



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

SECOND SECTION

CASE OF İZCİ v. TURKEY

(Application no. 42606/05)

JUDGMENT

STRASBOURG

23 July 2013

FINAL

23/10/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of İzci v. Turkey,

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

Guido Raimondi, President,
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, judges,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 9 July 2013,

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

PROCEDURE

1. The case originated in an application (no. 42606/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Ms Nergiz İzci (“the applicant”), on 9 November 2005.

2. The applicant was represented by Ms Seval Ballıkaya and Mr Murat Çelik, lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that during a demonstration she had been severely beaten up by a number of police officers, in breach of her rights guaranteed by Articles 3 and 11 of the Convention.

4. On 8 September 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

5. The applicant was born in 1974 and lives in Istanbul. As the facts of the case are in dispute between the parties, they will be set out separately. The facts as presented by the applicant are set out in Section B below (paragraphs 6-8). The Government's submissions concerning the facts are summarised in Section C below (paragraphs 9-13). The documentary evidence submitted by the applicant and the Government is summarised in Section D (paragraphs 14-26).

B. The applicants' submissions on the facts

6. On 6 March 2005 the applicant took part in a demonstration to mark the Women's Day celebrations in Beyazıt Square in Istanbul, during which a large number of police officers formed a ring around the crowd. Police officers did not prevent people from entering the square and did not interfere with the demonstrations.

7. When the celebrations ended with a press release issued by a number of women's organisations and the crowds began to disperse, police officers started hitting people, including the applicant, with their truncheons and the ends of their weapons and sprayed them with tear gas. As a result of the blows to her head, face and other parts of the body, the applicant fell to the ground. Whilst she was on the ground police officers continued to kick and hit her with their sticks. The police officers also swore at her and insulted her.

8. The applicant was seriously injured and was left semi-conscious. She had to be helped by a member of the public to leave the area. The incident was widely publicised in the national and international media.

C. The Government's submissions on the facts

9. On 18 February 2005 the office of the Governor of Istanbul was informed that a demonstration would be held in Beyazıt Square on 6 March 2005 to celebrate Women's Day. The request to hold the celebrations in Beyazıt Square was rejected and the organising committee was informed in a letter on 23 February 2005 that the celebrations could be held in Çağlayan

Square in the Şişli district and in Beykoz Field in the Beykoz district of Istanbul.

10. On 6 March 2005 people began gathering at different locations in order to march towards Beyazıt Square. Members of the security forces told them that they would not be allowed to do so because it would obstruct the flow of traffic.

11. Members of the security forces waited for 20-25 minutes for the demonstrators to disperse. During that time some of the demonstrators left the area. Those who remained blocked the traffic and insisted on marching to Beyazıt Square. Members of the security forces intervened and reopened the road.

12. At around 11.30 a.m. the dispersed groups gathered in Beyazıt Square and read out a press statement. At 1 p.m., after the press statement had been read out, a group of approximately sixty persons refused to leave the area. When the police warned them the demonstrators responded by throwing stones at the police officers. As a result the police officers arrested a number of the demonstrators and took them into custody by using force. The applicant was not arrested.

13. During the incident seven police officers were injured and many police cars were damaged by the demonstrators.

D. Documentary evidence submitted by the parties

14. The Government submitted to the Court video footage of the events. The footage is a compilation of news aired by national television channels, as well as the official video recording of the events by a police cameraman. The footage shows police officers wearing gas masks hitting with their truncheons a large number of demonstrators who try to run away from the area. Demonstrators fallen to the ground are also kicked and hit with truncheons. A male demonstrator who uses his body to protect a woman on the ground is kicked in the face by a police officer. When police officers notice a number of demonstrators hiding in bushes, they spray them with tear gas¹ before hitting them with their truncheons. Two women on the ground trying to protect themselves from attacks by police officers are sprayed with tear gas. Women who had taken refuge in nearby shops and cafes are dragged out by the police and beaten up. The footage also shows a number of shoppers, shopkeepers and other persons, who had not been demonstrating but who had been in the area and affected by the intense tear gas, wandering around in a confused state.

1. Although the applicant, the Government and various domestic authorities refer to tear gas as CS gas, CN gas, tear gas and/or pepper spray, for practical reasons the Court will use the term “tear gas” in this judgment.

15. According to the report prepared by an expert who was appointed by the domestic investigating authorities to examine the video footage and prepare a report, police officers had not issued any warnings to the demonstrators to disperse before attacking them. The demonstrators had not resisted the police intervention and had not attacked the police but had simply tried to run away from the area. Police had hit the demonstrators – including those who had fallen to the ground – with their truncheons, kicked them, punched them and sprayed them with tear gas.

16. On 8 March 2005 the applicant submitted a written request to the Bakırköy prosecutor and requested a medical examination. She alleged that excessive force had been used by the police officers during the incident and as a result of that force various parts of her body had been injured. The prosecutor referred the applicant to the Forensic Medicine Institute for a medical examination.

17. According to the report of the medical examination carried out at the Bakırköy branch of the Forensic Medicine Institute the same day, a large number of ecchymosed areas of various sizes were present on her body including her left upper arm, right forearm, left femur, buttocks and knees. The doctor concluded that the applicant's injuries would prevent her from working for a period of five days.

18. On 11 March 2005 the applicant lodged an official complaint with the Istanbul prosecutor against the Governor of Istanbul and the police officers responsible for her ill-treatment. She pointed out that, according to the applicable legislation, no prior notice or permission was necessary to read out a press release. She requested, *inter alia*, that the Governor and the police chiefs who abused their duties by not allowing her to enjoy her right to assembly, as well as the police officers who had ill-treated her, be put on trial. She complained that excessive force and tear gas had been used by the police officers against her and against her fellow demonstrators when they were dispersing and leaving the area of their own accord. Footage shown on television channels and photographs published in newspapers had showed the scale of the incident.

19. On 8 April 2005 the Chief Prosecutor at the Court of Cassation concluded that the applicant had not mentioned a specific incident that could be attributed to the Governor. A decision was thus made not to prosecute the Governor.

20. The disciplinary board of the police considered on 6 June 2005 that six of the police officers had kicked the demonstrators and had also hit them with their truncheons. It held that the police officers' actions amounted to "degrading behaviour", and decided to "condemn" the actions of three police chiefs for failing to train the six police officers properly. It also imposed a fine – equivalent to three days' salary – on the six police officers in question.

21. On 12 December 2005 the Istanbul prosecutor decided not to bring criminal proceedings against forty-four police officers for the offence of abuse of duty in respect of victims and complainants whose bodies did not bear any injuries. In the prosecutor's decision thirty-nine persons, including the applicant, were named as victims and complainants. The applicant lodged an objection against the prosecutor's decision in which she repeated her complaints about the excessive use of force against her. The applicant's objection was rejected on 28 September 2007 by the Beyoğlu Assize Court.

22. In the meantime, on 9 December 2005 the Istanbul prosecutor filed an indictment with the Istanbul Criminal Court of First Instance and accused a total of fifty-four police officers of the offence of causing injuries by exceeding the limits of their powers on the use of force. In this indictment forty-nine persons, including the applicant, were listed as victims and complainants.

23. References were made in the indictment to a report which had been forwarded to the prosecutor on 28 April 2005 and which pertained to an investigation conducted by four senior police inspectors in the immediate aftermath of the events. According to the indictment, it was concluded in the inspectors' report that seven of the fifty-four police officers named as "suspects" in the indictment had used excessive force against fifteen of the complainants and victims, including the applicant. The inspectors considered that the seven officers had not used their truncheons in accordance with the applicable regulations and had even kicked a number of female demonstrators who had already been neutralised.

24. The trial which began before the Fourth Division of the Istanbul Criminal Court of First Instance (hereinafter the "trial court") in 2005, was concluded on 12 May 2011. In its judgment the trial court held the following:

"According to the prosecutor's indictment, the victims and complainants complained of having been injured when the defendant police officers kicked them and punched them and hit them with their truncheons and shields. They also complained of having been excessively sprayed with tear gas. They added that the defendants had been wearing gas masks and hiding the identification numbers on their uniforms. Furthermore, the attacks had taken place very suddenly and when they had already been affected by tear gas. Thus, they could not identify the police officers individually.

The defendant police officers submitted that they had not committed the offence with which they were charged. They maintained that the demonstrators had been harming public order by insisting on continuing with the reading out of their press release as well as by attacking the police with iron bars. They maintained that the force used by them against the demonstrators had not been disproportionate.

Six of the defendants accepted during the preliminary investigation stage that they had kicked the demonstrators from behind. However, the lawyers defending these defendants submitted during the trial that those self-implicating statements had been taken from the police officers by the inspectors under duress and as a result of the

press coverage of the incidents. The inspectors questioning the police officers had thus acted contrary to the applicable procedure. The defendants also maintained that, although the medical reports would establish that the incidents had taken place, they were insufficient to establish the identities of the police officers. Thus, the victims should have been required to identify them first. They also added that the offence in question were time-barred and the proceedings against them should have been discontinued.

In his final submissions during the trial the prosecutor agreed with the defendants and argued that the defendants should be acquitted because the victims had been unable to identify the police officers.

The court finds that the defendants' objections based on the statute of limitations should be rejected. Proceedings against them will be time-barred five years after the last defence submissions were made by them on 8 September 2006.

It must be stressed that the large numbers of defendants and victims, coupled with the fact that this was a large-scale incident, resulted in delays in obtaining all the evidence. The trial was also delayed as a result of the defendants' covering their faces with helmets and not displaying their identification numbers.

Having examined the video footage of the events, as well as the reports and witness statements, the court finds that it is not possible to expect the victims to identify the police officers who attacked them because it is not possible to recognise the police officers in the video footage.

The inspectors who had questioned the police officers were also heard in the course of the trial proceedings and they confirmed the authenticity and accuracy of the statements they had taken from the police officers. One of the principles of criminal law is that witnesses are presumed to be telling the truth, unless their testimonies are contradicted by official documentation. There are no such documents in the file to discredit the statements taken from the police officers by the inspectors. On the contrary, their statements are corroborated by the video footage which shows the punching, kicking, hitting with truncheons and shields, and using an excessive amount of tear gas.

At the root of this incident is the freedom to express opinions which is guaranteed in the Constitution, and the question whether or not that freedom should be restricted in order to maintain public order. In the Saraçhane area, which is one of the two locations where the incidents took place, the police did not interfere in the demonstration until the demonstrators started walking on the road where there was traffic circulation. That intervention was thus made with a view to maintaining public order. [However] the video footage [also] shows the police intervention against the people who had already surrendered themselves to the police or who had been hiding in bushes after having been sprayed with tear gas. This happens not on the road but off it.

In Beyazıt Square, the other location of the demonstrations, the video footage shows a scuffle between the police and demonstrators carrying banners. The footage also shows the police kicking and hitting with their truncheons and shields persons – mostly women – who try to run away from the scene and who are not carrying any banners.

The above-mentioned statements taken from the police officers by the inspectors show that:

- the defendants M.C. and A.O.P. had kicked from behind two female demonstrators who had in their hands nothing to pose a danger to the two officers;

- the defendant S.B. used excessive force against a woman who had taken refuge in a café;

- the defendant C.U. hit a female demonstrator on her shoulder and broke one of her bones;

- the defendant Y.K. kicked a demonstrator who had been trying to seek help from the police after having been sprayed with tear gas; and

- the defendant E.B. kicked a person who had already been arrested.

In light of the foregoing it is accepted that some of the defendants exceeded the limits of their powers on the use of force and used excessive force.

...”.

25. The trial court concluded in its above-summarised judgment that the police officers M.C., A.O.P., S.B., Y.K. and E.B. had used excessive force against the demonstrators and committed the offence of ill-treatment defined in section 245 of the Criminal Code then in force (Law No. 765). It sentenced these officers to terms of imprisonment ranging from five to ten months. The officer C.U., who was found to have broken a bone of one of the demonstrators, was found guilty of the offence of causing grievous bodily harm while using his powers as a public official, an offence defined in section 86 § 3 of the Criminal Code now in force (Law No. 5237), and sentenced to twenty-one months' imprisonment. The remaining forty-eight defendant police officers were acquitted for lack of evidence.

26. According to the information provided to the Court by the Government on 10 November 2011, the criminal proceedings against the police officers were discontinued on 8 September 2011 on account of the statute of limitations.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Section 245 of the Criminal Code in force at the material time (Law No. 765), provided as follows:

“Any law-enforcement officer ... who, in the course of duty ... and in circumstances other than those prescribed by law ..., ill-treats, injures or hits a person or inflicts on them bodily harm, shall be sentenced to between three months' and five years' imprisonment and temporarily barred from public service. ...”

28. Relevant provisions of Section 86 of the Criminal Code now in force (Law. No. 5237) provide as follows:

“(1) A person who intentionally causes physical suffering to another person, or harms that other person’s physical or mental health, shall be sentenced to between one and three years’ imprisonment....

(2) If the offence of intentionally causing bodily harm is committed

...

c) by virtue of execution of public duties;

...

the offender shall be [prosecuted without waiting for an official complaint from the victim] and sentenced to between two and five years’ imprisonment.”

29. Section 10 of the Meetings and Demonstration Marches Act (Law no. 2911) provides as follows:

“In order for a meeting to take place, the governor’s office or authorities of the district in which the demonstration is planned must be informed, during opening hours and at least seventy-two hours prior to the meeting, by a notice containing the signature of all the members of the organising board...”

30. Section 22 of the same Act prohibits demonstrations and processions on public streets, in parks, places of worship and buildings in which public services are based. Demonstrations organised in public squares must comply with security instructions and not disrupt individuals’ movement or public transport. Finally, section 24 provides that demonstrations and processions which do not comply with the provisions of this law will be dispersed by force on the order of the governor’s office and after the demonstrators have been warned.

31. Section 32 of the Act, in so far as relevant, provided as follows before it was amended in 2008 and 2010:

“1. Unarmed persons taking part in an unlawful meeting or procession who, instead of dispersing of their own motion after having been warned or ordered to do so and who thus have to be forcefully dispersed by government forces, are liable to be sentenced to a term of imprisonment of between one and three years.

...

2. Unless their action breaches another criminal law provision which stipulates a more severe punishment, persons who resort to violence or making threats while being dispersed, or who resist the attempts to disperse them, are liable to be sentenced to a term of imprisonment of between three and five years.

...”

32. On 15 February 2008 the Ministry of the Interior issued a directive to law enforcement personnel on the use of tear gases (Circular No. 19). It is noted in the directive that, according to section 16 § 3 (b) of the Law on the Duties and Powers of the Police (Law No. 2559), tear gases are listed among the weapons which law enforcement officials are permitted to use in the execution of their duties. The directive sets out the circumstances in which tear gases may be used – both in open and confined spaces – and explains how best to obtain the maximum benefit from their use. It stipulates that tear gases may not be used against persons who have stopped putting up resistance, and recommends that law enforcement personnel be prepared to provide first aid to those affected by the gas.

33. According to an information note issued by the Turkish Medical Association (*Türk Tabipleri Birliği*) in June 2013, CS (*chlorobenzylidenemalononitrile*) and CN (*chloroacetophenone*) gases are used by law-enforcement officials in Turkey. These gases damage the eyes, cause burns on the skin, severely affect the respiratory system and the lungs, restrict breathing, slow down the heart beat and cause fluctuations in blood pressure. Prolonged contact with these gases permanently damages the cornea of the eye, upsets the heart rhythm, and has caused damage to the lungs which, in turn, has led to deaths. The effects of the gases are more pronounced in children, pregnant women and persons with existing respiratory problems, heart problems, aneurysms, allergies and weak immune systems. Sudden allergic oedema caused in the upper respiratory systems by such gases, as well as use of gases on persons with asthma or bronchitis, may be fatal. According to the expert reports, fatal doses of gases were used in the operations conducted in 20 prisons in Turkey on 19 December 2000 during which 32 persons lost their lives and hundreds were injured. On 1 May 2007 a seventy-five-year-old man who was sprayed with gas in Turkey lost his life. Furthermore, such gases have been used extensively in two incidents in 2011 during which two persons lost their lives.

34. On 3 June 2013 the Respiratory Society of Turkey (*Türkiye Solunum Araştırmaları Derneği; TÜSAD*) issued a press release with a view to informing the public about the dangers of tear gas and about the steps to be taken after contact with tear gas. In the press release the effects of tear gas are defined as follows:

“...Tear gas affects primarily the mucus membranes; in particular the eyes, throat, respiratory system and the nose. On contact, it immediately causes a general feeling of burning; discomfort and excessive watering of the eyes; pain and a feeling of burning of the skin and in the nose and throat; coughing; breathing difficulties; extreme restlessness and discomfort; and temporary blindness. The pain and the feeling of burning on contact with the skin causes extreme discomfort and panic. Although it does not cause permanent damage in the organs with which it comes into contact, its acute effects are extremely discomforting and lead to panic.

...”

III. RELEVANT INTERNATIONAL MATERIALS

35. According to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 (“the CWC”), tear gas is not considered a chemical weapon and its use is authorised for the purpose of law enforcement, including domestic riot control (Article II § 9 (d)). The CWC entered into force with regard to Turkey on 11 June 1997.

36. Relevant paragraphs of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990)) provide as follows:

“3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

...

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

...

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

...

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.”

37. Paragraph 35 of the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, (UN Human Rights Council A/HRC/20/27, 21 May 2012) provides as follows:

“35. With regard to the use of tear gas, the Special Rapporteur recalls that gas does not discriminate between demonstrators and non-demonstrators, healthy people and people with health conditions. He also warns against any modification of the chemical composition of the gas for the sole purpose of inflicting severe pain on protestors and, indirectly, bystanders.”

38. UN Committee against Torture, Thirty-eighth session, 30 April-18 May 2007, Consideration of reports submitted by States parties under article 19 of the Convention, paragraph 16 of the Concluding observations of the Committee against Torture, Denmark, CAT/C/DNK/CO/5, 16 July 2007 provides as follows:

“16. The Committee is concerned at reports emerging of alleged excessive use of force, such as the use of physical violence and tear gas, by law enforcement officials during the “Ungdomshus” Youth House riots in Copenhagen in March 2007. The Committee also notes with concern reports suggesting that a number of persons had been killed by Danish law enforcement officials over the past two years. (arts 10, 12, 13, 14 and 16)

The State party should review the existing framework to handle allegations of excessive use of force, including the use of weapons, by law enforcement officials to ensure its compliance with the Convention. The State party should ensure prompt and impartial investigations into all complaints or allegations of misconduct, in particular when a person dies or is seriously injured following contact with law enforcement officials. In addition, the State party should review and strengthen its education and training programmes relating to the use of force, including the use of weapons, by law enforcement officials in order to ensure that the use of force is strictly limited to that required to perform their duties.”

39. UN Committee against Torture, Forty-fifth session, 1–19 November 2010, Consideration of reports submitted by States parties under article 19 of the, Convention, paragraph 13 of the Concluding observations of the Committee against Torture, Turkey, CAT/C/TUR/CO/3, 20 January 2011 provides as follows:

“13. While noting the acknowledgement by the representative of the State party of excessive use of force by law enforcement authorities and information on measures taken to eradicate such practice, including by inscribing identification numbers on the helmet of police officers during demonstrations, the Committee remains concerned at reports indicating an increase in the excessive use of force and ill-treatment of demonstrators by police outside official detention places (...)”

The State party should promptly implement effective measures to put an end to excessive use of force and ill-treatment by law enforcement authorities. The State party should, in particular:

(a) Ensure that domestic laws, rules of engagement and standard operating procedures relating to public order and crowd control are fully in line with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, in particular the provision that lethal use of firearms may only be made when strictly unavoidable in order to protect life (Principles, para. 9)”

40. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”) has expressed its concerns over the use of such gases in law enforcement. The CPT considers that:

“... [P]epper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control. (CPT/Inf (2009) 25)”

41. In its reports pertaining to its visits carried out in a number of Member States of the Council of Europe the CPT has made the following recommendations:

“... [A] clear directive governing the use of pepper spray to be drawn up, which should include, as a minimum:

- clear instructions as to when pepper spray may be used, which should state explicitly that pepper spray should not be used in a confined area;

- the right of prisoners exposed to pepper spray to be granted immediate access to a doctor and to be offered measures of relief;

- information regarding the qualifications, training and skills of staff members authorised to use pepper spray;

- an adequate reporting and inspection mechanism with respect to the use of pepper spray...” (See, inter alia, CPT/Inf (2009) 8”.

42. In its 2005 Progress Report on Turkey {COM (2005) 561 final} the European Commission stated the following in relation to the demonstrations which are the subject matter of the present application:

“As regards the right to peaceful assembly, while public demonstrations are subject to fewer restrictions than in the past, a number of incidents have raised concerns. In

several regions brutality by the security forces has been alleged in the context of demonstrations and outdoor NGO press statements.

During a demonstration marking international Women's Day in Istanbul on 6 March 2005, police intervened with disproportionate force, using tear gas and truncheons and injuring a number of participants. The government quickly conveyed the message that such behaviour on the part of the police is unacceptable. Following the incident, the Ministry of Interior demoted and fined 6 policemen and reprimanded 3 senior officials. A judicial investigation, launched by the Istanbul Public Prosecutor, is ongoing.

..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The applicant complained under Article 3 of the Convention that she had been beaten up, sprayed with various gases, sworn at and insulted by the police officers. She also complained that such attacks by police officers were tolerated in Turkey and went unpunished. Article 3 of the Convention provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

44. The Government contested that argument.

A. Admissibility

45. The Government argued that the applicant had failed to exhaust the domestic remedies available to her, within the meaning of Article 35 § 1 of the Convention. In this connection they submitted that the applicant had not raised the substance of her complaints before the national authorities and that the criminal proceedings against the police officers were still continuing. They also argued that the applicant had failed to seek compensation at the national level pursuant to Article 125 of the Constitution.

46. The Court observes that the applicant did not only raise the substance of her complaints when she made complaints to the national authorities on a number of occasions, but also referred expressly to her rights guaranteed under the Convention (see paragraphs 16, 18 and 21 above). It also notes that the criminal proceedings against the police officers

were discontinued on 8 September 2011 (see paragraph 26 above). It therefore rejects the first element of the Government's objection.

47. As for the Government's objection based on the issue of compensation, the Court reiterates that it has already examined and rejected similar preliminary objections made in comparable cases (see, most recently, *Ali Güneş v. Turkey*, no. 9829/07, § 32, 10 April 2012; *Pekaslan and Others v. Turkey*, nos. 4572/06 and 5684/06, § 47, 20 March 2012). The Court finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned cases. It therefore rejects the Government's objection based on the issue of compensation.

48. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

49. The applicant submitted that the celebrations had been peaceful and that the intervention of the police officers while the crowds began dispersing had been unwarranted. Following the police officers' intervention the demonstrators had begun running away and had not attacked the police officers. Nevertheless, the police officers had attacked them violently and sprayed them extensively with tear gas. The applicant submitted that she could be seen in various parts of the video footage, struggling to walk away.

50. The applicant argued that the report pertaining to her medical examination after the incident, which had formed part of the evidence in the trial against the police officers, supported her allegations of ill-treatment. She had not only suffered physical injuries, but had also been affected mentally as a result of the ill-treatment.

51. The Government argued that the facts of the instant case did not fall within the scope of Article 3 of the Convention. The police officers had warned the protesters that they would be arrested if they continued to resist and those protesters who continued to resist had been arrested without excessive force having been used.

52. Referring to a number of the Court's judgments concerning the use of force by law enforcement officials, the Government submitted that the use of force by the police officers in the present case had been in compliance with domestic law and had not been excessive. Since the use of force had been proportionate to the aim of maintaining public order, there had been no violation of Article 3 of the Convention.

53. As the Istanbul prosecutor's office had initiated a criminal investigation against the police officers and filed a suit before the Istanbul

Criminal Court of First Instance, there was no liability which could be attributed to the domestic authorities concerning the procedural limb of Article 3 of the Convention.

54. The Court reiterates from the outset the absolute nature of the prohibition of torture and inhuman and degrading treatment and punishment. It is true that, according to the Court's case-law, Article 3 does not prohibit the use of force for effecting an arrest. Nevertheless, such force may be used only if it is indispensable and it must never be excessive (see *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007, and the cases cited therein).

55. Furthermore, recourse to physical force which has not been made strictly necessary by a person's own conduct is in principle an infringement of the right set forth in Article 3 of the Convention. In this connection, the Court reiterates that the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (see *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336 and the case cited therein).

56. In view of the above-mentioned judgments, the Court cannot accept the Government's submissions that the use of force by the police officers was proportionate to the aim of maintaining public order (see paragraph 52 above). It is crucial to stress that Article 3 of the Convention does not allow for a balancing exercise to be performed between the physical integrity of an individual and the aim of maintaining public order (see *Pekaslan and Others*, cited above, § 58).

57. The Court observes that to a large extent the facts of the present application have been established by the trial court which convicted a number of the defendant police officers for having used excessive force against the demonstrators (see paragraphs 24-25 above). Although the criminal proceedings against those officers subsequently became time-barred and were discontinued before the judgment convicting them became final, the Court considers that the facts as established by the trial court in its judgment can nevertheless be taken into account in its examination of the applicant's allegations.

58. To the extent that the Government's submission that the "facts of the instant case do not fall within the scope of Article 3 of the Convention" (see paragraph 51 above) is to be understood as meaning that the applicant's ill-treatment did not attain the required level of severity to fall within the ambit of this provision, the Court considers that the report pertaining to the applicant's medical examination refutes that submission. According to that report, the applicant's body bore a large number of injuries which required a healing period of five days (see paragraph 17 above). The Court also notes that the authenticity of that medical report and the veracity of its contents have not been challenged at the national level or indeed by the respondent Government. In the light of the foregoing, and having regard to the nature

and severity of the applicant's injuries, the Court considers that the applicant did suffer injuries which were sufficiently serious as to amount to ill-treatment within the meaning of Article 3 of the Convention.

59. The Court also observes that the applicant's allegation that her injuries were caused by the police officers has not been challenged by the national authorities or by the Government which, however, maintained that the use of force had been proportionate. In any event, the Court observes that, according to the report prepared by the four police inspectors, the applicant's injuries had been caused by seven police officers (see paragraph 23 above).

60. The Court has examined the video footage of the events submitted to it by the Government (see paragraphs 14-15 above), and has noted the violent methods employed by the police officers. Having examined the footage which shows police officers hitting the demonstrators who were trying to run away from the scene, had fallen to the ground and were 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, the Court does not find convincing the Government's submissions that the force used by the police officers was proportionate.

61. It is noteworthy that the Government have not referred to any evidence to show that the applicant had put up resistance to the police officers. In any event, the fact that the applicant was not arrested and no criminal proceedings were brought against her for any criminal offence – such as putting up resistance to a police officer – is another indication that she had not caused any danger to public order or to the police officers themselves, but had, like many other demonstrators, been indiscriminately attacked by the police officers.

62. The Court observes that the applicant has brought her allegations concerning being sprayed with tear gas to the attention of the domestic authorities (see paragraph 18 above). Like her allegations of having been beaten up, the applicant's allegation that she was sprayed with tear gas has also not been challenged by any domestic authority or subsequently by the Government. The Court will thus proceed to examine the circumstances in which the applicant was sprayed with tear gas. It reiterates in this connection that unwarranted use of tear gas by law enforcement officers is not compatible with the prohibition of ill-treatment within the meaning of Article 3 of the Convention (see *Ali Güneş*, cited above, § 43).

63. The Court reiterates that law-enforcement officers, such as the police or the gendarmerie, should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the

international standards which have been developed in this respect (see, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, § 59, ECHR 2004-XI).

64. It is to be noted that the respondent Government have not sought to argue that there existed at the time of the events clear and adequate instructions regulating the use of tear gas and that the police officers who attacked the applicant and other demonstrators acted in accordance with those instructions. In any event the Court notes that the directive on the use of tear gas which was summarised above (see paragraph 32) was not issued until some three years after the incident giving rise to the present application.

65. It thus appears that the only framework regulating the use of tear gas by police officers at the time of the events was the Law on the Duties and Powers of the Police which allow police officers to use tear gas (see paragraph 32 above). Nevertheless, beyond listing tear gas as one of the weapons which can be used by police officers, that Law does not set out any specific circumstances in which tear gas may be used in accordance with Turkey's international obligations.

66. It must be stressed in this connection that the Court has already had occasion to note the concerns expressed by the CPT on the use of tear gas and its recommendations in that area (see *Ali Güneş*, cited above, §§ 39-40; see also "Relevant International Materials" above). It would add in the present judgment that the lack of a clear, detailed and binding set of instructions on the use of tear gas at the time of the events giving rise to the present application contributed greatly to the excessive and unjustifiable use of tear gas towards the applicant and the other demonstrators.

67. In light of the foregoing the Court considers, as it has done in a number of judgments concerning similar cases against Turkey, that the police officers in the present case failed to show a degree of tolerance and restraint before attempting to disperse a crowd which did not present a danger to public order and was not engaging in acts of violence. It thus appears that the hasty response of the police to the peaceful gathering of the demonstrators resulted in mayhem, and the ensuing use of disproportionate force by the police officers resulted in the injuring of the applicant (see *Biçici v. Turkey*, no. 30357/05, §§ 35-36, 27 May 2010).

68. As for the domestic investigation into the applicant's complaint of ill-treatment, the Court observes that it was accepted by the trial court that the police officers hid their identity numbers to avoid recognition (see paragraph 24 above). Moreover, the Court observes that the national authorities did not investigate the broader issues relating to the planning and carrying out of the police actions, and have in effect allowed the police officers to benefit from hiding their identification numbers by discontinuing the proceedings on account of the statute of limitations, especially when the difficulty associated with identifying the police officers due to them hiding

their identification numbers was cited by the same trial court as a contributory factor to the prolongation of the criminal proceedings (see paragraph 24 above). These shortcomings entailed the result that the police officers' superiors were also not called to account.

69. It is to be observed that the prosecutor, who prepared the indictment and asked for the police officers to be prosecuted and punished, subsequently, in the course of the trial proceedings, requested that the police officers be acquitted on account of the victims' inability to identify them (see paragraphs 22-24 above). No explanation was given by that prosecutor as to how the victims would have been in a position to identify the police officers who had covered their faces with gas masks and hidden their identification numbers.

70. Although in its rejection of the prosecutor's request the trial court took into account the victims' inability to identify the police officers who allegedly used force against them, it only found guilty six police officers who had been questioned by inspectors after the incident and who had confessed to having used unnecessary and excessive force. Without giving any additional reasons the trial court acquitted the remaining forty-eight police officers for lack of evidence.

71. The Court is not called on to determine the criminal liabilities of the police officers or the appropriateness of their acquittals. However, it finds that the failure to identify and to assess the criminal liabilities of the large number of police officers – other than the six officers who confessed – who used unwarranted force against the demonstrators and whose presence in the area would have been logged in official police records, raises serious doubts on the issue of compliance with the obligation to carry out effective investigations into allegations of ill-treatment.

72. In a number of its judgments in cases against Turkey the Court has observed that the judicial authorities' failure to show diligence to expedite criminal proceedings against police officers for ill-treatment-related offences has resulted in those proceedings becoming time-barred on account of the statute of limitations (see, *inter alia*, *Mustafa Taştan v. Turkey*, no. 41824/05, §§ 50-51, 26 June 2012). As it has done in those judgments, the Court considers in the present application that the criminal-law system has proved to be far from rigorous and to be lacking in the dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant (see, most recently, *Yazıcı and Others v. Turkey (no. 2)*, no. 45046/05, § 27, 23 April 2013).

73. The Court stresses that when an agent of the State is accused of crimes that violate Article 3 of the Convention, any ensuing criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

74. It further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she should be suspended from duty during the investigation and trial, and should be dismissed if convicted (*ibid.*). There is no information in the present case that any of the police officers were suspended in the course of the six-year-long criminal proceedings against them.

75. The Court finds that, on account of the beating up of the applicant and her being sprayed with tear gas, as well as on account of the serious failures of the judicial authorities in establishing the true facts of the incident and in searching for the perpetrators, coupled with their failure to expedite the proceedings, which resulted in their becoming time-barred, there has been a violation of Article 3 of the Convention both in its substantive and procedural aspects.

II. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

76. Relying on Articles 10 and 11 of the Convention, the applicant complained that on account of the police officers' use of force, she had been unable to enjoy her right to freedom of expression and assembly.

77. The Government contested that argument.

78. The Court considers that the applicant's complaints should be examined solely from the standpoint of Article 11 of the Convention which provides as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime...”

79. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

A. Whether there was an interference with the applicant's exercise of her freedom of peaceful assembly

80. The Government argued that there had been no interference with the applicant's rights under Article 11 of the Convention. The demonstration in which the applicant had taken part was not held in a permitted location and the measures taken by the national authorities had not furthered the aim of preventing the dissemination of ideas. Those measures had been taken with a view to preventing disorder and crime.

81. The applicant maintained that the police had used unwarranted and excessive force in the demonstration and had thus prevented her from enjoying her rights under Article 11 of the Convention.

82. The Court considers that the intervention of the police officers, as well as the ill-treatment to which the applicant was subjected, constituted an interference with her rights under Article 11 of the Convention (see, *mutatis mutandis*, *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, §§ 33-35, 18 December 2007).

B. Whether the interference was justified

83. The Government stated that the demonstration at issue had been organised in breach of the Law on Meetings and Demonstration Marches (Law. No. 2911), and the interference had thus been “prescribed by law”. They also submitted that the interference had pursued the legitimate aim of, *inter alia*, prevention of disorder and crime and maintaining public order and that it had been “necessary in a democratic society”.

84. The applicant submitted that Beyazıt Square was an area closed to traffic. Thus, there had never been a question of interfering with the flow of traffic and the allegation that the police had waited for a period of 20-25 minutes before intervening and reopening the road to traffic, did not represent the truth. As could be seen from the video footage and the expert report (see, respectively, paragraphs 14 and 15 above), the police officers had attacked the crowds who had been dispersing of their own accord. The applicant submitted that the right to demonstrate was a constitutional and democratic right and the State was under an obligation to protect this right, rather than prevent its citizens from exercising it.

85. The Court reiterates that an interference will constitute a breach of Article 11 of the Convention unless it is “prescribed by law”, pursues one or more legitimate aim under paragraph 2 of that provision and is “necessary in a democratic society” for the achievement of those aims.

86. In this connection, it is noted that the interference in the present case had a legal basis, namely the Law on Meetings and Demonstration Marches (see paragraphs 29-31 above), and was thus “prescribed by law” within the meaning of Article 11 § 2 of the Convention. As regards a legitimate aim, the Government submitted that the interference pursued, among others, the legitimate aim of prevention of disorder and crime, and the Court finds no reason to differ.

87. Turning to the question of whether the interference was “necessary in a democratic society”, the Court has examined the applicant’s complaints in the light of the fundamental principles underlying its judgments relating to Article 11 of the Convention (see, in particular, *Oya Ataman v. Turkey*, no. 74552/01, §§ 35-44, ECHR 2006-XIII, and the judgments cited therein;

Bukta and Others v. Hungary, no. 25691/04, §§ 33-39, ECHR 2007-IX; *Éva Molnár v. Hungary*, no. 10346/05, §§ 23-46, 7 October 2008).

88. In the instant case, according to the Government, police officers intervened because the demonstrators had been acting in breach of the Law on Meetings and Demonstration Marches. However, having regard to the absence of any criminal proceedings against the applicant, as well as the lack of any information to show that proceedings were initiated against any other demonstrator for an alleged breach of that Law, the Court observes that the applicant and many other demonstrators did not act violently, contrary to the allegations of the Government.

89. Furthermore, the video footage (see paragraph 14 above), the report of the expert on that footage (see paragraph 15 above), statements taken from the six police officers who accepted having used unnecessary and excessive force against the demonstrators (see paragraph 20 above), and the conclusion reached by the trial court (see paragraphs 24-25 above) show that the demonstrators neither presented a danger to public order nor engaged in acts of violence requiring such a heavy-handed intervention. In this connection, the Court acknowledges that a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic (see *Disk and Kesik v. Turkey*, no. 38676/08, § 29, 27 November 2012 and the cases cited therein), but reiterates that where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Nurettin Aldemir and Others*, cited above, § 46).

90. In the light of the foregoing, the Court considers that the intervention of the police officers in the demonstration and the violence they used towards the applicant was disproportionate and not necessary for preventing disorder or crime, within the meaning of the second paragraph of Article 11 of the Convention. It also considers that the brutality of the dispersal had an inevitable dissuasive effect on people's willingness to demonstrate.

91. There has accordingly been a violation of Article 11 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

92. Finally, under Article 14 of the Convention the applicant complained that she had wanted to take part in a demonstration during which problems faced by women were going to be voiced. Nevertheless, her attempts at doing so had been obstructed by the use of force.

93. The Court considers that this complaint may be declared admissible. However, having regard to its conclusions under Articles 3 and 11 of the Convention above (see paragraphs 75 and 91) the Court does not deem it necessary to examine this complaint separately.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

94. The applicant expressed as her wish that the conclusions reached by the Court in her application would lead to the taking of necessary steps at the national level with a view to preventing similar breaches of the Convention in future.

95. The Court observes that it has found in over forty of its judgments against Turkey that the heavy-handed intervention of law enforcement officials in demonstrations or the bringing of criminal proceedings against applicants for taking part in peaceful demonstrations was in breach of Articles 3 and/or 11 of the Convention (see, *inter alia*, *Ali Güneş*, cited above, § 46; *Disk and Kesk v. Turkey*, cited above, §§ 36-37). It notes that a common feature of those cases is the authorities' failure to show a certain degree of tolerance towards peaceful gatherings and, in some cases, the precipitate use of physical force, including tear gas, by the law enforcement personnel.

96. The Court has also noted in over twenty of those judgments the failure of the Turkish investigating authorities to carry out effective investigations into allegations of ill-treatment by law enforcement personnel during demonstrations (see, most recently, *Taşarsu v. Turkey*, no. 14958/07, § 55, 18 December 2012).

97. The Court observes that 130 applications against Turkey, which concern the right to freedom of assembly and/or use of force by law enforcement officials during demonstrations, are currently pending before it.

98. In the light of the foregoing the Court considers that in order to execute the present judgment in accordance with their obligations under Article 46 of the Convention, the respondent State will have to adopt general measures to prevent further similar violations in future. To that end, and without prejudice to any other measures that Turkey might envisage and without prejudice to the directive issued by the Ministry of the Interior on 15 February 2008 (see paragraph 32 above), the Court considers that the taking of steps to ensure that law enforcement personnel act in accordance with the requirements of Articles 3 and 11 of the Convention and in compliance with the CPT's recommendations referred to above (see paragraphs 40 and 41) when resorting to use of forceful means – such as physical force or tear gas – are indispensable to eliminate the above-mentioned problems which the Court considers to be systemic. The Court also considers it necessary to ensure that the judicial authorities conduct effective investigations into allegations of ill-treatment in conformity with the obligation under Article 3 of the Convention and in such a way as to ensure the accountability of senior police officers.

99. In this connection, and in order to ensure full respect for the rights guaranteed in Articles 3 and 11 of the Convention, the Court considers it

crucial that a clearer set of rules be adopted concerning the implementation of the directive regulating the use of tear gas, and a system be in place that guarantees adequate training of law enforcement personnel and control and supervision of that personnel during demonstrations, as well as an effective *ex post facto* review of the necessity, proportionality and reasonableness of any use of force, especially against people who do not put up violent resistance.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

101. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage. In support of her claim the applicant submitted that she had suffered psychological problems and had been unable to work for a period of one week as a result of the breaches of her rights under the Convention.

102. The Government considered that the sum claimed by the applicant was unacceptable and would lead to unjust enrichment if awarded.

103. The Court awards the applicant EUR 20,000 in respect of non-pecuniary damage.

B. Costs and expenses

104. The applicant also claimed EUR 4,069 for the costs and expenses incurred before the domestic courts and before the Court. This sum included the fees of her legal representatives for which the applicant referred to the tariffs issued by the Bar Association.

105. The Government considered that the applicant’s claim for costs and expenses were not supported with adequate documentary evidence. The Government submitted that in calculating the legal fees, the tariffs set by the Turkish Bar Association may be helpful because those tariffs have a binding effect on the domestic courts.

106. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court observes that the applicant has

not submitted to the Court any documentation in support of her claim for the fees of her legal representatives – such as a bill, a fee agreement or a document showing the time spent by her legal representatives on the case – or any documentation to show that she incurred the remaining expenses such as translation, postal and other costs. The Court therefore rejects the applicant’s claim for costs and expenses.

C. Default interest

107. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention in its substantive and procedural aspects;
3. *Holds* that there has been a violation of Article 11 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 14 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 23 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President