IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 9078/14

B E T W E E N:

SIRENKO

Applicants

-and-

UKRAINE

Respondent

-and-

THE REDRESS TRUST ("REDRESS")

Intervener

WRITTEN COMMENTS BY REDRESS

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1. These comments are filed with the permission of the President of the First Section of the Court granted by letter dated 26 March 2014.

2. As set out in REDRESS' application to intervene of 3 March 2014, these comments provide a comparative review of international legal standards and of international and national jurisprudence in relation to:

   i. The factors to be taken into consideration when determining whether the use of force in response to protests amounts to inhuman or degrading treatment or torture; and

   ii. The relationship between the prohibition of torture and ill-treatment and freedom of assembly, particularly the circumstances under which the use of force against a protester constitutes a violation of his or her freedom of assembly.

A. Introduction

3. Recent years have seen the eruption of mass protest movements in the Middle East, the United States, Europe, Asia, Latin America and Africa.[1] While some have been tolerated or facilitated by authorities, many have been met with a heavy-handed police or military response, often resulting in injury or death.[2]

4. International human rights law recognises that torture and other prohibited ill-treatment do not only happen in formal detention settings.[3] Protests have long been regarded as a context in which violations of individuals' Article 3 rights can occur, and this Court's jurisprudence is rich with examples of such violations. Such cases are decided on whether the force used by law enforcement authorities was "necessary" and "proportionate" to pursue a legitimate aim.[4]

5. However, the use of force by state authorities may be more than simply "unnecessary" or "disproportionate" in a protest context. In some instances it can rather be seen as a deliberate tool to punish and crush protest movements, to humiliate particular social or political groups, and to intimidate others from exercising their rights to freedoms of assembly, association and expression.[5] Each of these bears the hallmarks of the prohibited purposes found in international understandings of torture.[6] Although committed in plain sight, they can – like custodial torture – be difficult for victims to prove, carried out as they are in what often resembles a battlefield, with contested versions of who used force first, and difficulties to identify those responsible.[7] They also have a chilling effect on the right to freedom of peaceful assembly, which is recognised as "the foundation stone for every free and democratic society"[8] and "a vehicle for the exercise of many other civil, cultural, economic, political and social rights".[9]

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[1] For an overview of a number of recent protest movements throughout the world see INCLO (2013), "Take back the streets": Repression and criminalization of protest around the world, October 2013, https://www.aclu.org/free-speech/take-back-streets-repression-and-criminalization-protest-around-world-report, pp. 14-19.

[2] *Ibid*. See also, eg. the concerns raised by the Special Rapporteur on Torture in 2010: UN HRC, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/13/39, 9 February 2010, para. 61; recent UN HRC Resolutions: UN HRC Res. 22/10, 9 April 2013, preamble; and UN HRC Res. 25/38, 24 March 2014, preamble; and concerns expressed by the Parliamentary Assembly of the Council of Europe: Parliamentary Resolution 1947 (2013), "Popular protest and challenges to freedom of assembly, media and speech", Text adopted by the Assembly on 27 June 2013 (25th Sitting).

[3] See, eg. UN Committee Against Torture ("CAT"), *VL v Switzerland* (2006) Comm. No. 262/2005, 20 November 2006, CAT/C/37/D/262/2005 at para. 8.10; ECtHR, *A v United Kingdom* (1998), 23 September 1998, 1998-VI, p. 2699, § 22; UN Human Rights Committee ("HRCtee"), General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 2.

[4] ECtHR, *Yaşa and Ors. v Turkey* (2013), App. No. 44827/08, 16 July 2013, §49. Or in alternative terminology, is "indispensible" and "not excessive": see eg. ECtHR, *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §54. See also *Gamarra v Paraguay*, Comm. No 1829/2008, 30 May 2012 (where the force used was held to have been disproportionate).

[5] See, eg. African CmHR, *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011), Comm. No. 323/06, 16 December 2011, in particular para. 192, discussed further in Part B.

[6] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Art. 1; ECtHR, *Ilhan v Turkey* (2000) 26 June 2000, ECHR 2000-VII, §85; *El Masri* [GC] (2012) App. No. 39630/09, 13 December 2012, §197. The UN Human Rights Committee has explained that it draws the distinction between torture and other ill-treatment on "the presence or otherwise of a relevant purposive element": HRCtee, *Giri v Nepal* (2011), Comm. No. 28 April 2011, 1761/2008, para. 7.5.

[7] See, eg. *Athan v Turkey* (2013), App. No. 36144/09, 3 September 2013, §26.

[8] HRCtee, *General Comment No. 34, Article 19: Freedom of Opinion and Expression*, CCPR/C/GC/34, 12 September 2011, para.2. The Committee has pointed out that although its General Comment No. 34 refers to freedom of opinion and expression, it also provides guidance with regard to elements of freedom of assembly and association, see UNHRComm, Communication No. 1790/2008, *Govsha, Syritsa and Mezyak v Belarus*, Views adopted on 27 July 2012, para. 22. See also German Federal Constitutional Court (First Senate), 14 May 1985, 1 BvR 233, 341/81, translation at: http://www.iuscomp.org/gla/judgments/tgcm/v850514.htm, para. I.2.

[9] UN Human Rights Council (UN HRC), Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012, A/HRC/20/27, http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/20/27, **("Kiai 2012 Report")**, para. 12.

6. There are concerns, therefore, that States are increasingly using illegitimate force to quell protests and intimidate opposition in a way that grossly violates rights to life and freedom from torture and other ill-treatment and rights to freedom of assembly and expression. These concerns have been expressed through resolutions at the UN Human Rights Council on the "Promotion and Protection of Human Rights in the Context of Peaceful Protests" adopted in 2013 and 2014.[10] The Preamble to the latest of those resolutions affirms and recognises that the Council is:

> Deeply concerned about extrajudicial, summary or arbitrary executions, torture and other cruel, inhuman or degrading treatment or punishment of persons exercising their rights to freedom of peaceful assembly, of expression and of association in all regions of the world,
>
> Expressing its concern about the number of attacks targeting human rights defenders and journalists in the context of peaceful protests,
>
> Expressing its concern also at the increasing criminalization, in all parts of the world, of individuals and groups organizing or taking part in peaceful protests.[11]

7. The issue has also received considerable attention from the Council of Europe, with a resolution adopted by the Parliamentary Assembly in June 2013 on "Popular protest and challenges to freedom of assembly, media and speech".[12] The Assembly noted that popular protests have erupted in many European and non-European countries recently, "deplore[d] recent cases of excessive use of force to disperse demonstrators and reiterate[d] its call on the authorities to ensure that police action, where necessary, remains proportionate".[13] The Assembly invited the Secretary General of the Council of Europe to consider drawing up guidelines in respect of human rights in the policing of demonstrations.[14]

B. Factors to be taken into consideration when determining whether the use of force in response to protests amounts to inhuman or degrading treatment or torture

i. Principles on the use of force by state agents: necessity and proportionality

8. International human rights law recognises that state agents may use force against individuals only in certain tightly defined circumstances, namely where it is both "necessary" and "proportionate" to achieve a legitimate aim.[15] The Court has held in cases concerning Article 2, that, for the use of force to be lawful, it must be "absolutely necessary" to achieve a legitimate aim and "strictly proportionate" to doing so.[16] In Article 3 cases, the Court tends to use the analogous terminology "indispensable" and "not excessive".[17] Legitimate aims may include "effecting the lawful arrest of a person suspected of having committed an offence, preventing the escape of a person lawfully detained, defending a person from unlawful violence, self-defence, or an action lawfully taken for the purpose of dissolving a demonstration or quelling a riot or insurrection".[18]

9. For the use of force to be "proportionate" it must be shown that "the benefits attached to the objective pursued should outweigh the damage that would be caused through the violence". For such force to be "necessary" it must be shown that "the lowest possible level of force necessary to achieve a legitimate objective" was used.[19]

10. Many domestic legal systems also reflect these principles in their legislation and jurisprudence.[20] In

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[10] UN HRC, Res. 25/38, 24 March 2014; UN HRC, Res. 22/10, 9 April 2013.
[11] UN HRC, Res. 25/38, 24 March 2014, preamble.
[12] Parliamentary Assembly of the Council of Europe, Resolution 1947 (2013), Text adopted by the Assembly on 27 June 2013 (25th Sitting). See also, Committee on Political Affairs and Democracy, rapporteur Mr Diaz Teiera, 'Popular protest and challenges to freedom of assembly, media and speech', Doc. 13258, 26 June 2013, http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=19955&Lang=EN.
[13] *Ibid*., para.1 and para. 7.
[14] *Ibid*., para.10.
[15] UN General Assembly, Code of Conduct for Law Enforcement Officials, Res. 34/169, 17 December 1979, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/34/169, (**"UN Code of Conduct for Law Enforcement Officials"**), Art. 3. See also UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (**"UN Basic Principles on the Use of Force and Firearms"**), Principle 9. These provisions are considered to reflect customary international law: see Report of the Special Rapporteur extrajudicial, summary or arbitrary executions, submitted by Philip Alston, 5 September 2006, A/61/311, (**"Alston 2006 Report"**), para. 35.
[16] ECtHR [GC] *Giuliani & Gaggio v Italy* (2011) App. No. 23458/02, 24 March 2011, §§175-176.
[17] See eg. ECtHR, *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §54.
[18] Manfred Nowak & Elizabeth McArthur, 'The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment', 16 *Torture (2006)* 147, 149.
[19] Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, submitted by Christof Heyns, 23 May 2011, A/HRC/17/28, (**"Heyns 2011 Report"**), para. 49, citing UN HRCtee, *Suárez de Guerrero v. Colombia* (1982) No. R.11/45, A/37/40, 31 March 1982; ECtHR, *Gül v. Turkey*, ECHR 2267/931 (4 December 2000); IACtHR, *Zambrano-Vélez and others v Ecuador* (2007) Merits, Reparations and Costs, Series C, No.166 (4 July 2007),
[20] Although note the conclusion of the Special Rapporteur on Extrajudicial Executions, based on a study of 76 countries, that many States' legislation does not comply with international standards in this regard: see Heyns 2011 Report, above n.19, paras. 18 and 91-103.

Azerbaijan, for example, the Law on Police provides that physical force, special equipment or firearms may be used when absolutely necessary in a manner proportionate to the danger posed.[21] Hungary's Law on the Police provides that "[o]f several possible and suitable options for Police measures or means of coercion, the one which is effective and causes the least restriction, injury or damage to the affected person shall be chosen".[22] Similarly, in Canada, the Supreme Court has stressed that "[t]he legal constraints on a police officer's use of force are deeply rooted in [the] common law tradition":

> police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.[23]

11. A number of international and regional instruments reflecting these standards provide guidance for law enforcement officials on the use of force, including when policing assemblies. Key among these are the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Basic Principles Code of Conduct for Law Enforcement Officials, the European Code of Police Ethics, and the OSCE Guidelines on Freedom of Peaceful Assembly.[24]

ii. Any unnecessary or disproportionate use of force by a state agent will in principle amount to a violation of Article 3

12. The seriousness with which the law treats the use of force by state agents in a protest context is reflected in this Court's approach to such cases under Article 3. This Court has established in a line of cases in the context of protests that "[w]hen a person is confronted by police or other agents of the State, recourse to physical force which has not been made strictly necessary by the person's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention".[25] Any use of force by agents of the state that is not necessary or proportionate therefore will *prima facie* amount to a violation of Article 3. As the Court explained in *Pekaslan v Turkey*, "only in certain well-defined circumstances can recourse to physical force by police officers be deemed not to amount to ill-treatment".[26]

13. Despite this, the Court will often, though not always, also undertake an examination of the severity of the pain and suffering inflicted.[27] Cases of unjustified use of force before this Court amounting to a violation of Article 3 were found to have resulted in injuries including scratches to tenderness on limbs, chest pain while breathing, pain on the forehead, possible fracture of the ribs and left side of the chest[28] and "bruises on both arms and a swelling on a foot as well as a 4 cm long laceration on the left parietal region".[29]

14. Where a person is already under the power and control of law enforcement authorities, such as when they are already restrained or handcuffed, it will be neither necessary nor proportionate to use force, and any use of force will in the normal course of events amount to a violation of Article 3.[30] In this way, this Court has repeatedly held that the use of tear gas or pepper spray when a person is already under the control of police is not compatible with the prohibition of ill-treatment within the meaning of Article 3 of the Convention.[31]

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[21] Law on Police of 8 October 1999, Article 26.VI, cited in *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §24.
[22] Section 15(2), Act XXXIV on the Police (2008), cited in OSCE/ODIHR, "Guidelines on Freedom of Peaceful Assembly", Second Edition, 25 October 2010, http://www.osce.org/odihr/73405 (**"OSCE Guidelines on Freedom of Peaceful Assembly"**), p.87.
[23] *R v Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.
[24] UN Code of Conduct for Law Enforcement Officials, above n. 15; UN Basic Principles on the Use of Force and Firearms, above n. 15; European Code of Police Ethics, Recommendation Rec(2001), adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum (**"European Code of Police Ethics"**), para. 35 and 37; OSCE Guidelines on Freedom of Peaceful Assembly, above n. 22, Guideline 5.5 and paras. 171-178.
[25] *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §43 (protestor hit on head and back, and kicked in chest and abdomen); *Kop v Turkey*, App. No. 12728/05, 20 October 2009, §27 (victim hit in the eye with a baton); *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §55 (victim beaten and kicked and sprayed with tear gas); *Timtik v Turkey* (2010) App. No. 12503/06, 9 November 2010, § 47 (victim hit in the face and subjected to pepper spray).
[26] *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, §58.
[27] See, eg. *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §§37, 45, cf. *Pekaslan v Turkey* (2012), *ibid*; *Balçik and others v. Turkey* (2007), App. No. 25/02, 29 November 2007.
[28] *Saya and Others v Turkey* (2008), App. No. 4327/02, 7 October 2008, §6 and §22.
[29] *Balçik and others v Turkey* (2007), App. No. 25/02, 29 November 2007, see §6 and §§32-4.
[30] *Ribitsch v Austria* (1995), App. No. 18896/91, 4 December 1995, §38; *Alí Güneş v Turkey* (2012), App. No. 9829/07, 10 July 2012, §41 (in relation to the use of tear gas against a person under control). See further Nowak & McArthur, above n. 18, 149.
[31] *Alí Güneş v. Turkey* (2012), App. No. 9829/07, 10 July 2012, §43; *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §62.

15. Where a person is not under custody or control, the key question as to whether such force amounts to a violation of Article 3 is if it was necessary to achieve a legitimate aim and was proportionate in the circumstances. Because of the Court's approach to the severity of the unjustified use of force by state agents, the Court will normally find a violation in cases where these criteria are not met. Although recognising that in some circumstances law enforcement authorities may use force, the Court stresses that "the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals".[32] As set out in more detail below, other international and regional human rights bodies, as well as national courts, have taken the same approach.

16. In either case, where the use of force results in the infliction of severe physical or mental pain or suffering, particularly for a prohibited purpose such as intimidation, punishment or discrimination, it may amount to torture.[33]

iii. Necessity and proportionality of the use of force to achieve a legitimate aim

17. Factors courts will consider in an assessment of whether force used was necessary and proportionate include the aim pursued by applying the force, the circumstances in which the force was used, including the actions of the complainant and any threat they posed, the type of weapon used, and the intensity of the force applied, which may be demonstrated by injuries sustained by the complainant.

Is force justified?

18. A key starting point is whether any force should have been used at all. The question of when it is lawful for authorities to disperse protests is examined further in Part C. Even where protests are unlawful under domestic law, "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance" towards them.[34] The Convention does not "allow for a balancing exercise to be performed between the physical integrity of an individual and the aim of maintaining public order".[35] This approach is consistent with international standards and the jurisprudence of other international human rights bodies.[36]

19. The Convention and other international treaties protect the right to "peaceful" assembly. However, "this does mean that States are absolved of human rights obligations in controlling violent assemblies".[37] These obligations include respect for the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment, which must be "guaranteed by States to all individuals under all circumstances and at all times, including in the exercise of the right to freedom of … peaceful assembly".[38] The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association (UN Special Rapporteur on freedom of assembly) has endorsed the view of a number of states that "the right to life… and the right to be free from torture or cruel, inhuman or degrading treatment or punishment … should be the overarching principles governing the policing of public assemblies".[39]

20. Where some participants in the course of an otherwise peaceful demonstration engage in violence, law enforcement authorities should be equipped to differentiate between peaceful and non-peaceful participants and remove violent participants so as to allow peaceful protestors to continue to

[32] *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §55.
[33] Cf. Nowak & McArthur, above n.19, pp. 150-151. For an argument that the alleged deliberate and repeated targeting of tear gas into homes of Shi'a community members as part of policing protests may amount to torture, see further Physicians for Human Rights, 'Weaponizing Tear Gas: Bahrain's Unprecedented Use of Toxic Chemical Agents Against Civilians', August 2012, https://s3.amazonaws.com/PHR_Reports/Bahrain-TearGas-Aug2012-small.pdf, p. 31.
[34] ECtHR, *Oya Ataman v Turkey* (2006), App. No. 74552/01, 5 December 2006, §§41-42.
[35] *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, §58.
[36] See, eg. UN Basic Principles on the Use of Force and Firearms, above n.15, Principles 4 and 13. IACtHR, *Velez Restrepo v Colombia*, Merits, Reparations and Costs, Series C, No. 248 (3 September 2012); HR Ctee, *Gamarra v Paraguay*, Communication No 1829/2008, 30 May 2012. See also UN HRC, Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests: Report of the United Nations High Commissioner for Human Rights, A/HRC/22/28, 21 January 2013, (**"UNHCHR 2013 Report"**), para. 13 ("The dispersal of assemblies should only be a measure of last resort. Law enforcement authorities should not resort to force during peaceful assemblies, and they should ensure that force is only used on an exceptional basis").
[37] Joseph, Schultz & Castan (2004), *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed., Oxford: Oxford, p. 569.
[38] Kiai 2012 Report, A/HRC/20/27, above n.9, para. 19.
[39] *Ibid*., para. 35.

participate.[40] Sporadic acts of violence are not in themselves grounds to resort to use of force against all protesters. Any force that is used must still meet the requirements of necessity and proportionality.

21. In the case of *Muradova v Azerbaijan* the Court was prepared to accept that "the authorities may have been justified, to a certain extent, in using a certain degree of force against … riotous protesters for the purpose of restoring order".[41] However, it did not accept that there was any justification for using force against the individual applicant. According to the Court, there was "no evidence showing that the applicant was somehow engaged in any violent behaviour during the demonstration. … At the time of the incident, she was trying to leave Azadliq Square, in an apparent attempt to avoid danger. There is nothing to indicate that her conduct somehow provoked or made it necessary for the police to use force on her. Accordingly, the force used against the applicant was unnecessary and excessive".[42]

22. Another case in which the use of force was not justified is *Velez Restrepo v Colombia*.[43] In that case, a journalist who was filming a protest was beaten in the abdomen with a rifle butt by police who were attempting to seize a tape on which he had recorded police violence against other protestors. In proceedings before the Inter-American Court of Human Rights, the State argued that "the incident in which Mr. Velez was injured was not a deliberate attack, but the result of a chaotic situation that led to acts of violence involving the marchers that caused the State's security forces to react, where one of the consequences was the injury to Mr. Velez".[44] Nevertheless, it accepted that it was responsible for a violation of Article 5 of the Inter-American Convention (right to humane treatment).[45]

Was the level of force justified?

23. According to this Court "it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it".[46] In this regard, the "burden rests on the Government to demonstrate with convincing arguments that the force used was indispensable and not excessive".[47]

24. The use of lethal weapons such as firearms is strictly regulated. Article 9 of the UN Basic Principles on the Use of Force and Firearms, which is generally accepted to reflect customary international law,[48] provides:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

25. However what are termed less-lethal weapons can also cause serious concerns in respect of Articles 2 and 3. The Committee against Torture has expressed concern on a number of occasions about the United Kingdom's use of plastic bullet rounds as a means of riot control. According to the Committee, to uphold its obligations under the Convention Against Torture, the use of plastic bullets should be abolished.[49]

26. The way in which certain weapons are used may also make their use disproportionate. In one case, while the Court found that the use of tear gas to disperse a crowd was justified because it was clear that the demonstration was not peaceful, the way in which it was fired led to a violation of Article 3. The Court held that "firing a tear-gas grenade along a direct, flat trajectory by means of a launcher cannot be regarded as an appropriate police action as it could potentially cause serious, or indeed fatal injuries, whereas a high-angle shot would generally constitute the appropriate approach, since it

[40] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 159; see also UNHCHR 2013 Report, above n.36, para. 10; *Brokdorf* (1985), German Constitutional Court, p. 316 (holding that when a minority of protesters cease to demonstrate peacefully, the right to free assembly for the remaining peaceful protesters is still protected. The police must exhaust all reasonable measures to control the minority of non-peaceful protesters before infringing on the rights of the peaceful majority.
[41] *Muradova v Azerbaijan* (2009) App. No. 22684/05, 2 April 2009, §133.
[42] *Ibid*.
[43] IACtHR, *Velez Restrepo v Colombia*, Merits, Reparations and Costs, Series C, No. 248 (3 September 2012), para. 135.
[44] *Ibid*., para. 143.
[45] *Ibid*., para. 135.
[46] *Güleç v Turkey* (1998) App No. 21593/93, 27 July 1998, para.71 (in relation to article 2).
[47] *Muradova v Azerbaijan* (2009) App. No. 22684/05, 2 April 2009, §109.
[48] Alston 2006 Report, above n.15, para. 35. See also UN Code of Conduct for Law Enforcement Officials, above n.15, Article 3(c).
[49] UNCAT, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, A/51/44 (1996) paras. 58-65, at para. 64; United Kingdom of Great Britain and Northern Ireland, A/54/44 (1999) paras. 72-77, at paras. 76-7.

prevents people from being injured or killed in the event of an impact".[50] A boy struck by a tear gas canister fired in this manner was held to have been a victim of a violation of Article 3.[51]

27. Batons are another less lethal weapon that can cause serious injury or death if used with excessive force or directed at sensitive parts of the body. Some States have detailed guidelines on their use, which provide evidence of what may amount to disproportionate use. For example, in the United States:

> The D.C. Police demonstration policing policy states, "A strike to the head with a riot baton is considered deadly force," and prohibits baton strikes to the head or other vital areas. The San Francisco Police Department prohibits the use of overhead baton blows (bringing the baton over the officer's head before striking a blow), and discourages the use of batons to disperse participants in a public demonstration. The Boston Police Department's use of force policy states, "no blows should be struck above the thigh, other than to the arms" unless the officer is in "imminent danger of serious injury" … Oakland's policy also instructs officers that: "Baton jabs should not be used indiscriminately against a crowd or group of persons but only against individuals who are physically aggressive or actively resisting arrest".[52]

28. In *Gamarra v Paraguay*, the UN Human Rights Committee considered whether there had been a violation of article 7 of the International Covenant on Civil and Political Rights (prohibition of torture) after the police violently cleared a demonstration.[53] The complainant claimed that at the time of his arrest a group of policemen surrounded him and one of them fired a shot, probably a rubber bullet, which knocked him to the ground. After being forced to the ground he was beaten and kicked by military personnel and police officers.[54] The Committee considered that "the use of force by the police was disproportionate and … the treatment to which the author was subjected constitute[d] a violation of article 7 of the Covenant".[55]

29. The OSCE Guidelines establish that the following principles should underpin all occasions when force is used in the policing of public assemblies: (i) where pepper spray or other irritant chemicals may be used, decontamination procedures must be set out; (ii) the use of attenuated energy projectiles (AEPs), baton rounds or plastic/rubber bullets, water cannon and other forceful methods of crowd control must be strictly regulated; (iii) under no circumstances should force be used against peaceful demonstrators who are unable to leave the scene; and (iv) the use of force should trigger an automatic and prompt review process after the event.[56] The Guidelines further provide that "[s]tandards concerning the use of firearms are equally applicable to the use of other potentially harmful techniques of crowd management, such as batons, horses, tear gas or other chemical agents, and water cannon".[57]

30. Even where weapons are not used force may be disproportionate. In England and Wales, a police officer, in the course of arresting individuals taking part in a protest, pulled a woman up from the ground by her arm, which was twisted behind her back, breaking it. Recognising that the circumstances were difficult, with chaotic and fast-moving events, and that the claimant had sought to frustrate the arrest of another person, creating a "potentially dangerous situation in a public place",[58] the Court nevertheless found that "whatever pressures existed, it seems to me that the operation employed and the force used by [the police officer] to get the Claimant to her feet were neither reasonable nor proportionate. On the contrary, both the operation itself and the force used were obviously dangerous".[59] The Claimant was thus entitled to damages for assault.

iv. Discriminatory and intimidatory use of force

31. Another dimension which must be considered alongside the necessity and proportionality analysis is whether force, or particular types of force, are being deliberately used to discriminate against specific social groups, or to punish or intimidate them.

32. In *Egyptian Initiative for Personal Rights and Interights v Egypt*, the African Commission on Human and Peoples' Rights found that riot police were responsible for assaults, including of a sexual nature,

[50] ECtHR, *Yaşa and Ors. v Turkey* (2013), App. No. 44827/08, 16 July 2013, §47.
[51] *Ibid*., §49.
[52] INCLO (2013), Take back the streets, above n.1, p. 38 (citations omitted).
[53] HR Ctee, *Gamarra v Paraguay*, Communication No 1829/2008, 30 May 2012.
[54] *Ibid.*, para. 2.8.
[55] *Ibid.* para. 7.4.
[56] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 176.
[57] *Ibid*., para. 177.
[58] *Minio-Paluello v The Commissioner of Police of the Metropolis* [2011] EWHC 3411 (QB), at para. 4, citing Ashley *v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962. para. 67.
[59] *Ibid.*, para. 68.

of four female journalists during a demonstration (by means of directing private individuals to carry out the attacks and failing to intervene to prevent them). Some of the journalists were covering the protests, another one was participating, and another was simply a bystander. The assaults resulted in bruises, scratches, and emotional trauma. According to the African Commission, the assaults to each were "debasing and humiliating, sufficiently severe to fall within the ambit" of inhuman and degrading treatment.[60]

33. Furthermore, the Commission found that the assaults were part of a deliberate discriminatory attack on women, in violation of the prohibition of discrimination.[61] According to the Commission:

> It is clear that the incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. Furthermore, perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband. The perpetrators were aware of the consequences of such acts on the Victims, both to themselves and their families, but still perpetrated the acts as a means of punishing and silencing them from expressing their political opinions.[62]

34. The March 2014 UN Human Rights Council resolution urges States to "pay particular attention to the safety and protection of women and women human rights defenders from acts of intimidation and harassment, as well as gender-based violence, including sexual assault, in the context of peaceful protests".[63] In this regard, experts have expressed concerns over the "actual or perceived risk of sexual and gender-based violence ... [as] a means of curtailing women's participation in public and political life and of perpetuating discrimination and exclusion".[64] According to the Report of the OHCHR, "[i]nstances of gender-based violence occurring during demonstrations should be investigated and prosecuted as a matter of priority".[65]

v. Positive obligations

Protection

35. States have a "positive duty to take reasonable and appropriate measures to enable peaceful demonstrations to take place without participants fearing physical violence".[66] This includes a positive obligation to actively protect participants "from individuals or groups of individuals, including agent-provocateurs and counter-demonstrators, who aim at disrupting or dispersing such assemblies [including] those belonging to the state apparatus or working on its behalf".[67] The Inter-American Commission on Human Rights stresses that "the police forces must receive clear and unequivocal instructions that their job is to protect the participants in a public meeting or a demonstration or mass gathering so long as the participants are exercising their right".[68]

Regulation, training and equipment

36. States must also take comprehensive measures to prevent and respond to violations by their own authorities. In the words of the Inter-American Commission on Human Rights:

> In order to prevent an inappropriate intervention by State forces that could infringe on the human rights of demonstrators, the States should adopt measures both of a regulatory as well as an administrative nature that enable police forces to have clear rules of conduct and the professional training needed to perform their jobs in situations involving mass concentrations of people.[69]

37. International standards establish that the use of force should be regulated by domestic law.[70] This Court has adopted the same approach, finding that "a legal and administrative framework should

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[60] African CmHR, *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011), Comm. No. 323/06, 16 December 2011, in particular paras. 201-202.
[61] *Ibid*., paras. 153-154.
[62] *Ibid*., para. 152.
[63] UN HRC Res. 25/38, 24 March 2014, para. 6.
[64] Report of the UN High Commissioner of Human Rights, *Seminar on effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests*, A/HRC/25/32, 29 January 2014, para.13.
[65] UNHCHR 2013 Report, above n.36, para. 15.
[66] See OSCE Guidelines on Freedom of Peaceful Assembly, above n. 22, paras. 125 and 139. See also German Federal Constitutional Court, above n.7, para. III.1.
[67] Kiai 2012 Report, A/HRC/20/27, above n.12, para. 33. The UN Special Rapporteur on Freedom of Assembly emphasised that the responsibility of the state to protect peaceful assemblies "should always be explicitly stated in domestic legislation, as it is in, for example, the Republic of Moldova, Serbia and Slovenia."
[68] IACmHR, *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. Doc. 66, 31 December 2011 (**"IACmHR Secord Report"**), para. 142.
[69] *Ibid.*, para. 141.
[70] UN Basic Principles on the Use of Force and Firearms, above n.15, para. 1.

define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the international standards which have been developed in this respect"[71] and that "police operations – including the launching of tear-gas grenades – should be sufficiently delimited by domestic law, under a system of adequate and effective safeguards against arbitrary action, abuse of force and avoidable accidents".[72] The OSCE Guidelines on Freedom of Peaceful Assembly make clear that such laws "should set out the circumstances that justify its use [of force] (including the need to provide adequate prior warnings) and the level of force acceptable to deal with various threats".[73] States must also "ensure that law enforcement officials are sufficiently trained and equipped, particularly with regard to crowd control and the use of force".[74]

38. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials recognise that police must have the "appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training".[75] This Court affirmed this principle, holding that when police carry out their duties in an area of extreme tension, where violent public disorder is expected, police must have the qualities necessary for that context to minimise the risk of injury.[76] It is also "critical that all police officers are absolutely clear about the circumstances in which they can use force and the legal thresholds that must be met before they use any level of force".[77]

39. A review of the policing of protests following instances of excessive use of force by police during G8 protests in London in 2009 found that "an absence of clear standards on the use of force for individual officers operating in the public order policing environment" and "out of date training and guidance" were key factors contributing to the violence.[78] The Report recommended "[t]he adoption of a set of fundamental principles on the use of force which run as a golden thread though all aspects of police business. These principles should be based on the minimum use of force and the requirement for a measured and calculated route to escalation where the use of force is a possibility",[79] and "[c]odification of public order policing to ensure consistency in public order training and use of equipment, tactics and police powers".[80]

Review and investigation of the use of force

40. The nature of policing during demonstrations, particularly the deployment of units wearing helmets or other equipment concealing an officer's identity, often makes it more difficult to identify those responsible for prohibited ill-treatment. Officials may also find it easier to "plausibly deny" that they excessively used force or deliberately inflicted injuries, particularly where some of the individuals involved in the protests are violent. This Court has recognised that where excessive force is used in such a context, and the officer responsible is not sanctioned, this can be seen as giving forces a 'carte blanche' to continue to use force.[81]

41. Where an individual sustains injuries while in the custody or control of state agents, this Court and others are clear that the burden of proof rests on the state to give a satisfactory and convincing explanation as to the cause of the injuries.[82] The situation differs in protest situations, at least before a person is taken under control.[83] Nevertheless, where it is established that officials used force, the burden lies on the State to show "by convincing argument that the use of force was rendered strictly necessary by these applicants' own behaviour and that the force used by the police officers was not excessive".[84] Also, where the State has means to corroborate or refute the claims (e.g., video evidence)

[71] *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §63; *Makaratzis v Greece* [GC] (2004), App. No. 50385/99, § 59, ECHR 2004-XI.
[72] *Yaşa and Ors. v Turkey* (2013), App. No. 44827/08, 16 July 2013, §42.
[73] See also OSCE Guidelines on Freedom of Peaceful Assembly, above n. 22, Guideline 5.5.
[74] UNHCHR 2013 Report, above n.36, para. 17. OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 176.
[75] UN Basic Principles on the Use of Force and Firearms, above n.15, Art. 18. See also OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, paras. 147-148.
[76] *Aydan v Turkey* (2013), App. No. 16281/10, 12 March 2013, §99.
[77] Her Majesty's Inspectorate of Constabulary (UK) 'Adapting to Protest: Nuturing the British model of policing', November 2009, www.hmic.gov.uk%2Fmedia%2Fadapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf, p.13.
[78] *Ibid.*, pp. 5-6.
[79] *Ibid*., p. 7.
[80] *Ibid*. See on the use of batons in particular, House of Lords and House of Commons Joint Committee on Human Rights (2011), 'Facilitating Peaceful Protest' 10th Report of Session 2010-2011, http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/123/12302.htm, paras. 6-7.
[81] *Aydan v Turkey* (2013), App. No. 16281/10, 12 March 2013, §100.
[82] *Selmouni v France* [GC] (1999), App. No. 25803/94, § 87, ECHR 1999 V.
[83] *Muradova v Azerbaijan* (2009) App. No. 22684/05, 2 April 2009, §107.
[84] *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, §59.

such evidence must be provided, failing which, this "may also give rise to the drawing of inferences as to the well-foundedness of the allegations".[85]

42. States must conduct prompt, impartial and effective investigations where allegations of unnecessary or disproportionate force are raised, or information to that effect is brought to the attention of the authorities, and impose appropriate punishments against those found guilty, including those responsible as superiors.[86] In order to fulfil these positive obligations, states should have in place procedures to ensure that investigations are carried out effectively and that perpetrators can be identified.[87] Best practices to this effect include ensuring that law enforcement officers are clearly and individually identifiable at protests,[88] having an ammunition registration and control system[89] and a communications records system to monitor operational orders, those responsible for them, and those carrying them out,[90] and requiring law-enforcement officials to maintain a written and detailed record of force used (including weapons deployed).[91] Where there has been large-scale violence, inquiries should be conducted with the involvement of all stakeholders, including opposition parties, civil society leaders and the Government, to ensure their credibility.[92]

C. The relationship between the prohibition of torture and ill-treatment and freedom of assembly

43. A finding that Article 3 of the Convention has been violated through the use of unnecessary or disproportionate force or other ill-treatment against a person peacefully taking part in protests, or the use of ill-treatment in response to a person's participation in a peaceful demonstration, invariably leads to a violation of Article 11.[93] In *Izci v Turkey*, this Court held that police intervention in the protest and *the fact* of ill-treatment went to showing an interference with the applicant's rights under Article 11 of the Convention.[94] Where a violation of Article 3 has been found, even if a State can show that its interference with the right to freedom of assembly was "prescribed by law" and that it pursued "legitimate aims", it would fail to demonstrate that the restriction was "proportionate" or "necessary in a democratic society".

44. The use of violence against protestors also has wider impacts on other individuals' or groups' rights to freedom of assembly and freedom of expression and opinion, as they may result in stifling the exercising of their own rights. This Court, in *Izci v Turkey*, held that it "considers that the brutality of the dispersal had an inevitable dissuasive effect on people's willingness to demonstrate".[95] The Inter-American Court of Human Rights, in the case of a journalist who was beaten while recording a protest in an attempt to stop him filming, held that his right to freedom of expression had been violated, even though he did not relinquish his camera and the footage was later aired.[96] The Court also noted that such attacks "had a negative impact on other journalists who had to cover events of this type, who could fear suffering similar acts of violence."[97]

45. As set out above, Articles 3 and 11 are also intricately linked by the question of when protests can be dispersed, and in what cases force can be used to do so. This Court has held that "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance".[98] A peaceful protest should not be dispersed simply because it is "unlawful" under domestic law due to, for example, not having complied with domestic

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[85] *Ibid.*, §61.
[86] Articles 12, 13 and 14 of the UN Convention against Torture; UNCAT, General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 26. See also UNHCHR 2013 Report, above n.36, para. 19; HRCtee, Concluding Observations: Belarus, A/53/40 vol. I (1998) 26 at para. 145; UN HRC, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai: Mission to Georgia', A/HRC/20/27.Add.2, 8 June 2012 (**"Kiai Georgia Mission Report"**), para. 82; IACmHR Second Report, above n.69, para. 149.
[87] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 176.
[88] *Ibid.*, para. 153. See also Her Majesty's Inspectorate of Constabulary (UK), Adapting to Protest, above n.77, pp. 57-58.
[89] IACmHR Second Report, above n. 69, para. 68.
[90] *Ibid.*
[91] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 176.
[92] Kiai Georgia Mission Report, above n.86, para. 82. For an overview of concerns that can arise in the context of investigating the use of force during protests see OSCE-OIDHR Panel of Experts of Freedom of Peaceful Assembly, 'Response to the UN Special Rapporteur's Questionnaire on Freedom of Assembly and Association', http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/Regional_HR_mechanisms/ODIHRPanel_of_experts.pdf, pp. 8-10.
[93] See e.g. *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §73.
[94] *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §82; see also *Balçik and others v Turkey* (2007), App. No. 25/02, 29 November 2007, §54; *Saya and Others v Turkey* (2008), App. No. 4327/02, 7 October 2008, §48; *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §§74-5.
[95] *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §90.
[96] *Ibid.*, §142-§149.
[97] *Ibid.*, §148. See also Kiai Georgia Mission Report, above n.86, para. 81.
[98] *Oya Ataman v Turkey* (2006), App. No. 74552/01, 5 December 2006, §§41-42.

registration and notification obligations,[99] deviating from the terms of notification,[100] or advocating for a purportedly unlawful objective.[101] Demonstrators should be given sufficient opportunity to manifest their views.[102] Similarly, spontaneous assemblies should be expected and participants should not be criminalised for participating in them.[103] Where peaceful protests can be lawfully dispersed, they should only be done so by force as a last resort, using the minimum amount of force necessary, and where this is proportionate to the legitimate aim sought to be protected.[104] In the case of *Tahirova v. Azerbaijan* this Court found a violation of Article 11 on the grounds that the police interference, i.e. forced dispersal (amounting to a violation of Article 3) was disproportionate and there was no evidence that the protestors were causing disorder or threatening the protection of the rights of others.[105]

46. By using force to manage protests, States increase the risk of escalation of violence, and consequent violations of Articles 2 and 3.[106] As the UN Special Rapporteur on Extrajudicial Executions has explained,"[c]rowds are more prone to violence when they see police actions as heavy-handed, and consequently illegitimate. The indiscriminate use of force against a crowd as a whole can persuade the more restrained members of the group to also resort to the use of force in order to protect their fellow group members".[107] As the Court found in *Izci v Turkey*:

> the police officers in the present case failed to show a degree of tolerance and restraint before attempting to disperse a crowd which did not present a danger to public order and was not engaging in acts of violence. It thus appears that the hasty response of the police to the peaceful gathering of the demonstrators resulted in mayhem, and the ensuing use of disproportionate force by the police officers resulted in the injuring of the applicant.[108]

47. In some cases it is conceivable that excessive force is used precisely to create chaos that can then be used by law enforcement officials as "cover" for ill-treatment of protestors.

48. Instead, to protect rights guaranteed by Articles 3 and 11, States should adopt an approach that affirms the right to peaceful assembly and facilitates protests. According to the Inter-American Commission on Human Rights, "in order to meet their obligations to respect and guarantee the right of assembly, the States have the obligation not to obstruct and to adopt positive measures to guarantee the exercise of this right", from the time of notification, during the demonstration, and afterwards if investigation into violations against the person are required.[109] Some States adopt a "negotiated management" approach to protests, by which "the task of the police is to protect rights and facilitate, rather than frustrate, demonstrations…".[110] It involves "a shift towards a more active use of communication, negotiation, cooperation, information gathering and emphasis on preventive police policies".[111] The principles underlying such approaches are recognised as good practice by experts[112] and the Human Rights Council.[113] According to the UN Special Rapporteur on Extrajudicial Executions, State recognition of the right to peaceful assembly, both at the political and legal levels, is a crucial element in shaping a State's response to protest and its eventual consequences.[114]

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16 April 2014

[99] *Karabulut v Turkey* (2009) App No. 16999/04, 27 January 2009, §§35-38; cf. *Molnar v Hungary* (2008) App. No. 10346//05, 7 October 2008. See also UNHCHR 2013 Report, above n.36, para. 38.
[100] *Tahirova v Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §71 and 74.
[101] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, para. 134.
[102] *Karabulut v Turkey* (2009) App No. 16999/04, 27 January 2009, §37.
[103] OSCE-OIDHR Panel of Experts of Freedom of Peaceful Assembly, 'Response to the UN Special Rapporteur's Questionnaire on Freedom of Assembly and Association', http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/Regional_HR_mechanisms/ODIHRPanel_of_experts.pdf, p. 3. See further *Bukta v Hungary* (2007), App. No. 25691/04, 17 July 2007, §36.
[104] UN Basic Principles on the Use of Force and Firearms, above n. 15, Principle 13.
[105] ECtHR, *Tahirova v. Azerbaijan* (2013), App. No. 47137/07, 3 January 2014, §73.
[106] See IACmHR Second Report, above n.69, para.131.
[107] Heyns 2011 Report, above n. 19, para. 112.
[108] ECtHR, *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §67.
[109] IACmHR Second Report, above n.69, para.133.
[110] UNHCHR 2013 Report, above n.36, para. 24. On different policing strategies for protests, including "Escalated Force", "Negotiated Management" and "Command and Control", see further Supressing Protest, pp. 26-31 and, on the negotiated management approach in particular see Heyns 2011 Report, above n. 19, para. 105-118.
[111] Heyns 2011 Report, above n. 19, para. 110.
[112] OSCE Guidelines on Freedom of Peaceful Assembly, above n.22, Principle 5.4 and paras. 145 and 157; Heyns 2011 Report, above n. 19, paras. 109-118.
[113] UN HRC Res. 25/38, 24 March 2014, paras. 4-5.
[114] UNHCHR 2013 Report, above n.36, para. 21.