Issues for consideration during a half-day general discussion in preparation for a General Comment on Article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights

Submission on behalf of the International Service for Human Rights

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Issues for consideration during a half-day general discussion in preparation for a General Comment on Article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights

The International Service for Human Rights (ISHR) welcomes the opportunity to provide the following observations on the right to peaceful assembly under Article 21 of the International Covenant on Civil and Political Rights (ICCPR). ISHR is an independent, non-governmental organisation dedicated to promoting and protecting human rights. We achieve this by supporting human rights defenders, strengthening human rights systems, and leading and participating in coalitions for human rights change.

This submission aims to inform the discussion and the drafting process by commenting on key aspects of the right to peaceful assembly through the provision of responses to the Questionnaire provided by the Human Rights Committee (HRCtee). This submission draws on relevant international, regional and domestic legal standards and decisions, including from the HRCtee, and makes specific reference to the Model Law on the recognition and protection of human rights defenders.¹

Question 1.

What are the unique features of the right to peaceful assembly, which distinguishes it from other related rights such as freedom of expression and political participation? What is the function, added value and rationale for this right in a social system based on democracy and human rights? Does the scope of the right differ depending on the context (for example, is it the same during political transitions)?

1.1 Overview of the Freedom of Peaceful Assembly

The right to freedom of peaceful assembly is a fundamental human right that is essential for public expression of one’s views and opinions and is indispensable in a democratic society.² Its significance is echoed by the reiteration of this right in a multitude of international and regional legal frameworks.³ Along with the right to freedom of association and freedom of expression, the right to freedom of peaceful assembly acts as a vehicle for the exercise of many other civil, cultural, economic, political and social rights.⁴

It is a right that is inextricably linked with the right to freedom of speech. We observe this most clearly in jurisprudence from the United States.⁵ Whilst broad free speech protections do not exist in the same fashion in the United Kingdom (UK), the Courts have drawn a clear link between the right to free speech and the right to peaceful assembly. In Hubbard v Pitt, Lord Denning MR asserted that ‘the right of protest is one aspect of the right to free speech.’⁶

States continue to enact restrictions on the right to peaceful assembly. For example, over the past 10 years, the police in Sierra Leone have regularly refused permission for peaceful protests, particularly those organised by opposition political parties or civil society groups. Similarly, in 2009 the Cambodian Government adopted The Law on Peaceful Assembly that is used to curtail the right to protest and to give the authorities the power to approve or ban all forms of peaceful protest.

Legal commentators and regional courts have highlighted the need to treat the right to freedom of assembly as a 'free-standing independent freedom'. This is particularly important at the domestic level. National courts must respect the legal doctrine of *lex specialis* when conducting legal analysis of claims, and where appropriate, formulate judgments through the lens of freedom of assembly rather than other associated rights such as freedom of expression. This approach will further develop and define the scope and understanding of this right, which is especially important given the continued and growing utility of peaceful assembly as a means of political participation.

### 1.2 Function of the Freedom of Peaceful Assembly

The right to peaceful assembly, which encompasses the right of groups to engage in protest, has long been recognised as important both for individuals and for the proper functioning of the democratic State. The right enables individuals to speak their own mind and to hear the ideas of others. As the HRCtee has noted, 'freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.'

Through the exercise of the right to freedom of peaceful assembly, individuals can express their opinions about issues of public interest. This fundamental pillar of democratic society facilitates the formulation of grievances and aspirations and allows those exercising this right to make their views known to those governing them. As a result, this physical manifestation

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15. Tatár and Fáber v Hungary, (ECtHR), Application No. 26005/08 and 26160/08, 12 June 2012, para 38.
of opinion can be a very powerful tool in shaping public debate, influencing governments\(^\text{18}\), and ultimately improving the overall governance of States.\(^\text{19}\)

Protests and assemblies are illustrative of discontent within society and have the potential to assist those governing to shape policies. In this sense, the right to assemble is linked to the right to directly and indirectly participate in political and public life. Whilst the right to assemble is a distinct right, separate from the right to political participation, it nevertheless plays a 'crucial role in the promotion of democratic governance, the rule of law, social inclusion and economic development.\(^\text{20}\)

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights (UN Declaration on Human Rights Defenders) recognizes the right to freedom of assembly and the legitimacy of participation in peaceful activities to protest against violations of human rights in its articles 5 and 12.\(^\text{21}\) This has been reflected in UN resolutions at the Human Rights Council\(^\text{22}\) and the Third Committee of the General Assembly.\(^\text{23}\)

Maina Kiai, the former Special Rapporteur on the rights to freedom of peaceful assembly and of association, stated that in his 25 years of experience as a human rights defender in Kenya and at the international level, the right for everyone to express their grievances and/or aspirations for change, including civil, political, economic, social and cultural, through peaceful protests and other non-violent ways, had been central.\(^\text{24}\)

### 1.3 Added Value of the Freedom and Its Rationale

The right to assemble and to communicate one's views can be seen as important as the right to vote. As Shami Chakrabati, a prominent human rights campaigner and lawyer, has asserted 'both are routes by which ideas can be promoted and debated.'\(^\text{25}\) The right to assemble has added value for those who are disenfranchised or are rendered powerless by autocratic rule. In Sudan, protestors have staged almost daily protests since December 2018 against President Omar al-Bashir, who came to power in the 1989 military coup. We note with concern that on

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\(^{18}\) R v Lebel, [1999] JQ No 4995 at para 83 (CM) [Quebec Municipal Court].


\(^{21}\) Discussed in more detail in section 1.5 below.

\(^{22}\) HRC Res 39/11 on 'equal participation in public and political affairs, 28 September 2018; HRC Resolution 38/11 on “the promotion and protection of human rights in the context of peaceful protests”, 5 July 2018; HRC Resolution 38/12 on ‘Civil society space: engagement with international and regional organizations’, 6 July 2018; HRC Res 31/32 on Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights; HRC Res 34/5 Mandate of the Special Rapporteur on the situation of human rights defenders.


25 February 2019, President Omar al-Bashir banned unlicensed public gatherings and has declared a state of emergency.26

Second, the right to freedom of peaceful assembly is often exercised in public places. As such, those exercising this right can attract the attention of not only State authorities or select groups, but also the general population. This in turn has the effect of facilitating dialogue, pluralism, tolerance and broadmindedness.27 Minority and other underrepresented groups are likely to benefit from this unique feature.28 As it can be used as an expression of their voices. For example, over the past six months, young people in Sudan with an average age of 17-23 years old - who may be prevented from participating in the political process due to their age - have been taking to the streets to protest the rising cost of living and economic hardships.29

A third democracy-enhancing feature is that the right to freedom of assembly is essential to individuals and groups with limited resources. National courts have recognised that influencing political processes is easier for large associations or mass media, and that in this regard freedom of assembly is especially important for ordinary citizens and civil society.30 Protests can be a tool for individuals and groups whose rights are being restricted by large corporations and States with pro-business agendas, e.g. In 2017, four environmental activists were murdered every week on average—most of them in Latin America, and most of them targeted for protesting industries like logging or mining.31

Finally, the large peaceful gatherings in Paris and around Europe after the January 2015 terrorist attacks emphasise how peaceful protests can bring people together in the face of financial or security related adversity.32 In this sense, protests are also a way to repair the very fabric of society when damaged.33

1.4 Varying Scope of Article 21

The right to freedom of peaceful assembly is particularly important in the context of periods of political transition, such as during elections. The former Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, stated that during elections, people should be given more, rather than less, space in which to exercise their assembly and association rights.34 Electoral periods and periods of political transition are an important time when there is considerable potential to build democratic, responsive and accountable

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institutions. States should put in place very strict and clear safeguards in these periods to prevent undue interference with public freedoms.35

However, the right to freedom of peaceful assembly often comes under increased attack during elections or periods of political transition, affecting the scope of the right.36 Around the world, political opponents and human rights defenders advocating for political change during election periods face judicial, physical and verbal harassment.37 As reported by the current Special Rapporteur on the rights to freedom of peaceful assembly and of association Clément Voule in 2018, in certain countries, peaceful protests continue to be the subject of severe and even blanket restrictions amid political tensions triggered by electoral periods.38 For example, in 2018, Congolese security forces used particularly violent methods (including the use of live rounds) to suppress protests that broke out after the country's presidential election was postponed by three months.39 Similar protests are currently on-going in Thailand where the military junta continues to delay a democratic election. The protests have been met with heavy criticism from military leaders and strict restrictions.40

The European Court of Human Rights (EChHR) held that legal measures that are more restrictive than the normal regulatory framework are not necessary to regulate assemblies during or immediately after an election period, even if there is heightened tension.41 Rather, the existing legal framework should be sufficient to cover assemblies associated with election campaigns, an integral part of which is the organization of public events.42

1.5 Peaceful assembly and the UN Declaration on human rights defenders

The Declaration on Human Rights Defenders acknowledges the legitimacy of participation in peaceful activities to protest against violations of human rights, and recognizes freedom of assembly as a very important element of this right.43

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The right to participate in peaceful assemblies is recognized in the UN Declaration on Human Rights Defenders under:

Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

(a) To meet or assemble peacefully; […]

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

The mandate of the UN Special Rapporteur on the situation of human rights defenders considers the right to peaceful assembly essential for human rights defenders working locally, nationally and globally to promote and protect human rights.\(^4^4\) Without a guarantee of this right and protection against its violation by State officials and non-State entities, human rights defenders will be restricted in their ability to fulfil their fundamental role of protecting and promoting human rights.\(^4^5\)

**Question 2.**

*How should the term 'peaceful assembly' be understood? When is one dealing with an 'assembly'? Does it require the expression of an idea through a gathering, and if so, what is the hallmark of such an expression of an idea (e.g. does it necessarily entail an appeal to the public opinion)? Does it cover strikes? Or do all gatherings (e.g., also sporting, religious, cultural events, or) qualify as 'assemblies'? Does it matter whether the organizers pursue a commercial interest? In order to qualify as an assembly, are there requirements about where should the gathering take place – in public, private or on-line? Can one person form an assembly? When is an assembly not 'peaceful', and fall outside the scope of the protection of the particular right? What level of violence (or mere disruption?) is required not to consider it peaceful? To what extent can the violent conduct of certain individuals...*
participating in the assembly be attributed to the group as a whole and render an assembly as a whole not peaceful?

2.1 Definition of Peaceful Assembly

The right to peaceful assembly is described as the right of persons to gather intentionally and temporarily for a specific purpose. Other assemblies, such as religious assemblies and gatherings of family and friends, are protected by Articles 18 and 17 of the ICCPR respectively. Nowak suggested that Article 21 is specifically directed at assemblies concerned with the discussion or proclamation of ideas.

An assembly must be an intentional and temporary gathering in a private or public space for a common expressive purpose. In Coleman v Australia (1157/03) the HRCtee established that if one is acting alone it does not constitute an assembly. Assemblies include both static and moving gatherings such as: public meetings, pickets, sit-ins, flash mobs, demonstrations, processions, rallies, pilgrimages and convoys. The definition of 'assembly' varies across jurisdictions; in some instances national courts apply an overly restrictive reading, limiting the scope of the right.

2.2 Duration of the Assembly

Assemblies such as flash mobs can be spontaneous and short-lived, whereas some may continue for several days and result in the construction of protest camps and other non-
permanent structures.\textsuperscript{61} The EctHR has held that in deciding whether it is appropriate and lawful to disperse an assembly, authorities must consider whether the demonstrators have been given sufficient opportunity to manifest their views.\textsuperscript{62} In the case of \textit{Molnar v Hungary}, the Court found that eight hours was a reasonable period of time for the participants in a spontaneous assembly to protest and that the police decision to disperse the assembly after such a time was not unreasonable.\textsuperscript{63}

### 2.3 Location of the Assembly

The HRCtee has stated that organisers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible unless it is (a) imposed in conformity with the law; and (b) is necessary in a democratic society, in the interests of national security or public safety public order, protection of public health or morals or protection of the rights and freedoms of others.\textsuperscript{64} States should always seek to facilitate public assemblies at the organiser's preferred location.\textsuperscript{65}

It is crucial that the right to freedom of peaceful assembly be regarded as an equally legitimate use of public space as more regular activities such as commercial activity or pedestrian traffic - despite the fact that the former may result in more disturbance or inconvenience.\textsuperscript{66} In the context of an increasing privatisation of public property, freedom of assembly in privately owned spaces has been said to be deserving of protection in instances where the prevention of access to the property would have the effect of curtailing the exercise of the freedom of assembly.\textsuperscript{67}

Protests and assemblies outside airports and abortion clinics have been the source of domestic jurisprudence, highlighting the ways that the right to freedom of peaceful assembly may be protected or curtailed in respect of other rights. The High Court of the United Kingdom in the case of \textit{Heathrow Airports v Garman} enjoined an eight-day long camping demonstration near Heathrow Airport because it was likely to be accompanied by direct action protests. The Court linked the location of the gathering and its likelihood of causing disruption because it would not only hinder thousands of people expecting to take flights but potentially also authorities in averting or preventing a terrorist attack.\textsuperscript{68}

Protests outside abortion clinics demonstrate the challenges when individual rights, including the right to assemble and free speech and the right to dignity clash. For example, Australian State and Territory Governments have enacted safe access zone laws that seek to prohibit gatherings outside abortion clinics.\textsuperscript{69} This approach is in stark contrast to the Supreme Court


\textsuperscript{62} Balcık and Others v. Turkey, (ECtHR), Application No. 25/02, 29 November 2007 & Patý and Others v Hungary, (ECtHR), Application No. 5529/05, 7 October 2008.

\textsuperscript{63} Éva Molnár v. Hungary (ECtHR) Application No. 10346/05, 7 October 2008.


\textsuperscript{66} Balcık and Others v. Turkey, (ECtHR), 29 February 2008, para 52.

\textsuperscript{67} Appleby and Others v. the United Kingdom (ECtHR) Application No. 44306/98, 24 September 2003, para 47. The Court stated if 'the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.'

\textsuperscript{68} Heathrow Airports Ltd and Bullock v Garman and Others [2007] EWHC 1957 (QB).

\textsuperscript{69} These laws exist in New South Wales, Tasmania, the Australian Capital Territory and the Northern Territory.
of United States, which has protected the rights of people to protest outside abortion clinics, finding that floating buffer zones restrict free speech as protected by the First Amendment.  

2.4 Online Assemblies

The right to freedom of peaceful assembly also extends to online spaces, meaning that States have an obligation to respect and protect assembly rights online. Aside from enabling peaceful assembly in the real world, online spaces are increasingly being used by individuals to assemble to express their ideas. A restriction on online content must also pass the three-part test (as discussed in part 2.3 of this submission) set out by Article 21 of the ICCPR and must be undertaken by a competent judicial authority or body that is independent of political, commercial, or other unwarranted influences. States should ensure that Internet access is maintained at all times, including during times of political unrest.

2.5 Common Expressive Purpose

Article 21 of the ICCPR states that assemblies may gather to express views, defend common interests, celebrate, commemorate and protest. The exercise of this freedom can have both symbolic and instrumental significance. International jurisprudence suggests that while the right may extend to assemblies that are social in nature, especially when exercised by groups or organisations, gatherings that are 'purely social' in character are unlikely to attract protection. Assemblies ought to have some meaningful common economic, political, cultural or religious purpose.

2.6 Peaceful Nature of Assemblies

A fundamental condition of the right guaranteed by Article 21 is that the assembly must be peaceful. The assembly must not use violence to achieve its aims in order to attract protection under the ICCPR. Weapons or items that might be used as weapons should not be taken to assemblies. An assembly that aims to annoy, give offence and even temporarily hinder, impede or obstruct the activities of third parties will still fall within the meaning of Article 21. As in the case of

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70 See Madsen v Women's Health Center, 512 US 753 (1994) and Schenck v Pro-Choice Network of Western New York, 519 US 357 (1997).
73 A/HRC/17/27, para. 69.
74 A/HRC/20/27, p 9-10, para 32.
75 A/HRC/17/27, para. 79.
77 Ibid.
78 Countryside Alliance v the UK, (ECtHR) Application No. 27908/08, 24 November 2009, para. 50.
79 Anderson and Nine Others v United Kingdom (ECtHR), Application No. 33689/96, Decision on admissibility, 27 October 1997.
80 O Salát (2015), The Right to Freedom of Assembly: A Comparative Study, Chapter 1, II.
83 A/HRC/20/27, p 8, para. 25.
84 Oya Ataman v. Turkey, Application No. 74552/01, (ECtHR), 5 December 2006, para. 38; Arzte fur das Leben v Austria, (ECtHR), Application No. 10126/82, 21 June 1988, para 32.
the right to freedom of expression; the right applies to ideas that offend, shock or disturb the State or any other part of society.\textsuperscript{85} International jurisprudence suggests that the only gathering which will not qualify as a 'peaceful assembly' will be that in which the organisers and participants actively intend to use violence.\textsuperscript{86} However, propaganda for war or advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence\textsuperscript{87} or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law\textsuperscript{88} should always be deemed unlawful.\textsuperscript{89}

Sporadic violence does not make the entire assembly non-peaceful.\textsuperscript{90} Individuals do not cease to enjoy the right to peaceful assembly as a result of violent acts by others if the intentions and behaviour of the individual in question remains peaceful.\textsuperscript{91}

Importantly, the unlawful or violent actions of a few during an otherwise peaceful assembly should not form basis of ending the entire assembly\textsuperscript{92} and should be properly balanced against competing public safety/law and order considerations. As such, authorities should take action against the particular person or group causing problems, in order to protect the rights of the majority who are assembling peacefully.\textsuperscript{93} In all cases, States should be guided by the principle of abstaining from unjustified interference with the right.\textsuperscript{94}

The State response to disorder and violence ought to always be proportionate to the actions taken by the protestors.\textsuperscript{95} The positive duty on States also dictates that where peaceful assemblies face aggressive actions on part of third parties, the State has a responsibility to take 'appropriate measures' to protect those who are exercising their right to freedom of peaceful assembly.\textsuperscript{96}

2.7 \textbf{Industrial Action & Strikes}

Without assembly and association rights, workers have little leverage to change conditions that entrench poverty, fuel inequality and limit democracy.\textsuperscript{97} The right to strike is established in various international law instruments, including Article 21 of the ICCPR.\textsuperscript{98} The current

\textsuperscript{85} Handyside v. the United Kingdom, Application No. 5493/72, (ECtHR). 7 December 1976, para. 49.
\textsuperscript{89} A/HRC/20/27, p 6, para 18.
\textsuperscript{90} Ziliberberg v. Moldova, Application No. 61821/00, (ECtHR) 1 February 2005, para 52. This approach has been endorsed by the HRC ine in A/HRC/20/27, p 8, para. 25.
\textsuperscript{91} Ezelin v. France, Application No. 11800/85, (ECtHR), 26 April 1991. This approach has been endorsed by the HRC ine in A/HRC/20/27, p 8, para. 25.
\textsuperscript{92} OSCE/ODIHR/Venice Commission Guidelines Section B para. 159.
\textsuperscript{93} OSCE Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Peaceful Assembly para. 5.3.
\textsuperscript{94} Denis Turchenyak et al. v. Belarus, CCPR/C/108/D/1948/2010 (2013), para.7.4.; HRC 'Concluding observations on the seventh periodic report of the Russian Federation' (2015) CCPR/C/RUS/CO/7, available at: http://dostoro.ochhr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2fIPPriCAgkB7ywhW5OjDQbMEkix20NhlFwS4AvJDc7q0OFcAG3Fb24aMVraFpysUmYJvEOEBQCPHJdUIaBGIBJeDz4ZqQa2FMGUZeFSjwclYP.
\textsuperscript{96} Ouranio Toxo and Others v. Greece (ECtHR) Application No. 74989, 20 October 2005, para. 43.
Special Rapporteur on the rights to freedom of assembly and of association has observed that the right to strike has become customary international law.\textsuperscript{99} It is recognised however that while strikes fall under the scope of Article 21, claims related to strike action are likely to be framed instead around arguments related to the freedom to association rather than freedom of assembly.\textsuperscript{100} Furthermore, in circumstances where such assemblies continue for prolonged periods of time, they may fall outside of the remit of Article 21 as a result of their prolonged duration.

**Question 3.**

Is freedom of assembly an individual or a collective right, or both? Who is the bearer of the right? The participants – individually or collectively? The organizers? Does the right cover planning/publication/advertisement of the event, and if so when does this start - before notification or other similar requirements have been met? Does the right cover protection of participants on their way to and from an assembly?

### 3.1 Individual or Collective Right?

The Council of Europe's Commission for Democracy, *Guidelines on the Freedom of Peaceful Assembly and Association* state that:

'The freedom to organise and participate in public assemblies must be guaranteed to individuals, groups, unregistered associations, legal entities and corporate bodies; to members of minority ethnic, national, sexual and religious groups; to nationals and non-nationals (including Stateless persons, refugees, foreign nationals, asylum seekers, migrants and tourists); to children, women and men; to law-enforcement personnel; and to persons without full legal capacity, including persons with mental illnesses.'\textsuperscript{101}

The right to peaceful assembly may be used to secure collective rights. Indigenous groups increasingly rely on assembly rights to assert their collective rights to their cultural identity and to the land, as set out in the UN Declaration on the Rights of Indigenous Peoples.\textsuperscript{102} There are many examples of Indigenous communities protesting agribusiness, the development of mines and dams and deforestation. These activities interfere with and threaten the traditional lands and resources that form a key component of Indigenous life and culture. Recent examples include the Guato people in Brazil who have been protesting in response to intensifying deforestation and the Taboli-manubo people of Mindanao in the Philippines who have opposed the expansion of an industrial coffee plantation.\textsuperscript{103} A 2017 report by Global together) of African Charter of Human and Peoples Rights & Article 28 of the European Union of Charter of Fundamental Rights of 2000 amongst others.

\textsuperscript{99} A/71/385, para. 56.

\textsuperscript{100} Enerji Yapi-Yol Sen v Turkey, (ECtHR) Application No. 68959/01, 21 April 2009.

\textsuperscript{101} Guidelines on Freedom of Peaceful Assembly, para. 2.5 & article 2 of the Covenant and resolutions 15/21, 21/16 and 24/5 of the Human Rights Council.

\textsuperscript{102} Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (James Anaya), A/HRC/15/37 (July 19, 2010), para 26-32 and Report of the Special Rapporteur on the rights of indigenous peoples (Victoria Tauli-Corpuz) A/HRC/39/17 (September 2018) para 12 states: 'international legal sources recognize indigenous peoples' rights to self-determination and to their traditional lands, territories and natural resources, self-government, cultures and ways of life. For indigenous peoples, most of these and other human rights are enjoyed collectively, reflecting the special relationship with their traditional lands, territories and natural resources which forms the basis of their collective identity and their physical, economic and cultural survival.'

Witness underscored the violence that many Indigenous land and environmental defenders face when peacefully protesting.\textsuperscript{104}

### 3.2 Rights without Assembly Notification / Permit

The domestic approach to the requirement for prior notification varies significantly.\textsuperscript{105} The Guidelines on Freedom of Peaceful Assembly, and the Human Rights Committee state that 'prior notification should only be required where the purpose is to enable States to put in place adequate arrangements to facilitate freedom of assembly and protect public order, public safety and the rights and freedoms of others'.\textsuperscript{106} Further, the right does not require the issuance of a permit; therefore, a lack of such license or notification (especially in circumstances of spontaneous assemblies)\textsuperscript{107} will not prevent individuals from relying on the protections afforded by the right.\textsuperscript{108}

### 3.3 Planning, Publication & Advertisement of Assemblies

The Special Rapporteur has explicitly stated that the right to freedom of assembly extends not only to participation, but also the \textit{organisation} of assemblies.\textsuperscript{109} The ECtHR has held that where an individual is found administratively liable and fined for having breached the procedure for \textit{organising} and holding a public assembly, the administrative prosecution will amount to an interference with the protestor's right to freedom of assembly, interpreted in the light of his right to freedom of expression.\textsuperscript{110} Therefore any disproportionate interference with planning, publicising or advertising events could amount to a violation of Article 21.

### 3.4 Access to Assemblies

The protections afforded under Article 21 apply equally before and during assemblies.\textsuperscript{111} Restrictions such as on the ability of participants to reach an assembly are likely to violate the right to freedom of peaceful assembly.\textsuperscript{112} Unless a clear and present danger of imminent violence exists, law-enforcement officials should not intervene to stop, search or detain protesters.\textsuperscript{113}

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\textsuperscript{105} Ibid.

\textsuperscript{106} Ireland is one example where there is no requirement at all for prior notification for static public assemblies (although organizers will generally notify the appropriate local police station). See, further, Article 40 of the Irish Constitution (Bunreacht na hÉireann); Article 24 of the Constitution (Amendment No. 17) Act, 1931 (power to proclaim public meetings); section 28 of the Offences Against the State Act, 1939; and section 21 Criminal Justice (Public Order) Act, 1994 which empowers senior officers of the Garda Síochána to regulate access to a place where an event likely to attract a large assembly of persons is taking, or is about to take, place. Similarly, the Public Order Act 1986 in England and Wales does not require that prior notification be given for open-air public meetings. This can be contrasted with Germany where under (Article 5(4) (1) of the Law on public Events and section 14 of the Assembly Act (VersG) States: "Anyone who intends to hold an open air public meeting or assembly must notify the competent authority at least 48 hours before the announcement, stating the subject of the assembly,"


\textsuperscript{108} A/68/299, para. 24.

\textsuperscript{109} Bączkowski and Others v. Poland, (ECHR), Application No. 1543/06,24 September 2007.

\textsuperscript{110} A/68/299, para 16.

\textsuperscript{111} Sergey Kuznetsov v. Russia, (ECHR) Application No. 10877/04, 23 October 2008, para 36.

\textsuperscript{112} Nisbet Ozdemir v Turkey (ECHR) Application No. 23143/04, 19 January 2010.

\textsuperscript{113} Nisbet Ozdemir v Turkey (ECHR) Application No. 23143/04, 19 January 2010.

\textsuperscript{114} R (on the application by Laporte) (FC) v. Chief Constable of Gloucestershire [2006] HL 55.
Restrictions on other human rights may also have the indirect effect of limiting the right to assemble peacefully. Restrictions on liberty and freedom of movement within the territory of a State (rights articulated in Article 12 of the ICCPR & Article 5 of the European Convention of Human Rights, respectively) and across international borders can also prevent or seriously delay participation in an assembly. Such indirect violations occur particularly in relation to human rights defenders. The former UN Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Hina Jilani, has observed that human rights defenders 'have been prevented from leaving the country by representatives of the authorities at airports or border-crossings...in order to prevent them from participating in assemblies of different kinds outside of their country of residence'.

Question 4.

*Article 2 (1) of the ICCPR requires States to 'respect and ensure' the rights in the ICCPR. Article 21 provides that the right of peaceful assembly 'shall be recognised'. Does this in general terms mean that there is a duty on the State to 'facilitate' peaceful assembly, and what does such a duty to 'facilitate' entail? Does it mean that, while people exercise this right, the focus of law enforcement officials should be primarily on protecting the rights of all concerned rather than upholding law and order? (Are States thus required to show a certain level of tolerance to conduct when engaged in as part of peaceful assembly, and not meet it with the same force of the law as it would otherwise do?) How should the obligation to allow assemblies to take place within 'sight and sound' of its target audience be interpreted?*

4.1 Underlying Importance of the Duty to Facilitate

As noted by the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the right to freedom of peaceful assembly and of association play '*...a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected.*'  

4.2 Duty to Facilitate

States have a clear, positive obligation to facilitate peaceful assembly. This means States should put in place measures to guarantee that this right can be exercised in practice. This includes ensuring conditions allow for peaceful assemblies to take place, protecting participants during a peaceful assembly and enacting and implementing laws to ensure that others respect this right. This requires that the State adopt the least intrusive means of achieving competing legitimate objectives.

This duty requires States to ensure that organisers of a peaceful assembly are allowed to choose a location within sight and sound of their target audience, without undue restrictions. Furthermore, the holding of a peaceful assembly should be regarded as a

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115 Ibid.
117 A/HRC/20/27 p20 para 84.
118 Plattform 'Ärzte Für Das Leben' v Austria (ECtHR), Application no 10126/82 A/139 (1988).
119 Ibid.
120 Ibid.
legitimate purpose for the use of public spaces such as squares, streets, parks, roads etc. Therefore, any restriction on organisers holding an assembly at their chosen location must be justified by the State. Where an assembly is to be held on private property, the right to freedom of assembly may legitimately be balanced against the owner's right to enjoyment of property.

States must respect the right of peaceful assembly and refrain from unnecessary interference. Public demonstrations and assemblies may cause a degree of disruption to the public, including, for example, disruption of traffic or obstructing pedestrian access to particular areas. Temporary disturbances or annoyances do not justify disproportionate restrictions and any measures taken to manage the protest must be proportionate and tailored to the particular factual circumstances.

Question 5.

More specifically, what are the (negative and positive) obligations placed by the right of peaceful assembly on the State? How should the right be respected by the State (e.g. through the adoption of laws providing for and regulating its exercise in accordance with international law)? How should it be protected? To what extent does the State have an obligation to protect those engaged in peaceful assembly from interference by other members of the public? And should counter-demonstrations be protected to the same extent? How should the obligation on States to take precautionary measures to prevent violations of rights be understood in this context (for example in the context of preventing and reducing violence)? Is there an obligation on the part of the authorities to attempt to engage with assembly organisers and participants prior to the holding of the assembly? Are organisers required to engage with the authorities? Is there a special role for NHRIs in this regard? And other stakeholders (such as local governments)?

5.1 Enactment of Laws

States must develop and implement legislation and policies to ensure that individuals are able to fully enjoy this right and that any restrictions imposed are clearly foreseeable and formalised in law. This means that laws restricting this right must not be overly broad or vague, and the legal consequences of actions by participants must be clear. Furthermore, laws must be of general application, without targeting particular groups, and may not be retroactive. The Inter-American Commission on Human Rights (IACHR) has highlighted

See section 11.1 of this paper for further discussion.
Ibid. see also Balçık and Others v. Turkey (ECtHR) Application no. 25/02 (2007) para. 50.
Ibid.
that where legal provisions are unclear, they should be clarified or, where appropriate, interpreted in favour of those exercising the right to freedom of peaceful assembly. As the Organisation for Security and Cooperation in Europe (OSCE) and the Office for Democratic Institutions and Human Rights (ODIHR) emphasise, legislation relating to peaceful assembly should provide for clear distinction between violent and non-violent demonstrators. This reflects the established principle that the positive obligation of States to protect the right to peaceful assembly does not extend to organisers/participants having violent intentions.

Further, the public should be clear as to which government body is responsible for decision-making regarding peaceful assemblies, and this should be provided for in law. Importantly, any decisions to restrict or prohibit peaceful assembly must be transparent, to ensure action taken is compatible with Article 21. This requires well-resourced and efficient administration, public access to information, clearly reasoned and communicated decisions and regulatory authorities that are broadly representative of different backgrounds and understand different interests across society.

Any restrictions on the right provided for in law must be necessary and comply with the proportionality requirements of Article 21 of the ICCPR. As such, any restrictions in law aimed at regulating the exercise of the right must ensure that the freedom to assemble peacefully can be enjoyed in practice and is not hampered by bureaucracy.

5.2 The Model Law on the recognition and protection of human rights defenders

In 2016 the Model Law on the recognition and protection of human rights defenders was launched. The Model Law was developed in consultation with over 500 human rights defenders from every region, and settled and adopted by 28 of the world’s leading human rights experts and jurists. It provides authoritative guidance to States on how to implement the UN Declaration on Human Rights Defenders at the national level. It also provides an influential new tool for civil society to promote, evaluate and report on implementation.


132 OSCE/ODIHR/Venice Commission Guidelines Section B para. 61.


134 OSCE/ODIHR/Venice Commission Guidelines Section B para.61-64.


The Model Law provides in section 11 in respect of the rights to peaceful assembly:

1. Everyone, individually or in association with others, has the right to meet or assemble peacefully as well as to participate in peaceful activities concerning human rights and fundamental freedoms, free from interference that is arbitrary or unlawful by public authorities and private actors, at the local, national, regional or international level.

2. The right in subsection (1) includes the right to plan, organise, participate in and disseminate information regarding peaceful activities concerning human rights and fundamental freedoms, including demonstrations, protests, seminars and meetings, whether conducted in a public or private place.

This Section of the Model Law draws on Articles 5 and 12 of the UN Declaration on Human Rights Defenders.

Article 5 provides in relevant part that:

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

(a) To meet or assemble peacefully;

Article 12 provides that:

1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.

... 

3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

While the UN Declaration does not explicitly state that human rights defenders have the right to hold demonstrations or protests, some domestic instruments for the recognition and protection of the rights of human rights defenders do include such a reference, such as Article 6 of the Burkinabe Bill\textsuperscript{138} and Article 3(5) of the Nepalese Bill\textsuperscript{139}.

The phrase “free from interference by public authorities and private actors” in subsection (1) makes clear that public authorities must not interfere in, and should prevent others from interfering in, the exercise of this right.

\textsuperscript{138} Avant-Projet de Loi Portant Protection des Défenseurs des Droits Humains au Burkina Faso (2012).
\textsuperscript{139} Draft Bill 2066 on Human Rights Defenders (2009).
To address concerns about existing laws that may restrict the ability of human rights defenders to hold public demonstrations and protests, subsection (2) makes clear that the right to meet and assemble peacefully includes the right to plan, participate in and disseminate information regarding peaceful demonstrations and protests.

The drafters discussed that despite the positive relationship between an enabling environment for civil society and the interests of national security, counter-terrorism measures are increasingly being developed and used to target, restrict and criminalise the work of human rights defenders. Such regressive developments come despite the Council’s calls in Resolutions A/HRC/22/6 and A/HRC/25/18 for States to ensure that:

.. measures to combat terrorism and preserve national security ... do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights.

Principles set out in these resolutions should be kept in mind when developing a law for the recognition and protection of human rights defenders.

This provision should be interpreted and applied consistently with the 2016 report of the Special Rapporteur on freedom of peaceful assembly and association and the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/31/66) which provides practical recommendations for the management of assemblies, as well as the 2012 (A/HRC/20/27) and 2013 (A/HRC/23/39) reports of the Special Rapporteur on freedom of peaceful assembly and association which state that in a free and democratic society, no authorization should be required to assemble peacefully. In accordance with these resolutions and reports, the exercise of the right to freedom of peaceful assembly, should be:

.. governed at most by a regime of prior notification whose rationale is to allow State authorities to facilitate this exercise and to take measures to protect public safety and order and the rights and freedoms of others.

5.3 Protection of Participants from Other Members of the Public

Article 21 imposes duties on States to take positive measures to protect participants in a peaceful assembly from persons or groups, including counter-demonstrators and agents provocateurs, who intend or attempt to interfere with the peaceful assembly or direct hostility or violence towards the participants.

International human rights law requires States to protect the right to freedom of assembly and expression of all individuals, even those espousing unpopular views.\(^\text{140}\) The HRCtee emphasises that the duty to protect peaceful assembly is particularly important where the participants are seeking to express views that are widely unpopular and therefore likely to be met with hostility.\(^\text{141}\) As such, the State has a duty to protect demonstrators ‘...promoting ideas that may be regarded as annoying or offensive by others' from hostile or violent

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reactions by others.\textsuperscript{142} Similarly, the ECtHR emphasises that this obligation is of particular importance for persons belonging to minority groups, because they are more vulnerable to victimisation.\textsuperscript{143}

For example, women human rights defenders often face additional and different risks and obstacles that are gendered, intersectional and shaped by entrenched gender stereotypes and deeply held ideas and norms about who women are and how women should be.\textsuperscript{144}

This means that an unspecified or general risk of a hostile reaction or violent counter-demonstration is not sufficient to ban a demonstration.\textsuperscript{145} Instead, where there is a genuine concern that violence may be directed at participants of a peaceful assembly, the State should take additional precautionary and law-enforcement measures to protect participants from hostile reactions. Indeed, the Human Rights Council has highlighted the important role of local authorities in protecting participants from threats and harassment.\textsuperscript{146} In particular, States are under the obligation to protect especially vulnerable groups during public assemblies. This not only includes individuals at risk of being subjected to violence because of their views, but, in addition, States should be aware of the risks to and protection needs of groups that may be targeted or affected in specific ways during public assemblies for other reasons, for example due to their age, gender, race, disability, sexual orientation, religion, national origin or membership of other particular group.\textsuperscript{147} States are required to facilitate the enjoyment of peaceful assembly without discrimination.\textsuperscript{148}

\textbf{5.4 Counter Demonstrations}

Where hostility towards a particular view results in counter-demonstrations, States have a positive obligation to protect the rights of all peaceful demonstrators under Article 21 of the ICCPR.\textsuperscript{149} As such, each simultaneous peaceful assembly should be facilitated by the State as far as possible, and one assembly should not be restricted or disbanded purely on the basis that another demonstration is likely to take place or has spontaneously formed. The principle of non-discrimination requires that peaceful assemblies in comparable circumstances do not


\textsuperscript{143} Bażków v. Poland, (ECtHR), Application No. 1543/06. (2006), para. 64.


\textsuperscript{145} OSCE/ODIHR/Venice Commission Guidelines Section B para.30.


face different degrees of restriction. The ECtHR has held that a number of factors should be taken into account when assessing the proportionality of restrictions on counter-demonstrations, including whether the counter-protest concerns expression of opinion on an issue of public interest, whether the coincidence of time and venue of the counter-demonstration is an essential part of that message, whether the counter-demonstration is intended to be peaceful and the methods adopted.

However, the duty of States to protect and facilitate both assemblies does not extend to counter-demonstrations that seek to violently or physically inhibit or disrupt a peaceful assembly. Crucially, the ECtHR has held that ‘...in a democracy, the right to counter-demonstrate cannot extend to inhibiting the right to demonstrate.’ This also reflects the position under the ICCPR, where organisers of a counter-demonstration intend to interfere with the rights of others seeking to lawfully assemble, this will constitute an unlawful interference with the rights of others under Article 5 ICCPR and the protections under Article 21 of the ICCPR will not apply to the counter-demonstration.

This established position relates to the duty of the State to protect peaceful demonstrators with unpopular views; individuals must be able to exercise their right to peaceful assembly without fear of being subjected to violent reactions by opponents. As the ECtHR highlights, ‘...such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.’ This is echoed by the HRCtee, which highlights that State obligations entail duties not only to refrain from unnecessary interference with the right to peaceful assembly, but to actively protect demonstrators from individuals seeking to inhibit this right.

5.5 Precautionary Measures

The OSCE Guidelines direct States to also consider ensuring public safety and maintaining law and order while facilitating peaceful assemblies. For example, States should put in place precautionary measures such as medical services, cleaning services, stewarding or additional policing and ensure that law-enforcement officials approach the policing of public assemblies by prioritising the protection of human rights. Furthermore, the State must ensure that any restrictions placed upon the right to peaceful assembly in pursuit of legitimate competing objectives are necessary and proportionate.

150 OSCE/ODIHR/Venice Commission Guidelines Section B para. 33.
152 Plattform 'Ärzte Für Das Leben' v Austria, (ECtHR), Application No. 10126/82 (1988) para. 32.
155 OSCE Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Peaceful Assembly [80].
157 Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Oesterreich, C-112/00 (2003), The European Court of Justice, para. 79.
5.6 Law Enforcement

Dispersing demonstrations must be guided by principles of necessity and proportionality and with regard to the duty of States to protect protesters. As such, authorities must use the least intrusive or harmful measures to safely disperse protesters and the use of force must be used only in exceptional circumstances where strictly necessary.\(^{158}\)

As discussed in more detail in 2.6 above, it is important that law enforcement officials are trained to approach public assemblies with a view to prioritising the protection of human rights and facilitating peaceful assembly as far as possible.\(^{159}\) States’ positive obligations under Article 21 of the ICCPR also require that States actively and effectively investigate allegations of disproportionate use of force and/or arbitrary arrest/detention against those exercising their rights, and appropriately punish those responsible.\(^{160}\)

5.7 Roles of Other Stakeholders (NHRIs)

National Human Rights Institutions (NHRIs) have an important role to play in promoting and protecting the right to freedom of peaceful assembly\(^{161}\) and human rights more broadly.\(^{162}\) NHRIs monitor peaceful assemblies and report on violations by officials. As the OSCE/ODIHR highlights, organisations can collaborate with authorities and governments to ensure that the protection of the right to freedom of assembly is practical and effective.\(^{163}\)

5.8 Role of Businesses

Business enterprises currently play an increasingly prominent role in the policing of assemblies, for example by providing private security companies performing stewarding, policing-type or surveillance roles.\(^{164}\) Such businesses should carry out human rights due diligence and respect and protect human rights while performing such roles.\(^{165}\) States may be responsible for any violations committed by such actors where those fail to prevent, investigate and provide effective remedies for the misconduct of private parties.\(^{166}\) In 2016,

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\(^{159}\) OSCE/ODIHR/Venice Commission Guidelines Section A para. 5.3.

\(^{160}\) HRC 'Concluding observations on the seventh periodic report of the Russian Federation' (2015) CCPR/C/RUS/CO/7. http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPrIcAqkhKb7yhsrWB5OjDQbMEikiX20XNhfwS44✈JDC9yOfcGg%2b4aMvruPpYuAMYJvE00EBQCPhWJdUA6hGlBjoe5Dl4ZqOzai12FMGUZjFSjwclYP; and

\(^{161}\) HRC, 'Concluding observations on the fourth periodic report of Uzbekistan' CCPR/C/UZB/CO/4 (2015) para. 24, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPrIcAqkhKb7yhsj07MIYGKLOR0JAcDdFO9808e6JD37xmvJkysf%U4eALL98u%bUAP69%27ToiTAnNpQm97FsBWOvdxwBxibCRIhLbNoGkX%2bfQ5yGwTTuJ.


\(^{166}\) Principles 17-21 of the UN Guiding Principles on Business and Human Rights


the former UN United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, firmly criticised the use of unjustified force by both public as well as private military contractors against the Standing Rock protesters opposing the construction of the North Dakota Pipeline.\(^{167}\)

5.9 **Role of Local Governments**

Local governments must ensure that appropriate systems are in place to protect human rights, and must comply with relevant international legal frameworks such as the ICCPR.\(^{168}\) Local governments must ensure that it can receive prior notifications (where mandated by national legislation) and that it has the necessary means at its disposal to arrange road closures and other practical arrangements conferred upon them by legislation or directives of the higher levels of government.\(^{169}\) In saying this, the former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, heavily criticised that all peaceful assemblies in Kazakhstan now require the go-ahead from local authorities.\(^{170}\) Kiai noted that, in rationalizing restrictions, local authorities frequently cited traffic issues and concerns about assemblies being disruptive as legitimate reasons for the prohibition of assemblies. That these concerns should not supersede the right; the right to freedom of peaceful assembly may be subject to certain limitations, but international human rights law is clear that limitations on this right cannot impair the essence of the right itself.\(^{171}\)

**Question 6.**

*When and how may the right of peaceful assembly be limited? Are the limitations affected by the modalities of the assembly (e.g. whether they take place in the open or within a building, whether they are stationary gatherings or marches)? Is it correct to say there is a 'presumption' under the Covenant in favour of allowing peaceful assemblies, and the onus is on those wishing to restrict such assemblies to justify such limitations? How should the procedural requirement for limitations on the right in sentence two of Article 21 (that limitations can only be imposed 'by law') and the substantive requirements (this can be done only where it is necessary to protect national security, etc.) be understood? What is their relationship to other articles of the Covenant, including Article 22? In what way are the limits on Article 21 different from the limits of Article 19? How should such limitations be enforced – is there e.g. a role for criminal sanctions, and if so when? What are the alternatives? Who can be held criminally responsible for violent conduct of individuals or groups that participate? What are the safeguards that should be in place to establish whether limitations on peaceful assemblies are permissible (e.g. judicial review)? What does an 'effective remedy' mean in time sensitive contexts? How can transparency of decision-making in relation to assemblies be ensured?*


171 Ibid.
6.1 Overview of Limitations

Article 21 provides that any restriction to the right to peaceful assembly must be (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. 172

As noted, the HRCtee has consistently held that States should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. 173 This is echoed by other human rights bodies. The IACHR has stated that ‘…in democracies, States should act based on the legality of protests or public demonstrations and under the assumption that they do not constitute a threat to public order.’ 174 The HRCtee is clear that where a State imposes restrictions with the aim of reconciling the right with other such legitimate objectives, the onus is on the State to justify the limitation of the right. 175

When considering whether the proposed restriction is proportionate, States must demonstrate that (1) the restriction is provided for in law, with sufficient certainty and foreseeability as to its extent; (2) the restriction must be in pursuit of a legitimate objective, as contained in Article 21 of the ICCPR; (3) the restriction must be necessary to achieve the intended objective; and (4) the means must be proportionate to the aim, that is, the least intrusive means of achieving the objective. 176 Thus, the scope of the restriction imposed must be proportional to the value that the restriction serves to protect. 177 Blanket bans will be disproportionate, as they do not consider the specific circumstances of each assembly. 178

A restriction in accordance with national law is not an indication that it is necessary or proportionate. 179

Where a State imposes restrictions but cannot demonstrate the purpose as being necessary to further public safety, national security or some other legitimate purpose, this will constitute a violation of the right to peaceful assembly. 180 This has been seen in HRCtee, ECtHR and African Commission on Human and People’s Rights (ACHPR) jurisprudence. 181 Further, the requirements of proportionality and necessity should not be subordinate to political

considerations;\textsuperscript{182} that is to say, that 'national, political, economic or government interest is not synonymous with national security or public order.'\textsuperscript{183}

This must be considered in the context of recent trends of deliberate and targeted abuse of overly broad and vague definitions of terrorism and violent extremism to criminalize and otherwise suppress human rights defenders and other civil society actors.\textsuperscript{184} As the UN Security Council has repeatedly underscored, it is the responsibility of the State to adopt measures to protect people from terrorist acts, in a manner that is consistent with its obligations under international law.\textsuperscript{185} However, laws related to national security have been used to persecute and hinder human rights defenders. Often, the scope of these laws exceeds the legitimate objective of strengthening security. Many are vague and imprecise definitions that allow varying interpretations, unduly limit judicial review, and infringe upon other guarantees for the protection of human rights.\textsuperscript{186}

It has been established in human rights jurisprudence across jurisdictions that a factor in determining whether a restriction of right to assembly is proportionate is whether the participant(s) concerned acted violently (or intended to).\textsuperscript{187} As noted in this submission, the protection of the right extends only to peaceful assemblies.

Restricting the right to freedom of assembly purely or primarily based upon the views advocated by participants, or their membership of a particular group, will likely amount to discrimination, in violation of the ICCPR and \textit{ jus cogens} human rights norms. The HRCtee held that interfering with the right to peaceful assembly purely because the purpose of the assembly was to advocate for a particular view - in that case, to promote respect for the human rights of sexual minorities - amounted to '...one of the most serious interferences with the freedom of peaceful assembly.'\textsuperscript{188} Article 21 of the ICCPR, read together with Articles 2(1), 3 and 26 of the ICCPR, provides for the protection of the right to peaceful assembly without discrimination. Equally, as highlighted by the UN Committee on the Elimination of Racial Discrimination, States should ensure that even where restrictions apply ostensibly to all, such restrictions must not be applied discriminatory in purpose or effect.\textsuperscript{189}
On the other hand, public assemblies aimed to incite hatred and/or violence towards certain groups would be deemed unlawful and their prohibition justified in order to protect the rights of others, including the right to be free from discrimination.\footnote{UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 20 (2).}

6.2 Enforcement of Limitations and Criminal Sanctions

The ECtHR has held that the freedom to participate in a peaceful assembly is of such importance that participants should not be subjected to criminal sanctions or lower end disciplinary penalties for participating in a demonstration that has not been prohibited, ‘...so long as this person does not himself commit any reprehensible act on such an occasion.’\footnote{Ezelin v. France, (ECtHR), Application No. 11800/85, 26 April 1991, para. 53.} This approach is echoed by the IACHR which confirmed that blanket restrictions (for example on public thoroughfare safety grounds) on assemblies and the resultant criminal sanctions will be viewed as unjustified.\footnote{IACHR ‘Report on Citizen Security and Human Rights’ OEA/Ser.L/V/II.Doc.57. (2009) Para. 197, available at: https://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CUIDADANIA%202009%20ENG.pdf.} Likewise, the HRCtee has urged States to consider the impact of implementing criminal laws against demonstrators on the duty to facilitate peaceful assembly.\footnote{HRCTtee ‘Concluding observations on the third periodic report of the former Yugoslav Republic of Macedonia’ (2015) CCPR/C/MKD/CO/3, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.aspx?enc=6QkG1d%2fPPRriCAqhKb7yhsvD39shLHEE RhvYOhFdzh0PKyP5LamSDEmmbMDUKB8dAcAL%2bnk6L8gjou1mtUDceVJSxPoPgiNHEZdpiZhvVoFqyxCoxx%2bQJx.}

It has been noted above that liability or penalties for failure to adhere to laws regulating freedom of assembly should be clearly stated in law, and any penalties imposed should be proportionate to the nature of the breach.\footnote{UN General Assembly, Human Rights Council, ‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ A/HRC/31/66 (2016), para. 7, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.}

Assembly organisers should not be liable for a failure to adhere to restrictions or responsibilities if they have acted in good faith and made reasonable efforts to do so. For example, organisers should not be penalised for underestimating the number of participants, if the estimate was provided in good faith,\footnote{OSCE/ODIHR/Venice Commission Guidelines, Section B, para 110.} organisers and individual participants should not be held responsible for violent or otherwise unlawful acts of others.\footnote{Ezelin v. France, (ECtHR), Application No. 11800/85, (1991) paras. 41 and 53.} There can be no risk that organisers/participants become liable for criminal acts of others that they did not intend or participate in and could not reasonably foresee.\footnote{Ibid. OSCE/ODIHR/Venice Commission Guidelines, Section B, para 112,} Further, heavy sanctions, such as detention, should not be imposed upon individuals exercising their rights who do not present a serious risk to national security or public safety.\footnote{HRCTtee, ‘Concluding observations on the second periodic report of Thailand’ CCPR/C/THA/CO/2 (2017) para. 40, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.aspx?enc=6QkG1d%2fPPRriCAqhKb7yhsn0o0Fgy2xt0pdp5yBvfo4gsdZhiVrziaJxLXhVQSTDN0qLBwe559zNYsqKtBpwSsTU1U0HhxFewgoB1dV7tcEMIENgEv9g4RVdd5.}

6.3 Accountability for Violations and Effective Remedies

The obligations under Article 21 of the ICCPR, read with Article 2(3)(a)-(c) ICCPR, entail the right to an effective remedy. The Venice Commission Guidelines recommend that an
initial administrative review mechanism of restrictions may be sufficient and help build a more constructive relationship between the authorities and the public. Should the applicant not be satisfied by this review, there should be an opportunity to appeal the decision to restrict the assembly to an independent court.\textsuperscript{199} However, exhaustion of administrative remedies should not be a prerequisite for an organiser or participant to seek judicial review.\textsuperscript{200}

Proposed restrictions should therefore be communicated in a time frame that allows sufficient time for an appeal or urgent interim relief.\textsuperscript{201} Laws should provide for legally binding time frames for the State to deliver decisions on restrictions of peaceful assemblies prior to their planned date.\textsuperscript{202} As such, decisions made in appeal proceedings after the date on which the assembly was held (or due to be held) are unlikely to constitute an effective remedy.\textsuperscript{203}

Where a violation of the right is found, the State must provide an effective remedy determined by a competent authority, including compensation, a review of any related conviction and reimbursement of costs. States must investigate any allegations of violations in the context of assemblies promptly and effectively through independent and impartial bodies and ensure that any resulting prosecutions are carried out in line with the fair trial protections contained in the ICCPR.\textsuperscript{204} The HRCtee has stressed that in order to avoid repetitions of such violations, States found to have violated the right should review its legislation and practices with a view to ensuring that the right to peaceful assembly is fully enjoyed.\textsuperscript{205}

**Question 7.**

*What is the position as far as organiser accountability is concerned? Can the organiser be required to cover police costs, provide assurances in advance as far as reparations for damages are concerned, cleaning up services, medical services, etc.? Do particular obligations arise for organiser in an assembly (including counter-demonstrations) intentionally advocate hatred, seek to intimidate others or call for or use force? How should concealment of their faces by participants be dealt with?*

### 7.1 Organizer Responsibility

The OSCE Guidelines on Freedom of Peaceful Assembly state that organizers of assemblies should not be held liable for failure to perform their responsibilities if they have made...

\textsuperscript{199} OSCE/ODIHR/Venice Commission Guidelines, Section A, para 4.6.


\textsuperscript{202} Baczkowski v. Poland, (ECtHR), Application no. 1543/06 (2007), para 83.

\textsuperscript{203} Baczkowski v. Poland, (ECtHR), Application no. 1543/06 (2007), para 68.


reasonable efforts to do so. Organisers should not be liable for the actions of individual participants.

7.2 Public-Liability Insurance

Assembly organisers may wish to take out public-liability insurance for their event, however, this should not be made a condition of the right to hold an assembly; any such requirement would have a disproportionate and inhibiting effect on the enjoyment of the right. Moreover, if an assembly degenerates into serious public disorder it is the responsibility of the State to limit the damage caused; in no circumstances should the organizers of a lawful and peaceful assembly be held liable for disruption caused to others.

7.3 Post-Assembly Clean-Up

The responsibility to clean up after a public assembly should lie with the municipal authorities and not the organisers. To require assembly organizers to pay such costs would create a significant deterrent for those wishing to enjoy their right to freedom of assembly and may be prohibitive for many organisers. The Venice Commission has criticised proposed domestic legislation imposing cleaning costs on organisers on numerous occasions.

Question 8.

Should those wishing to exercise this right be required to apply for authorisation; or merely be required to notify the authorities; and if the latter, what form should the notification take (how onerous can expectations of notification be: how long in advance; does this apply to spontaneous assemblies (and how are they to be defined); etc.)? Is a system of voluntary notification workable? Are there international standards for establishing which assemblies need to be free from all requirements of notification and authorization; which the former and which the latter?

8.1 Overview of Domestic Legislation

The ECtHR conducted a comparative study of the legislation of 28 Member States of the Council of Europe regarding the requirement to receive (prior) notification for public assemblies. The study found that a majority of the States provide a notification procedure. In the United Kingdom notification is required for marches and processions only. In other

206 OSCE/ODIHR/Venice Commission Guidelines, para. 197.
207 Ibid, para 198.
208 Ibid, para 32.
209 For example:


211 Lashmankin and others v. Russia, (ECtHR) Application No. 57818/09,7 February 2017, paras. 318-324.
212 Lashmankin and others v. Russia, (ECtHR) Application No. 57818/09,7 February 2017, paras. 319.
countries spontaneous assemblies are exempt from the notification requirement. With the exception of Ukraine, States impose certain restrictions on the location, date or time of an assembly, however, most do not provide statutory restrictions on the location, date or time of the assembly, but instead impose restrictions on a case-by-case basis. In thirteen States, the failure to give prior notification of an assembly or to comply with restrictions imposed on the assembly's location or time is a sufficient ground for dispersing an assembly. In Lichtenstein and Switzerland the domestic law requires that any dispersal should satisfy the requirement of proportionality, while in Sweden dispersal is permissible only if other steps to stop the disorder have proved ineffective.

The HRCtee has previously held that notice requirements may be compatible with the permitted limitations laid down in Article 21 of the ICCPR. However, while a system of prior notices may be important for smooth conduct of public demonstrations, "their enforcement cannot become an end in itself." In other words, States cannot and should not misuse prior authorization procedures to restrict the right of peaceful assembly.

8.2 Legality of Notification/Authorization Requirements

The ECtHR has stated that reasonable notification or authorization requirements are not contrary to the right of assembly and are good practice, provided their purpose is to allow domestic authorities to take necessary preventive security measures to guarantee the smooth conduct of any assembly, and to prevent disorder or crime. Furthermore, since States are allowed to impose authorization requirements, they can also impose sanctions on those who do not comply with the requirements.

Some jurisdictions have very firmly rejected the requirement for the need to acquire a permit in order to exercise the right to freedom of peaceful assembly. In the Nigerian High Court case of *All Nigeria Peoples Party & 11 others v. Inspector General of Police*, the Court upheld the demonstrator's right to freedom of peaceful assembly, despite the lack of a permit. The Court noted that the requirement to obtain a permit was a 'colonial relic' which was incompatible with the African Charter on Human and Peoples' Rights.

8.3 Spontaneous Demonstrations

Individuals must be able to assemble spontaneouly in reaction to certain incidents or events, which the OSCE/ODIHR describe as ‘...an expectable feature of a healthy democracy.’ A system of prior notices may be important for the smooth conduct of public

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213 In Azerbaijan, Germany, Greece and the United Kingdom spontaneous assemblies are exempt from the notification requirement.
214 Armenia, Bulgaria, Bosnia and Herzegovina, Estonia, Germany, Greece, Hungary, Latvia, Montenegro, the Netherlands, Serbia, Turkey and Ukraine.
218 *Berladir and Others v. Russia* (ECHR) no. 34202/06, 10 July 2012, paras. 40-41.
221 The Human Rights Committee considered the fourth periodic report of Switzerland (CCPR/C/CHE/4) at its 3374th and 3375th meetings (see CCPR/C/3374 and 3375), held on 3 and 4 July 2017, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHE/CO/4&Lang=En.
222 OSCE/ODIHR/Venice Commission Guidelines Section B para. 128.
demonstrations, or to protect national security, public safety or the rights of others, but their enforcement cannot become an end in itself. Laws and policies requiring prior notice therefore cannot amount to the effective banning of spontaneous assemblies. This position is echoed by the ECtHR, which has stated that a decision to disband an assembly solely because of the failure to follow a procedural notice requirement, without illegal conduct by participants, amounts to a disproportionate interference. Similarly, the ACHPR has held that a provision in law requiring prior authorisation from the government for the holding of political assemblies had the practical effect of banning such assemblies, and was therefore unlawful.

Furthermore, laws imposing heavy sanctions or onerous restrictions upon individuals exercising this right, is incompatible with the ICCPR. The HRCtee has made it clear that States should consider the impact of imposing criminal sanctions on demonstrators and how this aligns with its duty to facilitate peaceful assembly. Liability for failure to adhere to such provisions should be clearly stated in law, with a maximum penalty provided.

8.4 Legitimate & Necessary Purpose of Notification Procedures

A State Party must explain why it is necessary - under domestic law in conjunction with one of the legitimate purposes set out Article 21 - to obtain prior authorization. For example, in the HRCtee case of Tatyana Severinets v. Belarus, the respondent State was unable to provide an explanation as to why the movement along a pavement by a group of individuals towards a place of worship could have violated the rights and freedoms of others or posed a threat to public safety or order.

8.5 Fines & Detention

The State needs to demonstrate that the administrative arrest and fine following a spontaneous and peaceful public protest were necessary in a democratic society and were proportionate to the interest of national security or public safety, public order, the protection of public health or morals or the protection of the right and freedoms of others as required by Article 21 of the ICCPR.

230 OSCE/ODIHR/Venice Commission Guidelines Section B para. 110.
Question 9.

What sort of limitations may be placed on assemblies as far as their form (e.g. place, manner and time) or their contents (e.g. promotion of violence) is concerned? Are there circumstances under which all peaceful assemblies may be prohibited for a certain period in connection with States of emergencies, or independently of States of emergency? Can all assemblies in particular places (e.g. 'neutral zones' around parliaments, courts or monuments) or during a specific time be prohibited?

9.1 Overview of Limitations

The HRCtee has acknowledged that the right of peaceful assembly entails organizing and participating in a peaceful assembly in a public location within sight and sound of their target audience, and no restriction to this right is permissible unless it is (a) imposed in conformity with the law and (b) necessary in a democratic society, in the interest of national security or public safety, public order, protection of public health or morals or protection of the rights and freedom of others.

9.2 Limitations Relating to Location

The HRCtee noted that legislation specifying a single remote area or stadium in which assemblies can be conducted unduly limits the right to freedom of expression and assembly.

9.3 Limitations Relating to Safety & Security

The ECtHR has held that the threat of violence from counter-demonstrators is not a ground upon which to refuse permission for an assembly in a town park. Domestic authorities have a wide choice of means that they can use to facilitate the holding of the assembly without disturbance.

Ensuring the security and safety of the embassy of a foreign State or a previously authorized sporting event may be legitimate purposes for restricting the right to assembly. Nevertheless, the State needs to explain the necessary and proportionate actions taken.

Question 12

What are the rights of those who wish to observe and record assemblies and how they are policed, including participants, bystanders and the media?

12.1 Overview

In the context of enhanced restrictions on defenders and those participating in protests in certain countries, monitoring is essential. Third party accounts of assemblies and associated

235 For a discussion on limitations relating to private spaces, see section 12.1. For a discussion on limitations at other locations, including at airports and outside abortion clinics, see section 2.3.
238 Barankevich v. Russia (ECtHR) no. 10519/03, 26 July 2007, para. 33.
restrictions can often be perceived as independent and impartial and are particularly important when reporting on clashes between demonstrators, State officials and counter-demonstrators.\textsuperscript{241}

All individuals who wish to observe and record assemblies are permitted to do so under Articles 21 and 22 of the ICCPR. The right to observe/monitor and record public assemblies also falls under the closely related right to freedom of expression and to receive information, contained in Article 19 of the ICCPR.\textsuperscript{242} States must ensure that NHRIs and human rights defenders are able to carry out their monitoring activities safely.\textsuperscript{243} As recognised by the ACHPR and the Committee on the Elimination of Discrimination Against Women (CEDAW), States should have particular regard to the experiences and needs of human rights defenders belonging to particular groups, for example, accounting for the particular experiences faced by women human rights defenders, and take measures to ensure that they can carry out their activities without discrimination.\textsuperscript{244}

The basic human rights principles of legality, necessity, proportionality and non-discrimination guide the policing of assemblies, and therefore those who wish to police assemblies must consider these guiding points in order to prevent an infringement - these considerations must be applied equally to participants and observers.\textsuperscript{245} It is a recommendation, but not a requirement, that the organisers of assemblies discuss with public safety officials the safeguarding measures that should be put in place prior to assemblies, that should facilitate a safe observation.\textsuperscript{246} Force should not be used unless unavoidable, and when it is applied this must be done in conjunction with the provisions of international human rights law.\textsuperscript{247}

\section*{12.2 Role of the Media}

Journalists and the media have a vital role to play in impartially monitoring public assemblies and reporting on the activities of participants and State authorities. States must ensure that journalists are free to report on public assemblies without restriction and in safety. The media is encouraged to provide an ‘impartial and objective account’\textsuperscript{248} of an assembly and how it was

\begin{itemize}
\item \textsuperscript{241}Ibid, p 31.
\item \textsuperscript{243}OSCE/ODIHR, "Guidelines on the Protection of Human Rights Defenders", (Warsaw, 2014), para. 62.
\item \textsuperscript{245}See OSCE Office for the Democratic Institutions and Human Rights (ODIHR) 'Guidelines on Freedom of Peaceful Assembly' para. 2.3 - 2.6, available at https://www.osce.org/odihr/73405?download=true.
\item \textsuperscript{246}Human Rights Joint Committee 'Demonstrating respect for rights? A human rights approach to policing protest' (23 March 2009), available at https://publications.parliament.uk/pa/jt200809/itlement/jtrights/47/4705.htm.
\item \textsuperscript{247}See UN General Assembly Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary execution on the proper management of assemblies' (2016) para 29.
\end{itemize}
policed.\textsuperscript{249} This helps to inform public debate and hold the State accountable for violations.\textsuperscript{250} The OSCE Representative on Freedom of the Media has noted that 'uninhibited reporting on demonstrations is as much a part of the right to free assembly as the demonstrations are themselves the exercise of the right to free speech.'\textsuperscript{251} The OCHR's 'Principles of Proper Management of Assemblies' also states that media access should be granted 'as much as is possible' to perform a public accountability exercise, to keep law enforcement officials and organisers/protesters, cognisant of their actions.\textsuperscript{252}

Question 13

How should accountability for violations or abuses of rights by all parties concerned during assemblies be approached?

13.1 State Party Accountability

The State has a positive obligation to promote peaceful assembly for all.\textsuperscript{253} This obligation extends to the policing of abuses committed contrary to this right. The State is also required to create effective complaints mechanisms through which they can investigate human rights abuses. Any disproportionate interference with the rights in Article 21 cannot be deemed 'necessary'.\textsuperscript{254}

A State actively discouraging participation in assemblies, whether through oppressive laws, threats or, in worst cases, violence and fear mongering against prospective protesters will be in violation of Article 21 of the ICCPR.\textsuperscript{255}

13.2 Law Enforcement Accountability

Law enforcement officials policing assemblies should be held accountable for any violations of rights committed while doing so. Any force used to control an assembly must be in line with domestic laws that in turn must not be in contravention of international law. Where more force is used than necessary civil and criminal liability should be imposed.\textsuperscript{256} They should also be held liable for failing to intervene where a participant suffers harm due to the actions of any other officers. Powers to interfere in gatherings (for instance, the UK's Anti-social Behaviour Act 2003,\textsuperscript{257} which allows the dispersal of two or more persons gathered in a public place) must have sufficient justification on grounds of public safety, so that they may comply with the rights guaranteed by the ICCPR.

\textsuperscript{249} See UN General Assembly Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary execution on the proper management of assemblies', (2016).

\textsuperscript{250} OSCE/ODIHR/Venice Commission Guidelines Annex A pg. 101.


\textsuperscript{253} See Article 20(1) United Declaration of Human Rights, and Article 12 Charter of Fundamental Rights of the European Union.

\textsuperscript{254} See the Human Rights Committee's rationale in the decision of Vasily Poliakov v. Belarus, CCPR/C/111/D/2030/2011. Also see section 5.3.

\textsuperscript{255} See decision in Hmeed v Libya, CCPR/C/112/D/2046/2011.

\textsuperscript{256} See OSCE Office for the Democratic Institutions and Human Rights (ODIHR) 'Guidelines on Freedom of Peaceful Assembly' para. 5.6, available at https://www.osce.org/odihr/75405?download=true.

\textsuperscript{257} See s. 30 Anti-Social Behaviour Act 2003 (UK).
13.3 Participant Accountability

All individuals participating in assemblies ought to be liable for their own actions only. As stated above, organisers acting in good faith should not be held liable for the actions of others. The Venice Commission suggests the deployment of stewards to help facilitate the holding of a peaceful assembly. Stewards should be clearly identifiable participants or unconnected personnel deployed for that sole purpose. Stewards should aim to obtain the co-operation of assembly participants by means of persuasion only; any unlawful acts such as the use of force will attract individual liability.

It is important to bear in mind that Article 5 of the ICCPR contains a 'destruction of rights' provision, whereby the right to freedom of peaceful assembly is guaranteed to the participants to the extent that it does not violate or abuse other rights covered by the ICCPR.

Question 14

To what extent are private actors (including the owners of shopping centres) required to allow of facilitate peaceful assemblies? How should the responsibility of States in such situations be approached? How should public places (partly) owned by a State company (e.g. airports) be treated?

14.1 Assemblies on Private Property

Where land is privately held, ‘no one can be compelled to allow anyone else onto their land or have access to it for any purpose, including a protest or public meeting.’ Although the position is by no means clear in relation to demonstrations in privately owned places, such as malls and airports - especially if these were previously in public ownership. In the case of Appleby and Others v UK (ECtHR), a group of protesters were prevented from demonstrating in or near a shopping centre by the owners of the centre. Finding no violation on the facts, the Court however did conclude that States may have a positive obligation to allow access to private property if preventing access would have the effect of destroying the essence of free expression. This perhaps reflects the 'paradigmatic socio-economic shift in public ownership' and an increasing blurring of the lines between public/private spheres. Another view is from Germany, regarding private spaces partially owned by the State. In 2011, the court held that there was a right to assembly at Frankfurt Airport, a joint-stock company; because the State held a 52 per cent share, it must be bound by basic rights. Earlier cases from Germany have clarified that businesses owned solely by the State are bound by basic rights.

Whilst the US Supreme Court has held that the First Amendment would not protect union members picketing in a shopping centre car park, it found that a state could entertain a more expansive free speech constitutional guarantee, including as to granting limited and

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258 See OSCE/ODIHR/Venice Commission Guidelines para 5.3.
259 OSCE/ODIHR/Venice Commission Guidelines para 5.3.
261 Appleby and Others v United Kingdom (ECtHR), Application No. 44306/1998, 13 May 2003, para. 222.
262 Ibid.
264 BVerwGE 113, 208, as cited by the GFCC in Fraport, para. 50.
reasonable access rights over private property to hand out leaflets. The debate concerning where people can protest carries additional meaning in the US, given the First Amendment protections. Indeed, one scholar has even asserted that planning and architectural designs that constrict the ability of persons to assemble can constitute a violation of freedom of speech and assembly.

Question 15

*When may derogations (Article 4) and reservations to Article 21 be permitted and what non-derogable or otherwise fixed obligations in relation to assemblies do States retain where that is the case?*

15.1 Reservations

The ICCPR itself says nothing about the admissibility of reservations. Only the Second Optional Protocol of the ICCPR mentions reservations, providing that ‘[n]o reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.’

General Comment No. 24 of the HRCtee provides some clarification. Whilst previously, reservations were left to State parties, since 1994 the Committee has had the power to judge the validity of reservations and to sever reservations if they deem them invalid, leaving the State a full party to the treaty without the benefit of the reservation. General Comment 24 establishes three substantive policies to be applied to reservations: the Committee is to have legal authority to determine which reservations are permissible; the test for whether a reservation is permissible is to be whether the reservation is compatible with the ICCPR’s object and purpose; and if a reservation is incompatible, it is to be severed and the reserving State is to be a party to the ICCPR without its reservation.

Five State parties have made reservations to Article 21 of the ICCPR.

15.2 Derogations

In terms of derogations, Article 4 of the ICCPR is very prescriptive about where derogations are permitted. Derogations may only occur where there is a 'public emergency which threatens the life of the nation' which has been officially proclaimed ... and the restrictions should only be 'to the extent strictly required by the exigencies of the situation, provided such other measures are not inconsistent with the other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or

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266 PruneYard Shopping Center v Robins, 447 US 74 (1980).
268 HRCtee, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6.
269 HRCtee, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6.
social origin." If a State party chooses to derogate from Article 21 they are required to immediately notify the other State parties, provide their rationale, and also notify them upon termination (that the derogations cannot be indefinite).

The HRCtte has expressed concern in the case of Peru, specifically noting concern regarding the frequency with which Peru declared states of emergency and derogated from the rights enshrined in the ICCPR, even in relation to social protests. Derogations should occur only in truly exceptional situations. The HRCtte also noted with concern the allegations of serious human rights violations during the states of emergency, such as arbitrary detentions, killings and torture. It regretted the lack of concrete information from Peru on the specific measures taken pursuant to such derogations.

**Question 16**

*Is it correct to say that 'there is no such thing as an unprotected assembly' because even if the assembly is no longer peaceful, those involved retain their other rights, such as their rights against ill-treatment and the right to life?*

Whilst individuals will retain rights in non-peaceful assemblies, these rights may be limited if necessary and proportional.

**16.1 Suspension of Article 21**

The 2011 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, stated that 'certain rights may be suspended during states of emergency under national constitutions. While the right to life may not be suspended under international law, the right to freedom of peaceful assembly may be suspended, and most, but not all, constitutions also provide for derogation from this right.' Further, the report set out a suggested set of norms to policing protest, including that: 'International standards in respect of the use of force by the police centres around necessity and proportionality. Firearms should be used only to prevent grievous bodily harm and death. Lethal force may be used intentionally only if the objective is to protect life, and less harmful measures are inadequate.'

**16.2 Fatalities**

According to General Comment No. 6 of the HRCtte on the right to life, State parties should take measures to, inter alia, 'prevent arbitrary killings by their own security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.'

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273 HRCtte concluding observations of 2013 (CCPR/C/PER/CO/5).
275 Ibid.
276 Office of the UN High Commissioner for Human Rights, CCPR General Comment No. 6: Article 6 (Right to Life), Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982, para. 3.
16.3 Use of Force

In relation to the use of force, the OHCHR Code of Conduct for Law Enforcement Officials sets the standards, supplemented by commentaries, by which law enforcement officials should execute their duties. Article 2 of the Code requires law enforcement officials to respect and protect the human rights of all persons, including the right to freedom of peaceful assembly. The Code provides for the use of force 'only when strictly necessary and to the extent required for the performance of their duty'.

16.4 Proportionality & Precaution of State Response

Please see sections 1 and 4.2 for a detailed analysis on proportionality and precaution of state response. To reiterate, Christof Heyns (the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions) has emphasised the need for not only proportional but also precautionary responses, stating that:

'demonstrations [are] now a common occurrence...and not an excuse for police officers to say they were caught off-guard and the situation had escalated to a point where they had to use force to defend themselves, if they were in a position to diffuse the situation before it got to that point. That was even more the case if their own conduct had caused the tensions to erupt. This means we should not only apply the tests of necessity and proportionality to the police use of force, but also the test of precaution.'

Question 17

What is the relationship between Article 21 and other rights in the ICCPR, such as privacy (Article 17); freedom of movement (Article 12) freedom of expression and access to information (Article 19); advocacy of hatred etc. (Article 20); association (Article 22); political participation (Article 25); and equality and non-discrimination (Articles 2 (1); 3; 26) (e.g. people who are frequently targeted, or in positions of vulnerability).

For a discussion on the relationship between Article 21 and freedom of expression, freedom of association and political participation, see section 1.

For a discussion on political participation, see paragraph 1.4

For a discussion on equality and non-discrimination, including positions of vulnerability see paragraph 4.6.

Question 19

19.1 New Technologies and Social Media

States have an obligation to respect and fully protect assembly rights online as well as offline. The Internet, in particular social media, and other information and communication technology, are essential tools to facilitate peaceful assemblies in the real world. People also

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277 Art 2, Code of Conduct for Law Enforcement Officials


279 For digital space, see answer at 2.4.

have the right to assemble in virtual spaces, to gather online in order to express their opinion.\textsuperscript{281} All States should ensure that internet access is maintained at all times, including during times of political unrest and any determination to block online content must be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences.\textsuperscript{282}

The 2018 report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association stresses 'the utmost importance of new communication technologies, including the internet and mobile phones, in organizing peaceful assemblies. Such technologies allow organizers to mobilize a large group of people in a prompt and effective manner, and at little cost.'\textsuperscript{283}

The development of modern technologies has changed the way that assemblies are planned and organised. In particular, communication via mobile phones and social media makes it easier to connect and inform the public about previous and on-going assemblies. Further, social media offers greater opportunity for support and publicity for the cause. With these possibilities also comes the risk of additional regulations. States may now react to these developments with laws to 'cut off' these communications and to 'disrupt virtual assembly'.\textsuperscript{284} For example, the Venezuelan Law (Article 49 of the Venezuelan Law on Political Parties, Public Meetings, and Protests)\textsuperscript{285} regulates that companies are not allowed to 'print or record announcements of public meetings or protests which are in violation of the law'.\textsuperscript{286}

In addition, the Civil Society Watch Report states that the threatening of social media activists has increased, and that many States have 'monitored and blocked social media sites like Facebook and Twitter'.\textsuperscript{287}

State parties must respect the full right of assembly, ensuring the right of assembly also contains the right of 'free flow of information'.\textsuperscript{288}

19.2 Unmanned Weapons and Surveillance Systems

The use of unmanned systems, whether or not they are weaponised, raises questions of human rights law compliance.\textsuperscript{289} Surveillance techniques, such as the use of drones to monitor assemblies, continue to be used by States to monitor and control the right to freedom of assembly.

\begin{footnotesize}
\begin{enumerate}
\item HRC Resolution 21/16 A/HRC/RES/21/16 http://ap.ohchr.org/documents/dpage_e.aspx?i=a/HRC/RES/21/16
\item Ibid.
\end{enumerate}
\end{footnotesize}
peaceful assembly. For example, in the wake of protests against the right-wing government in Poland, the government vastly expanded the surveillance powers of law enforcement agencies. The 2016 amendment to the Police Act broadened the scope for surveillance, without adequate safeguards, to include such monitoring outside the context of a criminal investigation.

Surveillance may deter people from attending peaceful assemblies. Whilst surveillance may not in itself prohibit involvement in assemblies, it may deter people from attending peaceful assemblies for fear they are being monitored and may discourage those who attend peaceful assembly or gatherings out of interest. Participation in protest activities must be open to those who are merely curious or concerned, not restricted to those with strong beliefs. Furthermore, a high number of surveillance equipment may create an atmosphere of intimidation, hindering the exercise of the right guaranteed by Article 21 of the ICCPR.

The Network for Police Monitoring, a UK monitoring body, has argued that the intense focus on surveillance creates a 'chilling effect' on the freedom to protest. The Network suggests that surveillance can be seen as confrontational as policing at a protest itself and just as likely to discourage many from participation in campaigning activities. While there has been recognition of the 'chilling effect' of surveillance on protest activities, the UK courts have, to date, declined to substantially explore the issue within the framework of the right to freedom of assembly.

In relation to autonomous weapons systems (AWS), NGOs such as Amnesty International, have noted their very potential use in the suppression of demonstrations which may threaten the right to peaceful assembly. In this context, Amnesty noted that 'the onus should be on states that wish to develop and deploy AWS to first demonstrate that specific uses of each type of weapon can be fully lawful and, in particular, consistent with international human rights and humanitarian law in operational circumstances.'

**Question 20**

*Please identify 'soft-law' instruments that may be of relevance to the right of peaceful assembly. References to regional standards are also welcome.*

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294 G. v Germany, (ECtHR), Application No. 13079/87, 6 March 1989, para. 2.


See soft law instruments referred to throughout and in particular:

(a) UN Declaration on human rights defenders;\(^\text{298}\)

(b) Model Law for the recognition and protection of human rights defenders;\(^\text{299}\)

(c) *Guidelines on Freedom of Association and Assembly in Africa* of the African Commission on Human and Peoples' Rights 2017\(^\text{300}\);

(d) The Inter-American Legal Framework regarding the Right to Freedom of Expression, Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, 2009\(^\text{301}\);

(e) *Human Rights Handbook on Policing Assemblies (2016) by the OSCE*\(^\text{302}\)

(f) *Guidelines on Freedom of Peaceful Assembly* - published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2nd edt, 2010\(^\text{303}\)

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\(^{298}\) UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights (UN Declaration on Human Rights Defenders).


\(^{301}\) This document also addresses the right to assembly, accessed at: http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf.

\(^{302}\) Accessed at: https://www.osce.org/odihr/73405?download=true.

\(^{303}\) This handbook provides guidance for the police in facilitating the right to assembly peacefully, accessed at: https://www.osce.org/odihr/226981?download=true.