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The ECHR and the Nagorno-Karabakh Conflict – Applications Concerning 'Historical Situations' and the Difficult Quest for Legal Certainty

European Court of Human Rights, *Chiragov and Others against Armenia* [GC], application no. 13216/05, decision of 14 December 2011; *Minas Sargsyan against Azerbaijan* [GC], application no. 40167/06, Decision of 14 December 2011 (www.echr.coe.int)

The European Court of Human Rights has developed a significant body of case-law on the admissibility of cases stemming from events occurred before the so-called 'critical date', i.e. the moment in which the respondent State ratified the Convention or accepted the right of individual petition (see I. Kamiński, "'Historical Situations' in the Jurisprudence of the European Court of Human Rights in Strasbourg", in Polish Yearbook of International Law 2010, p. 9 ff.). Some further developments in this respect come from two Grand Chamber decisions of 14 December 2011: Chiragov and others v. Armenia and Sargsyan v. Azerbaijan. The former application was submitted by Azerbaijani nationals of Kurdish origin who fled Nagorno-Karabakh in 1992; the latter by a former Azerbaijani national of Armenian origin who fled to Armenia from the Shahumyan region, next to Nagorno-Karabakh, in the same year. At the relevant time, the conflict arising from the declaration of independence of the Nagorno-Karabakh Autonomous Oblast from Azerbaijan was at its climax. To date, the conflict is 'frozen' but, notwithstanding the efforts of international actors, specifically of OSCE, the underlying dispute between Azerbaijan, Armenia and the secessionist "Nagorno-Karabakh Republic" ("NKR") is far from being settled (an account of the events and of the current situation in the region may be found in Chiragov, paras 6-23; cf. the largely identical account in Sargsyan, paras 6-18).

In both cases, the applicants maintain that the impossibility to regain access to their homes and land infringes Articles 1, Protocol 1, 8, 13 and 14 of the Convention; in Sargsyan, it is also argued that widespread acts of vandalism against cemeteries and graves of ethnic Armenians in Azerbaijan, with the risk that the graves of the applicant's relatives might have been destroyed, constitute breaches of Articles 3 and 9. The respondent Governments challenged the admissibility of the applications on several grounds, but the Grand Chamber held both to be admissible.

Some objections raised in Chiragov were easily disposed of: notably, the contention by Armenia that the ongoing negotiations concerning the situation of refugees and internally displaced persons in the OSCE framework would preclude a

re-examination in the light of Article 35 para 2(b) of the Convention was rejected since "the application before the Court is substantially the same as another matter [if] the latter has been submitted by way of a petition lodged formally or substantively by the same applicants" (para. 61). This is not the case of "the interstate talks conducted within the OSCE, where the applicants are not parties and which cannot examine whether the applicants' individual rights have been violated" (ibidem; on this issue cf. F. Salerno, Rapporti fra procedimenti concernenti le medesime istanze individuali presso diversi organismi internazionali di tutela dei diritti umani, Rivista di diritto internazionale 1999, p. 363 ss., at p. 400). Also the allegation according to which the application was manifestly ill-founded was dismissed as the complaints raise "serious issues of fact and law under the Convention, the determination of which requires an examination of the merits" (Chiragov, paras 150, 158, 163, 168).

Other objections were joined to the merits. In both Chiragov and Sargsyan, this was the fate of the objections relating to the exhaustion of local remedies (respectively para. 120 and para. 111); the victim status of the applicants (respectively para. 110 and para. 99 – in Sargsyan, however, the claim related to the destruction of Armenian graves in general was declared to be incompatible with the Convention ratione personae, see paras. 96-97 –); and the critical issue of whether the alleged facts fall within the respondent States' jurisdiction ratione loci.

Concerning, more specifically, the last issue, Azerbaijan's objection in Sargsyan was two-pronged. The Government relied in the first place on a declaration included in its instrument of ratification, to the effect that "it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated" (see /www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=29/04/2012&CL=ENG&VL=1, last visited on April 24th, 2012). In the light of its findings in Ilaşcu and Others v. Moldova and Russia (European Court of Human Rights [GC], Application no 48787/99, Decision of 4 July 2001, paras. 20-21) and of the declaration's general scope, the Court deemed it invalid and dismissed this part of the objection (paras. 70-71). Secondly, the Respondent maintained that the hometown of Mr. Sargsyan, Gulistan, would at any rate fall outside Azeri jurisdiction since it is located along the "Line of Contact" established by the 1994 ceasefire agreement, and is "defined as an area with extensive mine and unexploded ordinance contamination with no safe access". Moreover, "Azerbaijan had no access to and was unable to exercise any control over the village. Opposing military forces were stationed on either side of the village and violations of the cease-fire agreement had occurred and continued to occur frequently" (para. 54). These circumstances were disputed by the Armenian Government, third party intervener (para. 58), and by the applicant, who also claimed (para. 57) that the responsibility of Azerbaijan would at any rate be engaged as a result of its positive obligations under the Convention. While recalling that the legal principles applying to the case are those set out in Ilascu (cited above, para. 311 ff.) and in Al-

Skeini v. United Kingdom (European Court of Human Rights [GC], Application no 55721/07, Judgment of 07 July 2011, para. 131 ff.) the Court joined this part of the issue to the merits since it lacked sufficient information "to make a ruling on the respondent Government's jurisdiction and responsibility in regard to the claims submitted by the applicant" and "these issues are closely linked to the merits of the case" (Sargsyan, para. 75).

The same stance was taken in Chiragov, where Armenia maintained that it "had not participated in the military conflict in Nagorno-Karabakh and the surrounding regions" and that the "military actions had been conducted by the 'NKR', in self-defence against Azerbaijani attacks following the proclamation of the 'NKR'" (ibid. para. 64). Moreover, Armenia denied having currently "any military presence in Nagorno-Karabakh and the surrounding regions" (ibid. para. 65), stating that the 'NKR', "since its formation, carried out its political, social and financial policies independently" (ibid. para. 66) and possesses "all the characteristics of an independent state in accordance with international law" (para. 67). A completely different picture was given by the applicants (ibid. para. 69 ff.) and by Azerbaijan, third party intervener in the case (ibid. para. 77 ff.): in their view, Armenia had actively participated in the conflict and still contributed a significant amount of material aid and crucial political support to the 'NKR' (ibid. paras 70-73, 77). Among other elements, it was stressed that many Armenian laws apply in 'NKR', the Armenian dram is the main currency in use there, and people from 'NKR' are issued Armenian passports to travel abroad (ibid. para. 75); furthermore, the close political ties between the two entities have "a strong personal element at the highest political level" (ibid. para. 78): notably, the former Prime Minister and President of 'NKR' became President of Armenia in 1998 (ibid., para. 74). Also in this case, the Court considered that it did not have sufficient information to decide on the issue at this stage of the proceedings and joined it to the merits (para. 84).

As regards the Convention's scope ratione temporis, it should be recalled that both Armenia and Azerbaijan ratified the European Convention in 2002 (on April 26 and April 15 respectively); this did not preclude a finding of admissibility as regards the complaints submitted by the applicants. The Grand Chamber considered the displacement of the applicants in 1992 "as resulting from an instantaneous act falling outside the Court's competence ratione temporis" (Chiragov, para. 104; Sargsyan, para. 91). However, the ensuing lack of access to their alleged property and homes was deemed to be a continuing situation "which the Court has competence to examine" since the date of entry into force of the Convention for the respondent State (ibidem).

It is worth noting that deprivation of property is qualified as an instantaneous act only if it respects the requirements set forth by Article 1, Protocol 1 (reference to the relevant case-law may be found both in Chiragov, para. 96 ff., and Sargsyan, para. 83 ff.). On the contrary, a continuing breach of the latter provision arises when such a deprivation is originated by an invalid act (Chiragov, para. 97; Sargsyan, para. 84) or from an ongoing de facto situation (Chiragov, para. 99; Sarg-

syan, para. 86). In Sargsyan the Court noted that, since Gulistan lies within the internationally recognized borders of Azerbaijan, "a valid legal act on the part of Azerbaijan would deprive the applicant of his alleged property and home and such deprivation would have to be considered as an instantaneous act"; however, since "according to the Government no laws have been adopted which would interfere with the alleged legal title of the applicant or any other Armenians who left Azerbaijan due to the conflict (...) [t]he applicant can (...) still be regarded as the legal owner of the alleged property" (para. 89). The situation in Chiragov was more complex, since Armenia contended that a "lawful deprivation" of the applicants' property had occurred through the enactment in 1998, by the 'NKR', of a land code which extinguished the land rights of those who had fled the occupied territories (cf. para. 102 of that decision). Besides noting that the text of the relevant statute had not been submitted in the proceedings, the Grand Chamber emphasized that "in any event (...) 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" (ibid.). The issue is discussed only for the very limited purposes of assessing jurisdiction ratione temporis whereas, as mentioned before, the assessment as to the involvement of Armenia was reserved for the merits: nevertheless, the Court here implicitly acknowledges that the 'NKR' has not become an independent State so far. Bearing in mind the broader implications of the dispute underlying the case, this is in itself an important holding in favour of Azerbaijan, especially in the light of the uncertainties relating to the right of secession in present-day international law.

Be that as it may, the most innovative part of the two decisions concerns the assessment of compliance with the six-month rule set forth by Article 35(1) ECHR. As is well known, the six-month rule aims at ensuring legal certainty while at the same time allowing alleged victims sufficient time to prepare and file their application (see among many others R. Chenal, "Articolo 35", in Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, S. Bartole, P. De Sena, V. Zagrebelski (eds.), Padova, 2012, p. 671). The relevant period usually runs from the date of the final domestic decision, but if "it is clear from the outset (…) that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of" (European Court of Human Rights, Dennis and Others v. the United Kingdom, Application no. 76573/01, Decision of 2 July 2002, p. 6). Whereas according to the Commission's and Court's case-law the rule does not apply in respect of continuing situations as long as they don't come to an end, with regard to disappearances this approach was qualified in Varnava and others v. Turkey (European Court of Human Rights [GC], Application nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009): the Grand Chamber held that "applicants cannot wait indefinitely before coming to

Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay" (ibid. para. 161). The Grand Chamber emphasized that this burden of diligence exists specifically for cases of disappearance, since "[w]ith the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness" (ibid.). Varnava did not set any precise time frame within which the complaint should be submitted, stressing the need for a particularly flexible approach in disappearance cases (as opposed, for instance, to unlawful or violent deaths) (ibid., para. 162). Nevertheless, even in "a complex disappearance situation (…) arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident" (ibid. para. 166). A longer delay may be justified if some sort of investigation is pursued, but waiting for more than 10 years would normally not be acceptable; at any rate, "stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities" (ibid.).

In Chiragov and Sargsyan the Grand Chamber concluded that also in circumstances such as these the passage of time has some negative consequences, albeit not as detrimental as in disappearance cases (Chiragov, paras. 137-141; Sargsyan, paras. 136-140). Thus, also "where alleged continuing violations of the right to property or home in the context of a long-standing conflict are at stake, the time may come when an applicant should introduce his or her case as remaining passive in the face of an unchanging situation would no longer be justified" (Chiragov, para. 141; Sargsyan, para. 140). The Court did not clarify whether the requirement of timeliness arises as regards any kind of continuing situation, even if is difficult to envisage a claim for which the passage of time has no negative repercussions of the kind described above. Furthermore, as in Varnava, the Court refused to identify general or precise deadlines by which the petition should be brought to Strasbourg. With specific regard to "complex post-conflict situations" like the ones in consideration, it emphasized that "the time-frames must be generous in order to allow for the situation to settle and to permit applicants to collect comprehensive information on the chances of obtaining a solution at the domestic level" (Chiragov, para. 142; Sargsyan, para. 141). In both cases the applications were submitted several years after the entry into force of the Convention for the respondent States (Chiragov on 6 April 2005 and Sargsyan on 11 August 2006). This notwithstanding, they were not deemed to be out of time, in the light of two "objective factors and developments" (Chiragov, para. 144; Sargsyan, para. 143): namely, the phase of intense negotiations between Armenia and Azerbaijan, after their ratification of the Convention, that gave rise to reasonable expectations for a peaceful settlement of the conflict in which also the position of displaced persons would be addressed (Chiragov, para. 145; Sargsyan, para. 144); and the personal situation of the applicants who, being

displaced persons, "are members of a particularly underprivileged and vulnerable population group" (Chiragov, para. 146; Sargsyan, para. 145).

The approach adopted in the two decisions is thus case-specific and allows the Court to retain a wide margin of discretion in handling future applications, to the detriment, however, of legal certainty. In this respect, a parallels may be drawn with another aspect of the recent case-law which is of significant relevance with regard to 'historical' cases: namely, the position according to which the "procedural limb" of the obligations stemming, in particular, from Article 2 of the Convention has evolved into a separate and autonomous duty (cf., mutatis mutandis, the criticism by Judge Zagrebelski, joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó, in his concurring opinion in Silih v. Slovenia, Application no. 71463/01, Judgment of 9 April 2009).

In Silih v. Slovenia the Grand Chamber held that the obligation to pursue an effective investigation on instantaneous acts such as a killing or a suspicious death is "detachable" from the substantive obligation set forth by Article 2 ECHR: acts or omissions of procedural nature, occurring after the critical date, may thus be reviewed by the Court even when the death took place before that date (para. 159). However, "having regard to the principle of legal certainty", in such contexts the Court's temporal jurisdiction is "not open-ended" (ibid. para. 161): "there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect" (ibid. para. 163). More specifically, "a significant proportion of the procedural steps required by this provision (…) will have been or ought to have been carried out after the critical date" (ibid.) since, as the Grand Chamber later clarified, a "failure to fulfil this procedural obligation does not, in itself, give rise to a continuing situation" (Varnava, cited above, para. 149). While before these developments the applicants in 'historical' cases tried to show the existence of continuing situations (cfr. for instance the proceedings relating to the Katyn massacre, such as Wolk-Jezierska and others v. Russia, Application no. 29520/09, statement of facts of 27 November 2009; on the issue see I. Kamiński, op. cit., p. 25), the perspective has now changed. The exact scope of the "genuine connection" criterion is currently being tested in a series of cases where killings took place several years before the critical date (cfr., for instance, Tuna v. Turkey, Application no. 22339/03, Decision of 19 January 2010), and, specifically, in situations of military operations or armed conflict (see e.g. Halide Çakir and Others v. Cyprus, Application no. 7864/06, Decision of 29 April 2010, p. 6; Jularić v. Croatia, Application no. 20106/06, statement of facts of 25 September 2009). The Nagorno-Karabakh conflict, in which several grave breaches of the laws of war are reported on all sides, including killings, (cfr. e.g. the massacre of hundreds of Azeri civilians in Khojali, on which Human Rights Watch, Azerbaijan – Seven Years of Conflict in Nagorno Karabakh, 1994, p. 6, available at www.hrw.org/sites/default/files/reports/AZER%20Conflict%20in%20N-K%20Dec 94pdf, last visited on April 25, 2012) appears to be in a gray area in this regard, especially since the strong public interest

in the prosecution of war crimes and crimes against humanity militates in favour of an approach to temporal jurisdiction that is not "overly prescriptive" (cfr. Çakir, cited above, p. 6). Moreover, in such a situation the proviso set out in Silih, to the effect that "in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner" (para. 163), may also be of relevance. Should the Court assert jurisdiction ratione temporis under similar circumstances, a further requirement that the application is not unduly delayed would seem reasonable analogously with the test developed in Varnava, Chiragov and Sargsyan (whereas the fact that Silih was issued only in 2009 should probably be taken into account in applying it).

It is not easy to foresee how the Court would answer these questions, nor whether the judgments on the merits of Chiragov and Sargsyan, through their assessment of facts and responsibilities, will somehow contribute to an overall settlement of the conflict over Nagorno-Karabakh.

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