

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 23380/09**

**B E T W E E N:**

**BOUYID**

**Applicants**

**-and-**

**BELGIUM**

**Respondent**

**-and-**

**THE REDRESS TRUST (“REDRESS”)**

**Intervener**

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**WRITTEN COMMENTS BY REDRESS**

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1. These comments are filed with the permission of the President of the Court granted by letter dated 27 June 2014.
2. As set out in REDRESS' application to intervene of 16 June 2014, these comments provide a comparative review of national, regional and international legal standards on the use of force in detention contexts, including reference to the use of force against children.

#### **A. Introduction**

3. International human rights law recognises that state agents may use force against individuals only in certain narrowly defined circumstances, namely where it is "necessary" and, if it is necessary, the use of force must be "proportionate" to achieve a legitimate aim.<sup>1</sup> Any use of force by agents of the state that is not necessary will therefore, prima facie, amount to a violation of Article 3. The European Court of Human Rights has established this principle in a line of cases involving both use of force in detention contexts,<sup>2</sup> and as regards the unnecessary use of force when policing protests.<sup>3</sup> 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".<sup>4</sup>
4. The Court's usual approach in Article 3 cases is to consider whether the pain and suffering inflicted attained a minimum level of severity. The assessment of the minimum level of severity depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>5</sup> However, this Court has also held that there are circumstances where proof of the actual effect on the person may not be a significant factor. In relation to detained persons, unless their conduct is harmful to themselves or others and/or requires forceful intervention in accordance with clearly established limitations, any other arbitrary, unjustified and unnecessary use of force inherently diminishes human dignity and is in principle an infringement of the right set forth in Article 3.<sup>6</sup> The seriousness of the use of any amount of force is heightened where there are other factors of vulnerability or discrimination.
5. The unjustified use of force by state agents against a person under their control is inherently degrading. Thus, it has been held in a variety of cases that the use of unnecessary force against an individual detained in custody automatically amounts to cruel, inhuman or degrading treatment or punishment at the least.

#### **B. Principles on the use of force by state agents**

6. The UN Human Rights Committee (the "UN HR Committee"), in its General Comment 20, has affirmed that the aim of the prohibition against torture and cruel, inhuman or degrading treatment or punishment is to protect both the dignity and the physical and mental integrity of the individual. The prohibition is complemented by the positive requirements of article 10 of the International Covenant on Civil and Political Rights (the "Covenant") which stipulates that "all persons deprived of their

<sup>1</sup> 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](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"), Principle 9. These provisions are considered to reflect customary international law: see Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, submitted by Philip Alston, 5 September 2006, A/61/311, ("Alston 2006 Report"), §35.

<sup>2</sup> *Ribitsch v Austria* (1995), App. No. 18896/91, 4 December 1995, §38; *Ali 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); ECtHR [GC] *El-Masri v The Former Yugoslav Republic of Macedonia*, (2012), App. No 39630/09, §207; *Krastanov v. Bulgaria*, App. No. 50222/99, (September 2004), §53, 30; *Keenan v. United Kingdom*, App. No. 27229/95, (3 April 2001), §.113; *Zelilof v Greece*, (App. No. 17060/03, (24 May 2007), §43. See further Manfred Nowak & Elizabeth McArthur, 'The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment', 16 *Torture* (2006) pp. 147, 149; Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment', 23 *Netherlands Quarterly of Human Rights* (2005), pp. 677-678; see also JH Burgers & H Danelius(1988) *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other cruel, Inhuman or Degrading Treatment of Punishment*, 1988 p.120 and p.149.

<sup>3</sup> *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 and 62 (victim beaten and kicked and sprayed with tear gas); *Timik v Turkey* (2010) App. No. 12503/06, 9 November 2010, §47 (victim hit in the face and subjected to pepper spray); *Ali Güneş v. Turkey* (2012), App. No. 9829/07, 10 July 2012, §43.

<sup>4</sup> *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, §58.

<sup>5</sup> *Dorđević v. Croatia*, App. No. 41526/10, ECHR 2012, §94.

<sup>6</sup> *Keenan v. United Kingdom*, App. No. 27229/95, (3 April 2001), §113.

liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Persons deprived of their liberty are subject to the exercise of state power, as the state authorities maintain control. The period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest.<sup>7</sup>

7. A number of core principles outlining best practices as regards the general conduct and use of force by law enforcement officials further articulate the responsibilities of law enforcements officials within, and outside, detention settings. The United Nations (“UN”) Code of Conduct for Law Enforcement Officials<sup>8</sup> and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials<sup>9</sup> (“UN Basic Principles on Use of Force”) are regarded as outlining best practice<sup>10</sup> and are consistently referred to by UN treaty bodies<sup>11</sup>, as well as regional courts and bodies.<sup>12</sup> The UN Code of Conduct and UN Basic Principles on the Use of Force have also informed national law<sup>13</sup> and resolutions from domestic institutions when determining whether the use of force is lawful or compatible with international standards.<sup>14</sup>
8. Similarly, in Europe, the European Code of Police Ethics, European Prison Rules and the OSCE Guidebook on Democratic Policing are well established and progressively developed relevant instruments. The aim and purpose of the European Code of Police Ethics<sup>15</sup> is to “provide a set of principles and guidelines for the overall objectives, performance and control of the police in democratic societies governed by the rule of law”.<sup>16</sup> The purpose of the European Prison Rules is to establish a range of minimum standards for achieving a prison system where humane and positive treatment prevails.<sup>17</sup> As recommendations adopted by the Committee of Ministers of the Council of Europe, both instruments are non-binding documents, however, they contribute to the interpretation of existing treaties, such as the European Convention on Human Rights, and to the standardisation of

<sup>7</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) has stressed that “in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest.” CPT standards, CPT/Inf/E (2002) 1 - Rev. 2011, §15.

<sup>8</sup> UN Code of Conduct for Law Enforcement Officials, above n.1.

<sup>9</sup> UN Basic Principles on the Use of Force, above n.1.

<sup>10</sup> Organisation for Security and Co-operation in Europe (“OSCE”), *Good practices in Basic Police Training – Curricula Aspects*, SPMU Publication Series Vol. 5, May 2008; Counter-Terrorism Committee Executive Directorate, *United Nations Security Resolution 1624 (2005). Compilation of International Good Practices, Codes and Standards*, in <http://www.un.org/en/sc/ctc/docs/bestpractices/res1624.pdf>.

<sup>11</sup> UN General Assembly, *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/42/123, 7 December 1987; UN Committee Against Torture, *Considerations of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Mongolia*, CAT/C/MNG/CO/1, 20 January 2011, §15; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee. United States of America*, CCPR/C/79/Add.50, A/50/40, 7 April 1995, §20, §32, §34; Statement by Mr. Juan Méndez, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, OSCE, Supplementary Human Dimension Meeting, Opening Session, PC.SHDM.IO/4/14, 10 April 2014, p. 14.

<sup>12</sup> [IACtHR], *Nadege Dorzema et al. v. Dominican Republic*, Judgment of 24 October 2012 (Merits, Reparations and Costs), §§78-80; [ECtHR], *Tahirova v. Azerbaijan*, App. No. 47137/07, Judgment, 3 October 2013, §§28-29; *Şimşek and Others v. Turkey*, App. Nos. 35072/97 and 37194/97, Judgment, 26 July 2005, §§91-92; [ACmHPR] *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Communication 295/04, 12 October 2013, §§110-112.

<sup>13</sup> Ministerio Da Justiça (Brazil), Portaria sobre o uso da força (arma de fogo) pelos Agentes de Segurança Pública, 31 December 2010, <http://www.policiaivil.pe.gov.br/index.php/atualidades-legislativas-e-normativas/1311-portaria-sobre-o-uso-da-forca-arma-de-fogo-pelos-agentes-de-seguranca-publica.html>; Secretaría de la Defensa Nacional (Mexico), *Manual del uso de la fuerza, de aplicación común a las tres fuerzas armadas*, 30 May 2014, p.12; Policía Nacional de Colombia, *Manual para el servicio de policía en la atención, manejo y control de multitudes*, Resolución número 03514, 5 November 2009, pp. 12-15.

<sup>14</sup> Comisión Nacional de los Derechos Humanos (Mexico), *Recomendación General 12. Sobre el uso ilegítimo de la fuerza y de las armas de fuego por los funcionarios o servidores públicos encargados de hacer cumplir la ley*, 26 February 2006; Audiencia Provincial de Málaga, Sección Séptima, Melilla, Sentencia, No. de recurso 78/2013, available at: <http://www.tribunalconstitucional.es/en/jurisprudencia/pages/Sentencia.aspx?cod=20806>; No. de resolución 21/2014, available at: <http://www.tribunalconstitucional.es/en/jurisprudencia/pages/Sentencia.aspx?cod=20972>; Audiencia Provincial de Madrid, Sección Segunda, Madrid, Sentencia, No. de recurso 69/2014, available at: <http://www.tribunalconstitucional.es/es/jurisprudencia/paginas/Sentencia.aspx?cod=21020>; No. de resolución 188/2014.

<sup>15</sup> European Code of Police Ethics, Recommendation Rec(2001)10, adopted by the Committee of Ministers, of the Council of Europe on 19 September 2001 (“**European Code of Police Ethics**”), available here <http://polis.osce.org/library/t/2687/500/CoE-FRA-RPT-2687-EN-500>.

<sup>16</sup> Geneva Centre for the Democratic Control of Armed Forces, *International Police Standards. The European Code of Police Ethics. Council of Europe, Committee of Ministers, Toolkit – Legislating for the Security Sector*, p. 14.

<sup>17</sup> Council of Europe, *European Prison Rules*, Recommendation No. R(87)3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987; see also Council of Europe, *European Prison Rules 2006*, Committee of Ministers, Recommendation Rec(2006)2, (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies) (“**European Prison Rules 2006**”) available here: <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

law.<sup>18</sup> The European Prison Rules and the European Code of Police Ethics have been referred to in the jurisprudence of the European Court of Human Rights<sup>19</sup> and in documents issued by domestic institutions.<sup>20</sup>

9. Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – set up as a non-judicial preventive mechanism with the aim of protecting persons deprived of their liberty against torture and other forms of ill-treatment through a system of visits to states – has made constant reference of these instruments in its visit reports.<sup>21</sup> Also relevant is the OSCE Guidebook on Democratic Policing, created with the aim of operationalising pre-existing norms, standards, good principles and lessons learned in relation to police and law enforcement, in order to make them accessible for practitioners.<sup>22</sup> The principles that have been established in the aforementioned instruments are aligned with the international standards outlined in the paragraph above and add a specific European dimension.

10. As regards the use of force, the primary principles emerging from international customary law<sup>23</sup>, and best practice codes emphasise that:

- i. everyone has the right to life, security of the person, and freedom from torture, cruel, inhuman or degrading treatment and punishment.<sup>24</sup> The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Enforcement Officials provides that the term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses;<sup>25</sup>
- ii. non-violent means are to be attempted first;<sup>26</sup>
- iii. force is to be used only when strictly necessary;<sup>27</sup>
- iv. force is to be used only for lawful law enforcement purposes;<sup>28</sup>
- v. in their relations with persons in custody or detention, law enforcement officials shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened;<sup>29</sup>
- vi. no exceptions or excuses shall be allowed for unlawful use of force;<sup>30</sup>
- vii. use of force is to be always proportional to lawful objectives;<sup>31</sup>

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<sup>18</sup> European Centre for Law and Justice, *Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe – Synthesis*, Document prepared in connection with the discussion of the draft recommendation of the Committee of Ministers on the rights and legal status of children and parental responsibilities, by Grégor Puppincq, 27 March 2012, in <http://eclj.org/PDF/status-of-the-recommendations-of-the-committee-of-ministers-in-the-legal-field-of-the-council-of-europe%E2%80%93synthesis-english.pdf>.

<sup>19</sup> For the European Prison Rules see: [ECtHR] *Harachiev and Tolumov v. Bulgaria*, App. Nos. 15018/11 and 61199/12, Judgment, 8 July 2014 §159; [ECtHR], *Vinter and Others v. the United Kingdom*, App. Nos. 66069/09, 130/10 and 3896/10, Judgment, 9 July 2013, §77; [ECtHR], *Stummer v. Austria*, App. No. 37452/02, Judgment, 7 July 2011, §49; [ECtHR], *Laduna v. Slovakia*, App. No. 31827/02, Judgment, 13 December 2011, §31. For the European Code of Police Ethics see: [ECtHR], *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, App. No. 11828/08, Judgment, 25 September 2012, §36.

<sup>20</sup> Irish Human Rights Commission, *IHRC Policy Statement. Human Rights Compliance of An Garda Síochána*, April 2003; Northern Ireland Policing Board, *Code of Ethics for the Police Service of Northern Ireland*, 2003; Cuerpo Nacional de Policía, *Código Ético del Cuerpo Nacional de Policía*, 2013.

<sup>21</sup> See the Visit Reports of the CPT for Georgia (2012), Greenland (2012), Portugal (2012), Slovenia (2012), Armenia, (2011), Norway (2011), Yugoslav Republic of Macedonia (2011), Lithuania (2010), Russian Federation (2012).

<sup>22</sup> OSCE, *Guidebook on Democratic Policing*, by the Senior Police Adviser to the OSCE Secretary General (Vienna 2008, 2nd edn) <http://www.osce.org/spmu/23804?download=true>; (“OSCE Guidebook on Democratic Policing”) May 2008, p. 6.

<sup>23</sup> Alston 2006 Report, above n.1, §35.

<sup>24</sup> UN Universal Declaration of Human Rights, articles 3 and 5; International Covenant on Civil and Political Rights, articles 6, 7 and 9; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Convention, preambular paragraphs 4 and 6, and articles 1, 2, and 4; UN Code of Conduct for Law Enforcement Officials, articles 2 and 5 (including commentary).

<sup>25</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. 76th plenary meeting, (9 December 1988), 43/173; available at: <http://www.un.org/documents/ga/res/43/a43r173.html>, Principle 6.

<sup>26</sup> UN Basic Principles on Use of Force, Principle 4; see also European Prison Rules 2006, §64.1; available here: <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

<sup>27</sup> UN Basic Principles on Use of Force, principles 4 and 5; UN Code of Conduct for Law Enforcement Officials, article 3; European Code of Police Ethics, §37; European Prison Rules 2006, “The amount of force used shall be the minimum necessary and shall be imposed for the shortest necessary time”, §64.2, available at: <https://wcd.coe.int/ViewDoc.jsp?id=955747>; OSCE Guidebook on Democratic Policing, §68.

<sup>28</sup> UN Basic Principles on Use of Force, principles 5 and 7; European Code of Police Ethics, §. 37; OSCE Guidebook on Democratic Policing, §68.

<sup>29</sup> UN Basic Principles on Use of Force, §15. See also, European Prison Rules 2006, “Prison staff shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order and always as a last resort.”, §64.1.

<sup>30</sup> UN Basic Principles on Use of Force, Principle 8.

<sup>31</sup> *Ibid.*, Principles 2 and 5(a); See also OSCE Guidebook on Democratic Policing, §68.

- viii. restraint is to be exercised in the use of force;<sup>32</sup>
- ix. damage and injury are to be minimised;<sup>33</sup>
- x. a range of means for differentiated use of force is to be made available;<sup>34</sup>
- xi. all officers are to be trained in the use of the various means for differentiated use of force;<sup>35</sup>
- xii. all officers are to be trained in use of non-violent means.<sup>36</sup>

### C. Jurisprudence

#### *i) The unnecessary use of force in custody and the prohibition of inhuman and degrading treatment and punishment*

11. The above general principles have been affirmed by the European Court of Human Rights, the Inter-American Court of Human Rights as well as in domestic practice and jurisprudence. Echoing the UN Basic Principles on Use of Force, European Code of Police Ethics; European Prison Rules, and the OSCE Guidebook on Democratic Policing, this Court has held that for the use of force to be lawful, it must be “indispensable” and “must never be excessive”.<sup>37</sup> 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”.<sup>38</sup> The circumstances are narrowly construed and as such, where a person is under the custody or control of state agents there will be very limited contexts in which the use of force will be lawful.

12. In a custody setting, any unnecessary use of force will in the normal course of events amount to a violation of Article 3.<sup>39</sup> In its landmark ruling in *Ribitsch v Austria* this court held that:

in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. It reiterates that the requirements of an investigation and 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.<sup>40</sup>

13. The Court has consistently upheld the principle that any recourse to physical force by a state agent which has not been made strictly necessary by the applicant’s own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.<sup>41</sup>

14. The Inter-American Court of Human Rights has upheld the same principle, finding violations of Article 5 of the American Convention on Human Rights<sup>42</sup> where officials have used force in situations where it was unnecessary.<sup>43</sup> In *Loayza-Tamayo v. Peru*, the Inter-American Court of Human Rights

<sup>32</sup> *Ibid.*, Principles 2, 5(a) and 9.

<sup>33</sup> *Ibid.*, Principle 5(b).

<sup>34</sup> *Ibid.*, Principle 2.

<sup>35</sup> *Ibid.*, Principles 4, 19, and 20; See also, European Prison Rules 2006, §66.

<sup>36</sup> *Ibid.*, Principles 4 and 20.

<sup>37</sup> See eg. ECtHR, *Izci v Turkey* (2013), App. No. 42606/05, 23 July 2013, §54; *Ivan Vasilev v. Bulgaria*, App. No. 48130/99, §63, 12 April 2007; *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, at §57, the Court notes that ‘recourse to physical force which has not been made strictly necessary by a person’s own conduct is in principle an infringement of the right set forth in Article 3 of the Convention. In this connection, the Court reiterates 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 (see *Ribitsch v. Austria*, 4 December 1995, §38, Series A no. 336, and the case cited therein).’

<sup>38</sup> Manfred Nowak & Elizabeth McArthur, ‘*The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment*’, 16 *Torture* (2006) 147, 149.

<sup>39</sup> See above, n.2.

<sup>40</sup> *Ribitsch v Austria* (1995), App. No. 18896/91, 4 December 1995, §38.

<sup>41</sup> ECtHR [GC] *El-Masri v The Former Yugoslav Republic of Macedonia*, (2012), App. No 39630/09, §207; see also *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, §38, and *Krastanov v. Bulgaria*, App. No. 50222/99, (September 2004), §53, and §30; *Keenan v. United Kingdom*, App. No. 27229/95, (3 April 2001), §113; *Zelilof v Greece*, (App. No. 17060/03, (24 May 2007), §43; *Pekaslan v Turkey* (2012), Apps. Nos. 4572/06 and 5684/06, 20 March 2012, §57-8.

<sup>42</sup> Article 5(2) of the American Convention on Human Rights provides that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment and that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

<sup>43</sup> [IACtHR] *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997, §57. See also, *Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, §197; *Cantoral-Benavides v. Peru*, Judgment of August 18, 2000, §96; and *Case of Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000, §155.

found that "any use of force that is not strictly necessary for the proper conduct of the detainee constitutes an attack on human dignity in violation of Article 5 of the American Convention".<sup>44</sup>

15. Although the African Commission on Human and Peoples' Rights has not addressed the issue specifically, it has stated that the prohibition of torture and cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.<sup>45</sup>

16. In an article considering the exercise of police powers, the previous UN Special Rapporteur on Torture, Professor Manfred Nowak, explained that:

As soon as the person concerned is... under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted. If such force results in severe pain or suffering for achieving a certain purpose, such as extracting a confession or information, it must even be considered as torture. It is the powerlessness of the victim in a situation of detention which makes him or her so vulnerable to any type of physical or mental pressure. That is why such pressure must be considered as directly interfering with the dignity of the person concerned and is, therefore, not subject to any proportionality test.<sup>46</sup>

Nowak contends that from the moment the person concerned is under the de facto control of the police officer (e.g. hors de combat, otherwise unable to resist or flee a premise, is arrested and handcuffed, detained in a police van or cell, etc.), in such circumstances the use of force will only be legitimate in very limited contexts.<sup>47</sup> Such contexts may include circumstances where it is strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.<sup>48</sup> Outside of fulfilling such legitimate purposes, the use of force will be arbitrary. Proportionality requires an assessment as to whether the minimum amount of force necessary was used to fulfil the legitimate aim being protected.<sup>49</sup> However, where there is not legitimate aim or purpose being protected, the need and ability to consider proportionality falls away.

17. Where it has been established that the use of force in a custody setting was unnecessary, it is no longer relevant to consider the severity of the suffering caused. In *Keenan v. United Kingdom*, this Court found that:

While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.<sup>50</sup>

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<sup>44</sup> [IACtHR] *Loayza-Tamayo v. Peru*, Judgment of 17 September 1997, §57.

<sup>45</sup> [ACmHPR] *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000 (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/236-2000.html>; §37.

<sup>46</sup> Manfred Nowak & Elizabeth McArthur, 'The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment', 16 *Torture* (2006) p. 151.

<sup>47</sup> Report of SRT Nowak 2005, §39.

<sup>48</sup> UN Basic Principles on Use of Force, §15. See also, European Prison Rules 2006, §64.1.

<sup>49</sup> 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"), §49, citing UN Human Rights Committee, *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) §§83-85; UN Basic Principles on the Use of Force and Firearms, above n1, Principle 13.

<sup>50</sup> *Keenan v. United Kingdom*, App. No. 27229/95, (3 April 2001), §113.

18. Where the severity of treatment is considered, it is well established that the Court will look at all the relevant factors, including the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>51</sup> The particular vulnerability of an individual is taken into account when considering the impact of treatment on him/her. In a detention setting, all individuals are vulnerable as they are under the absolute control of police or prison officials.<sup>52</sup>
19. This has also been the position adopted by national courts. In a Spanish Cassation Appeal, the Supreme Court<sup>53</sup> heard a case regarding alleged police abuse and harassment of two brothers who failed to provide identification. In relation to one of the men, who violently resisted arrest and detention (attempting to punch and kick the police) and attempted to flee, the Court found the police acted legitimately in forcibly detaining him.<sup>54</sup> The second man was also asked to provide his name and identification. He refused to cooperate and instead of giving his name, gave the name of a street in Madrid.<sup>55</sup> He was taken into detention where he was slapped, once.<sup>56</sup> He claimed that he had been injured and that his moral integrity had been impacted as a result of having been subject to humiliating and/or degrading treatment.<sup>57</sup>
20. The Court considered whether one slap met the threshold of physical and/or psychological suffering to constitute a violation. The Court found that the unnecessary and arbitrary use of force by a person with authority in a detention setting, where there was a difference in positions of power and liberty between the person acting with authority, and the person in receipt of authority, was sufficient to constitute a violation.<sup>58</sup> For the Court, the lack of a visible injury did not exclude this finding. Instead, the context – a detention setting where the person in receipt of the slap was powerless *vis à vis* the state authorities – was seen as the crucial determinative factor. The Court emphasised the lack of freedom that the detainee was able to exercise, and the fact that he was subject to the will of the authorities. This context meant that he was obliged to accept the slap without being able to react against it.<sup>59</sup> This action in the context of a detainee being subject entirely to the will of the authorities was inherently humiliating or degrading.<sup>60</sup>
21. The previous Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, has indicated that a slap across the face in interrogation will certainly amount to at least inhuman or degrading treatment. In a report concerning the United States of America, he commented that it was not clear from a revised Army Field Manual whether (among other techniques) it was permissible to slap a person being questioned. In his view, such conduct “would breach the prohibition against torture and any form of cruel, inhuman or degrading treatment”.<sup>61</sup>
22. This position is supported by the practice of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”). The CPT has raised concerns about police violence in custody settings, and in particular, the use of a slap by a police officer in questioning. In 2006, its report concerning Belgium examined the case of a woman slapped by a police officer and found that “*dès l’instant où la personne interpellée a été maîtrisée, rien ne saurait jamais justifier qu’elle soit frappée*” (from the moment at which a suspect has been arrested and is under [police] control, *nothing* can ever justify slapping her).<sup>62</sup>
23. Similarly, the UN HR Committee has held that the unnecessary use of force in detention contexts raises issues under Article 7 (prohibition of torture and ill-treatment) of the Covenant. The UN HR

<sup>51</sup> *Dorđević v. Croatia*, (2012) App. no. 41526/10, §94.

<sup>52</sup> Report of the Special Rapporteur on the question of torture, Manfred Nowak, 23 December 2005, E/CN.4/2006/6, §39; [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.4/2006/6](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2006/6).

<sup>53</sup> [España], Tribunal Supremo (Sala de lo Penal, Sección 1ª), Sentencia núm. 543/2010 de 2 de junio de 2010. Appeal No: 2144/2009.

<sup>54</sup> *Ibid.*, first legal reasoning.

<sup>55</sup> *Ibid.*, first factual background.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, second factual background.

<sup>58</sup> *Ibid.*, fourth legal reasoning.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin: Mission to the United States of America, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, §35.

<sup>62</sup> CPT, *Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants*, 20 April 2006, CPT/Inf (2006) 15, §12 (emphasis added).

Committee has specifically raised concerns about the excessive use of force by members of the police force, not compatible with the *UN Principles on the Use of Force and of Force and Firearms by Law Enforcement Officials*, particularly when persons are brought in for questioning.

24. In its 2010 review of Belgium's compliance with the Covenant, the Committee recommended Belgium to:

take all the necessary steps to guarantee that when the members of the police use force, they act in conformity with the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials and to ensure that arrests are carried out in strict adherence to the provisions of the Covenant. The State party should, in the event of complaints of alleged mistreatment, systematically undertake investigations and prosecute and punish those responsible in a manner commensurate with the acts in question.<sup>63</sup>

25. This echoed concerns raised previously by the UN HR Committee. In 2004 it expressed concern about the persistence of allegations of police violence, often accompanied by racial discrimination and about the investigations undertaken in relation to these allegations.<sup>64</sup>

### **Additional considerations**

26. The use of force by state agents in custody is even more serious where the individuals concerned have additional vulnerabilities or is discriminatory.

### **iii) Particular principles relating to children (under 18)**

27. The Special Rapporteur on Torture outlined the “dual vulnerability of child detainees” who are vulnerable “firstly, owing to their detention and like all other detainees, they depend on the State for care; secondly, owing to their age, their psychological stage of development and their physical fragility, what is at stake is not only the well-being of the child at the moment of deprivation of liberty but also his or her further development.”<sup>65</sup>

28. It is well established that recourse to instruments of restraint and the use of force against children is prohibited except as defined in very limited purposes.<sup>66</sup> The United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>67</sup> provide for limited restraint and/or use of force in exceptional circumstances including when acting to “prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property” and provides that such force may only be resorted to where all other control methods have been exhausted and failed.<sup>68</sup> This is consistent with the principles noted above that non-violent means are to be attempted first.<sup>69</sup>

29. The UN Committee on the Rights of the Child distinguishes the use of force in circumstances where it may be justified, such as where authorities are confronted with dangerous behaviour, from the pedagogical use of force which, it holds unequivocally, “is invariably degrading”.<sup>70</sup> The UN Committee on the Rights of the Child has noted the prevalence of slapping in a variety of settings, including within the penal and justice systems,<sup>71</sup> which is commonly administered as a form of

<sup>63</sup> UN Human Rights Committee Concluding observations: Belgium (2010), CCPR/C/BEL/CO/5, 16 November 2010; §14.

<sup>64</sup> UN Human Rights Committee, Concluding Observations: Belgium (2004), CCPR/CO/81/BEL; §12.

<sup>65</sup> Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/64/215, (3 August 2009), available here: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/64/215](http://www.un.org/ga/search/view_doc.asp?symbol=A/64/215), §64.

<sup>66</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>, §64; see also UN Code of Conduct for Law Enforcement Officials, article 3(c); Rights of the Child Resolution adopted by the General Assembly on 18 December 2007, on the report of the Third Committee (A/62/435); available here: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/62/141](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/141), (22 February 2008), §49.

<sup>67</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty; §K.

<sup>68</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty; §K.

<sup>69</sup> UN Basic Principles on Use of Force, Principle 4; see also European Prison Rules 2006, §64.1.

<sup>70</sup> UN Committee on the Rights of the Child (“UN CRC”), General Comment No. 13, the right of the child to freedom from all forms of violence General comment No. 13, (18 April 2011), UN Doc. CRC/C/GC/13, (“UN CRC GC13”), §24; and CRC General comment No. 8 *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* UN Doc. CRC/C/GC/8 21 August 2006 (“UN CRC GC8”), §11 and §15.

<sup>71</sup> UN CRC GC8, §§9-11.



punishment for failing to cooperate, or misbehaving.<sup>72</sup> The UN Committee on the Rights of the Child has held that the pedagogical use of force, i.e. the use of force in response to non-cooperation or misbehaviour, (whether in the home, education or justice systems) must not be used, “however light” it may be.<sup>73</sup>

30. The European Committee on the Prevention of Torture (“CPT”), in its 9th General Report in a section on ‘Juveniles deprived of their liberty’,<sup>74</sup> notes that juveniles run a higher risk of being deliberately ill-treated in police establishments than in other places of detention:

In a number of other establishments visited, CPT delegations have been told that it was not uncommon for staff to administer the occasional “pedagogic slap” to juveniles who misbehaved. The Committee considers that, in the interests of the prevention of ill-treatment, all forms of physical chastisement must be both formally prohibited and avoided in practice. Inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures. The Committee's experience also suggests that when ill-treatment of juveniles does occur, it is more often the result of a failure adequately to protect the persons concerned from abuse than of a deliberate intention to inflict suffering.<sup>75</sup>

31. The United Nations Committee on the Rights of the Child also notes that the threshold for ill-treatment will be met where there is an attempt to extrajudicially punish children for unlawful or unwanted behaviours and is typically applied by police and law-enforcement officers, staff of residential and other institutions and persons who have power over children.<sup>76</sup>

32. The United Nations Committee on the Rights of the Child reiterates that states must ensure an absolute ban on violence against children, noting “all forms of violence against children, however light, are unacceptable”.<sup>77</sup> The Committee emphasised that violence should not be interpreted as referring to strictly physical or intentional harm and that non-physical or non-intentional forms of harm must also be addressed.<sup>78</sup> Furthermore, it has noted that frequency, severity, and intent to harm are not prerequisites for the definitions of violence.<sup>79</sup> This highlights an overall trend towards ending all violence against children, and reinforces the high threshold for the lawful use of force.

33. The United Nations Committee on the Rights of the Child has further noted that children are often victims of torture and inhuman or degrading treatment or punishment when they are marginalised, disadvantaged and discriminated against, including as members of minority groups.<sup>80</sup>

#### *iv) Particular principles relating to discrimination*

34. The Committee on the Elimination of Racial Discrimination (“CERD”), in its General Recommendation 31, urged all states parties to take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership in a particular racial or ethnic group, or any profiling which exposes him or her to greater suspicion.<sup>81</sup> The Committee further asserts that states parties should prevent and punish violence, acts of torture, cruel, inhuman or degrading treatment and all violations of human rights affecting such persons<sup>82</sup> and ensure the observance of the general principle of proportionality and strict necessity in recourse to force against persons, in accordance with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>83</sup> The Committee has urged states to take special precautions when questioning or arresting persons belonging to, or

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<sup>72</sup> 9th General Report on the CPT's Activities (1998) CPT/Inf (99) 12, available here: <http://www.cpt.coe.int/en/annual/rep-09.pdf>, (“CPT 9<sup>th</sup> General Report”), §24.

<sup>73</sup> UN CRC GC8, §11.

<sup>74</sup> CPT 9<sup>th</sup> General Report.

<sup>75</sup> CPT 9<sup>th</sup> General Report, §§24-5.

<sup>76</sup> UN CRC GC13, §26.

<sup>77</sup> UN CRC GC8, §2, §8, §11; and §37; UN CRC GC13, §17, §26.

<sup>78</sup> UN CRC GC13, §4.

<sup>79</sup> UN CRC GC13, §17.

<sup>80</sup> UN CRC GC13, §26.

<sup>81</sup> UN Committee on the Elimination of Racial Discrimination, from A/60/18, General recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, §20.

<sup>82</sup> *Ibid.*, §21.

<sup>83</sup> *Ibid.*, §22.

perceived to be belonging to racial or ethnic minority groups, and notes the particular vulnerability of women and minors for whom states are urged to take special precautions.<sup>84</sup>

### 35. **D. National standards and practice on the use of force in detention settings**

36. National legal systems reflect the international and regional standards outlined above in their own legislation and jurisprudence.<sup>85</sup> In each of the countries surveyed below, clear standards exist prohibiting the use of force except where it is strictly necessary.

37. In the United Kingdom, Prison Service Order 1600 regulates the use of force in detention settings. It details the circumstances in which force can be used and the framework for justifying the use of force. The unnecessary use of force against a detainee is prohibited. The Order provides that force will only be necessary in circumstances where the detainee is posing a risk to life, limb or to the good order of the establishment.<sup>86</sup> The Order recognises that it is clearly easier to justify force as “necessary” if there is a risk to life or limb, and gives the following additional examples of where it may be necessary to use force in order to maintain the good order of the establishment: 1) where someone refuses to stop in an attempted escape from a detention facility; 2) a prisoner consistently refuses to stop swearing at a teacher and leave a classroom and all other alternatives such as persuasion and de-escalation had been tried and failed; and 3) a prisoner has an edged implement and they are threatening to undertake an act of self-harm (eg. cut their wrist with a blade), despite non-violent efforts to prevent it from doing so, the situation deteriorates and the prisoner actually tries to harm him or herself.

38. In Sweden, under section 10 of the Swedish Police Act,<sup>87</sup> a police officer may use force if other means are inadequate and if a law enforcement officer is: responding to force, or the threat of force; attempting to detain someone and that person is seeking to escape or is otherwise resisting; averting a threat to life, health valuable property, or extensive damage to the environment; with statutory support, is to turn away or remove a person from an area or premises or conduct or assist in the search of a person, a bodily examination or some other similar measure, a seizure or some other impoundment of property or a search of premises and encounters resistance; with statutory support is attempting to gain entry to, cordon off, shut off or evacuate a building, a room or an area, assist someone who is performing an official duty with such a measure or some similar measure, or in connection with a foreclosure in accordance with what is prescribed thereof, and encounters resistance; or if the measure otherwise is indispensable for the maintenance of public order and safety and it is evident that it cannot be implemented without the use of force.<sup>88</sup>

39. The Australian Federal Police Commissioner's Order on Operational Safety provides that police officers may use reasonable force only where it is necessary in order to de-escalate potential conflict situations and for purposes including; acting to defend oneself, or another person; protecting property from unlawful appropriation, damage or interference; and/or preventing criminal trespass to any land or premises effecting an arrest where authorised by a law.<sup>89</sup>

40. 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.<sup>90</sup>

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<sup>84</sup> *Ibid.*, §25.

<sup>85</sup> 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, §18 and §§91-103.

<sup>86</sup> HM Prison Service, Prison Service Order 1600: Use of Force, 31 August 2005 (subsequently updated), available here:

<https://www.justice.gov.uk/offenders/psos>.

<sup>87</sup> Swedish Police Act (1984:387).

<sup>88</sup> *Ibid.*, section 10: Use of force.

<sup>89</sup> The Australian Federal Police Commissioner's Order on operational safety (CO3), 1 June 2012, available here:

<http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/AFP%20Commissioners%20Order%20on%20Operational%20Safety%20CO3.ashx>.

<sup>90</sup> *R v Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

41. In *R. v. Leahey*, the Provincial Court of Alberta (Canada) considered a case of alleged abuse by an officer against a detainee that the accused officer had been questioning in police custody. The accused officer said that he was alarmed by the detainee suddenly raising his voice and by his body movements, and in particular his hand gestures, which caused the officer to spontaneously (the judgment suggests, potentially as part of a self-defence reaction, or as a reflex action), strike the detainee with a slap. The detainee fell to the floor. It was alleged that the officer then kicked the detainee twice in the stomach with his toe. The detainee consistently held that he did not make any threatening gesture or movement but was unresponsive to the officer accused's questions. The Court held that the unjustified use of force in relation to the slap and kicks was unnecessary and, therefore, excessive.<sup>91</sup> The police officer was convicted of assault.

42. In the United States of America, the Los Angeles County Sheriff Department's Use of Force policy,<sup>92</sup> is emblematic of the policies in place in a number of the federated states. It provides that force may only be used as a last resort. Police are encouraged to de-escalate confrontations through tactical communication, warnings, and other common sense methods preventing the need to use force whenever reasonably possible. Where force is necessary, only the amount reasonable to fulfil legitimate aims must be exerted. In determining the necessity for force and the appropriate level of force, officers are encouraged to consider whether the suspect poses an immediate threat to the safety of the member or others, and whether the suspect is actively resisting.<sup>93</sup> The U.S. Department of Justice - National Institute of Corrections has created a Resource guide for jail administrators.<sup>94</sup> The document states that:

As a general rule, force may be used only when absolutely necessary, that is, as a last resort when all other reasonable efforts have failed to resolve a problem. Officers should be trained to use only the minimum force necessary to control a given situation. Force should never be used as a method of punishment or retribution...<sup>95</sup>

43. In assessing the validity of force used, case law from the United States also centres on assessing "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight".<sup>96</sup>

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<sup>91</sup> *R. v. Leahey*, 2000 ABPC 198 (CanLII).

<https://www.canlii.org/en/ab/abpc/doc/2000/2000abpc198/2000abpc198.html?searchUrlHash=AAAAAQAcJ3VzZSBvZiBmb3JjZScsIH BvbGljZSwgc2xhcAAAAAAB>, see §§5, §90, §93, §§126-8.

<sup>92</sup> Los Angeles County Sheriff Department - Use of Force policy <http://shq.lasnews.net/content/uoa/EPC/force-policy.pdf>; '3-10/005.00 Force Prevention Principles'.

<sup>93</sup> *Ibid.*, It states that 'Department members are authorized to use only that amount of force that is objectively reasonable to perform their duties.'

<sup>94</sup> M. D. Martin and T. A. Rosazza, '*Resource Guide for Jail Administrators*', U.S. Department of Justice

National Institute of Corrections, (December 2004), available here: <https://s3.amazonaws.com/static.nicic.gov/Library/020030.pdf>.

<sup>95</sup> *Ibid.*, Chapter 8, p.119.

<sup>96</sup> [USA] *Graham v. Connor*, 490 U.S. 386 (1989) at 396; 109 S.Ct. at 1872.