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Communication from a NGO (29/10/2019) in the cases of CHIRAGOV AND OTHERS v. Armenia (Application No. 13216/05) and SARGSYAN group v. Azerbaijan (Application No. 40167/06)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1362e réunion (décembre 2019) (DH)

Communication d'une ONG (29/10/2019) dans les affaires CHIRAGOV ET AUTRES c. Arménie (requête n° 13216/05) et le groupe SARGSYAN c. Azerbaïdjan (requête n° 40167/06) **(*anglais uniquement*)**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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29 October 2019

Dear Sir/Madam,

Re: *Sargsyan v. Azerbaijan*, App. No. 40167/06; *Chiragov v. Armenia*, App. No. 13216/05 *(Leading cases, enhanced procedure)* - submissions pursuant to Rule 9(2) of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments – due to be examined at the 1362nd meeting (December 2019) (DH).[1]

These two cases concern the applicants' loss of their homes, land and property as a result of the Nagorno-Karabakh conflict. In both cases the applicants' complaints were upheld, with the Court finding *continuing* violations of their rights under Article 1 of Protocol No. 1 (the peaceful enjoyment of property) , Article 8 (the right to respect for private and family life and home) and Article 13 (the right to an effective remedy).

The Grand Chamber emphasised in both judgments (delivered on 16 June 2015) that the mere fact that peace negotiations were on-going did not absolve the two Governments from taking other measures, especially when negotiations had been pending for such a long time, without leading to tangible results. In both cases, the Court referred to the relevant international standards on property rights - notably the UN Pinheiro Principles, the UN Guiding Principles on Internal Displacement and the Poulsen Principles. The Grand Chamber concluded that:

> '...it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of their enjoyment' (*Sargsyan*, para. 238; *Chiragov*, para. 199).

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[1] EHRAC and the NGO Legal Guide represented the applicants in the case of *Sargsyan v Azerbaijan*.

To date, each respondent Government has made only one brief written submission to the Committee of Ministers (in March 2017), neither of which can be considered to be a serious attempt to respond to the matters of implementation raised by these two important Grand Chamber judgments. In the 'action plan' submitted by the Azerbaijani Government on 6 March 2017, as regards the Court's stipulation that a property claims mechanism be established, the Government asserted that it had 'established such mechanism which properly operates and was helpful in evaluation of the damages suffered by the applicant in the present case'. However, it then referred to an executive order of the Cabinet of Ministers (no. 51s) dated 26 February 2014, which 'established the Working Group on Evaluation of loss and damages suffered as a result of occupation of the territories of the Republic of Azerbaijan by the Armed Forces of Armenia'. Therefore, the Working Group would have no remit as regards the situation of ethnic Armenians claiming losses as a result of the actions of the Azerbaijani armed forces. As regards general measures, the action plan stated that '[t]he Government is still on the position that the main responsibility in this case belongs to the Republic of Armenia'. The Armenian Government lodged a brief submission on 8 March 2017, but to date has still not submitted an action plan.

More than two years after the publication of the merits judgments, it was noted in the subsequent Grand Chamber just satisfaction judgments (12 December 2017) that 'no property claims mechanism or other measures have been put in place by the Government which could benefit persons in the applicants' situation' (*Sargsyan v Azerbaijan* (Just Satisfaction), para. 52; *Chiragov v Armenia* (Just Satisfaction), para. 75).

It is recalled that there are more than a thousand similar cases pending at the Court (against both States) arising from the Nagorno-Karabakh conflict (*Sargsyan v Azerbaijan* (Merits), para. 216).

On 1 November 2016, EHRAC lodged a rule 9(2) submission with the CM which focused on the establishment of a property claims mechanism, setting out and applying the relevant international standards. As no progress whatsoever has yet been made by either respondent Government in implementing the 2015 Grand Chamber judgments, the earlier rule 9(2) submission is annexed to this letter, as it remains fully applicable and relevant to the situation of internally-displaced persons (IDPs) and refugees who were affected by the Nagorno-Karabakh conflict.

The Nagorno-Karabakh conflict created hundreds of thousands of refugees and IDPs on both sides, and the situation has remained unresolved in the ensuing decades. Peace negotiations have been held under the auspices of the OSCE 'Minsk Group', but as the Grand Chamber judgments made clear, settlement negotiations have repeatedly failed, due to the uncompromising attitudes of both Governments. In any event, a property compensation mechanism as required by the Court is explicitly intended to be a measure which is separate to any on-going peace negotiations. As more than four years have now passed since the Grand Chamber judgments were delivered, there is a compelling and urgent need to make discernible progress with their implementation.

Yours faithfully,

Philip Leach
Director, EHRAC

Encs.
Annex 1: Submission under Rule 9(2) of the Committee of Ministers' Rules in Sargsyan v Azerbaijan (40167/06) & Chiragov and others v Armenia (13216/05) dated 1 November 2016

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Sargsyan v Azerbaijan (40167/06) & *Chiragov and others v Armenia* (13216/05)

Submission under Rule 9(2) of the Committee of Ministers' Rules
1 November 2016

1. This document is submitted by the European Human Rights Advocacy Centre (EHRAC)[1] pursuant to Rule 9(2) of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* (10 May 2006). It concerns the execution of the judgments of the Grand Chamber of the European Court of Human Rights in *Sargsyan v Azerbaijan* (40167/06) and *Chiragov and others v Armenia* (13216/05) (16 June 2015).

2. The cases relate to the applicants' loss of their homes, land and property as a result of the Nagorno-Karabakh conflict. In both cases the applicants' complaints were upheld, with the Court finding continuing violations of their rights under Article 1 of Protocol No. 1 (the peaceful enjoyment of property), Article 8 (the right to respect for private and family life and home) and Article 13 (the right to an effective remedy).[2]

3. The Court emphasised in both judgments that the mere fact that peace negotiations were on-going did not absolve the two Governments from taking other measures, especially when negotiations had been pending for such a long time, without leading to tangible results. In both cases, the Court directed the Governments' attention towards the relevant international standards on property rights - notably the UN Pinheiro Principles,[3] the UN Guiding Principles on Internal Displacement[4] and the Poulsen Principles .[5] The Grand Chamber concluded that:

> **…it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of their enjoyment. (*Sargsyan*, para. 238; *Chiragov*, para. 199).**

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[1] EHRAC and the NGO *Legal Guide* represented the applicants in *Sargsyan v Azerbaijan*. These submissions were drafted with the assistance of Rhodri Williams (Senior Legal Expert, International Legal Assistance Consortium).
[2] When the Court issued its judgments in 2015 there were more than one thousand individual applications lodged by people who were displaced during the conflict pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan.
[3] *The Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 28 June 2005, E/CN.4/Sub.2/2005/17, Annex).
[4] Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), 11 February 1998.
[5] Committee of Ministers' Resolution 1708 (2010) – Solving property issues of refugees and internally displaced persons.

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4. Accordingly, these submissions focus on the establishment of a property claims mechanism. By virtue of the recommendation set out above, the Court has identified seven categories of issues that property claims mechanisms would need to address in order to provide effective remedies to displaced victims of the Nagorno-Karabakh conflict. These are addressed below with reference to relevant international standards (the Pinheiro and Poulsen Principles and the Guiding Principles on Internal Displacement), in the order that they were raised by the Court.

(A) "establish…"

5. In the process of considering options and identifying the key characteristics of a property claims mechanism, the respondent States should freely avail themselves of existing national and international expertise in this area, and should, in particular, ensure that they have fully consulted with refugees and internally displaced persons holding property claims in order to ensure that the solutions chosen reflect their needs, concerns and priorities.

6. Poulsen Principle 11 sets out this approach to establishing a property claims mechanism in more detail:

> *11. Member states directly affected by property claims related to displacement are:*
>
> *11.1. invited to seek technical assistance from and co-operate with other member states as well as with international organisations with relevant legal and technical expertise;*
>
> *11.2. encouraged to work with academic and civil society actors, as well as national human rights institutions, to generate reliable information on the number and nature of property claims, formulate proposals for procedures to address such claims, monitor their implementation, identify obstacles and measures to address them, and disseminate information and legal advice to persons affected;*
>
> *11.3. encouraged to consult directly with displaced persons and include them in the design and implementation of procedures and redress for property loss. Information on such procedures, including deadlines or other conditions for lodging claims, must be made available to all affected persons in a language they understand. It is of particular importance that such participatory processes seek out and take into account the views of vulnerable groups, such as female heads of household and minority groups, while respecting the security and right to privacy of all affected persons.*

7. Pinheiro Principle 14 further underscores the importance of consultation and participation in decision-making:

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14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities.

14.2 States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively. The needs of vulnerable individuals including the elderly, single female heads of households, separated and unaccompanied children, and the disabled should be given particular attention.

8. It is further submitted that the respondent States should closely coordinate their efforts in establishing their respective property claims mechanisms. This is not only of practical importance but also an arguable legal necessity, given that displaced property claimants from both sides of the conflict are fundamentally similarly situated:

   - they were subject to substantially the same legal framework governing residence and rights in land and property at the time of displacement;

   - they were displaced in circumstances of conflict with similar consequences in terms of the humanitarian vulnerability and lack of access to documentation this entails;

   - they have suffered the effects of over two decades of protracted displacement and have been unable to return to their homes or to access their possessions, due to the failure of the respondent States to resolve the Nagorno-Karabakh conflict or to take other steps to safeguard their rights;

   - they have undoubtedly been victimized by these factors and the great majority are presumptively victims of ongoing violations under Article 8, Article 13 and Article 1 of Protocol No. 1 to the Convention.

9. As a result of these extensive similarities between displaced property claimants on both sides of the Nagorno-Karabakh conflict, it is submitted that the property claims mechanisms on each side must not only individually provide adequate and effective redress for property relations but that they must also do so in a manner that provides substantially similar procedures, timelines for decisions and likely outcomes in terms of substantive reparations for displaced persons on both sides of the conflict.

10. Substantial variations between the two mechanisms that effectively privileged one category of displaced persons over another would risk raising similar discrimination concerns to those cited by the Court in *Chiragov*, in response to Armenia's argument that the need to provide assistance to hundreds of thousands of Armenian refugees and IDPs precluded attention to the rights of Azerbaijani citizens who had to flee during the conflict

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(para. 200). In rejecting this argument, the Court referred to Principle 3 of the Pinheiro Principles:

> *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.*

11. This is not to say that differences between the two property claims mechanisms required by the Court are categorically impermissible. However, such differences should, in principle, be limited to those necessary to give effect to (1) the provisions of a negotiated peace agreement based on systematic balancing of the rights of all populations affected by the conflict, should such an agreement be negotiated prior to the establishment of a property claims mechanism, or (2) the express wishes of the majorities of the respective populations of refugees and IDPs, to the extent that they deviate from each other. The latter example underscores the importance of designing property claims mechanisms on the basis of extensive consultations with displaced victims. Beyond the need to avoid arbitrarily different treatment of similarly-situated groups of refugees and IDPs, there are numerous practical reasons for coordination that would contribute materially to the effectiveness of the remedies provided by both mechanisms. For instance, the development of a memorandum of understanding between the respondent States defining areas of cooperation in implementing the judgments would allow the competent authorities of each respondent State to facilitate contact between displaced property claimants currently under their jurisdiction and the claims mechanism(s) developed by the other respondent State. Early development of such a memorandum would not only facilitate consultation of displaced persons, but could also facilitate the submission of claims and communications between claimants and the claims mechanisms, greatly increasing accessibility (see point C, below).

12. Finally, a coordinated approach would not only send strong signals to the rest of the world regarding the intention of the respondent States to comply with their obligations under the Convention, but could also help to build confidence between the two States, facilitating renewed efforts to arrive at an overall agreement for peace.

(B) "…a property claims mechanism…"

13. A key question in establishing a property claims mechanism relates to what form it should take, and particularly whether it should be created by tasking existing institutions or by developing new ad hoc bodies to resolve claims. Standards such as the Pinheiro Principles foresee a broad range of possibilities:

> *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. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner.

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12.3 States should take all appropriate administrative, legislative and judicial measures to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner.

12.4 States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms, including guidelines pertaining to institutional organization, staff training and caseloads, investigation and complaints procedures, verification of property ownership or other rights of possession, as well as decision-making, enforcement and appeals mechanisms. States may integrate alternative or informal dispute resolution mechanisms into these processes, insofar as all such mechanisms act in accordance with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

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.

14. The Poulsen Principles, drawing on European post-conflict practice, are more prescriptive in calling for special, ad hoc mechanisms to be set up in cases of systematic displacement and dispossession:

10.6. [Member states are invited to] 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 procedures 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. Sufficient funding must be provided to such bodies and relevant law-enforcement bodies must be legally bound to enforce their decisions.

15. The Explanatory Memorandum to the Poulsen Principles[6], provides further guidance on the rationale such bodies should apply and how they should be supported.

> *11. It is important to consider already at the outset the available state capacity and resources to ensure a fair and expedient property restitution process. Regular courts will seldom have the capacity to deal with an additional caseload of restitution cases. It may be necessary to establish special property commissions that use streamlined administrative procedures to decide restitution claims expediently so as to provide redress quickly.*
>
> *12. The capacity and resources of other state institutions that need to be involved in the property restitution process should be assessed at the outset and, where required, reinforced so that they do not hold up or delay the restitution process. This is of particular importance in respect of the enforcement of restitution decisions.*
>
> *13. Sufficient resources should be allocated to train staff involved to be familiar with the rights of refugees and displaced persons and with human rights law and standards generally in order to provide adequate assistance.*

16. Both the Pinheiro and Poulsen Principles are clear on the need for mechanisms to be capable of acting both efficiently and impartially, for them to be adequately resourced, for their staff to be adequately trained, and for there to be guarantees of accessibility, fairness and timeliness for all stages of the process, from claims collection to enforcement of decisions.

(C) "which should be easily accessible"

17. Accessibility of claims procedures is a key concern of the Court in both the *Sargsyan* and *Chiragov* judgments, which stress the infeasibility of travel, let alone return, between territories controlled by the respondent States under current circumstances. For instance, in finding an interference with the applicants' property rights in *Chiragov*, the Court sets out fundamental obstacles to return (para. 195):

> *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,*

[6] PACE, Committee on Migration, Refugees and Population, Report, *Solving property issues of refugees and displaced persons* (Rapporteur: Mr Jørgen POULSEN, Denmark, Alliance of Liberals and Democrats for Europe), Doc. 12106, 8 January 2010.

an overall hostile relationship between Armenia and Azerbaijan and no prospect of a political solution yet in sight.

18. The Pinheiro Principles include various provisions relating to accessibility. Principle 12.2 emphasises the fundamental importance of ensuring that all categories of displaced persons, and particularly those rendered vulnerable by discrimination and conflict, enjoy equal access to property claims processes:

> *12.2 States should ensure that housing, land and property restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women, as well as the equal rights of boys and girls, and reflect the overarching principle of the "best interests of the child".*

19. Pinheiro Principle 13 goes into further detail on accessibility, covering a range of different issues and scenarios. While not all of these may be relevant to the context of the Nagorno-Karabakh conflict, they are set out in full here in order to provide extensive guidance to the respondent States.

> *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. …*
>
> *13.2 States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive. States should adopt positive measures to ensure that women are able to participate on a fully equal basis in this process.*
>
> *13.3 States should ensure that separated and unaccompanied children are able to participate and are fully represented in the restitution claims process, and that any decision in relation to the restitution claim of separated and unaccompanied children is in compliance with the overarching principle of the "best interests of the child".*
>
> *13.4 States should ensure that the restitution claims process is accessible for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum or countries to which they have fled. States should ensure that all affected persons are made aware of the restitution claims process, and that information about this process is made readily available, including in countries of origin, countries of asylum or countries to which they have fled.*
>
> *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. States should*

also consider establishing mobile units in order to ensure accessibility to all potential claimants.

13.6 States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims.

13.7 States should develop restitution claims forms that are simple and easy to understand and use and make them available in the main language or languages of the groups affected. Competent assistance should be made available to help persons complete and file any necessary restitution claims forms, and such assistance should be provided in a manner that is age and gender sensitive.

13.8 Where restitution claims forms cannot be sufficiently simplified owing to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner that is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf.

13.9 States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin.

13.10 States should ensure that persons needing special assistance, including illiterate and disabled persons, are provided with such assistance in order to ensure that they are not denied access to the restitution claims process.

13.11 States should ensure that adequate legal aid is provided, if possible free of charge, to those seeking to make a restitution claim. While legal aid may be provided by either governmental or non-governmental sources (whether national or international), such legal aid should meet adequate standards of quality, non-discrimination, fairness and impartiality so as not to prejudice the restitution claims process.

13.12 States should ensure that no one is persecuted or punished for making a restitution claim.

20. In sum, a broad range of options, many of them field-tested, are available to the respondent States in order to ensure that claims mechanisms are accessible to claimants.

(D) "and provide procedures operating with flexible evidentiary standards"

21. Here, the Court itself has given explicit guidance that the respondent States should apply a standard similar to the 'prima facie evidence' test developed by the Court in conflict displacement cases, as set out in *Sargsyan* for instance (para. 183):

> *In Damayev v. Russia (no. 36150/04, § 108-111, 29 May 2012) it considered that an applicant complaining about the destruction of his home should provide at least a brief description of the property in question. ... 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....*

22. The Court notes that its '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' is reflected in the Pinheiro Principles. In fact, the Pinheiro Principles set out a broad range of measures that property claims mechanisms should take in order not only to accommodate displaced claimants' evidentiary issues, but also provide active assistance:

> *15.4 States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection in situ or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognizing the authenticity of said copies.*
>
> *15.5 States and other responsible authorities or institutions should provide, at the request of a claimant or his or her proxy, copies of any documentary evidence in their possession required to make and/or support a restitution claim. Such documentary evidence should be provided free of charge, or for a minimal fee.*
>
> *15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property or place of habitual residence. Such information should be sought whenever information is gathered from refugees and displaced persons, including at the time of flight.*
>
> *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*

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> *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.*

23. Poulsen Principle 10.6 similarly calls for 'relaxed evidentiary standards and facilitated procedure', with the Explanatory Memorandum providing further detail:

> *15. The lack of documentary evidence and absence of property records should not prevent the restitution of property rights. Refugees and displaced persons may often not be in a position to present documentary evidence in support of their restitution claims. A property restitution process should use flexible evidentiary standards and all efforts should be made to assist refugees and displaced persons to obtain evidence.*
>
> *16. Alterations of title or cadastral records concerning properties of refugees and IDPs which occurred during the period of displacement should be scrutinised for irregularities. Where indications exist that they were carried out without the consent of the refugees and displaced persons concerned, they should be given no legal effect. State authorities should protect the physical integrity of title and cadastral records throughout periods of conflict.*

24. It is important to underscore that the relevant international standards regarding 'flexible evidentiary standards' prescribe two categories of state action. First and most obviously, they call for alternative forms of evidence to not only be admitted but also granted probative value, to the extent that claims backed by such evidence should presumptively be accepted as valid. The Court itself notes that its case-law reflects the Pinheiro Principles by virtue of the adoption of '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' (*Sargsyan*, para. 184).

25. A second and closely relate set of state duties relating to evidence of property rights involves measures to safeguard such evidence during displacement, making all relevant documentation available to displaced persons, undertaking *ex officio* investigations to establish relevant evidence and information, and independently establishing the facts related to property claims that cannot be substantiated with evidence in situations of mass displacement. The objective of this broad range of positive measures is to ensure that persons displaced by conflict are not doubly victimized – first by being forced to flee their homes under life-threatening circumstances, and second for not having had the time to assemble and secure full documentation of their property rights before fleeing (cf: *Sargsyan*, para. 194).

26. The basis for these duties lie in positive state obligations that arise in relation to people made vulnerable by conflict and displacement. The inability of displaced persons to access documentation is only one of the many well-known aspects of this vulnerability.

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The UN Guiding Principles on Internal Displacement[7] state that IDPs 'shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced' (Principle 1). The subsequent sections of the Guiding Principles set out positive measures necessary to avoid discrimination by ensuring IDPs' equal enjoyment of key categories of rights vis-à-vis non-displaced populations.

27. In relation to property, Guiding Principle 28 calls for restitution of property (or appropriate compensation where this is not possible) in the context of ending displacement. However, Guiding Principle 21 is no less significant, in that it posits a positive obligation of states during ongoing displacement situations to protect rights to properties left behind by IDPs as well as the protection of the properties themselves:

> *Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.* (21(3))

28. In the same spirit, Guiding Principle 20 sets out a range of positive measures in the area of documentation that are necessary in order to ensure that IDPs do not face discrimination in the right to recognition as a person before the law:

> *… the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.* (20(2))

29. Armenia and Azerbaijan have both adopted legislation and decrees aimed at protecting the rights of IDPs.[8] On 5 April 2006, the Committee of Ministers adopted Recommendation Rec(2006)6 on internally displaced persons. This recommendation stated that 'a large number of citizens of the Council of Europe member states can not fully benefit from their human rights as a consequence of the fact that they have been forced or obliged to leave their homes or places of habitual residence' and noted that 'despite being displaced, [they] remain citizens of their country entitled to the full enjoyment of human rights and guarantees of international humanitarian law'. The recommendation accordingly concludes (para. 2):

> *Internally displaced persons shall not be discriminated against because of their displacement. Member states should take adequate and effective measures to ensure equal treatment among internally displaced persons and between them and*

[7] Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), 11 February 1998.
[8] See further: Statement by Roberta Cohen Co-Director, Brookings Institution-University of Bern Project on Internal Displacement at the Briefing on Internally Displaced Persons in Armenia and Azerbaijan Congressional Human Rights Caucus Washington D.C., May 16, 2006, available at: https://www.brookings.edu/wp-content/uploads/2016/06/200605_RC_HRCaucus_Armenia-AzerbaijanIDPs-1.pdf

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> *other citizens. This may entail the obligation to consider specific treatment tailored to meet internally displaced persons' needs.*

30. Among the measures of 'specific treatment' referred to in Recommendation Rec(2006)6 are the obligations to provide IDPs with 'all documents necessary for the effective exercise of their rights' (paragraph 7) and to safeguard their property rights (paragraph 8).

31. The Court has also cited the UN Guiding Principles on Internal Displacement in its 2004 Judgment in *Doğan and Others v. Turkey* (Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004*)*, pointing out that the Principles establish state duties to take positive measures in favour of IDPs, notably in regard to both facilitating durable solutions to displacement and providing remedies for property and other damage arising from displacement (para. 154)

32. It is recalled that the Applicants in the current cases were either IDPs or refugees - their vulnerability and the obstacles they faced to the enjoyment of their human rights due to displacement were clearly comparable, and therefore give rise to comparable positive obligations under the Convention. The Court has already rejected arbitrary differentiation in the treatment of IDPs and refugees, pointing out the possibility that this could give rise to concerns about discrimination (*Sargsyan*, para. 240).

33. Moreover in the Court's decision on admissibility in *Sargsyan*, an exception was made to the six-month rule for submitting an application to the Court, in part due to a finding that 'displaced persons' should be deemed to be 'members of a particularly underprivileged and vulnerable population group' (para. 145). It is generally understood that reference to 'displaced persons' and 'displacement' without further qualification can include both internal and cross-border cases (or both). This is the case, for instance, in the Pinheiro Principles (para. 1):

> *The displacement of millions of people worldwide is one of the key human rights and humanitarian challenges of our time. For both refugees and internally displaced persons (IDPs) the loss of housing, land and property is the foremost challenge to the achievement of durable solutions to displacement.*

34. Under the circumstances, it is therefore crucial that property claims mechanisms not only adopt a flexible approach to evidence, but are based on a comprehensive understanding of the circumstances of the applicants and all other displaced persons in their situation, and contemplate a broad range of evidentiary and procedural measures to ensure that their property rights are accorded effective protection.

(E) "allowing the applicant and others in his situation"

35. The reference by the Court to 'others in his situation' is clearly intended to ensure that property claims mechanisms are open and fully accessible (see point C, above) to all persons displaced and/or dispossessed as a result of the Nagorno-Karabakh conflict,

including throughout the many years during which the parties have failed to negotiate a peace settlement and return has remained impossible.

36. This language requires, at a minimum, that each of the respondent States in the current cases ensures that its property claims mechanism is accessible and in a position to provide an effective remedy to all claimants of property under their respective jurisdictions over which the claimants have lost access as a result of the conflict. The Pinheiro Principles provide a useful reinforcement of this point:

> *18.2 States should ensure that all relevant laws clearly delineate every person and/or affected group that is legally entitled to the restitution of their housing, land and property, most notably refugees and displaced persons. Subsidiary claimants should similarly be recognized, including resident family members at the time of displacement, spouses, domestic partners, dependents, legal heirs and others who should be entitled to claim on the same basis as primary claimants.*

37. At a broader level, and given the significant similarities between the experiences of displaced persons on both sides of the conflict (see above, point A), this language provides a further argument for coordination and significant harmonization of remedies provided by the respective respondent States, given that all displaced persons from all parts of the affected region can presumptively be described as being 'in the situation' of the Applicants.

(F) "to have their property rights restored"

38. The Court's reference to restoration of property rights implies both legal and factual restitution, including compensation for the value of the property where restitution is impossible, as reflected in the definition of 'redress' adopted in the Poulsen Principles. Under Principle 10, Council of Europe member states were urged to:

> *10.1. guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs …;*
>
> *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 or goods having a reasonable relationship to their market value, or other forms of just reparation;*

39. In the Pinheiro Principles, the relationship between restitution and compensation is drawn more strictly in favour of the former, with compensation only to be available in the case of claims to property 'that is factually impossible to restore as determined by an independent, impartial tribunal' (Pinheiro Principles, 2.1).

40. The 'material impossibility' standard set out in the Pinheiro Principles was not found appropriate to the circumstances of the Cyprus conflict in *Demopoulos v. Turkey* (No. 46113/99, dec. 1.3.10). However, the Court's prior judgment in *Arestis-Xenides v. Turkey* (No. 46347/99, 22.12.05) rejected a property claims mechanism in which physical restitution would have been categorically ruled out as a remedy.

41. Furthermore, the Court's rejection of 'material impossibility' in Demopoulos was narrowly tailored to situations in which application of the 'material impossibility' standard for restitution that would potentially result in new violations through mass evictions of longstanding occupants of claimed homes (paras. 115-117).

42. These considerations have several implications for property claims mechanisms. First, restoration clearly implies the necessity of recognizing the property rights of displaced persons in all cases, including their rights to 'possessions' in the sense of Article 1 of Protocol No. 1 to the Convention and to their 'homes' in the sense of Article 8.

43. Second, the presumptive remedy for loss of property and homes should be physical restitution. While it may be possible for the respondent States to set out limitations on restitution of pre-war property and homes, such restrictions must be narrowly tailored to the context of the region and formulated in a manner that creates a fair balance between the human rights of all categories of affected individuals.

(G) "and to obtain compensation for the loss of their enjoyment"

44. The fact that the Court mentions this requirement separately from the requirement to 'restore' property rights indicates that it considers such compensation to be an entirely separate component of an adequate remedy. In other words whether the loss of the property is redressed through its physical restitution or compensation for its value, a separate and independent claim to compensation arises in relation to the lack of enjoyment of their property that displaced persons suffered during the period of their displacement.

45. This interpretation is supported by Poulsen Principles 10.8 and 10.9, which call on Council of Europe states to:

> *10.8. ensure the effectiveness of redress through restitution of, or, where necessary, compensation for the value of abandoned property by adopting the following measures:*
>
> > *10.8.1. compensation for non-pecuniary damage related to the circumstances in which displacement and dispossession occurred and were perpetuated;*
> >
> > *10.8.2. compensation for damage suffered as a result of displacement and lack of access to abandoned properties, such as loss of income and costs that would not have been incurred had they not been forced to leave;*

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10.8.3. compensation for wrongful destruction or damage to immovable property or loss of significant moveable property attributable to acts or omissions on the part of the authorities in whose jurisdiction the property is located;

10.8.4. assistance and reintegration measures to facilitate durable solutions, such as the establishment of conditions of security, reconstruction of homes and infrastructure at return sites, and social and economic support to all displaced persons, regardless of whether or not they choose to return to their homes of origin;

10.8.5. public acknowledgment of any responsibility for displacement-related human rights violations by the competent authorities, full investigation and disclosure of such violations and for which individual perpetrators should be held to account;

10.9. ensure, where relevant, that effective remedies and redress for loss of access and rights to property are integrated into broader reparation programmes for recurrent human rights violations.

46. While not all of the compensatory mechanisms set out in the Poulsen Principles may necessarily be appropriate to the context of cases arising from the Nagorno-Karabakh conflict, all should be carefully considered in the development of a property claims mechanism in order to ensure the effectiveness of the remedies it will ultimately provide.

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