



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

FOURTH SECTION

**CASE OF CHERNEGA AND OTHERS v. UKRAINE**

*(Application no. 74768/10)*

JUDGMENT

STRASBOURG

18 June 2019

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Chernega and Others v. Ukraine,**

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

Jon Fridrik Kjølbro, *President*,

Paulo Pinto de Albuquerque,

Faris Vehabović,

Egidijus Kūris,

Georges Ravarani,

Péter Paczolay, *judges*,

Sergiy Goncharenko, *ad hoc judge*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 26 March 2019,

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

**PROCEDURE**

1. The case originated in an application (no. 74768/10) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 17 December 2010 by eleven Ukrainian nationals (“the applicants”):

1. Mr Denis Vadimovich Chernega, born in 1982;
2. Mr Andrey Andreyevich Yevarnitskiy, born in 1983;
3. Mr Gennadiy Leonidovich Kovshyk, born in 1963;
4. Mr Boris Yevgenyevich Zakharov, born in 1977;
5. Mr Andrey Vladislavovich Yevarnitskiy, born in 1959;
6. Mr Igor Fyodorovich Yasinskiy, born in 1957;
7. Ms Lyubov Vladimirovna Melnik, born in 1959;
8. Mr Sergey Sergeyevich Melnik, born in 1983;
9. Mr Andrey Viktorovich Tsukanov, born in 1969;
10. Mr Valeriy Yuryevich Bortnik, born in 1967; and
11. Mr Sergey Anatolyevich Kirilin, born in 1962.

2. The applicants were represented by Mr M. Tarakhkalo, a lawyer practising in Kyiv. When the application was lodged and the applicants’ observations and claims for just satisfaction were submitted on 15 November 2011 and 8 October 2014, the applicants were also being represented by Mr A. Bushchenko, who at that time was a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr I. Lishchyna.

3. The third, seventh and ninth applicants complained under Article 3 of the Convention that they had been ill-treated by State agents in the course of the protests in Gorky Park in Kharkiv in which they had participated in May and June 2010. They further complained that the State had failed to protect

them from that ill-treatment and to investigate effectively their allegations in that respect.

The first and second applicants complained under Article 6 § 1 of the Convention that they had not had a fair hearing before the court of appeal that examined their administrative-offence cases, in that the court had failed to ensure their presence at its hearings.

The first to sixth applicants complained under Article 11 of the Convention that they had been arrested and prosecuted for their participation in the above-mentioned protests.

All eleven applicants complained under Article 11 of the Convention that in the course of the above-mentioned protests, they had been subjected to assaults from which the respondent State had failed to protect them.

4. On 5 April 2011 the above complaints were communicated to the Government and the remainder of the application was declared inadmissible.

5. On 27 May 2014 the parties were invited to submit further observations concerning the above complaints, as well as on the question of whether the applicants had at their disposal an effective domestic remedy in respect of their complaints under Article 11 of the Convention.

6. As Ms Ganna Yudkivska, the judge elected in respect of Ukraine, was unable to sit in the case (Rule 28 of the Rules of Court), the Vice-President of the Section decided to appoint Mr Sergiy Goncharenko to sit as an *ad hoc* judge (Rule 29 § 1(a)).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The applicants live in Kharkiv.

8. According to the applicants, in the period from 20 May to 6 July 2010 they participated in obstructive protest activities against a road-construction project, in particular tree-felling, in Gorky Park (*Парк ім. Горького*) in Kharkiv.

9. The following issues are raised in connection with those events and their aftermath:<sup>1</sup>

(i) all applicants: whether alleged verbal and physical harassment on the part of the personnel involved in the project against the applicants breached their right to freedom of peaceful assembly;

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<sup>1</sup> This summary of the key issues is provided merely to facilitate the reading of the judgment which follows. It is therefore simplified and cannot be understood as part of the Court's reasoning.

(ii) the first six applicants: whether their arrest and conviction for refusal to obey the orders to leave the site breached their freedom of peaceful assembly. In this respect there are two sub-groups: the first five applicants who were arrested together and the sixth applicant who was arrested on a different date;

(iii) the first and second applicants: whether the above-mentioned proceedings for failure to obey the police order to leave were fair in view of the applicants' absence from the appeal hearings;

(iv) the third, seventh and ninth applicants: whether those applicants were subjected to inhuman or degrading treatment by the personnel involved in the project and, if so, whether there was a failure to protect them from such treatment and investigate it effectively.

#### **A. Approval of the road-construction project in Gorky Park, public consultations and preparation for its implementation**

10. On 23 June 2004 the Kharkiv City Council (“the City Council”) adopted a document entitled General Urban Development Plan until 2026, which had been drafted by the State Academic Institute for Urban Planning “*Dipromisto*” (“the Urban Planning Institute”). A public consultation on the plan had been held in 2003.

11. On 20 September 2007 the Kharkiv Municipal Construction Department (*Департамент будівництва та шляхового господарства Харківської міської ради*) published in the *Kharkivsky Kuryer* newspaper information about its plan to build a road from Sumska Street to Novgorodska Street, namely through the park in question, and invited comments.

12. On 10 September 2008 the City Council allocated land for the road construction to the Municipal Construction Department.

13. On 14 March 2008 the Urban Planning Institute approved the plan submitted by the Kharkiv Municipal Urban Planning Department (*Департамент містобудування, архітектури та земельних відносин*) envisaging construction of the road through the park and modification of the Urban Development Plan in that respect.

14. On 25 January or February 2009 the City Council approved the overall plan for the prospective road construction, including the road through the park.

15. On 27 April 2010 a commission of municipal officials examined the trees which had to be felled in order to allow the road construction and drew up a detailed list of the trees, including their varieties, ages, diameters and state of health. On 18 May 2010 the Kharkiv Regional Environmental Protection Department approved the list.

16. On 7 May 2010 the Municipal Construction Department published a notice about the planned construction of the road in *Ekologiya Syogodni*

(Environment Today), a newspaper published by the Kharkiv Regional Environmental Inspectorate. The notice contained an indication of where the road would be sited, and stated that it would be 1,283 metres long and 16 metres wide, with a footpath and a bicycle path. The notice stated that in the process, 503 trees would be destroyed but that 75 trees and 35 bushes would be replanted along the road. Comment was solicited and the Department's postal address given for the purpose.

17. On 17 May 2010 the Municipal Construction Department sent letters to the regional environmental protection authorities explaining that the purpose of the road construction was to relieve the problem of increasing traffic in central Kharkiv by creating a road linking two radial roads and thus circumventing the city centre.

18. On 19 May 2010 the Executive Committee of the Kharkiv City Council (the municipality's executive authority, "the Executive Committee") authorised the felling of 503 trees in Gorky Park.

19. On 11 or 19 May 2010 the Construction Department entered into a contract with private company P., engaging the latter as the main contractor for the road construction project ("the Main Contractor").

20. On 19 May 2010 the Main Contractor signed an agreement with a private company to perform "preparatory works" for the road construction. On the same date the Main Contractor also subcontracted municipal company K. to do the tree-felling on the construction site. Company K. in turn engaged another municipal company as its own subcontractor (hereinafter "the subcontractors").

21. On 26 May 2010 the Regional Architecture and Construction Inspectorate (*Інспекція державного архітектурно-будівельного контролю у Харківській області*) issued to the Municipal Construction Department a permit to carry out preparatory work for the road construction.

## **B. Private security and law-enforcement planning measures**

22. On 13 or 19 May 2010 the Main Contractor signed an agreement for the provision of security guard services with the local authority-owned company Municipal Guard (*Munitsipalna okhорona; Комунальне підприємство «Муниципальна охорона»* – hereinafter "MG"). Under the agreement MG undertook to provide services consisting of guarding the above-mentioned construction site. MG held a licence authorising it to provide commercial security guard services, issued on 2 February 2010 by the Ministry of the Interior.

23. On 19 May 2010 the Executive Committee sent a letter to the chief of the Kharkiv city police. Referring to its decision of the same date authorising the felling of trees (see paragraph 18 above), it asked him to dispatch police officers to the construction site as from 20 May 2010 to ensure public order.

24. On 19 May 2010 Kharkiv city police approved an action plan for ensuring public safety during the tree-felling work. According to the plan, twenty-seven active officers were assigned for ensuring public order and safety at the site daily from 20 May and a number of officers were to be kept in reserve at the local police station in case of need. It was mentioned in the plan that the tree felling could potentially generate picketing, demonstrations and other, unexpected action by opponents of the construction project.

25. On 21 May 2010 the Main Contractor signed an agreement for the provision of security guard services with private security company P-4 (*приватне підприємство «Охоронне агентство «P-4»*). (hereinafter “PS”). The subject of the agreement was the provision of security guard services for the purpose of preventing third parties from entering the road construction site, and the services were to be provided as from 28 May 2010. PS held a licence authorising it to provide commercial security guard services, issued on 11 April 2007 by the Ministry of the Interior.

26. On 25 May 2010 the Main Contractor asked the chief of the city police to send police units to the site at 7 a.m. on 26 May 2010 to prevent third parties from infiltrating the construction site. On 29 May it asked the chief of police of the then Dzerzhinsky (presently Shevchenkivsky) District, where Gorky Park is located (hereinafter “the district”), to ensure public order on the construction site, referring to an incident the previous day in which, according to the company, unidentified people had interfered with the construction work, shouted profanities at the workers and tried to provoke a fight.

### **C. General description of the events in Gorky Park**

27. The tree felling commenced on 20 May 2010, attracting a number of individuals (including, according to them, the applicants) who protested against it. According to the applicants, there were “hundreds” of protesters. No formal notification had been sent to the municipal authorities. The protesters alleged, *inter alia*, that the felling was unjustified and not duly authorised, and demanded proof of its legality. Some protesters actively attempted to interfere with the work. In particular, they climbed the trees with the help of climbing equipment, and attached themselves to the trees to be felled or interfered with work to be carried out by machinery by placing themselves in front of it.

28. Notwithstanding the protests, the work proceeded. According to the Government’s submissions, in response to the protesters’ actions the security guards attempted to drive them away by pushing them back beyond the boundaries of the area. In some instances, clashes took place. On at least fifteen occasions ambulances were called to the site. The police officers

deployed at the site allegedly remained largely passive in the face of the clashes.

29. It appears that the bulk of the protest activity was brought to an end on 2 June 2010 and most of the protesters left the site on that day (see paragraph 76 below regarding the relevant police report). However, some of the protesters apparently continued to picket the construction site until about mid-August 2010 (see also paragraphs 64 and 65 below concerning the sixth applicant's arrest on 6 July 2010).

30. Video and photographic evidence of the events of 20 May to 2 June 2010, described in paragraphs 31 to 35, 38, 40, 42 and 45 below, was provided by the applicants. At the time of examination of the case by this Court, similar video evidence was also publicly available online (see paragraph 45 below regarding the evidence concerning the events of 28 May, for example).<sup>2</sup> Certain video material was also examined in the course of the domestic proceedings (see, for example, paragraphs 51 and 82 below) but it was not provided to the Court. The Court will rely on the evidence set out below to the extent that it does not contradict the domestic authorities' findings (see on this point paragraph 248 below) and, in particular, to the extent that it disproves the applicants' own allegations (see, for example, paragraphs 145, 154 and 212 below).

#### **D. Events of 20-25 May 2010**

31. Material for 20 May 2010 consists of a news report by the Kharkiv local television channel ATN concerning the events in Gorky Park. The report shows workers felling trees, apparently unobstructed. There is no sign of any protesters. The narrator says that the tree-felling work for the road construction is advancing rapidly. The project dated from 2007 but, at the time, was attracting opposition from academics, environmentalists and city residents. At this point the report shows footage of what appears to be a demonstration in front of a public building with flags and the slogan "Dobkin [Kharkiv mayor at the time], do not destroy the park". This is marked as archive footage. The narrator goes on to say that those protests have not prevented the city authorities from pushing ahead with the project. At what appears to be a public meeting of city authorities, the head of the Municipal Construction Department is shown explaining the need for the new road in the city's traffic scheme. In footage marked "17 September 2007" the then-mayor of Kharkiv is shown speaking at what appears to be a press conference about the sources of financing for the project.

Mr Sh., a representative of *Pechenigy*, an NGO, discusses his concern that more trees would be felled than authorised. Mr K., a representative of

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2. See, for example, <https://www.youtube.com/watch?v=chOJV43g4Vw&t=104s> and <https://www.youtube.com/watch?v=aoYl6D2x0-w> (last visited on 11 June 2018).



another NGO, *My Kharkiviany*, denies that he has been shown the permits for tree felling, in particular the Executive Committee's decision of 19 May. The acting mayor of Kharkiv is shown at a public meeting of the Executive Committee saying that the project has all the necessary permits and the NGOs have been informed. The narrator says that civil activists have complained to the police of illegal tree felling and intended to appeal to the prosecutor's office and the courts.

32. Material for 22 May shows an area that has been cleared of some trees. Protesters are seen standing by two trees and hugging them.

33. Material for 23 May shows tree-felling work with a number of individuals standing by. An individual is seen being taken away by the police. Three individuals are surrounding a tree and facing the police. One of them says "Welcome to the picnic".

34. Material for 24 May shows tree-felling work. Police and individuals who appear to be protesters surround the loggers who are holding chainsaws. One scene shows a logger starting to cut down a tree with a chainsaw, at which moment an individual in civilian clothing comes along and puts his foot on the tree trunk at the level where the logger is attempting to cut. The worker walks away.

35. Material for 25 May shows a large number of police officers standing in lines blocking protesters' access to certain areas where tree felling is ongoing or pulling individual protesters away from the trees while protesters attempt to cling to them. It appears that the protesters are pushed, pulled and escorted away from the felling area and released. Another scene shows the police pushing back some protesters who appear to be trying to get closer to the area where a tall tree is being cut down. A worker starts cutting a tree with a chainsaw, he makes a short pause, a protester comes along and hugs the tree, preventing the worker from proceeding.

#### **E. Alleged attacks on the applicants and other protesters**

36. The applicants alleged a number of "attacks" on them and other protesters by the security guards and loggers in the period from 20 May to 2 June 2010. The following alleged incidents are of particular note.

##### *1. Incident of 27 May 2010*

37. According to the applicants, on 27 May 2010 the ninth applicant was beaten by unidentified men in orange vests.

An ambulance was called and the ninth applicant was taken to hospital where he was diagnosed as having sustained injuries to the soft tissue of the head and face, and was treated as an outpatient. On the same day he lodged a complaint with the district police, alleging that he had been assaulted in the course of the Gorky Park events near the children's railway.

38. Video and photographic material for 27 May shows the following scenes: (i) a person introducing himself as the head of the Municipal Construction Department and surrounded, apparently, by some other officials, including a police officer, is arguing with protesters; (ii) a group of protesters confront a bulldozer near railway tracks. They attempt to sit down on its blade. Several individuals in civilian clothing unsuccessfully attempt to pull the protesters off, but they manage to surround the blade and block the bulldozer; (iii) a group of individuals in orange vests and a group in civilian clothing are shown confronting and pushing each other in a chaotic fashion around an excavator. Several individuals in civilian clothing on what appears to be the protesters' side are seen recording the events with cameras. Photographs reproduce what appear to be some aspects of the same scenes. Red-and-white warning tape is seen on some photographs for the first time.

## *2. Incident of 31 May 2010*

39. According to the applicants, on 31 May 2010 the seventh applicant was assaulted by men in black wearing MG badges in response to her protests about the beating of another protester. According to her, the police officers who were standing nearby observed the assault without reacting to her cries for help.

On that day she was taken to hospital by ambulance. In the hospital she was diagnosed as suffering from stress-related hypertension and soft tissue contusions in the lumbar area. She stayed in the hospital from 10 a.m. to 4 p.m. that day.

On 1 June 2010 the seventh applicant complained to the head of the district police that on 31 May she had been hit in the back by the MG staff.

40. Video and photographic material for 31 May shows another tumultuous scene. The sound of machinery is heard in the background and men in black with badges are seen confronting a large group of individuals in civilian clothing. They appear to be pulling some protesters away from an area they are attempting to protect. They then form an elbow-to-elbow line blocking access. Individuals in civilian clothing on the protesters' side are seen filming the events. There are shouts of "Police!" and "Call an ambulance!" A woman (apparently the ninth applicant) is seen lying on the ground surrounded by the crowd. An ambulance team arrives and takes her away. Photographs show other scenes, supposedly from the same day: (i) individuals, apparently protesters, are seen sitting in groups around trees marked with slogans; (ii) men in black clothing with badges confront individuals in civilian clothing, pushing them away; (iii) a man in black is facing what appears to be a group of protesters sitting on the ground and holding onto a tree.

### *3. Incident of 2 June 2010*

41. According to the applicants, on 2 June 2010 men in black with MG badges and loggers were attempting to clear the site of protesters. In the course of that action, the third applicant was closely approached by two loggers, subsequently identified as A. and K., employees of one of the subcontractors. They threatened him and a group of other protesters with working chainsaws. One of them nearly injured the third applicant.

The Government alleged, on the contrary, that it was the protesters who had attacked the workers, trying to take away the chainsaws so that the workers had had to retreat to avoid injuries. In their statements in the course of the domestic investigation, as summarised in the decision not to institute criminal proceedings of 9 August 2010 (see paragraph 81 below), A. and K. stated that on the day in question, on arriving at the designated felling area in Gorky Park, they had observed men in black and protesters. The latter had started insulting the workers and the men in black. They had had then started to push A. and K., grabbing their arms, trying to seize their chainsaws. In order to prevent those people from approaching, A. and K. had switched on the chainsaws. However, the protesters had started approaching and in order not to injure them, A. and K. had had to step back, holding the chainsaws in front of them.

42. Video material for 2 June shows a tumultuous scene involving dozens of individuals, with men in black attempting to push the protesters away from the trees and the protesters attempting to hold their ground and push back. Several police officers observe. Some distance away from this altercation, two workers are seen starting their chainsaws. At the same time an individual identified as the third applicant approaches closely and confronts one of the workers, raising and spreading his arms. Several other individuals also closely approach the worker. The worker is shown stepping back while holding the chainsaw close and waving it in horizontal semi-circles in front of him. Shortly thereafter, a group of individuals in camouflage and in black intervene and interpose themselves in a line between the workers and the protesters.

## **F. Arrest of and proceedings against certain applicants**

### *1. Arrest of certain applicants on 28 May 2010 and subsequent proceedings*

43. On 28 May 2010 the first to fifth, the eighth and the tenth applicants, among other protesters, were arrested and taken to a police station, where charges of malicious insubordination in the face of lawful demands of a police officer were drawn up. According to those reports, the above applicants had repeatedly refused to abide by police officers' instructions to leave the construction site and resisted the officers' efforts to remove them,

in particular by dragging their feet and attempting to break free and to remain on the site. It appears that the applicants were released shortly after the reports had been drawn up.

44. On various dates those reports were examined by the Kharkiv Dzerzhinsky District Court (“the District Court”). During the hearings, the applicants pleaded not guilty. They submitted, in particular, that on the morning of 28 May 2010 they had been in Gorky Park along with some other protesters to express their dissatisfaction with the tree felling (see, however, the first and second applicants’ statements, which differed from others in this respect, at paragraphs 52 and 53 below). The construction site had no boundary markers and they had believed that they were lawfully in a public open space. About 100 police officers had been standing nearby, and they had never asked the protesters to leave the area. A number of men in black with MG badges had surrounded the protesters and started pressing them into a tight circle. The police officers had then approached and, instead of responding to the protesters’ cries for help, had taken some of the protesters, including the applicants, out of the crowd one by one and escorted them to the police station, without any demands or explanations. The applicants had followed the officers without offering any resistance.

45. Video and photographic material for 28 May shows an individual in civilian clothing leading a group of several dozen men in black and other clothing with badges. They approach a group of protesters, who are within a zone marked off with warning tape standing by what appears to be a railroad crossing. The individual repeats several times “Please leave the construction site”. He receives the response: “This is a park, not a construction site”. Then the people with badges, having lined up elbow-to-elbow, start pushing, apparently attempting to push the protesters away from the crossing towards the periphery of the marked-off area. The protesters resist the pressure and some shout “Police!” and “The park is ours!” (*Парк наш!*) A large group of police officers arrives. On seeing them, the protesters start chanting “Police with the people!” (*Милиция с народом!*) By the time the police have arrived, the protesters have been moved away from the crossing and are surrounded by the people with badges, in a tight circle, but are still within the marked-off area. The police officer in charge exchanges inaudible words – he appears to be saying “Do you wish to leave [the territory]?” (*Хотите покинуть?*) – with a person who appears to be one of the surrounded protesters, and says to the other officers “To the police station!”. The exact exchange is difficult to hear as there is so much noise, in particular from the protesters, who continue to chant “Police with the people!” The police officers then start prising individuals from the group and lead them away from the marked-off area. Several are seen dragging their feet and arguing. Eventually, the area previously occupied by the protesters is cleared and an excavator moves through it.

**(a) The first and second applicants**

46. In his statement to the police the first applicant said that at 7.30 a.m. on 28 May 2010 he had been in Gorky Park with his bicycle. He had been grabbed by people with MG badges and then handed over to the police.

47. In his statement to the police the second applicant said that at 7.20 a.m. on 28 May 2010 he had been in the park near the railway crossing, where he had seen a crowd and had come closer to find out what was going on. He had been unaware that construction work was being conducted there. Individuals with MG badges had pushed him and others away from the railway crossing and encircled them. Afterwards, police officers had come and dragged him out of the circle and to the police station. He had not heard any warnings to leave the site.

48. On 28 May 2010 the cases against the first and second applicants were sent to court. The applicants requested that the hearings in their cases be postponed as they needed time to appoint a lawyer. They appointed a lawyer on the same day.

49. The second applicant's administrative-offence case file contains two versions of the report drawn up by arresting officers and addressed to their superiors concerning the circumstances of his arrest. The first version states that the second applicant was taken to the police station because he had been protesting at the construction site in Gorky Park, thus putting his life at risk and interfering with the construction work. The second version states that the applicant had been present at the construction site in Gorky Park, had refused to leave despite repeated warnings from police officers, and had struggled when police officers had attempted to escort him out of the area.

50. On 31 May 2010 the first and second applicants' lawyer asked the court to admit to the file and examine a video recording of the events of 28 May 2010.

51. On 9 June 2010 the District Court held a hearing at which it heard the police officers, who supported the charges and the account of events set out in the offence reports. It also heard the applicants and some witnesses, and examined the video recording submitted by the applicants' lawyer.

52. The first applicant stated that on the morning of 28 May he had been cycling through Gorky Park on his way to work. He had seen many people in the place where trees were being felled and had gone closer. There had been red-and-white tape but he had not realised that that meant that the area in question was a construction site. People with MG badges had tried to push him and others away from the railway crossing and had surrounded them, after which he had been taken away by police officers, who had not addressed any orders to him personally.

53. The second applicant stated that on the morning of 28 May he had gone to the park to look at the events surrounding the tree felling. There had been a lot of people there. There had been red-and-white tape but he had not understood that that meant it was a construction site and that his presence

there could be dangerous. He described the subsequent events in terms close to those used by the first applicant.

54. At the close of the hearing the court convicted the first and second applicants as charged and sentenced them to fifteen days' administrative detention. The court stated that, in view of the examined evidence, including that submitted by the defence, it was convinced that the applicants were guilty as charged. It further stated that the video recording submitted by the applicants' lawyer had not exculpated them since it had pauses and did not show certain witnesses; therefore, it could not be regarded as a complete record of the events in question. Having examined the circumstances of the case and the character of the applicants, it was also convinced that a punishment less severe than detention would not be adequate. The decision was enforced immediately and the applicants were taken into custody.

55. The District Court's judgments were served on the first and second applicants and on 10 June 2010 their lawyer appealed to the Kharkiv Regional Court of Appeal ("the Court of Appeal"). He argued that the District Court had failed to set out its analysis of the evidence which had led it to the conclusion that the applicants were guilty, and had thus failed adequately to reason its judgments. He also argued that under the Code of Administrative Offences administrative detention could only be applied in exceptional cases. The court had failed to explain the exceptional nature of the applicants' cases which would justify the severity of the punishment imposed.

56. On 14 June 2010 the District Court notified the lawyer and the applicants (through the detention centre) that their cases were being sent to the Court of Appeal.

57. According to a note in the domestic files, at 5 p.m. on 17 June 2010 a clerk from the Court of Appeal informed the applicants' lawyer that court hearings in the first and second applicants' cases would be held at 2 p.m. and 2.20 p.m. the following day respectively. The same day the lawyer studied the files.

58. On 18 June 2010 the Court of Appeal heard the appeals of the first and second applicants in their absence but in the presence of their lawyer, and upheld their conviction. The Court of Appeal found that the case-file material showed that the police officers had acted lawfully in directing the applicants to leave the construction site. The construction work was being conducted on the basis of valid permits and the appellants had failed to show otherwise. At the same time, the court concluded that the District Court had not had sufficient grounds to impose the maximum punishment on the applicants, having failed to sufficiently take into account the circumstances of the cases and the applicants' personal characteristics. Accordingly, it reduced their sentence to nine days' detention.

59. On the same day that decision became final and the first and second applicants were released.

**(b) The third and fourth applicants**

60. In the course of the hearing before the District Court the third applicant stated that he had indeed been in Gorky Park, he had not heard any orders to leave the site from the police officers but had heard it from a person in civilian clothing. He and other protesters had been surrounded by a line of individuals in civilian clothing and he had then been dragged from the circle by police officers, who had taken him to the police station.

On 14 June 2010 the District Court, having heard the police officers, who supported the charges, the third and fourth applicants and some witnesses, convicted the applicants as charged and sentenced them to fines of 136 and 170 Ukrainian hryvnias (UAH) respectively, at the time the equivalent of about 14 and 17 euros (EUR) respectively (see paragraph 97 below). The applicants appealed. In his appeal the third applicant argued, in particular, that he could not be held liable for failure to comply with the order of the police since he had had the right to be present in the park and the order to leave it had been without legal basis. The fourth applicant also argued that police officers had not issued any order to leave the site.

61. On 27 July and 11 August 2010 respectively the judgments in those applicants' cases were upheld by the Court of Appeal.

**(c) The fifth applicant**

62. On 23 June 2010 the District Court, having heard the police officers, the fifth applicant and some witnesses, convicted the fifth applicant as charged and fined him UAH 170, at the time the equivalent of about EUR 17. On 27 July 2010 the Court of Appeal quashed the conviction by a final decision and discontinued the proceedings against the fifth applicant under Article 22 of the Code of Administrative Offences (see paragraph 95 below). It found that the trial court had correctly established the facts concerning the applicant's guilt, but that its judgment lacked reasoning as to the degree of dangerousness of the applicant's conduct and his actions and as to his personal characteristics. The Court of Appeal found it established that the applicant's registered residence was in Kharkiv, that he was employed and that his actions had not caused prejudice to the public interest or to individuals. Therefore, the delinquent element in his conduct had been so insignificant that an oral reprimand would have sufficed, under Article 22 of the Code of Administrative Offences (see paragraph 95 below). The court proceeded to issue the reprimand.

**(d) The eighth and tenth applicants**

63. On 8 June and 12 July 2010 the District Court discontinued proceedings against the eight and tenth applicants. In its judgment concerning the eighth applicant the District Court noted, in particular, that his explanations were consistent with a private video recording of the events

submitted by him. There were inconsistencies between various police reports in the case file and a lack of evidence that the officers had duly instructed him to leave. Concerning the tenth applicant, the court likewise pointed to inconsistencies between various police reports in the case file and the lack of evidence that the officers had duly instructed him to leave.

*2. Arrest of the sixth applicant on 6 July 2010 and subsequent proceedings against him*

64. On 6 July 2010 the sixth applicant was arrested and charged with malicious insubordination in the face of orders given by police officers to leave the construction site.

65. On 7 July 2010 the sixth applicant's case was heard by the District Court. At the hearing the police officers supported the charges. The sixth applicant acknowledged that he had been sitting on the ground in the construction area, protesting against the tree felling, which he considered unlawful. He had refused to comply with the police officers' requests to leave the site, to the point where they had had to drag him away by the arms with his legs dragging on the ground. He further admitted that he had told the police officers that he would return to the site as soon as he could. Witnesses gave testimony to the same effect, with one adding that the applicant had also tried to break away from the police.

66. On the same day the District Court convicted the sixth applicant as charged and sentenced him to ten days' administrative detention. The court set out the evidence describing the applicant's conduct. In justifying the sanction, the court stated that it had taken into account the nature of the offence and its specific circumstances, the applicant's personal characteristics, the fact that he had no employment, the absence of aggravating or attenuating circumstances, and the need to re-educate the offender and to prevent new offences. It considered that the use of sanctions less severe than imprisonment would be insufficient and that administrative detention needed to be imposed, but not for the maximum duration provided for in the law. The applicant started to serve his sentence immediately.

67. The applicant's lawyer lodged an appeal, arguing that the District Court had failed to set out its analysis of the evidence which had led it to the conclusion that the applicant was guilty, and had thus failed adequately to reason its judgment. He also argued that under the Code of Administrative Offences administrative detention could only be applied in exceptional cases (see paragraph 96 below). The District Court had failed to explain the exceptional nature of the applicant's case which would justify the severity of the punishment imposed. He requested that the District Court's judgment be quashed and the proceedings in the case discontinued.

68. On 15 September 2010, after a hearing at which it heard the sixth applicant and his lawyer and having examined, at the request of the defence, an additional witness, the Court of Appeal upheld the judgment. It



recounted the evidence in the file and concluded that the evidence, notably the applicant's own explanations in court, fully supported the finding of the applicant's guilt. Contrary to the applicant's arguments, there was no indication of illegality in the police order to leave the site, in particular because the applicant had not submitted any evidence of any challenge having been lodged concerning the police actions or the Executive Committee's decision of 19 May 2010 authorising the tree felling. Concerning the sentence, the Court of Appeal was in no position to reduce it, since neither the applicant nor his lawyer had asked the court to modify the District Court's judgment in that respect, in the light of any particular circumstances of the case or of the applicant's personal characteristics, but had rather insisted only on the applicant's innocence.

### **G. Events subsequent to the Gorky Park protests**

69. On 2 June 2010 the ninth applicant informed the chief of the city police that, in protest against the destruction of trees in Gorky Park, the Kharkiv regional council would be picketed daily from 8 a.m. to 4 p.m., and until further notice, by the *Zelenyi Front* association (*об'єднання Зелений фронт*), which the ninth applicant represented.

70. On 14 June 2010 the Regional Environmental Protection Inspectorate informed the Municipal Construction Department that it had failed to obtain an environmental impact assessment for the road construction project from the Inspectorate.

71. On 17 June 2010 the Executive Committee ordered that 1,006 trees be planted in city parks to compensate for the trees felled in Gorky Park.

72. On 2 July 2010 the Regional Environmental Protection Department issued a positive environmental impact assessment (*висновок державної екологічної експертизи*) of the road construction project.

### **H. Domestic proceedings concerning the events in the park**

#### *1. Investigation by the prosecutor's office*

73. On various dates the protesters, including some of the applicants, complained to the law-enforcement authorities that they had been assaulted by unidentified loggers and men in black clothing with MG badges, and that the police officers stationed nearby had done nothing to protect them. Those complaints were investigated by the city prosecutor's office.

74. On or around 3 June 2010 two television companies sent to the prosecutor's office, at its request, their video recordings of the events in the park.

75. On 3 June 2010 the assistant prosecutor of Kharkiv questioned Mr Kl., director of MG, and the heads of four departments of that company

about the presence and acts of the guards in the area. They stated, in particular, that there had been nobody from the company present in the area except them. They also stated that there had been a lot of men in black with MG badges, who, nevertheless, were not in fact the company's employees. On 28 May 2010, after having being rebuked by Mr Kl., those individuals had taken the badges off.

76. On 3 June 2010 the chief of the Kharkiv police sent to the city prosecutor a report summarising the law-enforcement measures taken in the course of the protests. The report stated, in particular, that Sh. and K., the heads of the NGOs *Pechenigy* and *My Kharkiviany* (see paragraph 31 above), had taken part in the protests. The police chief reported that the police had invited the protesters to submit an official notification of their protest action, as required by Article 39 of the Constitution, but they had responded that they were not organising any assembly or action but were rather present in the park as ordinary citizens. Police officers had been deployed in full force, as envisaged by the law-enforcement plan (see paragraph 24 above), that is twenty-seven officers on site daily from 20 May to 2 June 2010, except for 23, 29 and 30 May 2010 when two officers had been deployed. The construction site had been marked off with tape on 28 May 2010. The "picketing" of the construction site had been discontinued at 9.45 a.m. on 2 June.

77. The prosecutor's office questioned a number of police officers and employees of subcontractor companies, and journalists. It also examined video evidence of the events provided by the protesters and solicited information from the local hospital concerning reports of injuries sustained in the course of the events in the park.

78. On 17 and 18 June the prosecutor's office questioned twenty PS employees (see paragraph 25 above). The latter stated that they had not assaulted the protesters, had not deployed any special gear but had indeed pushed the protesters away from the construction site.

79. On 24 June 2010 the Kharkiv city prosecutor's office decided not to institute any criminal proceedings.

80. On 4 August 2010 the Kharkiv regional prosecutor's office overruled the decision of 24 June 2010 and ordered a further inquiry.

## *2. Decision not to institute criminal proceedings of 9 August 2010 and subsequent appeals*

81. Following an additional round of pre-investigation enquiries, on 9 August 2010 the prosecutor's office decided not to institute criminal proceedings against loggers A. and K., managers of the Main Contractor and subcontractor companies, MG, the City Council or its executive authorities, including the Municipal Construction Department, for lack of constituent elements of a crime in their actions.

The decision stated that it was the result of an investigation conducted in response to a large number of complaints in connection with the Gorky Park events, including from several members of parliament, a member of the regional council, the *Pechenigy* NGO (see paragraph 76 above), a number of journalists and a number of protesters, including the applicants' then representative, Mr Bushchenko (see paragraph 2 above), and the seventh and ninth applicants. It also referred to the rulings of the District Court of 26 May and 14 July 2010 in a case brought by a certain Ms Y. against the Executive Committee concerning the construction project as being at the origin of the investigation.

82. The decision stated that in the course of the investigation more than a hundred people, including protesters, police officers, employees of the Main Contractor and subcontractors, and MG staff had been questioned. The prosecutor's office had also examined photographs and video recordings of the events, including those provided by news outlets, complainants and NGOs.

83. As to the events of 28 May 2010, the prosecutor's office described the facts as follows. At around 7 a.m. the Main Contractor's staff had marked the boundaries of the construction site with tape and MG staff had taken up the duties of guarding it. The MG staff had then asked any individuals who were at the time within the perimeter to leave the area in order to avoid the risk of trauma from the construction equipment. When they refused, the Main Contractor's management had appealed to the police for help in removing those individuals from the construction site. Some protesters had then been arrested as they had refused to leave.

84. PS staff had provided guard services on the construction site from 28 May to 2 June 2010. When questioned, the private security guards had stated that they had avoided any conflict with the protesters and had not assaulted them, despite provocative behaviour on the part of the latter.

85. The prosecutor's office concluded that no criminal-law provision had been breached in the course of issuance of approvals for the project, tree removal, the construction work or interactions with the protesters. Loggers A. and K. had not committed any offence for the reasons set out in the Government's version of the events of 2 June 2010 (see paragraph 41 above).

86. According to the applicants, notwithstanding their persistent efforts and requests submitted on 17 February, 5 July, 9 August and 12 September 2011, they had been unable to obtain a copy of the decision of 9 August 2010.

They submitted a copy of the letter from the city prosecutor's office of 19 August 2011, which stated that in response to Mr Bushchenko's request of 5 July 2011 a copy of the decision of 9 August 2010 had been sent to him on 26 July 2011. On 4 October 2011 Mr Bushchenko wrote to the prosecutor's office again, stating that in fact a copy of the decision had not

been enclosed with the authorities' previous letters. On 10 October 2011 the city prosecutor's office sent Mr Bushchenko another copy. The applicants allege that he finally received that copy, for the first time, on 19 October 2011.

On 25 October 2011 the applicants appealed against the decision of 9 August 2010. According to them, on 25 November 2011 the Kharkiv Kyivsky District Court dismissed their appeal. On 2 April 2012 the applicants appealed against that decision. They have not informed the Court of any further developments.

### *3. Police investigation concerning the seventh and ninth applicants*

87. On 13 August 2010 the police refused to institute criminal proceedings in connection with the seventh applicant's complaint of ill-treatment. On 20 March 2012 the Kharkiv Dzerzhinsky District Court quashed that decision on the grounds that the requirements of the Code of Criminal Procedure concerning pre-investigation enquiries (see paragraph 101 below) had not been complied with and the applicant's allegations had not been verified. The applicants submitted a copy of a letter from their lawyer to the district police dated 3 October 2014, stating that after the court's decision of 20 March 2012, the seventh applicant had not been informed about any further progress in the proceedings.

88. According to the Government, the prosecutor's office investigated possible official involvement in the alleged attacks on the seventh and ninth applicants and, having found no such involvement, forwarded the material to the police to investigate the possibility that bodily injuries may have been inflicted by private parties. On 20 August 2010 the police decided not to institute criminal proceedings in that respect either.

In their response of 15 November 2011 to the Government's observations, the applicants alleged that they had learned about the decision of 20 August 2010 only from those observations and had never been provided with a copy. They submitted copies of letters addressed to the city prosecutor's office and to the city and district police chiefs in which they had asked to be provided with a copy of the decision of 20 August 2010 and enclosed postal receipts showing that those letters had been delivered on 9 and 10 November 2010.

In their comments of 1 March 2012 concerning the applicants' observations of 15 November 2011, the Government commented on a number of factual matters raised by the applicants (notably the public consultation concerning the project, see paragraph 200 below) but not on the applicants' alleged inability to obtain a copy of the decision of 20 August 2010.

89. On 31 July 2014, in response to the Court's request for further observations (see paragraph 5 above), the Government informed the Court that material concerning enquiries into the seventh and the ninth's

applicants' allegations of ill-treatment had been destroyed due to the expiry of the time-limit for their preservation. They provided a statement documenting the destruction dated 9 September 2013.

*4. Administrative court proceedings concerning the police's failure to protect the applicants*

90. In November 2010 a number of protesters, including all the applicants, lodged an action with the Kharkiv Circuit Administrative Court, complaining that the police had failed to protect them against assaults during their peaceful protest against the tree felling, in particular on 28 and 31 May and 1 and 2 June 2010.

According to the Government, in the course of the trial in this case the seventh applicant was examined by a representative of the police. She stated that she could not say with certitude who had hit her on 31 May 2010 and only supposed that it had been a person in black.

91. On 24 May 2011 the first-instance court rejected the applicants' claim. On 9 December 2011 the Kharkiv Administrative Court of Appeal upheld that decision. On 26 June 2014 the High Administrative Court allowed an appeal lodged by the applicants and remitted the case to the first-instance court for re-examination on the grounds that the lower courts' examination of the facts had been incomplete. They had failed, in particular, to establish whether attacks on the protesters had really taken place, the list of the officers present, and whether the protesters had appealed for help.

92. As of the date of the last communication from the applicants on this point, 8 October 2014, the claim was pending before the first-instance court.

## II. RELEVANT DOMESTIC LAW

### A. Constitution of 1996

93. Articles 39 and 40 of the Constitution of Ukraine read as follows:

#### **Article 39**

“Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.

Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons.”

#### **Article 40**

“Everyone has the right to file individual or collective petitions, or to personally appeal to bodies of state power, bodies of local self-government, and to the officials

and officers of these bodies, that are obliged to consider the petitions and to provide a substantiated reply within the term established by law.”

94. In its decision of 19 April 2001 the Constitutional Court provided an official interpretation of Article 39 of the Constitution. The interpretation was provided in response of the application for abstract interpretation lodged by the Ministry of the Interior. The court stated, *inter alia*:

“2. ... Deadlines for advance notification of meetings, rallies, marches and demonstrations must be reasonable ... During this [advance notification] period the authorities have to take preparatory actions, in particular to ensure that there are no obstacles to the meeting, rally, march or demonstration, maintenance of public order, rights and freedoms of others ...

The period of advance notification must also be sufficient for executive or local government authorities to determine whether holding such events complies with the law and, if necessary, to apply to a court under paragraph 2 of Article 39 of the Constitution to resolve any matters in dispute.”

## **B. Code of Administrative Offences of 1984 (as amended)**

95. Article 22 of the Code provides that in the case of an offence of minor importance (*малозначності правопорушення*) the offender could be relieved of liability with a reprimand.

96. Article 32 § 1 of the Code provides that administrative detention for up to fifteen days may be applied by courts only in exceptional cases for certain administrative offences. Article 33 of the Code requires the sentencing authority, in determining a sentence, to take into account the nature of the offence in question, the degree of culpability of the person concerned and his or her financial situation, and any attenuating and aggravating circumstances.

97. Articles 185 and 185-1 of the Code read as follows:

### **Article 185. Malicious disobedience in the face of a lawful order or demand by a police officer, a member of a public body for the protection of public order or the State border, or a military officer**

“Malicious disobedience (*злісна непокіра*) in the face of a lawful order or demand by a police officer who is carrying out his official duties ...

shall be punished by a fine of [UAH 136 to 255], or by withholding 20% of [the person’s] earnings; or, in the event that in the particular circumstances of the case and with regard to the offender’s character these measures are found to be insufficient, by administrative detention of up to fifteen days.”

### **Article 185-1. Breach of the procedure for organising and holding meetings, rallies, street marches and demonstrations**

“A breach of the procedure for organising and holding meetings, rallies, street marches and demonstrations shall be punishable by a reprimand or by a fine ...

The same actions committed within a year of the application of administrative penalties or by the organiser of the meeting, rally, street procession or demonstration shall be punishable by a fine ... or by correctional labour of one to two months, with a deduction of 20% of earnings; or by administrative detention of up to fifteen days.”

98. Under Article 294 of the Code, the parties to the administrative-offence proceedings have the right to appeal against court judgments in their cases within ten days of their delivery. Such an appeal is to be submitted through the court of first instance. That court must, within three days, refer the appeal or appeals together with the case file to a court of appeal, which, in its turn, has twenty days to examine the case.

The court of appeal must notify the parties about the hearing not later than three days before the hearing. The failure of parties to appear does not prevent the court from examining the case, except where a good reason is shown for their failure to appear (*є поважні причини неявки*) or the court has no information that the party failing to appear has been duly notified.

The appellate court’s examination is limited to matters raised in the appeal, unless the court discovers another breach of substantive or procedural law. The court has the power to examine new evidence if it finds that a good reason has been shown for non-production of such evidence before the first-instance court or that the first-instance court rejected such evidence without sufficient grounds. The court has powers to reject the appeal, to quash the first-instance court’s judgment and discontinue the proceedings or quash the judgment and adopt a new judgment, or to amend the judgment. The court of appeal cannot impose a sentence more severe than that imposed at first instance. The appellate courts’ decision is final and not amenable to any further appeal.

99. Article 297-1 of the Code provides that a judgment in an administrative-offence case can be reviewed in the event of a finding by an international judicial body, whose jurisdiction Ukraine has accepted, of a violation by Ukraine of its international obligations during the judicial examination of the case.

### **C. Code of Administrative Justice of 2005 (as amended)**

100. The relevant part of Article 182 of the Code provides:

#### **Article 182. Features of proceedings relating to administrative actions lodged by the authorities with a view to restricting the freedom of peaceful assembly**

“1. Immediately upon receipt of a notification concerning the organisation of meetings, rallies, processions, demonstrations, etc., executive authorities [and] bodies of local self-government shall have the right to apply to a circuit administrative court of the respective locality with an action seeking to prohibit these events or otherwise restrict the right to freedom of peaceful assembly (concerning the place or time of their organisation, etc.).

2. An action received on the date on which the aforementioned ... events take place or thereafter shall be left without examination.”

#### **D. Code of Criminal Procedure of 1960 (as amended)**

101. At the material time the Code of Criminal Procedure of 1960 provided for a procedure known as “pre-investigation enquiries”. That procedure resulted in a decision either not to institute criminal proceedings or to institute them. In case of the latter, a fully-fledged criminal investigation was to be conducted. The provisions concerning the pre-investigation enquiries procedure and the remedies available to alleged victims in that context were set out in Articles 97, 99-1 and 236-1 of the 1960 Code. They read as follows:

##### **Article 97. The obligation to accept allegations or notifications of crimes and the procedure for their examination**

“A prosecutor, investigator, body of inquiry or judge shall accept allegations or notifications of crimes [which have been] committed or [are] being prepared, including in cases that are outside their jurisdiction.

Upon receipt of an allegation or notification of a crime, the prosecutor, investigator, body of inquiry or judge shall adopt, within three days, one of the following decisions:

- (1) to institute criminal proceedings;
- (2) to refuse to institute criminal proceedings;
- (3) to remit the application or communication for examination in accordance with [the rules of] jurisdiction.

Simultaneously, all possible measures shall be applied to prevent the further commission of the crime or to put an end to it ...

Before instituting criminal proceedings, the prosecutor, investigator or body of inquiry shall conduct an inquiry, if it is necessary to verify [information contained in] an allegation or notification of a crime. [Such inquiry] shall be completed within ten days by means of collecting explanations from individual citizens or officials or by means of obtaining necessary documents.

[Information contained in] an allegation or notification of a crime may be verified before instituting criminal proceedings by means of detection and search activities ...”

##### **Article 99. Refusal to institute criminal proceedings**

“Where there are no grounds to institute criminal proceedings, a prosecutor, investigator, body of inquiry or judge shall issue a decision refusing to institute criminal proceedings. They shall inform the individuals and organisations with an interest in the matter of such a decision.

...”

##### **Article 99-1. Appeal against a decision refusing to institute criminal proceedings**

“A decision by an investigator or body of inquiry refusing to institute criminal proceedings may be appealed against to the relevant prosecutor. If that decision was



taken by a prosecutor, it may be appealed against to a higher prosecutor. An appeal shall be lodged by the person whose interests are concerned or by his/her representative within seven days of the date of receipt of a copy of the decision.

If the prosecutor refuses to annul the decision ... the person whose interests are concerned or his/her representative may lodge an appeal against it with a court under the procedure prescribed by Article 236-1 of this Code.

...”

**Article 236-1. Appeal to a court against a decision refusing to institute criminal proceedings**

“An appeal against a decision by a body of inquiry, investigator or prosecutor ... refusing to institute criminal proceedings shall be lodged with [the relevant] court by the person whose interests are concerned or his/her representative within seven days of notification of the decision by the prosecutor ...”

102. Other relevant provisions concerning pre-investigation enquiries can be found in the judgment in the case of *Kaverzin v. Ukraine* (no. 23893/03, § 45, 15 May 2012).

103. The Code of Criminal Procedure of 1960 was in force at the material time and was repealed with effect from 19 November 2012.

**E. Citizens’ Petitions Act of 1996 (as amended)**

104. The Act contains the rules concerning petitions, guarantees for those lodging them and regulates the procedure for their examination. The Act provides for the right of citizens and other persons lawfully present in Ukraine to address petitions to State and municipal bodies on matters of concern, including alleged breaches of the law (notably sections 1 and 3). It imposes on those bodies an obligation to examine them in an impartial manner, respond and take remedial action if warranted (section 19). The time-limit for response is normally one month but it can be shortened where the citizen so requests and the circumstances so warrant (section 20).

**F. Rules concerning security guards**

105. Section 9 of the Licensing Act of 2000, in force at the relevant time, required a licence for “services associated with guarding State-owned and other property” and for personal protection services (*надання послуг, пов’язаних з охороною державної та іншої власності, надання послуг з охорони громадян*). Section 6 of the Act required the authorities issuing licences for respective activities to enact the rules regulating the activities in the relevant field. In the field of security guard services, such rules were enacted by Order no. 505 of the Ministry of the Interior of 1 December 2009 and entitled *Licensing Rules for Business Operations Involving Security Services to Guard Property and Individuals (Ліцензійні умови*

*провадження господарської діяльності з надання послуг з охорони власності та громадян*) (“the Licensing Rules”). They were in force at the relevant time.

106. Rule 1.3 defined “guarded entity” (*об’єкт охорони*) as either individuals or property belonging to individuals and public or private legal entities.

107. The Licensing Rules provided, in particular:

“1.4. Security measures performed by security guards:

1.4.1. control over persons’ access to the guarded entity, their movement within its territory and leaving it;

...

1.4.2. physical security measures – actions directly aimed at detecting, preventing and stopping ... intrusions into the ... guarded entity unauthorised by the owner ... and the presence of persons unauthorised [by the owner] within the guarded entity;

...

1.4.3. rapid response measures, that is urgent actions, starting from those minimally required (*оперативне реагування - негайні, починаючи з мінімально необхідних, дій*), in connection with any unlawful acts against the guarded entities or events and circumstances causing (or capable of causing) pecuniary damage to the owners or posing an obvious threat to the personal safety of individuals, the personnel of the guarded entity, or other individuals and guards, including measures to locate the specific place where an offence might be committed or the occurrence of hazardous circumstances, to identify and bring them under control and, if necessary, to neutralise them, and also to prevent unlawful acts or eliminate other consequences harmful to ... individuals.

...”

108. Rule 2.1.2 of the Licensing Rules required licensed entities to ensure that their guards wore insignia showing that they belonged to a specific licensed entity. Such insignia were to be approved by the licensed entity and notified to the licensing authority (the Ministry of the Interior).

109. Rule 2.2.3 of the Licensing Rules required the licensed entity to notify the police without delay of any attempted unlawful actions against the guarded entity (*негайно сповіщати орган внутрішніх справ за місцезнаходженням об’єкта охорони про вчинення протиправних посягань на об’єкт, що охороняється*), discovery of theft or any other offences, and to take steps to restrict the access of third parties to the scene of the event until the arrival of the police.

110. Section 12(1)(3) of the Guarding Activity Act of 2012 authorises security guards to prevent people from accessing a guarded entity or to apprehend (*затримувати*) those who have entered it or are trying to leave it in breach of established rules. In the latter case, guards are required to notify the police without delay.

### **G. Rules governing tree removal and construction site safety**

111. At the relevant time, section 28(3) of the Populated Localities Development Act of 2005 (*Закон України «Про благоустрій населених пунктів»*) provided that the removal of trees had to be carried out in accordance with the procedure set forth by the Cabinet of Ministers (Cabinet of Ministers Resolution no. 1045 of 1 August 2006). The procedure stipulated that trees could be removed, in particular, within the framework of implementation of urban development plans but that their removal required a decision by the executive authority of the municipality and an order. Before any decision could be issued, the trees had to be examined by a commission appointed by the municipal authorities.

112. At the material time safety rules for construction were contained in a document entitled Construction Norms and Rules (*СНІП*) III-4-80 Safety Rules for Construction, enacted by Order no. 82 of the USSR State Committee on Construction (*Госстрой СССР*) of 9 June 1980. This continued to be applicable in Ukraine, on the basis of Resolution of the Ukrainian Parliament of 12 September 1991 on temporary application of legislative acts of the Soviet Union.

Rule 1.16 prohibited access of unauthorised persons to construction sites (*допуск сторонних лиц ... на территорию строительной площадки... запрещается*).

## **III. RELEVANT INTERNATIONAL MATERIAL**

### **A. Guidelines on Freedom of Peaceful Assembly**

113. The Guidelines on Freedom of Peaceful Assembly developed by the Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe and by the Venice Commission, and adopted by the Venice Commission at its 83rd Plenary Session (4 June 2010) provide, in so far as relevant:

#### **Section A – guidelines on freedom of peaceful assembly**

##### **1. Freedom of Peaceful Assembly**

“ ...

1.2 Definition of assembly. For the purposes of the Guidelines, an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose. This definition recognizes that, although particular forms of assembly may raise specific regulatory issues, all types of peaceful assembly – both static and moving assemblies, as well as those that take place on publicly or privately owned premises or in enclosed structures – deserve protection.

...”

## 5. Implementing Freedom of Peaceful Assembly Legislation

### “5.3 A human rights approach to policing assemblies

The policing of assemblies must be guided by the human rights principles of legality, necessity, proportionality and non-discrimination and must adhere to applicable human rights standards. In particular, the State has a positive duty to take reasonable and appropriate measures to enable peaceful assemblies to take place without participants fearing physical violence. Law enforcement officials must also protect participants of a peaceful assembly from any person or group (including agents provocateurs and counter-demonstrators) that attempts to disrupt or inhibit it in any way.”

### **Section B – Explanatory notes Principal definitions and categories of assembly**

“19. These Guidelines apply to assemblies held in public places that everyone has an equal right to use (including, but not limited to, public parks, squares, streets, roads, avenues, sidewalks, pavements and footpaths). In particular, the state should always seek to facilitate public assemblies at the organizers’ preferred location, where this is a public place that is ordinarily accessible to the public...

...”

### **‘Peaceful’ and ‘non-peaceful’ assemblies**

“25. ‘Peaceful’ assemblies: Only ‘peaceful’ assembly is protected by the right to freedom of assembly...

26. The term ‘peaceful’ should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties. Thus, by way of example, assemblies involving purely passive resistance should be characterized as ‘peaceful’ ...

...

28. If this fundamental criterion of ‘peacefulness’ is met, it triggers the positive obligations entailed by the right to freedom of peaceful assembly on the part of the State authorities ... It should be noted that assemblies that survive this initial test (thus, prima facie, deserving protection) may still legitimately be restricted on public order or other legitimate grounds ...

...”

### **Policing Public Assemblies**

“ ...

149. Law enforcement agencies should be proactive in engaging with assembly organizers: [o]fficers should seek to send clear messages that inform crowd expectations and reduce the potential for conflict escalation ... Furthermore, there should be a nominated point of contact within the law enforcement agency whom protesters can contact before or during an assembly. These contact details should be widely advertised ...

150. The policing operation should be characterized by a policy of ‘no surprises’: [I]aw enforcement officers should allow time for people in a crowd to respond as

individuals to the situation they face, including any warnings or directions given to them ...

...

168. If dispersal is deemed necessary, the assembly organiser and participants should be clearly and audibly informed prior to any intervention by law enforcement personnel. Participants should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further.

...”

### **Use of force**

“ ...

179. Law-enforcement officials should be liable for any failure to fulfil their positive obligations to protect and facilitate the right to freedom of peaceful assembly. Moreover, liability should also extend to private agencies or individuals acting on behalf of the state...

...

182. If the force used is not authorized by law or more force was used than necessary in the circumstances, law-enforcement officers should face civil and/or criminal liability, as well as disciplinary action. The relevant law-enforcement personnel should also be held liable for failing to intervene where such intervention may have prevented other officers from using excessive force.

...”

## **B. United Nations Special Rapporteurs**

114. In their joint report on the proper management of assemblies, issued in 2016 (A/HRC/31/66), the United Nations Special Rapporteurs on the right to freedom of peaceful assembly and of association and on extrajudicial, summary or arbitrary executions stated:

“38. The proper facilitation of assemblies also benefits from effective communication and collaboration among all relevant parties ... Open dialogue between authorities (including the authority responsible for receiving notices and law enforcement officials) and, where identifiable, assembly organizers before, during and after an assembly enables a protective and facilitative approach to be taken, helping to defuse tension and prevent escalation. Law enforcement agencies and officials should take all reasonable steps to communicate with assembly organizers and/or participants regarding the policing operation and any safety or security measures. Communication is not limited to verbal communication and law enforcement officials must be trained on the possible impact of any indirect communication that may be perceived by organizers and participants as intimidation, for example, the presence or use of certain equipment and the body language of officials.

...

63. Only governmental authorities or high-ranking officers with sufficient and accurate information of the situation unfolding on the ground should have the authority to order dispersal. If dispersal is deemed necessary, the assembly and

participants should be clearly and audibly informed, and should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further.

...

65. A clear and transparent command structure must be established to minimize the risk of violence or the use of force, and to ensure responsibility for unlawful acts or omissions by officers. Proper record keeping of decisions made by command officers at all levels is also required. Law enforcement officials must be clearly and individually identifiable, for example by displaying a nameplate or number ...

...

85. Business enterprises also play an increasingly prominent role in the policing of assemblies. For example, civilian private security services may perform a policing-type role while protecting private property or assets during an assembly, and private companies often play a role in surveillance ... Business entities should carry out human rights due diligence, and where a potential impact on assembly and related rights is identified mitigate these risks. Civilian private security services should not perform policing-type functions in relation to assemblies. However, where this occurs, such services must respect and protect human rights and should comply with the highest voluntary standards of conduct.”

115. In his report on the right to life and the use of force by private security providers in law-enforcement contexts, issued in 2016 (A/HRC/32/39), the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions stated:

“76. As noted above, where States choose to devolve some of their responsibilities for the provision of security to private entities, it is clear that those actions are attributable to the State, and that at least the same restrictions apply to private security providers operating in such a context as would apply to State law enforcement personnel. In the sections that follow the Special Rapporteur turns to situations in which the standards are perhaps less authoritative, but, he argues, must remain normatively identical, if practically distinct.

...

84. The responsibility to plan an appropriate operational response to an emerging situation applies as clearly to private security providers as it does to State law enforcement. However, in the case of private security providers there exists an additional potential precautionary step, namely to call upon the State’s law enforcement personnel. In circumstances where private security providers resort to force having turned down an opportunity to defer to the State’s police, their full compliance with the requirements of precaution would be called into question. In circumstances where help from authorities was forthcoming, private security providers can no longer justify the use of force under the principle of self-defence or defence of others.

...

103. There are several contexts in the corporate sector where the overlap between private and public can be problematic, such as mass labour protests or disputes, or other mass gatherings taking place on or around private property, where the corporation involved may choose to employ a private security provider for security provision. As noted above in the context of assemblies, or other activities that take

place on the border of public and private, either physically or conceptually, it is important to bear in mind that private security providers have a very different mandate and set of priorities to the police. As such, the police should be called in whenever uncertainties exist with regard to private and public interests, especially concerning the use of force in such contexts.

...

120. Where States directly contract security services from a private security provider, the standards and level of the State's responsibility for the actions of its agents must remain unaffected. Where private corporations or individuals contract a private security provider, or where corporations provide their own security, the standards remain effectively the same, a fact that should be clarified by national legislation. States must impose on private security providers and their personnel a duty of precaution concerning recruitment, training, equipment, planning, command and control, and reporting. Moreover, in circumstances they assess as likely to require the use of force, private security personnel have a responsibility to inform State law enforcement, and to follow any instructions they are given."

### **C. International Code of Conduct for Private Security Service Providers**

116. The International Code of Conduct for Private Security Service Providers of 9 November 2010 was drawn up as part of a multi-stakeholder initiative in the international private security sector, and has been signed by a number of security companies. It sets out, in particular, the following commitment:

"43. Signatory Companies, to the extent consistent with reasonable security requirements and the safety of civilians, their Personnel and Clients, will:

a) require all Personnel to be individually identifiable whenever they are carrying out activities in discharge of their contractual responsibilities ..."

### **D. Amnesty International's intervention**

117. On 17 June 2010 Amnesty International's Director for Europe and Central Asia wrote to the Prosecutor General of Ukraine describing the background to the events in Gorky Park and calling on the Prosecutor General to take a number of steps for the protection of the Gorky Park protesters. The letter contained the following passages:

"According to information received by Amnesty International, at about 6am on 28 May a large number of 'Municipal Guard' security guards started to break up the human chain which had been formed by the demonstrators. They were joined after a few minutes by police officers, who then detained 10-12 people and took them to the Dzehinsky district police station ... Andrei Yevamitsky and Denis Chernega were charged and subsequently sentenced to 15 days' detention on 9 June ... Witnesses state that at no point during these events did the police officers make any requests or demands to the demonstrators that might have resulted in these charges.

...

From the information available to Amnesty International it appears that Andrei Yevarnitsky and Denis Chernega have been sentenced to a punishment which amounts to imprisonment for the peaceful exercise of their rights to freedom of assembly and expression, and for this reason the organization considers them to be prisoners of conscience.”

## THE LAW

### I. STATUS OF PERSONNEL WHO TOOK PART IN THE GORKY PARK EVENTS

#### A. The parties’ submissions

##### 1. *The Government*

118. The Government submitted that the respondent Government could not be held responsible for the actions of the loggers. In particular, the workers in question were employees of a subcontractor, a legal entity. The company could not be held liable for damage caused within working hours but not connected with the exercise of official duties. The use of means of physical coercion was neither envisaged nor implied in the loggers’ duties, so any fight or altercation with third parties could not entail their employer’s liability. Domestic law provided for criminal liability for abuse of authority or office or for exceeding official powers. To be held liable for those offences, a person’s actions needed to relate to his or her official position or result from action taken in connection with his or her official powers but in excess of their scope or result from an intention to abuse an official power. Where this was not the case, different provisions of the law penalising offences committed by private individuals were applicable. The alleged acts of the loggers had not been associated with their duties as employees as set out in their contracts and job descriptions, and any liability for them would have to be borne by them personally.

119. As to the MG staff, they had been on the site to perform security guard duties. Under the Licencing Rules (see paragraph 105 above) security guards could, in certain instances, use “measures of physical influence” and their employer could be held liable if it were proven that they had performed their duties improperly, exceeded their authority or abused their powers. Regardless of this submission, in the English text of their observations the Government submitted that the respondent State “[was] not responsible for the acts committed by the employees of the Municipal Guard company”.



## 2. *The applicants*

120. The applicants submitted that the subcontractor that had employed the loggers was a municipal company administered by a person appointed by the city council and answerable to the latter. Therefore, the loggers had to be regarded as State agents.

121. The applicants contested the Government's argument that the State could not be held responsible for the loggers' alleged actions as they were unrelated to their official duties. They pointed out that, on the contrary, the incident had occurred in the course of the loggers' attempt to cut down trees, which it was exactly their duty to do. They referred to cases in which the Court had held the respondent State responsible for police officers exceeding their powers, citing the cases of *Ivan Vasilev v. Bulgaria* (no. 48130/99, 12 April 2007) and *Krastanov v. Bulgaria* (no. 50222/99, 30 September 2004).

122. The above arguments were also applicable to MG staff, to whom the State had delegated the authority to use force. The applicants compared this situation to that in the case of *Avşar v. Turkey* (no. 25657/94, § 414, ECHR 2001-VII (extracts)), in which the State had been held responsible for the actions of village guards to whom authority to use force had been delegated.

123. Moreover, the loggers, the MG staff and the police had acted in concert with the single goal of driving the protesters away and the police had remained passive in the face of the action on the part of the loggers and MG staff. The applicants compared the latter situation to that in *Riera Blume and Others v. Spain* (no. 37680/97, §§ 33-35, ECHR 1999-VII).

124. Accordingly, both the loggers and the MG staff had to be considered State agents.

## **B. The Court's assessment**

### *1. Relevant principles*

125. It is a well-established principle of the Court's case-law that a Contracting State will be responsible under the Convention for violations of human rights caused by acts carried out by its agents in the performance of their duties (see *V.K. v. Russia*, no. 68059/13, § 174, 7 March 2017). Where the behaviour of a State agent is unlawful, the question of whether the impugned acts can be imputed to the State requires an assessment of the totality of the circumstances and consideration of the nature and circumstances of the conduct in question (see *Reilly v. Ireland* (dec.), no. 51083/09, § 53, 23 September 2014, with further references).

126. The Court reiterates that whether a person is an agent of the State for the purposes of the Convention is defined on the basis of a multitude of

factors, none of which is determinative on its own. The key criteria used to determine whether the State is responsible for the acts of a person, whether formally a public official or not, are as follows: manner of appointment, supervision and accountability, objectives, powers and functions of the person in question (see *V.K. v. Russia*, cited above, § 175).

127. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention (see *Cyprus v. Turkey* [GC], no. 25781/94, § 81, ECHR 2001-IV). A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions (see *Moldovan and Others v. Romania* (no. 2), nos. 41138/98 and 64320/01, § 94, ECHR 2005-VII (extracts)).

## 2. Application of the above principles to the present case

128. The Court observes that the coercive authority of MG staff, which is in issue in the present case, was based on a licence of the type available to any commercial company providing security guard services. In this respect, such a licence was indistinguishable from that of private security guards (see paragraph 22 and, concerning the relevant domestic legal framework, paragraph 105 above). Even though the company was wholly owned by the municipality, it was distinct from municipal institutions in that, unlike the latter, it conducted for-profit activities largely subject to private-law rules (see paragraph 22 above and contrast *V.K. v. Russia*, cited above, § 180). This is further illustrated by the fact that the company and its staff had been engaged to guard the construction site by a private entity, the Main Contractor, under a private-law contract (see paragraphs 19 and 22 above). These considerations, however, do not suffice to absolve the State from responsibility under the Convention for the actions of the security guards.

129. The Court recalls that in *Basenko v. Ukraine* (no. 24213/08, § 82, 26 November 2015) it found the respondent State responsible for the actions of a ticket controller who was, like the MG staff in the present case, a municipal company employee authorised by domestic law to exercise a certain degree of compulsion. In that case the Court examined and rejected the Government's arguments as to the lack of responsibility on the part of the respondent Government for the acts of that employee due to the fact that, in injuring the applicant, he had acted *ultra vires* and had been convicted for an offence committed in his private capacity rather than of official misconduct. The Court reiterated that the domestic legal classification of actions could not be decisive for resolving the question of attribution of responsibility under the Convention (*ibid.*, §§ 86-90).

130. Moreover, the case-file material shows that police officers were present at a number of key events involving MG and other security staff and appeared to have remained passive in the face of most of their actions aimed

at counteracting the protest (see, for example, paragraphs 45 and 42 above). In accordance with the Court's case-law, this factor alone could, in some contexts, be sufficient for attribution of responsibility to the respondent State (for example, see, *mutatis mutandis*, *Koval and Others v. Ukraine*, no. 22429/05, §§ 56 and 78, 15 November 2012, where the Court found a violation of the substantive limb of Article 3 on the grounds, in particular, that police officers had witnessed the applicant being attacked by a private party but had not intervened; *Riera Blume and Others*, cited above, §§ 33 and 35, where the State's responsibility under Article 5 of the Convention had been engaged by the authorities' knowledge of the applicants' being held in a hotel by private parties and their failure to intervene; and *Ouranio Toxo and Others v. Greece*, no. 74989/01, § 42, ECHR 2005-X (extracts), where decisions taken by local authorities had incited an attack against the applicant party's headquarters).

131. Therefore, the Court finds that, in view of the above, the actions of the security guards can be considered attributable to the respondent State.

132. In the light of its findings below (see, in particular, paragraphs 147 and 212 to 216), the Court does not consider it necessary to rule on the question of whether the actions of the loggers can also be imputable to the respondent State (see, *mutatis mutandis*, *Constantin Tudor v. Romania*, no. 43543/09, § 78, 18 June 2013).

## II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

133. The third, seventh and ninth applicants complained that they had been subjected to ill-treatment by the security guards and loggers, and that the respondent State had failed to protect them from it and to investigate effectively their complaints in that respect. They relied on Article 3 of the Convention, which reads as follows:

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

### A. The parties' submissions

#### 1. The applicants

##### (a) Alleged ill-treatment

134. The applicants described the facts which had occurred on 2 June 2010, as set out at paragraph 41 above, and cited *Gäfgen v. Germany* ([GC], no. 22978/05, § 91, ECHR 2010). They submitted that the threat of injury to the third applicant from an operating chainsaw had been direct and real. The situation had therefore been serious enough to engage Article 3. The applicants contested the Government's allegation that it had been the

protesters who had moved towards the worker with a chainsaw and tried to take it away. They referred to the video submitted by them which, according to them, showed the workers making threatening movements in the direction of the third applicant and other protesters, who could be seen with their arms raised to show their peaceful intentions. None of the protesters had tried to attack the workers or to take the chainsaw away.

135. The seventh and ninth applicants referred to their documented injuries and stressed that the timing of the injuries coincided with the moments when, as shown in the video evidence they had submitted, men in black had been beating and pushing protesters on 31 May 2010 (the seventh applicant) and when the workers had attempted to break through the protesters' barrier on 27 May 2010 (the ninth applicant). Accordingly, they argued that there was a "co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" from which it could be concluded that their injuries had resulted from an attack by men in black and loggers. That treatment had "exceeded the minimum level of severity within the meaning of Court's case-law".

136. Despite the proof of their injuries, the applicants had never been questioned by the law-enforcement authorities. They could not be held responsible for the authorities' failure to identify the attackers, which, in itself, had stemmed from the ineffectiveness of the investigation. They had gone to hospital and registered their injuries, but had not been offered, or urged by the authorities to undergo, a more detailed forensic examination in that respect, which the Government had submitted was needed (see paragraph 143 below).

137. The State was responsible for the ill-treatment the applicants had suffered because it had been inflicted by State agents (see the applicants' submissions concerning this matter at paragraphs 120 to 124 above). In any event, the State had failed to protect them from ill-treatment even though the protesters had repeatedly called the police to the scene of the events and warned them about possible attacks on them. Moreover, on many occasions police officers had been present at the scene. In fact, the police had facilitated the attacks, in particular by arresting protesters who had attempted to resist the attacks.

#### **(b) Investigation**

138. The applicants submitted that the investigation into their complaints of ill-treatment had not been "immediate", no formal criminal proceedings had been instituted and the investigation had been limited to the procedure of "pre-investigation enquiries" under Article 97 of the Criminal Procedure Code (see paragraph 101 above). An effective investigation had been impossible in such conditions, since the authorities had strictly limited powers within that procedure. In that connection, the applicants referred to the Court's findings to that effect in *Davydov and Others v. Ukraine*

(nos. 17674/02 and 39081/02, §§ 309-12, 1 July 2010). The investigation had also been incomplete: the authorities had failed to take the steps necessary to establish the timing of the applicants' injuries; and despite the regular presence of numerous journalists at the scene of the events, the authorities had not attempted to collect their photographic and video material or to question those journalists. The Government had not shown that any of the forty-eight protesters who had been questioned had been asked in detail about the attacks on the seventh and ninth applicants. The prosecutor's office had failed to examine the video and had taken no action to find eyewitnesses to the attack. No steps had been taken to identify and question the loggers or persons wearing MG badges.

139. The applicants considered that the conclusions of the investigation were unfounded, particularly the conclusion that in the chainsaw incident, it had been the protesters who had attacked the workers and not *vice versa*. Likewise, the conclusion that the MG staff and loggers had not been involved in the attack on the seventh and ninth applicants was based on an incomplete investigation and unfounded.

140. Lastly, the applicants had either not been informed about the course of the investigation, or had been informed about it with significant delays. This concerned notably the decisions of 9 and 20 August 2010 (see paragraphs **Error! Reference source not found.** and 88 above).

## 2. *The Government*

### (a) **Alleged ill-treatment**

141. The Government argued that the matter of the alleged attack on the third applicant had been investigated by the prosecutor's office. On the basis, notably, of video and photographic material provided by the protesters, the prosecutor's office had identified A. and K. as the persons accused by the third applicant, but had concluded that there had been no constituent elements of a crime in their actions. The third applicant had not sustained any injuries and his account of the events had not corresponded to reality. The Government cited, in this connection, A.'s and K.'s accounts of those events given in the course of the domestic investigation and considered that their statements had been corroborated by video recordings of the event in the files of the prosecutor's office, which showed the applicant himself approaching A. and the latter, far from threatening the applicant with his chainsaw, stepping back (see paragraph 41 above).

142. The seventh and ninth applicants' complaints were ill-founded since their accounts had not provided grounds for a firm conclusion as to the origin of their injuries. The Government referred, notably, to the vagueness of the account which the seventh applicant had given on this point to the administrative court (see paragraph 90 above). It had been impossible to establish exactly who had caused injuries to the applicants and whether it

had been a person who could be considered a State agent because of the unclear and inconsistent nature of the applicants' statements and the chaotic conditions in which the events had taken place. In addition, the applicants' had generally failed to adduce evidence in this respect. The Government cited in this context the case of *Muradova v. Azerbaijan* (no. 22684/05, §§ 106 and 107, 2 April 2009) in which the Court had found that, in the context of use of force to disperse a demonstration, the burden of proof rested on the applicant to show that her injuries had resulted from the use of force by the police. The applicant in that case had met that requirement, whereas the applicants in the present case had not.

143. Notably, none of the persons present at the scene (protesters, guards, workers or police officers) had mentioned the seventh and ninth applicants' suffering an assault, let alone identified the guilty party, if any. The medical documents submitted by the applicants did not show the timing of their injuries, nor the manner in which they had been inflicted. The applicants had not undergone a forensic medical examination to establish those facts. Their allegations had been duly investigated and the competent authority, the prosecutor's office, had come to the conclusion that they were unfounded.

#### **(b) Investigation**

144. The Government submitted that the investigation into the applicants' allegations had met the requirements of Article 3. The investigation had been launched without delay and the first witnesses had been questioned on 31 May 2010. The authorities had questioned police officers, employees of the Main Contractor and the subcontractors, forty-eight protesters, MG and other security guards, and journalists. Documents related to the issuance of permits for tree-felling had been collected and examined. The prosecutor's office had identified all the subcontractor employees who had the right to operate chainsaws, and two of the workers, A. and K., had been questioned about the third applicant's allegations. The investigation had been completed expeditiously. Although the applicants complained that full-scale criminal proceedings had not been instituted, they had not identified investigative actions which had not been conducted as a result.

### **B. The Court's assessment**

#### *1. Admissibility*

##### **(a) The third applicant**

145. As far as the third applicant is concerned, the Court has no reason to doubt the domestic authorities' conclusion that, on 2 June 2010, he had actively approached the working chainsaw and that the worker operating it

had not threatened him. The video evidence on which the applicants relied to put that account in doubt would appear, on the contrary, to largely corroborate the domestic authorities' rather than the applicants' assessment of the situation (see paragraph 42 above). Moreover, the domestic authorities' assessment that it was the third applicant who had intentionally exposed himself to danger was consistent with the conduct of the protesters shown on videos of other incidents that had occurred in Gorky Park submitted by the applicants themselves: their tactic apparently consisted in interposing themselves between the workers with chainsaws and other tree-felling equipment and the trees (see the evidence of events of 24, 25 and 27 May at paragraphs 34, 35 and 38 above). In any event, at the very least the case file does not contain cogent elements which would permit the Court to put the domestic authorities' conclusions in respect of the incident between A. and the third applicant in doubt.

146. In such circumstances, the Court finds it established that the third applicant came within a dangerous distance of an operating chainsaw of his own volition. Therefore, his exposure to that danger cannot be attributed to A.'s actions. It is true that A. could have immediately switched off his chainsaw when the applicant and other protesters had approached. However, given the atmosphere of high tension, to which the case-file material amply testifies, the Court is not prepared to second-guess the domestic authorities' assessment of that split-second decision on the part of the worker and their assessment that he himself may have felt threatened by the protesters' conduct. In any event, the third applicant had been free to avoid any danger resulting from that situation by retreating. Lastly, it is relevant that the situation lasted only a matter of seconds.

147. Therefore, the third applicant's complaint is manifestly ill-founded and must be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

**(b) The seventh and ninth applicants**

148. The Court notes, by contrast, that the seventh and ninth applicants' complaints under Article 3 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. This part of the application must therefore be declared admissible.

*2. Merits*

**(a) Substantive aspect of the complaint**

149. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental

effects and, in some instances, the sex, age and state of health of the victim (see *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 35, 28 January 2014, with further references).

150. It further reiterates that Article 1 of the Convention, taken in conjunction with Article 3, imposes on the States positive obligations to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited under Article 3, including where such treatment is administered by private individuals. This obligation should include effective protection of, *inter alia*, an identified individual or individuals from the criminal acts of a third party, as well as reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known (*ibid.*, § 36).

151. Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 168, ECHR 2016 (extracts)).

152. The Court would stress that the present case is not one where the relevant information lies within the exclusive knowledge of the authorities. Not only is plentiful video and photographic material from the scene of the events available, but that material, in turn, testifies to the presence of numerous witnesses, including apparently from among the protesters, at the scene (see, for example, paragraphs 38 and 40 above). Despite this, no specific evidence emerged linking any particular person to the injuries inflicted on the applicants (compare *Hentschel and Stark v. Germany*, no. 47274/15, § 75, 9 November 2017).

153. Moreover, and contrary to other cases examined by the Court, there is no evidence that the police or other individuals whose actions could be attributed to the State ever deployed tear gas, truncheons or other heavy riot-control equipment which, coupled with the nature of the applicants’ injuries, would allow for the conclusion to be drawn that they were inflicted by such equipment (contrast, for example, *Süleyman Çelebi and Others v. Turkey*, nos. 37273/10 and 17 others, §§ 75-79, 24 May 2016).

154. The applicants’ own evidence shows that, on the days when they were injured (see paragraphs 38 and 40 above), the protesters actively tried to interfere with operating construction equipment and the counter-protest action consisted mainly in efforts to move them out of the works area, with in itself cannot qualify as ill-treatment.

155. In such circumstances the Court is unable to establish, to the required standard of proof, that the seventh and ninth applicants suffered ill-treatment reaching the threshold of Article 3 and requiring the authorities to protect them from it.



156. There has, accordingly, been no violation of Article 3 of the Convention in its substantive aspect in respect of the seventh and ninth applicants.

157. This conclusion does not prejudice the Court's assessment of whether the respondent State has complied with its obligation to ensure the peaceful nature of the protests (see paragraphs 270 to 282 below).

**(b) Procedural aspect of the complaint**

158. Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals (see, for example, *T.M. and C.M. v. the Republic of Moldova*, cited above, § 38).

159. An investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or for use as the basis of their decisions. They must take all reasonable steps available to them to secure evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 183 and 184, ECHR 2012). The victim should be able to participate effectively in the investigation (*ibid.*, § 185, and *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 324, ECHR 2014 (extracts)).

160. The Court notes at the outset that the seventh and ninth applicants' allegations of ill-treatment suffered in the course of protests in Gorky Park were supported by medical evidence of injuries. It is not open to doubt that the applicants were present at the scene of clashes in Gorky Park on the days in question and that the injuries were sustained there. This meant that their complaints were arguable for the purpose of Article 3 of the Convention, requiring the domestic authorities to carry out an effective investigation. In that connection, it is important to stress that the term "arguable claim" cannot be equated to finding a violation of Article 3 under its substantive limb (see *Hentschel and Stark*, cited above, § 82) or even to such a substantive complaint being found well-founded at the stage of the proceedings before the Court (see *Alpar v. Turkey*, no. 22643/07, § 42, 26 January 2016, and *Skant v. Ukraine* (dec.), no. 25922/09, § 43, 6 September 2016).

161. The case-file material shows that the core domestic investigation into the events in Gorky Park in May and June 2010 was conducted within the framework of pre-investigation enquiries carried out by the prosecutor's office, which eventually ended in a decision not to institute criminal proceedings of 9 August 2010. That decision and the extensive material gathered within the framework of that procedure were submitted to the Court.

162. However, that decision did not deal with finality specifically with the cases of the seventh and ninth applicants, since their complaints were investigated by the police. That investigation ended in decisions not to institute criminal proceedings of 13 August 2010 (concerning the seventh applicant only) and of 20 August 2010 (see paragraphs 87 and 88 above).

163. It is a matter of regret that the latter decision was not provided to the Court. The reason for this omission is unclear. This failure to provide records of the investigation has deprived the Court of a full opportunity to review the steps taken by the authorities to investigate the applicants' allegations (see *Davydov and Others*, cited above, § 281). However, the applicants alleged, and this allegation remains undisputed, that they only learned about the decision from the Government's observations and that a copy of that decision was never served on them, even after they had learned about it and attempted to obtain a copy. Their allegation is supported by evidence that they requested information from the authorities, and it was not specifically contested by the Government (see paragraph 88 above).

164. In such circumstances, the Court finds it established that the applicants were prevented from learning about the outcome of the investigation of their complaints.

165. The Court has already found violations of Article 3 in a number of cases, at least in part on the grounds that the applicants' right to participate effectively in the investigation was not secured (see, for example, *Büyükdag v. Turkey*, no. 28340/95, §§ 67-69, 21 December 2000; *Dedovskiy and Others v. Russia*, no. 7178/03, § 92, 15 May 2008; and *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, §§ 73 and 74, 24 June 2010), in particular where this had prevented the applicants from benefiting from the remedies available under domestic law and from challenging the adequacy of the domestic investigation (see *Basenko*, cited above, §§ 69-71).

166. That is exactly what occurred in the present case. The applicants' evidence shows that the authorities consistently withheld information about all their decisions from the applicants, or at least considerably delayed the provision of such information to them (see paragraphs **Error! Reference source not found.** to 88 above), notwithstanding the explicit requirement of the domestic law that they be informed (Article 99 of the 1960 Code of Criminal Procedure, see paragraph 101 above). In such circumstances, the decision of 20 August 2010 was never reviewed by the domestic courts. This also means that the finding of the domestic court that the decision of 13 August 2010 was wholly unfounded (see paragraph 87 above) remained unchallenged.

167. The Court notes the Government's argument that the applicants had failed to undergo a forensic medical examination in order to establish the way in which their injuries had been sustained (see paragraph 143 above). In this context, the Court would point out that it is a well-established

case-law principle that the authorities must act of their own motion (see *Mihhailov v. Estonia*, no. 64418/10, § 126, 30 August 2016, and *Mocanu and Others*, cited above, § 321). There is no indication that the applicants were ever directed or urged by the authorities to undergo forensic medical examinations. Moreover, the domestic investigation always remained within the framework of the pre-investigation enquiries procedure (see paragraph 101 above). In a number of judgments against Ukraine the Court has held that the very nature of that procedure prevented a full-scale expert examination of such medical matters to be ordered (see *Yevgeniy Petrenko v. Ukraine*, no. 55749/08, §§ 67 and 68, 29 January 2015, and *Grigoryan and Sergeyeva v. Ukraine*, no. 63409/11, §§ 61-63, 28 March 2017).

168. The Court also refers to its findings below concerning the authorities' failure to investigate the presence at the scene of the events where the applicants were injured by unidentified persons bearing security guard insignia who might not have been duly authorised security guards (see paragraph 279 below). These considerations are also relevant in the context of the applicants' complaint under Article 3.

169. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 3 of the Convention in its procedural aspect in respect of the seventh and ninth applicants.

170. In view of the reasons for this finding, the Court considers that there is no call to examine the remainder of the seventh and ninth applicants' grievances concerning the domestic investigation.

### III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

171. The first and second applicants complained that they had not had a fair hearing before the Court of Appeal which examined their administrative-offence cases, in that the court had failed to ensure their presence at its hearings. They relied on Article 6 § 1 of the Convention, which reads:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

#### **A. Admissibility**

172. The Court notes that, by virtue of the severity of the sanction, administrative proceedings such as those directed against the applicants in the present case are to be considered “criminal” for the purposes of the Convention and its Protocols (see *Gurepka v. Ukraine*, no. 61406/00, § 55, 6 September 2005) and thus attract the full guarantees of Article 6 of the Convention.

173. This part of the application 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**

### *1. The parties' submissions*

174. The applicants submitted that they had wished to participate in the appeal hearings in their cases but had been unable to do so because they had been in custody. Under Article 294 of the Code of Administrative Offences (see paragraph 98 above) the Court of Appeal could examine questions of law, including new evidence. In their appeals they had contested the interpretation of evidence by the first-instance court. Their participation had been essential since only they had had the full picture of the evidence in issue in the case and could have provided clarifications to the Court of Appeal on the matters of evidence. Moreover, the decisions of the Court of Appeal had imposed on the applicants the burden of proving that the police had not ordered them to leave the place of the protest, and they had needed to be present in order to meet it. Another matter before the Court of Appeal had been the possible mitigation of their sentences, a matter where the defendants' personal characteristics were in issue. They had not petitioned to be brought to the hearing because it would have delayed the examination of their cases by several days beyond 18 June 2010, by which date they would already have served nine days out of their fifteen-day sentences. A postponement would have resulted in them serving their entire sentences while awaiting the appeal hearings.

175. The Government stressed that the applicants had taken part in the hearings before the first-instance court, at which they had also been represented by counsel. They had also been represented before the Court of Appeal by counsel of their choice. During those latter proceedings, their counsel had not adduced any new evidence in support of the applicants' version of the events, nor had he presented any new facts or asked that new witnesses be called. He had presented their position on the basis of the same evidence as that already examined by the first-instance court. He had only challenged the findings of the first-instance court "on the basis of the available facts" and challenged the severity of the punishment imposed. The proceedings could not have resulted in a deterioration of the applicants' situation, and had been limited to matters raised in their appeals. Indeed, the Court of Appeal had mitigated their punishment. In view of this, the presence of their lawyer at the appeal hearings had been sufficient. Moreover, the Government stressed that neither the applicants, nor their lawyer on their behalf, had applied to the Court of Appeal to be brought to the hearings.

## 2. *The Court's assessment*

176. As the Court has stated on many occasions, Article 6 § 1 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, but a State which does institute such courts is required to ensure that persons having access to the law enjoy before such courts the fundamental guarantees in Article 6 (see, for example, *Morice v. France* [GC], no. 29369/10, § 88, ECHR 2015).

177. The manner in which Article 6 applies to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appeal court therein. The Court has held that where an appeal court has to make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Kashlev v. Estonia*, no. 22574/08, § 82, 26 April 2016).

178. Turning to the present case, the Court notes that under the domestic legislation the Court of Appeal had the power to reject the appeal, to quash the trial court's judgment and discontinue the proceedings or quash the judgment and adopt a new judgment, or to amend the judgment (see paragraph 98 above). The Court of Appeal had the power to engage in re-examination of evidence and discontinue the proceedings against the applicants if it reached a conclusion contrary to that of the first-instance court (see paragraph 62 above).

179. The applicants' lawyer formulated his appeals against the applicants' convictions in a way that indicated that he wished to obtain the review of both facts and law (compare *Abdulgadirov v. Azerbaijan*, no. 24510/06, § 42, 20 June 2013) and, in fact, the Court of Appeal engaged in such analysis, finding that the appellants had failed to disprove the factual findings of the trial court (see paragraph 58 above). The appeals also raised the matter of sentencing, which required the assessment of the applicants' character and motivation (compare *Kremzow v. Austria*, 21 September 1993, § 67, Series A no. 268-B). In fact, the Court of Appeal did engage in such assessment, having found that the trial court had failed to take the applicants' personal characteristics into account (see paragraph 58 above).

180. The Court concludes that it was essential for the fairness of the proceedings that the applicants be present at the appeal hearings, unless they validly waived that right. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Such a waiver need not be explicit, but it must be voluntary and constitute a knowing and

intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Moreover, the waiver must not run counter to any important public interest (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 115, 12 May 2017, with further references).

181. The Court considers that the mere fact that the applicants' lawyer did not request that their presence be ensured is not decisive in this respect (see, for example, *Botten v. Norway*, 19 February 1996, § 53, *Reports of Judgments and Decisions* 1996-I, and *Pobornikoff v. Austria*, no. 28501/95, § 32, 3 October 2000). On the contrary, the Court finds relevant that:

(i) the applicants were not informed about the hearing before the court of appeal, and

(ii) there was no clearly established procedure in place for the applicants, who were detained, to ask to be brought to the hearings of the court of appeal.

182. On the first point, the Court notes that the domestic law requires the court of appeal to notify the parties about its hearing (see paragraph 98 above). However, the case file does not contain any indication that such notification had been transmitted to the applicants in detention. There is equally no indication that the court of appeal examined the question of whether the applicants had been properly notified or decided to dispense with notifying them for any particular reason (compare, in a civil context, *Gankin and Others v. Russia*, nos. 2430/06 et al, § 36, 31 May 2016, and *Lazarenko and Others v. Ukraine*, nos. 70329/12 and 5 others, § 40, 27 June 2017).

183. However, even if they had been notified, the applicants could not simply make their own arrangements to attend the hearings because they were detained. There had, therefore, to be a procedure in place, clearly established in law or in practice, for them to ask the authorities to bring them to the hearing. Moreover, that procedure had to be explained to the applicants by the authorities or easily consultable on the applicants' own initiative. Unless it is shown that those safeguards were in place, the Court cannot establish a valid waiver of the right to attend the hearings.

184. The Government have not shown that any such clear procedure was established at the time. In fact, domestic law does not appear to provide any such procedure in administrative offence cases (compare *Sayd-Akhmed Zubayrayev v. Russia*, no. 34653/04, § 31, 26 June 2012, and contrast, for criminal cases, *Sobko v. Ukraine*, no. 15102/10, § 80, 17 December 2015).

185. In such circumstances, it cannot be established in an unequivocal manner that the applicants waived their right to be present. In any event, it cannot be said that requisite safeguards were in place to ensure any waiver was effective.

186. There has, accordingly, been a violation of Article 6 § 1 of the Convention in respect of the first and second applicants.

#### IV. ALLEGED VIOLATIONS OF ARTICLE 11 OF THE CONVENTION

187. The applicants complained of a number of violations of Article 11 of the Convention, which reads:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

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 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

##### A. The parties' submissions

###### 1. *The applicants*

188. The applicants alleged that there had been an unjustified interference with their freedom of peaceful assembly within the meaning of Article 11 on account of the following:

- (i) the arrest and prosecution of the first to sixth applicants;
- (ii) the fact that the third applicant had been threatened with a chainsaw, leading to his Article 3 complaint;
- (iii) the physical violence perpetrated against the applicants in the course of the dispersal attempt by the police on 25 May 2010 and, from 20 May to 6 June 2010, by the loggers and MG staff;
- (iv) the verbal threats from loggers and police officers who demanded that the applicants leave the site intended for tree felling;
- (v) the incident whereby, in the course of trying to break the barrier formed by the protesters, an excavator driver had injured several of them with the excavator's bucket;
- (vi) the injuries sustained when a tree that was cut down fell on a neighbouring tree into which a protestor (not an applicant) had climbed, injuring his hand, and when another protestor (not an applicant) was pulled from a tree by individuals wearing MG badges who pulled on his climbing equipment; and
- (vii) the physical violence perpetrated against the seventh and ninth applicants, leading to their Article 3 complaints.

189. The applicants submitted that any actions aimed at dispersal of the protesters and their removal had been unlawful under domestic law, since

there had been no court order banning the assembly, even though it was required by Article 39 of the Constitution (see paragraph 93 above). Article 185 of the Code of Administrative Offences (see paragraph 97 above) under which they had been convicted was too vague, as illustrated by the fact that some protesters had been acquitted while others had been convicted under it, even though the circumstances of their cases had been similar. In any case, it had been applied arbitrarily in respect of the applicants arrested on 28 May 2010: the applicants had been surrounded by MG staff so that, when the police had come and proposed that they leave the territory, they had been physically unable to comply with that order.

190. The applicants further submitted that neither dispersal nor prosecution and conviction of the first to sixth applicants had been necessary in a democratic society since: (i) the protest action had been peaceful; the protesters had not attacked the loggers, the MG staff or the police, which meant that the authorities were required to display a degree of tolerance; the applicants referred to the cases of *Oya Ataman v. Turkey* (no. 74552/01, §§ 41 and 42, ECHR 2006-XIV) and *Bukta and Others v. Hungary* (no. 25691/04, § 37, ECHR 2007-III); (ii) the protest had taken place in a park and caused no disturbance to city life; and (iii) allowing private security guards to disperse a peaceful assembly could not be considered necessary in a democratic society and neither could the use of violence.

191. The applicants contested the Government's argument (see paragraph 200 below) that they had had alternative means to protest against the construction project. In particular, they contested the Government's submission that information about public consultations concerning the Urban Development Plan of 2004 (see paragraphs 10 above and 200 below) had been published. There had been no prior public discussion and the decision to start felling trees had come as a surprise. The goal of the protesters' action had been to block the tree-felling work temporarily, until public hearings had been held on the matter or until the completion of court proceedings concerning the legality of the project.

192. Even though the Government had argued that not all of the uniformed men with badges had in fact been MG staff (see paragraph 209 below), the applicants argued that all those men had acted in concert and had obeyed common commands.

193. The applicants stressed that their actions had been "peaceful and legitimate". They had not committed any reprehensible act which went beyond the boundaries of their protest action. While it was true that the authorities had not been notified in advance, their action had been spontaneous and there had been no organisers. The only legal provision in force regulating their actions was Article 39 of the Constitution but that provision did not specify precisely how peaceful assemblies should be notified to the authorities. The applicants had notified the authorities



through the media on 20 May 2010 and, in any event, after that date the ongoing protests could no longer have been a surprise to the authorities. Therefore, the protest action had been lawful. By contrast, the attempt to disperse the protesters had been unlawful. In particular, none of the protesters had been arrested or convicted under Article 185-1 of the Administrative Offences Code for “Breach of the procedure for organising and holding meetings, rallies, street marches and demonstrations” (see paragraph 97 above), indicating that the authorities had not considered that the protest action had breached that procedure.

194. The applicants alleged that the authorities had resorted to the MG staff and other unofficial groups, rather than to the law-enforcement authorities, because they had understood that the protest had been lawful.

195. Despite a number of complaints to the police about the attacks by men in black with MG badges, which the Government did not deny the police had indeed received, the police had not reacted. In fact, they had indulged the attackers and helped them.

196. The applicants stressed that the police had either failed to intervene against the attackers or on the contrary, had intervened to arrest protesters when they had been attacked on 27 May and 2 June 2010. Contrary to the law-enforcement plan, the police had also been absent from the scene when the protesters had been attacked on 27 and 31 May and 1 and 2 June 2010, even though the plan had envisaged an around-the-clock police presence and the police, given previous confrontations, had had every reason to believe that there would be further clashes.

197. The police’s inaction had led to the escalation of the confrontation, with the workers and the municipal guards becoming increasingly aggressive with the connivance and support of the police.

## 2. *The Government*

198. The Government submitted that there had been no interference with the first and second applicants’ right to freedom of peaceful assembly. Before the domestic authorities, those applicants had explained their presence at the scene by curiosity rather than by a will to express their position through participation in an assembly. The Government referred to the applicants’ statements to the police on 28 May 2010 and to the District Court to the effect that they had been merely passing by the place of the events and had been attracted there by curiosity (see paragraphs 46, 47, 52 and **Error! Reference source not found.** above). The Government stressed that, in contrast to such cases as *Galstyan v. Armenia* (no. 26986/03, §§ 100 and 116, 15 November 2007), in which the domestic authorities had punished the applicant for his conduct in the course of a demonstration, in the present case the domestic authorities had not referred to the applicants’ participation in an assembly but merely to their refusal to obey the police officers’ demands. Thus neither the applicants’ statements before the

domestic authorities nor any decisions taken by those authorities had referred to their participation in an assembly.

199. The Government conceded that there had been an interference with the third to sixth applicants' right to freedom of peaceful assembly but submitted that it had complied with the requirements of Article 11 § 2. The interference had been lawful, being based on Article 185 of the Code of Administrative Offences. It had pursued the legitimate aim of protecting the health of the protesters and the workers involved in the construction work: by being on the construction site, the third to sixth applicants had been interfering with the construction work and putting their and others' lives in danger.

200. The interference had also been necessary in a democratic society and proportionate: the need for it had been due to the fact that the applicants had chosen to engage in illegal conduct even though they had had opportunities to express their objections to the construction project without endangering their lives. The issue of road construction had not arisen suddenly but had been the culmination of a long-term process: road construction had been envisaged by the Urban Development Plan, approved as early as 23 June 2004 (see paragraph 10 above). The applicants had had at least two opportunities to express their position: at the public consultation dedicated to the Urban Development Plan and upon publication of information about the road construction plan in 2007 (see paragraphs 10 and 16 above). As many of the protesters were active in the protection of the environment, that information must have been known to them.

201. Moreover, the following factors were relevant: (i) the tree-felling area had been demarcated with warning tape; (ii) tree felling had been carried out in the presence of the police; (iii) the site had been visited on several occasions by officials who had shown the protesters the documents authorising the tree felling; and (iv) the officials had repeatedly stressed to the protesters that they were in an area of ongoing construction work. Thus the applicants must have been aware that they were in an area where hazardous operations were under way.

202. Sanctions had been applied only to those who had persisted in remaining in the area of ongoing construction and who were thus endangering their lives and health. No sanctions had been applied to protesters who had not interfered with the workers' actions and the movement of machinery. Notably, the eighth and tenth applicants and other protesters had been acquitted, as the courts had found no evidence of failure to comply with lawful police orders (see paragraph 63 above). This showed that the persons who had left the site when directed to do so had not been punished. In this connection, the Government pointed out the principle, recognised in *Ezelin v. France* (26 April 1991, § 53, Series A no. 202), according to which freedom to take part in a peaceful assembly could not be restricted so long as the person concerned did not himself commit "any

reprehensible act". For them, participation in the protest action could not justify the offence committed by the applicants.

203. The punishment imposed had been proportionate. The offence committed by the applicants had been rather serious as it had been aimed at undermining confidence in the law-enforcement authorities. Only a minimal fine had been imposed on the third to fifth applicants. The sixth applicant had been sentenced to ten days' imprisonment because his actions had been particularly impudent. He had demonstrated obstinate disobedience to the order to leave and had had to be carried away by police officers. Even after he had been removed from the construction site, he had declared that he would go back to the area (see paragraph 65 above). This repeated disobedience had led to the imposition of a more severe sanction on him.

204. The Government repeated that the respondent Government were not responsible for the alleged actions of the loggers and MG staff (see paragraphs 118 and 119 above) and could only be held responsible in the case of demonstrated inaction of the police in the face of unlawful acts towards the applicants.

205. In this context, the Government stressed that the prosecutor's office had found no constituent elements of a crime in the police officers' actions and on 24 May 2011 the first-instance administrative court had rejected a complaint lodged by the applicants in respect of alleged police inaction (see paragraph 91 above). Those enquiries had established that the police had employed all means available to them to maintain law and order in the area. A law-enforcement plan had been drawn up and a number of officers assigned to the operation on a permanent basis. Had the protesters properly notified the authorities about their action, the number of officers could have been further adjusted to their numbers.

206. The protesters had been able to draw the attention of the police to any unlawful action either by directly approaching officers present at the scene or by calling the police emergency number. This they had done and the police had duly reacted to all such calls for help. From 20 May to 6 June 2010 the police had registered nearly 120 complaints and reports in respect of alleged violations of public order at the construction site. However, although the protesters alleged that there had been conflicts at the site, none of them had named the offenders or victims or explained what the conflicts had consisted in. This had led to decisions not to institute criminal proceedings.

207. The police had taken measures to stabilise the situation and keep it under control. For instance, according to the statement of one of the protesters, in the course of a confrontation on 27 May between the protesters and the workers, a police major had interposed himself between the two parties, ordering the protesters to disperse, which they had done.

208. In any event, the actions of MG staff, even as they are described by the applicants, had not been unlawful and had not required police

intervention. The police officers had explained to the protesters that they were in an area of ongoing construction, which was demarcated with tape. The guards had been assigned to limit access to that area to authorised workers only and to secure the safety of those workers. That was why the MG and PS guards had attempted to push the protesters away from the construction area. The competent domestic authority, the prosecutor's office, had found no breaches of the law on the part of the guards. They had been acting in accordance with powers conferred on them by the Licencing Rules (see paragraph 107 above).

209. Following its enquiries, the prosecutor's office had adopted a decision refusing to institute criminal proceedings against the MG staff, having found that all the acts of the guards associated with the exercise of their employment duties had been legitimate. The prosecutor's office had established that there had been only five MG employees in the area, all of whom had been wearing badges of the approved type. According to the statements of the MG director (see paragraph 75 above), there had also been some other persons with MG badges in the area. After the director had told them to take the badges off and they had done so, nobody except the five MG employees mentioned had been wearing the badges there.

210. Having regard to the above, the Government maintained that there were no facts indicating that any particular action on the part of the MG staff could be considered as having interfered with the applicants' rights under Article 11 of the Convention.

## **B. The Court's assessment**

### *1. Admissibility*

211. The third applicant's complaint related to the alleged chainsaw threat against him (see paragraph 188 (ii) above) is a restatement of his Article 3 complaint and should be rejected for the same reasons (see paragraph 147 above).

212. As far as the applicants' complaints of verbal threats are concerned (see paragraph 188 (iv) above), they are entirely unsubstantiated. There is no proof of them in the materials of the domestic investigations, in the photographic and video evidence submitted by the applicants or in other case-file material.

213. Moreover, there is nothing to indicate that the applicants can lay claim to being "victims", within the meaning of Article 34 of the Convention, in respect of their complaints about unidentified protesters having been exposed to danger in the course of tree-felling and construction work (see paragraph 188 (v) and (vi) above).

214. Similar considerations apply in respect of the applicants' complaints concerning physical violence against them in the course of the

dispersal attempt by the police on 25 May 2010 and, from 20 May to 6 June 2010, by the loggers and MG staff (see paragraph 188 (iii) above). The applicants' protest action was, by their own admission, spontaneous, there were no organisers (see paragraph 193 above) and, apparently, there was no stable list of participants. In this context the Court also notes the Government's submissions, which are in turn based on the first two applicants' statements before the domestic court, to the effect that some of those present on the site may have been attracted there by mere curiosity (see paragraphs 198, 52 and **Error! Reference source not found.** above).

215. For these reasons, it is unclear which of the applicants participated in which protest action on which day. What is more, the link between the applicants and the two NGOs which had been identified in the domestic proceedings as associated with the protests (see paragraphs 76 and 81 as well as paragraph 31 above) is unclear. The case-file material shows that much of the counter-protest action was aimed at preventing individual protesters from infiltrating the construction site area, rather than at dispersing or even limiting the protest action in general (see, for example, the evidence concerning the events of 23 and 25 May, at paragraphs 33 and 35 above). There is, in most cases, no indication as to the identity of those individual protesters and whether the applicants were among them.

216. Accordingly, the above complaints should be rejected as manifestly ill-founded or incompatible with the Convention *ratione personae*, as the case may be, pursuant to Article 35 § 3 (a) and 4 of the Convention.

217. The remainder of the first to seventh and the ninth applicants' complaints under Article 11 (see paragraph 188 (i) and (vii) above) is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

## 2. Merits

### (a) Relevant principles

218. The Court reiterates its case-law to the effect that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have a legal basis in domestic law, but also refer to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 108, ECHR 2015, with further references).

219. The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered

“necessary in a democratic society”, the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the Court to give a final ruling on the restriction’s compatibility with the Convention and this is to be done by assessing the circumstances of a particular case (*ibid.*, § 142).

220. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a “legitimate aim”, whether it answered a “pressing social need” and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient” (*ibid.*, § 143).

221. The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued. Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction, and notably to deprivation of liberty. Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (*ibid.*, § 146).

222. States must not only refrain from applying unreasonable indirect restrictions upon the right to assemble peacefully but also safeguard that right. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (*ibid.*, § 158). The authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens. However, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved (see *ibid.*, § 159, and *Frumkin v. Russia*, no. 74568/12, § 96, ECHR 2016 (extracts)).

**(b) Application of the above principles to the present case***(i) The arrests and convictions of the first six applicants**(α) Whether there has been an interference: the first six applicants**The first and second applicants*

223. The Government submitted that there had been no interference with the first and second applicants' right to freedom of peaceful assembly (see paragraph 198 above).

224. The Court observes that, as the case-file material shows, it appears to have been the position of those protesting in Gorky Park that they were defending the park as a public space open to everyone as a place of leisure, without attaching a formal label to their action (see, for instance, paragraph 76 above). Therefore, it would appear entirely in line with this apparently shared position for the first and second applicants to assert that they had been using the park as a public space. Given the circumstances, implicit in this position was their opposition to any construction work there. Moreover, it has not been contested that the first and second applicants were actually among the group of protesters who, on 28 May 2010, had been blocking the railroad passage for a bulldozer in the area marked off as a construction site, who had been warned to leave the site and allow the construction to continue and who, having failed to comply, had been surrounded by MG staff and removed from the construction site (see paragraph 45 above). It is evident from that sequence of events that those who continued to be present in that restrained group of protesters until the time of arrest could not have been simple bystanders ignorant of what was at stake and caught up in the events, since any such bystander would have had an opportunity to leave before being surrounded by security guards.

225. The domestic courts found it established, moreover, that the first and second applicants had resisted being escorted away from the site by the police, which, like the blocking of the railroad passage, was in the very nature of the obstructive protest tactic used by the Gorky Park protesters. What is more, one of the police reports in the second applicant's administrative-offence case file explicitly states that he was arrested for having protested on the construction site in the park (see paragraph 49 above).

226. Lastly, the Court is conscious of Amnesty International's contemporaneous intervention on behalf of the first and second applicants, referring to them as protesters (see paragraph 117 above).

227. According to the Court's established case-law, measures taken by the authorities during an assembly, such as dispersal or arrest of participants, and penalties imposed for taking part in an assembly, amount to an interference with the right to freedom of peaceful assembly (see

*Navalnyy and Yashin v. Russia*, no. 76204/11, § 51, 4 December 2014, with further references).

228. The Court concludes that there has been an interference with the first and second applicants' right to freedom of peaceful assembly.

*The fifth applicant*

229. The Government did not appear to contest that the fifth applicant, regardless of the fact that proceedings against him had been discontinued, could still claim to be a "victim" of a violation of his right under Article 11 of the Convention and that there had been an interference with that right (see paragraph 199 above). In any event, like the other applicants, the fifth applicant was removed from the site by the police, which in itself constitutes an interference with the right to freedom of peaceful assembly, and later formally reprimanded for his actions (see paragraphs 43 and 62 above). Therefore, the applicant can continue to claim to be the victim of an interference with his right under Article 11 of the Convention.

*The third, fourth and sixth applicants*

230. The Government did not contest that those applicants' conviction constituted an interference with their right to freedom of assembly (see paragraph 199 above). The Court finds no reason to find otherwise.

*Conclusion concerning the existence of an interference with respect to the first six applicants*

231. There was, therefore, an interference with the first six applicants' freedom of peaceful assembly. Such an interference with the right to freedom of peaceful assembly gives rise to a breach of Article 11, unless it can be shown that it was "prescribed by law", pursued one or more legitimate aims as defined in paragraph 2 of that Article, and was "necessary in a democratic society" (see, for example, *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 107, ECHR 2011 (extracts)).

(β) "Prescribed by law": the first six applicants

232. The interference had a basis in domestic law, namely Article 185 of the Code of Administrative Offences, which penalises failure to obey a lawful order of a police officer (see paragraph 97 above). There is no indication that the above-mentioned provision was not accessible to the applicants or not foreseeable as such.

233. The applicants argued, however, that any action aimed at counteracting their protest was unlawful because Article 39 of the Constitution required the authorities to obtain a court order authorising such dispersal. In order to assess this argument the Court must summarise its case-law concerning the legislative framework for peaceful protest in Ukraine.



234. The general domestic legal framework has already been subject to the Court's scrutiny in the cases of *Vyerentsov v. Ukraine* (no. 20372/11, 11 April 2013), and *Shmushkovych v. Ukraine* (no. 3276/10, 14 November 2013). As established in those cases, no law had been enacted by the Ukrainian Parliament regulating the procedure for holding peaceful demonstrations (see *Vyerentsov*, § 55, and *Shmushkovych*, § 40, both cited above). In those cases the applicants were sanctioned under Article 185-1 of the Code of Administrative Offences, which prescribes a penalty for violations of the procedure for organising and holding assemblies. In such circumstances the Court, having concluded that the relevant law lacked the requisite foreseeability, found that there was no need to verify whether the other two requirements of Article 11 § 2 had been complied with (see *Vyerentsov*, § 54-56, and *Shmushkovych*, § 41, both cited above).

235. By contrast, in *Chumak v. Ukraine* (no. 44529/09, §§ 12 and 44, 6 March 2018) the Court was confronted with a situation where the demonstration organised by the applicant had been dispersed on the basis of an order from the domestic court, which had found that the demonstrators had breached particular requirements of substantive law and had encroached upon important legally protected rights and interests of others. They had unlawfully erected structures on the pavement, obstructed the passage of pedestrians, and offended and endangered road users. In that case, unlike in *Vyerentsov* and *Shmushkovych*, Article 185-1 of the Code of Administrative Offences was not applied. While criticising the shortcomings of the judicial procedure which had led to the dispersal of the applicant's assembly, the Court nevertheless held that the imposition of restrictions on gatherings at which participants breached substantive law was not, as such, unforeseeable (see *Chumak*, cited above, § 44). In view of the shortcomings in the judicial procedure, which consisted, in particular, in the fact that the courts had taken the authorities' allegations of inappropriate conduct on the part of the protesters at face value and issued an overly broad order banning the applicant's assembly, the Court expressed doubt as to whether the interference in that case met the lawfulness requirement. Nevertheless, it proceeded to examine whether the dispersal in that case met the other requirements of Article 11 § 2 (*ibid.*, § 48).

236. As in *Chumak*, the matter of lawfulness confronting the Court in the present case is different from that examined in *Vyerentsov*. In fact, the applicants themselves stressed and made much of the fact that they had not been sanctioned under Article 185-1 of the Code of Administrative Offences (see paragraph 193 above), which was at stake in *Vyerentsov*.

237. It is in this context that the applicants' argument about the lack of a judicial order banning their assembly needs to be assessed. The Court is mindful, however, of the well-established principle of the Convention system that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Radomilja and Others*

*v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, ECHR 2018). There is no evidence that the applicants raised this argument before the domestic courts or that those courts examined this matter. In such circumstances, the Court must be particularly cautious in undertaking such an analysis on its own.

238. Nevertheless, the Court has to address the applicants' argument, as it is central to their case, and notes that the constitutional provision on which it is based appears to provide for a regulatory scheme under which the procedure of judicial restrictions of assemblies is linked with a procedure for their advance notification (see paragraph 93 above), which allows the authorities to apply to a court with a request to impose certain restrictions on the planned assembly. This follows from a decision of the Constitutional Court, which provides the authoritative interpretation of the relevant constitutional provision (see paragraph 94 above). It is well illustrated by the provision in the Code of Administrative Justice, which requires the court to reject an action for a judicial order restricting an assembly if it has been lodged belatedly, that is on the planned date of the event or thereafter (see paragraph 100 above). This latter provision was subject to the Court's examination in *Chumak*, where the Court, for precisely that reason, expressed a doubt as to whether the judicial procedure in question could properly be used to disband an ongoing assembly (cited above, § 42).

239. The Court is not convinced, moreover, that a purely obstructive protest action which, by its very nature, would normally be unlawful as infringing on the rights and legitimate interests of third parties, could, in principle and as a practical matter, be subjected to prior notification requirements. Such a requirement would deprive many such actions of much effect and would amount to a requirement to declare the intention to break the law.

240. In the circumstances of the case this means that, as there was no notification, no judicial procedure for banning the protest could be launched.

241. The Court, accordingly, dismisses the applicants' arguments in this respect and accepts that the interference was "prescribed by law".

(γ) Legitimate aim

242. The Court observes that the applicants' presence on the construction site was in breach of safety rules (see paragraph 112 above). The applicants' own evidence and submissions show that protesters were clearly exposed to serious dangers on the site (see, for example, paragraphs 34 and 35 above regarding video evidence from 24 and 25 May and the applicants' submissions at paragraph 188 (v) and (vi) above). Accordingly, the Court accepts the Government's submission that the interference had pursued the legitimate aim of protecting the health and

safety of protesters and workers. In the latter respect, it can also reasonably be viewed as having been for the protection of the rights and freedoms of others. The Court notes that the project involved numerous entities and individuals who had a stake in its implementation in terms of urban infrastructure development, economic activity, jobs, performance of contractual obligations etc. (compare *Drieman and Others v. Norway* (dec.), no. 33678/96, 4 May 2000).

(δ) “Necessary in a democratic society”: the first six applicants

*General considerations*

243. The Court observes that both prior to the construction project being launched and thereafter, opponents were able to protest against it in a non-obstructive fashion (see paragraph 31 above regarding evidence of protest activity at the planning stage, and paragraph 69 above regarding picketing of the regional council). Moreover, at least initially some degree of tolerance was shown *vis-à-vis* even the obstructive activity and, in that initial period, some protesters systematically engaged in highly dangerous conduct, such as exposing their bodies to chainsaws (see paragraphs 34 and 35 above regarding video evidence from 24 and 25 May). By the time the applicants were arrested, substantial public attention had already been attracted to the problem (compare *Cisse v. France*, no. 51346/99, §§ 51 and 52, ECHR 2002-III, and *Çiloğlu and Others v. Turkey*, no. 73333/01, § 51, 6 March 2007). Opponents also actively used their right to petition in order to oppose the project (see the list of various authorities and organisations who complained to the law-enforcement authorities concerning the project at paragraph 81 above and the constitutional provision concerning the right of petition and the legislation implementing it at paragraphs 93 and 104 above). It would appear, moreover, that the authorities reacted to the protests by ordering the replanting of a considerable number of trees (see paragraph 71 above).

244. It is a matter of regret that the applicants have not explained to the Court what judicial remedies were used or not used (and, if the latter, for what reason) by the opponents of the project, even though there are indications in the case file that certain judicial proceedings were initiated in respect of the project by third parties (see paragraph 81 above). It appears that the applicants also omitted to raise this issue before the domestic courts which tried them (see, for example, paragraph 68 above concerning the sixth applicant). In any case, there is no indication that such judicial remedies were unavailable to the protesters (compare *Kudrevičius and Others*, cited above, § 168).

245. There is a certain confusion over the public consultations which preceded the approval of the project, and the evidence submitted by both parties does not appear to support their own allegations in this respect. The

Government insisted that the 2004 Urban Development Plan had been subject to public consultation, even though official documents submitted by them appear to indicate that the road-building plans were not included in its original version in any clear form, and that the plan had to be amended in this respect in 2008 (see paragraphs 200 and 13 above respectively). For their part, the applicants insisted that the project had come as a surprise, even though their own evidence indicates that it had received publicity and had been the subject of protest activity as early as 2007 (see paragraphs 191 and 31 above respectively).

246. That being so, the Court does not need to make a definitive finding as to whether or not the public consultations concerning the development and implementation of the construction project were sufficient. For the Court, it is sufficient to note that the public was consulted about the project and protested against it as early as 2007, and that other alternative means of protest, as set out in the preceding paragraphs, were available.

247. These observations are of relevance in the Court's assessment of the proportionality of the interference with the applicants' right to freedom of peaceful assembly.

*The first to fifth applicants*

248. The Court finds established the following order of the relevant events on 28 May 2010. The applicants were among a group of protesters in an area marked off as a construction site. A person in civilian clothing, apparently a representative of MG, the municipal authorities or the Main Contractor, asked them to leave. They failed to do so. The protesters were then surrounded by security staff in a tight circle. Police officers arrived and asked the protesters, still surrounded, to leave the site. It is unclear what response was received. The police officers proceeded to arrest the applicants. That sequence of events is shown with most clarity in the video recordings submitted by the applicants, which, at the time of the Court's examination of the case, are also publicly available online (see paragraph 45 above). It is important to stress, however, that the Court's assessment of this sequence does not contradict the factual findings of the domestic authorities (see paragraph 83 above and contrast, for example, *Nemtsov v. Russia*, no. 1774/11, §§ 63-71, 31 July 2014, and *Karpyuk and Others v. Ukraine*, nos. 30582/04 and 32152/04, §§ 194-209, 6 October 2015).

249. It is not entirely clear from the domestic courts' decisions or, indeed, from other documents in the domestic files concerning the administrative-offence cases, exactly when the police issued the order which the applicants failed to obey, resulting in their arrest and conviction. In such circumstances, the Court sees no reason to doubt the applicants' submission that the only police order was the one mentioned in the previous paragraph and issued when the applicants had already been surrounded and blocked in by security guards.

250. The Court observes that that order from the police appears to have been issued at ordinary voice volume without the use of amplifying equipment, despite the noisy environment. Moreover, the preceding initial request to disperse was issued by a person without police insignia, apparently a civilian, and failure to comply with it had resulted in the protesters' containment by security guards. There are reasons to doubt that the order, when repeated by the police, was immediately audible and clear to all protesters (see, for example, at paragraph 63 above the findings of the domestic court in the case of the eighth and tenth applicants who had been arrested at the same time as the first to sixth applicants and the proceedings against whom were discontinued). In any event, that repetition came only when the protesters were already restricted in their movement. Moreover, it cannot be said that the authorities were overwhelmed or that operational circumstances prevented them from having greater clarity in communication: after all, by the time the police issued its order, the protesters had been fully contained in a small area by security guards.

251. Under such circumstances the Court cannot rule out that there was some degree of confusion on the part of the protesters, including the applicants, with regard to the authority which had issued the order to leave the area and the practical ways of complying with it. That confusion appears to have stemmed in part from the lack of clarity in the distribution of authority between the security guards and the police. In this context the Court observes that the Guidelines on Freedom of Peaceful Assembly stress the need for clarity as to the authority ordering dispersal and the importance of allowing sufficient time to comply with such an order (see § 168 of the Guidelines at paragraph 113 above).

252. This aspect of the case is of particular importance in light of the concern expressed internationally about the appropriateness of the use of private security agents to disperse individuals exercising the right to freedom of peaceful assembly and the need to resort to police, rather than private security guard, intervention in case of doubt (see paragraphs 114 and 115 above and see paragraph 128 concerning the MG staff having a status equivalent to that of private security guards).

253. Nevertheless, the above considerations are not sufficient, in and of themselves, for the Court to find that the domestic courts, which had the benefit of direct observation of all the evidence in the case, including examination of eyewitnesses, erred in their factual finding that the applicants did indeed disobey the police order to leave. After all, the situation on 28 May 2010 has to be seen not in isolation but in the broader context of the events: by that date, it was public knowledge that a construction project was unfolding in the area where the applicants were present and the applicants, who by their own admission, participated in the protests from 20 May 2010, could not but have been aware that the police were likely to be deployed to stop them from interfering in the tree-felling

and construction work (see paragraphs 31 and 35 above regarding the evidence concerning the events of 20 and 25 May, for example, and compare *Pentikäinen v. Finland* [GC], no. 11882/10, § 100, ECHR 2015). Moreover, it should not be overlooked that the applicants' own evidence appears to support the finding that some protesters had indeed attempted to obstruct the efforts of the police to remove them from the site, at least passively, by dragging their feet (see paragraph 45 above).

254. That said, the Court reiterates its conclusion that the applicants were, to all appearances, convicted for failure to comply with the specific order to leave, issued on 28 May 2010. It considers that, in particular given the importance of the right to freedom of peaceful assembly in a democratic society, it was incumbent on the domestic courts to take into account in their reasoning the above-mentioned possible confusion on the part of the applicants as to the source of that order and precisely how to comply with it.

255. The courts, however, failed to do so. They also failed to explain the severity of the sentence imposed on the first and second applicants, especially in comparison with the sentences imposed on the other protesters and any particularity in their conduct which would justify such treatment. Despite the fact that their sentences were mitigated on appeal, the first and second applicants still served nine-day prison sentences.

256. In such circumstances, the Court finds that the domestic courts did not provide sufficient reasons for their decision to impose custodial sentences of such severity on the first and second applicants and, therefore, it was not demonstrated by the Government that the sanction imposed on those applicants was proportionate to the legitimate aim pursued.

257. The Court's findings of procedural unfairness in the proceedings against the first and second applicants (see paragraph 186 above) serve to compound this lack of proportionality (see, *mutatis mutandis*, *Karpyuk and Others*, cited above, § 236).

258. There has, accordingly, been a violation of Article 11 of the Convention in respect of the first and second applicants concerning their arrest and conviction.

259. As far as the third to fifth applicants are concerned, for the above-mentioned reasons the Court does not have at its disposal cogent elements to question the findings of the domestic courts in respect of them. The case-file material demonstrates that they acted in a deliberately obstructive way in an area of danger (compare *Pentikäinen*, cited above, § 100). Moreover, the authorities remained, for a time, tolerant of even such dangerous protest activity, and the applicants were arrested and convicted not for their protest action as such but for their failure to obey the order to leave (*ibid.*, § 108). A certain degree of reaction could be considered appropriate to address such conduct. Their removal from the construction site and conviction for the administrative offence was, in the light of the

nature of the sanctions imposed, proportionate to the legitimate aim pursued.

260. There has, accordingly, been no violation of Article 11 of the Convention in respect of the third to fifth applicants concerning their arrest and conviction.

*The sixth applicant*

261. It has been established by the domestic courts – and their findings in this respect are fully supported by the sixth applicant’s own statements in the course of the trial (see paragraphs 65 and 66 above) – that the sixth applicant not only refused to obey a direct order from the police to leave the site, but also resisted, in an obstinate fashion, at least passively and perhaps even actively, the efforts of police officers to remove him.

262. The Court is also conscious of the fact that by the time the applicant engaged in his obstructive conduct, the construction project had been ongoing for a month and a half. Its opponents had had plentiful opportunity to protest against it (see paragraph 243 above), including by means of obstructive protest activity from 21 May to 2 June 2010. The fact that the project was at an advanced stage by that time meant that even greater use could be made of any lawful protest measures and remedies.

263. In such circumstances, there is nothing to put in doubt the conclusion that the imposition of a sanction on the sixth applicant was justified. It remains, however, to be seen whether a custodial sentence of such severity was proportionate. The Court reiterates in this context that where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction, and notably to deprivation of liberty. Thus, the Court must examine with particular scrutiny cases such as the present one, where non-violent conduct led to a prison sentence (see *Kudrevičius and Others*, cited above, § 146).

264. At the same time, imposition of custodial sanctions for obstructive protest activity is not in itself incompatible with Article 11. Domestic authorities have a margin of appreciation in assessing what is an appropriate and proportionate sanction to be imposed following a “criminal” conviction, having regard *inter alia* to the nature and seriousness of the reprehensible acts in question and the purposes of the sanction imposed.

265. In assessing the proportionality of the sanction imposed on the applicant, the Court notes that he was convicted for refusal to obey an order from the police to leave the site and for resisting the efforts of the police to remove him. There is no indication that the order was unreasonable, unclear or that anything prevented the applicant from complying. Had the applicant complied with the order, nothing would have prevented him from continuing his protest outside of the construction area (see, *mutatis mutandis*, *Pentikäinen*, cited above, §§ 95-101). Furthermore, the applicant

had clearly expressed his intention to return to the site and continue his obstructive activity. Notably, after clearly indicating his intention to reoffend to the police, he failed to renounce those statements at the trial and to present any assurances in that respect (see paragraphs 65 and 66 above and compare *Steel and Others v. the United Kingdom*, 23 September 1998, § 107, *Reports* 1998-VII).

266. Moreover, the Court also observes that the applicant, though represented by a lawyer, did not properly ask the Court of Appeal for mitigation of his sentence, having presented that court, which was bound by the arguments raised in the appeal (see paragraph 68 above) with the alternative between acquittal and discontinuation of proceedings, on the one hand, which was not merited under the circumstances, and affirmation of the sentence imposed by the trial court, on the other hand. It is true that review by the Court of Appeal occurred after the applicant had already served his sentence. However, his position demonstrates the untenable position he had taken before the domestic courts in general, thus reinforcing the correctness of the assessment that he continued to consider his conduct fully legitimate and was likely to engage in it again, creating considerable risk for the safety of the ongoing construction work.

267. In such circumstances the Court finds that the sanction imposed on the applicant in the form of a ten-day custodial sentence cannot be described as grossly disproportionate (see, *a contrario*, *Frumkin*, cited above, § 140; *Işıkırık v. Turkey*, no. 41226/09, § 69, 14 November 2017; *Bakır and Others v. Turkey*, no. 46713/10, § 68, 10 July 2018; and *İmret v. Turkey (no. 2)*, no. 57316/10, § 58, 10 July 2018).

268. In view of the above considerations the Court concludes that, in the particular circumstances of the present case, the domestic courts cannot be said to have overstepped their margin of appreciation.

269. There has, accordingly, been no violation of Article 11 of the Convention in respect of the sixth applicant concerning his arrest and conviction.

*(ii) Events of 31 May and 27 May 2010 concerning the seventh and ninth applicants respectively*

270. The seventh and ninth applicants alleged that they had been injured by persons who had attempted to counteract their protest.

271. The Court has already found that the authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens (see *Kudrevičius and Others*, cited above, § 159). The Court considers that the same obligation applies to an assembly, which, whether lawful or not in terms of domestic law, attracts the protection of Article 11 and of which the authorities have had sufficient notice, whether formal or *de facto*, enabling them to take such measures (see also § 28 of the Guidelines of Freedom of



Peaceful Assembly, at paragraph 113 above). The Court considers that the conditions triggering this obligation were met in the present case, as the authorities were undoubtedly aware of the planned protest activity well in advance of the events in question (27 and 31 May 2010), which had in fact allowed them sufficient time to prepare (see paragraphs 24 and 76 above).

272. The applicants did not allege that the police had directly engaged in any action aimed at counteracting their protest activities on 27 May and 31 May 2010. Likewise, it has not been contested that security guards were deployed to the site and that they used some force to try and push the protesters outside of the construction site (see paragraphs 28 and 208 above).

273. At the relevant time the basis for the powers of the security guards to use coercion against the protesters lay in the Licensing Rules, which closely linked those powers to the security guards protecting a “guarded entity”. The wording of rules 1.4.1 and 1.4.2 of the Licensing Rules indicates that a “guarded entity” was understood primarily as a well-defined physical facility, access to which could be controlled by guards, the latter being understood as their primary role (see paragraph 107 above).

274. By contrast, it does not appear that domestic rules authorised private security guards to undertake crowd control or dispersal functions in public areas. It appears, moreover, that even in well-defined guarded areas their coercive functions were to be in principle limited to denial of unauthorised access to them (see the above-mentioned provisions of the Licensing Rules) and any coercion beyond that could be resorted to only in exigent circumstances, where urgency so required (see rule 1.4.3 of the Licensing Rules). Implicit in this appears to have been the requirement that in any non-urgent situations security staff had to call on the help of the police (see also in this respect section 2.2.3 of the Licensing Rules, at paragraph 109 above), which appears to be in line with internationally endorsed best practices for the private security industry (see § 85 of the Special Rapporteur’s report at paragraph 115 above).

275. The reality on 27 May and 31 May 2010 was different, however. The Court notes that nothing in the findings of the domestic authorities contradicts the video evidence provided by the applicants. That evidence shows that, even though the site was marked off with tape, the protesters *de facto* had been present there prior to the marking off and continued to be present in it on both dates. The access to the area was not physically barred to any great extent, beyond the warning tape (see paragraphs 38 and 40 above). This is corroborated by the domestic authorities’ finding that, when the area was marked off on 28 May 2010, there were already protesters inside it (see paragraph 83 above). In such circumstances, the security staff’s involvement consisted in attempts to remove the protesters from the path of the construction machinery and from the construction site rather than deny them entry to it. This situation was fraught with tension and

bound to create greater friction than a simple denial of access to a well-defined and guarded area. In other words, the security guards acted on the basis of a framework focussed on operations within limited and well-defined perimeters with restricted access, which appears to have been inapplicable or, at least impractical, in the context of the events as they actually unfolded.

276. It is true that the domestic framework appears also to have allowed the security guards to take, more broadly, any appropriate action to prevent offences or control the damage in cases of emergency (see section 1.4.3 of the Licensing Rules). However, in the present case there is no indication that any such urgency existed. In fact, the situation was far from unexpected since by the time of the events in question (27 and 31 May 2010) the standoff had been ongoing for seven and eleven days respectively and, in fact, the Main Contractor, which had appointed the security personnel, had informed the police of the likelihood of clashes with the protesters ahead of time (see paragraph 26 above). The police were deployed in full force, as envisaged by the law-enforcement plan, on the days the clashes in which the applicants were injured took place (see paragraph 76 above), but did not make any intervention worth of note and capable to prevent or control effectively the clashes.

277. While in certain circumstances a degree of restraint on the part of the police in policing assemblies can be appropriate and even required by the Convention, no specific operational reasons have been given for the policy of, effectively, non-intervention in this case (contrast, for example and *mutatis mutandis*, *P.F. and E.F. v. the United Kingdom* (dec.), no. 28326/09, §§ 40-47, 23 November 2010, and *Király and Dömötör v. Hungary*, no. 10851/13, §§ 63-69, 17 January 2017). Moreover, as shown above, this policy left the security guards to deal with the protesters in circumstances that were bound to generate increased tension and in the absence of clear legal powers to engage in coercive actions on their own.

278. Moreover, the above-mentioned lack of clarity in the security personnel's status and powers is compounded by the allegation that certain unidentified individuals were present on the site and were wearing security guard insignia without being security guards and having appropriate authorisation to do so. This allegation was made by the MG director to the prosecutor's office (see paragraph 75 above) and was never denied or disproven at the domestic level. The Court, therefore, cannot but treat the allegation as credible. Such a situation was not in line with best practices endorsed by the security industry (see paragraph 116 above) and raised an issue under domestic rules as well (see paragraph 106 above).

279. However, there appears to have been no concerted effort to investigate this worrying aspect of the situation. For instance, there was no effort to verify whether it was the staff of another private security provider, PS, who had been inappropriately wearing MG badges, which would in

itself be evidence of a dangerous confusion between them in terms of the line of command and responsibility.

280. The Court has already held that failure to ensure a mechanism for identification of security personnel deployed in operations where force is used may raise issues under Article 3 of the Convention (see *Hristovi v. Bulgaria*, no. 42697/05, § 92, 11 October 2011, concerning the deployment of masked police officers without overt signs allowing their personal identification). The authorities' failure to investigate the alleged presence on the scene of the protests of unidentified persons bearing security guard insignia without proper authorisation is one of the factors which has led the Court to find a violation of Article 3 of the Convention in the present case (see paragraph 168 above). The Court considers that, in the particular circumstances of the present case those failings also have consequences for the respondent State's compliance with its Article 11 obligations. The authorities' failure to take any demonstrable steps to investigate that alleged infiltration of the scene of protests by such unidentified and unauthorised persons form part of the respondent State's failure to take reasonable steps to ensure the peaceful nature of the protests (see, *mutatis mutandis*, *Identoba and Others v. Georgia*, no. 73235/12, § 98, 12 May 2015, and § 76 the UN Special Rapporteur's report at paragraph 115 above).

281. The Court concludes that by failing (i) to regulate in an adequate fashion the use of force by security personnel, (ii) to properly organise the division of responsibility in maintaining order between the private security personnel and the police, which would also have allowed for the identification of the security personnel deployed, (iii) to enforce the rules concerning adequate identification of persons authorised to use force, and (iv) to explain the decision of the police not to intervene on 27 and 31 May 2010 in any meaningful fashion capable of preventing or controlling effectively the clashes, the respondent State failed to comply with its obligation to ensure the peaceful nature of the protests on those dates.

282. There has, accordingly, been a violation of Article 11 of the Convention in respect of the seventh and ninth applicants concerning the events of 31 and 27 May 2010 respectively.

#### V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 11 OF THE CONVENTION

283. The applicants submitted that had there been a court order banning their assembly, an appeal to a higher court against such an order would have been an effective remedy in respect of the alleged violation of their right to freedom of assembly. As far as prosecutions were concerned, appeals to higher courts constituted an effective remedy which the applicants had exhausted. However, they had not been prosecuted under Article 185-1 of

the Code of Administrative Offences, thus depriving them of an effective remedy in respect of their complaint. For them, this constituted a breach of Article 13 of the Convention, which reads:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

284. The Government did not comment on this aspect of the case.

285. The Court considers that this complaint is a mere repetition of the applicants’ arguments which it has examined above (see paragraphs 233 to 241 above) in the context of their complaint under Article 11 of the Convention. Having regard to the violation found above, the Court does not consider it necessary to give a separate ruling on the admissibility or the merits of the complaint under Article 13 of the Convention taken together with Article 11 of the Convention.

## VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

286. 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

287. The applicants claimed the following amounts in respect of non-pecuniary damage:

- (i) the first and second applicants 15,000 euros (EUR) each;
- (ii) the sixth applicant EUR 10,000;
- (iii) the seventh and ninth applicants EUR 17,000 each.

288. The first and second applicants also asked the Court to indicate in the operative part of its judgment that there had to be a retrial in their case.

289. The Government considered those claims excessive and urged the Court to reject them.

290. The Court, ruling on an equitable basis, awards the first, second, seventh and ninth applicants EUR 6,000 each in respect of non-pecuniary damage.

291. The Court also notes that in the present case it has found a violation of the fair trial guarantees in respect of the first and second applicants and that the domestic law allows for the possibility of reopening of the proceedings (see paragraph 99 above). The Court considers that, notwithstanding the award it has made under Article 41 of the Convention, an appropriate form of redress in their cases would be the reopening of the proceedings, if requested (see, for example, *Yaroslav Belousov v. Russia*,

nos. 2653/13 and 60980/14, § 193, 4 October 2016, *Igranov and Others v. Russia*, nos. 42399/13 and 8 others, § 39, 20 March 2018, and *Topi v. Albania*, no. 14816/08, § 65, 22 May 2018).

### **B. Costs and expenses**

292. The applicants also claimed EUR 13,608 for the costs and expenses incurred before the domestic courts and EUR 9,912 for those incurred before the Court.

293. The Government contested those claims. They pointed out that the costs claimed for the proceedings before the domestic courts related to fourteen clients in the domestic proceedings, only eleven of whom were applicants. The claims for administrative and postal expenses were not supported by appropriate documentation and the overall amount claimed, EUR 20,328, could not be considered as necessarily incurred.

294. 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, regard being had to the documents in its possession and the above criteria, in particular the complexity of the case, the Court considers it reasonable to award to the first, second, sixth, seventh and ninth applicants jointly the sum of EUR 16,600 covering costs under all heads.

### **C. Default interest**

295. 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,**

1. *Declares*, unanimously, the following complaints admissible:
  - (a) the seventh and ninth applicants' complaints under Article 3 of the Convention,
  - (b) the first and second applicants' complaints under Article 6 § 1 of the Convention,
  - (c) the first to sixth applicants' complaints under Article 11 of the Convention concerning their arrest and conviction, and
  - (d) the seventh and ninth applicants' complaints under Article 11 of the Convention concerning physical violence against them on, respectively, 31 and 27 May 2010;

2. *Declares*, by six votes to one, the remainder of the application inadmissible;
3. *Holds*, by six votes to one, that there has been no violation of Article 3 of the Convention in its substantive aspect in respect of the seventh and ninth applicants;
4. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention in its procedural aspect in respect of the seventh and ninth applicants;
5. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention in respect of the first and second applicants;
6. *Holds*, unanimously, that there has been a violation of Article 11 of the Convention in respect of the first and second applicants concerning their arrest and conviction;
7. *Holds*, by six votes to one, that there has been no violation of Article 11 of the Convention in respect of the third, fourth and fifth applicants concerning their arrest and conviction;
8. *Holds*, by six votes to one, that there has been no violation of Article 11 of the Convention in respect of the sixth applicant concerning his arrest and conviction;
9. *Holds*, unanimously, that there has been a violation of Article 11 of the Convention in respect of the seventh and ninth applicants concerning the events of 31 and 27 May 2010 respectively;
10. *Holds*, unanimously, that there is no need to examine the admissibility or the merits of the complaint under Article 13 of the Convention taken together with Article 11 of the Convention;
11. *Holds*, unanimously,
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 6,000 (six thousand euros) to the first, second, seventh and ninth applicants each, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 16,600 (sixteen thousand six hundred euros), plus any tax that may be chargeable to the first, second, seventh and ninth applicants jointly, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

12. *Dismisses*, by six votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli  
Registrar

Jon Fridrik Kjølbro  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge P. Pinto de Albuquerque is annexed to this judgment.

J.F.K.  
M.T.

## PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I respectfully disagree with the Court's conclusion that the third applicant's complaint under Article 3 of the European Convention of Human Rights ("the Convention") is inadmissible. I also believe that substantive violations of Article 3 occurred in respect of the seventh and ninth applicants. Finally, I cannot accept the finding of no violation of Article 11 of the Convention in respect of the third, fourth, fifth, and sixth applicants' complaints about their arrest and conviction. In all other respects, I agree with the majority's findings of violations.

2. This case is extremely consequential for the right to freedom of demonstration, especially as it pertains to the safety and security of protestors confronted with violent action from private security and police forces. I am left unconvinced that the majority has adequately considered these ramifications. On the Article 3 claims, the majority unjustifiably adopts an interpretation of the events that is excessively favourable to the Government. On the alleged violations of Article 11, I regret that the European Court of Human Rights ("the Court") has not engaged in a proper balancing exercise in evaluating the necessity of the interference in a democratic society.

### **I. The Government's failure to provide relevant information**

3. First, I would submit a general comment on the Government's failure to provide this Court with essential documents: where the Government have failed to provide relevant information through no fault of the applicants, the lacunae must be construed in the latter's favour.

4. By way of example, the Government did not submit to the Court a copy of the decision not to institute criminal proceedings in response to complaints from the seventh and ninth applicants, for "unclear"<sup>1</sup> reasons – thereby "depriv[ing] the Court of a full opportunity to review the steps taken by the authorities to investigate the applicants' allegations"<sup>2</sup>. Indeed, the majority establish that the seventh and ninth applicants were prevented from learning about the outcome of the investigation into their complaints, and on this basis find a violation of the procedural aspect of Article 3 of the Convention<sup>3</sup>.

5. However, the majority err in not applying this same reasoning to the other complaints too, in particular to the alleged substantive violations of Article 3. When the Government cite the destruction of relevant documents

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<sup>1</sup> § 163 of the judgment.

<sup>2</sup> § 163 of the judgment.

<sup>3</sup> § 164 of the judgment.



as the reason for their failure to provide relevant information, and the parties submit different versions of the circumstances giving rise to the complaint, the Court must assess the merits of the complaints solely on the basis of the submissions of the applicant<sup>4</sup>. Such practice recognises that the State has a disproportionately privileged access to information and the investigation compared to applicants, and must thus bear the responsibility of failing to provide facts for the Court's evaluation.

6. In contrast to that approach, the majority have resolved any gaps in favour of the Government, as I will discuss below.

## II. Article 3 of the Convention

### *i. Inadmissibility of the complaint raised by the third applicant*

7. I am appalled by the majority's failure to address the extremely disturbing behaviour of the two workers (A. and K.) in operating and wielding chainsaws to intimidate the third applicant. In the Court's own version of events:

“Some distance away from this altercation, two workers are seen starting their chainsaws. At the same time an individual identified as the third applicant approaches closely and confronts one of the workers, raising and spreading his arms. Several other individuals also closely approach the worker. The worker is shown stepping back while holding the chainsaw close and waving it in horizontal semi-circles in front of him.”<sup>5</sup>

8. The majority interpret this segment of the video as the third applicant approaching and confronting one of the workers. This conclusion is wrong for two reasons. First, the workers starting the chainsaws and the applicant approaching one of the workers are two events which occurred “at the same time” and it is entirely possible that the worker in question started the chainsaw in reaction to seeing the applicant approach him. Indeed, this is a more plausible explanation than the third applicant advancing towards him after he saw the chainsaw being turned on.

Second, the lack of an effective investigation by the State is at fault for any ambiguity on this point. The difficulty in determining whether there is any substance to the allegations of ill-treatment lies with the authorities' failure to investigate the complaints effectively.

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<sup>4</sup> See *Sudarkov v. Russia* (no. 3130/03, §§ 63 and 64, 10 July 2008), in which the Court accepted as undisputed the applicant's description of the conditions of his transportation to custody in finding a violation of Article 3, when the Government cited the destruction of relevant documents as the reason for their failure to provide relevant information.

<sup>5</sup> § 42 of judgment.

9. Even assuming that the worker in question operated the chainsaw before the third applicant started advancing towards him, the issue of whether the purpose of the worker's action was to make the third applicant feel threatened is only one factor to be taken into account. In any event, the absence of any such purpose cannot conclusively rule out a violation of Article 3<sup>6</sup>.

10. Moreover, raising and spreading one's arms is most commonly understood to indicate that the person approaching does not intend to engage in violence, and to show clearly that there are no weapons in his or her hand. This is indeed the explanation given by the applicants in their submission and is consistent with the entirely peaceful nature of the protests, which did not involve any weapons or violence. To characterise the applicant's behaviour as confrontational, and to regard it as an acceptable reason for retaliation with a chainsaw, is shocking.

11. Furthermore, as cited above, the worker not only turned on the chainsaw but waved it in horizontal semi-circles in front of the third applicant. Such behaviour can only be understood by any rational person as a threat to wield the tool against the protesters, and is particularly heinous because none of the participants were armed. In other words, even if it were true that the applicant willingly exposed himself to danger by approaching the operating chainsaw, there would be nothing to justify the worker's waving it in semi-circles in front of him as if threatening to use it against the applicant.

12. Most importantly, by focusing on the applicant's action at the point that the chainsaw was used as a threat, the majority are suggesting that a potential victim must retreat from a situation where such intimidation occurs<sup>7</sup>. No case-law from this Court supports such a position. Article 3 imposes a duty on the States not to engage in inhuman or degrading treatment, not a duty on individuals to avoid it where the State attempts to do so. To use the Court's own words, "It prohibits in absolute terms torture or inhuman or degrading treatment, irrespective of the circumstances and the victim's behaviour"<sup>8</sup>.

13. Thus, the third applicant's complaint is admissible. Furthermore, I consider that the State could be held responsible for the two workers' actions, since the subcontractor employing them was a municipal company administered by an individual who had been appointed by the city council and was answerable to that body, the incident occurred in the course of the workers' attempt to cut down trees and the police remained passive in the face of the workers' action<sup>9</sup>.

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<sup>6</sup> See *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook XII, and *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III.

<sup>7</sup> § 146 of the judgment.

<sup>8</sup> See *Denis Vasilyev v. Russia*, no. 32704/04, § 114, 17 December 2009.

*ii. Substantive violations of Article 3 in respect of the seventh and ninth applicants*

14. The majority dismiss the well-documented injuries, sustained by the seventh and ninth applicants at the hands of the workers at the protest site, as a result of the protesters “actively tr[ying] to interfere with operating construction equipment”, and characterise the abuse as “counter-protest action”<sup>10</sup>. While it is true that removing protesters from an area cannot be regarded as ill-treatment *per se*, the use of excessive violence in this process must not be tolerated. Besides, as established above, the victim’s behaviour and the circumstances giving rise to the degrading treatment cannot overcome the absolute ban imposed by Article 3.

15. Another basis on which the majority reject a substantive violation of Article 3 is the applicants’ inability to pinpoint who exactly imposed the injuries on them. Yet, as the majority admit, it is certain that these injuries occurred in the course of the protests: “the seventh and ninth applicants’ allegations of ill-treatment suffered in the course of protests in Gorky Park were supported by medical evidence of injuries”<sup>11</sup>. Moreover, it is undisputed that the infliction of injuries occurred during “a tumultuous scene involving dozens of individuals, with men in black attempting to push the protesters away from the trees and the protesters attempting to hold their ground and push back”<sup>12</sup>. In this context, the applicants’ failure to identify the specific personnel who were responsible for their injuries is completely reasonable. The onus is on the State, which did not launch an effective investigation, a procedural violation of Article 3 which has been acknowledged by the majority<sup>13</sup>. It is wrong to penalise the applicants for absent information that is attributable to the State. This is all the more so when the majority themselves have criticised the Government for the failure to ensure a mechanism for the identification of the security personnel deployed in the operations where force was used<sup>14</sup>.

### III. Article 11 of the Convention

16. In this case, the majority heavily – and, in my opinion, incorrectly – rely on the ‘illegality’ of the demonstration and on the applicants’ actions. However, the Court’s case-law establishes that if an assembly is peaceful, the sole fact that it is illegal will not remove it from the protection of Article 11<sup>15</sup>.

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<sup>9</sup> § 42 of the judgment (“Several police officers observe”).

<sup>10</sup> § 154 of the judgment.

<sup>11</sup> § 160 of the judgment.

<sup>12</sup> § 42 of the judgment.

<sup>13</sup> § 168 of the judgment.

<sup>14</sup> § 279 of the judgment.

<sup>15</sup> See *Éva Molnár v. Hungary*, no. 10346/05, 7 October 2008, and the admissibility decision in *Lucas v. United Kingdom* (dec.), no. 39013/02, 18 March 2003.

17. Even in the context of protests that are illegal under domestic law, the right to freedom of peaceful assembly is one of the foundations of a democratic society, and should not be interpreted restrictively. This has been a long-standing principle of the European human-rights protection system, dating back to the time of the Commission. In fact, in *G v. Germany*,<sup>16</sup> while the applicant's conviction was ultimately considered necessary in a democratic society, the Commission stressed that the illegal nature of a protest should not in itself be a decisive factor in analysing an alleged Article 11 violation.

18. Indeed, in a case with parallel circumstances to the present case, *Nurettin Aldemir and Others v. Turkey*,<sup>17</sup> the Court found that the fact of security forces forcibly ending a demonstration that was illegal under domestic law amounted to an Article 11 violation, because the interference in the meetings and the force used by the police to disperse the participants, as well as the subsequent (albeit unsuccessful) prosecution of the applicants, could have had a chilling effect and discouraged the applicants from taking part in similar meetings. There is no reason why the Court should depart from such a conclusion in the present case.

19. Similarly, in *Ezelin v France*,<sup>18</sup> although protesters engaged in clearly illegal action, including threatening police officers with violent language and painting insulting graffiti on various administrative buildings, the Court found that the punitive measures taken by the applicant's Bar Association had violated his Article 11 right. In particular, the Court described the Bar Association's sanction as "minimal", yet nonetheless held that it was not "necessary in a democratic society"<sup>19</sup>.

20. Above all, States have the negative obligation to refrain from any interference with the rights protected in Article 11, unless this interference is in accordance with Article 11 § 2.<sup>20</sup> Article 11 § 2 requires prescription by law and necessity in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

21. In this case, the interference with the applicants' right to freedom of assembly was admittedly prescribed by law and pursued a legitimate aim, but was far from being "necessary in a democratic society".

22. An interference is "necessary in a democratic society" only if it answers a "pressing social need" and, in particular, if it is proportionate to

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<sup>16</sup> *G v. Germany*, no. 13079/87, Commission decision, DR 60.

<sup>17</sup> *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18 December 2007.

<sup>18</sup> *Ezelin v France*, no. 11800/85, 26 April 1991.

<sup>19</sup> *Ibid.*, § 53.

<sup>20</sup> *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V.

the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient”.<sup>21</sup> While it is for the national authorities to make the initial assessment in all these respects, this Court has the authority for final evaluation of whether the interference was necessary.

23. Given the circumstances of this case, it is difficult to accept that the convictions of the applicants were “necessary in a democratic society”.

24. As has been repeatedly stressed by the OSCE, the Venice Commission and the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, there is a presumption in favour of holding peaceful assemblies, which means that an assembly should be deemed as not constituting a threat to public order until and unless the Government put forward compelling evidence that rebuts that presumption<sup>22</sup>. In the instant case, the Government did not prove to the required level of satisfaction that the violence had been initiated by the demonstrators, still less that the applicants had been in any way involved in any violent action against the police or the private security guards. In fact, the available evidence speaks against that thesis. The majority did not take into account the above presumption, acknowledged by current international human-rights standards.

*i. Third to fifth applicants*

25. With regard to the facts, the majority admit that the police order to leave was given “without the use of amplifying equipment, despite the noisy environment”, and that “there are reasons to doubt that the order, when repeated by the police, was immediately audible and clear to all protesters”<sup>23</sup>. Furthermore, the majority accept that “by the time the police issued its order, the protesters had been fully contained in a small area by security guards”<sup>24</sup>. Finally, the majority go so far as to recognize that the reining confusion “appears to have stemmed in part from the lack of clarity in the distribution of authority between the security guards and the police”<sup>25</sup> and, on that basis, they even reproach the domestic courts for having failed to take into account in their reasoning “the above-mentioned possible

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<sup>21</sup> See, for example, *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, ECHR 2001, and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008.

<sup>22</sup> See the Venice Commission and OSCE/ODIHR Guidelines on freedom of peaceful assembly, 2010, second edition, guideline 2.1, and the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 24 April 2013, A/HRC/23/39, paragraph 50. See also my opinion in *Primov and Others v. Russia*, no. 17391/06, 12 June 2014.

<sup>23</sup> § 250 of the judgment.

<sup>24</sup> *Ibid.*

<sup>25</sup> § 251 of the judgment.

confusion on the part of the applicants as to the source of that order and precisely how to comply with it.”<sup>26</sup>

26. Nevertheless, in logically unsustainable reasoning, the majority then accept the factual findings of the domestic courts that the applicants disobeyed the police order to leave.

27. Two arguments are given by the majority to support their assessment of the evidence: that “the applicants could not but have been aware that the police was likely to be deployed to stop them from interfering in the tree-felling and construction work” and that “the applicants’ own evidence appears to support the finding that some protesters had indeed attempted to obstruct the efforts of the police to remove them from the site, at least passively, by dragging their feet”<sup>27</sup>. None of these arguments convinces.

28. The assumption that the applicants “could not but have been aware that the police was likely to be deployed” to stop them does not constitute a sufficient ground to impute to them the administrative offence provided for in Article 185 of the Code of Administrative Offences, punishable with a fine or detention up to fifteen days<sup>28</sup>. This offence requires not only the issuance of a “lawful” order on the part of the police, but also “malicious” disobedience on the part of the addressees of the order. It does not suffice that a person is aware that it is likely that he or she might be the addressee of a police action. There needed to have been an audible, clear and feasible order from the police, addressed to the applicants, which was not the case here, as found in the Court’s own assessment of the facts<sup>29</sup>. The majority’s own description of the chaotic nature of the context in which the police order was issued directly contradicts the majority’s conclusion that the applicants understood the police order and “maliciously” failed to obey the order to leave<sup>30</sup>.

29. In addition, the fact that “some protesters had attempted to obstruct the efforts of the police to remove them from the site, at least passively, by dragging their feet”<sup>31</sup> is also insufficient to impute to the applicants the above-mentioned offence. There is no evidence, other than the police reports, that the third to fifth applicants indeed acted this way<sup>32</sup>. To impute

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<sup>26</sup> § 254 of the judgment.

<sup>27</sup> § 253 of the judgment.

<sup>28</sup> § 97 of the judgment.

<sup>29</sup> It is odd, to say the least, that on the one hand the majority do not want to depart from the factual findings of the domestic courts (§ 253 of the judgment) and that, on the other, they reproach those same courts for not having taken into account the “possible confusion on the part of the applicants as to the source of the order” (§ 254 of the judgment). Such a reproach would warrant that the majority depart from the said factual findings.

<sup>30</sup> § 259 of the judgment.

<sup>31</sup> § 253 of the judgment.

<sup>32</sup> It is telling that in paragraphs 248 and 253, in the law part of the judgment, the majority do not refer to the police reports as set out in paragraph 43, but only to the video material mentioned in paragraph 45. It is patent that the majority themselves do not trust the police

an administrative offence of “malicious disobedience” to the applicants on the basis of the conduct of third persons, as if there was collective guilt on the part of all those involved in the demonstration, breaches the basic principle of individual criminal responsibility.

30. Even assuming that there was a “lawful” order, that it was audible and that the third to fifth applicants understood it, they should not have been sentenced to any criminal sanction, simply because there is no evidence of a “malicious” intent on their part. It is clear from the materials available to the Court that their intention was to draw the attention of the general public, and of the city authorities, to an issue of general interest.

31. Finally, the majority attempt to diminish the importance of the negative consequences of the criminal conviction of the third to fifth applicants by implying that the fines were but for small amounts. In doing so, however, the majority ignore the case-law of this Court, which has held that “[w]here the sanctions imposed on the demonstrators are criminal in nature, they require particular justification ... Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.”<sup>33</sup>

32. Under such particular scrutiny, the circumstances of the protest do not give rise to any necessity for a criminal fine: the third to fifth applicants were peaceful, unarmed and surrounded by private guards, and they posed no risk to anyone or to any property.

*ii. Sixth applicant*

33. The majority further posit that the ten-day prison sentence imposed on the sixth applicant renders the interference with his freedom of assembly justified. It is astonishing that the majority find the same prison sentence, imposed on the first and second applicants for a similar offence, unjustified<sup>34</sup>.

This stance is even incomprehensible, given that the majority are unsure about the kind of conduct for which they criticise the sixth applicant, since they refer to him as resisting the police “at least passively and perhaps even actively”<sup>35</sup>. The fact is that the domestic decisions make no mention of the extent of the disruption caused by this applicant. Hence, the least that the majority could and should have done was to presume that the applicant had engaged in a purely passive obstruction.

34. Moreover, it is quite surprising that the majority censure the applicant for not having renounced his previous statements (made to the police) when he was brought to the trial court and for not having “presented assurances in that respect”<sup>36</sup>. There is no evidence that the applicant was

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reports.

<sup>33</sup> *Kudrevicius and Others v. Lithuania* [GC], no. 37553/05, § 146, 15 January 2015. Internal citations omitted.

<sup>34</sup> § 255 of the judgment.

<sup>35</sup> § 261 of the judgment.

asked by the trial judge whether he intended to pursue his alleged obstructive action or that he made statements in the course of the trial and on his own initiative clearly reaffirming his intention to pursue it. Admittedly, he had made statements to this effect to the police when being removed from the site<sup>37</sup>. However, there is no indication in the record that he persisted in this attitude at the time of the trial.

35. The majority's repressive tone is noticeable not only in the way they evaluate the risk of reoffending posed by the applicant, but also in the manner in which they assess his procedural conduct. Apart from the quite vague remark concerning the "untenable position he had taken before the domestic courts in general"<sup>38</sup>, the majority are wrong in their evaluation of the defendant's procedural duties. According to the Convention principle of immediacy<sup>39</sup>, a defendant is not required to renounce statements with which he was not even confronted during the trial hearing and certainly not statements allegedly made before the police under unknown circumstances and without the benefit of legal assistance. The majority go too far when attributing to the defendant an "intention to reoffend"<sup>40</sup> on the basis of these alleged pre-trial statements, which were not confirmed at trial. More Catholic than the Pope, the majority request from him a "renunciation"<sup>41</sup> of his pre-trial statements and even the presentation of unspecified "assurances"<sup>42</sup> to which the domestic courts did not refer, either in the first-instance judgment or in the Court of Appeal's judgment<sup>43</sup>.

36. Under the Code of Administrative Offences, administrative detention could only be applied in exceptional cases<sup>44</sup>. The first-instance court failed to explain the exceptional nature of the applicants' cases which would have justified the severity of the punishment imposed. In his appeal, the sixth applicant omitted to request a mitigation of his sentence, insisting instead on his innocence. The Court of Appeal examined his case on 15 September 2010, almost two months after the applicant had served his ten-day detention sentence in full. Thus, a mitigation of his sentence at that stage would not have effectively remedied the effects of the unexplained severity of the sanction imposed by the first-instance court<sup>45</sup>. The majority admit this

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<sup>36</sup> § 265 of the judgment.

<sup>37</sup> § 65 of the judgment.

<sup>38</sup> § 266 of the judgment.

<sup>39</sup> See my critique of the highly illiberal stance of the Court in *Murtazaliyeva v. Russia*, no. 36658/05, 18 December 2018, and also Laurens Lavrysen, "*Murtazaliyeva v. Russia*: on the examination of witnesses and the "corrosive expansion" of the overall fairness test", in *Strasbourg Observers*, 25 January 2019.

<sup>40</sup> § 265 of the judgment.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> §§ 66 and 68 of the judgment.

<sup>44</sup> § 96 of the judgment.

<sup>45</sup> See, *mutatis mutandis*, *Shvydka v. Ukraine*, no. 17888/12, §§ 53 and 54, 30 October



fact, but go on to blame the defendant for having used his procedural right to appeal a conviction and to ask for his acquittal<sup>46</sup>. This is an inadmissible reproach in a court of law, let alone in a human-rights court.

37. Finally, as a matter of principle, imposing a custodial sentence for simply refusing to leave the protest site must be regarded as disproportionate, regardless of the length of the sentence. “A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction, and notably to deprivation of liberty”<sup>47</sup>.

38. There is no indication that the applicant was violent or aggressive in his behaviour during the protest or in resisting the efforts of the police to remove him. Instead, the applicant’s alleged refusal to obey the police order must be viewed as an extension of his protest activity. In the absence of any indication of violence on the part of the sixth applicant, a custodial sentence of any length in this context cannot be justified.

39. Quite apart from the criminal convictions, the violence and aggression involved in making the protesters leave the site cannot be regarded as necessary in a democratic society. According to the applicants, in the period from 20 May to 6 June 2010 they were subjected to physical violence by workers and private security personnel, as well as verbal threats<sup>48</sup>. In my view, these instances of violence have not been adequately accounted for.

40. While some physical intervention may be accepted as a last resort to remove protesters physically from a site when they refuse to leave, the video footage, the photographic material, the medical evidence and the witnesses’ accounts clearly demonstrate that the amount of force used in this case was excessive enough to cause injuries to participants. Considering that none of the applicants were armed or threatening to use violence and that the number of protest participants was not overwhelming in comparison to the number of private security personnel and police officers, I simply cannot endorse the position that their conviction was “necessary in a democratic society”.

There has, accordingly, been a violation of Article 11 of the Convention in respect of the third to sixth applicants’ arrest, conviction and punishment.

#### **IV. Conclusion**

41. This case is of paramount importance, in view of the stance taken by the Court with regard to the imputability of the actions of private security forces to the respondent State when they interfere with the right to

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2014.

<sup>46</sup> § 266 of the judgment.

<sup>47</sup> *Kudrevicius and Others*, cited above, § 146.

<sup>48</sup> Applicants’ Reply to the Government’s Observations on Admissibility and Merits, 8 October 2014, § 19.

demonstrate. Unfortunately, this correct decision was not followed by an equally correct assessment of the facts, which showed a striking logical inconsistency compounded by a wrongful evaluation of the sixth defendant's procedural duties. I am afraid that the repressive tone of some passages of the judgment is nothing but a sign of the illiberal wind blowing in Strasbourg.