

1. These written comments are submitted by the United Nations Special Rapporteur on the right to freedom of peaceful assembly and of association, Maina Kiai, and the Human Rights Center of Ghent University, pursuant to leave granted by the President of the First Section of the European Court of Human Rights in his letter dated 14 October 2015, and in accordance with rule 44 § 5 of the Rules of the Court. The expertise and experience of the interveners is set out in the application for leave to intervene, dated 22<sup>nd</sup> of September 2015<sup>1/2</sup>.
2. The interveners submit that *Mahammad Majidli v. Azerbaijan (no. 3) and three other applications* raise a number of issues and legal questions faced by participants in many assemblies today. States are increasingly limiting the right to freedom of assembly using justifications such as ‘unauthorized assemblies’ or ‘unlawful assemblies’ with consequent measures such as administrative and criminal sanctions<sup>3</sup>. The cases before the Court provide an excellent opportunity for the Court to clarify the use of these notions and measures in light of the legal protection guaranteed by Article 11 of the Convention. We invite the Court to set clear and strong protective standards in this area and to be conscious of the leading role it plays in ensuring effective protection of human rights standards in the Council of Europe and - through the authority of its case law - across the globe.
3. The Court’s jurisprudence recognizes that Convention rights are not applied in a vacuum, but instead are interpreted in the light of, and in harmony with, other international law standards and obligations<sup>4</sup>, including under treaty and customary international law<sup>5</sup>. The present intervention thus draws principally upon the authoritative interpretation of the UN Human Rights Committee of certain relevant provisions of the International Covenant on Civil and Political Rights (ICCPR), as well as the commentary in the reports of the UN Special Rapporteur on the rights to freedom of assembly and of association and the comparative interpretations of the Inter-American Commission on Human Rights. It also highlights relevant passages from the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly.

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<sup>1</sup> The United Nations Special Rapporteur is mandated pursuant to Human Rights Council resolution 21/5 and renewed by resolution 24/5, to examine, monitor, advise and report on the freedoms of assembly and association worldwide, covered in articles 21 and 22 of the International Covenant on Civil and Political rights. Authorization for the positions and views expressed by the UN Special Rapporteur Maina Kiai, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.. This application to submit a third party intervention is made by the United Nations Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations.

<sup>2</sup> For the Human Rights Centre the team consisted of Megan Jameson, Jasmine Rayée, Ella Rutter, Stijn Smet and Amélie Verfaillie.

<sup>3</sup> These practices are described in the Reports of the UNSR to the Human Rights Council and the General Assembly, see in particular A/HRC/29/25/Add.2, §§55-60 and 70-71; A/HRC/29/25/Add.1, §§18-28; A/HRC/26/29/Add.1, §§14-31; A/HRC/23/39/Add.2, §14, see also §44;.

<sup>4</sup> ECtHR, *Demir and Baykara v. Turkey* [GC], Application no. 34503/97, § 67; ECtHR, *Al-Adsani v. UK* [GC], Application no. 35763/97, § 55.

<sup>5</sup> ECtHR, *Al-Adsani v. UK* [GC], Application no. 35763/97, § 55.

4. This submission aims to offer comparative experience, analysis and material on the principal matters of (1) the criminalization of participation in assemblies, with particular emphasis on questions related to authorization and notification; the distinction between violent and non-violent assemblies; the liability of organizers and other participants for violent elements in otherwise peaceful assemblies and the use of administrative and criminal law to sanction participants in peaceful demonstrations; (2) the role of plain-clothed police in the management of assemblies, with a specific focus on arrests, procedural guarantees and chilling effect; (3) specific country elements based upon recent evolutions and the experiences of the UN Special Rapporteur.

#### **1. Criminalization of participation in assemblies**

5. The notion of ‘criminalization’ of participation in assemblies refers to administrative or criminal measures taken to sanction participants or organizers of assemblies. States use a number of ‘justifications’ to penalize participation in assemblies such as organizers’ failure to obtain authorization, or for any violence occurring in the assembly committed by third parties. Clearer guidance by this Court on the use of administrative or criminal sanctions in restricting the right to freedom of peaceful assembly (Article 11 ECHR), which is fundamental to democratic societies<sup>6</sup>, will contribute in clarifying the scope of the right and also prevent future violations.
6. The third party interveners have noted that the Court's recent Grand Chamber judgment in *Kudrevičius and Others v. Lithuania*<sup>7</sup>, in which the court reiterates a number of standards under article 11 of the ECHR, was the first Grand Chamber judgment on the right to freedom of peaceful assembly. We invite the Court to consider the specific context of the *Kudrevičius case*, which the Court determined to be about actions aimed at blocking another activity, and which had no direct connection with the object of the protest. These actions were thus, according to the Grand Chamber, not at the core of the freedom of peaceful assembly. We invite the Court to seize the opportunity provided by *Mahammad Majidli v. Azerbaijan (no. 3) and three other applications* to reiterate and clarify that more protective standards apply to peaceful assemblies generally. We submit, in particular, that the principles set out by the Grand Chamber in *Kudrevičius* should not be assumed to apply to assemblies generally. We urge the Court to consider the detrimental impact the expansion of certain principles set out in *Kudrevičius* would have for the right to freedom of peaceful assembly more broadly, which is fundamental to democratic societies. We further call upon the Court to deliver, in the near future, a Grand Chamber judgment setting out strong and protective standards on the right to freedom of peaceful assembly generally. We consider such a Grand Chamber decision vital to ensure the continued and effective protection of the right to freedom of peaceful assembly.

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<sup>6</sup> And should thus not be interpreted restrictively. For this see, for instance, ECtHR, *Primov and Others v. Russia*, Application no. 17391/06, 12 June 2014, § 116; ECtHR, *Djavit An v. Turkey*, Application no. 20652/92, 20 February 2003, § 56.

<sup>7</sup> ECtHR, *Kudrevičius and Others v. Lithuania*, Application no. 37553/05.

### **Notification, authorization and the three-pronged test<sup>8</sup>**

7. The Court has previously considered, as upheld in *Kudrevičius* by the Grand Chamber, that “notification and even authorization procedures for a public event do not normally encroach upon the essence of the right under Article 11 of the Convention, as long as the purpose is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assemblies”<sup>9</sup> This has at times been referred to as giving states the right to require authorization<sup>10</sup>. However, the interveners note that on numerous occasions, this approach has been qualified by the Court with more circumspection and conditions<sup>11</sup>. On several occasions, the Court held, as duly recognized by the Grand Chamber in *Kudrevičius*, that the absence of prior authorization and the ensuing domestic 'unlawfulness' of an assembly does not in and of itself justify an interference with the right to freedom of peaceful assembly: Authorities are still restricted by the proportionality requirement of Article 11<sup>12</sup>. The Court has moreover stated that authorizations may be allowed for reasons of public order and security<sup>13</sup> but it must be established why a demonstration was not authorized in the first place, what was the public interest at stake, and what were the risks represented by it<sup>14</sup>.
8. The Court’s recognition that authorizations must meet certain strict conditions, comports with the position of the UN Human Rights Committee, which has observed that, “even if, in principle, a State party may introduce a system aimed at reconciling an individual’s freedom to impart information and to participate in a peaceful assembly with the general interest of maintaining public order in a certain area, that system must not operate in a way that is incompatible with the object and purpose of articles 19 and 21 of the Covenant.”<sup>15</sup> The Inter-American Commission on Human Rights has clearly stated “the exercise of the right of assembly through social protest must not be subject to authorization on the part of the authorities or to excessive requirements that make such protests difficult to carry out”.<sup>16</sup> This view is shared by the UN Special Rapporteur on

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<sup>8</sup> Under Article 11, § 2: (1) prescribed by law; (2) 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; (3) necessary in a democratic society. Analogously set out by the UN Human Rights Committee for restrictions of the rights to freedom of peaceful assembly and association (ICCPR). See, UN Human Rights Committee, *Aleksander Belyatsky et al v. Belarus*, Communication No. 1296/2004, UN Doc. CCPR/C/90/D/1296/2004, 24 July 2007.

<sup>9</sup> *Kudrevičius*, op. cit., § 147; ECtHR, *Sergey Kuznetsov v. Russia*, Application no. 10877/04, 23 October 2008, § 42; ECtHR, *Rai and Evans v. the United Kingdom*, Application nos. 26258/07 and 26255/07, 17 November 2009.

<sup>10</sup> ECtHR, *Ziliberg v. Moldova*, Application no. 61821/00; ECtHR, *Kudrevičius*, op. cit., § 149.

<sup>11</sup> See also Third Party Intervention by M. Hamilton on behalf of ICJ and ILGA in *Milica Dorđević and others v. Serbia*, Application Nos. 5591/10, 17802/12, 23138/13 and 25474/14, November 2014: <http://www.icj.org/icj-and-ilga-europe-joint-submissions-in-milica-dordevic-and-others-v-serbia/>.

<sup>12</sup> ECtHR, *Primov and Others v. Russia*, Application no. 17391/06, § 119; *Kudrevičius*, op. cit., § 151.

<sup>13</sup> ECtHR, *Gulizan Tuncer v. Turkey (no. 2)*, § 47.

<sup>14</sup> ECtHR, *Primov and others v. Russia*, Application no. 17391/06, § 119 and *Kudrevičius*, op. cit., § 151.

<sup>15</sup> UN Human Rights Committee, *Turchenyak et al. v. Belarus*, UN Doc. CCPR/C/108/D/1948/2010 (24 July 2013), § 7.8; UN Human Rights Committee, *Bazarov. v. Belarus*, UN Doc. CCPR/C/111/D/1934/2010, 24 July 2014), § 7.4. It equally recognized that such procedures can indeed result “in de facto limits of the right of assembly”. UN Human Rights Committee, in UN Doc. UN doc. CCPR/79/Add. 113, § 24.

<sup>16</sup> Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas* (OEA/Ser.L/V/II.Doc.66), 31 December, 2011, § 139.

the rights to freedom of peaceful assembly and of association<sup>17</sup> as well as in the OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly. The latter underscore a presumption in favor of holding assemblies and that “those wishing to assemble should not be required to obtain permission to do so”.<sup>18</sup>

9. Notifications, subject to a proportionality assessment<sup>19</sup>, may assist States to take appropriate measures to accompany the exercise of the right to freedom of assembly. Notifications are less intrusive measures than authorizations, less likely to be disproportionate and also serve the purpose of allowing the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of assemblies. Authorization regimes, however, should be deemed inherently disproportionate, because they require permission for the exercise of a right. The Inter-American Commission on Human Rights notes in this regard: “the requirement of prior notification must not be confused with the requirement of prior authorization granted as a matter of discretion, which must not be established in the law or practice of the administrative authorities, even when it comes to public spaces.”<sup>20</sup>
10. We contend that the exercise of human rights, including the freedom of peaceful assembly, should not be subject to prior authorization by national authorities. Requiring authorization turns the right into a privilege to be dispensed by authorities<sup>21</sup>. Authorization regimes shift the burden to organizers or participants to challenge a refusal, instead of placing the burden on authorities to justify the restrictions they wish to impose<sup>22</sup>. In addition to turning the right into a privilege, authorization poses overly onerous burdens on individuals seeking to organize an assembly.
11. The detrimental impact of authorization requirements has been sporadically recognized by the Court, for instance in *Bączkowski and Others v Poland*, in which the Court indicates that a refusal of authorization could have a chilling effect on the exercise of the freedom of peaceful

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<sup>17</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at § 28, UN. Doc. A/HRC/20/27 (May 21, 2012) [hereinafter *Report Special Rapporteur*, UN Doc. A/HRC/20/27] and United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at § 52, U.N. Doc. A/HRC/23/39 (April, 2013) [Hereinafter *Report Special Rapporteur*, UN Doc. A/HRC/23/39].

<sup>18</sup> OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly* (2010), § 2.1; and § 118 (notification, not authorization) (available at <http://www.osce.org/odihr/73405?download=true>).

<sup>19</sup> See previous paragraph, but also specifically *Report Special Rapporteur*, UN Doc. A/HRC/20/27UN, § 28 and OSCE/ODIHR-Venice Commission, *Guidelines on Freedom of Assembly*. Note: notification is not always proportional, e.g. in cases of spontaneous assemblies or when the impact upon the public is very limited. The Court also recognized that enforcement of notifications should not become an end in itself, see ECtHR, *Oya Ataman v Turkey*, Application no. 74552/01, 5 December 2006, § 36.

<sup>20</sup> Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas*, op. cit., § 137.

<sup>21</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Freedom of Peaceful Assembly and Association*, at § 60, U.N. Doc. A/HRC/29/25/Add.2 (June 2015)

<sup>22</sup> See also the concurring opinion of Judge Pinto de Albuquerque in ECtHR, *Navalnyy and Yashin v. Russia*, Application no. 76204/11 (“No attention has been paid to the widely acknowledged presumption in favour of holding peaceful assemblies, and the resulting rule on the burden of proof incumbent on the Government with regard to the facts which justify a restriction on the right to assembly.”)

assembly<sup>23</sup>. The mere fact that an assembly has not been authorized does not in and of itself justify interference with the freedom of peaceful assembly, as duly recognized by the Court<sup>24</sup>. We invite the Court to clarify that refusals to allow peaceful assemblies amount to restrictions and should therefore always be justified under Article 11 §2 of the Convention. In that regard, we recall that "freedom of assembly is a fundamental right in a democratic society and ... should not be interpreted restrictively."<sup>25</sup> We encourage the Court to consider the wider negative effects of authorization regimes, such as indirectly providing leeway to States to use lack of authorization as a pretext to penalize participants or organizers<sup>26</sup>.

### **Location and prerogative of the right holder to the manner of exercising the right**

12. Similarly, limitations on the location of assemblies must be analyzed under the three-pronged test and not result from arbitrary decision-making. We invite the Court to strongly uphold the principle stipulated in its case law that national regulations "should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention"<sup>27</sup>. The Special Rapporteur has in his reports warned "against the practice whereby authorities allow a demonstration to take place, but only in the outskirts of the city or in a specific square, where its impact will be muted."<sup>28</sup> Due to the very nature of an assembly, its effectiveness is often contingent on its public nature. Granting an authorization for a location away from 'sight and sound' of the intended audience may defeat the very purpose of an assembly and thus unduly restricts individuals' rights under Article 11 ECHR. A decision of the Human Rights Committee, in which it ruled that a denial of authorization on the grounds of location, followed by a suggestion of a different location, constituted a violation of Article 21 ICCPR<sup>29</sup>, further supports this position. We therefore invite the Court to clarify that the manner of exercising human rights should, in principle, be the prerogative of the right holder; this includes a principled free choice as to the location of the assembly<sup>30</sup>. A change of location by authorities needs to be submitted to strict scrutiny under the three-pronged test.

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<sup>23</sup> ECtHR, *Bączkowski and Others v Poland*, Application no. 1543/06, 3 May 2007, § 67.

<sup>24</sup> See *Primov v. Russia*, op. cit., § 119; *Oya Atman v. Turkey*, op. cit., § 39; ECtHR, *Samüt Karabulut v. Turkey* Application no. 16999/04, 27 January 2009, § 35.

<sup>25</sup> *Primov v. Russia*, op. cit., § 116.

<sup>26</sup> In particular sections such as "since States have the right to require authorisation, they must be able to apply sanctions to those who participate in demonstrations that do not comply with the requirement." As in ECtHR, *Ziliberberg v. Moldova*, Application no. 61821/00 and reiterated more recently in *Primov v. Russia*, op. cit., § 118 have such effects.

<sup>27</sup> National legislation should not present a hidden obstacle to the freedom of peaceful assembly. See *Oya Ataman v Turkey*, op. cit., § 38; ECtHR, *Balçık and Others v Turkey*, Application no. 25/02, 29 November 2007, § 49; ECtHR, *Nurettin Aldemir and Others v Turkey*, Application nos. 32124/02 et al., 18 December 2007, § 43.

<sup>28</sup> *Report Special Rapporteur*, UN Doc. A/HRC/20/27, § 40. See also Amnesty International, *A Right, Not a Crime Violations of the Right to Freedom of Assembly In Russia* (2014), 13 (available at <http://www.amnesty.org/en/documents/EUR46/028/2014/en/>) (finding that the practice of denying permission to demonstrate in central areas is routinely applied in several States as a way of suppressing dissenting voices).

<sup>29</sup> See, most notably, UN Human Rights Committee, *Chebotareva v Russian Federation*, Communication No. 1866/2009, 26 March 2012 (CCPR/C/104/D/1866/2009). See also OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, op. cit., § 2.4.

<sup>30</sup> See also *Oya Ataman v Turkey*, op. cit., § 36.

### **Violent and peaceful assemblies and State response**

13. In *Kudrevičius*, the Grand Chamber reiterated that the applicability of Article 11 ECHR depends on the peaceful intentions of the organizers of and participants in an assembly.<sup>31</sup> In this regard, the Court has repeatedly stated that the mere fact that acts of violence occur in the course of a gathering is not, in and of itself, sufficient to find that its organizers had violent intentions and deprive them of the protection of Article 11 ECHR.<sup>32</sup> Moreover, sporadic violence or other punishable acts committed by certain individuals during an assembly do not deprive other peaceful participants of their rights under Article 11 ECHR.<sup>33</sup> As accepted by the Court, any demonstration in a public place may cause a certain level of disruption to ordinary life, which does not in itself justify an interference with the right to freedom of assembly.<sup>34</sup> More generally, "any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it".<sup>35</sup> We invite the Court to reiterate that occurrence of violence does not provide a ground for a general action against the assembly, or any of its organizers or participants.

### **Criminal and administrative offences in a context of unauthorized assemblies**

14. We further invite the Court to underscore once more that the use of criminal law against individuals for having organized or participated in a peaceful assembly is, in principle, not a legitimate response available to States, when the persons concerned have not themselves engaged in criminal acts<sup>36</sup>. In this context, we have noted with concern that the Grand Chamber in *Kudrevičius*, after having stated that "a peaceful demonstration should not, in principle, be

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<sup>31</sup> *Kudrevičius*, op. cit., § 92. See also ECtHR, *Gün and Others v. Turkey*, Application no. 8029/07, 18 June 2013, § 49; ECtHR, *Taranenko v. Russia*, Application no. 19554/05, 15 May 2014, § 66. This is in line with OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, op. cit., § 25 ("An assembly should, therefore, be deemed peaceful if its organizers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence.").

<sup>32</sup> *Gün and Others v. Turkey*, op. cit., § 50. See also the view of the Inter-American Special Rapporteur for freedom of expression, to the effect that police officers should not arrest demonstrators when they are acting peacefully and legally. See Annual Report of the Inter-American Commission on Human Rights 2005 - Report of the Office of the Special Rapporteur on Freedom of Expression (OEA/Ser.L/V/II.124), 26 February 2006, § 99.

<sup>33</sup> See *Kudrevičius*, op. cit., § 94. Also *Ezelin*, op. cit., § 53. See also *Gün*, op. cit., §§ 50-51. See further Geneva Academy of International Humanitarian Law and Human Rights, *Facilitating Peaceful Processes* (2014), 81 (available at [http://www.geneva-academy.ch/docs/publications/briefing5\\_web\\_singles8.pdf](http://www.geneva-academy.ch/docs/publications/briefing5_web_singles8.pdf)). See also Guidelines on Freedom of Peaceful Assembly of the OSCE/ODIHR and the Venice Commission, which state that "[t]he use of violence by a small number of participants in an assembly (including the use of inciteful language) does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly, and any intervention should aim to deal with the particular individuals involved rather than dispersing the entire event." OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, op. cit., § 164

<sup>34</sup> *Kudrevičius*, op. cit., § 155.

<sup>35</sup> *Taranenko*, op. cit., § 67; *Kudrevičius*, op. cit., § 145; ECtHR, *Fáber v. Hungary*, Application no. 40721/08, 24 July 2012, § 37. This is in line with the position of the Special Rapporteur on the presumption of legitimacy of assemblies with the exception of situations as described by articles 20 and 5 of the ICCPR and the function of assemblies in societies. *Report of the Special Rapporteur*, A/HRC/20/27, § 18.

<sup>36</sup> See also *ibid.*, § 111 : "Individual participants in any assembly who themselves do not commit any violent act should not be prosecuted, even if others in the assembly become violent or disorderly."

rendered subject to the threat of criminal sanction”,<sup>37</sup> nevertheless found the criminal prosecution and conviction of the applicants acceptable under Article 11 ECHR.<sup>38</sup> We invite the Court to duly limit the reach of the *Kudrevičius* holding and instead consider the relevance of *Ezelin v. France* and other cases, in which the Court has duly concluded that the "freedom to take part in a peaceful assembly ... is of such importance that it cannot be restricted in any way ... so long as the person concerned does not himself commit any reprehensible act on such an occasion."<sup>39</sup> In addition, domestic definitions of crimes need to be clearly defined as per international standards to avoid broad and vague notions. We encourage the Court to underscore that use of definitions of crimes that essentially criminalize participation in an assembly or other activities otherwise protected under the ECHR have no place in the State law of parties to the ECHR.

15. We are concerned about the recent expansion of the concept of "reprehensible acts" in the Court's case law under Article 11 ECHR, where the Court utilizes the notion of "reprehensible acts committed by participants" as a threshold to determine when States can legitimately interfere with assemblies. We submit that the concept of "reprehensible act" should be interpreted narrowly, given its potential for abuse by States to 'criminalize' protest generally. We refer to *Ezelin v. France* and other cases, in which the Court found that not formally disassociating oneself from acts considered violent could not be considered "reprehensible".<sup>40</sup> In that respect, we note with regret that the Court has confirmed, in *Kudrevičius*, that the notion of "reprehensible acts" is not limited to acts of violence and discrimination or those that incite violence or discrimination, but also covers much less severe acts such as roadblocks.<sup>41</sup> We invite the Court to adopt a very restricted interpretation of the notion of "reprehensible act". We particularly urge the Court to clarify, in the wake of *Kudrevičius*, that the principle remains that all peaceful demonstrations are protected under Article 11 ECHR and that, in particular, demonstrations may cause disturbances and disruption to ordinary life without losing such protection.<sup>42</sup>
16. We wish to draw the attention of the Court to the increased use, globally, of 'administrative offences' in the sanctioning and management of assemblies. The Court recently found these offences effectively penalized participation to unauthorized assemblies and found it a violation of Article 11 of the Convention<sup>43</sup>. The use of administrative sanctions in such situations underscores again the need to clarify that authorization requirements always need to be justified against the

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<sup>37</sup> See also ECtHR, *Akgöl and Göl v. Turkey*, Applications nos. 28495/06 and 28516/06, 17 May 2011, § 43.

<sup>38</sup> *Kudrevičiusi*, op. cit., § 146.

<sup>39</sup> The court ruled this was even true for a penalty at the lower end of the scale of disciplinary penalties. *Ezelin*, op. cit., § 53; *Taranenko*, op. cit., § 88; *Ashughyan*, op. cit., § 98.

<sup>40</sup> ECtHR, *Ezelin v. France*, Application no. 11800/526, 26 April 1991, § 53. See also ECtHR, *Galstyan v. Armenia*, Application no. 26986/03, 15 November 2007, § 115; ECtHR, *Ashughyan v. Armenia*, Application no. 33268/03, 17 July 2008 § 98; ECtHR, *Christian Democratic People's Party v. Moldova (No. 2)*, Application no. 25196/04, 2 February 2010, § 27.

<sup>41</sup> *Kudrevičius*, op. cit., § 174.

<sup>42</sup> See, for instance, ECtHR, *Aytas and Others v. Turkey*, Application no. 6758/05, 8 December 2009.

<sup>43</sup> "Despite being formally charged with failure to comply with a lawful order of a police officer, the applicant in fact was arrested and convicted for his participation in an unauthorised peaceful demonstration." ECtHR, *Gafgaz Mammadov v. Azerbaijan*, Application no. 60259/11, § 62.

three-pronged test. Thereafter, any administrative sanctions also have to be measured against the same test.

## **2. The role of plain-clothed police officers**

17. To date, as far as we are aware, the Court has not had the occasion to clarify the role of plain-clothed police officers in the management of assemblies, in particular in relation to arrests carried out by unidentified police officers. We invite the Court to seize the opportunity provided by *Mahammad Majidli v. Azerbaijan (no. 3) and three other applications* to develop clear standards in this regard.
18. We submit that arrests carried out by plain-clothed police officers not only constitute a direct interference with the right to freedom of peaceful assembly of the arrested person(s)<sup>44</sup>, they also indirectly interfere with the right to freedom of peaceful assembly of the other protestors. In particular, such arrests may have a deterrent and chilling effect on the continuance of the assembly at issue, as well as on the organization of, and participation in, future assemblies.
19. In this respect, we refer to the earlier recognition by the Court that methods employed by the police to disband an assembly can have a chilling effect on participation in future assemblies.<sup>45</sup> In *Nurettin Aldemir and Others v. Turkey*, for instance, the Court found that dispersal of an assembly with use of force could constitute a chilling effect, even though the individuals arrested were acquitted and no proceedings were brought.<sup>46</sup> The Court's case law on unidentifiable police officers under article 3 ECHR, could be applied analogously under Article 11 ECHR.<sup>47</sup> In addition to creating a chilling effect, arrests of protestors carried out by unidentified police officers encourage a culture of impunity as it is impossible to identify the arresting officer.
20. The Special Rapporteur has indicated "the importance of police officers wearing visible identification numbers on their uniforms" as a core element of transparent management of assemblies<sup>48</sup>. Law enforcement personnel involved in the management of assemblies should always be clearly and individually identifiable<sup>49</sup>. In our opinion, any arrest for alleged crimes or administrative offences *not* conducted by a uniformed and identifiable law enforcement officer constitutes a violation of Article 11 ECHR.

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<sup>44</sup> See *Primov*, op. cit., § 164.

<sup>45</sup> *Kudrevičius*, op. cit., § 100, *Nurettin Aldemir*, op. cit., § 34.

<sup>46</sup> *Nurettin Aldemir*, op. cit., § 34. See also ECtHR, *Izci v. Turkey*, Application no. 42606/05, 23 July 2013, § 90.

<sup>47</sup> See, for instance, ECtHR, *Hristovi v. Bulgaria*, Application no. 42697/05, 11 October 2011.

<sup>48</sup> *Report Special Rapporteur*, UN Doc. A/HRC/20/27, § 79.

<sup>49</sup> OSCE/ODIHR and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, op. cit., § 78. See further Amnesty International, *Gezi Park Protests. Brutal Denial Of The Right To Peaceful Assembly In Turkey* (2013), 53 (available at <https://www.amnesty.org/en/documents/EUR44/022/2013/en/>).



### 3. Country Context

21. The right to freedom of assembly is in a crisis in Azerbaijan, as is the situation of human rights defenders and civil society organizations, generally. Since the beginning of his mandate in 2011, the UN Special Rapporteur has observed the deterioration of both the rights to freedom of association and of peaceful assembly. His office has sent more than a dozen communications to express concern over a variety of issues, ranging from detention of protesters, mistreatment and detention of civil society leaders to comments on legislative reforms. In each case, Azerbaijan has either failed to reply or responded by stating that the alleged facts did not constitute violations of human rights but were expressions of enforcement of national legislation which it believes to be in line with international law<sup>50</sup>.
  
22. Since the events in this case took place, there has been a further increase of penalization of participation in peaceful assemblies in Azerbaijan. Of particular concern are amendments to the laws on freedom of peaceful assembly and administrative offences. The amendments have increased fines and criminalized breaches of regulations regarding the organization and participation in peaceful assemblies. The organization, conduct and participation of an ‘unlawful’ gathering ‘violating the rights and legitimate interest of citizens’, is now punishable by a fine of up to 8.000 manat (from 300; 1 manat is about 0,87 Euro), community service, or imprisonment for up to two years. Mere participation in an ‘unauthorized’ rally is punishable by a fine of up to 1.000 manat, up to 200 hours of community service or administrative detention of up to 15 days. The severity of the penalty is highly problematic, as is the ‘administrative’ character of the penalties, which removes the processes from the review systems established under criminal law principles. In addition to the abusive use of administrative sanctions, criminal charges such as mass rioting, ‘abuse of authority’, tax evasion and ‘illegal entrepreneurship’ are increasingly used against civil society leaders or ‘political opponents’ to muzzle dissent<sup>51</sup>. Activists even face murder and torture, as recognized by the ECtHR in the case of *Emin Huseynov v. Azerbaijan* earlier this year<sup>52</sup>.

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<sup>50</sup> Communications of the UNSR on freedom of assembly to Azerbaijan (not including those relating to freedom of association): See UN Doc. A/HRC/23/29/Add.2: JUA 22/03/2012. Case no. AZE 2/2012. State Reply: 08/05/2012. Alleged acts of ill-treatment and violence against peaceful protesters in the context of peaceful demonstrations held in the center and the proximities of the city of Baku; JUA 27/06/2012. Case no. AZE 4/2012. State Reply: None to date. Alleged detention and sentencing of a photo-journalist and human rights defender; JAL 10/12/2012. Case no. AZE 5/2012. State Reply: *late reply* 16/08/2013. Alleged legislative amendments increasing fines and criminalizing breaches of the regulations regarding the organization and participation in peaceful assemblies, which may be contrary to the fundamental right to freedom of peaceful assembly. JUA 01/02/2013. Case no. AZE 2/2013. State Reply: 23/04/2013. Allegations of arrest of 63 participants in a peaceful protest held in Baku, of whom 26 were sentenced to administrative detention or heavy fines. See UN Doc. A/HRC/26/29/Add.1: JAL 28/03/2013. Case no. AZE 3/2013. State reply: 16/08/2013. Reported amendments to the Code of Administrative Offences, the law “On non-governmental organizations (public associations and foundations)” and the law “On grants” which will allegedly affect the work of religious organizations and non-governmental organizations (NGOs), including those working for the promotion and protection of human rights.

<sup>51</sup> Freedom Now and Human Rights House Network, *Breaking point in Azerbaijan. Promotion and glamour abroad, repression and imprisonment at home*, May 2014, pp. 39-43, 47 and 51-55.

<sup>52</sup> ECtHR, *Emin Huseynov v. Azerbaijan*, Application No. 59135/09.

23. In addition to criminalizing participation in peaceful assemblies, Azerbaijani authorities have systematically refused to authorize peaceful assemblies to be held in the center of Baku: Assemblies that have been held without authorization have been rapidly dispersed<sup>53</sup>. The Commissioner for Human Rights of the Council of Europe has repeatedly highlighted these same challenges with regard to the right to peaceful assembly<sup>54</sup>. In practice, the Government of Azerbaijan has moved beyond merely discouraging or chilling the right to freedom of peaceful assembly: It has effectively annihilated it.
24. We wish to underscore the all too common use of notions such as ‘unlawful’ and ‘unauthorized’ when referring to assemblies, both in Azerbaijani legislation and during the practical management of assemblies, to justify the imposition of penalties or to dissolve assemblies. We hold such an approach incompatible with the right to freedom of peaceful assembly as it is understood in international law. Unfortunately, this trend is not limited to Azerbaijan – it occurs in a number of States under this Court’s jurisdiction and beyond<sup>55</sup>. It is our considered opinion that these States would greatly benefit from a clearer guidance from the Court on how to avoid abuse of these notions that violate the right to freedom of peaceful assembly.

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<sup>53</sup> A recent report documents the responses to the limited number of protests held in Baku between 2013 and September 2015. Apart from one pro-government protest (September 2015), they were all violently responded to, dispersing and punishing the participants. Sport for Rights Campaign, *No holds barred: Azerbaijan’s human rights record crackdown in Aliyev’s third term*, October 2015, pp 48-51. The same report documents the lack of respect for the decisions of the European Court for Human Rights. See also Council of Europe Commissioner for Human Rights, *Observations on the human rights situation in Azerbaijan*, CommDH (2014) 10, April 2014, p.4. For the period surrounding the last presidential elections some ‘special places’ were identify for holding meetings.

<sup>54</sup> Council of Europe Commissioner for Human Rights, *Report following visit to Azerbaijan*, CommDH (2013) 14, August 2013, p.3 and Council of Europe Commissioner for Human Rights, *Observations on the human rights situation in Azerbaijan*, CommDH (2014) 10, April 2014, p.4.

<sup>55</sup> See amongst others the reports referred to in *supra* footnote 3.