



The Law on Policing Peaceful Protests

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been asked by Not1More (N1M) to prepare a report on how the law protects the rights of environmental rights defenders in the United Kingdom (UK), with a particular focus on the right to peaceful protest.
2. N1M has been investigating police brutality and rights violations against environmental defenders in the UK, and has so far documented evidence on incidents of violence, surveillance, criminalisation and the conduct of police forces deployed ostensibly to facilitate protests. We have been informed by N1M that these violations are gendered, and that there have also been targeted attacks on persons with disabilities and the elderly. The interviews focus on the anti-fracking movement, particularly the experiences of protesters at the Preston New Road protection camps in Lancashire, but some also cover the Stop HS2 protests and Extinction Rebellion.
3. The aim of N1M's project is to submit a communication to the United Nations' Special Mechanisms about the United Kingdom's treatment of environmental defenders.
4. To this end, N1M has sought OPBP's research assistance on how international human rights instruments, the European Convention on Human Rights (ECHR) and the domestic law of the UK (with a focus on England and Wales) protect peaceful protesters through: (i) the right to freedom of peaceful assembly; (ii) the right to freedom of expression; and (iii) the right against torture and cruel, inhuman or degrading treatment.
5. In particular, N1M poses three legal questions:
 - i. What are the limits of police powers in the context of peaceful protests?
 - ii. What type and cumulative effect of policing, criminalisation, surveillance and use of force constitutes the 'chilling effect'?
 - iii. What constitutes cruel, inhuman or degrading treatment in the context of policing of peaceful protests?
6. The following section briefly sets out the findings of our research.

(b) Research Questions

QUESTION 1: WHAT ARE THE LIMITS OF POLICE POWERS IN THE CONTEXT OF PEACEFUL PROTEST?

7. This question is answered with a focus on how the right to freedom of peaceful assembly limits police powers under international human rights instruments, the ECHR and the domestic law of the UK.
8. The right of peaceful assembly is guaranteed under Article 21 of the International Covenant on Civil and Political Rights (ICCPR), Article 11 of the ECHR and the UK's Human Rights Act 1998 (HRA) which replicates Article 11 of the ECHR. In all three legal regimes, any restrictions on the right must be provided by law and be proportionate to one or more of the legitimate aims listed in the stated provisions, namely interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The European Court of Human Rights (ECtHR) and the UK courts in light of the HRA additionally require that the restriction be justified by a 'pressing social need'. Further, the ECtHR also considers that States have a wide margin of appreciation in assessing the necessity of measures to restrict disruptive conduct during assemblies. In any event, all three legal regimes agree that the restriction imposed must be the least intrusive among the measures that might achieve the relevant protective function and the onus is on the State to justify the same.
9. As regards the police's power to regulate protests, both the UN Human Rights Committee (UNHRC) and the ECtHR consider that the failure of participants to notify authorities or seek authorisation does not render the assembly unlawful. The UK's domestic law aligns with this. All three systems recognise that restrictions may be imposed on the time, place and manner of an assembly. However, while the UNHRC (*Popova v Russia*) holds that no person can be arrested for failing to notify or secure authorisation without showing how they also disrupted public order, under the UK's Public Order Act 1986, failing to meet notification requirements has been criminalised for organisers of public processions. Additionally, knowingly failing to comply with any conditions imposed on the assembly by the police has also been criminalised for both participants and organisers, unless it can be shown that the failure arose from circumstances beyond their control.

10. As regard the police's power to arrest participants, under international human rights instruments and the ECHR, the mere act of participating in or organising a peaceful assembly cannot be criminalised. Further, each participant or organiser can be held accountable only for their own unlawful conduct. As held by the ECtHR in *Giuliani and Gaggio v Italy*, a participant can be arrested only if they commit a 'reprehensible offence' (such as engaging in acts of violence, violating the rights and freedoms of others, etc.) during the demonstration. However, under the UK's domestic law, even peaceful protesters may be charged with criminal offences such as the failure to comply with conditions, wilful obstruction of a highway, etc., or be arrested for 'breach of the peace' based on an apprehension of harm (*Laporte v Commissioner of the Police of the Metropolis*) although breach of the peace is not an offence in itself in England and Wales and cannot lead to criminal charges. In any event, as recognised by the UNHRC and the ECtHR, sanctions and penalties should not be excessive, for they risk having a chilling effect on the exercise of the right of peaceful assembly.
11. As regards the power to stop and search, both the UNHRC and the ECtHR (*Gillan v UK*) acknowledge that police officers cannot exercise this power without a reasonable suspicion of wrongdoing or crime. The Venice Commission's Guidelines on Freedom of Peaceful Assembly echo this principle and further provide that the exercise of stop and search powers should be subject to: (i) the tests of necessity and proportionality; (ii) an effective oversight mechanism; (iii) effective judicial review; (iv) limits on temporal and geographical scope; and (v) clear specification of the modalities for carrying out the search. In the UK, legislation like the Police and Criminal Evidence Act 1984 and the Criminal Justice and Public Order Act 1994 empower the police to stop and search persons based on a 'reasonable belief' that they will find prohibited or stolen items or that incidents of 'serious violence' may occur.
12. As regards the power of surveillance, the UN's Special Rapporteur on freedom of assembly stressed that the collection and processing of personal information of demonstrators must strictly comply with protections against arbitrary or unlawful interference with privacy under Article 17 of the ICCPR. Similarly, in *Big Brother Watch v UK*, the ECtHR held that all measures of surveillance, including the interception of communications and tracking of individuals via GPS, must meet the tests of legality and proportionality under the right to 'private life' under Article 8 of the ECHR. In the UK, the Regulation of Investigatory Powers Act 2000 gives the police the power to acquire communications data, to acquire electronic data, and to conduct surveillance, including the use of covert police operations, *inter alia* in the interests of national

security and crime detection/ prevention. However, the Special Rapporteur on freedom of assembly noted that the use of covert policing to gather intelligence on environmentalists and human rights defenders is simply unjustifiable. Further, both the ECtHR (*Catt v UK*) and UK courts (*R (Wood)*) are clear that the retention of personal data of demonstrators, after it is clear that they have not committed criminal offences, is disproportionate and violates the privacy.

13. As regards the power to disperse assemblies, according to the UNHRC, law enforcement agencies should always first seek to isolate and separate violent participants from others and allow the assembly to continue. Although the UK's Public Order Act 1986 gives the police the power to disperse an assembly, UK courts (*R (Moos)*) conduct a proportionality assessment on a case-by-case basis to determine whether dispersal was justified. However, both the UNHRC and the ECtHR (*Ibrahimov v Azerbaijan*) agree that mere disruptions or failure to abide by applicable formalities do not justify dispersal.
14. As regards the power to use force at assemblies, both the UNHRC and the ECtHR stress that assemblies should ordinarily be managed without resorting to force. Where unavoidable, force should be resorted to only after verbal warnings and sufficient time have been afforded to participants to voluntarily cease activities. Under international law, any use of force should meet the principles of legality, necessity and proportionality. Particularly, lethal force may be employed only as a last resort, subject to strict or absolute necessity. Further, both the UNHRC and the ECtHR agree that force should only be directed to the specific individuals causing or threatening violence; collateral harm is not justified. The UK's domestic law mirrors this understanding of the limits on the power to use force. The College of Policing states that the 'core questions' for whether force should be used in policing protests are as follows: (i) whether it has a lawful objective; (ii) whether there is an imminent threat; (iii) whether there are means short of the use of force that would obtain the objective; (iv) whether the force is proportionate and not excessive.
15. In 2014, the UN Special Rapporteur on freedom of peaceful assembly noted that surveillance tactics and disproportionate use of force have a chilling effect on peaceful protestors. The ECtHR (*Balçık v Turkey*) also acknowledges that the use of disproportionate force during an assembly may have a chilling effect on the participants themselves and others.

16. Additionally, States also have a positive duty to facilitate the exercise of the right to peaceful assembly. According to the UNHRC, this positive duty entails *inter alia* allowing the peaceful assembly to take place in the participants' desired location – even if it involves some disruption to daily activities and is not formally authorised – and protecting participants from both State abuses and private interferences. Further, it requires States to provide assistance to individuals to help them overcome difficulties they may face in the exercise of such rights, including by putting an end to actions that hinder the equal enjoyment of rights by all participants. According to the ECtHR too, positive obligations of a State include protecting participants (especially those belonging to minority groups, for they are more vulnerable to victimisation), and facilitating an assembly without fear of physical violence from counterdemonstrators. In the UK too, the College of Policing, which provides operational guidance for police forces across the UK, recognises that the police have a duty to take reasonable steps to protect participants of an assembly from threats of disruption or disorder from others.
17. Importantly, the right to peaceful assembly is guaranteed to everyone without discrimination based on any of the grounds listed under Article 26 of the ICCPR, or Article 14 of the ECHR (replicated in the HRA), or the UK's Equality Act 2010. In this light, the UNHRC and the ECtHR (*Bączkowski v Poland*) agree that law enforcement officials should be sensitised to the specific needs of individuals and groups in situations of vulnerability (including disability) when participating in peaceful assemblies. In the UK, the College of Policing and the Independent Police Complaints Commission (which deal with police training and oversight respectively) recognise this principle. Law enforcement agencies should also be alert to and address the potential discriminatory impacts of policing tactics, including in relation to new technologies. In the UK, the Equality Act 2010 makes it unlawful for the police to discriminate against, harass or victimise any person on the grounds of the protected characteristics of age, disability, race, religion, sex and sexual orientation, etc., when using their powers.

QUESTION 2: WHAT TYPE AND CUMULATIVE EFFECT OF POLICING, CRIMINALISATION, SURVEILLANCE AND USE OF FORCE CONSTITUTES THE 'CHILLING EFFECT'?

18. In answering this question, the Report considers whether policing, criminalisation, surveillance and use of force have a 'chilling effect' on the right to freedom of speech and expression

guaranteed under international human rights instruments, the ECHR and the domestic law of the UK. A ‘chilling effect’ will arise in this context when the specified State conduct has the effect of discouraging individuals from exercising their right to freedom of expression.

19. ‘Chilling effect’ does not appear to be a clearly defined legal concept in any of the three legal regimes considered in this Report. Nor have these regimes considered the possibility of several distinct State actions having a ‘cumulative’ chilling effect. However, based on a survey of jurisprudence, it is clear that overly broad or vague laws and disproportionate restrictions of the right to freedom of expression are typically considered to have a chilling effect on the right.
20. The England and Wales High Court of Justice (*R (Miller)*) came closest to giving the notion some legal effect when it held that State actions which are capable of having a chilling effect on the right to freedom of expression amount to an ‘interference’ with the right.
21. The right to freedom of expression is guaranteed under Article 19 of the ICCPR and Article 10 of the ECHR (replicated in the HRA). Any restriction on the right must be provided by law and be proportionate to one or more of the legitimate aims listed in the stated provisions. The ICCPR mentions respect of the rights or reputations of others, or protection of national security or public order, or public health or morals, whereas the ECHR and the HRA also refer to protection of territorial integrity or public safety, and prevention of disorder or crime, in addition to the aims listed in Article 19 of the ICCPR. The ECtHR and UK courts additionally require that the restriction be justified by a ‘pressing social need’. Under all systems, the restriction should be the least intrusive among those that would achieve the relevant protective aim. Further, the ECtHR (*Surek v Turkey*) holds that States have a narrow margin of appreciation when it comes to expression relating to matters of general public interest, or which scrutinises governmental actions.
22. The UN Special Rapporteur on the freedom of peaceful assembly considers that police tactics like stopping individuals at random during or after protests, requesting identification and profiling individuals based on their ethnicity or detaining them in the absence of identification may have a chilling effect on freedom of expression. Similarly, mandatory notifications and authorisation requirements, police tactics like ‘kettling’, tagging individuals as ‘extremists or terrorists’, using IMSI-catchers in protests, and heavy fines or criminal penalties may also have a chilling effect, according to the Special Rapporteur. The ECtHR also recognised in *Ricci v*

Italy that handing down disproportionate prison sentences has a significant chilling effect on the right to freedom of expression. In the UK, it was held in *R (Miller)* that the police threatening an individual with criminal prosecution has a chilling effect on the freedom of expression.

23. The UNHRC and the UN Special Rapporteur on the freedom of peaceful assembly consider that the following have a chilling effect on the right to freedom of expression: (i) charging peaceful protesters with terrorist offences; (ii) using charges as a means of intimidation, without pursuing them; (iii) imposing disproportionate penalties; (iv) imposing individual liability on organisers of peaceful assemblies for harm caused by participants; (v) criminalising acts like ‘disruption of traffic’ and ‘road-blocking’; (vi) criminalising non-violent protests using ‘lock-on’ devices; and (vii) invoking criminal defamation, anti-State propaganda, national security and sedition laws against human rights defenders. The ECtHR (*Eon v France*) also considers that the criminalisation of expression in public interest and the imposition of criminal penalties, such as fines or imprisonment, are likely to have a chilling effect on freedom of expression. As noted above, in the UK, the decision in *R (Miller)* recognises the chilling effect of criminalisation on the right to freedom of expression.

24. The UNHRC considers that the following may have a chilling effect on the exercise of the freedoms of peaceful assembly and expression: (i) use of surveillance technologies, including recording devices like body-cameras, during assemblies in a manner that intimidates or harasses individuals; (ii) information or data gathering by authorities in connection with an assembly; (iii) use of surveillance technologies that perpetuate fear of subsequent uses of the surveillance footage or data obtained, and the fear of the risks of being tracked or stigmatised. The ECtHR (*Big Brother Watch v UK*) also considers that bulk interception of communications of journalists could have a chilling effect on the freedom of expression. In the UK, the London Policing Ethics Panel’s report noted that surveillance has the potential to produce a chilling effect on democratic debate and protest. In *R (on the application of Edward Bridges)*, the England and Wales Court of Appeal recognised that surveillance could disproportionately interfere with the right to privacy.

25. All three legal regimes considered here recognise that force should not be used unless strictly unavoidable and, if used, must be used in accordance with human rights law. The Special Rapporteur on the situation of human rights defenders recognises that the use of force (such

as beating and shooting) against journalists, lawyers and human rights defenders has a broad chilling effect on the freedom of expression. There is no ECtHR or UK jurisprudence specifically addressing the chilling effect of the use of force by police officers on the freedom of expression.

QUESTION 3: WHAT CONSTITUTES CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF POLICING OF PEACEFUL PROTEST?

26. This question is answered with a focus on the right against cruel, inhuman and degrading treatment as guaranteed under international human rights instruments, the ECHR and the domestic law of the UK.
27. Torture and cruel, inhuman or degrading treatment (CIDT) are prohibited by Article 7 of the ICCPR and Articles 2 and 16 respectively of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT). Additionally, Article 15 of the Convention on the Rights of Persons with Disabilities (CRPD) guarantees specifically to persons with disabilities the right against torture and CIDT. The prohibition of torture and CIDT is absolute, implying that individuals do not lose their protection even in the context of violent riots or unlawful protests.
28. According to the UNHRC, any ill-treatment that causes physical or mental pain and suffering to a victim is covered within the meaning of CIDT. Such CIDT amounts to torture if it is: (i) intentional; (ii) causes severe physical or mental suffering to a powerless person, and (iii) is committed with a specific purpose or objective. Both the Special Rapporteur on torture and other CIDT and the UNHRC (*Gamarra v Paraguay*) recognise that inherent in the concept of CIDT is any unnecessary or disproportionate use of force by the police. As per the Istanbul Protocol and other UN bodies, the following acts amount to CIDT: (i) punching, kicking, slapping, beating with objects, etc.; (ii) prolonged constraint of movement, forced positioning, etc.; (iii) choking; (iv) humiliation, including through verbal abuse and performance of humiliating acts; (v) treatment that exploits pre-existing injuries; and (vi) treatment that causes permanent physical damage.

29. The UNHRC (*Suleimenov v Kazakhstan*) also recognises that the vulnerability (including disability) of an individual forms a crucial factor in determining the intensity of the physical or mental suffering endured by that person. The Committee on the Rights of Persons with Disabilities therefore considered the UK's use of physical restraints, taser guns and similar weapons on persons with disabilities, to be a violation of CIDT. Similarly, the Special Rapporteur on torture and CIDT noted that any intimidation and serious threats, including death threats, to the physical integrity of human rights defenders amounts to CIDT.
30. In the ECHR, Article 3 enshrines the absolute prohibition of torture and other forms of ill-treatment. For the ECtHR, treatment that is premeditated and causes either actual bodily injury or intense physical or mental suffering amounts to 'inhuman treatment'. Treatment will qualify as 'degrading' where its object is to humiliate and debase the victim. When undertaken with 'intent' and 'purpose', such inhuman and degrading treatment amounts to torture.
31. The ECtHR (*Bouyid v Belgium*) considers that any resort to physical force by law-enforcement officers, which has not been made strictly necessary by the victim's own conduct, diminishes human dignity and is a violation of Article 3. Law enforcement actions that may violate Article 3 include: (i) causing severe bodily injuries or intense physical or mental suffering without sufficient justification; (ii) treatment that humiliates or debases an individual, diminishing their human dignity; (iii) unwarranted use of pepper spray and tear gas against demonstrators; (iv) slapping individuals (even if it is devoid of physical injury); (v) hitting demonstrators who are trying to run away from the scene, or have fallen to the ground or are trying to hide from the police (*Najafli v Azerbaijan*); and (vi) grabbing demonstrators or pulling their hair and dragging them along the ground in order to arrest them (*Annenkov v Russia*).
32. Further, the ECtHR recognises that vulnerabilities (such as age and disability) should be taken into account in determining whether a certain kind of treatment attains the 'minimum level of severity' required under Article 3. Accordingly, in *Vincent v France*, when a wheelchair user was detained in different prisons that were not adapted to his disability, the ECtHR found a violation of Article 3, despite no evidence of a positive intention to humiliate the person.
33. In the UK, the HRA replicates Article 3 of the ECHR, and UK courts tend not to depart from clear and constant Strasbourg jurisprudence without good reason. Apart from the HRA, according to the College of Policing, firearms, less lethal weapons and arrest and restraint

procedures must not be used by police officers with the sole intention of inflicting severe pain or suffering on another. Any such action violates human rights provisions and is contrary to Section 134 of the Criminal Justice Act 1988 and Section 3 of the Criminal Law Act 1967. Particularly, the UK Parliament's Joint Committee on Human Rights made it clear that a Taser should not be used against peaceful protestors.

34. Additionally, the England and Wales High Court of Justice recognised that in determining whether a certain 'treatment' meets the 'minimum level of severity' to constitute inhuman or degrading treatment under Article 3, the vulnerability of the victim must be taken into account. Accordingly, in *ZH v The Commissioner of Police for the Metropolis*, it held that the actions of the police officers in hand-cuffing and restraining a 16-year old autistic boy for a long duration amounted to inhuman or degrading treatment.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1. International human rights instruments like the ICCPR, the CAT and the CRPD are binding on the UK in light of its ratification of these treaties in 1969, 1988 and 2009 respectively. Consequently, from the perspective of international law, the UK is bound by the human rights obligations it has undertaken in these treaties. It cannot invoke its domestic law as a justification for not complying with its obligations under international law.¹

QUESTION 1: WHAT ARE THE LIMITS OF POLICE POWERS IN THE CONTEXT OF PEACEFUL PROTEST?

2. The Report answers this question with reference to the right to freedom of peaceful assembly under the ICCPR. Specifically, it considers: (i) the scope of the right; (ii) the scope of corollary State obligations; (iii) how other rights overlap with the right to peaceful assembly; (iv) how the exercise of various police powers impacts the right; and (v) how the protection against discrimination interacts with the right.

I. General Principles

3. The right to freedom of peaceful assembly is guaranteed in numerous international human rights instruments.² It is notably provided under Article 21 of the ICCPR, which is almost universally ratified.³ The UK has also ratified the ICCPR and accordingly, is obliged to respect, protect and fulfil the right under Article 21. Although individuals cannot bring complaints against the UK to the UNHRC directly, great weight should be ascribed to the UNHRC's interpretations of the ICCPR, since it was established specifically to supervise the application

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 27.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 21; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 7; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 29. For complete list, see Office of the High Commissioner for Human Rights (OHCHR), 'International Standards on the Rights to Freedom of Peaceful Assembly and of Association' <<https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/InternationalStandards.aspx>> accessed 19 August 2020.

³ 173 State parties on 28 July 2020. See OHCHR, 'Status of Ratification Interactive Dashboard' <<https://indicators.ohchr.org/>> accessed 19 August 2020.

of the ICCPR.⁴ Relevant to the present context, the UNHRC has built up a considerable body of interpretative case law on the right of peaceful assembly, in particular, through its recently adopted General Comment No 37.⁵ The right of peaceful assembly has also been the subject of many Human Rights Council resolutions,⁶ and reports by the UN Special Rapporteur on the right to freedom of assembly,⁷ two of which pertain to missions conducted in the UK in 2013 and 2016.⁸ Although not binding, these sources provide some guidance as to the interpretation, application and expected implementation of the rights enshrined in the ICCPR.

a. Definition

4. The right to peaceful assembly is recognised as a fundamental right that entails the opportunity of individuals to organise and participate in peaceful assemblies for a specific purpose, generally in order to express support or disagreement with a particular cause or communicate ideas.⁹ Gatherings covered by Article 21 could also be aimed at achieving other social, cultural, religious or commercial objectives.¹⁰
5. Further, such assemblies may take any form, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash-mobs.¹¹ The right is applicable to small gatherings too.¹²

⁴ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 [66]; UN Human Rights Committee (UNHRC), ‘General Comment No 33 – The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ (5 November 2008) UN Doc CCPR/C/GC/33 [13].

⁵ UNHRC, ‘General Comment No 37 – Article 21: Right of Peaceful Assembly’ (27 July 2020) UN Doc CCPR/C/GC/37 (GC 37).

⁶ See UN Human Rights Council, ‘The Promotion and Protection of Human Rights in the Context of Peaceful Protests’ (11 April 2014) UN Doc A/HRC/RES/25/38; UN Human Rights Council, ‘The Promotion and Protection of Human Rights in the Context of Peaceful Protests’ (12 April 2016) UN Doc A/HRC/RES/31/37; UN Human Rights Council, ‘The Rights to Freedom of Peaceful Assembly and of Association’ (18 July 2016) UN Doc A/HRC/RES/32/32.

⁷ The complete list of reports is available at OHCHR, ‘Thematic Annual Reports’ <<https://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/AnnualReports.aspx>> accessed 19 August 2020.

⁸ UN Human Rights Council, ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on his Follow-Up Mission to the United Kingdom of Great Britain and Northern Ireland’ (8 June 2017) UN Doc A/HRC/35/28/Add.1 (2017 Report of Special Rapporteur on Mission to UK); UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, on his mission to the United Kingdom (14-23 January 2013)’ (17 June 2013) UN Doc A/HRC/23/39/Add.1.

⁹ See notably *Elena Popova v Russia*, Communication No 2217/2012 (6 April 2018) [7.3].

¹⁰ GC 37 (n 5) [12].

¹¹ *ibid* [6].

¹² *Turchenyak v Belarus*, Communication No 1948/2010 (24 July 2013) (picket of 10 persons); *Derzhavtsev v Belarus*, Communication No 2076/2011 (29 October 2015) (picket of 2 persons).

6. Article 21 demands that an ‘assembly’ be ‘peaceful’. The term ‘assembly’ identifies the inherent associative element of the right, which means that it is exercised and enjoyed collectively.¹³ The term ‘peaceful’ demands non-violent conduct from the participants of the gathering, and not from police officers, the public or counter-demonstrators.¹⁴ Crucially, this element is assessed individually – thus, the commission of acts of violence by certain members of a protest does not automatically deprive all participants of the protection granted by Article 21. Further, ‘violent’ acts must reach a certain threshold for the protest to be deemed not ‘peaceful’ – the UNHRC notes that ‘mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities’ would not amount to violence for the purpose of Article 21.¹⁵ Even where individuals act violently during a protest and thus fall outside the scope of Article 21 for such acts, they may nonetheless retain other rights under the ICCPR, and are not left deprived of all protection under international human rights law.
7. Moreover, peaceful is not to be equated with ‘lawful’; the fact that domestic legal requirements have not been met does not exclude an assembly from the scope of the right.¹⁶ Ultimately, there should be a presumption of the lawfulness and peacefulness of an assembly, and the term ‘peaceful’ should be interpreted broadly.¹⁷

b. Two Stage-Process

8. The application of the right to peaceful assembly is governed by a two-stage process. The first step is to determine whether an event or gathering is covered by the protection it offers. The right has a large scope of application, as it applies to everyone (whether citizens or non-citizens of a State)¹⁸ without discrimination, in any place (physical or online, also including in enclosed premises, open areas or public or private spaces,¹⁹ as well as protests held in remote areas

¹³ GC 37 (n 5) [4].

¹⁴ *ibid* [18].

¹⁵ *ibid* [15].

¹⁶ *ibid* [16].

¹⁷ UN Human Rights Council, ‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ (4 February 2016) UN Doc A/HRC/31/66 [18] (2016 Joint Report of Special Rapporteurs); UN Human Rights Council, ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai’ (14 April 2014) UN Doc A/HRC/26/29 [45] (2014 Report of Special Rapporteur on Freedom of Peaceful Assembly).

¹⁸ GC 37 (n 5) [5].

¹⁹ *Giménez v Paraguay*, Communication No 2372/2014 (25 July 2018) [8.3].

shielded from public view),²⁰ whether stationary (such as a picket, or an occupation)²¹ or mobile (such as a march),²² to any number of people (except a single protester, who would be covered by other rights, such as Article 19 of the ICCPR),²³ planned/coordinated or spontaneous,²⁴ for whatever purpose/expressive content. It covers both participation and organisation. Furthermore, Article 21 does not only protect the event or gathering itself, but also other associated activities, before, during, and after a peaceful assembly.²⁵

9. A peaceful protest may be disruptive, promote contentious ideas²⁶ and have practical consequences (such as vehicular or pedestrian movement or economic activity),²⁷ yet remain within the scope of the protection. Even if a protest may or does incite hostile reactions from others, it remains covered by Article 21. In *Alekseev v Russian Federation*,²⁸ a permission to hold a picket protesting the execution of homosexuals and minors in Iran was refused on the basis of ensuring public order and safety – it was claimed that the aim of the picket would trigger ‘a negative reaction in society’ and could lead to ‘group violations of public order which can be dangerous to its participants’. The UNHRC noted that ‘an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralise such violence is not sufficient to ban a demonstration’.²⁹ There was no evidence in that case that the ‘negative reaction’ would involve violence, or that the police would be unable to prevent violence; there was thus a violation of Article 21.

10. Once it is established that an activity is covered by the protection of Article 21, and that it has been subject to a restriction or limitation, the second step is to verify whether such restriction is justifiable and thus compatible with the ICCPR. The right to peaceful assembly under the ICCPR is not a non-derogable right (as it is not listed under Article 4(2) ICCPR); it is not absolute and may be subject to limitations.³⁰

²⁰ *Kovalenko v Belarus*, Communication No 1808/2008 (17 July 2013).

²¹ *Turchenyak* (n 12) [7.4] (holding of a picket to draw public attention to problems related to the erection of a public monument); *Giménez* (n 19) (occupation of a private property to protest against the closure of a hospital).

²² *Severinets v Belarus*, Communication No. 2230/2012 (19 July 2018) [8.5].

²³ GC 37 (n 5) [13].

²⁴ *Severinets* (n 22).

²⁵ GC 37 (n 5) [33].

²⁶ For example, in *Derzhavtsev* (n 12), the author promoted the boycott of the presidential elections.

²⁷ GC 37 (n 5) [7].

²⁸ *Alekseev v Russian Federation*, Communication No. 1873/2009 (25 October 2013).

²⁹ *ibid* [9.6].

³⁰ *Kuznetsov v Belarus*, Communication No. 1976/2010 (24 July 2014) [9.7].

11. First, all restrictions to the freedom of peaceful assembly must be provided by law (or administrative decisions adopted under the law), under legal provisions that are sufficiently clear and precise, accessible to the public, in order ‘to enable an individual to regulate his or her conduct accordingly’.³¹ Moreover, the legal basis may not confer unfettered discretion to the competent authorities executing such restriction.³² These conditions apply irrespective of the domestic lawfulness of the restriction.³³
12. Secondly, any restriction must also meet the strict tests of necessity and proportionality.³⁴ According to the second sentence of Article 21, any restriction of the right must be necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.³⁵ Article 20 of the ICCPR also specifies certain permissible restrictions to the right of peaceful assembly, namely where the assembly is used to promote propaganda for war, or advocate for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.³⁶ The right under Article 21 cannot be limited on any other grounds but the ones listed here.
13. Further, the restriction imposed must be ‘the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought’.³⁷ The ban of a specific peaceful assembly must thus be a last resort measure, and allowing an assembly should prevail, rather than imposing preventive restraints to eliminate all risks.³⁸ Generic bans or blanket prohibitions are generally incompatible with the protection of Article 21, as they would be disproportionate and unnecessary.³⁹

³¹ *Nepomnyashchiy v Russia*, Communication No 2318/2013 (17 July 2018) [7.7]. See also *Sannikov v Belarus*, Communication No 2212/2012 (6 April 2018) [6.12], in which the UNHRC held that the restriction to the right of peaceful assembly was ‘not provided for by law, since the provisions of article 293 of the Criminal Code [were] too vague and broad to be able to foresee the legal consequences of one’s actions and there [was] no definition of what constitutes “mass disorder” in domestic law’.

³² *Nepomnyashchiy* (n 31) [7.7]; GC 37 (n 5) [39].

³³ *Nepomnyashchiy* (n 31).

³⁴ *Sekerko v Belarus*, Communication No 1851/2008 (28 October 2013) [9.6].

³⁵ This is repeatedly underlined in the jurisprudence of the HRC. See notably *Derzhantsev* (n 12) [8.6].

³⁶ GC 37 (n 5) [50].

³⁷ *Toregozhina v Kazakhstan*, Communication No 2137/2012 (21 October 2014) [7.4].

³⁸ GC 37 (n 5) [37].

³⁹ See *Alekseev* (n 28) (banning of gay pride marches); *Giménez* (n 19) (the administered sentence included a two-year ban on the author’s participation in assemblies of more than 3 persons).

14. The onus is on the State to justify any restriction.⁴⁰ Justifications may be provided by the police officers who arrested the person, by the courts who assessed the legality of her arrest and/or the charges against her, or by the State party when facing a complaint before the UNHRC.⁴¹ An individual assessment is required – the State must demonstrate why, based on the facts of the case at hand, the limitation was strictly necessary and proportionate to one of the legitimate purposes listed in Article 21.⁴² Moreover, the State, when imposing restrictions in order to reconcile the right of the individual to peaceful assembly and the general interests listed in Article 21 ‘should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it’.⁴³ Restrictions cannot limit the very essence of the right, and cannot aim at discouraging participation.⁴⁴

II. State Obligations

15. States have both positive and negative duties under Article 21. Such duties are applicable before, during and after assemblies.⁴⁵

16. The State’s negative duties entail no unwarranted interference with peaceful assemblies. States can neither ‘prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor sanction their participants or organisers without legitimate cause’.⁴⁶ This includes protection from harassment and reprisal from State authorities.⁴⁷

17. The UNHRC has further recognised that the State has an obligation to facilitate the exercise of the right to peaceful assembly; in other words, to ensure conditions that enable participants to exercise such a right.⁴⁸ Positive duties incumbent on the State include:

- i. *Adopting legislative and institutional measures (Article 2(1) and (2), ICCPR)*: There should be transparency in all decision-making processes concerning peaceful assemblies, and all

⁴⁰ See *Bakur v Belarus*, Communication No 1902/2009 (15 July 2015) [7.8]; *Derzhavtsev* (n 12).

⁴¹ *Korol v Belarus*, Communication No 2089/2011 (14 July 2016) [7.6].

⁴² *Nepomnyashchiy* (n 31) [7.8].

⁴³ *Turchenyak* (n 12) [7.4].

⁴⁴ GC 37 (n 5) [36].

⁴⁵ *ibid* [23].

⁴⁶ *ibid* [23].

⁴⁷ *ibid* [33].

⁴⁸ *Turchenyak* (n 12) [7.4].

applicable laws and regulations should be easily accessible to the public.⁴⁹ Adequate training and resources must be allocated to facilitate the exercise of this right.⁵⁰

- ii. *Undertaking pragmatic measures to facilitate the exercise of the right, including particularly the protection of participants, rather than suppressing it on security grounds:* Facilitation entails accommodation, in allowing the peaceful assembly to take place in the desired location, to reach its designated audience.⁵¹ The State must protect participants in the exercise of their right of peaceful assembly against both State abuses and private interferences or violence such as from other members of the public, counterdemonstrators, and security providers.⁵² Other measures may include roadblocks, redirection of traffic, and other forms of security provision.⁵³ These protective duties are incumbent on State authorities even where the demonstration has not been formally authorised.⁵⁴ States are obliged to take reasonable measures, but are not required to take any such measures that would place an undue burden upon them. Members of society must tolerate a certain level of disruption in the exercise of their rights.⁵⁵

- iii. *Alleviating difficulties in exercising the right:* Positive measures may include providing assistance to individuals in order to help them overcome difficulties they may face in the exercise of such right, such as illiteracy and language barriers that may impede the ability to apply for the required authorisations, distance from public locations designated for demonstrations, impediments to freedom of movement or access to information, fear from reprisal or hostile reactions from opposed groups in society, etc.⁵⁶ This includes all actions required to put an end to discriminatory actions, arising both from the public and the private sector, hindering the equal enjoyment of rights.⁵⁷

⁴⁹ GC 37 (n 5) [28].

⁵⁰ *ibid* [35].

⁵¹ *Turchenyak* (n 12) [7.4].

⁵² *Alekseev* (n 28) [9.6].

⁵³ GC 37 (n 5) [24].

⁵⁴ *Sannikov* (n 31) [3.8].

⁵⁵ GC 37 (n 5) [31].

⁵⁶ See UNHRC, 'General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service' (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7 [12] (GC 25); 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [34].

⁵⁷ UNHRC, 'General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10 [4].

- iv. *Enforcing sanctions and providing effective remedies (Article 2(3), ICCPR)*: States must additionally ensure independent and transparent oversight of public bodies involved with peaceful assemblies⁵⁸ and must conduct effective, impartial and timely investigations where allegations of violations are raised.⁵⁹ They must adopt and enforce sanctions on those committing abuses, whether public officials or private parties, and provide adequate, prompt and effective remedies.⁶⁰ States must also provide access to relevant information concerning violations and reparation mechanisms.⁶¹

III. Overlapping Rights

18. The right to peaceful assembly cannot be considered in a vacuum. It is often raised alongside other rights, as the same facts may give rise to a violation of more than one provision of the ICCPR.⁶² The right to peaceful assembly is frequently invoked alongside the right to freedom of opinion and expression (Article 19, ICCPR),⁶³ as well as the protection against arbitrary arrest or detention (Article 9, ICCPR),⁶⁴ the right to human treatment in detention (Article 10, ICCPR)⁶⁵ and the protection against torture or to cruel, inhuman or degrading treatment or punishment (Article 7, ICCPR),⁶⁶ and procedural guarantees in criminal trials (Article 14, ICCPR).⁶⁷
19. The right of peaceful assembly is essential to the right of peaceful association under Article 22 of the ICCPR; restrictions on one generally adversely impact the other, whereas enabling conditions for one may contribute to the exercise of the other.⁶⁸ The right of peaceful assembly may also be related to the right to participate in public life (Article 25, ICCPR), as it ‘provides an essential means for individuals or groups to express their opinion on matters of public interest and to participate in public life’.⁶⁹ To that effect, assemblies which seek to convey a political message have a particular value and should thus ‘enjoy a heightened level of

⁵⁸ GC 37 (n 5) [29].

⁵⁹ *ibid* [90].

⁶⁰ *AJ v United Kingdom*, Communication No 126/2018 (20 December 2019).

⁶¹ 2016 Joint Report of Special Rapporteurs (n 17) [89].

⁶² *Korol* (n 41) [7.5] (the acts in question were the arrest and sentencing to a fine of the author).

⁶³ *Sannikov* (n 31); *Bakur* (n 40); *Severinets* (n 22) (which also raised a violation of the freedom of thought, conscience and religion under art. 18, however not upheld).

⁶⁴ *Zhagiparov v Kazakhstan*, Communication No 2441/2014 (25 October 2018); *Bakur* (n 40); *Toregozhina* (n 37).

⁶⁵ *Kozulina v Belarus*, Communication No 1773/2008 (21 October 2014); *MT v Uzbekistan*, Communication No 2234/2013 (23 July 2015).

⁶⁶ *Kozulina* (n 65) (violation of art 7 raised yet not found); *MT* (n 65).

⁶⁷ *Zhagiparov* (n 64); *Giménez* (n 19) (raised yet no violation of art 14 found); *Elena Popova* (n 9).

⁶⁸ GC 37 (n 5) [100].

⁶⁹ GC 25 (n 56) [8].

accommodation and protection'.⁷⁰ The right to non-discrimination under Article 26 may also come into play in cases of demonstrations that promote the opinions, political positions, or ideas of or associated with minority groups (whose identities intersect with the prohibited grounds of discrimination listed in Article 26).⁷¹ Restrictions on assemblies and associated acts of activism, therefore, may give rise to violations of such other rights, even where Article 21 is not raised or found inapplicable.⁷²

IV. The Exercise of Police Powers

20. This section considers how the right to peaceful assembly under Article 21 of the ICCPR interacts with the following police powers: (i) the power to regulate peaceful protests; (ii) the powers of arrest and criminalisation; (iii) the power of surveillance; and (iv) the power to disperse an assembly and use force against participants of an assembly.

a. Power to Regulate Peaceful Protests

21. The right to peaceful assembly is a right that should be enjoyed, as far as possible, without regulation. Nonetheless, its exercise may in some circumstances be legitimately regulated, notably with regards to the 'time, place and manner' of assemblies.⁷³ Yet such limitations must be narrowly circumscribed and justified in light of the purposes listed in Article 21.⁷⁴

22. With regard to the place of an assembly, individuals exercising their right of peaceful assembly should generally have access to all sites accessible to the public.⁷⁵ Even when limitations are applied, States should allow participants to assemble 'within sight and sound' of their target audience, or at whatever site is important for their purpose.⁷⁶ In *Kuznetsov et al v Belarus*,⁷⁷ the State designated *only one single location* for the holding of public gatherings, whereas the protesters believed that to hold their picket in such location for their purpose [of protesting

⁷⁰ GC 37 (n 5) [32].

⁷¹ *MT* (n 65); *Turchenyak* (n 12) (violation of art 26 raised yet not found); *Nepomnyashchiy* (n 31) (violation of art 26 found yet art 21 not raised).

⁷² For example, see *Kozulina* (n 65), where the UNHRC held that there was insufficient information to find a violation of art 21 yet other violations were found.

⁷³ GC 37 (n 5) [22].

⁷⁴ *ibid* [56].

⁷⁵ *ibid* [55].

⁷⁶ *Turchenyak* (n 12) [7.4]; *Giménez* (n 19) [8.3].

⁷⁷ *Kuznetsov* (n 30).

against the slow process in the investigation of a former Minister's disappearance] would have been meaningless.⁷⁸ The UNHRC held that the State failed to justify such restrictions.

23. As a general rule, prohibitions on assemblies anywhere in the capital, or in any public location except a single specified place, are not permissible under Article 21.⁷⁹ In *Turchenyak et al v Belarus*,⁸⁰ the protesters wanted to hold pickets in a pedestrian zone of a street. Their application was denied on the ground that domestic by-laws provided that public gatherings could only be held in a certain stadium [the established *permanent location of public gatherings*]. The UNHRC held that the State had failed to demonstrate how a picket held in the location proposed by the complainants would jeopardise any of the interests listed in Article 21. It further noted that the '*de facto* prohibition of an assembly in any public location' in the city, with the exception of a single stadium, 'unduly limits the right to freedom of assembly', thus violating Article 21.
24. While assemblies on private property are also protected by Article 21, the interests of those with rights in the property must be given due weight. The restrictions that may be imposed on such gatherings depends on factors like: (i) whether the private property is routinely publicly accessible; (ii) the nature and extent to which the gathering could interfere with the rights in the property; (iii) whether those holding rights in the property approve of such use; (iv) whether the ownership of the property is contested through the gathering; and (v) whether participants have other reasonable means to achieve the purpose of the assembly.⁸¹
25. Requirements of payment of costs for managing peaceful assemblies, such as of policing or security, medical, cleaning, or other public services, are generally incompatible with Article 21.⁸² In *Zaleskaya v Belarus*,⁸³ restrictions to the organisation and holding of mass events included: (i) designation of only three rarely-visited parks as locations where mass events may be organised; (ii) compulsory payment of special services of the city (like police, garbage-collection services, ambulance); (iii) impossibility to conduct mass events on holidays, commemorative and other significant days defined as such by the State. The UNHRC held that these restrictions were not justified under Article 21.

⁷⁸ *ibid* [2.2].

⁷⁹ See GC 37 (n 5) [56] (citations omitted).

⁸⁰ *Turchenyak* (n 12).

⁸¹ GC 37 (n 5) [57].

⁸² *ibid* [64].

⁸³ *Zaleskaya v Belarus*, Communication No 1604/2007 (28 March 2011).

26. With regard to authorisation and prior notification regimes, the UNHRC has recognised that where a State adopts a particular procedure or imposes formalities for holding mass events, it effectively establishes restrictions regarding the exercise of the right of peaceful assembly.⁸⁴ Requirements to inform authorities of the holding of a public assembly are only permissible to the extent that they serve to facilitate the smooth conduct of peaceful assemblies and to protect the participants in the exercise of their rights as well as the rights of others.⁸⁵ Such procedures must be accessible, transparent, free of charge and meet the justification tests of Article 21. Furthermore, authorisation must be given as a matter of course – it must act as a system of notification.⁸⁶
27. The failure of participants to abide by the applicable law or regulations does not render participation unlawful; it does not absolve the State of its duty to facilitate the assembly and protect its participants; any sanction imposed must be justified. The State must respond with tolerance, restraint and proportionality to peaceful assemblies even when legal or administrative procedures or formalities, such as notifying the authorities, have not been followed.⁸⁷ This is particularly true with regards to spontaneous demonstrations, ‘which cannot by their very nature be subject to a lengthy system of submitting a prior notice.’⁸⁸
28. In *Sekerko v Belarus*,⁸⁹ the complainants were denied authorisation to hold mass events to protest against the abolition of social benefits to people in need, because they failed to provide the authorities with information as required by domestic law such as measures to be taken to guarantee security and medical care to the participants and to ensure that the area remained clean during and subsequent to the gathering. The State alleged that the missing information was required in order to ensure public order and public safety during the holding of such events in public spaces. The UNHRC, however, held that the State party had not specified which specific details might be missing, the absence of which would pose a threat to public safety, public order. The State had also failed to demonstrate that, in the complainants’ case, such purposes could only be achieved by the denial of the planned mass event.

⁸⁴ Also, to impart information under art 19(2), ICCPR. See *Kuznetsov* (n 30) [9.4].

⁸⁵ GC 37 (n 5) [70].

⁸⁶ *ibid* [70].

⁸⁷ *ibid* [71].

⁸⁸ *Elena Popova* (n 9) [7.5].

⁸⁹ *Sekerko* (n 34).

b. Power of Arrest and Criminalisation

29. The mere act of participating in or organising a peaceful assembly cannot be sanctioned or criminalised as this would deny the essence of the right.⁹⁰ Participants and organisers may however be held accountable for their own unlawful conduct,⁹¹ but in such instances, criminal or administrative sanctions should not be discriminatory, disproportionate or based on ambiguous or overbroad offenses, or be applied as a deterrent to protected conduct.⁹² Indeed, penalties for unlawful conduct must be necessary and proportionate, otherwise they risk having a chilling effect on participants and the exercise of their assembly rights.⁹³
- i. Indiscriminate mass arrests are arbitrary and thus unlawful.⁹⁴
 - ii. Most States impose fines, which should not however be disproportionate sums.⁹⁵
 - iii. In *Giménez v Paraguay*,⁹⁶ the complainant was prosecuted and convicted for protesting on private property. His sentence included a two-year ban on his participation in assemblies of more than three persons. The UNHRC held that the sentence was unjustified and violative of Article 21.
30. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that criminal law and penal sanctions are used in several States to deter the exercise of the right to freedom of assembly.⁹⁷ The Special Rapporteur also underlined in 2018 that the prosecution of demonstrators constituted a ‘worrying trend’.⁹⁸
31. For instance, in *Popova v Russian Federation*,⁹⁹ the complainant was arrested for organising an unauthorised public event. When the police attempted to stop the event and warned the participants to cease all activities, the complainant refused and was arrested. She was charged and found guilty of failing to notify the authorities. The UNHRC found that the State failed to explain how in practice the complainant’s actions had ceased to be peaceful or had disturbed public order, for example, by preventing traffic flow or the passage of pedestrians. Thus, the

⁹⁰ 2016 Joint Report of Special Rapporteurs (n 17) [27].

⁹¹ GC 37 (n 5) [65].

⁹² *ibid* [67]-[68].

⁹³ *ibid* [36].

⁹⁴ *ibid* [82].

⁹⁵ In *Zaleskaya* (n 83), the fine imposed was the equivalent of two months of the author’s retirement pension, which was found to be incompatible with Articles 19 and 21.

⁹⁶ *Giménez* (n 19).

⁹⁷ 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [60].

⁹⁸ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ (13 June 2018) UN Doc A/HRC/38/34 [65] (2018 Report of the Special Rapporteur).

⁹⁹ *Elena Popova* (n 9).

complainant's administrative arrest and fine following a spontaneous and peaceful public protest were neither necessary nor proportional.¹⁰⁰

32. It must also be noted that minimal guarantees of justice are provided under Article 14 of the ICCPR, some of which apply solely to criminal trials, and others which also apply to civil proceedings.¹⁰¹ Such guarantees must be provided to protestors charged with administrative or criminal offenses in relation to their activities in the exercise of their assembly rights. They include, notably, the fairness of proceedings, the independence and impartiality of decision-makers, publicity of hearings, etc. For example, in *Zhagiparov v Kazakhstan*,¹⁰² the complainant, a journalist, invited readers to join a rally in which he participated. He subsequently attended a public gathering on the issue of mortgage rights. In both cases, he was arrested, detained, and found guilty of organising/participating in an unsanctioned public event and sentenced to seven days, then 15 days of administrative arrest. He claimed that his administrative sentences were enforced immediately, without giving him the opportunity to appeal them, in violation of Article 14, which gives everyone the right to have their conviction and sentence reviewed by a higher tribunal. The UNHRC therefore found a violation of Article 14.¹⁰³
33. Moreover, individuals exercising their assembly rights should not be subject to unlawful or arbitrary arrest and detention, as provided under Article 9 of the ICCPR. The UNHRC has held that a person must not be arbitrarily detained because of the exercise of his rights, including the right of peaceful assembly. For instance, in *Zhagiparov v Kazakhstan* referred to above, the complainant also claimed that his arrests were arbitrary, in violation of Article 9. The UNHRC held that 'arrest or detention as punishment for the legitimate exercise of the rights guaranteed by the Covenant, including freedom of opinion and expression and freedom of assembly, is arbitrary' and that in the present case, the deprivation of the complainant's liberty for organising and participating in protests violated Article 9.¹⁰⁴
34. An arrest or detention may be authorised by domestic law and nonetheless be arbitrary.¹⁰⁵ In *Bakur v Belarus*, the complainant claimed that his detention was arbitrary as it was not recorded,

¹⁰⁰ See also *Kovalenko* (n 20); *Derzhavtsev* (n 12); *Korol* (n 41) on the point of arrests and sentencing to fines.

¹⁰¹ See UNHRC, 'General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32.

¹⁰² *Zhagiparov* (n 64).

¹⁰³ *ibid* [13.8].

¹⁰⁴ *ibid* [13.6].

¹⁰⁵ *Bakur* (n 40) [7.2]; UNHRC, 'General Comment No 35, Article 9 (Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35 [12].

in violation of Article 9. The UNHRC held that ‘the State party failed to demonstrate that the grounds for the author’s apprehension, namely, participation in a meeting held by a political party in private premises, were lawful, necessary and proportionate’ under Article 9.¹⁰⁶ Similarly, in *Toregozhina v Kazakhstan*,¹⁰⁷ the complainant claimed that her arrest and conviction for organising an art-mob event violated *inter alia*, her right under Article 9(1) of the ICCPR. The Committee recalled that, ‘in order for an arrest to be in compliance with Article 9(1), it must not only be lawful, but also reasonable and necessary in all the circumstances’.¹⁰⁸ The State party failed to show why it was necessary to detain the author; her detention was thus unreasonable and violated Article 9 of the ICCPR. See also *MT v Uzbekistan*,¹⁰⁹ *Kozulina v Belarus*¹¹⁰ and *Sannikov v Belarus*,¹¹¹ in which violations of Articles 9 and 14 were found.

35. Preventive detention of targeted individuals should be exceptional, only last for a few hours and resorted to only where there is proof of engagement with or incitement to violence, and where other measures would prove inadequate.¹¹² Stop and search measures must only be exercised where there is reasonable suspicion of the commission or threat of a serious offence.¹¹³

c. Power of Surveillance

36. While information-gathering may in some circumstances assist the facilitation of peaceful assemblies,¹¹⁴ the Special Rapporteur has noted that the use of surveillance technology must be subject to a ‘delicate balancing [with] potential intrusions into privacy’, and that adequate safeguards to ensure the protection of privacy, in compliance with Article 17 of the ICCPR, must be in place.¹¹⁵
37. The collection and processing of personal information may be undertaken by various means, such as through police bodycams, drones, recording devices, closed-circuit television,

¹⁰⁶ *Bakur* (n 40) [7.2].

¹⁰⁷ *Toregozhina* (n 37).

¹⁰⁸ *ibid* [7.2].

¹⁰⁹ *MT* (n 65).

¹¹⁰ *Kozulina* (n 65).

¹¹¹ *Sannikov* (n 31).

¹¹² UNHRC, ‘Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia’ (17 August 2015) UN Doc CCPR/C/MKD/CO/3 [19].

¹¹³ GC 37 (n 5) [83] (references omitted).

¹¹⁴ *ibid* [61].

¹¹⁵ 2016 Joint Report of Special Rapporteurs (n 17) [92].

undercover policing, facial recognition, location tracking, monitoring of social media, online tracking and profiling, analysis of data from protesters' mobile telephones, etc. Any such measures must comply with international human rights standards including protections against arbitrary or unlawful interference with privacy,¹¹⁶ irrespective of domestic lawfulness.¹¹⁷ They should not be employed where interferences with the right to privacy cannot be justified in the interests of society as understood under the ICCPR.¹¹⁸ Such practices should, moreover, be subject to oversight mechanisms and judicial review. The UNHRC stressed that information gathering cannot be aimed at intimidating, harassing, discouraging participants or potential participants in assemblies.¹¹⁹

38. In *Sannikov v Belarus*,¹²⁰ the complainant alleged that his phone was tapped, and phone calls recorded during the period of his electoral campaign. He argued that the wiretapping was unnecessary, illegal and unjustified, and was therefore a violation of his right to privacy. The State did not justify the wiretapping. The UNHRC therefore found a violation of Article 17, ICCPR.¹²¹

39. The Special Rapporteur on the right to freedom of peaceful assembly, in his 2017 report on his follow-up mission to the UK, underlined that the use of covert policing remained a concern in the UK. He recognised that even though undercover policing 'serves a crucial function in gathering intelligence on criminal groups [...] its use against protest movements, environmentalists, leftist groups and others exercising their legitimate rights to dissent and peacefully assemble is not justifiable'.¹²² He called for releasing the undercover officers' identities, as the victims and survivors have a right to know that they were wrongfully spied on, the information collected against them, how it disrupted their lives and, if they were convicted, whether they may be able to overturn that conviction.¹²³ He concluded that the damage suffered can only be partially remedied through accountability, transparency, and full reparation.¹²⁴

¹¹⁶ *ibid* [73].

¹¹⁷ UNHRC, 'General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) UN Doc HRI/GEN/1/Rev.9, vol I [4].

¹¹⁸ *ibid* [7].

¹¹⁹ GC 37 (n 5) [61].

¹²⁰ *Sannikov* (n 31).

¹²¹ *ibid* [6.9].

¹²² 2017 Report of Special Rapporteur on Mission to UK (n 8) [49], [54].

¹²³ *ibid* [52].

¹²⁴ *ibid* [53].

d. Power of Dispersal and Use of Force

40. The UNHRC has stressed that assemblies should ordinarily be managed with no resort to force.¹²⁵ Where unavoidable, the principles applicable to the use of force in the management of peaceful assemblies are legality, caution, necessity, proportionality and accountability.¹²⁶
41. Under the principle of legality, the use of force must be provided for, and restricted, by law. The law must restrict the use of force during assemblies and require that formal authorisations be obtained for the use of force and tactical options.¹²⁷
42. The use of force during assemblies and forced dispersal of assemblies should only be executed after verbal warnings and sufficient time has been afforded to participants to voluntarily cease activities. Appropriate risk assessment, testing and approval of weapons, as well as training of police officers (including on the relevant human rights standards) must be conducted. States and law enforcement authorities must in every case act with caution in deploying force to manage assemblies.¹²⁸
43. The principles of necessity and proportionality demand that force be used as a last resort and that when used, the least harmful means be employed. The use of force should not be indiscriminate, but rather directed to specific individuals or groups involved in acts or threats of violence. The force deployed must be proportionate to the level of resistance and violence perpetrated. Risks of injuries to bystanders or peaceful participants must be avoided and harmful consequences must be minimised.¹²⁹ Use of lethal force, such as firearms, is only justified ‘where it is strictly unavoidable to protect another life from an imminent threat’, and where there is no other feasible option.¹³⁰ In other words, force must in all cases be strictly necessary and proportionate to safeguard the interests listed in Article 21.
44. Dispersal presents risks of rise in violence, of injuries and harm – it should thus only be executed where it is strictly unavoidable. Law enforcement agencies should always first seek to

¹²⁵ 2016 Joint Report of Special Rapporteurs (n 17) [57].

¹²⁶ *ibid* [50]. This report details the international human rights law principles applicable to the use of force in the context of peaceful assemblies.

¹²⁷ *ibid* [51].

¹²⁸ *ibid* [52], [53], [55], [63].

¹²⁹ *ibid* [52].

¹³⁰ *ibid* [60].

isolate and separate violent participants from others and allow the assembly to continue. Under international human rights law, dispersal is permitted only in rare cases, such as where a peaceful assembly ‘incites discrimination, hostility, violence’, in violation of Article 20 of the ICCPR. Less intrusive means should always be attempted first. Mere disruptions or failure to abide by applicable procedures and formalities cannot justify dispersal. Only where disruptions are ‘serious and sustained’ is it warranted.¹³¹

45. In 2014, the Special Rapporteur noted that ‘surveillance tactics and disproportionate [use] of force attest that authorities in some Member States often presume [that public assemblies are not peaceful and lawful], and have a chilling effect on peaceful protestors, such as in the UK of Great Britain and Northern Ireland’.¹³² In 2018, he stated that ‘indiscriminate and excessive use of force by law enforcement authorities to counter or repress peaceful protest was recorded in countries across all regions’, and expressed concern to that effect.¹³³
46. In his 2017 report, the Special Rapporteur expressed his concern about the use of disproportionate force by the police against anti-fracking protesters in the UK. He specifically highlighted the protests at the Barton Moss Camp, Salford, Greater Manchester in 2013-14. Although the protests were disruptive, they were peaceful. Yet, the Greater Manchester Police ‘frequently pushed and shoved peaceful protesters, stood on their heels, dug their knuckles in their backs, pushed them down the road and verbally harassed them.’ The police also reportedly targeted young, elderly and disabled protesters, with some male police officers sexually harassing female protesters by ‘insulting them, groping their private parts and pressing their genitals against them while walking in a line.’ The Special Rapporteur considered that all these actions amounted to ‘excessive use of force’.¹³⁴
47. Furthermore, no one should be subjected to threats of or actual violence, harassment, persecution or reprisals for exercising their assembly rights.¹³⁵ The treatment of demonstrators by law enforcement agents may, in some cases, violate the right against CIDT under Article 7 of the ICCPR, which will be discussed in Question 3 below.

¹³¹ *ibid* [61]-[62], cited in GC 37 (n 5) [85].

¹³² 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [45].

¹³³ 2018 Report of the Special Rapporteur (n 98) 41.

¹³⁴ 2017 Report of Special Rapporteur on Mission to UK (n 8) [61]-[62].

¹³⁵ 2018 Report of the Special Rapporteur (n 98) [39].

48. Lastly, those using force must be held accountable for each use of force.¹³⁶ The State is under an obligation to adopt clear command structures to underpin accountability, as well as protocols for recording and documenting events, ensuring the identification of officers and reporting of any use of force during an assembly.¹³⁷ The use of recording devices by law enforcement officials during assemblies, including body-cameras, may play a positive role in securing accountability.¹³⁸ However, the UNHRC is clear that authorities must follow clear and transparent guidelines to ensure that their use is consistent with international standards on privacy and does not have a chilling effect on participation in assemblies.¹³⁹ In any event, participants, as well as journalists and monitors, have the right to record law enforcement officials and use the same to secure accountability.¹⁴⁰

V. Discrimination

a. The General Protection Against Discrimination

49. The protection against discrimination forms part of various international human rights instruments; it is included in general instruments such as the ICCPR, as well as specialised conventions seeking to afford protection to particular groups, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the CRPD, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child, amongst others.

50. Discrimination, although not defined in the ICCPR itself, implies ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’.¹⁴¹ According to the

¹³⁶ UNHRC, ‘General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/36 [13]-[14].

¹³⁷ GC 37 (n 5) [77].

¹³⁸ *ibid* [94].

¹³⁹ *ibid*; UNHRC, ‘Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)’ (29 April 2013) UN Doc CCPR/C/CHN-HKG/CO/3 [10]; UNHRC, ‘Concluding observations on the initial report of Macao, China, adopted by the Committee at its 107th session (11–28 March 2013)’ (29 April 2013) UN Doc CCPR/C/CHN-MAC/CO/1 [16].

¹⁴⁰ 2016 Joint Report of Special Rapporteurs (n 17) [71].

¹⁴¹ UNHRC, ‘General Comment No 18: Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.9, vol I [7] (GC 18); CEDAW (n 2) art 1; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 1.

UNHRC, Article 26 of the ICCPR also prohibits discrimination based on sexual orientation and gender identity.¹⁴²

51. Article 3 of the ICCPR also specifically provides for the equal enjoyment of rights of men and women. However, the UNHRC considers that ‘not every differentiation based on the grounds listed in Article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective criteria and in pursuit of an aim that is legitimate under the Covenant’.¹⁴³
52. The right to non-discrimination and equality is an autonomous right,¹⁴⁴ which means that it need not be invoked in conjunction with another right. States have numerous duties under Article 26, as they must ensure the equal protection before the law and of the law of all persons, prohibit discrimination, and guarantee equal and effective protection against discrimination on any of the listed grounds. States are thus obliged to take affirmative action ‘to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant’,¹⁴⁵ whether deriving from the public or the private sphere.

b. The Protection Against Discrimination in the Context of Peaceful Protests

53. The right to freedom of peaceful assembly is guaranteed to everyone without discrimination on any of the grounds listed under Article 26 of the ICCPR.
54. The Special Rapporteur on the right to freedom of peaceful assembly noted in 2014 that ‘certain groups are at particular risk of having their space [to promote or defend ideas collectively] all but vanish’.¹⁴⁶ The Special Rapporteur identified the groups most at risk as persons with disabilities, youth, including children, women, LGBTIA+ persons, members of minority groups, indigenous peoples, internally displaced persons, and non-nationals, including refugees, asylum seekers and migrants workers, as well as persons lobbying for the rights of those most at risk, including rights defenders, environmentalists and trade unionists, amongst others.¹⁴⁷ These persons experience discrimination, unequal treatment and harassment when

¹⁴² *Nepomnyashchiy* (n 31) [7.3].

¹⁴³ *ibid* [7.5].

¹⁴⁴ GC 18 (n 141) [12].

¹⁴⁵ *ibid* [10].

¹⁴⁶ 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [8].

¹⁴⁷ *ibid* [10]-[11].

seeking to or exercising, *inter alia*, their right to peaceful assembly.¹⁴⁸ Marginalisation occurs at multiple levels and discrimination often includes intersectional discrimination.¹⁴⁹ This is problematic as the exercise of assembly rights is particularly important for marginalised groups, including those intersectionally disadvantaged, to affirm their identity and ensure their interests are heard and taken into account.¹⁵⁰

55. Discriminatory practices may include differences in the policing of peaceful assemblies, surveillance tactics, use of disproportionate force, or failure to intervene to protect demonstrators and thus enable minority groups to exercise their assembly rights, and other practices used as a way to intimidate groups and prevent them from freely exercising their assembly rights.¹⁵¹ The UNHRC has noted that law enforcement officials should receive training to be sensitised to the specific needs of individuals and groups in situations of vulnerability, which may in some cases include women, children, or persons with disabilities, when participating in peaceful assemblies.¹⁵² Law enforcement agencies should also be alert to the potential discriminatory impacts of policing tactics, including in relation to new technologies.¹⁵³

56. Any restriction on the exercise of the right of peaceful assembly must generally be content neutral, i.e. unrelated to the message conveyed.¹⁵⁴ Restrictions cannot be discriminatory in intent or in effect.

57. Although claims of discrimination during peaceful assemblies have been raised in several cases, in most of them, the concerned UN human rights bodies found the claims to be insufficiently substantiated and therefore, inadmissible.¹⁵⁵ This was the case in *AJ v United Kingdom of Great Britain and Northern Ireland*,¹⁵⁶ where the complainants who were women activists and/or associated with groups involved in environmental or social justice campaigns were deceived into entering into long-term intimate relationships with male undercover police officers during various periods from 7 months to 9 years, between 1987 and 2009. The officers' mission was

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid* [13].

¹⁵⁰ 2018 Report of the Special Rapporteur (n 98) [58].

¹⁵¹ 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [22]-[47].

¹⁵² GC 37 (n 5) [80].

¹⁵³ *ibid* [81]-[82].

¹⁵⁴ *ibid* [48].

¹⁵⁵ See *KK v Russian Federation*, Communication No 98/2016 (25 February 2019); *Sannikov* (n 31); *Turchenyak* (n 12).

¹⁵⁶ *AJ* (n 60).

to infiltrate social and political movements in order to gather intelligence and thereby predict and control the impact of protest activity. The complainants alleged, *inter alia*, that the fear of being deceived into an intimate relationship with an officer inhibits and discourages the exercise by women of their fundamental freedoms of political association and full participation in public life, on an equal basis with men, in violation of Article 7(c) of the CEDAW. Although the communication was found to be inadmissible by the CEDAW Committee, as the Special Rapporteur on the right to freedom of peaceful assembly and of association stated in his 2017 report, such undercover policing is unjustifiable.¹⁵⁷

58. An exception to the above trend is *MT v Uzbekistan*,¹⁵⁸ in which the complainant, a journalist and activist, was arrested numerous times, interrogated about her human rights activities, beaten and threatened and raped by police officers. During her picketing activities, she was attacked, beaten, and robbed; authorities failed to intervene. She was eventually detained, prosecuted and found guilty of 13 charges, and sentenced to 8 years of imprisonment. She was also subject to inhumane conditions of imprisonment, including denial of medical care and external contact, severe beatings and abuses, prolonged solitary confinement, forced medication, and a forced surgery leading to her sterilisation. She complained, *inter alia*, of a violation of her right to peaceful assembly, as well as discrimination on the basis of sex, and on grounds of political or other opinion. The UNHRC found that the rape committed against the complainant and her forced sterilisation showed specific aggression against her as a woman, constituting a violation of Article 26 of the ICCPR. As acknowledged in the individual concurring opinion of UNHRC members Sarah Cleveland and Olivier de Frouville, violence is gender based if it is ‘the mere fact that abuses such as rape or forced sterilisation are also capable of being committed against men does not preclude the possibility that they can constitute gender-based discrimination’.¹⁵⁹

59. As highlighted above, the Special Rapporteur in his 2017 report on the UK expressed concern regarding policing practices targeting young, elderly and disabled people, and with instances of police officers sexually harassing female protestors.¹⁶⁰ Particularly, the Special Rapporteur underlined that environmental activists and protesters in the context of natural resources may face particular vulnerability, in view of the opaque decision structures in such industry,

¹⁵⁷ 2017 Report of Special Rapporteur on Mission to UK (n 8) [49], [52].

¹⁵⁸ *MT* (n 65).

¹⁵⁹ *ibid* 19, [3].

¹⁶⁰ 2017 Report of Special Rapporteur on Mission to UK (n 8) [62].

conducive to corruption, and ‘the clash of interests between such civil society groups and private businesses and the State regarding the exploitation of natural resources’.¹⁶¹

60. Significantly, the Special Rapporteur notes that restrictions on and exclusions from the exercise of the right of peaceful assembly have the consequence of reinforcing marginalisation, and therefore, must be avoided.¹⁶²

QUESTION 2: WHAT TYPE AND CUMULATIVE EFFECT OF POLICING, CRIMINALISATION, SURVEILLANCE AND USE OF FORCE CONSTITUTES THE ‘CHILLING EFFECT’?

61. ‘Chilling effect’ does not appear to be a clearly defined legal concept in international human rights instruments. The notion arose in law in the 1960s in the United States of America from First Amendment jurisprudence.¹⁶³ Generally, it refers to the notion that certain State acts or regulatory conduct may discourage persons from legally exercising their rights or freedoms. Overly broad or vague laws may have a chilling effect because of the fear of prosecution, criminal or civil punishment, and the uncertainties underlying the legal process.¹⁶⁴ In the context of modern online surveillance, persons may fear other risks, such as loss of privacy, being tracked by the State or stigmatised as a criminal or deviant.¹⁶⁵

62. The ‘chilling effect’ is considered to be difficult to empirically measure or prove.¹⁶⁶ However, where laws are vague, overly broad or involve the exercise of discretion, a ‘chilling effect’ may arise or be more likely to occur. Similarly, where restrictions on a right are disproportionate, there may be a chilling effect on the exercise of the right.

63. In the context of protesting, the right to freedom of expression under Article 19 of the ICCPR is also relevant. The right to freedom of expression includes the freedom to seek, receive and

¹⁶¹ 2018 Report of the Special Rapporteur (n 98) [48].

¹⁶² 2014 Report of Special Rapporteur on Freedom of Peaceful Assembly (n 17) [15].

¹⁶³ See the classic statement in *Dombrowski v Pfister* 380 US 479, 494 (1965) (United States Supreme Court).

¹⁶⁴ Frederick Schauer, ‘Fear, Risk, and the First Amendment: Unravelling the “Chilling Effect” (1978) 58 Boston University Law Review 685, 687–9; Jonathon W Penney, ‘Chilling Effects: Online Surveillance and Wikipedia Use’ (2016) 31 Berkeley Technology Law Journal 117, 126.

¹⁶⁵ Daniel Solove, A Taxonomy of Privacy (2006) 154 University of Pennsylvania Law Review 477, 496; Penney (n 164) 126–7.

¹⁶⁶ Schauer (n 164) 730; Penney (n 164) 123.

impart information and ideas of all kinds, whether orally, in writing, as art or through any other media.¹⁶⁷

64. Article 19(3) of the ICCPR establishes a three-part test for permissible restrictions on the right to freedom of expression. First, the restrictions must be provided by law. To be characterised as law, a norm must be sufficiently precise to enable a person to regulate their conduct accordingly and must be publicly accessible.¹⁶⁸ Laws should not confer unfettered discretion for the restriction on those charged with its execution.¹⁶⁹ Laws should provide sufficient guidance to enable persons to ascertain what types of expression are restricted.¹⁷⁰ Second, restrictions are only permissible to protect the legitimate aims stated in Article 19(3): for respect of the rights or reputations of others, or for the protection of national security of public order, or of public health or morals.¹⁷¹ Third, any restrictions must be necessary to protect those legitimate aims.¹⁷² According to the UNHRC, this implies strict tests of necessity and proportionality apply to the legitimate aim sought to be protected.¹⁷³ The restriction should be the least intrusive among those that would achieve the relevant protective aim.¹⁷⁴

65. This section separately considers the effect of the following distinct types of State conduct on the exercise of the right to freedom of expression under the ICCPR: (i) policing; (ii) criminalisation; (iii) surveillance; and (iv) use of force.

A. WHAT IS THE EFFECT OF POLICING ON THE RIGHT TO FREEDOM OF EXPRESSION?

66. In order to effectively guarantee the right to freedom of expression, the police must protect the safety of protesters, first responders and bystanders during a protest. Appropriate policing may enhance the right to freedom of expression. Safety measures taken by police should not

¹⁶⁷ ICCPR (n 2) art 19(2).

¹⁶⁸ UNHRC, 'General Comment No 34 on Article 19 – Freedoms of Opinion and Expression' (22 October 2010) UN Doc CCPR/C/GC/34/CRP.4 [25] (GC 34).

¹⁶⁹ UNHRC, 'General Comment No 27 – Freedom of movement (article 12)' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [13]; *ibid* [25].

¹⁷⁰ GC 34 (n 168) [25].

¹⁷¹ ICCPR (n 2) art 19(3).

¹⁷² *ibid*.

¹⁷³ GC 34 (n 168) [22]; *Velichkin v Belarus*, Communication No 1022/2001 (20 October 2005); *Gauthier v Canada* Communication No 633/1995 (7 April 1999) [13.6]; *Tae Hoon Park v Republic of Korea*, Communication No 628/1995 [10.3].

¹⁷⁴ GC 34 (n 168).

result in the criminalisation of individuals participating in peaceful protests.¹⁷⁵ The failure to notify authorities of a protest should not be a basis for dispersal under international law.¹⁷⁶

67. Stopping individuals at random during or after protests, requesting identification, and detaining individuals in the absence of identification may have a chilling effect on freedom of expression.¹⁷⁷ There may be arbitrary differences in the manner of policing in poor or marginalised communities, including racial, cultural and class biases, which may result in disproportionate impacts on groups at risk.¹⁷⁸
68. Restrictions on assemblies, mandatory notifications and authorisation requirements, and punishing breaches with heavy fines or criminal penalties may have a greater chilling effect on persons living in poverty.¹⁷⁹
69. In relation to the UK, the Special Rapporteur on the right to freedom of peaceful assembly considered the following to have a chilling effect on protestors seeking to exercise their peaceful assembly and expression rights:
- i. Policing tactics like ‘kettling’;¹⁸⁰
 - ii. Stop-and-search practices, which involve the collection of information on the self-perceived ethnicity of the protestor, or the defined ethnicity as observed;¹⁸¹
 - iii. Registration by the police of the names of peaceful activists, with no criminal record, on the National Domestic Extremism Database;¹⁸² and
 - iv. The use of International Mobile Subscriber Identity catchers by the police during peaceful protests to, *inter alia*, gather intelligence from protestors’ mobile phones.¹⁸³

¹⁷⁵ Special Procedure Communication, ‘Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the situation of human rights defenders’ (3 December 2019), Reference OL AUS 8/2019 (2019 Special Procedure Communication).

¹⁷⁶ 2016 Joint Report of Special Rapporteurs (n 17) [62].

¹⁷⁷ UN General Assembly, ‘Note by the Secretary General: Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ (11 September 2019) UN Doc A/74/349 [44] (2019 Report of the Special Rapporteur).

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* 37.

¹⁸⁰ 2017 Report of Special Rapporteur on Mission to UK (n 8) [65].

¹⁸¹ *ibid* [67].

¹⁸² *ibid* [73]-[74].

¹⁸³ *ibid* [75]-[76].

70. In 2015, the UNHRC expressed concern that the UK maintained a broad definition of terrorism in the Terrorism Act 2000, which can include a politically motivated action designed to influence a government or international organisation, and recommended revision and oversight mechanisms.¹⁸⁴ The threat and use of such anti-terrorism laws against peaceful protesters is also likely to have a chilling effect, much like the registration of names in the National Domestic Extremism Database.

B. WHAT IS THE EFFECT OF CRIMINALISATION ON THE RIGHT TO FREEDOM OF EXPRESSION?

71. The threat of criminal sanctions or punitive fines is likely to have a chilling effect on the exercise of the right to freedom of expression and may violate Article 19(2) of the ICCPR. In *Toregozhina v Kazakhstan*, an organisation staged an art-mob to commemorate Civil Disobedience Day and draw attention to social justice issues. Although authorities did not intervene during the event, five days later, police officials arrested the head of the organisation and detained her for 48 hours. She was convicted and fined for organising a public event without requesting prior permission from the local executive authorities. The UNHRC held this ‘interfered with her right to freedom of expression and to impart information and ideas of all kind’, protected under Article 19(2) of the ICCPR. The UNHRC further found that the restrictions were not necessary or proportionate to the legitimate aims recognised under Article 19(3) and Article 21 of the ICCPR.¹⁸⁵

72. Similarly, charges which are not pursued but used for the purpose of intimidation or deterrence may violate Article 19 and have a chilling effect. In *Kankanamge v Sri Lanka*,¹⁸⁶ the Sri Lankan Attorney-General had issued three indictments against a journalist for criminal defamation in relation to newspaper publications which allegedly defamed high State party officials. The UNHRC found a violation of Article 19. The previous indictments against the journalist had either been withdrawn or discontinued, and the indictments were pending for a period of several years. The UNHRC considered that the journalist was left ‘in a situation of uncertainty and intimidation’ and ‘thus had a chilling effect which unduly restricted the author’s exercise of his right to freedom of expression.’¹⁸⁷

¹⁸⁴ UNHRC, ‘Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland’ (17 August 2015) UN DOC CCPR/C/GBR/CO/7 [14].

¹⁸⁵ *Toregozhina* (n 37).

¹⁸⁶ *Kankanamge v Sri Lanka*, Communication No 909/2000 (27 July 2004).

¹⁸⁷ *ibid* [9.4].

73. Disproportionate penalties, mandatory penalties, and recording convictions may also have a chilling or deterring effect on persons wishing to engage in peaceful protest,¹⁸⁸ human rights defenders and bystanders.¹⁸⁹ Imposing individual liability on organisers of peaceful assemblies for harm caused by participants has been considered disproportionate, and is likely to have a chilling effect on freedom of expression.¹⁹⁰ The issue of proportionality is particularly relevant to administrative sanctions for breaches of regulations, whereby any penalty should not be excessive or it may have a chilling effect.¹⁹¹
74. Criminalisation of acts like ‘disruption of traffic’ and ‘road-blocking’ may disproportionately affect the enjoyment of rights by people living in poverty and rights of marginalised groups in particular.¹⁹² This problem is compounded by the fact that the poor and the marginalised are more likely to fail to comply with notification and authorisation requirements, rendering illegal any assembly organised by them and furthering negative stigmas that depict their assemblies as ‘riots’ and ‘criminal acts’.¹⁹³ The use of disproportionate criminal charges against peaceful protesters, such as security or terrorist offences, is likely to have a significant chilling effect.¹⁹⁴
75. Special Rapporteurs have expressed concern at the criminalisation of peaceful protests that block access to roads or buildings, and the criminalisation of non-violent protests using ‘lock-on’ devices.¹⁹⁵ The right of peaceful assembly requires States to tolerate some level of disruption to ordinary life, including disruption of traffic, annoyance and even harm to commercial activities, or the right would not be substantive.¹⁹⁶ States have a positive obligation to protect protesters from civil actions brought frivolously or for the purpose of chilling public participation.¹⁹⁷

¹⁸⁸ 2019 Special Procedure Communication (n 175).

¹⁸⁹ *ibid.*

¹⁹⁰ 2016 Joint Report of Special Rapporteurs (n 17) [26].

¹⁹¹ *ibid* [48].

¹⁹² 2019 Report of the Special Rapporteur (n 177) [46].

¹⁹³ *ibid* [46].

¹⁹⁴ Special Procedure Communication, ‘Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (1 February 2019) Reference AL GBR 13/2018.

¹⁹⁵ 2019 Special Procedure Communication (n 175).

¹⁹⁶ 2016 Joint Report of Special Rapporteurs (n 17) [32].

¹⁹⁷ *ibid* [88].

76. The UNHRC¹⁹⁸ and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism¹⁹⁹ also note that while acts of terrorism must be criminalised, it is necessary to ensure that the definition of such crimes is not overbroad or discriminatory, for that may discourage the exercise of the right of peaceful assembly. In any event, the UNHRC is clear that the mere act of organising or participating in a peaceful assembly cannot be criminalised under anti-terrorism laws.²⁰⁰
77. The Special Rapporteur on the situation of human rights defenders further considers that criminal defamation laws, anti-State propaganda laws, national security laws and sedition laws which are often invoked against human rights defenders and journalists to suppress their dissenting voices create a chilling effect on civil society.²⁰¹

C. WHAT IS THE EFFECT OF SURVEILLANCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

78. Surveillance may have both ‘warming’ and chilling effects on the right to freedom of expression. Surveillance technologies can, on the one hand, detect threats of violence and protect the public, promote accountability, and deter the excessive use of police powers to arrest and use force.²⁰² Protesters, journalists and bystanders have the right to record police officers who are abusing their powers.²⁰³
79. Surveillance technologies may, on the other hand, also have a chilling effect because they infringe upon the right to privacy,²⁰⁴ and perpetuate fear of subsequent uses of the surveillance footage or data obtained, the fear of the risks of being tracked or stigmatised,²⁰⁵ or consequences in the context of employment. Footage and data is disseminated internationally

¹⁹⁸ UNHRC, ‘Concluding observations on Swaziland in the absence of a report’ (23 August 2017) UN Doc CCPR/C/SWZ/CO/1 [36].

¹⁹⁹ UN Human Rights Council, ‘Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (1 March 2019) UN Doc A/HRC/40/52.

²⁰⁰ GC 37 (n 5) [68].

²⁰¹ UN Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights defenders: Observations on communications transmitted to governments and replies received’ (22 February 2019) UN Doc A/HRC/40/60/Add.1 [283], [325], [563] (2019 Report of the Special Rapporteur on Human Rights Defenders).

²⁰² GC 37 (n 5) [10], [94].

²⁰³ 2016 Joint Report of Special Rapporteurs (n 17) [71]; *ibid* [94].

²⁰⁴ GC 37 (n 5) [10], [94]. The right to privacy is protected by the Article 17(1) of the ICCPR.

²⁰⁵ Solove (n 165) 496; Penney (n 164) 126–7.

through social media, and is used to identify, target and threaten protesters.²⁰⁶ States may have obligations to protect protesters from such conduct. The UNHRC considers that there may be a chilling effect on the exercise of the right of peaceful assembly in the following situations:

- i. The use of surveillance technologies, including recording devices like body-cameras, during assemblies;²⁰⁷
- ii. Information or data gathering by authorities in connection with an assembly.²⁰⁸

80. While the use of surveillance for law enforcement and police accountability may be legitimate in appropriate circumstances, recording peaceful protesters in a context and manner that intimidates or harasses may constitute an interference with the right to freedom of expression and freedom of assembly.²⁰⁹

D. WHAT IS THE EFFECT OF USE OF FORCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

81. Force should not be used unless strictly unavoidable and, if used, must be used proportionately in accordance with human rights law.²¹⁰ Force used must be proportionate to the threat posed by the person targeted.²¹¹ If not, the use of force may curtail the right to freedom of expression. The Special Rapporteur on freedom of assembly considers that unnecessary and disproportionate restrictions on the right of peaceful assembly may create a chilling effect on the exercise of the right.²¹²

82. The Special Rapporteur on the situation of human rights defenders, in the specific context of Mozambique, underlined that the use of force (such as beating and shooting) against journalists, lawyers and human rights defenders has a 'broader chilling effect on the exercise of the right to freedom of expression, particularly when exercised by the media, civil society organisations,

²⁰⁶ Special Procedure Communication, 'Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; and the Special Rapporteur on the situation of human rights defenders' (6 February 2018) Reference OL GBR 2/2018.

²⁰⁷ GC 37 (n 5) [10].

²⁰⁸ *ibid* [61].

²⁰⁹ 2016 Joint Report of Special Rapporteurs (n 17) [72].

²¹⁰ *ibid*, Recommendation E.

²¹¹ *ibid* [58].

²¹² *ibid* [36].

human rights defenders and in general those voicing dissent.²¹³ Similarly, in relation to Bangladesh, the Special Rapporteur noted that a ‘climate of violence, threats, killings...of human rights defenders’ has a chilling effect on the work of human rights defenders.²¹⁴

QUESTION 3: WHAT CONSTITUTES CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF POLICING OF PEACEFUL PROTEST?

83. The absolute and non-derogable prohibition of torture and CIDT²¹⁵ is recognised in several international human rights instruments including the ICCPR, the CAT and the CRPD. The absolute nature of the prohibition implies that any use of force amounting to torture or CIDT is ‘conclusively unlawful and cannot be justified under any circumstance’.²¹⁶ To clarify, individuals do not lose their protection against torture and CIDT even in the context of violent riots or unlawful protests.²¹⁷

84. This section considers: (i) the meaning of torture and CIDT; (ii) whether extra-custodial use of force by the police is covered under the prohibition of torture and CIDT; (iii) the prohibited forms of ill-treatment; and (iv) how specific vulnerabilities, such as disability, interact with the prohibition of torture and CIDT.

I. Torture and CIDT

85. Article 7 of the ICCPR provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ According to the UNHRC, any ill-treatment that causes physical or mental pain and suffering to a victim is covered within the meaning of this broad prohibition.²¹⁸ Article 7 is essentially aimed at protecting the dignity of individuals.

²¹³ 2019 Report of the Special Rapporteur on Human Rights Defenders (n 201) [69].

²¹⁴ UN Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst: Observations on communications transmitted to governments and replies received’ (16 February 2018) UN Doc A/HRC/37/51/Add.1 [263].

²¹⁵ UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (20 March 2020) UN Doc A/HRC/43/49 [11].

²¹⁶ UNHRC, ‘General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) UN Doc HRI/GEN/1/Rev.1, 30 [3] (GC 20).

²¹⁷ UN General Assembly, ‘Note by the Secretary-General: Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment’ (20 July 2017) UN Doc A/72/178 [15] (2017 Note by Secretary General on Extra-custodial Use of Force).

²¹⁸ GC 20 (n 216) [5].

86. Although Article 7 of the ICCPR refers to two distinct types of conduct (i.e. conduct constituting torture, and conduct constituting CIDT), in considering individual cases, the UNHRC generally does not draw a clear distinction between the two. The UNHRC finds it unnecessary to establish a sharp distinction, although it indicates that the distinction primarily depends on the ‘nature, purpose and severity of the treatment’.²¹⁹

87. The CAT, on the other hand, clearly defines ‘torture’ as:

‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’²²⁰

88. At the same time, the CAT does not define CIDT, and instead operates on the principle that the obligations to prevent torture and CIDT, under Articles 2 and 16 respectively, are indivisible, interdependent and interrelated.²²¹

89. Although no international human rights instrument defines CIDT, at a minimum, what is clear is that ‘torture’ is an aggravated form of CIDT.²²² CIDT covers any ill-treatment that causes physical or mental pain and suffering to a victim,²²³ and such ill-treatment amounts to ‘torture’ if it is: ‘(i) intentional; (ii) causes severe physical or mental suffering [to a powerless person], and (iii) is committed with a specific purpose or objective’.²²⁴ ‘Powerlessness’ is generally understood to mean that someone is under the direct control of the perpetrator and ‘has lost the capacity to resist or escape the infliction of pain or suffering’.²²⁵

²¹⁹ *ibid* [4].

²²⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1.

²²¹ Committee Against Torture, ‘General Comment No 2: Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/C/GC/2 [3].

²²² 2017 Note by Secretary General on Extra-custodial Use of Force (n 217) [28].

²²³ GC 20 (n 216) [5].

²²⁴ 2017 Note by Secretary General on Extra-custodial Use of Force (n 217) [29].

²²⁵ *ibid* [31].

90. As the Special Rapporteur on torture and other CIDT helpfully summarises, while torture involves ‘intentional and purposeful infliction of pain or suffering on a powerless person’, CIDT involves ‘the infliction of pain or suffering without deliberate intention (for example, as an expected or unexpected incidental effect) or without instrumentalising such pain and suffering for a particular purpose’.²²⁶ CIDT is, therefore, interpreted so as to extend the widest possible protection against abuses, whether physical or mental.²²⁷

II. Extra-custodial Use of Force by Police

91. The *travaux préparatoires* to the CAT suggest that detention and similar direct control were meant only to constitute a precondition for torture and not for other forms of CIDT.²²⁸ Therefore, CIDT also covers ill-treatment that occurs in an extra-custodial setting.

92. As the Special Rapporteur on torture and other CIDT recognises, inherent in the concept of CIDT is any unnecessary or disproportionate use of force by the police, irrespective of whether it was intentional or inadvertent.²²⁹ Any conduct of law enforcement authorities that diminishes a person’s human dignity, including the use of physical force when not ‘strictly necessitated’ by that person’s conduct, violates the prohibition of torture and CIDT.²³⁰

93. This is true even in relation to the use of excessive or disproportionate police force during arrest and the policing of assemblies,²³¹ i.e., against persons who are in situations of ‘self-defence, arrest or crowd control’.²³² For instance, in *Benítez Gamarra v Paraguay*, the UNHRC found the disproportionate use of force by the police against peaceful demonstrators (including forcing them to lie on the ground, beating them with batons, kicking and stamping

²²⁶ *ibid* [32].

²²⁷ Code of Conduct for Law Enforcement Officials (adopted by UN General Assembly Resolution 34/169 of 17 December 1979) art 5.

²²⁸ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (2nd edn, OUP 2008) 566-567.

²²⁹ 2017 Note by Secretary General on Extra-custodial Use of Force (n 217) [46].

²³⁰ UN General Assembly, ‘Note by the Secretary-General: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (5 August 2016) UN Doc A/71/298 [43].

²³¹ 2017 Note by Secretary General on Extra-custodial Use of Force (n 217) [34]; UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez’ (16 March 2015) UN Doc A/HRC/28/68/Add.4 [27].

²³² 2017 Note by Secretary General on Extra-custodial Use of Force (n 217) [32]; UNHRC, ‘Concluding Observations of the Human Rights Committee: Togo’ (28 November 2002) UN Doc CCPR/CO/76/TGO [11]; UNHRC, ‘Concluding Observations of the Human Rights Committee: Belarus’ (19 November 1997) UN Doc CCPR/C/79/Add.86 [9]; UNHRC, ‘Concluding Observations of the Human Rights Committee: Kosovo (Serbia)’ (14 August 2006) UN Doc CCPR/C/UNK/CO/1 [15].

on them, setting fire to their belongings, etc.) amounted to a violation of Article 7 of the ICCPR.²³³

III. Prohibited Treatment

94. The Istanbul Protocol, which lays down a set of international guidelines for investigating and documenting torture and CIDT, provides a non-exhaustive list of incidents that amount to ill-treatment. These include:

- i. Blunt trauma, such as punching, kicking, slapping, whipping, beating with objects, etc.;
- ii. Position torture, including prolonged constraint of movement, forced positioning, etc.;
- iii. Choking, asphyxiation, smothering, etc.;
- iv. Crush injury or traumatic removal of digits and limbs; and
- v. Humiliation, including through verbal abuse and performance of humiliating acts.²³⁴

95. According to various UN bodies, the following acts amount to prohibited CIDT or torture:

- i. Police officers violently twisted the arm of an accused person, pushed him to the floor, and choked him, making him fight for his breath, before taking him into police custody. The Special Rapporteur considered this to be ill-treatment prohibited by the ICCPR.²³⁵
- ii. Beatings so severe as to cause the victim to be hospitalised.²³⁶
- iii. Treatment that exploits pre-existing injuries.²³⁷

96. The UNHRC also gives due weight to acts which cause permanent damage, for this element may be a crucial factor in assessing whether the treatment amounts to the aggravated form of torture, and not just CIDT.²³⁸ For instance, in *Massera v Uruguay*,²³⁹ the UNHRC found that there had been a breach of Article 7 of the ICCPR because the complainant suffered 'permanent physical damage' during his detention, which amounted to torture.

²³³ *Benítez Gamarra v. Paraguay*, Communication No 1829/2008 (30 May 2012) [2.7], [2.8], [7.4].

²³⁴ OHCHR, 'Istanbul Protocol' (2004) UN Doc HR/P/PT/8/Rev.1 [145].

²³⁵ UN Commission on Human Rights, 'Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (12 January 1995) UN Doc E/CN.4/1995/34 [712].

²³⁶ *Siragena v Uzbekistan*, Communication No 907/2000 (1 November 2005).

²³⁷ UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (12 February 2014) UN Doc A/HRC/25/65, Annex IV [36].

²³⁸ OHCHR, 'Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies', 15 <https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> accessed 19 August 2020.

²³⁹ *Massera v Uruguay*, Communication No R.1/5 (15 August 1979).

IV. Discrimination

a. General Principles

97. Article 1 of the CAT expressly prohibits acts of physical and mental suffering committed against persons for the purpose of discrimination of any kind. Therefore, the discriminatory use of mental or physical violence or abuse is crucial in determining whether an act constitutes ‘torture’ or mere ‘CIDT’.²⁴⁰ Moreover, States are under an obligation to prevent torture and CIDT in respect of all persons, regardless of race, colour, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, mental or other disability, health status, etc., without discrimination.²⁴¹
98. Additionally, ensuring special protection of vulnerable groups and individuals is also a critical component of the obligation to prevent torture and CIDT.²⁴² According to the Committee Against Torture, States have a heightened obligation to protect vulnerable individuals from torture and CIDT, because they are generally more at risk of experiencing torture and CIDT.²⁴³
99. Factors that are endogenous and exogenous to the individual, such as duration of the treatment, age, health and vulnerability of the individual, etc. also form crucial factors in determining the intensity of the physical or mental suffering endured by a person at the hands of State agents and therefore, must be analysed on a case-by-case basis.²⁴⁴

b. Rights Defenders

100. The mandate of the Special Rapporteur on torture and CIDT recognises that any intimidation and serious threats, including death threats, to the physical integrity of human rights defenders amounts to CIDT.²⁴⁵

²⁴⁰ *ibid* [20].

²⁴¹ GC 20 (n 216) [21].

²⁴² UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan E Méndez’ (1 February 2013) UN Doc A/HRC/22/53 [26] (2013 Report of the Special Rapporteur on Torture and CIDT).

²⁴³ GC 20 (n 216) [21].

²⁴⁴ *ibid* [27]; *Vuolanne v Finland*, Communication No 265/1987 (2 May 1989) [9.2].

²⁴⁵ 2013 Report of the Special Rapporteur on Torture and CIDT (n 242) [94].

c. Persons with Disabilities

101. Apart from Article 7 of the ICCPR, Article 15 of the CRPD guarantees to persons with disabilities the right against torture and CIDT.²⁴⁶ Moreover, the CRPD also prohibits violence, abuse and exploitation of persons with disabilities and recognises the right of every person with disabilities to respect for his or her physical and mental integrity.²⁴⁷ Therefore, police authorities must exercise a heightened level of care and precaution ‘with respect to individuals who are known or are likely to be especially vulnerable’ to the use of force.²⁴⁸ Law enforcement policies must give special consideration to the vulnerabilities of persons with disabilities to the harmful consequences of the use of force in general as well as the effects of specific less-lethal weapons.²⁴⁹ The Committee on the Rights of Persons with Disabilities, in its 2017 Concluding Observations on the UK, expressed concern over the UK’s ‘continued use of physical, mechanical and chemical restraint, including the use of Taser guns and similar weapons, on persons with disabilities...’ and highlighted that these ‘measures disproportionately affect black and other persons with disabilities belonging to ethnic minorities’ and amount to cruel, inhuman or degrading treatment.²⁵⁰

102. Assessing the level of suffering or pain afflicted by State agents requires a consideration of the circumstances of each individual case, including the existence of a disability.²⁵¹ If there is evidence that a person has been discriminated against on the basis of disability, the element of ‘intent’ in the definition of ‘torture’ is met.²⁵²

103. In *Zhaslan Suleimenov v Kazakhstan*,²⁵³ the complainant, who was a wheelchair user, was arrested on false charges and ill-treated for a confession. He was beaten and prevented from using his wheelchair in police custody. The UNHRC concluded that this amounted to a violation of Article 7 of the ICCPR, without specifying whether it amounted to torture or CIDT.²⁵⁴

²⁴⁶ CRPD (n 2) art 15.

²⁴⁷ *ibid* arts 16 and 17.

²⁴⁸ OHCHR, *Guidance on Less-Lethal Weapons in Law Enforcement* (United Nations 2020) [2.11].

²⁴⁹ *ibid* [2.7].

²⁵⁰ Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland’ (3 October 2017) UN Doc CRPD/C/GBR/CO/1 [36].

²⁵¹ UN General Assembly, ‘Note by the Secretary-General: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, UN Doc A/63/175 (28 July 2008) [47] (Note by Secretary-General on Torture and CIDT); *Noble v Australia*, Communication No 7/2012 (10 October 2016) [8.9].

²⁵² Note by Secretary-General on Torture and CIDT (n 251) [49].

²⁵³ *Zhaslan Suleimenov v Kazakhstan*, Communication No 2146/2012 (12 May 2017).

²⁵⁴ *ibid* [8.4].

EUROPEAN CONVENTION ON HUMAN RIGHTS

104. The ECHR is binding upon the UK by virtue of the latter signing the ECHR on 4 November 1950 and ratifying it on 8 March 1951. The ECHR entered into force for the UK on 3 September 1953. Consequently, from the perspective of international law, the UK is bound by the human rights obligations it has undertaken under the ECHR, and any conduct not compliant with such obligations, would incur its international responsibility. In the domestic law of the UK, the HRA gives legal effect to the rights guaranteed under the ECHR.

QUESTION 1: WHAT ARE THE LIMITS OF POLICE POWERS IN THE CONTEXT OF PEACEFUL PROTEST?

105. In this section, the Report sets out: (i) the scope of the right to peaceful assembly under the ECHR; (ii) how the exercise of various police powers impacts the right; (iii) the scope of State obligations; and (iv) how the protection against discrimination interacts with the right.

I. General Principles

106. Article 11 of the ECHR recognises that ‘everyone has the right to freedom of peaceful assembly’. It includes both negative and positive obligations on the part of the State.²⁵⁵ The former requires the State to refrain from particular acts; the latter requires the state to perform certain acts that facilitate the exercise of the right.

107. Article 11 covers both private meetings and meetings in public places, whether they are static or in the form of a procession; further, the right itself is exercised both by individual participants and by the persons organising the gathering.²⁵⁶ The primary purpose of Article 11 is to protect the right of peaceful political demonstrations.²⁵⁷

²⁵⁵ *Öllinger v Austria* App no 76900/01 (ECtHR, 29 June 2006) [35].

²⁵⁶ *Kudrevičius v Lithuania* [GC] App no 37553/05 (ECtHR, 26 November 2013) [91].

²⁵⁷ *Friend v United Kingdom* App no 16072/06 (ECtHR, 24 November 2009) [50].

108. Article 11 covers only the right of ‘peaceful’ assembly. Thus, where an assembly is otherwise characterised, the protection of Article 11 may not be available. As held by the ECtHR in *Kudrevičius*, the provision applies to all gatherings except those where organisers and participants: (i) have violent intentions; (ii) incite violence; or (iii) reject the foundations of a democratic society.²⁵⁸ However, the existence of some violent actors within a protest does not automatically make the protest lose its ‘peaceful’ character.²⁵⁹ A crucial factor in determining whether Article 11 is applicable is whether the organising association has violent intentions.²⁶⁰ Further, the freedom to take part in a peaceful assembly cannot be restricted in any way so long as the person concerned did not himself commit an unlawful or violent act.²⁶¹
109. At the same time, Article 11 is not an absolute right, but a qualified one. This means that any interference with the right can be justified where it is both (i) in accordance with the law; and (ii) necessary in a democratic society.
110. The former requirement speaks to the ‘quality of law’ standards of foreseeability and clarity.²⁶² Any norm regulating the exercise of the right of peaceful assembly must be formulated with sufficient precision to enable the citizen (with appropriate legal advice if necessary) to foresee the consequences of a given action.²⁶³ Nevertheless, the ECtHR recognises that absolute precision is impossible – indeed, the law may need some flexibility to adapt to changing circumstances.²⁶⁴ The crucial test with legality is thus whether domestic law affords a measure of ‘legal protection against arbitrary interferences’ by public authorities.²⁶⁵
111. The ‘necessity’ requirement, on the other hand, involves a proportionality assessment. This implies that any interference must answer a ‘pressing social need’ and be proportionate to one or more of the legitimate aims enumerated under Article 11(2), which include ‘the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others’.²⁶⁶

²⁵⁸ *Kudrevičius* (n 256) [92].

²⁵⁹ *Eželin v France* App no 11800/85 (ECtHR, 26 April 1991) [53].

²⁶⁰ *Primov v Russia* App no 17391/06 (ECtHR, 13 October 2014) [155].

²⁶¹ *Eželin* (n 259) [53].

²⁶² *Kudrevičius* (n 256) [108]-[110].

²⁶³ *Djavit An v Turkey* App no 20652/92 (ECtHR, 9 July 2003) [65].

²⁶⁴ *Eželin* (n 259) [45].

²⁶⁵ *Navalnyy v Russia* [GC] App no 29580/12 (ECtHR, 15 November 2018) [115].

²⁶⁶ *ibid* [142]-[144].

112. These ‘legitimate aims’ must be interpreted narrowly.²⁶⁷ However, in *Navalnyy*, the ECtHR noted that it will accept that a measure pursues the aims of ‘prevention of disorder’ or ‘protection of the rights of others’ only if this argument is not wholly irrelevant in the specific circumstances.²⁶⁸ It is also open to the Court to examine under Article 18 whether the measures implemented by State authorities are actually for an ulterior purpose (either instead of or in addition to a legitimate purpose).²⁶⁹

113. Crucially, the degree of scrutiny in this proportionality inquiry is influenced by the State’s ‘margin of appreciation’, i.e. the degree of national discretion conferred on domestic authorities. This margin is narrow where there is an interference based on the content of views expressed during an assembly.²⁷⁰ However, the ECtHR recognises that in a democratic society based on the rule of law, ideas challenging the existing order, where advocated by peaceful means, must be afforded a proper opportunity of expression through the means of Article 11.²⁷¹

114. A State’s margin of appreciation is also narrow where it seeks to impose a general ban on assembly, namely concerning pre-defined situations regardless of the individual facts of each case.²⁷² Such bans are permissible only where there is a real danger of the assembly resulting in disorder which cannot be prevented by less stringent measures. In determining the proportionality of such general bans, State authorities must also have regard to the chilling effect the ban could have on the exercise of the right of peaceful assembly.²⁷³

115. A State’s margin of appreciation, however, is wide in its assessment of the necessity of measures to restrict disruptive conduct, such as the intentional disruption of ordinary life and traffic.²⁷⁴ While a demonstration on a public highway is not prohibited *per se*,²⁷⁵ as held by the ECtHR in *Kudrevičius*, ‘physical conduct obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of [the] freedom as protected by Article 11 of the Convention’.²⁷⁶ In the facts of the said case, however, the

²⁶⁷ *ibid* [137].

²⁶⁸ *ibid* [124]-[126].

²⁶⁹ *Nemtsov v Russia* App no 1774/11 (ECtHR, 15 December 2014) [126]-[130].

²⁷⁰ *Kudrevičius* (n 256) [145].

²⁷¹ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* App no 29221/95 (ECtHR, 2 October 2001) [97].

²⁷² *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 April 2013) [106].

²⁷³ *Bączkowski v Poland* App no 1543/06 (ECtHR, 24 September 2007) [66]-[68].

²⁷⁴ *Kudrevičius* (n 256) [82].

²⁷⁵ *Barraco v France* App no 31684/05 (ECtHR, 5 March 2009).

²⁷⁶ *Kudrevičius* (n 256) [97].

Court limited the State's margin of appreciation, even though the applicants moved onto highways and parked tractors there, blocking three major roads in Lithuania and exceeding the scope of the permits issued.²⁷⁷

II. Exercise of Police Powers

116. This section considers how the right to peaceful assembly under the ECHR interacts with the following police powers: (i) the power to regulate peaceful protests; (ii) the power of arrest; (iii) the power of stop and search; (iv) the power of surveillance; and (v) the power to disperse an assembly and use force against participants of an assembly.

a. Power to Regulate Demonstrations

117. According to the ECtHR, States have the right to require prior notification or authorisation for holding an assembly, so long as any such procedure is meant to allow authorities to take reasonable measures to guarantee the smooth conduct of the assembly.²⁷⁸ Where the procedure is meant to serve such purpose, it does not as such constitute a violation of the right of peaceful assembly.²⁷⁹ At the same time, such regulations must not represent a 'hidden obstacle' to exercising the right under Article 11.²⁸⁰

118. Similarly, States can also impose limitations on holding a demonstration in a certain place for public security reasons.²⁸¹

119. Staging a demonstration without prior authorisation, however, does not automatically justify an infringement of the freedom of assembly.²⁸² States can apply sanctions for failing to notify or secure authorisation only if such sanctions meet the tests of legality and necessity.²⁸³ This may require an examination of various factors like: (i) why the demonstration was not authorised in the first place; (ii) what the 'public interest' at stake was; (iii) what risks were presented by the demonstration; (iv) how the authorities responded to the irregular assembly

²⁷⁷ *ibid* [96], [98].

²⁷⁸ *Sergey Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 January 2009) [42].

²⁷⁹ *Ziliberg v Moldova* App no 61821/00 (ECtHR, 4 May 2004) [2].

²⁸⁰ *Oya Ataman v Turkey* App no 74552/01 (ECtHR, 5 December 2006) [38].

²⁸¹ *Malofeyeva v Russia* App no 36673/04 (ECtHR, 30 August 2013) [136].

²⁸² *Cisse v France* App no 51346/99 (ECtHR, 9 July 2002) [50]; *Ataman* (n 280) [37]-[39]; *Gafgaz Mammadov v Azerbaijan* App no 60259/11 (ECtHR, 14 March 2016) [59].

²⁸³ *Primov* (n 260) [119].

(containment or dispersal),²⁸⁴ (v) the degree of disturbance caused by the demonstrators' conduct.²⁸⁵

120. Where demonstrators do not engage in violence, public authorities ought to show a certain degree of tolerance towards peaceful gatherings (including spontaneous demonstrations) which do not exceed the level of minor disturbance that flows from exercising the right of peaceful assembly in public.²⁸⁶ The limits of tolerance expected towards an irregular assembly depend on factors like the duration and the extent of public disturbance caused by it, and on whether its participants had been given sufficient opportunity to manifest their views and to leave the venue when such an order was given.²⁸⁷

b. Power of Arrest

121. According to the ECtHR, merely participating in an unauthorised peaceful demonstration is not a sufficient ground to arrest a person.²⁸⁸ A participant or organiser can be arrested only if they commit a 'reprehensible offence' (such as engaging in acts of violence, violating the rights and freedoms of others, etc.)²⁸⁹ during the demonstration. Arrest and conviction for 'inciting to violence' during a demonstration may be an acceptable measure in certain circumstances.²⁹⁰

122. The causing of intentional disruption to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a 'reprehensible act' and justify even criminal prosecution.²⁹¹

123. A participant who engaged in sporadic acts of violence may still enjoy the protection of Article 11, which means that the penalty imposed for this person's acts must remain proportionate.

²⁸⁴ *ibid.*

²⁸⁵ *Navalnyy* (n 265) [134].

²⁸⁶ *Kudrevičius* (n 256) [150]; *Ataman* (n 280) [41]-[42]; *Bukta v Hungary* App no 25691/04 (ECtHR, 17 October 2007) [34]; *Navalnyy and Yashin v Russia* App no 76204/11 (ECtHR, 20 April 2015) [63].

²⁸⁷ *Frumkin v Russia* App no 74568/12 (ECtHR, 6 June 2016) [97].

²⁸⁸ *Mammadov* (n 282) [63].

²⁸⁹ *Giuliani and Gaggio v Italy* [GC] App no 23458/02 (ECtHR, 24 March 2011) [251].

²⁹⁰ *Osmani v the former Yugoslav Republic of Macedonia* App no 50841/99 (ECtHR, 11 October 2001).

²⁹¹ *Kudrevičius* (n 256) [81].

For instance, a lengthy prison sentence for throwing a small object at the police was found to be disproportionate.²⁹²

c. Power of Stop and Search

124. The ECtHR acknowledged that widely framed stop and search powers (the exercise of which do not require ‘reasonable suspicion’ on the part of the police officer) could be misused against demonstrators and protesters in breach of Article 11 of the ECHR.²⁹³ Therefore, States are under an obligation not to grant broad discretion to police officers to stop and search.

125. Moreover, stop and search powers may also interfere with the right to private life under Article 8 of the ECHR if they are not adequately regulated by law and depend on the broad discretion of the police officer.²⁹⁴ Where accompanied by an element of coercion, they are also subject to scrutiny under Article 5 of the ECHR because they lead to a deprivation of liberty.²⁹⁵ This is the case notwithstanding a lack of physical constraint such as handcuffs or a cell.²⁹⁶

126. The Venice Commission’s Guidelines on Freedom of Peaceful Assembly aptly summarise that the ECtHR generally analyses whether: (i) search measures are necessary and proportional to the legitimate aim, (ii) there is an effective oversight mechanism in place, (iii) the authorisation to conduct such searches is subject to effective judicial review and action for damages, (iv) there are temporal and geographical restrictions to the said powers of search, (v) the modalities for carrying out stop and search measures are clearly stated, and (vi) there are any caveats to the decision to stop and search individuals (for instance, the necessity to demonstrate reasonable suspicion).²⁹⁷

d. Power of Surveillance

127. In *Big Brother Watch v UK*, the ECtHR held that all measures of surveillance, including the interception of communications and tracking of individuals via GPS, may interfere with the

²⁹² *Gülciü v Turkey* App no 17526/10 (ECtHR, 6 June 2016) [110]-[117]; *Yaroslav Belousov v Russia* App nos 2653/13 and 60980/14 (ECtHR, 6 March 2017) [177]-[182].

²⁹³ *Gillan and Quinton v UK* App no 4158/05 (ECtHR, 28 June 2010) [85].

²⁹⁴ *ibid* [85], [87].

²⁹⁵ *ibid* [56]-[57].

²⁹⁶ *MA v Cyprus* App no 41872/10 (ECtHR, 23 October 2013) [193].

²⁹⁷ European Commission for Democracy through Law (Venice Commission), Guidelines on Freedom of Peaceful Assembly, CDL-AD(2019)017 (8 July 2019) 84, fn 421, citing *Gillan and Quinton* (n 293) [80]-[83], [86].

right to ‘private life’ under Article 8 of the ECHR.²⁹⁸ As such, therefore, surveillance measures are subject to the requirements of legality and necessity in a democratic society/proportionality.²⁹⁹

128. The Venice Commission’s Guidelines state that while the use of technology may help to secure police preparedness and prevent disorder during larger assemblies, they should not be used for the purposes of ‘general profiling or monitoring or even surveillance of the activities of targeted individuals or groups’.³⁰⁰ Such technologies include police video recordings, facial recognition tools, surveillance of social media sites used by activists and identification of a person’s whereabouts through location tracking, etc. According to the Guidelines, such tools should only be used where such interference can be justified as being strictly proportionate to the aims of national security or public order and should be subject to judicial review.³⁰¹

129. In *Amann v Switzerland*, the ECtHR held that the collection and storing of data relating to the private life of an individual (here, that the applicant was a ‘contact with the Russian embassy’ and did ‘business of various kinds with the [A.] company’) amounted to an interference with Article 8 of the ECHR, since domestic law did not define the scope and conditions of exercise of the authorities’ discretionary power in such collection and storing of data.³⁰²

e. Power of Dispersal and Use of Force

130. State must provide relevant and sufficient reasons to disperse an assembly.³⁰³ Dispersing it, solely because of the absence of prior notice or authorisation, without any illegal conduct on the part of the participants, may amount to a disproportionate restriction on their freedom of peaceful assembly.³⁰⁴ This is especially so if waiting for permission would have rendered the protest obsolete (such as in the case of a protest in response to a current event).³⁰⁵

²⁹⁸ *Big Brother Watch v UK* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) [303]-[388].

²⁹⁹ *ibid* [304].

³⁰⁰ Guidelines on Peaceful Assembly (n 297) [163].

³⁰¹ *ibid* [71]. See generally *Big Brother Watch* (n 298).

³⁰² *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [65]-[81].

³⁰³ *Ibrahimov v Azerbaijan* App nos 69234/11, 69252/11 and 69335/11 (ECtHR, 11 May 2016) [80].

³⁰⁴ *Bukta* (n 286) [36].

³⁰⁵ *Éva Molnár v Hungary* App no 10346/05 (ECtHR, 7 January 2009) [37]-[38]; *Budabázy v Hungary* App no 41479/10 (ECtHR, 15 March 2016) [34].

131. A decision whether to disperse a political rally must also take into account ‘the privileged protection under the Convention of political speech, debate on questions of public interest and the peaceful manifestation on such matters, and remain within the authorities’ narrow margin of appreciation in restricting political speech’.³⁰⁶
132. In any event, any interference with an assembly involving disruption, dispersal or arrest can be justified only if it meets the tests of legality and proportionality outlined above, and only after the participants have been given sufficient opportunity to manifest their views.³⁰⁷
133. Law enforcement agencies should not use force at assemblies unless strictly unavoidable. Even where force is used against an assembly, it must: (i) only be applied to the minimum extent necessary;³⁰⁸ (ii) comply with the tests of legality and proportionality set out above in the context of Article 11; and (iii) be preceded by clear and adequate warnings, providing participants with sufficient time to heed any police orders and exit the area.³⁰⁹
134. Use of high-pressure water, tear gas or armoured vehicles to disperse assembly requires specific justification.³¹⁰ The risk of ‘collateral harm’ to bystanders not participating in the assembly renders indiscriminate uses of force (like tear gas) as particularly difficult to justify.³¹¹
135. When force is used at an assembly, State authorities should undertake a prompt investigation, which considers the necessity and proportionality of the force used.³¹² Law enforcement personnel should also be held liable for any excessive or disproportionate use of force.³¹³
136. Lastly, the use of force to disperse the assembly, the participants’ arrests, detention and/or ensuing administrative convictions may have a chilling effect on the exercise of the right of peaceful assembly both by the participants themselves and others.³¹⁴ This chilling effect is not automatically removed even if the sanctions are reversed.³¹⁵

³⁰⁶ *Navalnyy* (n 265) [133].

³⁰⁷ *Molnár* (n 305) [42].

³⁰⁸ Guidelines on Peaceful Assembly (n 297) [32].

³⁰⁹ *ibid* [181], [187].

³¹⁰ *Sendikası v Turkey* App no 20347/07 (ECtHR, 5 July 2016) [108].

³¹¹ *Çelebi v Turkey* App no 22729/08 and 10581/09 (ECtHR, 12 December 2017) [111].

³¹² Guidelines on Peaceful Assembly (n 297) [33].

³¹³ *Najafli v Azerbaijan* App no 2594/07 (ECtHR, 2 January 2013) [39].

³¹⁴ *Balçık v Turkey* App no 25/02 (ECtHR, 29 February 2008) [41].

³¹⁵ *United Macedonian Organisation Ilinden and Ivanov v Bulgaria* App no 44079/98 (ECtHR, 15 February 2006) [135].

III. Positive Obligations

137. Positive obligations pursuant to Article 11, such as adopting legislative or operational measures, are of particular importance for those holding ‘unpopular’ views, or belonging to minorities, because those groups are more vulnerable to victimisation.³¹⁶ States are under an obligation to ensure peaceful conduct and citizen safety,³¹⁷ and to facilitate assembly without fear of physical violence from counterdemonstrators.³¹⁸ While States have a wide discretion in how they balance the concurrent Article 11 rights of counterdemonstrators, the mere risk of violence is insufficient to ban the original assembly in such situations.³¹⁹

138. Specifically, the ECtHR has emphasised the importance of ‘taking preventative security measures in order to guarantee the smooth conduct of an event’, including ensuring that first-aid providers are at the site of demonstrations.³²⁰

IV. Discrimination

139. The freedom of peaceful assembly under the ECHR is enjoyed equally by all individuals. Both Article 14 and Protocol 12 of the ECHR require States to secure rights under the Convention to all individuals within their jurisdiction without discrimination.³²¹ Therefore, discrimination against organisers and/or participants in an assembly based on sex, race, ethnicity, religion, political opinion, disability, age, sexual orientation, health conditions, etc. is prohibited.

140. In *Bączkowski v Poland*, the mayor of Warsaw made public announcements that he would refuse permission to hold a march that raises awareness about discrimination based on sexual orientation. Although the relevant body denied permission for the march for other reasons, the ECtHR found that the mayor’s homophobic statements could have influenced this decision, and that the decision therefore constituted a violation of Article 14 of the ECHR in conjunction with Article 11.³²² Similarly, in *Identoba v Georgia*, a peaceful demonstration to mark the International Day against Homophobia was disrupted by violent counterdemonstrators

³¹⁶ *Bączkowski* (n 273).

³¹⁷ *Giuliani and Gaggio* (n 289) [251].

³¹⁸ *Plattform ‘Ärzte für das Leben’ v Austria* App no 10126/82 (ECtHR, 21 June 1988).

³¹⁹ *Barankevich v Russia* App no 10519/03 (ECtHR, 26 October 2007) [33].

³²⁰ *Ataman* (n 280) [39].

³²¹ Guidelines on Peaceful Assembly (n 297) [101].

³²² *Bączkowski* (n 273).

and the applicant-demonstrators suffered verbal and physical assaults. Since the national authorities failed to ensure that the march took place peacefully, the ECtHR found a violation of Article 14 in conjunction with Article 11.³²³

141. States also have a positive obligation to address the specific needs and challenges confronting individuals and groups that have historically faced discrimination or marginalisation at all times before, during and after assemblies.³²⁴

QUESTION 2: WHAT TYPE AND CUMULATIVE EFFECT OF POLICING, CRIMINALISATION, SURVEILLANCE AND USE OF FORCE, CONSTITUTES THE ‘CHILLING EFFECT’?

142. The concept of ‘chilling effect’ is not clearly defined in ECtHR jurisprudence. However, the Court has on occasion held that disproportionate restrictions discourage individuals from exercising their right to freedom of expression. This section, therefore, considers the chilling effect of policing, criminalisation, surveillance and use of force on the said right.

143. Article 10(1) of the ECHR provides that every person has the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference by public authorities, including the police. It does not apply to private actors.³²⁵ Article 10(1) covers both the right to express ideas, opinions or information that are received favourably or indifferently by the state and the public, as well as those that offend, shock and disturb.³²⁶ However, it may not extend to hate speech, nor may it apply to speech designed to undermine the rights protected in the ECHR.³²⁷

144. Importantly, Article 10 protects both the substance and content of speech and the form in which it conveyed.³²⁸ The ECtHR protects freedom of speech and the dissemination of

³²³ *Identoba v Georgia* App no 73235/12 (ECtHR, 12 May 2015) [93]-[100].

³²⁴ Guidelines on Peaceful Assembly (n 297) [84].

³²⁵ *Saliyev v Russia* App no 35016/03 (ECtHR, 21 January 2011) [52].

³²⁶ *Lingens v Austria* (1986) 8 EHRR 407; *Goodwin v United Kingdom* (2008) ECHR 61; *Lehideux and Isorni v France* (1998) 30 EHRR 665.

³²⁷ Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 17; *Lehideux and Isorni v France* (1979) 1 EHRR 737 [47]; *Gunduz v Turkey* (2001) 41 EHRR 5.

³²⁸ *Jersild v Denmark* (1994) 19 EHRR 1.

information, ideas and opinions in a variety of forms, including oral communication, print media, works of art, political demonstrations and rallies, and online communication tools.³²⁹

145. Any restrictions imposed on communication or the dissemination of information necessarily interfere with the right to receive and impart information.³³⁰ However, the right to freedom of expression is a qualified right under the ECHR, meaning that it can legitimately be restricted by the State in certain situations. Article 10(2) notes that freedom of expression may be subject to formalities, conditions, restrictions or penalties that are prescribed by law and necessary in a democratic society, for reasons including to protect national security, territorial integrity or public safety, to prevent disorder or crime, to uphold public health or morals and to protect the rights of others.

146. The ECtHR applies a proportionality test to determine whether a measure undertaken by the State violates the right to freedom of expression.³³¹ In order for the measure to be lawful, it must be necessary in a democratic society, meaning that it should respond to a pressing social need, and be proportionate to a legitimate aim listed in Article 10(2).³³² Importantly, as is evident from the decision in *Goodwin v United Kingdom*, the ECtHR may take into account the ‘chilling effect’ a certain action could have on the exercise of the right to freedom of expression in determining whether that action is proportionate.³³³

147. The proportionality assessment will also be affected by the margin of appreciation given to States with regard to deciding whether the measure is necessary, which depends on the content and wider context of the expression, as well as the extent to which there is consensus among ECHR States on the issue.³³⁴ Expression relating to matters of general public interest, including those of political importance, or which scrutinises the actions of the government, enjoy a high level of protection under Article 10, meaning that the margin of appreciation is narrow.³³⁵ In contrast, the government has a wider margin of appreciation for commercial

³²⁹ *Schöpfer v Switzerland* App no 25405/94 (ECHR, 20 May 1998); *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976); *Müller v Switzerland* (1988) 13 EHRR 212; *Piermont v France* (1995) 20 EHRR 301; *Times Newspapers Ltd v UK* (2009) ECHR 451.

³³⁰ *Oberschlick v Austria* (1995) 19 EHRR 389.

³³¹ *Thoma v Luxembourg* App no 38432/97 (ECtHR, 29 March 2001) [48].

³³² *Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4.

³³³ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) [39].

³³⁴ *Hertel v Switzerland* (1998) 28 EHRR 534 [46]; *Ovchinnikov v Russia*, App no 24061/04 (ECHR, 16 December 2010) [51].

³³⁵ *Axel Springer v Germany* (2012) 55 EHRR 6; *Surek v Turkey* (1999) 7 BHRC 339; *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992).

activities, which has justified restrictions and outright bans on commercial advertisements relating to animal cruelty and environmentalism in cases like *Tierfabriken v Switzerland*.³³⁶

A. WHAT IS THE EFFECT OF POLICING ON THE RIGHT TO FREEDOM OF EXPRESSION?

148. As mentioned above, the expression of political opinions or opinions on matters of public interest by protesters at public assemblies comes within the scope of Article 10. At such demonstrations, the arrest and detention of protesters can be justified under Article 10(2) on the grounds of protecting public order and safety, so long as the police have a legitimate aim, the action undertaken is proportionate to that aim and is carried out in accordance with the law.³³⁷ For example, in *Chorherr v Austria* a protester at a rally holding a placard with anti-war slogans was arrested, detained and released after questioning by the police.³³⁸ The ECtHR said that a less restrictive approach to policing, such as asking him to remove the sign rather than arresting him, was not required following the determination of proportionality. Deference was shown to the means of law enforcement chosen by the authorities.

149. The arrest, detention and conviction of protesters can be a violation of Article 10 if the measures taken and penalties imposed are disproportionate to the need to protect public order. For example, in *Kiliç v Turkey*, the ECtHR held that the imposition of long prison sentences on applicants who had participated in a demonstration and expressed support for the PKK, an illegal organisation, violated Article 10.³³⁹ The rally had been non-violent, and the applicants had not undermined public order. As a result, the harsh penalties were held to be disproportionate. As the ECtHR noted in *Ricci v Italy*, handing down disproportionate prison sentences has a significant chilling effect on the right to freedom of expression.³⁴⁰

150. In order to invoke the justifications of preventing disorder and protecting public safety, the danger must not merely be speculative or hypothetical, undertaken as a preventative measure for the protection of democracy.³⁴¹ There must be an actual danger of disorder triggered by the public display of a sign or symbol or the expression of an idea or opinion.³⁴²

³³⁶ *Tierfabriken* (n 332).

³³⁷ *Chorherr v Austria* (1993) 17 EHRR 358.

³³⁸ *ibid.*

³³⁹ *Kiliç v Turkey*, App no 46227/11 (ECtHR, 12 December 2017).

³⁴⁰ *Ricci v Italy* App no 30210/06 (ECtHR, 8 October 2013) [59].

³⁴¹ *Vajnai v Hungary* (2008) 50 EHRR 44.

³⁴² *ibid.*

B. WHAT IS THE EFFECT OF CRIMINALISATION ON THE RIGHT TO FREEDOM OF EXPRESSION?

151. The ECtHR recognises that the criminalisation of expression in the public interest and the imposition of criminal penalties, such as fines or imprisonment, are likely to have a chilling effect on freedom of expression under Article 10.³⁴³ As mentioned above, the ECtHR has taken a strong stance against the criminalisation and conviction of applicants for expressions of general or political interest. While state authorities can adopt measures to respond to expression that threatens public order, it must show restraint when resorting to criminalisation of behaviour and the instigation of criminal proceedings, particularly where other means are available to reply to unjustified attacks and criticisms of its adversaries.³⁴⁴ If the criminal penalty imposed is disproportionate to the aim cited by the state or unnecessary to achieve that aim, it will not be considered legitimate under Article 10.³⁴⁵

152. The ECtHR has held that the State cannot criminalise expression merely because it criticises the government, or other state authorities such as the army or police, or because its underlying ideology is offensive or unpalatable to the government.³⁴⁶ However, the chilling effect of criminalisation on expression will not be given preference if it is particularly subversive in nature, due to the risk of it inciting violence or hatred against a group.³⁴⁷

C. WHAT IS THE EFFECT OF SURVEILLANCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

153. The ECtHR considers that surveillance may have a chilling effect on the right to freedom of expression. In *Big Brother Watch v UK*, the ECtHR found that the State's bulk interception of communications of journalists could have a 'chilling effect' on freedom of press, which is part of the freedom of expression.³⁴⁸ However, the ECtHR has not explicitly acknowledged that surveillance could have a 'chilling effect' on the right to freedom of expression of all citizens.

³⁴³ *Eon v France*, App no 26118/10 (ECtHR, 14 March 2013).

³⁴⁴ *Surek v Turkey* (n 335).

³⁴⁵ *Lehideux and Isorni v France* (n 326).

³⁴⁶ *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1994) 20 EHRR 56; *Grigoriades v Greece* (1997) 27 EHRR 464.

³⁴⁷ *Zana v Turkey* (1997) 27 EHRR 667 [59]-[60]; *Süreke v Turkey (No 3)* App no 24735/94 (ECtHR, 8 July 1999) [40].

³⁴⁸ *Big Brother Watch* (n 298).

154. The ECtHR recognises that intrusive surveillance without adequate oversight and protection from abuse violates Article 10 of the ECHR because it does not meet the tests of legality and proportionality.³⁴⁹ The Court also acknowledges that such surveillance could violate the right to private and family life under Article 8.³⁵⁰ For example, violations of Article 8 were found in cases involving the surveillance, arrest and detention of human rights activists,³⁵¹ tapping of the telephones of human rights lawyers³⁵² and of journalists³⁵³ and the introduction of anti-terrorist legislation granting broad data collection powers.³⁵⁴ Most recently, the ECtHR found that entitling the authorities to use geolocation data without sufficient clarity as to the extent of such discretionary powers and how they must use such powers violated Article 8.³⁵⁵

D. WHAT IS THE EFFECT OF USE OF FORCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

155. There is no jurisprudence specifically addressing the chilling effect of the use of force by police officers during demonstrations on the freedom of expression.

QUESTION 3: WHAT CONSTITUTES CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF POLICING PEACEFUL PROTESTS?

156. This section considers: (i) the nature of Article 3 of the ECHR, the meaning of torture and CIDT and the corollary State obligations; (ii) what constitutes the minimum level of severity under Article 3, the various forms of prohibited ill-treatment and the burden of proof.

I. General Principles

157. The ECHR enshrines in Article 3 the absolute³⁵⁶ prohibition of torture and other forms of ill-treatment: ‘No one shall be subjected to torture or to inhuman or degrading treatment or

³⁴⁹ *ibid.*

³⁵⁰ *Iordachi and Others v Moldova* (2009) 54 EHRR 5.

³⁵¹ *Shimovolos v Russia* App no 30194/09 (ECtHR, 28 November 2011).

³⁵² *Iordachi* (n 350).

³⁵³ *Zakbarov v Russia* App no 47143/06 (ECtHR, 4 December 2015).

³⁵⁴ *Szab v Hungary* App no 37138/14 (ECtHR, 12 January 2016).

³⁵⁵ *Ben Faïza v France*, App no 31446/12 (ECtHR, 8 February 2018).

³⁵⁶ It is an absolute prohibition, under no circumstances is the prescribed conduct allowed, even in case of emergencies, and irrespective of the victim’s conduct. See, among others, *Bonyid v Belgium* [GC] App No 23380/09 (ECtHR, 28 September 2015) [81]; *Labita v Italy* [GC] App no 26772/95 (ECtHR, 6 April 2000) [119].

punishment’. According to the ECtHR, the provision of Article 3 enshrines ‘one of the most fundamental values of a democratic society’,³⁵⁷ and is intertwined with human dignity.³⁵⁸

158. The ECHR contains no definition for either torture or inhuman or degrading treatment. In its case law, it has given consideration to the distinction contained in Article 3 between torture and others forms of ill-treatment, namely inhuman or degrading treatment. According to the ECtHR, the ECHR attaches ‘a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’.³⁵⁹ The severity of such suffering is *relative*: it ‘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, etc.’³⁶⁰ Additionally, torture entails a ‘purposive element’, as also recognised under the CAT, which defines torture as ‘the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating’.³⁶¹ Severity of suffering and deliberate intention have led the ECtHR to a finding of torture under Article 3 on several occasions.³⁶² In some cases, the ECtHR based its finding of torture ‘not so much on the intentional nature of the ill-treatment as to the fact that it had ‘caused “severe” pain and suffering’ and had been particularly ‘serious and cruel’,³⁶³ stating that such particularly cruel pain or suffering could have only been caused deliberately. In yet other cases, the ECtHR ascribed particular significance to the ‘gratuitous nature of the violence inflicted’ and where the violence was intended as a ‘reprisal’.³⁶⁴

159. With regard to inhuman treatment, the ECtHR has noted that it refers to treatment which, ‘*inter alia*, was premeditated, applied for hours at a stretch³⁶⁵ and caused either actual bodily injury or intense physical or mental suffering’.³⁶⁶ As the ECtHR stressed in *Bouyid v Belgium*, there is a particularly strong connection between the concept of ‘degrading treatment or

³⁵⁷ *Bouyid* (n 356) [81]; *Mushegh Saghatelyan v Armenia* App no 23086/08 (ECtHR, 20 September 2018) [140]; *Cestaro v Italy* App no 6884/11 (ECtHR, 7 April 2015); *Abdullah Yasa and Others v Turkey* App no 44827/08 (ECtHR, 16 July 2013) [37]; *Muradova v Azerbaijan* App no 22684/05 (ECtHR, 2 April 2009) [97].

³⁵⁸ *Bouyid* (n 356) [81].

³⁵⁹ *Cestaro* (n 357) [171]; *Aksay v Turkey* App no 21987/93 (ECtHR, 18 December 1996) [63].

³⁶⁰ *Cestaro* (n 357) [171].

³⁶¹ *ibid* [171].

³⁶² *ibid* [172].

³⁶³ *ibid* [173].

³⁶⁴ *ibid* [174].

³⁶⁵ This is not a definitional requirement of inhuman treatment. Even if a certain treatment is not applied for hours at a stretch, it may amount to inhuman treatment depending on the relative severity of the harm caused. For e.g., in *Gäfgen*, although the ill-treatment lasted for only 10 minutes, the ECtHR found that the conduct of the police officers amounted to inhuman treatment. See *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010) [102], [108].

³⁶⁶ *Ataman* (n 280) [23]; *Muradova* (n 357) [98]; *Najafli* (n 313) [35].

punishment’ under Article 3 and respect for human dignity.³⁶⁷ The ECtHR’s conception of human dignity in *Boyid* was ‘sensitive to the particular relational factors that determine the character of a particular treatment—including factors which go to the inquiry of the perpetrator’s act and the vulnerability of the victim’s circumstances’.³⁶⁸ Treatment will qualify as ‘degrading’ where ‘its object is to humiliate and debase the victim’ and where ‘as far as the consequences are concerned, it adversely affects his/ her personality in a manner incompatible with Article 3’.³⁶⁹

160. The absolute prohibition of torture and other forms of ill-treatment under Article 3 ECHR has two distinct aspects: a substantive aspect and a procedural aspect. Not only are States parties to the ECHR prohibited from inflicting torture and inhuman or degrading treatment or punishment on individuals but State authorities are also under an obligation to conduct an effective official investigation into an alleged ill-treatment, even in cases where such ill-treatment has been inflicted by private parties.³⁷⁰ This obligation stems from Article 3 in conjunction with Article 1 ECHR, according to which States parties ‘shall secure to everyone within their jurisdiction the rights and freedoms defined’ in the ECHR.

161. The procedural obligation of States parties concerns any credible allegation, any ‘arguable claim’ or ‘arguable complaint’, of an individual that they have suffered such treatment by State agents or private parties.³⁷¹ As the ECtHR has reiterated recently in *Musbeg Shaghatelyan v Armenia*, if such an obligation did not exist:

the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.³⁷²

162. With regard to the substantive aspect of Article 3 ECHR, and in combination with Article 1 ECHR, the State bears both negative and positive obligations. Not only are States prohibited from inflicting torture, inhuman or degrading treatment or punishment to persons under their

³⁶⁷ *Boyid* (n 356) [90], referring to *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) [33].

³⁶⁸ Natasa Mavronicola, ‘*Boyid v Belgium*: The “Minimum Level of Severity” and Human Dignity’s Role in Article 3 ECHR’ (2020) 1 European Convention on Human Rights Law Review 105, 120.

³⁶⁹ *Ataman* (n 280) [23]; *Muradova* (n 357) [98]; *Najafli* (n 313) [35].

³⁷⁰ *Chernega and Others v Ukraine* App no 74768/10 (ECtHR, 18 June 2019) [158].

³⁷¹ *Boyid* (n 356) [116].

³⁷² *Musbegh* (n 357) [151], citing *El-Masri v the former Yugoslav Republic of Macedonia* [GC] App 39630/09 (ECtHR, 13 December 2012) [182]; *Boyid* (n 356) [115]; *Muradova* (n 357) [100].

jurisdiction through their agents but they have to also protect those persons from ill-treatment inflicted by private parties and prevent such ill-treatment when they have become aware or should have been aware of it. Hence, States have to ‘to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is administered by private individuals’.³⁷³ They are also obliged to ensure that individuals are effectively protected ‘from the criminal acts of a third party, as well as [take] reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known’.³⁷⁴

163. Despite the fact that certain forms of State violence, especially by law enforcement officials may be pervasive, e.g., in the context of detention or in policing mass protests, the prohibition of Article 3 remains absolute. As argued by Mavronicola, ‘[t]orture, inhuman treatment, and degrading treatment, are as pervasive as they are egregious’.³⁷⁵ The ECtHR has generally taken a ‘stringent approach’ with regard to violence by law enforcement officers against individuals.³⁷⁶ It has repeatedly found that when an individual is ‘confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his [sic] own conduct, diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3 of the Convention’.³⁷⁷ The ECtHR’s approach in that respect, takes into consideration ‘the power asymmetry’ characterising such relations.³⁷⁸ With regard to mass crowd-control operations, the ECtHR has stressed (even in a context different from a peaceful assembly) that it ‘acknowledges the difficulties that may be encountered in policing large groups of people during mass events where the police have not only the duty of maintaining public order and protecting the public, but also of maintaining confidence in their adherence to the rule of law’.³⁷⁹ Difficulties that law enforcement faces in fighting crime do not under any circumstances allow for restrictions on the bodily integrity of individuals as protected under Article 3 and the ECHR more generally.³⁸⁰

³⁷³ *Chernega* (n 370) [150].

³⁷⁴ *ibid* [150].

³⁷⁵ Mavronicola (n 368) 118.

³⁷⁶ *ibid* 112.

³⁷⁷ *Bouyid* (n 356) [88], [100]; *Mushegh* (n 357) 140; *Izci v Turkey* App no 42606/05 (ECtHR, 23 July 2013) [55]; *Muradova* (n 357) [109]; *Najafli* (n 313) [38].

³⁷⁸ Mavronicola (n 368) 112.

³⁷⁹ *Hentschel and Stark v Germany* App no 47274/15 (ECtHR, 9 November 2017) [83].

³⁸⁰ *Izci* (n 377) [55]; *Najafli* (n 313) [34].

164. Finally, it needs to be borne in mind that a finding that the State has not violated Article 3 does not foreclose a finding that the State failed to comply with its obligation to ensure the peaceful nature of the protests under Article 11 ECHR.³⁸¹

II. Substantive Aspect of Article 3 ECHR

a. Minimum Level of Severity

165. As a general matter, in order to fall within the scope of Article 3 ECHR, ill-treatment must attain ‘a minimum level of severity’.³⁸² This test does not employ ‘a quantitative level of harm’ but rather refers to the ‘gravity of the wrong committed’.³⁸³ In accordance with the ECtHR’s constant jurisprudence, the assessment of this ‘minimum level of severity’ is relative, depending on ‘all circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age, and state of health of the victim’.³⁸⁴ For example, as the Grand Chamber found in *Bonyid v Belgium*, ill-treatment will have greater impacts, especially psychological, when inflicted upon minors.³⁸⁵ Treatment that might not qualify as inhuman when applied to healthy, fit adults, could very well become inhuman or degrading when imposed upon elderly persons or persons suffering from illness,³⁸⁶ or indeed *a fortiori* to a person with disabilities. For example, in *Vincent v France*, the applicant, a wheelchair user, was detained in different prisons that were not adapted to his disability. The ECtHR therefore found that the treatment was degrading and amounted to a violation of Article 3, even though there was no evidence of a positive intention to humiliate the applicant.³⁸⁷

166. Other factors that may be taken into consideration for this assessment are ‘the purpose for which ill-treatment was inflicted, together with the intention or motivation behind it’.³⁸⁸ However, the absence of ‘an intention to humiliate or debase the victim’ does not preclude a finding of a violation of Article 3.³⁸⁹ The context in which ill-treatment was inflicted, e.g.,

³⁸¹ *Chernega* (n 370) [157].

³⁸² *Bonyid* (n 356) [86]; *Chernega* (n 370) [149]; *Annenkov v Russia* App no 31475/10 (ECtHR, 25 July 2017) [78].

³⁸³ *Mavronicola* (n 368) 120.

³⁸⁴ *Bonyid* (n 356) [86]; *Chernega* (n 370) [149].

³⁸⁵ *Bonyid* (n 356) [109].

³⁸⁶ Jim Murdoch and Ralph Roche, ‘The European Convention on Human Rights and Policing: A Handbook for Police Officers and Other Law Enforcement Officials’ (Council of Europe Publishing 2013) 35.

³⁸⁷ *Vincent v France* App no 6253/03 (ECtHR, 24 October 2006).

³⁸⁸ *Bonyid* (n 356) [86].

³⁸⁹ *ibid* [86].

heightened tensions and emotions, may also be relevant.³⁹⁰ For example, in a case where the forensic medical examination performed on the victim recorded that she had suffered many injuries on her entire body, which would prevent her from working for five days, the ECtHR found that the minimum level of severity had indeed been attained and the ill-treatment fell within the ambit of Article 3.³⁹¹

167. As the ECtHR found in *Bonyid v Belgium*:

Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.³⁹²

168. For example, in a case where the police had used tear gas grenades against demonstrators injuring the victim on the nose with a grenade, causing facial oedema, a fractured nose bone and concave incisions, thereby resulting to 'moderately severe damage to his vital functions', the ECtHR found that the severity threshold had been obviously crossed.³⁹³

169. Additionally, as the Court highlighted again in *Bonyid*, the 'minimum level of severity' does not mean that:

there might be situations in which such a finding of a violation is not called for, because the above-mentioned severity threshold has not been attained. Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question.³⁹⁴

³⁹⁰ *ibid* [86].

³⁹¹ *Izci* (n 377) [58].

³⁹² *Bonyid* (n 356) [87].

³⁹³ *Abdullah Yasa* (n 357) [38].

³⁹⁴ *Bonyid* (n 356) [101].

170. In this context, the ECtHR stressed that a slap which ‘was an impulsive act in response to an attitude perceived as disrespectful’ was not an act of physical force made necessary by the individual’s conduct.³⁹⁵ This action then undermined the individual’s dignity, resulting to a violation of Article 3.

b. Forms of Ill-Treatment

171. Discussing in more detail the ‘slap’ as a particular form of ill-treatment, the ECtHR has emphasised:

[A] slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual’s dignity. A slap has a considerable impact on the person receiving it. A slap to the face affects the part of the person’s body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others. Indeed, the Court has already had occasion to note the role played by the face in social interaction[.]³⁹⁶

172. Additionally, and given that the ECtHR has held that it is enough that the victim is humiliated in their own eyes for degrading treatment to occur under Article 3, even ‘one unpremeditated slap devoid of any serious or long-term physical effect’ on the victim may be perceived as humiliating by them.³⁹⁷ This is particularly the case when the victim is under the control of law enforcement officers, as such action highlights the inferiority and superiority characterising such relationships.³⁹⁸ The fact that victims of such ill-treatment know such conduct to be unlawful and a breach of codes of professional conduct and ethics, triggers feelings of ‘arbitrary treatment, injustice and powerlessness’.³⁹⁹

173. It is also irrelevant whether a slap takes place ‘thoughtlessly by an officer who was exasperated by the victim’s disrespectful or provocative conduct’.⁴⁰⁰ The absolute prohibition of Article 3 precludes ill-treatment under any circumstances, and ‘under the most difficult circumstances’: ‘In a democratic society ill-treatment is never an appropriate response to problems facing the

³⁹⁵ *ibid* [102].

³⁹⁶ *ibid* [103]–[04] [references omitted].

³⁹⁷ *ibid* [105].

³⁹⁸ *ibid* [106].

³⁹⁹ *ibid* [106].

⁴⁰⁰ *ibid* [108].

authorities.⁴⁰¹ As also prescribed by the European Code of Police Ethics, ‘the police, specifically, must “not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances”’.⁴⁰²

174. With respect to the use of pepper spray or tear gas to disperse non-peaceful assemblies, such as where the demonstrators were throwing rocks to the police, and for crowd control purposes, the ECtHR has found that it does not *ipso facto* violate Article 3 ECHR.⁴⁰³ In that regard, although the ECtHR has recognised that tear gas can have ‘unpleasant consequences’, including ‘respiratory problems, nausea, vomiting, irritation of the respiratory track, irritation of tear ducts and eyes, spasms, thoracic pain, dermatitis or allergies’ and ‘in strong doses...necrosis of the tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging’,⁴⁰⁴ it has referred to the fact that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons allows the use of this chemical for law enforcement purposes, including domestic riot control.⁴⁰⁵ However, there is no justification for the use of pepper spray or tear gas when it is used against a person already taken in the control of the authorities (e.g., where she has already been arrested).⁴⁰⁶ ‘Unwarranted use of tear gas by law enforcement officers is not compatible with the prohibition of Article 3’ and will qualify as inhuman and degrading treatment under this provision.⁴⁰⁷

175. However, in a case where the applicant had not submitted any medical assessments evidencing any injuries suffered from the use of tear gas or of any other ill-treatment under Article 3, the ECtHR found that the use of tear gas by the law enforcement officers to disperse an unlawful but peaceful assembly, albeit a violation of Article 11 ECHR, did not constitute a violation of the substantive aspect of Article 3.⁴⁰⁸

176. The situation, according to the ECtHR, is also different when tear gas is used in the form of grenades, which when launched against the demonstrators can cause serious injury or even

⁴⁰¹ *ibid* [108].

⁴⁰² *ibid* [108].

⁴⁰³ *Abdullah Yasa* (n 357) [41].

⁴⁰⁴ *Ataman* (n 280) [17]–[18], [25].

⁴⁰⁵ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45, art II(9)(d). See *Abdullah Yasa* (n 357) [40].

⁴⁰⁶ *Ali Günes v Turkey* App no 9829/07 (ECtHR, 10 April 2012) [41].

⁴⁰⁷ *Izci* (n 377) [62]; *ibid* [43].

⁴⁰⁸ *Ataman* (n 280) [25]–[27].

death, when the launcher is used improperly.⁴⁰⁹ For the use of tear-gas grenades, the ECtHR has consequently found that the limitations applicable on the use of lethal weapons apply *mutatis mutandis* and that ‘unregulated and arbitrary action by State agents’ in the context of Article 3 (as in the context of Article 2) is ‘incompatible with the effective respect for human rights’.⁴¹⁰ Hence, police operations, including the use of tear-gas grenades, in order to not violate Article 3, should both be authorised and sufficiently delimited by domestic law ‘under a system of effective and adequate safeguards against arbitrary action, abuse of force, and avoidable actions’.⁴¹¹

177. With regard to the use of tear-gas grenades launched by means of a shoulder-borne device by law enforcement officers attempting to disperse an unlawful and non-peaceful assembly, the question whether the victim was actively or not participating in the demonstration in question should not have been relevant to the domestic prosecutor’s inquiry into the events and into how the grenades were launched by the officers.⁴¹² This conclusion was also supported by the fact that the tear-gas grenades were launched in *Abdullah Yasa v Turkey*, ‘in a boulevard with many passers-by..., who thus risked becoming the potential targets of such a launch’.⁴¹³ In that case, the ECtHR found that:

...firing a tear gas grenade along a direct, flat trajectory by means of a launcher [as opposed to a high-angle shot] 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 prevents people from being injured or killed in the event of an impact.⁴¹⁴

178. In that case, the ECtHR found a violation of the substantive aspect of Article 3 given that the use of force by the police officers against the victim could not be considered the appropriate response to the circumstances or proportionate to the objective pursued, namely, to disperse a non-peaceful demonstration. Particularly, the victim’s conduct had not made strictly necessary such use of force by the police to cause injuries of that severity.⁴¹⁵

⁴⁰⁹ *Abdullah Yasa* (n 357) [42].

⁴¹⁰ *ibid* [43].

⁴¹¹ *ibid* [43].

⁴¹² *ibid* [47].

⁴¹³ *ibid* [47].

⁴¹⁴ *ibid* [48].

⁴¹⁵ *ibid* [50].

179. According to the ECtHR, Article 3 does not allow for ‘a balancing exercise to be performed between the physical integrity of an individual and the aim of maintaining public order’.⁴¹⁶ Despite the fact that in certain circumstances use of force may be necessary and proportionate against ‘riotous protesters for the purpose of restoring order’, when dealing with allegations under Article 3, the ECtHR examines the individual conduct of the victim to assess whether the use of force against her had been made strictly necessary by her conduct or whether it was excessive.⁴¹⁷ In such an assessment the ECtHR seeks to establish whether the applicant had displayed violent behaviour against the police and whether she had put up resistance or whether contrary to that, for example, she was seeking to leave the scene of the assembly to avoid danger.⁴¹⁸

180. Violent conduct by police officers which consists in ‘hitting the demonstrators who [are] trying to run away from the scene, ha[ve] fallen to the ground and [are] hiding from the police officers, as well as these officers indiscriminately spraying the demonstrators with tear gas to the extent that not only the demonstrators but also unconnected persons in the vicinity were affected’ is not considered proportionate use of force in the context of Article 3 and in dealing with demonstrators that do not pose a danger to public order or put up resistance to the police officers.⁴¹⁹ Hence, it constitutes a violation of the substantive aspect of Article 3.

181. Additionally, in a case where the applicant, a journalist, had suffered serious injuries in the context of an unauthorised assembly by law enforcement officers (as established by the evidence before the ECtHR), having posed no threat to them and having used no violence against them, the use of force by the police was considered excessive, unnecessary and unacceptable.⁴²⁰ In that case, the injuries sustained were very serious and had caused extensive suffering to the victim, resulting in cranio-cerebral trauma and concussion that required long-term treatment. In view of the physical and mental suffering caused, the ECtHR found that the ill-treatment constituted inhuman and degrading treatment under Article 3.⁴²¹

182. With respect to effecting a lawful arrest —also in the context of an assembly protected under Article 11 ECHR— Article 3 does not prohibit the use of force by law-enforcement officials.

⁴¹⁶ *Izci* (n 377) [56].

⁴¹⁷ *Muradova* (n 357) [133].

⁴¹⁸ *ibid* [133].

⁴¹⁹ *Izci* (n 377) [60]–[61].

⁴²⁰ *Najafli* (n 313) [39].

⁴²¹ *ibid* [40].

However, ‘such force may be used only if it is indispensable and must not be excessive’.⁴²² In circumstances where there was no urgency in confronting and addressing the peaceful occupation of a marketplace by a number of entrepreneurs and employees, the ECtHR found that law enforcement authorities could have ‘planned their operation’ and that there was no evidence of how the victims had tried to resist their arrest or any alternative explanation on how their injuries had happened.⁴²³ Hence, it had not been established why recourse to force by the police, which resulted to significant injuries, had been strictly necessary by each applicant’s conduct, amounting thus to inhuman treatment under Article 3.⁴²⁴ Similarly, in cases where the police should have anticipated the unrest and were not called to act in a random and unprepared manner, the ECtHR has found that they should have taken the necessary steps ‘to avoid risks and to refrain from applying force in an indiscriminate and disorderly manner’.⁴²⁵

183. According to the ECtHR’s judgment in *Chernega*, when counter-protest action mainly consists in trying to remove the demonstrators out of a works area, this cannot qualify as ill-treatment.⁴²⁶ Contrary to that, use of force by law-enforcement officials to effect an arrest in the context of a peaceful assembly which consisted in the victims ‘being grabbed by a police officer’ or ‘having their hair pulled and being dragged along the ground’ would qualify as a degrading manner of arrest.⁴²⁷

184. Where law enforcement officers do not show the requisite restraint and tolerance towards a peaceful assembly, but rather try to disperse the demonstrators in a violent manner causing ‘mayhem’, resulting to disproportionate use of force by them with consequent injuries of the demonstrators, this could also lead to a finding of a violation of the substantive aspect of Article 3.⁴²⁸

185. Additionally, as highlighted by the ECtHR, the mere fact of the dispersal of a demonstration is not a justification in itself for the use of physical violence against the protesters, and without

⁴²² *Annenkov* (n 382) [79]; *Izvi* (n 377) [54].

⁴²³ *Annenkov* (n 382) [87]–[91].

⁴²⁴ *ibid* [87]–[91].

⁴²⁵ *Muradova* (n 357) [111].

⁴²⁶ *Chernega* (n 370) [154].

⁴²⁷ *Annenkov* (n 382) [99]–[100].

⁴²⁸ *Izvi* (n 377) [67].

adequate justification, the use of force against individuals may qualify as inhuman and degrading treatment.⁴²⁹

186. With regard to the most serious form of ill-treatment under Article 3, namely the infliction of torture, the case of *Cestaro v Italy* is instructive. While raiding a school lawfully occupied by anti-globalisation demonstrators during the G-8 Summit in Genoa, in 2001, the law-enforcement officers ‘systematically beat up all those present throughout the building’.⁴³⁰ Additionally, with respect to the individual applicant, the police had inflicted upon him injuries with severe physical consequences, kicking him repeatedly and striking him with tonfa-type truncheons. He had also suffered severe fear and anguish having been caught by surprise in a space where he had sought shelter for the night.⁴³¹ What was more, the applicant was already advanced in age and did not pose any danger or display any violence towards the police officers. Hence, the violence inflicted upon him was entirely gratuitous.⁴³² The ECtHR found that in these circumstances, the ill-treatment was intentional and premeditated and qualified as torture under Article 3.

187. Article 3 also establishes the positive obligation of State parties to train their law-enforcement officers in a manner so that no one suffers torture or inhuman or degrading treatment or punishment in their hands.⁴³³ This is particularly important in cases where law enforcement officials are called to police democratic freedoms, such as the exercise of the right of peaceful assembly under Article 11 ECHR.⁴³⁴ For example, in *Yasa v Turkey*, the ECtHR criticised Turkey for not having provided effective training and instructions to police officers for the use of tear-gas grenades launched as a means of dispersal of a non-peaceful assembly, finding a violation of the substantive aspect of Article 3.⁴³⁵ In *Izci*, the ECtHR reiterated that law enforcement officers ‘should not be left in a vacuum when performing their duties’ and a legal framework should define ‘the limited circumstances in which law enforcement officers may use force and firearms’ in line with international standards.⁴³⁶

⁴²⁹ *Süleyman Çelebi and Others v Turkey*, App nos 37273/10 and others (ECtHR, 24 May 2016) [77], [79].

⁴³⁰ *Cestaro* (n 357) [183].

⁴³¹ *ibid* [177]–[78].

⁴³² *ibid* [180]–[82].

⁴³³ *Bouyid* (n 356) [108].

⁴³⁴ *Murdoch and Roche* (n 386) 104 ff.

⁴³⁵ *Abdullah Yasa* (n 357) [49].

⁴³⁶ *Izci* (n 377) [63]–[66].

c. Burden of Proof

188. In *Musbeg Shaghatelyan v Armenia*, the ECtHR most recently reiterated in plain terms the well-established evidentiary rule that, '[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise' about how injuries and ill-treatment have occurred, and the burden of proof will lie with the State authorities to provide a 'satisfactory and convincing explanation' otherwise.⁴³⁷ Similar considerations apply when an individual is taken into custody in good health and is found injured upon release.⁴³⁸

189. This presumption does not apply, however, where the victim has not been detained by the police nor has she suffered her injuries while being under the control of the police.⁴³⁹ In *Hentschel and Stark v Germany*, where the applicants were kept in football stadium stands whose exits had been blocked by the police but they could still move freely within the stand, while the violence had happened according to them after they had left the stands, they were not considered by the ECtHR as being 'under the control of the police' for the purposes of the presumption.⁴⁴⁰

190. Medical certificates provided to establish that the victims have suffered ill-treatment and issued shortly after such ill-treatment has taken place, detailing injuries and traces of blows, are of substantial evidentiary weight.⁴⁴¹ In such cases, adverse inferences may be drawn by the ECtHR against the government, in the absence of satisfactory explanations.⁴⁴² However, where the medical certificates have been issued a substantial time after the alleged ill-treatment has taken place and where they are not based on an examination of the actual injuries but rather on the applicant's own account of the events and on pictures taken by them, they do not carry the same evidentiary weight in establishing the cause of the injuries.⁴⁴³

⁴³⁷ *Musbegh* (n 357) [142]; *Annenkov* (n 382) [83]; *Hentschel and Stark* (n 379) [70]; *Bouyid* (n 356) [83].

⁴³⁸ *Musbegh* (n 357) [142]; and early on in *Aksoy* (n 359) [61]. See also Mavronicola (n 368) 109.

⁴³⁹ *Muradova* (n 357) [106].

⁴⁴⁰ *Hentschel and Stark* (n 379) [72].

⁴⁴¹ *Bouyid* (n 356) [92]; *ibid* [74].

⁴⁴² *Bouyid* (n 356) [83].

⁴⁴³ *Hentschel and Stark* (n 379) [74].

DOMESTIC LAW OF THE UNITED KINGDOM

191. In the UK, the Human Rights Act 1998 gives legal effect to the rights guaranteed under the ECHR. Under Section 6 of the HRA, the police and the Home Office are public authorities required to comply with the State's obligations under the ECHR. The HRA also requires that domestic courts and tribunals take into account ECHR jurisprudence when deciding questions arising in connection with the ECHR rights.⁴⁴⁴ This does not mean that UK courts are bound by the judgments of the ECtHR. But there is a presumption that "clear and constant Strasbourg jurisprudence" should only be departed from in special circumstances with good reason'.⁴⁴⁵ It also requires that, 'so far as it is possible', domestic legislation, both primary and secondary, are read and given effect in a way which is compatible with ECHR rights.⁴⁴⁶

QUESTION 1: WHAT ARE THE LIMITS OF POLICE POWERS IN THE CONTEXT OF PEACEFUL PROTEST?

192. Article 11 of the ECHR, replicated in the HRA, protects the right to freedom of peaceful assembly. Article 11(2) provides that any restrictions on the right must be: (i) prescribed by law; and (ii) be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

193. This section considers how police powers interact with the right to peaceful assembly under the domestic law of the UK, particularly in England and Wales, with a focus on: (i) the power to regulate protests; (ii) the power of investigation; (iii) the power of stop and search; (iv) the power of arrest (under statutory law and the breach of the peace doctrine); and (v) the power to use force. It also considers what positive obligations States have in relation to the right to peaceful assembly, and how the right against discrimination interacts with the right to peaceful assembly.

⁴⁴⁴ Human Rights Act 1998 s 2 (HRA).

⁴⁴⁵ David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing 2010) 41; *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

⁴⁴⁶ HRA (n 444) s 3.

I. Power to Regulate Protests

a. Introduction

194. Under the common law, the police had limited powers to interfere with peaceful protests.⁴⁴⁷

However, with the introduction of legislation, particularly the Public Order Act 1986 (the POA), the police now have significant powers to regulate protests, either by imposing conditions or by prohibiting protests.

195. The POA distinguishes between two different types of peaceful protests: ‘public assemblies’ (or static protests) and ‘public processions’ (or marches and other non-static forms of protest). A public assembly is defined as an assembly of two or more persons in a public space which is wholly or partly open to the air.⁴⁴⁸ A public procession is defined as a procession in a public space.⁴⁴⁹ It is important to highlight that these regulations apply only to protests that take place on public land. Protests that take place on private land are addressed separately below.

196. To enable the regulation of public processions, an organiser must provide written notice to the police of the date, time, route and organisers of the procession at least six days prior to the protest.⁴⁵⁰ However, there is no requirement for organisers of public assemblies to notify the police. Whilst it is an offence for an organiser of a public procession to fail to notify the police,⁴⁵¹ the procession does not become unlawful due to failure to provide notice.⁴⁵²

197. The College of Policing, which provides operational guidance for police forces across the UK, advises that in policing protests, peaceful intentions of the organisers and participants ‘should be presumed unless there is compelling evidence’ that those involved in a particular event will themselves use, advocate or incite violence.⁴⁵³ It further states that ‘peaceful’ includes conduct that annoys or offends persons opposed to the cause of the protest.⁴⁵⁴

⁴⁴⁷ R (*Jones*) v *Commission of the Metropolis of Police* [2019] EWHC 2957 (Admin) [40].

⁴⁴⁸ Public Order Act 1986 s 16 (POA).

⁴⁴⁹ *ibid.*

⁴⁵⁰ *ibid* s 11(3).

⁴⁵¹ *ibid* s 11(7).

⁴⁵² College of Policing, ‘Public Order: Core Principles and Legislation’ <<https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/#starting-point-for-policing-public-protest-the-presumption-in-favour-of-peaceful-assembly>> accessed 19 August 2020.

⁴⁵³ *ibid.*

⁴⁵⁴ *ibid.*

198. The College of Policing also highlights that any restriction on peaceful protests (such as the imposition of a condition or prohibition) must (i) be prescribed by law; (ii) pursue a legitimate aim (as specified in Article 11(2) of the ECHR); (iii) be necessary and (iv) be proportionate.⁴⁵⁵ It emphasises that a restriction will not be permissible merely because ‘the majority are in favour of it’; rather, ‘a balance which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position must be achieved.’⁴⁵⁶

199. Although not dealt with in detail in this note, it should be noted that further regulations apply to peaceful protests that occur in Parliament Square in London under the Police Reform and Social Responsibility Act 2011, including the prohibition of the operation of noise amplification equipment and tents or other structure designed for sleeping overnight.⁴⁵⁷ In *R (Gallastegui) v Westminster City Council*, the Court of Appeal rejected an application by a protester that these provisions violated right to assembly, amongst other rights, under the ECHR.⁴⁵⁸

b. Conditions

200. The police have broader powers to impose conditions on public processions than on public assemblies. Conditions may either be imposed on the organisers in advance of the protest or on persons taking part at the protest.⁴⁵⁹

201. The police may place any condition ‘necessary to prevent disorder, damage, disruption or intimidation’⁴⁶⁰ on a public procession. In order to impose a condition, the police must have a reasonable belief that the public procession may result in ‘serious public disorder, serious damage to property or serious disruption to the life of the community’ or that its purpose is the ‘intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act that they do not have a right to do’.⁴⁶¹ Police may only place certain conditions on public assemblies, namely, conditions relating to the ‘place of assembly, maximum duration, maximum number of people as necessary to prevent disorder, damage,

⁴⁵⁵ *ibid.*

⁴⁵⁶ *ibid.*

⁴⁵⁷ Police Reform and Social Responsibility Act s 143.

⁴⁵⁸ *R v Gallastegui v Westminster City Council* [2013] Civ 28.

⁴⁵⁹ POA (n 448) s 12(2); s 14(2).

⁴⁶⁰ *ibid* s 12(1).

⁴⁶¹ *ibid.*

disruption or intimidation.⁴⁶² To impose such conditions, the police must have the same reasonable belief as stated above.⁴⁶³

202. UK courts have held that the power of the police to impose conditions on public processions and assemblies that are underway can be used to bring those protests to an end.⁴⁶⁴

203. Recently, the Divisional Court has held that ‘public assembly’ means an assembly occurring at a particular location and does not include assemblies occurring in other locations, even if they are related to the same cause.⁴⁶⁵ Accordingly, the Divisional Court held that the police’s conditions bringing an end to the ‘Extinction Rebellion Autumn Uprising’ protests across all of London were unlawful.⁴⁶⁶

204. Courts in the UK have also held that where the police impose conditions on protests that are underway, they do not need to provide reasons.⁴⁶⁷ However, when police impose conditions on planned protests, they must provide reasons, including the identification of which statutory ground they are relying upon that are sufficient for a court to determine whether their belief is reasonable.⁴⁶⁸

205. It is an offence to fail to comply with a condition imposed by the police, which may result in a fine or imprisonment.⁴⁶⁹ However, it is a statutory defence if the failure to comply was due to circumstances beyond the protester’s control.⁴⁷⁰

c. Prohibition

206. Police have the power to prohibit public processions, but do not have the power to prohibit public assemblies.⁴⁷¹ Police may apply to the relevant local authority for an order prohibiting all or a specified class of public processions if they reasonably believe that the impositions of

⁴⁶² *ibid* s 14(1).

⁴⁶³ *ibid*.

⁴⁶⁴ R (*Jones*) (n 447) [55]-[56]. See also *Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480 [91]; R (*Moos*) v *Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin) [63].

⁴⁶⁵ R (*Jones*) (n 447) [65]-[72].

⁴⁶⁶ *ibid*.

⁴⁶⁷ R (*Brehony*) v *Chief Constable of Greater Manchester* [2005] WL 607518 [17].

⁴⁶⁸ *ibid* [17]-[18].

⁴⁶⁹ POA (n 448) s 12(8),(9); s 14(8), (9).

⁴⁷⁰ *ibid* s 12(4).

⁴⁷¹ College of Policing, ‘Public Order: Core Principles and Legislation’ (n 452).

conditions are not sufficient to prevent ‘serious public disorder’.⁴⁷² Any order may not exceed the period of three months⁴⁷³ and must also be approved by the Secretary of State.⁴⁷⁴ The Commissioner of the Metropolis Police may, with the consent of the Secretary of State, himself/herself make an order prohibiting public processions in the City of London if satisfied to the same standard.⁴⁷⁵

207. It is an offence both to organise and to take part in a public procession if an order banning such protests is in effect, which may result in a fine or imprisonment.⁴⁷⁶

208. The College of Policing emphasises that the prohibition of public processions is only justified in ‘extreme circumstances’ and that the fact that a procession may annoy or offend others is not a sufficient justification.⁴⁷⁷ Between 2005 and 2012, twelve prohibitions orders have been made; ten of those associated with public processions organised by far-right political groups and two associated with anti-capitalist/anti-globalist groups.⁴⁷⁸ No prohibition order has been sought by the police since 2011.⁴⁷⁹

d. Protests on Private Land

209. Protests on private land are not subject to the same regulation as protests occurring in public spaces. In general, if a protest occurs on private land without the permission of the occupier, those involved in the protest are trespassing. In *Appleby v UK*, the ECtHR held that Articles 10 and 11 do not provide freedom of forum, in other words, that those rights do not guarantee entry to private property or even to all public property.⁴⁸⁰ This was confirmed by the High Court of Justice (EWHC) in *Laporte and Christian v Commissioner of Police of the Metropolis* in relation to a protest inside a council chambers.⁴⁸¹

⁴⁷² POA (n 448) s 13(1).

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid* s 13(2).

⁴⁷⁵ *ibid* s 13(4).

⁴⁷⁶ *ibid* s 13(7), (8), (11), (12).

⁴⁷⁷ College of Policing, ‘Public Order: Core Principles and Legislation’ (n 452).

⁴⁷⁸ House of Commons, ‘Briefing Paper on Police Powers: Policing Protests’ (17 June 2020) 6.

⁴⁷⁹ *ibid.*

⁴⁸⁰ *Appleby v UK* (2003) 37 EHRR 783 [47], [52].

⁴⁸¹ *Laporte and Christian v Commissioner of Police of the Metropolis* [2014] EWHC 3574 [127].

210. An amendment to the POA gave the police the power to prohibit ‘trespassory assemblies’, that is, assemblies of 20 or more persons without the permission of the occupier.⁴⁸² The police may apply to the local authority for an order prohibiting such an assembly if they have reasonable belief that it will ‘result in serious disruption to the life of the community’ or ‘significant damage’ to ‘land, building or monument’ of ‘historical, architectural or scientific importance’.⁴⁸³ The local authority may make the order for a specified period with the consent of the Secretary of State. The Commissioner of the Metropolis Police may, with the consent of the Secretary of State, him/herself make an order prohibiting trespassory assemblies in the City of London if satisfied to the same standard.⁴⁸⁴

II. Powers of Investigation against Protesters

211. Although more relevant to the right to privacy (Article 8 of the ECHR), it should be noted that the powers of police to conduct investigations extend to peaceful protesters. The police have powers under common law and statute, in particular the Regulation of Investigatory Powers Act 2000 (RIPA), to undertake investigations for the prevention and detection of crime and maintenance of public order.⁴⁸⁵ These powers include the power to acquire communications data;⁴⁸⁶ to acquire electronic data;⁴⁸⁷ and to conduct surveillance, including the use of covert police operations.⁴⁸⁸ It also includes the powers to store and retain any data collected.

212. There have been several cases in which UK courts have held that the police’s use of their investigatory powers against protesters were disproportionate and therefore involved a breach of the right to privacy. In *R (Wood) v the Commissioner of the Police of the Metropolis*, the Court of Appeal held that the retention of a photograph of the applicant who had attended a protest meeting against the arms trade was disproportionate after it was clear that no criminal offences had been committed.⁴⁸⁹ Similarly, in *Catt v the UK*, the ECtHR, reversing a decision of the Supreme Court, held that police had breached the applicant’s right to privacy by retaining certain data in the National Extremism and Disorder Database on an indefinite basis with

⁴⁸² POA (n 448) s 14A(1), (9).

⁴⁸³ *ibid* s 14A(1).

⁴⁸⁴ *ibid* s 14A(4).

⁴⁸⁵ *R (Catt) v Commissioner of the Metropolis of Police* [2015] UKSC 9, [7].

⁴⁸⁶ Regulation of Investigatory Powers Act 2000, Part I.

⁴⁸⁷ *ibid* Part III.

⁴⁸⁸ *ibid* Part II.

⁴⁸⁹ *R (Wood) v the Commissioner of the Police of the Metropolis* [2009] EWCA Civ 414.

insufficient safeguards on account of his involvement in peace protests.⁴⁹⁰ The ECtHR emphasised that higher standard of scrutiny applied to retention of information that disclosed the applicant's political opinion.

III. Powers of Stop and Search

213. The police's powers to stop and search are also used against peaceful protesters. The Police and Criminal Evidence Act 1984 (PACE) empowers the police to stop and search any person if they have reasonable grounds to believe that they will find prohibited or stolen items.⁴⁹¹ In *Howarth v Commissioner of the Police of the Metropolis*, the applicant was unsuccessful in challenging the lawfulness of the stop and search to which he was subjected whilst travelling to a protest against the oil industry: the Divisional Court found that 'intelligence and past experience' that persons at past protests against the oil industry had caused criminal damage through oil and molasses was sufficient for reasonable suspicion that the small group of protesters had prohibited items,⁴⁹² thereby suggesting a very low bar for reasonable suspicion in relation to the stop and search of protesters.

214. In addition, police have an explicit power to stop persons who they reasonably believe are on their way to attend a trespassory assembly.⁴⁹³ The Criminal Justice and Public Order Act further empowers the police to conduct 'suspicion-less' stop and searches, following the requisite authorisation based on a reasonable belief that incidents of 'serious violence' may occur.⁴⁹⁴ A similar power previously existed under the Terrorism Act 2000⁴⁹⁵ and in *Gillan v UK*,⁴⁹⁶ the ECtHR found this to be a violation of the right of peaceful assembly.

IV. Powers of Arrest

215. Apart from violent protesters, even peaceful protesters may be charged with criminal offences and are therefore subject to the police power of arrest. This section reviews statutory powers

⁴⁹⁰ *Catt v UK* (2019) 69 EHRR 7.

⁴⁹¹ Police and Criminal Evidence Act, s 1 (PACE).

⁴⁹² *Howarth v Commission of the Police of the Metropolis* [2011] EWHC 2818 (Admin) [33]-[34].

⁴⁹³ POA (n 448) s 14C.

⁴⁹⁴ Criminal Justice and Public Order Act 1994, s 60 (CJPOA).

⁴⁹⁵ Terrorism Act 2000, s 44.

⁴⁹⁶ *Gillan and Quinton* (n 293).

of arrest (related to statutory criminal offences), as well as the common law power of arrest under the breach of peace doctrine.

216. Set out below is a list of the criminal offences for which non-violent protesters may be charged, depending on their conduct:

- i. Offences under the POA for failure to comply with a condition or prohibition imposed by police related to a planned or ongoing protest;⁴⁹⁷
- ii. Offences under the POA related to disorderly conduct, particularly intentionally causing harassment, alarm or distress⁴⁹⁸ and causing harassment, alarm or distress.⁴⁹⁹ It is a defence to these offences that the conduct was reasonable.⁵⁰⁰
- iii. Offences under the Protection from Harassment Act 1997, in particular intentional harassment of two or more persons with intention to persuade them not to do something which they are entitled to do, or to do something which they are not obliged to do.⁵⁰¹ This offence was added to the Act in response to action by protesters against animal testing.⁵⁰²
- iv. The offence of wilful obstruction of a highway under the Highways Act 1980.⁵⁰³
- v. The offence of aggravated trespass under the Criminal Justice and Public Order Act 1994 which criminalises trespassing and doing anything which is intended to intimidate persons on the land from engaging in lawful activity or to obstruct or disrupt that lawful activity.⁵⁰⁴

217. Defences available to protesters charged with these offences are very limited. In *R (DPP) v Stratford Magistrates Court*, the Divisional Court held that the defence under s 3 of the Criminal Law Act 1967 of using reasonable force to prevent crime was not available to protesters charged with obstructing a highway. Persons protesting against the illegal arms trade had sought to prevent lorries travelling to a defence exhibition. The Court held that they could not rely on s 3 of the Criminal Law Act as there was insufficient nexus between an imminent crime (the lorries traveling to the defence exhibition did not contain illegal arms) and the use of force by the protesters.⁵⁰⁵ There was nothing to link the obstruction of the highway with an immediate or imminent crime.⁵⁰⁶

⁴⁹⁷ POA (n 448) s 12 (8), (9); s 14(8), (9).

⁴⁹⁸ *ibid* s 4A.

⁴⁹⁹ *ibid* s 5.

⁵⁰⁰ *ibid* s 4A(3); s 5(3).

⁵⁰¹ Protection from Harassment Act 1997, s 1A.

⁵⁰² HM Govt, 'Explanatory notes: Serious Organised Crime and Police Act 2005' [45], [302]-[304].

⁵⁰³ Highways Act 1980, s 137.

⁵⁰⁴ CJPOA (n 494) s 68.

⁵⁰⁵ *R (DPP) v Stratford Magistrates Court* [2017] EWHC 1794 (Admin) [25].

⁵⁰⁶ *ibid* [43].

218. The common law doctrine of breach of the peace is commonly relied upon by the UK police for intervening in public order situations and justifying arrest. It empowers the police to arrest (or to take any action short of arrest against) a person where there is actual harm or a reasonable apprehension of harm to a person or property, or a person ‘is in fear of being so harmed through an assault, an affray, riot, unlawful assembly or other disturbance’.⁵⁰⁷ However, although there is some certainty about what constitutes a breach of the peace, the same cannot be said of the police power to prevent a breach of the peace.⁵⁰⁸
219. Breach of the peace is not a criminal offence in England and Wales.⁵⁰⁹ However, it enables the police to take immediate preventive action by way of arrest and detention, and then determine at a later stage if the detained person needs to be charged with a recognised criminal offence involving violence or the threat of violence.⁵¹⁰ This gives the police a great deal of discretion and therefore, has grave implications for the right to peaceful assembly.
220. Further, although UK courts stress that the police can take preventive action only if a breach of the peace is ‘imminent’,⁵¹¹ the term ‘imminence’ has come to be interpreted very broadly in recent years.⁵¹² For example, the High Court held in *Laporte v Commissioner of the Police of the Metropolis* that the conduct of protesters in forcing their way into the Council Chambers indicated imminent harm, even if ‘no intentional blows had been struck’. The situation therefore amounted to a breach of the peace, permitting the use of force and arrest of the protesters.⁵¹³ Similarly, in *Hicks v Commissioner of the Police*, the Divisional Court rejected the plaintiffs’ arguments that their arrests on the day of the Royal Wedding to prevent a breach of the peace violated their right to peaceful assembly. The plaintiffs were anti-royalist protesters and the court held that their arrests were lawful on the basis of ‘the likelihood that protest may lead to violence against the protesters themselves’.⁵¹⁴ The plaintiffs appealed on a point of law relating to their right to liberty under Article 5 of the ECHR, but their appeal was dismissed by the Supreme Court.⁵¹⁵

⁵⁰⁷ *R(Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105, [27].

⁵⁰⁸ Richard Glover, ‘Keeping the Peace and Preventive Justice – A New Test for Breach of the Peace?’ (2018) 3 Public Law 444-460.

⁵⁰⁹ *Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337.

⁵¹⁰ Glover (n 508).

⁵¹¹ *R(Laporte)* (n 507) [30]-[31], [45], [48]-[49].

⁵¹² For an overview of various interpretations of the term, see Glover (n 508).

⁵¹³ *Laporte* (n 481) [85]-[86].

⁵¹⁴ *Hicks v Commissioner of the Police* [2012] EWHC 1947, [123].

⁵¹⁵ *R (Hicks) v Commissioner of the Metropolis of Police* [2017] UKSC 9.

V. Use of Force

221. Police may use force against peaceful protesters in the exercise of their duties, most commonly to prevent a breach of peace. Common tactics in the policing of protest which involve force include the use of batons, shields, and containment.
222. Under both common law and statute,⁵¹⁶ the police's power to use force is limited to force that is reasonable in the exercise of their duties. In line with the ECHR, the College of Policing states that 'reasonable force' means force: (i) that was 'absolutely necessary for a purpose permitted by law' and (ii) 'the amount of force used must also be reasonable and proportionate.'⁵¹⁷ The College of Policing further states that the 'core questions' for whether force should be used in policing protests are as follows: (i) whether the use of force has a lawful objective; (ii) whether the threat requiring the use of force is imminent; (iii) whether there are means short of the use of force that would similarly obtain the lawful objective; (iv) whether the force proposed is the minimum level of force required to obtain the lawful objective and is proportionate and not excessive.⁵¹⁸
223. Whether the use of force is reasonable in the exercise of police duties will depend on the facts of the case. However, where used to prevent a breach of the peace, force will be reasonable only if the breach of the peace was imminent. In *Laporte v Chief Constable of Gloucestershire*, the House of Lords held that the turning around of a bus of protesters traveling to an anti-Iraq war demonstration was unlawful as there was no 'imminent' breach of the peace.⁵¹⁹
224. The use of containment as a crowd control tactic during protests has been held to be reasonable use of force in several cases since it was necessary to prevent imminent breaches of the peace. In *Austin v UK*, the ECtHR held that containment must not be used to discourage protest and that if containment was not necessary to prevent serious injury and damage to property, there would have been a violation of the right to liberty.⁵²⁰

⁵¹⁶ Criminal Law Act 1967, s 3(1); PACE (n 491) s 117.

⁵¹⁷ College of Policing, 'Public Order: police use of force' <<https://www.app.college.police.uk/app-content/public-order/core-principles-and-legislation/police-use-of-force/>> accessed 19 August 2020.

⁵¹⁸ *ibid.*

⁵¹⁹ *R (Laporte)* (n 507) [30], [33], [50].

⁵²⁰ *Austin v UK* (2012) 55 EHRR 14, [68].

225. The College of Policing states that police action in response to a breach or likely breach of the peace must be directed to the persons responsible and that action cannot be taken against protesters if their conduct might provoke violence by others, provided that the protesters' conduct is reasonable.⁵²¹ It emphasises that restrictions on the rights of innocent third parties must only be exercised in extreme circumstances.⁵²²

VI. Positive Obligations

226. As discussed in relation to the ICCPR and the ECHR, the right to freedom of assembly also gives rise to positive obligations on the police to facilitate peaceful protests. The College of Policing states that 'the police have a duty to take reasonable steps to protect those who want to exercise their rights peacefully. This applies where there is a threat of disruption or disorder from others.'⁵²³

VII. Discrimination

227. Article 14 of the ECHR, replicated in the HRA, prohibits unjustified discrimination in the way that Convention rights are enjoyed. Under Section 149 of the Equality Act 2010, police forces must, in carrying out their functions, have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and any other conduct which is prohibited by that Act. The Equality Act also makes it unlawful for police officers to discriminate against, harass or victimise any person on the grounds of the 'protected characteristics' of age, disability, race, religion, sex and sexual orientation, etc., when using their powers.⁵²⁴

228. Both the College of Policing⁵²⁵ and the Independent Police Complaints Commission⁵²⁶ recognise that a police officer must take into account the special needs of the protected characteristic groupings.

⁵²¹ College of Policing, 'Public Order: Core Principles and Legislation' (n 452).

⁵²² *ibid.*

⁵²³ *ibid.*

⁵²⁴ Equality Act 2010, s 149.

⁵²⁵ College of Policing, *Code of Ethics: A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales* (College of Policing 2014) 7.

⁵²⁶ Independent Police Complaints Commission, 'IPCC Guidelines for Handling Allegations of Discrimination' (2015) III <https://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/guidelines_for_handling_allegations_of_discrimination.pdf> accessed 19 August 2020.

QUESTION 2: WHAT TYPE AND CUMULATIVE EFFECT OF POLICING, CRIMINALISATION, SURVEILLANCE AND USE OF FORCE, CONSTITUTES THE ‘CHILLING EFFECT’?

229. ‘Chilling effect’ is not a clear legal concept recognised by domestic courts in the UK in determining the substance of the right to freedom of expression or the basis upon which it might be limited. However, it is understood as any action which deters individuals from doing or expressing that which they lawfully could.

230. In a successful appeal against injunctions ordered to stop anti-fracking protestors, the England and Wales Court of Appeal stated that there may be a chilling effect if an injunction were granted to prevent a person from ‘unreasonably obstructing’ the highway, because this was a matter of fact and degree, and not susceptible of advance definition.⁵²⁷ Similarly, the Court held that it would be wrong to incorporate the concepts of ‘without lawful authority or excuse’ into an injunction because, ‘if he is not clear about what he can and cannot do, that may well have a chilling effect also.’⁵²⁸

231. Article 10 of the HRA replicates Article 10 of the ECHR, and therefore, is understood similarly. Briefly, any limitation of the right must be in accordance with law, proportionate and necessary. This section considers the chilling effect of policing, criminalisation, surveillance and use of force on the said right.

A. WHAT IS THE EFFECT OF POLICING ON THE RIGHT TO FREEDOM OF EXPRESSION?

232. The ‘chilling effect’ that police actions could have on the freedom of expression was addressed in *R (Miller) v The College of Policing* by the High Court of Justice. In this case, the police had turned up at the claimant’s place of work because of his political opinion and warned him that he would be at risk of criminal prosecution if he continued to tweet about transgender issues.⁵²⁹ For the Court, ‘the police’s actions, taken as a whole, had a chilling effect on [the claimant’s] right to freedom of expression. That is an interference for the purposes of Article 10(1).’⁵³⁰

⁵²⁷ *Boyd v Ineos Upstream Ltd* [2019] EWCA Civ 515, [40] (Longmore LJ, David Richards and Leggatt LJJ agreeing).

⁵²⁸ *ibid.*

⁵²⁹ [2020] EWHC 225 (Admin) [256], [259].

⁵³⁰ *ibid* [261].

B. WHAT IS THE EFFECT OF CRIMINALISATION ON THE RIGHT TO FREEDOM OF EXPRESSION?

233. Although there is no decision in the specific context of peaceful protests, it is evident from the decision in *R (Miller)* referred to above that UK courts acknowledge that undue threats of criminal prosecution could have a chilling effect on the right to freedom of expression. Similarly, in *Reynolds v Times Newspapers*, Lord Nicholls noted the ‘chilling effect’ of defamation laws and held that ‘people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed’.⁵³¹ Further, in a case brought against the United Kingdom, the ECtHR noted that ‘the threat of criminal sanctions or punitive fines would create a chilling effect [on freedom of expression] which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.’⁵³²

C. WHAT IS THE EFFECT OF SURVEILLANCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

234. The London Policing Ethics Panel’s *Final Report on Live Facial Recognition* does not explicitly define ‘chilling effect’ but appears to consider it a perceived threat that is sufficient to deter deterrence.⁵³³ It notes, on the one hand, that ‘surveillance has the potential to produce a chilling effect on democratic debate and protest, and more generally dissuade people from engaging in legitimate activities in public space,’ and on the other that ‘surveillance can make public spaces safer, including for vulnerable groups’ (a ‘warming effect’).⁵³⁴

235. The effect of surveillance and use of personal data in operational policing is largely considered in relation to the right to private life (Article 8 of the ECHR). The recent decision of the England and Wales Court of Appeal in *R (on the application of Edward Bridges) (Appellant) v The Chief Constable of South Wales Police (Respondent) & others* has emphasised that any interference with Article 8 of the ECHR must be in accordance with the law, meaning that the police are

⁵³¹ [2001] 2 AC 127.

⁵³² *Mosley v United Kingdom* App no 48009/08 (ECtHR, 15 September 2011) [129].

⁵³³ London Policing Ethics Panel, ‘Final Report on Live Facial Recognition’ (2019) <http://www.policingethicspanel.london/uploads/4/4/0/7/44076193/live_facial_recognition_final_report_may_2019.pdf> accessed 19 August 2020.

⁵³⁴ *ibid.*

afforded only a limited discretion in use of surveillance.⁵³⁵ The Court of Appeal considered that the proportionality of any such interference with Article 8 rights is to be determined, in the usual way, through the conduct of a weighing exercise of the actual and anticipated benefits of the policing measure and the impact on individual rights. South Wales Police's overt deployment of 'AFR Locate' at various public events on c. 50 occasions over a two-year period (May 2017 to April 2019), potentially capturing (and, since he was not on a 'watch-list', likely immediately deleting) Mr Bridges' image, was held to be proportionate since the potential benefits were great and the impact on Mr Bridges was minor. A case in which a more substantial impact can be shown might lead to a different determination, though this would depend on the actual and anticipated benefit/s derived from the specific policing measure. The case also illuminated the possibility of successful challenges under the Data Protection Act 2018 and the Public Sector Equality Duty (section 149 of the Equality Act 2010). Any act of data processing must be fair, accurate, transparent and have a legal basis, while also respecting persons' right to private life. As above, an interference with said right must thus be in accordance with the law and be proportionate. In the context of policing, this interference must be 'proportionate to the objective of maintaining public order and preventing or detecting crime'.⁵³⁶

236. Collecting, retaining and using an individual's personal data in a database not formally known to have existed prior to judicial review was deemed a proportionate interference with the right to privacy in *R (Catt) v Association of Chief Police Officers*.⁵³⁷ The claimant had attended peace movement demonstrations regularly since 1948, and started attending demonstrations which involved serious disorder and criminality against the organisations Smash EDO in 2005.⁵³⁸ The police arrested the claimant twice, but he was never convicted. After invoking his rights under the Data Protection Act 1998, the claimant's entries in the database were disclosed, which included information about his presence at protests, in addition to one photograph which had been destroyed. Lord Sumption found that the data processing acts were lawful as the interference to private life was minor. Of importance was the fact that the information retained was personal, not sensitive or intimate, whereby the facts had been in the public domain, that the data was used for police purposes only, and there was no stigma attached to the inclusion of the claimant's information in the database in question. Lord Sumption also

⁵³⁵ [2020] EWCA Civ 1058.

⁵³⁶ *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [17].

⁵³⁷ *ibid.*

⁵³⁸ *ibid* [19]-[23].

noted that data had not been obtained by an intrusive technique such as DNA sampling or bugging.⁵³⁹ Notably, when *Catt* reached the ECtHR, the Court held that the claimant's right to private life had been violated as the interference was disproportionate.⁵⁴⁰

D. WHAT IS THE EFFECT OF USE OF FORCE ON THE RIGHT TO FREEDOM OF EXPRESSION?

237. There is no jurisprudence specifically addressing the chilling effect of use of force by police officers during demonstrations on the freedom of expression.

QUESTION 3: WHAT CONSTITUTES CRUEL, INHUMAN OR DEGRADING TREATMENT IN THE CONTEXT OF POLICING PEACEFUL PROTESTS?

238. Article 3 of the ECHR, which embodies the right against torture and CIDT, seeks to limit the use of force by the police. The interpretation of this provision by UK courts closely aligns with its interpretation by the ECtHR. For instance, in *ZH v The Commissioner of Police for the Metropolis*, the England and Wales High Court held that excessive use of force by the police amounts to a violation of Article 3 of the ECHR.⁵⁴¹ In this case, a 16-year old autistic boy was handcuffed and restrained by the police for a long duration. Although there was no intended humiliation, this treatment was found to amount to inhuman or degrading treatment.⁵⁴² The Court further recognised that in determining whether a certain 'treatment' meets the 'minimum level of severity' to constitute inhuman or degrading treatment under Article 3, all circumstances, including the duration of the treatment, injury sustained, and age, health and vulnerability of the victim must be taken into account.⁵⁴³

239. Apart from the HRA, there are various domestic statutes and common law principles governing the use of force by law enforcement officers in the UK.⁵⁴⁴ Generally, 'firearms, less

⁵³⁹ *ibid* [26].

⁵⁴⁰ (2019) 69 EHRR 7, [128].

⁵⁴¹ [2012] EWHC 604 (QB).

⁵⁴² *ibid* [144].

⁵⁴³ *ibid* [144].

⁵⁴⁴ The legal framework and principles outlined herein are drawn to a large extent from the UK section of The Law on Police Use of Force Worldwide Database, 'Analysis of Domestic Rules on Use of Force by Law Enforcement: United Kingdom' (*Institute for International and Comparative Law in Africa/Centre for Human Rights, University of Pretoria*) <<https://www.policinglaw.info/country/united-kingdom>> accessed 19 August 2020.

lethal weapons and arrest and restraint procedures must not be used by police officers with the sole intention of inflicting severe pain or suffering on another in the performance or purported performance of official duties'.⁵⁴⁵ Any such action violates human rights provisions and is contrary to section 134 of the Criminal Justice Act 1988 and section 3 of the Criminal Law Act 1967.⁵⁴⁶

240. According to the Criminal Law Act 1967: 'A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offender or of persons unlawfully at large.'⁵⁴⁷ The same principle is part of common law with respect to self-defence of police officers and others.⁵⁴⁸

241. In determining what may be considered as 'reasonable' use of force, the Criminal Justice and Immigration Act 2008 provides as below (restating the relevant common law principles):

The question whether the degree of force used by D [the person charged with the offence] was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be...

If it is determined that D did genuinely hold it, D is entitled to rely on it...whether or not—

- i. It was mistaken, or
- ii. (If it was mistaken) the mistake was a reasonable one to have made.⁵⁴⁹

242. Thus, there is both a subjective and an objective element to this defence: whether the use of force was reasonable in the circumstances is assessed on the basis of the circumstances as the person using force genuinely believed them to be. But whether the force used in the circumstances was indeed reasonable, will be assessed objectively by the courts.⁵⁵⁰ A person, including a police officer, that has used disproportionate force in the circumstances does not enjoy the benefit of the defence.⁵⁵¹

⁵⁴⁵ College of Policing, 'Armed Policing: Legal Framework' <<https://www.app.college.police.uk/app-content/armed-policing/legal-framework/#article-3-prohibition-of-torture>> accessed 19 August 2020, citing *Ribitsch v Austria* App no 18896/91 (ECtHR, 4 September 1995).

⁵⁴⁶ College of Policing, 'Armed Policing: Legal Framework' (n 545).

⁵⁴⁷ Criminal Law Act 1967, s 3 (1); see, also, Criminal Law Act (Northern Ireland) 1967, s 3 (1).

⁵⁴⁸ College of Policing, 'Armed Policing: Legal Framework' (n 545).

⁵⁴⁹ Criminal Justice and Immigration Act 2008, s 76 (3) and (4).

⁵⁵⁰ College of Policing, 'Armed Policing: Legal Framework' (n 545).

⁵⁵¹ *ibid.*

243. In Scotland, there are particular rules for the common law defence of self-defence or defence of another to be applied, and those were enunciated in the case of *HM Advocate v Doherty*:⁵⁵²

- i. There must be imminent danger to the life or limb of the accused,
- ii. The force used in the face of this danger must be necessary for the safety of the accused – by this, it is meant that the force must be both necessary in the circumstances and should be proportional to the threat which is being combated, and,
- iii. If the person assaulted has means of escape or retreat, they are bound to use them.

244. The concept of ‘reasonable belief’ in Scottish law is outlined in guidance to the officers, circulated by the Crown Agent:

A police officer is not entitled to discharge a firearm against a person unless the officer has reasonable grounds for believing that the person is committing, or about to commit, an action likely to endanger the life or cause serious injury to the officer or any other person, and there is no other way to prevent the danger.⁵⁵³

245. Under the common law, misconduct in public office is an offence. The elements of this common law offence comprise:

- i. A public officer acting as such; and
- ii. wilfully neglects to perform his duty and/or wilfully misconducts themselves; and
- iii. to such a degree as to amount to an abuse of the public’s trust in the office holder; and
- iv. without reasonable excuse or justification.⁵⁵⁴

246. In 2011, the Independent Police Complaints Commission found that when during a protest a wheelchair user had been forcibly removed from his wheelchair and dragged along the road by a police officer, he had been subjected to excessive force. It observed that the internal investigation carried out by the Metropolitan police after the victim’s complaint had wrongly concluded that there was no wrong-doing in the conduct of the officer.⁵⁵⁵ Additionally, in the same report the IPCC found that another unidentified police officer had hit the victim with a police baton, unlawfully subjecting him to unnecessary use of force.⁵⁵⁶

⁵⁵² 1954 JC 1, 4–5.

⁵⁵³ *ibid.*

⁵⁵⁴ *Attorney General’s Reference (No 3 of 2003)* [2005] QB 73. The case also held that police officers occupy a public office.

⁵⁵⁵ Shiv Malik, ‘Policeman used excessive force against disabled student, IPCC rules’ (*The Guardian*, 24 August 2011), <<https://www.theguardian.com/politics/2011/aug/24/ipcc-upholds-protester-complaint-police>> accessed 19 August 2020.

⁵⁵⁶ *ibid.*

247. The Police (Conduct) Regulations 2012 set out the Standards of Professional Behaviour for police officers in England and Wales.⁵⁵⁷ According to those Standards of Professional Behaviour, police officers have to act according to the following principles, among others:

Honesty and Integrity: Police officers are honest, act with integrity and do not compromise or abuse their position.

Authority, Respect and Courtesy: Police officer act with self-control and tolerance, treating members of the public and colleagues with respect and courtesy. Police officers do not abuse their powers or authority and respect the rights of all individuals.

Use of Force: Police officers only use force to the extent that it is necessary, proportionate and reasonable in all circumstances.⁵⁵⁸

248. In 2014, a Code of Ethics on the Principles and Standards of Professional Behaviour for the Policing Profession of England and Wales was adopted elaborating on the principles set out in the Standards of Professional Behaviour.⁵⁵⁹ With regard to the use of force by police officers, the Code outlined that police ‘must use only the minimum amount of force necessary to achieve the required result’ and that they will need to account for any use of force, in other words justify it based upon their honestly held belief at the time that they used force.⁵⁶⁰

249. With regard to the use of conducted energy devices (Taser) specifically, which according to the College of Policing is ‘a less lethal weapon system designed to temporarily incapacitate a subject through use of an electrical current which temporarily interferes with the body’s neuromuscular system and produces a sensation of pain’,⁵⁶¹ the College of Policing has issued policy guidelines, which do not, however, provide a ‘definitive list of circumstance’ where law enforcement officers may be deployed with such weapons.⁵⁶² According to the guidelines:

⁵⁵⁷ Police (Conduct) Regulations 2012, Schedule 2. In Northern Ireland, police officers have to act in accordance with PSNI Police Code of Ethics, article 4 of which deals with the use of force and the responsibility of those in command. In Scotland, police officers have to act in accordance with Police Service of Scotland (Conduct) Regulations.

⁵⁵⁸ Police (Conduct) Regulations 2012, Schedule 2.

⁵⁵⁹ *Code of Ethics* (n 525). The Code of Ethics was commended by the former United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, in his report on his follow-up mission to the UK in 2016. See 2017 Report of Special Rapporteur on Mission to UK (n 8) [64].

⁵⁶⁰ *Code of Ethics* (n 525) [4.3], [4.4].

⁵⁶¹ College of Policing, ‘Armed Policing: Conducted energy devices (Taser)’ <<https://www.app.college.police.uk/app-content/armed-policing/conducted-energy-devices-taser/>> accessed 19 August 2020.

⁵⁶² *ibid.*

the discharge of a CED [conducted energy device (Taser)] is intended to mitigate the threat by temporarily incapacitating the individual, not solely to inflict severe pain or unnecessary suffering on another in the performance or purported performance of official duties (see ECHR Article 3).⁵⁶³

250. As clarified, '[t]he initial discharge and any subsequent discharge must be proportionate, lawful, accountable and absolutely necessary' while '[i]ncidents where subjects are already contained or restrained may be subject to closer scrutiny or interest. Any medical risk may be increased the longer or more often the device is discharged'.⁵⁶⁴ In its 2009 Report, the Joint Committee on Human Rights discussed the use of tasers and recommended that 'guidance on the use of tasers, to which officers should be required to have regard, should make clear that the weapons should not be used against peaceful protestors'.⁵⁶⁵

251. According to a written statement made by the Minister for Policing and the Fire Service before the UK Parliament on 28 February 2019, 'any use of force by police officers must be lawful, proportionate and reasonable in the circumstances'.⁵⁶⁶ In that written statement, the Minister informed the Parliament that the Home Secretary had granted approval for 'chief officers of police forces in England and Wales to train selected student officers to carry CEDs [conducted energy devices] where they have identified an operational need to do so'.⁵⁶⁷ Such deployment of student officers with Tasers would remain conditional upon the completion of special training and the passing of an assessment.

⁵⁶³ *ibid.*

⁵⁶⁴ *ibid.*

⁵⁶⁵ Joint Committee on Human Rights, 'Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest' Seventh Report of Session 2008 –09, HL Paper 47- I and HC 320- I (23 March 2009), 54.

⁵⁶⁶ Police Equipment: Written Statement – HCWS1369 and HLWS1334 (29 February 2019).

⁵⁶⁷ *ibid.*