fait », mais elle a omis de préciser le résultat du vote, et elle n'a plus fait référence au document dans la partie « En droit ». Aucune mention n'est faite dans l'arrêt des deux précédentes résolutions de l'Assemblée générale, adoptées sans vote.

35. A/RES/48/114.

36. A/RES/60/285.

37. Résolution 1047 (1994) de l'APCE sur le conflit du Haut-Karabagh et Recommandation 1251 (1994) de l'APCE sur le conflit du Haut-Karabagh.

de la Charte de Paris pour une nouvelle Europe de 1990 : inviolabilité des frontières ; garantie de la sécurité pour tous les peuples des zones en question, notamment grâce à des forces multinationales de maintien de la paix ; statut de large autonomie pour le Haut-Karabagh à négocier entre toutes les parties concernées ; droit de retour des réfugiés et des personnes déplacées, et réintégration de ceux-ci dans le respect des droits de l'homme[38].

En 2002, l'Assemblée a reconnu et salué « les efforts indéniables que l'Arménie [avait] déployés pour maintenir des contacts réguliers à haut niveau avec l'Azerbaïdjan et l'influence positive qu'ils exer[çai]ent sur les Arméniens du Haut-Karabagh, en vue de parvenir à une solution adaptée et pacifique »[39].

En 2005, après avoir constaté que « [d]es parties importantes du territoire azerbaïdjanais demeur[ai]ent occupées par les forces arméniennes et [que] des forces séparatistes conserv[ai]ent le contrôle de la région du Haut-Karabagh », l'Assemblée a réaffirmé que « l'indépendance et la sécession d'un territoire qui fait partie d'un État ne [pouvaient] être que l'aboutissement d'un processus légal et pacifique, fondé sur le soutien exprimé démocratiquement par les habitants du territoire en question [et qu']elles ne sauraient être la conséquence d'un conflit armé débouchant sur des expulsions ethniques et sur l'annexion de fait du territoire concerné par un autre État »[40]. Elle a rappelé que l'occupation d'un territoire étranger par un État membre constituait une grave violation des obligations qui incombent à cet État en sa qualité de membre du Conseil de l'Europe, et elle a réaffirmé le droit pour les personnes déplacées de la zone du conflit de retourner dans leur foyer dans la sécurité et la dignité. Elle a aussi rappelé les résolutions 822 (1993), 853 (1993), 874 (1993) et 884 (1993) du Conseil de sécurité des Nations unies et invité instamment les parties concernées à se conformer à ces résolutions, notamment en renonçant aux hostilités armées et en retirant leurs forces militaires des territoires occupés. Elle a rappelé également que tant l'Arménie que l'Azerbaïdjan avaient pris l'engagement, lors de leur adhésion au Conseil de l'Europe en janvier 2001, de n'utiliser que des moyens pacifiques pour régler le conflit, en s'abstenant de menacer de faire usage de la force contre le pays voisin, et que dans le même temps l'Arménie s'était engagée à user de son influence considérable sur le Haut-Karabagh

38. Résolution 1119 (1997) de l'APCE relative aux conflits en Transcaucasie.

39. Résolution 1304 (2002) de l'APCE, « Respect des obligations et engagements de l'Arménie ».

40. La référence tronquée à ce passage de la résolution de l'APCE 1416 (2005) « Le conflit du Haut-Karabagh traité par la Conférence de Minsk de l'OSCE » faite au paragraphe 176 de l'arrêt est trompeuse, car l'APCE ne parle pas d'une occupation du territoire azerbaïdjanais par l'armée de la République arménienne ni d'une annexion du territoire azerbaïdjanais par l'État d'Arménie. On ne devrait pas faire dire à la résolution quelque chose qu'à l'évidence elle ne dit pas.

pour promouvoir une solution au conflit. Elle a invité instamment les deux gouvernements à respecter ces engagements et à s'abstenir de faire usage de la force armée l'un contre l'autre ou de développer les actions militaires[41].

iii. La position officielle de l'Union européenne

28. Afin de traiter le conflit relatif au territoire du Haut-Karabagh, l'Union européenne (UE) applique une politique qui s'appuie principalement sur quatre outils : la politique européenne de voisinage (la « PEV », que la Commission européenne élabore et met en œuvre au moyen de plans d'action)[42], la stratégie de l'UE en faveur du Caucase du Sud[43], les négociations concernant l'accord d'association UE-Arménie[44] et le représentant spécial de l'UE pour le Caucase du Sud (qui opère sous mandat du Conseil de l'Union européenne).

En vertu des instruments adoptés dans le cadre de cette politique, la position de l'UE est que l'occupation par un pays du Partenariat oriental du territoire d'un autre pays emporte violation des principes et objectifs fondamentaux dudit partenariat et que le conflit du Haut-Karabagh doit être résolu dans le respect des résolutions 822, 853, 874 et 884 de 1993 du Conseil de sécurité des Nations unies et des principes de base du groupe de Minsk de l'OSCE, inscrits dans la déclaration commune de L'Aquila. L'UE condamne l'idée d'une solution militaire et les lourdes conséquences de la force armée déjà déployée et exhorte les deux parties au conflit à éviter toute nouvelle rupture du cessez-le-feu de 1994. Elle appelle aussi au retrait des « forces arméniennes » de tous les territoires qu'elles occupent en Azerbaïdjan et au déploiement de forces internationales qui s'organisent, dans le respect de la Charte des Nations unies, pour fournir les garanties de sécurité nécessaires pendant une période de transition, qui assurent la sécurité de la population du Haut-Karabagh et permettent aux personnes déplacées de réintégrer leurs foyers et d'éviter d'autres conflits qu'elles

41. Recommandation 1690 (2005) de l'APCE, « Le conflit du Haut-Karabagh traité par la Conférence de Minsk de l'OSCE », et Résolution 1416 (2005), « Le conflit du Haut-Karabagh traité par la Conférence de Minsk de l'OSCE ».

42. Résolutions du Parlement européen du 19 janvier 2006 sur la politique européenne de voisinage, du 6 juillet 2006 concernant la création d'un instrument européen de voisinage et de partenariat, du 15 novembre 2007 sur le renforcement de la politique européenne de voisinage, du 7 avril 2011 sur la révision de la politique européenne de voisinage – dimension orientale, et, plus récemment, du 23 octobre 2013 sur la politique européenne de voisinage, vers un renforcement du partenariat : position du Parlement européen sur les rapports de suivi 2012.

43. Résolution du Parlement européen du 20 mai 2010 sur la nécessité d'une stratégie de l'Union européenne en faveur du Caucase du Sud.

44. Résolution du Parlement européen du 18 avril 2012 contenant les recommandations du Parlement européen au Conseil, à la Commission et au Service européen pour l'action extérieure sur les négociations concernant l'accord d'association UE-Arménie.

risqueraient d'occasionner. Enfin, elle invite l'Arménie et l'Azerbaïdjan à prendre des mesures concrètes d'instauration de la confiance, telles que la démilitarisation complète et le retrait des snipers de la ligne de contact[45].

iv. La position officielle de l'Organisation pour la sécurité et la coopération en Europe

29. L'OSCE s'est engagée à œuvrer dans le sens d'un accord reposant, en particulier, sur les principes de l'Acte final d'Helsinki : non-recours à la force ou à la menace de la force, respect de l'intégrité territoriale, égalité des droits et autodétermination des peuples. Ses efforts n'ont pas été couronnés de succès jusqu'à présent.

En 1992, la Conférence sur la sécurité et la coopération en Europe (CSCE) a créé le groupe de Minsk, dans le but d'encourager une résolution du conflit du Haut-Karabagh pacifique et issue de négociations. Au sommet de Lisbonne de l'OSCE (1996), les États membres de l'organisation ont posé trois principes en tant que base juridique du processus de règlement pacifique. Ces principes étaient les suivants : intégrité territoriale de la République d'Arménie et de la République d'Azerbaïdjan, statut juridique du Haut-Karabagh, défini dans un accord reposant sur l'autodétermination, qui confère le plus haut degré d'autonomie au Haut-Karabagh au sein de l'Azerbaïdjan, et garantie de la sécurité du Haut-Karabagh et de sa population, y compris la garantie des obligations mutuelles d'assurer le respect par les autres parties des dispositions de l'accord de règlement.

L'année suivante, le « plan » du groupe de Minsk de l'OSCE pour un accord global de résolution du conflit du Haut-Karabagh prévoyait les mesures suivantes relativement au corridor de Latchin :

> « A. L'Azerbaïdjan louera le corridor à l'OSCE, qui conclura un contrat sur son usage exclusif par les autorités du Haut-Karabagh (avec les exceptions prévues pour le transit, exposées à la clause E ci-dessous).
>
> B. L'OSCE observera les conditions de sécurité conjointement avec les autorités du Haut-Karabagh.
>
> C. Les limites du corridor de Latchin sont énoncées à l'Annexe II, compte dûment tenu des recommandations du GPHN.
>
> D. L'OSCE observera la construction de routes autour de la ville de Latchin. Une fois les routes construites, la ville de Latchin sera exclue du corridor de Latchin. Elle

45. La référence à la résolution de 2012 du Parlement européen faite au paragraphe 176 de l'arrêt est donc trompeuse, puisque le Parlement ne parle pas d'une occupation du territoire azerbaïdjanais par l'armée de l'État d'Arménie. L'appel à ce que l'Arménie cesse d'envoyer des appelés accomplir leur service dans le Haut-Karabagh, qui repose sur l'accord de coopération militaire de 1994 susmentionné, doit être compris dans le cadre de la proposition de démilitarisation générale de la région avancée par l'UE.

retournera sous juridiction azerbaïdjanaise (en tant que partie de la zone de division) et ses anciens habitants pourront y retourner.

E. Ni l'établissement de colonies permanentes ni le stationnement de forces armées ne sont autorisés dans le corridor, à l'exception des contingents de forces de sécurité autorisés. Les représentants d'organes officiels, les observateurs et les forces de maintien de la paix de l'OSCE ont le droit d'y transiter sous réserve de notification préalable, de même que les habitants azerbaïdjanais de la région qui se rendent du district de Latchin à celui de Gubadly et *vice versa*. Le territoire du district de Latchin situé hors du corridor fait partie de la zone de division. »

La proposition d'« État commun » du groupe de Minsk de l'OSCE en date de novembre 1998 comprenait la clause suivante à l'égard du corridor de Latchin :

« La question de l'utilisation du corridor de Latchin par le Haut-Karabagh aux fins de la libre communication entre le Haut-Karabagh et l'Arménie fera l'objet d'un accord distinct, à moins que d'autres décisions relatives à un régime spécial pour le district de Latchin ne soient prises sur la base de l'accord entre l'Azerbaïdjan et le Haut-Karabagh. Le district de Latchin doit demeurer une zone définitivement et totalement démilitarisée. »

Les conclusions de la mission d'enquête du groupe de Minsk de l'OSCE sur les colonies dans les territoires occupés d'Azerbaïdjan (Agdam, Jabrayil, Fizuli, Zanguelan, Gubadly, Kelbajar et Latchin) qui a eu lieu du 30 janvier au 5 février 2005 étaient les suivantes :

« La mission d'enquête n'a constaté aucun signe d'implication directe des autorités arméniennes dans ces territoires, à l'exception de la fourniture d'électricité à certaines zones des districts de Jabrayil et Gubadly depuis Kapan (Arménie). »

Pour ce qui est plus particulièrement de la situation à Latchin, le rapport indiquait ceci :

« La mission a conduit dans tout le district de Latchin de nombreux entretiens qui ont révélé que c'était l'initiative privée et non l'action gouvernementale qui était le moteur d'installations à Latchin. La mission n'a constaté aucun signe que les autorités demandent réellement aux gens de manière planifiée et organisée de s'installer dans la ville de Latchin ni qu'elles en sélectionnent à cette fin. (...) Il n'y avait pas non plus de signe de réinstallation non volontaire ni de recrutement systématique. (...) la mission n'a constaté aucun signe d'implication directe du gouvernement arménien dans l'installation d'individus à Latchin[46]. »

Les ministres français, russe et américain ont présenté à l'Arménie et à l'Azerbaïdjan une version préliminaire des principes de base en vue d'un règlement en novembre 2007 à Madrid. Ces principes de base prévoyaient notamment : le retour sous contrôle azerbaïdjanais des territoires entourant

46. La majorité fait référence à cet élément dans la partie « En fait », mais elle n'en tient pas compte dans la partie « En droit ».

le Haut-Karabagh, l'instauration dans le Haut-Karabagh d'un statut provisoire prévoyant des garanties en matière de sécurité et d'autonomie, la mise en place d'un couloir reliant l'Arménie au Haut-Karabagh, la définition ultérieure du statut définitif du Haut-Karabagh au moyen d'un référendum juridiquement contraignant, le droit pour toutes les personnes déplacées à l'intérieur de leur pays et pour tous les réfugiés de retourner là où ils résidaient précédemment et la mise en place de garanties pour la sécurité internationale, au nombre desquelles devait figurer une opération de maintien de la paix.

Le 20 juillet 2009, les présidents des pays assurant la coprésidence du groupe de Minsk de l'OSCE (la France, la Fédération de Russie et les États-Unis d'Amérique) ont émis une déclaration commune dans laquelle ils réaffirmaient leur engagement à soutenir les dirigeants de l'Arménie et de l'Azerbaïdjan lorsqu'ils achèveraient l'établissement des principes de base d'un règlement pacifique du conflit du Haut-Karabagh. Ils ont aussi donné pour instruction à leurs médiateurs de présenter aux présidents de l'Arménie et de l'Azerbaïdjan une version mise à jour du document de Madrid de novembre 2007.

La deuxième mission de l'OSCE (mission d'évaluation sur le terrain menée par les coprésidents du groupe de Minsk dans les sept territoires occupés d'Azerbaïdjan entourant le Haut-Karabagh) a eu lieu en octobre 2010. Le rapport de cette mission, qui n'a été publié qu'en mars 2011, confirmait qu'il n'y avait pas eu de croissance significative de la population depuis 2005. Les colons, pour la plupart des personnes d'ethnie arménienne réinstallées dans les territoires depuis d'autres lieux d'Azerbaïdjan, vivaient dans des conditions précaires, l'infrastructure était pauvre, il y avait peu d'activité économique, et l'accès aux services publics était limité.

v. La représentation externe de la « République du Haut-Karabagh »

30. La « République du Haut-Karabagh » a été représentée par ses propres émissaires à la conclusion du Protocole de Bichkek du 5 mai 1994, ainsi qu'à la conclusion de l'accord de cessez-le-feu qui reposait sur ce protocole et qui a été signé respectivement par M. Mamedov à Bakou le 9 mai, S. Sargsian à Erevan le 10 mai et S. Babayan à Stepanakert le 11 mai 1994[47]. De plus, la conclusion n° 9 de la réunion supplémentaire du Conseil de l'OSCE tenue à Helsinki le 24 mars 1992 se lit ainsi : « Des représentants

47. Voir aussi le communiqué de Jeleznovodsk du 23 septembre 1991, l'accord de Sotchi du 19 septembre 1992, le protocole militaro-technique du 25 septembre 1992 sur l'application de l'accord de Sotchi, et le calendrier de mesures urgentes proposé par le président du groupe de Minsk de l'OSCE en septembre 1993, calendrier dans lequel le Haut-Karabagh est mentionné pour la première fois en tant que partie au conflit.

élus et autres du [Haut]-Karabagh seront invités à la conférence en tant que parties intéressées par le président de la conférence après consultations avec les États participant à la conférence. » Les représentants du Haut-Karabagh étaient officiellement partie aux négociations de paix jusqu'à ce que l'Azerbaïdjan refuse de poursuivre les négociations avec eux en 1998.

La commission des relations avec les pays européens non membres de l'Assemblée parlementaire du Conseil de l'Europe a organisé depuis 1992 une série d'auditions auxquelles ont participé des délégations du Parlement arménien, du Parlement azerbaïdjanais, de la « direction du Haut-Karabagh » et de la « partie intéressée azérie du Haut-Karabagh »[48].

En 2005, l'Assemblée parlementaire du Conseil de l'Europe a invité le gouvernement azerbaïdjanais à établir des contacts, sans conditions préalables, avec « les représentants des forces politiques des deux communautés de la région du Haut-Karabagh » quant au statut futur de la région. Elle a ajouté qu'elle était disposée à faciliter la tenue de tels contacts à Strasbourg, rappelant qu'elle l'avait déjà fait sous forme d'audition en d'autres occasions, avec une participation arménienne[49].

Ainsi, la représentation externe des intérêts de la « République du Haut-Karabagh » par des émissaires de cette entité a été reconnue par des interlocuteurs cruciaux. Si ce rôle est aussi assumé par des hommes d'État et des représentants publics arméniens, il n'y a là rien d'inhabituel au regard de la pratique diplomatique. Et il n'est pas inhabituel non plus que des ressortissants étrangers soient nommés à des postes de haut rang dans d'autres États d'Europe orientale : ainsi, le premier et le troisième ministre des Affaires étrangères de l'Arménie étaient tous deux citoyens américains. Ce type de pratiques ne peut donc en lui-même être considéré comme mettant en danger l'indépendance de l'État concerné.

D. L'appréciation des éléments de preuve de nature judiciaire, administrative et financière

i. L'indépendance du pouvoir judiciaire

31. Le contrôle de l'organisation judiciaire, administrative et financière du territoire d'un État membre par un autre État membre, associé à l'exercice de la puissance publique, peut emporter juridiction du second sur le territoire du premier[50]. Toutefois, en l'espèce, il n'a pas été présenté à la Cour de « preuve concluante » d'un tel contrôle.

48. Recommandation 1251 (1994) de l'APCE relative au conflit du Haut-Karabagh.
49. Résolution 1416 (2005) de l'APCE, « Le conflit du Haut-Karabagh traité par la Conférence de Minsk de l'OSCE ».
50. *Al-Skeini et autres c. Royaume-Uni* [GC], n° 55721/07, § 139, CEDH 2011.

Le droit arménien n'est pas d'application automatique en « République du Haut-Karabagh ». Tant que les lois arméniennes sont reprises volontairement et qu'elles sont appliquées et interprétées de manière indépendante, on ne peut pas déduire que le Haut-Karabagh se trouve sous contrôle arménien. Ainsi, l'argument de la majorité selon lequel « plusieurs lois de la « RHK » [ont] été reprises de la législation arménienne » (paragraphe 182 de l'arrêt) ne prouve rien. Au vu des témoignages du président de la Cour suprême, du président du barreau de la « République du Haut-Karabagh » et d'autres juges et juristes locaux (témoignages que les requérants n'ont pas contredit et que la majorité a préféré ignorer), force est de conclure que non seulement la « République du Haut-Karabagh » a un système judiciaire différent de celui de l'Arménie, mais encore elle ne considère pas les décisions de justice arméniennes comme des précédents ni même comme des sources jurisprudentielles. Ses tribunaux opèrent en toute indépendance et ne comprennent ni juges, ni procureurs, ni greffiers arméniens.

ii. L'autonomie de l'administration

32. La délivrance de passeports arméniens aux citoyens de la « République du Haut-Karabagh » est régie par un accord international du 24 février 1999 entre l'État arménien et la « République du Haut-Karabagh », qui prévoit cette possibilité mais la limite aux cas « exceptionnels » (paragraphe 83 de l'arrêt). Ni la délivrance « exceptionnelle » de passeports arméniens aux citoyens de la « République du Haut-Karabagh » ni le fait que le dram arménien est actuellement utilisé sur le territoire de celle-ci ne prouvent que l'État qui a émis ces passeports et cette monnaie contrôle l'administration ou le territoire de cette entité. La meilleure preuve du caractère autonome de l'administration du Haut-Karabagh est donnée par les conclusions des deux missions envoyées par l'OSCE dans les territoires sous son contrôle, conclusions selon lesquelles il n'y avait pas de signe de participation directe de l'État arménien dans l'administration de ces territoires[51].

iii. L'appui financier externe

33. La thèse selon laquelle on peut légitimement déduire de l'appui financier apporté à la « République du Haut-Karabagh » par l'État arménien et la diaspora arménienne ou par des citoyens des États-Unis d'Amérique et des organisations de personnes d'origine arménienne ou sympathisantes de l'Arménie que celle-ci exerce un contrôle effectif sur le Haut-Karabagh est encore moins crédible. Prises séparément ou conjointement, ces différentes

51. Voir ci-dessus les conclusions de la mission de l'OSCE de 2005, confirmées par la mission de 2010.

contributions financières ne fournissent pas d'argument convaincant au vu de la pratique contemporaine de coopération financière internationale[52].

E. Conclusion préliminaire : la majorité atténue la portée de la jurisprudence *Al-Skeini et autres*

34. Dans l'arrêt *Al-Skeini et autres*, précité, la Cour a résumé l'état de sa jurisprudence, considérant le « nombre de soldats déployés par l'État sur le territoire en cause » comme le « principal » élément d'appréciation de la question de savoir si un État exerce ou non un contrôle effectif sur un territoire hors de ses frontières[53]. Elle a ajouté que d'autres éléments « [pouvaient] aussi entrer en ligne de compte », par exemple « la mesure dans laquelle le soutien militaire, économique et politique apporté par l'État à l'administration locale subordonnée assur[ait] à celui-ci une influence et un contrôle dans la région », ces éléments ne pouvant évidemment pas remplacer le facteur « principal ». Or c'est exactement ce qui s'est produit en l'espèce, de sorte que les critères de la Cour ont été renversés. Dans le présent arrêt, la majorité de la Grande Chambre abandonne l'« élément principal », celui de la présence militaire sur le terrain, et le remplace par un vague mélange d'autres facteurs, parmi lesquels l'« appui militaire »[54]. Empêtrée dans ses contradictions, elle abandonne les critères bien établis que la Cour utilisait précédemment pour déterminer l'existence d'un contrôle militaire sur un

52. Par exemple, l'Arménie reçoit des fonds de l'Instrument européen de voisinage et de partenariat dans le cadre d'un programme national. Le montant des sommes versées à l'Arménie par l'UE dans le cadre de l'assistance bilatérale s'élève à 157 millions d'euros pour la période 2011-2013 (contre 98,4 millions d'euros pour la période 2007-2010). La progression des réformes et l'amélioration de la gouvernance et de la démocratie dans le pays lui ont permis de bénéficier de subventions européennes supplémentaires (15 millions d'euros en 2012 et 25 millions en 2013) en vertu du programme d'intégration et de coopération du partenariat oriental, dans le cadre de l'application du principe « donner plus pour recevoir plus » de la politique européenne de voisinage révisée. L'Arménie bénéficie aussi de plusieurs programmes thématiques tels que l'Instrument européen pour la démocratie et les droits de l'homme. Pour autant, nul n'oserait prétendre qu'elle est sous le contrôle effectif de l'UE.

53. *Al-Skeini et autres*, précité, § 139.

54. En fin de compte, la majorité se contredit, puisqu'au paragraphe 96 de l'arrêt, elle considère que l'occupation militaire implique toujours « la présence physique de troupes étrangères » qui « sont en mesure d'exercer un contrôle effectif, sans le consentement de l'autorité souveraine », et qu'au paragraphe 146 de l'arrêt, elle dit expressément que le Haut-Karabagh, le district de Latchin et les territoires environnants sont « actuellement occupés », alors qu'au paragraphe 180 de l'arrêt, elle renonce à exercer le critère de la « présence militaire sur le terrain » pour appliquer celui, plus complaisant et plus glissant, d'une participation « significative » reposant sur l'apport d'un appui militaire par la fourniture de matériel et de conseils. Le contraste entre le paragraphe 180 du présent arrêt et les paragraphes 144 et 224 de l'arrêt *Sargsyan c. Azerbaïdjan* ([GC], nº 40167/06, CEDH 2015) est encore plus saisissant. Au paragraphe 144 de l'arrêt *Sargsyan*, la majorité revient au critère de la « présence de troupes étrangères » en tant que condition nécessaire à l'établissement d'une occupation, et au paragraphe 224, elle considère que l'Azerbaïdjan « a perdu le contrôle d'une partie de son territoire du fait d'une guerre et d'une occupation ».

territoire étranger, fermant ici les yeux sur la taille et la puissance réelles de la force militaire opérant en terre étrangère. Avec cette méthode, elle engage la Cour sur une pente glissante, sans aucune limite prévisible à l'extension de la notion de « contrôle effectif » d'un territoire étranger.

La présence militaire sur le terrain, au sens de la présence physique d'une armée hostile en territoire occupé, n'est plus ici une condition *sine qua non* de l'occupation. En admettant que l'État arménien exerce son autorité sur le Haut-Karabagh à distance, par téléguidage, la majorité s'écarte aussi d'une règle de droit international humanitaire et de droit des traités établie de longue date qui, conformément à l'article 42 du Règlement de La Haye de 1907, veut qu'il n'y ait pas d'occupation sans la présence physique non consentie de l'armée étrangère sur le terrain et la substitution par celle-ci de sa propre autorité à celle du gouvernement local[55].

35. À ce stade, la Cour ne dispose tout simplement pas d'éléments suffisants pour établir au degré de certitude requis la réalité des faits invoqués par les requérants à l'appui de leurs griefs. Elle ne peut partir ainsi d'affirmations virtuelles et d'allégations infondées, sans avoir procédé soit à l'envoi d'une mission judiciaire d'établissement des faits soit à l'audition de témoins, et sans même disposer d'une appréciation préalable des faits opérée par les tribunaux compétents au niveau national. La majorité de la Grande Chambre a refusé de prendre ces mesures bien que, dans des affaires de même importance, la Cour se soit déjà montrée disposée à mener des investigations, par exemple à enquêter « sur les faits pertinents pour déterminer la juridiction de la Moldova et de la Fédération de Russie, notamment sur la situation en Transnistrie et les relations entre celle-ci, la Moldova et la Fédération de Russie, ainsi que sur les conditions de détention des requérants » (*Ilaşcu et autres*, précité, § 12 – dans cette affaire, des juges de la Cour ont même entendu des témoins appartenant aux forces armées de la Fédération de Russie au quartier général du groupement opérationnel des forces russes

55. Ainsi, il faut pour que le critère du contrôle effectif soit rempli en droit international humanitaire qu'il y ait à la fois une présence non consentie sur le terrain de troupes hostiles et un remplacement de l'autorité locale (Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, CIJ Recueil 2005, § 173, et Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, CIJ Recueil 2004, § 78, voir aussi T. Ferraro, « Comment déterminer le début et la fin d'une occupation au sens du droit international humanitaire » (*Revue internationale de la Croix Rouge*, vol. 94, nº 885, 31 mars 2012, pp. 73-106), V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation* (Paris, éditions Pedone, 2010, pp. 35-41) et E. Benvenisti, *The international law of occupation* (2e édition, Oxford, 2012, pp. 43-54)). Dans l'affaire République démocratique du Congo c. Ouganda, la CIJ a envisagé la possibilité que différentes factions congolaises rebelles aient établi une « administration indirecte » sur place, avant de rejeter cette hypothèse pour manque de preuves. En tout état de cause, les actions spécifiques de l'acteur non étatique doivent être imputables à l'État étranger au sens de l'article 8 du projet d'articles sur la responsabilité de l'État pour fait internationalement illicite de la CDI.

dans la région transnistrienne de la Moldova). Or en l'espèce, même la possibilité d'entendre des témoins à Strasbourg n'a pas été envisagée, bien que cela ait déjà été fait dans des affaires de même nature, en particulier dans l'affaire *Géorgie c. Russie (I)* ([GC], nº 13255/07, CEDH 2014). Étant donné que la Cour est la cour constitutionnelle européenne et compte tenu du principe de subsidiarité, la démarche consistant à établir les faits et à recueillir des témoignages doit bien entendu demeurer exceptionnelle, et être réservée, par exemple, aux affaires susceptibles d'avoir de graves répercussions au niveau paneuropéen[56]. Or tel était bien le cas en l'espèce[57].

36. En bref, du fait de sa propre omission, la Cour ne sait tout simplement pas ce qui se passe aujourd'hui sur le territoire de la « République du Haut-Karabagh » et des districts environnants, et encore moins ce qui s'y est passé pendant les vingt-trois ans qui se sont écoulés depuis 1992. On pourrait arguer que cette affaire repose sur une impression générale de la situation en « République du Haut-Karabagh », conçue à partir d'un agrégat d'éléments différents, et que même s'il est prouvé qu'un ou plusieurs des éléments de cet agrégat sont faux, l'impression d'ensemble demeure intacte. Ce type de raisonnement doit être rejeté avec force.

37. Par principe, une juridiction internationale ne devrait pas rendre ses décisions en s'appuyant sur des impressions mais des faits, établis de préférence par les juridictions internes. C'est enfoncer une porte ouverte que de dire qu'un ramassis sans cohérence d'éléments de preuve douteux ne fait pas un dossier. On ne peut parvenir à la vérité en se fondant sur un ensemble d'affirmations sujettes à caution portées par les victimes alléguées, de témoignages contradictoires, de vagues présomptions factuelles provenant de tierces parties et de déductions tortueuses imaginées à partir des preuves documentaires. Le critère des « faits établis au-delà de tout doute raisonnable » utilisé de longue date par la Cour en matière de preuve ne doit pas être remplacé par un aperçu impressionniste des éléments de preuve. De même, le critère substantif du « contrôle effectif » ne doit pas être dilué pour

56. Sur la nature de cour constitutionnelle européenne de la Cour, voir mon opinion séparée dans l'affaire *Fabris c. France* [GC], nº 16574/08, CEDH 2013.

57. On peine à comprendre pourquoi la présente affaire ne mériterait pas le même soin et la même attention que d'autres affaires dont les répercussions étaient moindres, telles par exemple que *Davydov et autres c. Ukraine* (nºs 17674/02 et 39081/02, 1er juillet 2010), *Naoumenko c. Ukraine* (nº 42023/98, 10 février 2004), ou *Tekin Yıldız c. Turquie* (nº 22913/04, 10 novembre 2005), où cet examen approfondi des éléments de preuve a eu lieu. En l'espèce, la Cour n'a même pas motivé son rejet des démarches d'administration des preuves proposées par les parties. Dans l'affaire *McKerr c. Royaume-Uni* (nº 28883/95, § 117, CEDH 2001-III), la Cour avait certes décidé de ne pas mener d'enquête aux fins de l'établissement des faits, mais elle avait expliqué que c'était parce qu'elle considérait qu'une telle démarche aurait chevauché celle menée dans le cadre de la procédure interne, qui était en cours. Tel n'aurait pas été le cas en l'espèce, où précisément le fait qu'il n'y ait pas eu de procédure interne rendait indispensable de rechercher des éléments de preuve supplémentaires.

les besoins de l'affaire. Le présent arrêt restera donc comme un exemple malheureux de conjonction négative d'inertie judiciaire, de manque de preuves, de faits omis et de dilution des critères juridiques établis.

V. Le droit à la sécession-remède en droit international

A. La présomption contre la sécession

38. L'État défendeur affirmait que la prise de Latchin était justifiée au regard des lois de la guerre, car le site était à l'évidence d'une grande importance stratégique militaire pour la création d'un lien terrestre entre le Haut-Karabagh et l'Arménie visant à acheminer vers le Haut-Karabagh du matériel militaire, de la nourriture et d'autres fournitures. En d'autres termes, la prise de Latchin aurait été une mesure militaire nécessaire afin d'éviter le blocus de la région du Haut-Karabagh par les forces militaires azerbaïdjanaises. De plus, l'État défendeur arguait que, en tant que victime de crimes contre l'humanité (à savoir des raids opérés sur Stepanakert et d'autres lieux par la population et l'armée azéries), la population arménienne de l'ancien *oblast* soviétique du Haut-Karabagh avait acquis un droit de sécession. Ces questions ont été ignorées dans l'arrêt de la majorité[58].

39. Il n'est pas dit un mot dans l'arrêt sur le problème de la « légitime défense » de la population arménienne de la région du Haut-Karabagh ni sur celui, étroitement lié, de la sécession-remède en droit international, notion qui a pourtant été abondamment examinée, non seulement dans la doctrine[59], mais aussi par les juridictions nationales et internationales, en

58. Même si la majorité mentionne au paragraphe 197 de l'arrêt le problème de la « question de savoir si [l]es circonstances pouvaient ou non justifier des atteintes aux droits individuels des habitants de la région », elle élude la question en présumant simplement que la justification de la prise de Latchin en mai 1992 et la création d'une liaison terrestre entre l'Arménie et le Haut-Karabagh n'ont pas d'« incidence directe » sur les événements qui ont suivi ni sur la situation actuelle – et ce sans expliquer pourquoi. Elle ne prend pas non plus la peine de dire pourquoi la situation actuelle ne serait plus « une situation d'urgence » (paragraphe 200 de l'arrêt). Cette position n'est pas cohérente avec celle prise aux paragraphes 231 et 232 de l'arrêt *Sargsyan*, précité, où la même majorité examine la pertinence du droit international humanitaire s'agissant de justifier les atteintes à un droit garanti par la Convention. Je suis convaincu que, contrairement à ce que la majorité a estimé dans la présente affaire, mais comme elle l'a exprimé dans l'affaire *Sargsyan*, précitée, seule une appréciation de la « justification » des événements de 1992 peut fournir une base juridique solide à l'évaluation de la situation actuelle et de la situation qui prévalait pendant la période qui s'est écoulée depuis ces événements, comme je le démontrerai plus loin. On trouve une critique méthodologique analogue (« il est impossible de dissocier la situation personnelle de la victime d'une évolution historique complexe et d'une situation actuelle qui ne l'est pas moins ») dans l'opinion séparée du juge Bernhardt, à laquelle le juge Lopes Rocha déclarait se rallier, dans l'affaire *Loizidou* (arrêt précité), ainsi que dans l'opinion séparée du juge Kovler dans l'affaire *Ilaşcu et autres* (arrêt précité).

59. Voir, parmi d'autres auteurs favorables à un droit de sécession-remède, U.O. Umozurike, *Self-determination in International Law* (Hamden, 1972, p. 199), L.C. Buchheit, *Secession: the Legitimacy of Self-Determination* (New Haven, 1978, p. 332), B. Kingsbury, « *Claims by Non-State Groups in*

particulier après l'avis consultatif rendu en 2010 par la CIJ sur la déclaration unilatérale d'indépendance du Kosovo[60] et l'affaire relative au droit de sécession unilatérale de la province du Québec de la Confédération canadienne examinée par la Cour suprême du Canada en 1998[61]. Ce silence de la Cour européenne est encore moins compréhensible une fois replacé dans le contexte de la pratique internationale récente reconnaissant la sécession-remède comme un droit, l'exemple le plus notable étant l'accord de 1999 entre l'Indonésie et le Portugal pour la reconnaissance des droits à l'autodétermination et à la sécession-remède du *Timor Leste* dans le cadre d'une consultation populaire par référendum de la population du Timor oriental[62].

40. Le droit international régit la formation de nouveaux États, y compris celle d'États sécessionnistes. La formation d'un État – par sécession ou par tout autre moyen – n'étant pas une question purement politique, la reconnaissance d'un nouvel État ne peut être le fruit d'une décision dis-

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International Law » (*Cornell International Law Journal*, vol. 25 (1992), p. 503), F.L. Kirgis, « *Degrees of Self-Determination in the United Nations Era* » (*American Journal of International Law*, vol. 88 (1994), p. 306), R. McCorquordale, « *Self-Determination: a Human Rights Approach* » (*International and Comparative Law Quarterly*, vol. 43 (1994), pp. 860-861), A. Cassese, *Self-Determination of Peoples* (Cambridge, Cambridge University Press, 1995, pp. 112-118), O.C. Okafor, « *Entitlement, Process, and Legitimacy in the Emergent International Law of Secession* » (*International Journal on Minority and Group Rights*, vol. 9 (2002), pp. 53-54), D. Raič, *Statehood and the Law of Self-Determination* (Leyde, Martinus Nijhoff Publishers, 2002, pp. 324-332), K. Doehring, dans Simma (éd.), *The Charter of the United Nations* (2002, *Article 1*, *Annex: Self-Determination*, notes 40 et 61), M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2e édition révisée, Kehl, 2005, pp. 19-24), M. Suksi, « *Keeping the Lid on the Secession Kettle: a Review of Legal Interpretations concerning Claims of Self-Determination by Minority Populations* » (*International Journal on Minority and Group Rights*, vol. 12 (2005), p. 225), C. Tomuschat, « *Secession and self-determination* » (dans Kohen (éd.), *Secession, International Law Perspectives*, Cambridge, Cambridge University Press, 2006, pp. 41-45), J. Dugard et D. Raič, « *The role of recognition in the law and practice of secession* » (dans Kohen (éd.), *ibidem*, p. 103), J. Dugard, « *The Secession of States and their Recognition in the Wake of Kosovo* » (*Recueil des cours de l'Académie de droit international de La Haye*, Leyde, 2013, pp. 116-117), et B. Saul *et al.*, *The International Covenant on Economic, Social and Cultural Rights. Commentary, Cases and Materials* (Oxford, Oxford University Press, 2014, pp. 25-52).

60. Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo, avis consultatif, CIJ Recueil 2010, p. 403.

61. [1998] 2 SCR 217.

62. La nature *erga omnes* du droit à l'autodétermination a été clairement confirmée par la CIJ dans l'affaire relative au Timor oriental (Timor oriental (Portugal c. Australie), arrêt, CIJ Recueil 1995, § 29). Dans cette affaire, alors que des milices sous contrôle indonésien massacraient la population du Timor oriental, le Secrétaire général Kofi Annan a dû menacer le gouvernement indonésien de poursuites internationales pour crimes contre l'humanité pour qu'il coopère avec la communauté internationale et qu'il admette le principe de l'autodétermination de la population du *Timor Leste* (conférence de presse tenue par le Secrétaire général au siège des Nations unies le 10 septembre 1999). C'est la raison pour laquelle certains ont considéré la position de l'Indonésie comme un « consentement forcé », qui aurait fait de la sécession du *Timor Leste* une sécession qui en réalité n'était pas consensuelle (G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, Brookings Institution Press, 2008, p. 63), et A.J. Bellamy, *Responsibility to Protect* (Londres, 2009, pp. 147-148)).

crétionnaire, et encore moins arbitraire, de chaque État[63]. Il y a en droit international un principe d'interdiction de la sécession non consensuelle, qui découle des principes de l'intégrité territoriale et de la souveraineté énoncés à l'article 10 du Pacte de la Société des Nations et à l'article 2 § 4 de la Charte des Nations unies. La présomption contre la sécession est encore plus puissante si cette sécession résulte de l'usage de la force, car elle va alors à l'encontre de l'interdiction coutumière et conventionnelle du recours à la force, reconnue par le Pacte général de renonciation à la guerre comme instrument de politique nationale (1928), par les articles 10 et 11 de la Convention de Montevideo concernant les droits et devoirs des États (1933) et par l'article 2 § 4 de la Charte des Nations unies. Il en va de même du recours à « d'autres violations graves de normes de droit international général, en particulier de nature impérative (*jus cogens*) »[64]. *Ex injuria jus non oritur*.

B. La sécession non consensuelle en tant qu'expression de l'autodétermination

i. Les prérequis factuels et juridiques de la sécession

41. De même que les populations colonisées[65], les populations non colonisées ont droit à l'autodétermination. Ce droit a été reconnu dans les deux pactes internationaux de 1966 (le Pacte international relatif aux droits civils

63. Comme Hersch Lauterpacht (*Recognition in International Law*, Cambridge, Cambridge University Press, 1947, p. 1), je pars du fait que la reconnaissance n'est pas hors de la sphère du droit international et qu'elle dépend d'une appréciation juridique objective de faits réels. Bien que chargée d'implications politiques, cette question n'est pas purement et exclusivement politique.

64. La CIJ s'est référée à des résolutions du Conseil de sécurité des Nations unies condamnant certaines déclarations d'indépendance (résolutions 216 (1965) et 217 (1965) concernant la situation en Rhodésie-du-Sud, résolution 541 (1983) concernant le nord de Chypre et résolution 787 (1992) concernant la Republika Srpska) pour conclure que « dans chacun de ces cas, le Conseil de sécurité s'[était] prononcé sur la situation telle qu'elle se présentait concrètement lorsque les déclarations d'indépendance [avaient] été faites ; l'illicéité de ces déclarations découlait donc non de leur caractère unilatéral, mais du fait que celles-ci allaient ou seraient allées de pair avec un recours illicite à la force ou d'autres violations graves de normes de droit international général, en particulier de nature impérative (*jus cogens*). ( ) le caractère exceptionnel des résolutions susmentionnées semble confirmer qu'aucune interdiction générale des déclarations unilatérales d'indépendance ne saurait être déduite de la pratique du Conseil de sécurité ». Voir aussi, dans le même sens, les articles 40 et 41 du projet d'articles sur la responsabilité de l'État pour fait internationalement illicite.

65. Résolution 1514 (XV) de 1960 de l'Assemblée générale des Nations unies contenant la Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux (A/RES/1514 (XV), voir aussi les documents A/L.323 et Add.1-6 (1960)) et, dans la jurisprudence constante de la CIJ, Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, précité, § 52, Sahara occidental, avis consultatif, CIJ Recueil 1975, §§ 54-59, Timor oriental (Portugal c. Australie), précité, § 29, et Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, précité, § 88.

et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels)[66] et dans les résolutions de l'Assemblée générale des Nations unies 2625 (XXV) du 24 octobre 1970 contenant la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations unies[67] et 48/121 du 14 février 1994[68] approuvant la Déclaration et le programme d'action de Vienne adoptés à la Conférence mondiale des Nations unies sur les droits de l'homme tenue à Vienne en 1993[69]. Il est énoncé, dans le contexte africain, à l'article 20 de la Charte africaine des droits de l'homme et des peuples[70] ; il a été reconnu, dans le contexte américain, par la Cour suprême du Canada dans l'affaire du Renvoi relatif à la sécession du Québec (1998)[71] ; et enfin, dans le contexte européen, il figure dans l'Acte final de la Conférence sur la sécurité et la coopération en Europe de 1975 (accords d'Helsinki)[72] et dans les lignes directrices de la Communauté européenne sur la reconnaissance de nouveaux États en Europe orientale et en Union soviétique (1991)[73].

42. Dans le cadre du droit à l'autodétermination, de nouveaux États peuvent se former, par sécession non consensuelle[74], à condition que la sécession réponde aux conditions factuelles et juridiques suivantes : 1) la nouvelle entité a la qualité d'État en vertu des critères de Montevideo (être peuplé en permanence, contrôler un territoire défini, être doté d'un gouver-

66. Le Comité des droits de l'homme des Nations unies a dit que le principe d'autodétermination s'applique à tous les peuples et pas seulement aux peuples colonisés (Observations finales sur l'Azerbaïdjan, CCPR/C/79/Add.38, § 6, voir aussi son observation générale n° 12 sur le droit à l'autodétermination, § 7, où il renvoie à la résolution 2625 (XXV) de l'Assemblée générale).

67. A/RES/2625(XXV). Voir aussi le document A/8082 (1970). Même si elle a été adoptée sans vote, la déclaration reflète le droit international coutumier (Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique), précité, §§ 191-193).

68. A/RES/48/121. Résolution adoptée sans vote.

69. A/CONF.157/24 (Part I), p. 19 (1993). La Déclaration de Vienne a été adoptée par consensus par les représentants de 171 États.

70. Congrès du peuple katangais c. Zaïre (communication n° 75/92 (1995)) et Kevin Mgwanga Gunme *et al.* c. Cameroun (communication n° 266/03 (2009)) de la Commission africaine des droits de l'homme et des peuples. Dans ces deux affaires, la Commission a conclu à la non-violation de l'article 20 de la Charte africaine.

71. Paragraphe 138 : « (...) le droit à l'autodétermination en droit international donne tout au plus ouverture au droit à l'autodétermination externe dans le cas des anciennes colonies ; dans le cas des peuples opprimés, comme les peuples soumis à une occupation militaire étrangère ; ou encore dans le cas où un groupe défini se voit refuser un accès réel au gouvernement pour assurer son développement politique, économique, social et culturel. »

72. Les États membres de la CSCE étant exclusivement européens, l'« égalité de droits des peuples et leur droit à l'autodétermination » ne peuvent évidemment pas être limités aux peuples coloniaux.

73. Voir aussi l'avis n° 2 de la Commission d'arbitrage Badinter sur la Yougoslavie.

74. Le Comité pour l'élimination de la discrimination raciale a admis au paragraphe 6 de sa recommandation générale n° 21 (1996) « la possibilité de conclure des arrangements par libre accord entre toutes les parties concernées ».

nement, et être apte à entrer en relation avec les autres États)[75] ; 2) avant la sécession, la population faisant sécession ne pouvait pas participer de manière juste à un gouvernement représentant l'ensemble de la population de l'État parent ; et 3) elle était systématiquement traitée par le gouvernement ou par une partie de la population de l'État parent, sans que le gouvernement ne s'y oppose, de manière discriminatoire ou contraire aux droits de l'homme. À ces strictes conditions, le droit de sécession-remède des populations non colonisées n'a cessé d'être reconnu dans la pratique des États et dans l'*opinio juris*, pour se cristalliser en norme de droit international coutumier[76].

ii. La qualité d'État en vertu des critères de Montevideo

43. Il est superflu de débattre du point de savoir si la population arménienne du Haut-Karabagh est un « peuple », étant donné son identité ethnique, religieuse, linguistique et culturelle incontestée et ses liens historiques avec ce territoire. Si les Albanais kosovars sont un « peuple » selon la CIJ[77], les Arméniens du Haut-Karabagh doivent inévitablement être considérés comme tel également. De plus, si dans la logique de la CIJ « [l]a portée du principe de l'intégrité territoriale est (...) limitée à la sphère des relations interétatiques », il faut déduire *a contrario* que ce même principe

75. Article 1 de la Convention de Montevideo concernant les droits et devoirs des États (1933).

76. Outre les références déjà citées, voir en particulier le cinquième principe de la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États (précitée, § 7), qui impose de respecter le principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes et requiert un « gouvernement représentant l'ensemble du peuple appartenant au territoire sans distinction de race, de croyance ou de couleur ». Interprétée *a contrario*, cette « clause de sauvegarde » doit être comprise en ce sens qu'un gouvernement qui discrimine une partie de sa population en vertu de considérations de race, de croyance ou de couleur ne représente pas l'ensemble du peuple et ne peut exiger de lui le respect de son intégrité territoriale. Les interprétations systématiques comme les interprétations téléologiques de la déclaration confirment cette conclusion, eu égard au préambule et à la reconnaissance de l'importance fondamentale du droit à l'autodétermination. La Déclaration de Vienne de 1993 sur les droits de l'homme (précitée) a étendu le droit à l'autodétermination externe à raison de violations des droits de l'homme, puisqu'elle requiert un « gouvernement représentant la totalité de la population appartenant au territoire, sans distinction aucune » (A/CONF.157/24 (1993)). L'Assemblée générale des Nations unies a repris la formulation de la déclaration de Vienne dans la Déclaration du cinquantième anniversaire de l'Organisation des Nations unies, qu'elle a approuvée « par acclamation » (résolution 50/6 du 24 octobre 1995, A/RES/50/6). Historiquement, la première autorité à avoir reconnu ce droit de faire sécession fut la Commission des rapporteurs nommés par la Société des Nations pour rendre un avis sur le litige des îles d'Åland. Dans son rapport, cette commission formula la conclusion suivante : « La séparation d'une minorité d'un État dont elle fait partie et son incorporation dans un autre État ne peut être considérée que comme une solution absolument exceptionnelle, un dernier recours lorsque l'État n'a pas la volonté ou pas la possibilité d'adopter et d'appliquer des garanties justes et effectives. » (rapport de la Commission des rapporteurs, 16 avril 1921, document B7/21/68/106 (1921) du Conseil de la Société des Nations). On trouvera d'autres références à la pratique dans mon opinion séparée en l'affaire *Sargsyan* (précitée).

77. Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo, avis consultatif, précité, § 109.

ne fait pas obstacle à la sécession des acteurs non étatiques dans un État multinational dans un contexte non colonial[78]. Cela étant posé, les critères de Montevideo en matière de population et de territoire ne s'opposeraient pas à la reconnaissance du droit de sécession de la population arménienne du Haut-Karabagh. De même, il ressort des éléments disponibles que les autres critères de la qualité d'État, c'est-à-dire le gouvernement et l'aptitude à entrer en relation avec d'autres États, sont indiscutablement réunis dans le cas présent[79].

iii. L'absence d'autodétermination interne de la population faisant sécession

44. Le droit de créer un nouvel État indépendant (c'est-à-dire le droit à l'autodétermination externe) naît lorsque la population concernée n'a pas les moyens juridiques et factuels d'exprimer sa propre volonté politique au sein de la structure constitutionnelle de l'État parent, c'est-à-dire lorsque son droit à l'autodétermination interne n'est pas respecté[80]. Les actions militaires menées dans le district de Latchin qui sont au cœur de cette affaire

78. *Ibidem*, § 80. Il s'agit de la principale (bien que timide) contribution de la CIJ à la polémique sur le droit de sécession en droit international. Avec cette interprétation restrictive du principe de l'intégrité territoriale, la CIJ doit être considérée comme souscrivant tacitement à la thèse – défendue par l'Albanie, l'Allemagne, l'Estonie, la Finlande, l'Irlande, la Jordanie, la Norvège, les Pays-Bas, la Pologne, la Russie, la Slovénie et la Suisse – selon laquelle ce droit doit être reconnu aux acteurs non étatiques dans les États multinationaux. On pourrait tirer une conclusion semblable de l'article 11 du projet de déclaration des droits et des devoirs des États de la CDI : « Tout État a le devoir de s'abstenir de reconnaître toute acquisition territoriale faite par un autre État en violation de l'article 9. » Le juge Antônio Augusto Cançado Trindade a aussi exprimé un avis analogue dans sa convaincante opinion individuelle jointe à l'avis consultatif de la CIJ sur le Kosovo, opinion selon laquelle les violations systématiques des droits de l'homme subies par les Albanais kosovars leur avaient donné droit à une autodétermination externe à l'égard de l'État parent (opinion individuelle du juge Cançado Trindade, *ibidem*, §§ 177-181). Dans la même affaire, le juge Abdulqawi Ahmed Yusuf a lui aussi admis l'existence d'un tel droit, en vertu duquel la CIJ aurait dû examiner les faits de la cause *in concreto* (opinion individuelle du juge Yusuf, *ibidem*, §§ 11-13). De même, à la Cour européenne, le juge Wildhaber a admis dans son opinion séparée en l'affaire *Loizidou* (précitée), à laquelle s'est rallié le président Rysdall, l'existence d'un « droit à l'autodétermination si les droits de l'homme font ( ) l'objet de violations constantes et flagrantes ou si les populations concernées ne bénéficient d'aucune représentation ou sont massivement sous-représentées, de manière discriminatoire et antidémocratique ».

79. Sur la structure de l'État et son fonctionnement, voir la Constitution de la « République du Haut-Karabagh » mentionnée ci-dessus et les élections multipartites qui ont lieu régulièrement sur le territoire. Sur la capacité d'entrer en relation avec d'autres États avant même la conclusion du Protocole de Bichkek en mai 1994 et l'accord de cessez-le-feu subséquent, voir les éléments mentionnés plus haut dans la présente opinion.

80. Voir l'affaire de la Cour suprême du Canada, précitée, et les affaires Congrès du peuple katangais c. Zaïre et Kevin Mgwanga Gunme *et al.* c. Cameroun de la Commission africaine, précitées. Dans ces affaires, les populations du Québec, du Katanga et du Cameroun du Sud, respectivement, ne se sont pas vu reconnaître le droit à l'autodétermination externe, en raison de leur autodétermination interne. Cette position a été confirmée par l'article 4 de la Déclaration des Nations unies sur les droits des peuples autochtones, que l'Assemblée générale a adoptée le 13 septembre 2007 par sa résolution 61/295 (A/RES/61/295), avec 143 voix pour, 4 contre et 11 abstentions.

ont eu lieu le 18 mai 1992, soit huit mois après la déclaration de sécession du 2 septembre 1991 et deux ans avant la signature du Protocole de Bichkek et de l'accord de cessez-le-feu de mai 1994 et leur entrée en application le 12 mai 1994.

Afin de clarifier la question de l'absence alléguée d'autodétermination interne de la population arménienne, il faut répondre aux questions essentielles suivantes : avant le 2 septembre 1991, le gouvernement azerbaïdjanais représentait-il la population arménienne du Haut-Karabagh ? La population arménienne jouissait-elle d'un statut constitutionnel qui lui permettait d'exprimer librement sa volonté politique au sein de l'État azerbaïdjanais ? Exerçait-elle dans ce cadre son droit à l'autodétermination interne ?

iv. Les atteintes systématiques aux droits humains de la population faisant sécession

45. Pour qu'il y ait un droit à l'autodétermination externe, il faut aussi que le gouvernement de l'État parent ou une partie de la population de cet État agissant sans que le gouvernement ne s'y oppose portent systématiquement atteinte aux droits humains de la population faisant sécession[81]. Pour reprendre les termes de Grotius, un peuple n'a pas le droit de faire sécession « à moins qu'il n'apparaisse clairement que celle-ci est absolument nécessaire pour sa propre préservation »[82].

Pour déterminer si cette condition est vérifiée, il faut répondre aux questions essentielles relatives aux affrontements entre les populations arménienne et azérie de l'Azerbaïdjan avant la date critique. Ces questions sont les suivantes : le gouvernement azerbaïdjanais a-t-il commis ou admis que des particuliers commettent des atteintes systématiques aux droits humains de la population arménienne sur le territoire national ? Ces atteintes ont-elles eu lieu avant ou après la date critique du 2 septembre 1991 ?

46. Enfin, pour déterminer l'éventuelle responsabilité internationale de l'État défendeur à raison d'actes ayant eu lieu pendant la guerre de sécession et en particulier à raison de la destruction de biens et du déplacement de civils, il est capital de répondre aux questions suivantes : l'État arménien est-il intervenu militairement dans le Haut-Karabagh ou les districts environnants avant la date critique du 2 septembre 1991 ? Est-il intervenu militairement dans l'ouverture du corridor de Latchin et la prise du district de Latchin et, si oui, cette action était-elle justifiée, notamment par le blocus,

81. Si les autorités de l'État approuvent, formellement ou tacitement, les actes des particuliers violant dans le chef d'autres particuliers soumis à sa juridiction les droits garantis par la Convention, la responsabilité dudit État peut se trouver engagée au regard de la Convention (*Chypre c. Turquie*, précité, § 81, et *Ilaşcu et autres*, précité, § 318).

82. H. Grotius, *De jure belli ac pacis libri tres*, 2.6.5.

l'agression et le risque imminent d'extinction de la population arménienne du Haut-Karabagh ? L'État arménien a-t-il détruit des biens civils en général et ceux des requérants en particulier à cette occasion ou plus tard et, si oui, cette action était-elle justifiée ? A-t-il expulsé ou déplacé la population locale en général et les requérants en particulier à cette occasion ou plus tard et, si oui, cette action était-elle justifiée ? A-t-il fait obstacle au retour de la population locale en général et des requérants en particulier dans le district de Latchin et, si oui, cette action était-elle justifiée ? Cette justification est-elle toujours valable aujourd'hui ?

47. Si la population arménienne avait été privée du droit à l'autodétermination interne au sein de l'État azerbaïdjanais et que le gouvernement azerbaïdjanais avait commis ou admis que des particuliers commissent des atteintes systématiques aux droits de l'homme à l'égard de cette population sur le territoire national avant la date critique du 2 septembre 1991, l'intervention militaire de l'État arménien en faveur de la population arménienne du Haut-Karabagh après cette date, y compris l'ouverture du corridor de Latchin, si elle a eu lieu, devrait être appréciée à la lumière des obligations humanitaires de la communauté internationale et de la « responsabilité de protéger »[83].

C. Conclusion préliminaire : les questions auxquelles l'arrêt ne répond pas

48. À mon avis, l'issue de la présente affaire est étroitement liée aux réponses à donner aux questions posées ci-dessus. La Cour n'ayant pas apprécié l'affaire dans le cadre d'un cheminement intellectuel logique et cohérent, sa conclusion erratique n'est pas crédible. En confinant ses débats

83. À ce stade, il y a lieu de rappeler l'importance cruciale du corridor de Latchin, reconnue explicitement par le Conseil de sécurité et par l'OSCE. Ainsi, le Conseil de sécurité demandait dans ses résolutions 822 (1993) et 853 (1993) « que soit assuré le libre accès des secours humanitaires internationaux dans la région, en particulier dans toutes les zones touchées par le conflit, afin que puissent être allégées les souffrances accrues de la population civile », et il y réaffirmait « que toutes les parties [étaient] tenues de se conformer aux principes et aux règles du droit international humanitaire ». Dans sa résolution 874 (1993), il « [demandait] à toutes les parties de s'abstenir de toute violation du droit international humanitaire [et demandait] de nouveau, comme il l'[avait] fait dans les résolutions 822 (1993) et 853 (1993), que soit assuré le libre accès des secours humanitaires internationaux dans toutes les zones touchées par le conflit ». À l'issue de sa première réunion supplémentaire (Helsinki, 24 mars 1992), le Conseil de la CSCE notait ceci : « Les ministres ont prié instamment tous les États participant à la CSCE et toutes les parties intéressées de prendre toutes les mesures nécessaires pour assurer qu'une aide humanitaire soit fournie à tous ceux qui en ont besoin, à l'aide de moyens rapides et efficaces, y compris l'ouverture de corridors sûrs sous contrôle international. » (résumé des conclusions de la première réunion supplémentaire, § 10). Il ressort clairement de ces demandes que la situation à l'époque pertinente appelait bien une intervention humanitaire urgente, passant au besoin par la mise en place de corridors sûrs. Sur l'intervention humanitaire en tant que droit et responsabilité de la communauté internationale, voir mon opinion séparée dans l'arrêt *Sargsyan* (précité).

aux limites les plus étroites, la majorité a éludé la clarification pleine et entière des prémisses de son raisonnement, discréditant encore sa conclusion. Même en admettant que les requérants aient vécu dans la région de Latchin et y aient possédé des biens, comme ils l'ont affirmé mais non suffisamment prouvé, on ne pouvait trancher l'affaire sans procéder à une analyse approfondie de la licéité des actions militaires menées dans le district de Latchin à l'époque pertinente (18 mai 1992) dans le contexte de la sécession de la « République du Haut-Karabagh », y compris l'ouverture d'un corridor humanitaire entre le Haut-Karabagh et l'Arménie aux fins de la protection d'une population menacée (la population arménienne) et, en définitive, le déplacement de civils et la destruction de biens civils consécutifs à ces actions[84].

84. Pour apporter à ces questions une réponse approfondie, il aurait fallu examiner attentivement les preuves officielles disponibles de l'occurrence au moment des faits de violations des droits de l'homme à l'égard de la population arménienne d'Azerbaïdjan, par exemple les résolutions du Parlement européen du 7 juillet 1988 (« Le Parlement européen, (…) considérant que la dégradation de la situation politique, qui a entraîné des pogroms anti-arméniens à Soumgaït et de graves actes de violence à Bakou, constitue en elle-même une menace pour la sécurité des Arméniens vivant en Azerbaïdjan, (…) condamne la violence de la répression à l'encontre des manifestants arméniens en Azerbaïdjan »), du 18 janvier 1990 (« vu la reprise par les Azéris des activités anti-arméniennes à Bakou (une première estimation fait mention de nombreuses victimes, dont certaines ont péri dans des conditions particulièrement atroces) et les attaques de villages arméniens situés en dehors du Haut-Karabagh, comme Chahoumian et Guetachen, (…) considérant que l'Azerbaïdjan a réinstauré dans toute sa rigueur le blocus du Haut-Karabagh (…) »), du 15 mars 1990 (« inquiet de la situation des droits de l'homme au Nagorny-Karabagh, placé sous administration de l'Azerbaïdjan malgré la volonté majoritaire de sa population composée à plus de 75 % d'Arméniens, et de la poursuite des violences en Azerbaïdjan »), du 14 mars 1991 (« les massacres d'Arméniens en Azerbaïdjan »), du 16 mai 1991 (« déplorant l'aggravation incessante des violences au Caucase, notamment contre les Arméniens de la région autonome du Karabagh »), du 13 février 1992 (« considérant que depuis trois ans, les populations arméniennes du Haut-Karabagh sont soumises au blocus et à des agressions incessantes, considérant que depuis fin décembre 1991 l'Azerbaïdjan a déclenché une offensive massive sans précédent contre les Arméniens du Haut-Karabagh, considérant qu'au cours du mois de janvier 1992, les localités arméniennes du Haut-Karabagh ont été bombardées à l'artillerie lourde à 34 reprises, recevant plus de 1 100 roquettes et obus faisant une centaine de victimes civiles dont des femmes et des enfants, considérant que l'état sanitaire *et ali*mentaire des habitants du Haut-Karabagh s'est encore dégradé et qu'il a atteint des limites difficilement soutenables »), du 21 janvier 1993 (« Le Parlement européen, (…) conscient de la situation dramatique des 300 000 réfugiés arméniens qui ont fui les pogroms en Azerbaïdjan, (…) estime que le blocus implacable mis en œuvre par l'Azerbaïdjan constitue une violation du droit international, et exige du gouvernement azerbaïdjanais sa levée immédiate ») et du 10 février 1994 (« considérant la reprise des bombardements de civils par l'aviation azerbaïdjanaise, notamment dans la ville de Stepanakert »), l'article 907 de la loi américaine *Freedom Support Act* (24 octobre 1992, toujours en vigueur : « Les États-Unis ne peuvent prêter assistance au gouvernement azerbaïdjanais, ni en vertu de la présente loi ni en vertu d'aucune autre loi (à l'exception de l'assistance prévue au titre V de la présente loi) tant que le président n'aura pas déterminé et rapporté au Congrès que le gouvernement azerbaïdjanais prend des mesures démontrables pour mettre fin à tous les blocus et à tous les autres recours à la force offensive contre l'Arménie et le Haut-Karabagh »), et la résolution du 17 mai 1991 du Sénat des États-Unis (« Considérant que les forces soviétiques et azerbaïdjanaises ont détruit des villages arméniens et dépeuplé les régions arméniennes à l'intérieur du Haut-Karabagh et dans ses environs en violation des droits de l'homme

L'appréciation pleine et entière des implications juridiques de l'ouverture du corridor de Latchin en tant que mesure militaire cruciale pendant la guerre de sécession est évidement pertinente aux fins de déterminer la licéité et la proportionnalité de la restriction continue alléguée des droits des requérants au respect de leurs biens et de leur vie familiale dans le district de Latchin. Ainsi, la Cour n'aurait pas dû statuer sur la privation alléguée de ces droits sans apprécier « la source des droits revendiqués »[85].

49. Pour le formuler dans les termes de la Convention, la question suprême que soulève cette affaire, et que la majorité a choisi d'ignorer, est celle de la mesure dans laquelle les « principes généraux du droit international », y compris ceux du droit relatif à la sécession d'États et du droit international humanitaire, peuvent restreindre la jouissance du droit au respect des biens au sens de l'article 1 du Protocole nº 1 (deuxième phrase). L'effet d'un tel renvoi est de subordonner l'application de l'article 1 du Protocole nº 1 à la manière dont la Cour interprète *incidenter tantum* le droit de la sécession et le droit international humanitaire. Comment les dispositions de la Convention européenne des droits de l'homme et de son Protocole nº 1 peuvent-elles se concilier avec les impératifs du droit relatif à la sécession d'États et du droit international humanitaire ? Comment les droits de l'homme consacrés par la Convention et son Protocole nº 1 peuvent-ils être protégés dans le contexte d'une sécession-remède et de l'action militaire menée par les forces de défense d'une minorité ethnique et religieuse menacée ? Ces questions nous auraient amenés à une approche très différente de l'affaire.

VI. Conclusion finale

50. L'autodétermination n'est pas un concept dépassé. Ce n'est pas un simple mot d'ordre politique, mais un droit au sens juridique du terme, droit qui a évolué à partir d'une revendication anticolonialiste historique pour s'appliquer à une revendication plus large fondée sur les droits de l'homme. En principe, le droit à l'autodétermination externe est reconnu en droit international, non seulement dans un contexte colonial mais aussi dans un contexte non colonial. Lorsqu'une partie de la population d'un État n'est

internationalement reconnus (…) [le Sénat] condamne les attaques perpétrées contre des hommes, des femmes et des enfants innocents dans les régions et les agglomérations arméniennes situées à l'intérieur et aux alentours du Haut-Karabagh ou en Arménie ; condamne l'usage aveugle de la force, y compris le pilonnage de zones civiles, aux frontières orientale et méridionale de l'Arménie ; appelle à la fin des blocus et des autres recours à la force et à l'intimidation dirigés contre l'Arménie et le Haut-Karabagh »). La Cour elle-même a reconnu l'existence d'« expulsions », accompagnées « d'arrestations et d'actes de violence » envers la population civile arménienne, commises par les « forces gouvernementales » sur le territoire azerbaïdjanais en avril-mai 1991 (*Sargsyan*, précité, § 32).

85. *Šilih*, précité, §§ 159-163.

pas représentée par son gouvernement et qu'elle est victime d'atteintes systématiques aux droits de l'homme commises par son propre gouvernement, ou par des personnes privées dont l'action est admise par le gouvernement, cette partie de la population peut être contrainte, « en suprême recours, à la révolte contre la tyrannie et l'oppression », pour reprendre la formulation puissante du préambule de la Déclaration universelle des droits de l'homme.

51. Notre Cour est compétente *ratione materiae* pour établir l'existence de pareilles violations des droits de l'homme et les conséquences juridiques qui en découlent, notamment en termes de droit des civils déplacés au respect de leurs biens. Cependant, elle aurait dû rejeter la présente affaire pour non-épuisement des voies de recours internes, défaut de qualité de victime et défaut de juridiction de l'État défendeur. Si elle avait pris plus au sérieux son rôle de recueil de preuves, ces exceptions auraient peut-être pu être écartées. Alors et alors seulement, la Cour aurait été en mesure de traiter complètement les questions de fond en jeu dans cette affaire. Elle ne l'a pas fait. Ceux qui souffrent le plus de ces omissions sont précisément les hommes et les femmes arméniens et azéris de bonne volonté qui veulent simplement vivre en paix dans le Haut-Karabagh et les districts environnants.