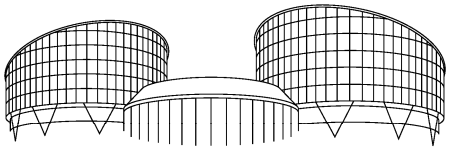

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF NARAYAN AND OTHERS v. AZERBAIJAN

(Applications nos. 54363/17 and two others)

JUDGMENT

Art 2 (substantive and procedural) • Life • Effective investigation • Art 1 • Jurisdiction of States • Killing of three Armenian soldiers on Armenian territory by a soldier in the Azerbaijani Armed Forces acting as an agent of the respondent State • Prima facie case established • Respondent State's failure to provide satisfactory and convincing explanation of the events • Jurisdictional link under the Convention established only regarding two of the soldiers; the perpetrator having exercised physical power and control over their lives in a situation of proximate targeting • Unlawful use of force attributable to the respondent State • Failure to conduct an investigation

Prepared by the Registry. Does not bind the Court.

STRASBOURG

19 December 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Narayan and Others v. Azerbaijan,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani*, President*,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
María Elósegui,
Erik Wennerström,
Mattias Guyomar*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 54363/17, 54364/17 and 54365/17) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by ten Armenian nationals ("the applicants"), on 29 June 2017;

the decision to give notice to the Azerbaijani Government ("the respondent Government") of the applications;

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by the Armenian Government, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 19 September and 21 November 2023,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The case concerns alleged violations of Articles 2, 13 and 14 of the Convention in connection with the killing of the applicants' relatives by Mr Çingiz Gurbanov, a soldier in the Azerbaijani Armed Forces, who allegedly crossed the border and initiated the shooting while acting as a State agent of Azerbaijan.

THE FACTS

2. A list of the applicants and the relevant details of their applications is set out in the appendix. They were represented before the Court by Mr Ara Ghazaryan, a lawyer practising in Yerevan.

3. The respondent Government were represented by their Agent, Mr Ç. Asgarov.

I. BACKGROUND TO THE CASE

4. On 29 December 2016 military clashes took place on the border between Azerbaijan and Armenia. Three Armenian soldiers (the applicants' relatives – see paragraph 8 below) and one Azerbaijani soldier (see paragraph 13 below) were killed in the fighting. Their bodies were found close to the village of Chinari in the Tavush region of Armenia (see also *Gurbanov v. Armenia*, no. 7432/17).

5. On 9 January 2017 the Co-Chairs of the OSCE Minsk Group released the following statement:

> "Baku and Yerevan continue to accuse each other of a December 29, 2016 attempted incursion on the Armenian-Azerbaijani border resulting in casualties. Armenian Armed Forces are still holding the body of an Azerbaijan serviceman killed in the fighting.
>
> Violations of the ceasefire are unacceptable and are contrary to the acknowledged commitments of the Parties, who bear full responsibility, not to use force. The Co-Chairs urge the leaders of Armenia and Azerbaijan to strictly observe the agreements reached during summits in Vienna and St. Petersburg in 2016, including obligations to finalize in the shortest possible time an OSCE investigative mechanism. The Co-Chairs also urge the return, without delay, of human remains, in accord with the agreements of the Astrakhan Summit of 2010, bearing in mind the exclusively humanitarian nature of this issue. We call upon the Parties to cease mutual accusations and undertake all necessary measures to stabilize the situation on the ground."

6. In a statement of 11 January 2017, Thorbjørn Jagland, Secretary General of the Council of Europe at the time, said:

> "[W]e are concerned about the humanitarian aspects of the conflict. I am aware that the violations of the ceasefire on 29 December resulted in casualties, and that the Armenian Armed Forces are still holding the body of an Azerbaijani serviceman killed in the fighting. I urge the parties to respect the ceasefire, and I fully support the Co-Chairs of the OSCE Minsk Group's call for the return, without delay, of human remains – in accordance with the agreements of the Astrakhan Summit of 2010 – bearing in mind the humanitarian nature of this issue."

II. THE CIRCUMSTANCES OF THE CASE

7. The facts of the case are disputed. They may be summarised as follows.

A. Facts as submitted by the applicants

8. The applicants, who are Armenian nationals, are the parents and/or siblings (see appendix) of Edgar Narayan, Erik Abovyan and Shavarsh Melikyan, who were soldiers in the Armed Forces of the Republic of Armenia and were killed on 29 December 2016 while on duty at the Bitlis military post, close to the village of Chinari in the Tavush region of Armenia.

9. A criminal investigation was opened by the Chief Military Investigation Department of the Investigative Committee of Armenia on 29 December 2016. On the same day, the investigator examined the site of the incident and drew up a report. Further evidence was adduced in the investigation, notably witness statements and forensic reports.

10. On the basis of that evidence, the Armenian investigative authorities established that on the morning of 29 December 2016 Mr Çingiz Gurbanov, a soldier in the Azerbaijani Armed Forces, had crossed the border into Armenian territory and advanced towards Bitlis.

11. At the time of the relevant events there were nine Armenian soldiers posted at Bitlis, including the three relatives of the applicants as mentioned above. Five soldiers were questioned about events leading to the incident. According to their consistent testimony, at around 8.30 a.m. (some minutes after the shift had changed at 8.20 a.m.) Mr Narayan left the Bitlis trench shelter to go to the toilet, some 20 metres away, while Mr Abovyan, the cook at the military post, went to collect water from the tanks located some 40 metres away from the military post. A few shots had been fired during a period of between five and ten minutes, and it was later established that these were what had killed Mr Narayan and Mr Abovyan. The photographs taken on site, which are attached to the site examination records, showed Mr Narayan where he had been shot while he was using the toilet and Mr Abovyan lying shot beside the water tanks. Both of them were unarmed and they were not wearing armoured jackets or military boots (in fact, Mr Abovyan was wearing his slippers).

12. Shortly thereafter, the alarm was raised by soldier O.H. Mr Melikyan, who was the head of the military post, accompanied by soldiers G.S. and H.S., had put on their military clothing and left the shelter and were advancing along the right-hand and left-hand sides of the road respectively in the direction of the sound of the shots, with the aim of going to the defence of the soldiers who had already fallen down. Since visibility was very much reduced because of the fog, Mr Melikyan fired a few ("several" or "one or two") single shots blindly, without aiming at a specific target, after which an automated shot was launched "from a close distance" (estimated by soldier T.S. to have been fired from a distance of 60-70 metres), hitting Mr Melikyan in the head. He fell onto his right side. The witnesses also stated that a person wearing a non-Armenian military uniform had been seen close to the military post, "on the right-hand side of the road". After about an hour of sporadic crossfire, during which time Armenian reinforcements arrived, the shots from the other side stopped.

13. The dead bodies of the three Armenian soldiers were found on the ground along with the body of Mr Gurbanov, who was wearing an Azerbaijani military uniform. A rifle, spare magazines of ammunition and spent cartridge cases were found next to Mr Gurbanov's body, which was found about 70 metres away from the military post. The body of Mr

Abovyan was found some 40 metres away from Mr Gurbanov's body in the direction of the military post; the body of Mr Narayan was found some 4 metres from that of Mr Abovyan, on an earth dam some 30 cm towards the toilet; finally, the body of Mr Melikyan was found some 8 metres from the staircase leading to the toilet, on the left-hand side of the road.

14. Forensic medical examinations of the bodies of the three Armenian soldiers were initiated on 30 December 2016 and concluded with reports issued on 1, 25 and 3 March 2017. The medical reports stated that the three soldiers had died from gunshot wounds to the thorax and neck (Mr Narayan), to the abdomen, thorax and right leg (Mr Abovyan) and to the head (Mr Melikyan). According to a report of 3 May 2017 on the forensic examination of the rifle carried by Mr Gurbanov, the fatal shots had been fired from that rifle.

15. The body of Mr Gurbanov was also examined, firstly on 29 December 2016. According to the report on the examination of the body, which had been drawn up on that occasion in the presence of M.D.H, a forensic doctor from the nearest Armenian town, and of two attesting witnesses, no signs of torture or ill-treatment were found. On 14 January 2017 the body was re-examined in the presence of M.V., the International Committee of the Red Cross coordinator of issues relating to forensic medicine. The report drafted on that date noted that no signs of torture had been found. M.V. confirmed those findings.

16. On the basis of the two above-mentioned forensic examinations (see paragraph 15 above), further biological, chemical and criminological conclusions as to the absence of traces of sexual abuse and of alcohol or drug intoxication on the body of Mr Gurbanov were issued on 9, 18 and 30 January 2017 respectively. Final forensic conclusions, confirming Mr Gurbanov's death as a result of gunshot injuries, in particular injuries to the left anterior part of his chest and abdomen and his upper left shoulder, were issued on 22 February 2017.

17. On 4 May 2018 the Armenian experts completed a further forensic medical and ballistic report on the four dead soldiers based on the type of bullets and the positions of the entry and exit wounds, aiming to ascertain whether their injuries corresponded to the traces on their clothes. The conclusions of the report confirmed what had been established in the previous forensic reports, namely that the soldiers' injuries were gunshot wounds of which the nature, position and trajectories corresponded largely to the traces on the soldiers' clothes and/or helmets.

18. According to the applicants, Azerbaijan has acknowledged that its soldier Mr Gurbanov killed the Armenian soldiers. Nonetheless, the Azerbaijani authorities have not carried out any concrete investigation of the circumstances of the killings, nor have they ever conducted an examination of the site of the incident. Moreover, on 7 February 2017 the Azerbaijani State praised the acts in question, by among other things posthumously

giving Mr Gurbanov the title of "National Hero of Azerbaijan" and naming a street after him.

B. Facts as submitted by the respondent Government

19. On 29 December 2016 the Azerbaijani Ministry of Defence issued a press statement in which it held that during that morning, "the Armenian Armed Forces' reconnaissance team had run into an ambush during violations of the Azerbaijani-Armenian State border". As a result of the battle, the Azerbaijani soldier Mr Gurbanov had been declared missing and a search was being carried out for him.

20. The respondent Government submitted that on the same day an examination of the "scene" (not specified further) had been conducted and a magazine belonging to the missing soldier with twenty-seven bullets inside had been found. No report or other document confirming any such examination has been submitted to the Court.

21. On 18 January 2017 the Military Prosecutor's Office of Azerbaijan launched a criminal investigation into the murder of Mr Gurbanov by the Armenian Armed Forces.

22. According to an affidavit sworn on 18 January 2017 by the commander of the Azerbaijani military unit which had been "conditionally named" Findiq, access, whether by transport or on foot, to the Findiq site and any examination of the site was prohibited indefinitely for security reasons, because it was situated on the enemy front line.

23. It was therefore impossible to examine the site. The respondent Government submitted that forensic medical and ballistic examinations had been carried out, and ten witnesses had been heard (see also paragraph 26 below). The witnesses stated in almost identical terms that there was a minefield in the neutral zone between the two military posts, which were located on either side of the border; at the time of the incident, namely early in the morning, there had been fog and drizzle and therefore visibility had been somewhat limited; it was possible that, while attacking their post, the "enemy sabotage group" had used the sappers to clear the mines, and Mr Gurbanov had identified the "enemy sabotage group" and opened fire on them, "heroically fighting to repel the assault", but had been captured, possibly when he was reloading his gun. There were no traces of blood inside the trench he had fired from, which most probably meant that the "sabotage group had taken him alive and murdered him at their post, and then put out information alleging that we attacked them". Also, the witnesses stated that there had been no dead bodies in the area as far as they could see and that "most probably the enemy's sabotage group [had] managed to take the bodies away with them".

24. The investigation concluded that on the morning of 29 December 2016 at around 7 a.m., Mr Gurbanov, a senior rifleman of the military unit

stationed in Tovuz (in the Azerbaijani District), had been on duty at the observation point of the battle station when a reconnaissance and sabotage group of the Armenian Armed Forces crossed the border, broke the ceasefire and attacked the observation point. He had opened fire and after an exchange of gunfire lasting fifteen to twenty minutes, he and his gun had been captured by the Armenian soldiers on Armenian territory, where he was killed at around 8.40 a.m.

25. On 13 April 2017 the investigation was suspended because it had not been possible to establish the identity of the person(s) responsible for the murder.

26. In support of the above version of the facts, the respondent Government submitted evidence from the relevant criminal investigation file: copies of ten witness statements, typed up by the Azerbaijani investigator and then confirmed by the witnesses with their signature; a copy of the affidavit about the impossibility of carrying out an on-site examination (see paragraph 22 above); and copies of the decisions concerning the initiation and the suspension of the investigation respectively (see paragraphs 21 and 25 above).

27. Concerning the posthumous award granted to Mr Gurbanov, the respondent Government submitted that it had not been given for killing the Armenian soldiers but that it had aimed to reward Mr Gurbanov for having defeated the attack on an Azerbaijani military post and prevented the incursion of an Armenian sabotage group into Azerbaijani territory. On making the award, the President of the Republic of Azerbaijan, I. Aliyev, had described how Mr Gurbanov had "fought to the last breath, killed several invaders and became a martyr"[1].

THE LAW

28. The applicants complained under Article 2 of the Convention about the deaths of Mr Narayan, Mr Abovyan and Mr Melikyan. They argued that the three soldiers had been unlawfully killed, since there had been no armed conflict at the time and the soldiers had not posed any threat to anyone. Their deaths therefore had not resulted from the use of force which was "absolutely necessary". The applicants submitted that there had also been a violation of the procedural obligations under Article 2 since Azerbaijan had failed to conduct an investigation into the killings carried out by Mr Gurbanov. Under Article 14 of the Convention in conjunction with Article 2, they further complained that the killings constituted a hate crime and that both the killings and the lack of an investigation were the result of ethnic hatred towards the Armenian victims, allegedly a policy widely advocated

[1] "Ilham Aliyev met with family members of National Hero of Azerbaijan Chingiz Gurbanov", official website of the President of the Republic of Azerbaijan.

by Azerbaijan. Lastly, the applicants maintained that, in breach of Article 13 of the Convention, there was no remedy available in Azerbaijan in respect of the alleged violations which could be accessible to and effective for Armenians.

I. JOINDER OF THE APPLICATIONS

29. Having regard to the similar subject matter of the applications, the Court finds it appropriate to order their joinder (Rule 42 § 1 of the Rules of Court).

II. OBSERVANCE OF ARTICLE 38 OF THE CONVENTION

30. The Court observes that at the time of giving notice of the present applications to the respondent Government on 15 March 2018, it explicitly requested that they provide all the relevant information and documents relating to the case, together with English translations of all national documents.

31. The respondent Government provided copies of several witness statements and an affidavit confirming the impossibility of an on-site examination at the Azerbaijani military post close to the border, as well as of the decisions firstly to initiate and then, less than three months later, to suspend the criminal investigation into the death of Mr Gurbanov (see paragraph 26 above). No further documents were provided – in particular, copies of the forensic or ballistic reports allegedly produced in the course of the investigation (see paragraph 23 above), or of the site examination records (see paragraph 20 above) – and nor were any explanations given as to the lack of such documents.

32. The applicants complained about the failure of the respondent Government to provide the full investigation file as outlined above, including the failure to provide any record of the examination of the machine-gun magazine and ammunition used by Mr Gurbanov (see paragraph 20 above). They also indicated that some paragraphs of the English translations of the witness statements were missing from the original text in Azerbaijani, which raised questions as to the authenticity of the documents.

33. All of the above pointed to a failure by the respondent Government to observe the requirements of Article 38 of the Convention, which reads as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

34. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article

34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications. This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. A failure on the part of a Government to submit any such information that is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicants' allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 of the Convention (see *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 224, 26 May 2020).

35. Turning to the present case, the Court observes that the applicants' complaint under Article 38 of the Convention relates to the alleged failure of the respondent Government to provide certain documents pertaining to the criminal investigation carried out by the Azerbaijani authorities, as well as to their alleged failure to explain certain discrepancies between what was claimed to constitute the original version of the witness statements and their English translation.

36. Concerning the authenticity of the documents submitted by the respondent Government, the Court, as master of its own procedure and its own rules, has complete freedom in assessing not only the admissibility and relevance but also the probative value of each item of evidence before it. It therefore considers that, in so far as the respondent Government have sought to rely on the documentation they have provided, which reveals discrepancies between the Azerbaijani version and the English one, the Court will draw appropriate inferences from their failure to explain such discrepancies. The Court's reliance on evidence obtained as a result of a domestic investigation and on facts established within domestic proceedings will depend on the quality of the domestic investigative process, and the thoroughness and consistency of the proceedings in question (see, *mutatis mutandis*, *Carter v. Russia*, no. 20914/07, §§ 94 and 97-98, 21 September 2021).

37. Furthermore, bearing in mind the difficulties arising from the establishment of the facts in the present case and in cases similar to it, and in view of the importance of a respondent State's cooperation in Convention proceedings, the Court emphasises that the failure of the Azerbaijani authorities to submit further documents – assuming such documents actually existed – which could have assisted it in carrying out a proper and effective examination of the present application would entitle it to draw inferences as to the well-foundedness of the applicants' allegations (contrast *Bekirski v. Bulgaria*, no. 71420/01, § 116, 2 September 2010).

38. In this connection, the Court nevertheless notes that, in spite of the respondent Government's allusions to the disputed documents (the site

examination record and forensic and ballistic reports – see paragraphs 20 and 23 above), the respondent State's authorities have not relied on any concrete factual information supposedly contained in those documents, either in the criminal proceedings conducted at the domestic level or in the proceedings conducted before the Court.

39. The Court therefore considers that, on the face of it, there is no indication, other than the allusions made by the respondent Government (see paragraphs 20 and 23 above), that any further evidence, beyond the documents submitted to the Court, was indeed adduced in the Azerbaijani criminal investigation. There therefore appears to have been no failure on the part of the respondent State to produce the required documents (see, *mutatis mutandis*, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 139, 24 February 2005); moreover, the Court considers that the gravamen of the applicants' complaint relates rather to the lack of thoroughness and ultimately the lack of effectiveness of the criminal investigation conducted by the Azerbaijani authorities, matters which will be examined in relation to the applicants' complaint concerning the failure of the respondent State to comply with its procedural obligations under Article 2 of the Convention (see paragraphs 124- 126 below).

40. In conclusion, it cannot be said that the respondent Government failed to cooperate with the Court and thus to observe the requirements of Article 38 of the Convention in the present case.

III. JURISDICTION

A. The parties' submissions

1. The respondent Government

41. The respondent Government argued that the applicants' relatives had not been under the authority or effective control, and hence within the jurisdiction, of the respondent State as a result of any extraterritorial act of the latter.

42. Firstly, the applicants had not submitted any evidence supporting their version of the facts according to which there had been an Azerbaijani military presence on Armenian territory, where their relatives had been undergoing military service. It could therefore be presumed that the bodies of the four soldiers, one Azerbaijani and three Armenian, had been taken from Azerbaijan and brought onto Armenian territory for the purposes of "staging a show".

43. Also, even if the bullets found in the bodies of the Armenian soldiers had been fired from the submachine gun belonging to Mr Gurbanov, there was no evidence that he had been the person who had fired them; it was possible that an Armenian soldier had taken the gun from Mr Gurbanov after his death and then shot the other Armenian soldiers with it. That

scenario was plausible given that the armed incident as a whole appeared to work in the interests of the Armenian side, who wanted to push the OSCE Minsk Group for a deal within the peace negotiations which were under way at the time.

44. In any event, the criminal investigation initiated by the Azerbaijani authorities had not revealed any evidence to support the idea that Azerbaijan had authorised or given orders to either Mr Gurbanov or any other Azerbaijani soldier to cross the border and attack Armenian military positions.

45. In view of all the above, the respondent Government argued that the facts of the present case did not fall under Azerbaijan's jurisdiction.

2. The applicants

46. The applicants submitted that in the absence of any ongoing armed conflict at the relevant time, Mr Gurbanov, a soldier in the Azerbaijani Armed Forces, had crossed the Armenian border and, acting as a State agent of Azerbaijan, had fired at the applicants' relatives, who were Armenian soldiers. This had been witnessed by Armenian soldiers from the Bitlis military post who had testified that they had seen a person nearby wearing a military uniform that was not Armenian. The Azerbaijani soldier had shot at the three Armenian soldiers from a close distance, bringing them within his physical control. Two of the three soldiers had been unarmed at the time of the incident and had been killed at a moment when they were not on active military service, while the third had been killed at his post while he was engaged in defending himself. The dead body of Mr Gurbanov, just like the bodies of the three Armenian soldiers, had been found on Armenian territory.

47. The scenarios proposed by the respondent Government to explain the factual background of the case, blaming the Armenian military for having staged the death scene and having killed their own soldiers (see paragraphs 41 and 43 above), lacked any plausibility and were highly offensive. Moreover, the Azerbaijani criminal investigation had not included any examination of the site of the incident, leaving such scenarios unsupported by any evidence.

48. In the same vein, the applicants challenged the authenticity and reliability of the ten witness statements submitted by the respondent Government, as they appeared to be largely identical word for word, even having the same grammatical structure and sentence sequences, with the same details and expressions used to describe what the witnesses had allegedly seen, all of this showing that the statements had in fact been copied and pasted from one to another. Also, some paragraphs of the English translations of the statements were missing from the original text in Azerbaijani. Such doubtful evidence could not be used by the Court in its examination of the case.

49. Conversely, the Armenian criminal investigation had established on the basis of a substantial body of evidence (see paragraphs 10-17 above) that the Armenian soldiers had been shot dead on Armenian territory with a submachine gun that had belonged to the Azerbaijani soldier, the position of the bodies and the forensic evidence being sufficient to show where the shooting and subsequent deaths had occurred.

50. The applicants therefore maintained that the alleged violations came under the extraterritorial jurisdiction of Azerbaijan under Article 1.

3. The Armenian Government, third-party intervener

51. The Armenian Government fully shared the applicants' position on the matter. They emphasised that the use of force by State agents operating outside the territory of the State concerned could bring an individual under the control of that State's authorities and therefore within that State's jurisdiction within the meaning of Article 1 of the Convention (they cited *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 136, ECHR 2011).

52. In that connection, they stated that the suppositions made by the respondent State as to the unfolding of the events of the morning of 29 December 2016 were absurd and unsupported by any evidence. There had been no signs of struggle on Mr Gurbanov's body, as there would be in a case where a person was kidnapped and inevitably put up some resistance; no traces of the alleged border incursion by the Armenian military group had been detected; and the Armenian soldiers had been shot at very close range, making it more plausible that the crossfire had happened on Armenian territory, where all four bodies had been found.

53. Consequently, the Armenian Government argued that the burden of proving that the facts of the present case did not in fact fall under Azerbaijan's jurisdiction lay with the respondent Government.

54. However, the investigation conducted by the Azerbaijani authorities had lacked effectiveness and the evidence produced to that investigation was unreliable, if not fake, as, for instance, the statements taken from the witnesses appeared to be, given that they included many paragraphs which were identical word for word. Such evidence was insufficient to reverse the findings of the Armenian investigation, which had concluded that the killing of the Armenian soldiers had been perpetrated by the soldier Mr Gurbanov, acting as an Azerbaijani State agent. That was also demonstrated by the fact that Mr Gurbanov had been posthumously awarded the title of "National Hero of Azerbaijan", showing that his actions had been sponsored and encouraged by the Azerbaijani authorities, such that their responsibility was engaged for the purposes of Article 1 of the Convention.

B. The Court's assessment

55. 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."

56. The Court would begin by noting that the relevant events did not take place in occupied territory but concerned an incursion over the border between the States of Armenia and Azerbaijan and the subsequent killing of the applicants' relatives, allegedly perpetrated by an Azerbaijani State agent, the soldier Mr Gurbanov. The facts of the case raise the issue of the extraterritorial jurisdiction of Azerbaijan.

57. The exercise of jurisdiction is a necessary condition for a Contracting State to be held responsible for acts or omissions imputed to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. While a State's jurisdictional competence under Article 1 is primarily territorial, the Court in its case-law 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 extraterritorially must be determined with reference to the particular facts (see *Carter*, cited above, § 124).

58. The two main criteria governing the exercise of extraterritorial jurisdiction are that of "effective control" by the State over an area outside its territory (the spatial concept of jurisdiction) and that of "State agent authority and control" over individuals (the personal concept of jurisdiction) (see *Al-Skeini and Others*, cited above, §§ 133-40, and *Georgia v. Russia (II)* [GC], no. 38263/08, § 115, 21 January 2021). In the present case, it is the second of these criteria that is relevant.

59. Moreover, as regards the procedural obligation to investigate a death which has occurred outside a State's jurisdiction, the Court has recently summarised the relevant principles in *Makuchyan and Minasyan* (cited above, § 48, citing *Güzelyurtlu and Others v. Cyprus and Turkey* [GC] no. 36925/07, §§ 178-90, 29 January 2019), in which it stated, in particular:

> "[W]here no investigation or proceedings have been instituted in a Contracting State, according to its domestic law, in respect of a death which has occurred outside its jurisdiction, the Court will have to determine whether a jurisdictional link can, in any event, be established for the procedural obligation imposed by Article 2 to come into effect in respect of that State. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, 'special features' in a given case will justify departure from this approach, according to the principles developed in *Rantsev*, §§ 243-44. However, the Court does not consider that it has to define *in abstracto* which 'special features' trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2, since these features

will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other."

60. On the basis of the above and having regard to the applicants' complaints against the respondent State as formulated in the present case, the Court considers that the issue of jurisdiction, closely linked to that of attribution of the acts in question to the respondent State, has to be established by examining at the outset the following elements: firstly, whether the fatal shooting was indeed carried out by Mr Gurbanov, as alleged by the applicants; if so, then secondly, whether each of the three victims was under his authority and control at the relevant time (the personal concept of jurisdiction); and lastly, whether he was acting as an Azerbaijani State agent at the time of that shooting. Should those elements be established, the Court could properly proceed to consider that if it has jurisdiction regarding the substantive limb of Article 2, that entails jurisdiction regarding the procedural limb (see *Güzelyurtlu and Others*, cited above, § 188, and *Georgia v. Russia (II)*, cited above, §§ 328-30).

61. Those issues are interlinked with the substance of the applicants' allegations and will be examined simultaneously with the related complaints (see, *mutatis mutandis*, *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, nos. 75734/12 and 2 others, § 161, 19 November 2019, and *Makuchyan and Minasyan*, cited above, § 52).

62. In so far as the complaints raised by the applicants under Articles 13 and 14 of the Convention are closely linked to the above, the corresponding conclusion on the issue of jurisdiction will be affected by the Court's findings in that respect under Article 2 of the Convention.

IV. SIX MONTHS

63. The respondent Government argued that, given that the applicants considered that there was no effective remedy in respect of the killing of their relatives, they should have lodged their application to the Court within six months of the time of the deaths, which had taken place on 29 December 2016. However, the applications had been received by the Court on 11 July 2017 and therefore outside the six-month time-limit.

64. The applicants indicated that they had sent their applications by post in time, namely on 29 June 2017.

65. Having examined the material submitted by the applicants, the Court notes that the envelopes containing their respective application forms bear the postmark of a post office in Yerevan, Armenia, with the date of 29 June 2017. According to its long-standing case-law on the matter (see, among many other authorities, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 117, ECHR 2015), the Court considers the postmark to be the date on which the applications were lodged, notwithstanding that the Registry of the Court may have received them at a later date (see paragraph 63 above). The

applications were therefore lodged within the time-limit provided for in Article 35 § 1 of the Convention; accordingly, the respondent Government's objection must be dismissed.

V. EXHAUSTION OF DOMESTIC REMEDIES

A. The parties' submissions

1. The respondent Government

66. The respondent Government argued that the applicants had not addressed their complaints relating to the deaths of their relatives to the Azerbaijani authorities, which could have initiated criminal investigations into the matter in accordance with the provisions of their national Code of Criminal Procedure, which provided, among other things, for the right of the victims of a criminal act to actively participate and be involved in the investigation.

67. The Azerbaijani criminal investigation had also established that members of the Armenian military had attacked the Azerbaijani military post close to the State border; any evidence to the contrary should have been filed in the Azerbaijani criminal proceedings by the applicants, and their failure to do so had meant that the national authorities had no opportunity to put matters right through their own legal system.

68. Lastly, the respondent Government denied the existence of any practice preventing Armenian citizens from contacting, whether by telephone or via the Internet, the relevant national authorities involved in criminal investigation proceedings; indeed, the applicants had not substantiated their allegations in that respect (see paragraph 70 below) by any evidence.

2. The applicants

69. The applicants stated that there was no available effective remedy for them in Azerbaijan. They referred to the conclusions drawn by the Court in *Sargsyan v. Azerbaijan* ([GC], no. 40167/06, §§ 117 and 119, ECHR 2015).

70. Furthermore, owing to the unresolved conflict concerning Nagorno-Karabakh, there were obstacles of a diplomatic and practical nature (there were no postal services; Armenian citizens had no access to the relevant Internet pages of the Bar Association or of the criminal investigation authorities; and it was not possible to make phone calls from Armenia to Azerbaijan) to attempts by Armenians to gain access to or to participate in any potential remedies in Azerbaijan.

3. The Armenian Government, third-party intervener

71. The Armenian Government also referred to *Sargsyan* (cited above) and argued that against the background of conflict between the two countries in relation to Nagorno-Karabakh, it was difficult for Armenian nationals to gain access to remedies in Azerbaijan. Nothing had changed since the Court's judgment in *Sargsyan*. Furthermore, the respondent State had not pointed to any specific domestic provisions that the applicants should have relied on in seeking the examination of their complaints. Azerbaijan had therefore 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.

B. The Court's assessment

72. In the assessment of the arguments put forward by the respondent State as to the effectiveness of the domestic remedies available to the applicants in the present case, the Court will have recourse to its findings of a principled nature stated in *Saribekyan and Balyan v. Azerbaijan* (no. 35746/11, §§ 45-48, 30 January 2020). In that case, it referred to the Grand Chamber case of *Sargsyan* (cited above, § 117) and confirmed once again that a person from Armenia or Azerbaijan would have considerable practical difficulties in bringing and pursuing legal proceedings in the other country; furthermore, the respondent Government had not provided any example of a domestic case or remedy showing that individuals in the applicants' situation were able to seek redress through the Armenian authorities.

73. Similarly, in the present case the Court considers that the practical obstacles to the proper functioning of the system for the administration of justice have to be seen as material to the potential attempts of citizens of either of the countries involved in the conflict to bring their complaints before the authorities of the other country, notwithstanding the potential good will of the domestic authorities on both sides.

74. Moreover, the respondent Government have not provided any concrete example that could show how the domestic provisions of a general nature set out in the Code of Criminal Procedure constitute a remedy that the applicants had to use for exhaustion purposes before the Azerbaijani authorities in relation to their specific complaints about the necessary investigation into the deaths of their relatives.

75. Consequently, the Court considers that the respondent Government's objection concerning the exhaustion of domestic remedies (see paragraph 66 above) should be dismissed (see, *mutatis mutandis*, *Saribekyan and Balyan*, cited above, § 48).

VI. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

76. The applicants complained that Mr Gurbanov had killed their relatives unlawfully as an agent for the Azerbaijani authorities, given that there had been no ongoing armed conflict and their deaths had therefore not resulted from the use of force which was absolutely necessary; and that the respondent State had failed to conduct an effective investigation into the killings. The applicants relied on Article 2 of the Convention, which reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The parties' submissions

1. The respondent Government

77. The respondent Government contended that the killing of the Armenian soldiers had occurred in the midst of an armed conflict on the State border. Indeed, the Armenian authorities themselves had announced at the time of the incident that "the Armenian Armed Forces were engaged in a battle with the Azerbaijani forces; sniper and mortar fire being used"[2].

78. Furthermore, the armed incident had been provoked by the Armenian Armed Forces, which had sent a military group to attack the Azerbaijani military post, killing the soldier Mr Gurbanov and subsequently keeping his body for almost forty days before returning it to the family.

79. Lastly, the respondent Government observed that the applicants' claims relied heavily on investigative material produced by the Armenian authorities. However, the respondent State had never had access to that material or any opportunity to challenge the veracity or reliability of such evidence.

[2] "Azerbaijani forces attempt sabotage infiltration at Armenian state border, Armenian forces engage in battle", ARMENPRESS Armenian News Agency.

2. The applicants

80. The applicants submitted that the killing of the three Armenian soldiers, their relatives, lacked the "absolute necessity" element which in certain circumstances would be capable of justifying such killing under Article 2 of the Convention.

81. Firstly, at the general level, there had been no armed conflict between Armenia and Azerbaijan at the relevant time, although had the cross-shooting escalated, it could have led to an armed conflict.

82. Secondly, the particular circumstances in which each of the three deaths had occurred showed that the use of force against the applicants' relatives which had led to their deaths had not been made absolutely necessary by the context. In particular, Mr Narayan and Mr Abovyan had been killed while away from the military unit for reasons unconnected with their military service, and had been unarmed and not in military uniform, whereas Mr Melikyan had been shot in crossfire while he was trying to come to the defence of the two soldiers who had already been shot by a soldier who was later identified as Mr Gurbanov.

83. Lastly, the applicants submitted that the Azerbaijani authorities had not even attempted to investigate the circumstances surrounding the death of their relatives.

3. The Armenian Government, third-party intervener

84. The Armenian Government submitted that in the present case, Azerbaijani saboteurs acting during peacetime on behalf of the State of Azerbaijan had illegally crossed the Armenian border on the orders of their superiors and attacked unarmed Armenian soldiers. The criterion of absolute necessity was therefore not fulfilled in the present case.

85. Moreover, the respondent Government's arguments were not supported by the evidence produced in the criminal investigation that the Azerbaijani authorities claimed to have conducted, which in any event lacked any effectiveness.

B. The Court's assessment

1. Substantive obligation under Article 2 of the Convention

86. As already mentioned above (paragraphs 57-58), in cases concerning the personal concept of jurisdiction, a State may also be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (see *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV, and *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004). That approach also covers isolated and specific acts of

violence involving an element of proximity (see *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, § 570, 30 November 2022) and was taken in a series of cases including *Isaak and Others v. Turkey* ((dec.), no. 44587/98, 28 September 2006), *Pad and Others v. Turkey* ((dec.), no. 60167/00, 28 June 2007), *Andreou v. Turkey* ((dec.), no. 45653/99, 3 June 2008) and *Solomou and Others v. Turkey* (no. 36832/97, §§ 48-51, 24 June 2008). In those cases, control over individuals on account of incursions and targeting of specific persons by the armed forces or police of the respondent State was sufficient to bring the affected persons "under the authority and/or effective control of the respondent State through its agents" (see *Carter*, cited above, § 127).

87. Turning to the present case, having regard to the fact that the bodies of the applicants' relatives, who are presumed to have been killed by an Azerbaijani soldier, were found on Armenian territory, it remains for the Court to establish whether Azerbaijan can be held accountable for the alleged violation of the applicants' relatives' right to life under the personal concept of jurisdiction, if that is found to be applicable in the circumstances of the case (see also paragraph 60 above).

88. In the light of the Court's case-law summarised in paragraphs 58 and 86 above, and as already mentioned in paragraph 60 above, the jurisdiction issue in the present case depends on the answers to the following two interrelated questions: (i) whether the killing amounted to the exercise of physical power and control over the men's lives in a situation of proximate targeting; and (ii) whether the killings were carried out by an individual acting as a State agent. The Court will establish the facts on the basis of the evidence available in the case file (see *Carter*, cited above, § 150).

(a) Establishment of the facts

89. The Court reiterates at the outset that in assessing evidence in cases concerning an alleged violation of the right to life, it has adopted the standard of proof "beyond reasonable doubt". In the proceedings before it, there are no predetermined formulae for assessment of evidence. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions (see, among many other authorities, *Carter*, cited above, § 151).

90. In addition, the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 26, ECHR 2004-VII). In this connection, the Court has held that, where it is unable to establish the exact circumstances of a case for reasons objectively attributable to the State authorities, it is for the respondent Government to explain, in a satisfactory and convincing manner, the

sequence of events and to exhibit solid evidence that can refute the applicant's allegations (see *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 586, 13 April 2017).

91. The Court has found a violation of Article 2 of the Convention where a prima facie case had been made that an individual was killed by State agents and the Government had failed to provide any other satisfactory and convincing explanation of the events. It has also found that it could draw inferences from the Government's conduct in respect of the investigation documents (see, for example, *Khashiyev and Akayeva*, cited above, § 139, and paragraph 34 above).

92. In the present case, while the circumstances of the deaths of the applicants' relatives are disputed between the parties, what is uncontested, either explicitly or implicitly, is that they died from gunshot wounds, the fatal shots having been fired from Mr Gurbanov's rifle (see paragraph 14 above); and that all the bodies, including that of Mr Gurbanov, had been found on Armenian territory, close to the Bitlis military post (see paragraph 13 above).

93. Concerning the identification of the possible perpetrator of the shooting of the Armenian soldiers, the Court takes note of the parties' contradictory versions of the facts, and, most importantly, of the evidence submitted in support of their respective allegations in that regard.

94. Thus, on the one hand, the applicants' allegations that their relatives had been shot by Mr Gurbanov, an Azerbaijani soldier who had entered Armenia and attacked the Armenian military base, are informed by the applicants' reliance on the conclusions of the criminal investigation conducted by the Armenian authorities into the incidents of 29 December 2016, in which a range of evidence corroborating their version of the facts was produced. Those authorities concluded that Mr Narayan, Mr Abovyan and Mr Melikyan had died from fatal gunshot wounds, the fatal shots having been fired from Mr Gurbanov's rifle (see paragraphs 14 and 17 above).

95. In so far as there is no apparent reason to doubt the quality of the domestic investigation conducted by the Armenian authorities, the Court considers that it cannot disregard the findings of that investigation in relation to the killing of the three Armenian soldiers solely because the authorities of the respondent State were not involved in the procedure. Accordingly, the Court finds that the conclusions of the Armenian authorities' investigation should be considered reliable and therefore admitted in evidence, although, like any other evidence, they may be refuted by solid and convincing evidence put forward by the opposing party (see, *mutatis mutandis*, *Carter*, cited above, § 110); similarly, the applicants' submissions that their relatives had been fatally shot by Mr Gurbanov will be presumed to be accurate as long as other evidence available in the case file does not lead to a different conclusion.

96. In that connection, the Azerbaijani authorities put forward two scenarios of how the events surrounding the death of Mr Gurbanov on the one hand and the deaths of Mr Narayan, Mr Abovyan and Mr Melikyan on the other could have unfolded; both scenarios contradict the applicants' version of the facts.

97. According to the scenario put forward by the respondent State to explain the circumstances of Mr Gurbanov's death, an Armenian group of saboteurs had initially crossed the border into Azerbaijan and opened fire, then kidnapped Mr Gurbanov and killed him on Armenian territory (see paragraphs 19, 24 and 42 above).

98. Having regard to the evidence submitted by the respondent Government in the present case, which, critically, did not include any *in situ* examination report (see paragraphs 20 and 22 above), the Court considers that this scenario falls short of the requirement of plausibility, in that it lacks any substantiation of relevant facts such as, for instance, footprints or traces of bodies being moved in the area, or indeed any physical evidence as to the crossing of the border by a large or small group of military personnel. Moreover, according to the conclusions of the forensic report drawn up by the Armenian investigative authorities, which included the participation of a neutral expert observer (see paragraphs 15-16 above), the body of Mr Gurbanov showed no traces of having been manhandled or dragged or in any way physically coerced, which would have been the case if he had been kidnapped or in any way forced into crossing the border onto Armenian territory. Lastly, the statements given by the Azerbaijani witnesses, which included substantial identical elements (see paragraphs 23 and 26 above), were often mere assertions or assumptions of what could have occurred and did not cover the full scope of the allegations made as to the kidnapping of the soldier and the moving of bodies by the Armenian saboteur group; in any event, they cannot be considered sufficiently conclusive in the absence of any corroborative evidence (see, *mutatis mutandis*, *Benzer and Others v. Turkey*, no. 23502/06, § 168, 12 November 2013).

99. The Court therefore considers that the version of the facts according to which a group of Armenian soldiers had entered Azerbaijani territory and subsequently had taken Mr Gurbanov against his will to Armenia, where they had killed him, is not supported by a sufficient body of evidence to be considered a satisfactory and convincing explanation of the events, capable of refuting the applicants' allegations that it had instead been Mr Gurbanov who entered Armenia and attacked the Armenian military post (see paragraph 43 above).

100. The respondent State's scenario concerning the circumstances of the applicants' relatives' death suggested that the Armenian authorities had possibly staged the whole scene, and after having killed the Azerbaijani soldier, had killed their own soldiers with his gun.

101. In the absence of any relevant evidence, the Court cannot but find that this explanation is not only highly speculative but also very improbable, having regard mainly to the actual circumstances of the four soldiers' deaths. Indeed, the investigation carried out by the Armenian authorities found that the sudden attack launched by Mr Gurbanov in the early morning of 29 December 2016 had taken the Armenian party completely by surprise: while Mr Narayan and Mr Abovyan had been shot, one while using the toilet and the second while attempting to fill a water tank, both having been unarmed and wearing civilian clothing at the time of the shooting, Mr Melikyan had been shot in the head after having himself fired a few shots blindly, while attempting to visually identify and neutralise the shooter (see paragraphs 12-13 and 46 above). These findings are supported by the forensic and ballistic reports, as well as by the *in situ* examination which described the scene of the killing, including the location of the spare magazine, the distance between the bodies and their position at the time of death.

102. Moreover, that scenario directly contradicts statements made by the highest State official, the President of Azerbaijan, who publicly declared that Mr Gurbanov had killed some Armenian soldiers (termed "invaders"), an action for which he was praised and posthumously made a national hero (see paragraph 27 above). This only reinforces the Court's conclusion that the respondent Government's version of the facts, accordingly to which the three Armenian soldiers might have been killed by other members of the Armenian army, is entirely speculative.

103. At this juncture, the Court must reiterate that the level of persuasion necessary for reaching a particular conclusion and the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegations made and the Convention right at stake (see *Ukraine v. Russia (*re *Crimea)* ((dec.) [GC], nos. 20958/14 and 38334/18, § 257, 16 December 2020).

104. Therefore, given the documentary and other evidence which the parties have submitted, or have failed to submit, the Court considers that overall the Azerbaijani authorities have failed to provide a satisfactory and convincing explanation of how the incident of 29 December 2016 had actually unfolded, capable of casting doubt on the account of events given by the applicants. Furthermore, the respondent Government have provided no convincing arguments that could call into question the credibility of the applicants' version of events and the evidence submitted in support of it (see *Ukraine v. Russia (re Crimea)*, cited above, § 328). The only reasonable inference to be drawn in these circumstances is that the applicants' allegations in this respect are substantially accurate (see, *mutatis mutandis*, *Ukraine and the Netherlands v. Russia*, cited above, § 610).

105. It follows that having regard to the standard of proof which it habitually employs when ascertaining whether there is a basis in fact for an

allegation of unlawful killing, namely proof "beyond reasonable doubt", the Court finds it established that the three Armenian soldiers, the applicants' relatives, were shot with the gun that was in the possession of and used by Mr Gurbanov while he was on Armenian territory in his capacity as an Azerbaijani soldier; moreover, two of them, namely Mr Narayan and Mr Abovyan, were unarmed and had been taken completely by surprise when they were shot, while the third, Mr Melikyan, had been shot while trying to visually identify the enemy shooter and repel Mr Gurbanov's attack (see paragraph 101 above).

(b) Whether Mr Gurbanov exercised physical power and control over the life of the applicants' relatives in a situation of proximate targeting

106. As framed in paragraph 88 above, the Court's assessment will first address the issue whether the killing of the applicants' relatives amounted to the exercise of physical power and control over their lives in a situation of proximate targeting.

107. The Court reiterates that it has found it established beyond reasonable doubt that Mr Gurbanov was the perpetrator of the shootings which killed the applicants' relatives. As already mentioned above, the three Armenian soldiers died from gunshot wounds, the fatal shots having been fired from Mr Gurbanov's rifle, which was found next to his body, together with gun magazines. Furthermore, the position of the bodies and the traces of gunshot residue on their clothes and/or helmets confirmed that conclusion (see paragraphs 9-17 above).

108. In the case of Mr Narayan and Mr Abovyan, who were taken by complete surprise when they were shot, and had therefore without a doubt been unable to do anything to escape the situation, it may be easily concluded that they were under the physical control of Mr Gurbanov, who wielded power over their lives (see, *mutatis mutandis*, *Carter*, cited above, § 160, and the references cited in paragraph 86 above). What remains to be established is whether the same conclusion may be drawn in relation to the third soldier, Mr Melikyan, who himself had fired his gun in the direction of the enemy but was shot shortly afterwards (see paragraph 101 above). The question is therefore whether in those specific circumstances it may be safely concluded that, in addition to the element of proximity, there were also other features indicating that Mr Gurbanov had effective control over Mr Melikyan.

109. In its assessment, the Court must rely once more on the documentary and other evidence which the parties have submitted about the events leading to the incident of 29 December 2016, while also taking into account the applicants' allegations about those events, which it has found to be substantially accurate (see paragraph 104 above). On that basis, the Court notes the particular circumstances in which Mr Melikyan was shot, namely, from a distance of around 60 to 70 m (see paragraph 12 above), in

conditions of reduced visibility because of the fog and drizzle (see paragraphs 12 and 23 above), and, importantly, during a short crossfire, and not as a selected unarmed target, as was the case for Mr Narayan and Mr Abovyan. Consequently, the Court considers that there is insufficient convincing material to enable it to establish the existence of an exception to the principle of territoriality whereby acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention. More specifically, the particular circumstances in which Mr Melikyan was shot – namely, while he was attempting to repel an assault by using his own gun to shoot at the enemy – do not form a sufficient basis for establishing whether one soldier wielded power over the life of the other in such a way as to clearly amount to an exercise of physical power and control in a situation of proximate targeting.

110. Noting also that with regard to Mr Melikyan, there are no special procedural circumstances which could create a jurisdictional link under the Convention (see paragraph 59 above, and, *mutatis mutandis*, *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 196, 14 September 2022), the Court concludes in line with its case-law (see paragraphs 58 and 86 above) that the act perpetrated by Mr Gurbanov, namely the shooting of Mr Melikyan, does not fall within the jurisdiction of the respondent State.

111. The complaints raised in that respect must therefore be found incompatible with the provisions of the Convention and inadmissible pursuant to Article 35 §§ 3 and 4 thereof.

112. That being said, in so far as Mr Narayan and Mr Abovyan are concerned, if the act perpetrated by Mr Gurbanov was attributable to the respondent State, the Court considers that it was capable of falling within the jurisdiction of that State.

(c) Whether Mr Gurbanov acted as a State agent

113. In the light of its conclusions above concerning the jurisdiction of the respondent State in relation to the act at issue perpetrated by Mr Gurbanov (see paragraphs 109, 110-111) the Court will next consider whether Mr Gurbanov acted as an agent of the respondent State when fatally shooting Mr Narayan and Mr Abovyan.

114. In a case of an extraterritorial extrajudicial targeted killing, the authorities of the State on whose soil it was carried out are limited as to their potential responses. They can and should, circumstances permitting, identify the perpetrators and the elements linking them to the State allegedly responsible for the killing. This was what the Armenian authorities did in the present case. The Court considers that the identification of the perpetrator of the killings and the indication of his connection with the authorities of the respondent State (see paragraphs 14 and 54 above) established a strong prima facie case that, in the events at issue in the

present case, Mr Gurbanov was acting as an agent of the Azerbaijani authorities (see *Carter*, cited above, § 165).

115. While there was no direct evidence of an authorisation or order given either to Mr Gurbanov or to another Azerbaijani soldier to cross the border and attack the Armenian military post, any information that might refute the Armenian version of the facts would lie wholly, or in large part, within the exclusive knowledge of the Azerbaijani authorities, which were expected to carry out a meticulous investigation into the incidents, identify those involved in the operation and analyse Mr Gurbanov's conduct.

116. The respondent State's authorities, however, have not made any serious attempt either to elucidate the facts surrounding the death of Mr Gurbanov (see paragraphs 21-26 above describing the investigation launched by the respondent State into the murder of the Azerbaijani soldier) or to counter the conclusions arrived at by the Armenian authorities in respect of the events leading to the incident (see paragraphs 52-54 above).

117. The Court must therefore reiterate its findings above, emphasising that in the absence of any convincing counterargument based on solid evidence, it must be concluded that Mr Gurbanov, dressed in his Azerbaijani military uniform and carrying his army issue gun, fatally shot Mr Narayan and Mr Abovyan while on Armenian territory. The Court reiterates that, at the material time, Mr Gurbanov was an active member of the Azerbaijani military forces and acting in the course of his official duties as a soldier (contrast *Makuchyan and Minasyan*, cited above, § 111). In particular, even assuming that he was not engaged in a planned operation but involved in a spontaneous chase, the same considerations would apply (contrast *Leonidis v. Greece*, no. 43326/05, § 58, 8 January 2009). Moreover, Mr Gurbanov's actions in causing the death of the Armenian soldiers were posthumously praised by the Azerbaijani authorities, which declared him a "national hero" for what he had done (see paragraph 27 above).

118. Noting the respondent Government's failure to displace the prima facie evidence of State involvement, the Court cannot but conclude that Mr Gurbanov was, and purported to act as, an agent of the State, and that he made use of that position in the actions he carried out which led to the deaths of the two Armenian soldiers. In those circumstances, the acts complained of are attributable to the respondent State, which is answerable for his conduct. The applicants' complaints in that respect must therefore be declared admissible.

(d) Conclusions under the substantive limb of Article 2

119. The Court has already examined and established the necessary elements enabling it to conclude that Mr Gurbanov wielded power over the life of, and therefore exercised effective physical control over Mr Narayan and Mr Abovyan (see paragraphs 109 and 110-112 above). On that basis

and in view of its findings in response to the questions framed in paragraph 88 above, the Court has accepted that, when he killed the applicants' relatives, Mr Gurbanov was acting as an agent of the respondent State and that he exercised physical power and control over their lives in a manner sufficient to establish a jurisdictional link with the respondent State for the purposes of Article 1 of the Convention.

120. The Court reiterates that Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention. In the light of the importance of the protection afforded by Article 2, the Court must subject to the most careful scrutiny complaints about deprivation of life (see *Velikova v. Bulgaria*, no. 41488/98, § 68, ECHR 2000-VI).

121. The respondent Government have sought to argue that the killings of the applicants' relatives were carried out in self-defence, while Mr Gurbanov was protecting the Azerbaijani military base from attack by an invading group of Armenian soldiers.

122. However, in view of its findings (see paragraphs 116-118 above) that there was no evidence to support the respondent State's version of the facts, and in the absence of any further argument indicating that any of the exceptions in the second paragraph of Article 2 might apply so as to justify the killing of Mr Narayan and Mr Abovyan by Mr Gurbanov, acting as an agent of the respondent State, the Court finds that there has been a violation of the substantive limb of that Article.

2. Procedural obligations under Article 2 of the Convention

123. As the Court held in *Al-Skeini and Others* (cited above, §§ 163-67) and subsequently reiterated in *Jaloud* (cited above, § 186):

> "163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see *McCann and Others* [*v. the United Kingdom*, 27 September 1995], § 161[, Series A no. 324]). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life (see, by implication, *McCann and Others*,

cited above, §§ 150 and 162; *Hugh Jordan v, the United Kingdom*, no. 24746/94, § 128, 4 May 2001; *McKerr v. the United Kingdom*, no. 28883/95, §§ 143 and 151, ECHR 2001-III; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-25, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003-VIII; *Nachova and Others*, cited above, §§ 114-15; and, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006)."

124. Turning to the present case, the Court reiterates that it has found a violation of Article 2 of the Convention on account of the unlawful use of force by an Azerbaijani State agent, Mr Gurbanov, which led to the death of the Armenian soldiers who were the applicants' relatives (see paragraph 122 above). It follows that Azerbaijan had an obligation to carry out an effective investigation of those events under Article 2 of the Convention (see paragraph 60 above; and, *mutatis mutandis*, *Ukraine and the Netherlands v. Russia*, cited above, § 916). The applicants' complaints in that respect must therefore be declared admissible.

125. The Court notes, however, that the respondent State's authorities have not initiated or conducted any investigation into the circumstances of the death of the applicants' relatives. That matter is not contested by the parties.

126. In the light of the foregoing, the Court considers that there has been a violation of the procedural limb of Article 2 of the Convention on account of the Azerbaijani authorities' failure to conduct any, let alone an effective, investigation into the death of Mr Narayan and Mr Abovyan.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

127. The applicants complained that they had not had an effective remedy in respect of their Article 2 complaints raised in the present application. They relied on Article 13 of the Convention, 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 respondent Government

128. The respondent Government submitted that the applicants had never asked the Azerbaijani authorities to initiate an investigation into the deaths of their relatives.

2. The applicants

129. The applicants referred to their statements with regard to the respondent Government's objection concerning the exhaustion of domestic

remedies (see paragraphs 69-70 above). In essence, they submitted that the possibility of applying to the Azerbaijani authorities was illusory and unrealistic.

3. The Armenian Government, third-party intervener

130. The Armenian Government concurred with the submissions of the applicants.

B. The Court's assessment

131. In what concerns the complaint raised by the relatives of Mr Melikyan under Article 13, and in view of its above findings (see paragraphs 62 and 111 above), the Court finds that it is incompatible with the provisions of the Convention and inadmissible pursuant to Article 35 §§ 3 and 4 thereof.

132. Nevertheless, in what concerns the respective complaint raised by the applicants in applications nos. 54363/17 and 54364/17, the Court reiterates its above conclusion that there were no remedies in Azerbaijan for individuals in the applicants' situation (see paragraphs 73-74 above). However, it has regard to the reasoning which led it to find a violation of Article 2 of the Convention (see paragraphs 118 and 125 above).

133. In these circumstances, the Court considers that while the complaint under Article 13 of the Convention in applications nos. 54363/17 and 54364/17 is likewise admissible, there is no need to examine separately whether, in the present case, there has also been a violation of that provision (see, *mutatis mutandis*, *Saribekyan and Balyan*, cited above, §§ 96-97).

VIII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 2 OF THE CONVENTION

134. The applicants complained that the above-mentioned breaches of the Convention had come about by means of discriminatory treatment based on ethnicity and national origin, in violation of Article 14 of the Convention, which reads 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 respondent Government

135. The respondent Government did not submit any comments on this matter.

2. The applicants

136. The applicants argued that the killings of their relatives constituted a hate crime and that both the killings and the lack of an investigation were the result of ethnic hatred towards the Armenian victims, allegedly a policy widely advocated by Azerbaijan.

3. The Armenian Government, third-party intervener

137. The Armenian Government submitted that the applicants' relatives had been killed on account of their ethnic Armenian origin and that on that same account, no investigation into the killings had been carried out by the respondent State; essentially, all this had to be viewed in the wider context of the general policy of the authorities of Azerbaijan towards Armenia.

B. The Court's assessment

138. In view of its above findings (see paragraphs 62 and 111 above), the Court finds that the complaint under Article 14 raised by the relatives of Mr Melikyan is incompatible with the provisions of the Convention and inadmissible pursuant to Article 35 §§ 3 and 4 thereof.

139. Nevertheless, in what concerns the respective complaint raised by the applicants in applications nos. 54363/17 and 54364/17, the Court notes that the essence of the applicants' complaints under Article 14 relates significantly to the general context of long-standing hostility and tension between Azerbaijan and Armenia. In so far as such allegations have not already been the subject of the Court's reasoning concerning the admissibility and merits of both the substantive and the procedural limbs of Article 2 (see paragraphs 73, 95, 99, 101, 102, 116 and 126 above), it considers that while the complaint under Article 14 in applications nos. 54363/17 and 54364/17 is likewise admissible, there is no need to give a separate ruling in respect of that complaint, given that the main legal questions raised by the present applications have already been addressed (see, *mutatis mutandis*, *Khojoyan and Vardazaryan v. Azerbaijan*, no. 62161/14, § 85, 4 November 2021).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. 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."

A. Damage

141. The applicants claimed 30,000 euros (EUR) per application, thus an overall amount of EUR 90,000, in respect of the non-pecuniary damage caused by the death of their relatives and the ensuing lack of an investigation by the respondent State in that regard.

142. The respondent Government denied responsibility for the breaches complained of by the applicants.

143. The Court awards the applicants in applications nos. 54363/17 and 54364/17, EUR 16,000 per application in respect of non-pecuniary damage, plus any tax that may be chargeable, the amounts to be awarded to the respective applicants jointly.

B. Costs and expenses

144. The applicants also claimed 1,200,000 Armenian drams (equivalent to approximately EUR 2,780) per application for the costs and expenses incurred before the Court. In respect of each application, they submitted contracts for the provision of legal services whereby they were bound to pay that sum only in the event of the Court finding in their favour.

145. The respondent Government considered these claims to be unsubstantiated.

146. The Court has previously recognised the validity of contingency fee agreements for the purposes of making an award for legal costs (see *Mnatsakanyan v. Armenia*, no. 2463/12, § 101, 6 December 2022). It sees no reason to depart from that approach in the present case.

147. Noting also that, according to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum, the Court considers it reasonable in the present case to award the sum of EUR 2,780 per application in what concerns applications nos. 54363/17 and 54364/17, covering costs under all heads, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, applications nos. 54363/17 and 54364/17 admissible and, by a majority, application no. 54365/17 inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 2 of the Convention in respect of the deaths of Mr Narayan and Mr Abovyan;

3. *Holds*, by six votes to one, that there has been a violation of Article 2 of the Convention in respect of the lack of any investigation into the deaths of Mr Narayan and Mr Abovyan;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds*, unanimously, that there is no need to examine the complaint under Article 14 of the Convention;

6. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 16,000 (sixteen thousand euros) per application in respect of applications nos. 54363/17 and 54364/17, to be paid jointly to the respective applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,780 (two thousand seven hundred and eighty euros), per application in respect of applications nos. 54363/17 and 54364/17, to be paid jointly to the respective applicants, plus any tax that may be chargeable to them, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

7. *Dismisses*, by five votes to two, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 19 December 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

APPENDIX

List of applicants:

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality Relationship to the deceased	Represented by
1.	54363/17	29/06/2017	**Grigor NARAYAN** 1963 Yerevan Armenian Father **Piruza BOYAJYAN** 1972 Yerevan Armenian Mother **Marine NARAYAN** 1991 Yerevan Armenian Sister	Ara GHAZARYAN

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality Relationship to the deceased	Represented by
			Armine NARAYAN 1993 Yerevan Armenian Sister	
2.	54364/17	29/06/2017	**Gagik ABOVYAN** 1964 Stepanavan Armenian Father **Ruzanna ZARGARYAN** 1971 Stepanavan Armenian Mother **Armen ABOVYAN** 1998 Stepanavan Armenian Brother	Ara GHAZARYAN
3.	54365/17	29/06/2017	**Melikset MELIKYAN**	Ara GHAZARYAN

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality Relationship to the deceased	Represented by
			1961 Ashotsk village Armenian Father **Ruzan(na) PETROSYAN** 1959 Ashotsk village Armenian Mother **Nel(l)i MELIKYAN** 1991 Ashotsk village Armenian Sister	