

**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

¹ Model Law for the recognition and protection of human rights defenders, 2016, https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

² UN Human Rights Committee, Communication no. 1948/2010: Human Rights Committee: views / adopted by the Committee at its 108th session, 8-26 July 2013, 10 September 2013, CCPR/C/108/D/1948/2010, para. 7.4. See also national jurisprudence : *Garbeau c Montréal (Ville de)*, 2015 QCCS 5246 at para 1.

³ For example: Article 20(1) Universal Declaration of Human Rights; Article 15 Convention on the Rights of the Child, Article 11 European Convention on Human Rights; Article 15 American Convention on Human Rights; Article 12 Charter of Fundamental Rights of the European Union; and the First Amendment of the American Constitution, Article 10 of the African Charter on Human and People's Rights.

⁴ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 21 May 2012, A/HRC/20/27, p 5, para 12.

⁵ Nicholas S. Brod, *Rethinking a Reinvigorated Right To Assemble* (2013) 63 *Duke Law Journal* 155-197.

⁶ *Hubbard and Others v Pitt and Others* [1976] Q.B. 142, Judgement of Lord Denning M.R. at 1. *The Law of Libel*.

States continue to enact restrictions on the right to peaceful assembly.⁷ 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.⁸ 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 to the power to approve or ban all forms of peaceful protest.⁹

Legal commentators and regional courts have highlighted the need to treat the right to freedom of assembly as a 'free-standing independent freedom'.¹⁰ 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.¹¹ 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.¹²

1.2 Function of the Freedom of Peaceful Assembly

The right to peaceful assembly, which encompasses the right of groups to engage in protest¹³, has long been recognised as important both for individuals and for the proper functioning of the democratic State.¹⁴ The right enables individuals to speak their own mind and to hear the ideas of others.¹⁵ 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'.¹⁶

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.¹⁷ As a result, this physical manifestation

⁷ See for example the government monitoring of the "Black Lives Matter" movement - <https://www.aljazeera.com/news/2017/11/documents-show-monitoring-black-lives-matter-171128110538134.html>

⁸ Amnesty International 'A Force for Good: Restrictions on Peaceful Assembly and Impunity for Excessive Use of Force by the Sierra Leone Police' (2018) <https://www.amnesty.org/download/Documents/AFR5185902018ENGLISH.PDF> p 7.

⁹ Siena Anstis 'Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia' *Journal of Human Rights Practice* 4:3 (2012) p 319.

¹⁰ Basil S. A., "Exploring a More Independent Freedom of Peaceful Assembly in Canada", (2018) 8:1 online: *UWO J Leg Stud* 4 <https://ir.lib.uwo.ca/uwojls/vol8/iss1/4>, pg. 18.

¹¹ OSCE/ODIHR/Venice Commission 'Guidelines on Freedom of Peaceful Assembly' (2010) second edition ('OSCE/ODIHR/Venice Commission Guidelines') para 14.

¹² OSCE/ODIHR/Venice Commission 'Guidelines on Freedom of Peaceful Assembly' (2010) second edition ('OSCE/ODIHR/Venice Commission Guidelines'), Foreword, pg. 9-10.

¹³ Helen Fenwick, *Marginalising Human Rights: Breach of the Peace, "Kettling", the Human Rights Act and Public Protest*, 4 PUB. L. 737, (2009) 739.

¹⁴ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, [A/HRC/38/34], p 8, para 39.

¹⁵ *Tatár and Fáber v Hungary*, (ECtHR), Application No. 26005/08 and 26160/08, 12 June 2012, para 38.

¹⁶ *Mechevslav Gryb v. Belarus*, Communication No. 1316/2004, U.N. Doc. CCPR/C/103/D/1316/2004 (2011) at para. 13.3.

¹⁷ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 21 May 2012, A/HRC/20/27, p 7, para. 24.

of opinion can be a very powerful tool in shaping public debate, influencing governments¹⁸, and ultimately improving the overall governance of States.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.'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 12.²¹ This has been reflected in UN resolutions at the Human Rights Council²² and the Third Committee of the General Assembly.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.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.'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

¹⁸ *R c Lebel*, [1999] JQ No 4995 at para 83 (CM) [Quebec Municipal Court].

¹⁹ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, [A/HRC/38/34], p 8, para 39.

²⁰ OHCHR, 'Equal participation in political and public affairs' <https://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.

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.

²³ GA Resolutions on human rights defenders: 68/181, 72/24; UN GA resolution 72/175 on the safety of journalists and the issue of impunity; UN GA Resolution on the 'Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association': <http://undocs.org/A/C.3/73/L.41/Rev.1>.

²⁴ UN Human Rights Council 'Summary of the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests prepared by the Office of the United Nations High Commissioner for Human Rights' A/HRC/19/40 (2011), para 13.

²⁵ D Aoife *Demonstrating Positive Obligations: Children's Rights and Peaceful Protest in International Law*, The George Washington International Law Review (2014) 770.

25 February 2019, President Omar al-Bashir banned unlicensed public gatherings and has a 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

²⁶ Aya Elmileik 'What prompted the protests in Sudan' Al Jazeera (26 December 2018)

<https://www.aljazeera.com/news/2018/12/prompted-protests-sudan-181224114651302.html>.

²⁷ *Gorzelik and Others v. Poland*, (ECtHR), [GC], Application No. 44158/98, 17 February 2004, para 92 & UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 21 May 2012, A/HRC/20/27, p 5, para 12.

²⁸ Basil S. Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada", (2018) 8:1 online: UWO J Leg Stud 4 <<https://ir.lib.uwo.ca/uwojls/vol8/iss1/4>, [Exploring a More Independent Freedom of Peaceful Assembly in Canada], pg. 5, see also: *Bączkowski and Others v. Poland* (Application No. 1543/06).

²⁹ Aya Elmileik 'What prompted the protests in Sudan' Al Jazeera (26 December 2018)

<https://www.aljazeera.com/news/2018/12/prompted-protests-sudan-181224114651302.html>.

³⁰ Salát, O., "The Right to Freedom of Assembly: A Comparative Study", [Bloomsbury Publishing, 2015], Chapter 1, IV. iv.

³¹ <https://www.newsecuritybeat.org/2018/03/deadly-year-environmental-defenders-momentum-increases-protecting-environmental-human-rights/>.

³² Council of Europe Parliamentary Assembly, 'Urgent need to prevent human rights violations during peaceful protests', Resolution 2116 (2016), para. 1, available at: <http://statewatch.org/news/2016/may/coe-resolution-right-to-assembly-5-16.pdf>.

³³ Council of Europe Parliamentary Assembly, 'Urgent need to prevent human rights violations during peaceful protests', Resolution 2116 (2016), para. 1, available at: <http://statewatch.org/news/2016/may/coe-resolution-right-to-assembly-5-16.pdf>.

³⁴ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, p 8, para 68.

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 (EctHR) 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

³⁵ UN General Assembly, 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association', 7 August 2013, A/68/299, [A/68/299], para 56.

³⁶ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, para. 2.

³⁷ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, para 71.

³⁸ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, para 71.

³⁹ R Maclean, 'DRC Protests About Election Delay Violently Put Down', 27 December 2018, available at: <https://www.theguardian.com/world/2018/dec/27/congolese-soldiers-fire-air-quest-protests-against-election-delay>.

⁴⁰ H Ellis-Petersen, 'Thailand: biggest democracy protests in years held as military junta delays elections', 14 January 2019, available at: <https://www.theguardian.com/world/2019/jan/14/thailand-biggest-democracy-protests-in-years-held-as-military-junta-delays-elections>.

⁴¹ *Popa (Radu) v. Moldova*, (ECHR) Application No. 29837/09, 14 September 2009.

⁴² OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly. Second Edition (Warsaw: ODIHR, 2010), p. 24, para 6.

⁴³ Report of the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, A/61/312, para 76; Article 12 Report of the Special Representative of the Secretary-General on Human Rights Defenders, in accordance with General Assembly resolution 57/209, A/58/380, para 24.

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.⁴⁴ 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.⁴⁵

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 should 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

⁴⁴ UN General Assembly, Note by the Secretary-General: Human Rights Defenders, 5 September 2006, A/61/312, para. 76.

⁴⁵ UN General Assembly, Note by the Secretary-General: Human Rights Defenders, 5 September 2006, A/61/312, introduction.

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.⁴⁶ Other assemblies, such as religious assemblies and gatherings of family and friends, are protected by Articles 18⁴⁷ and 17⁴⁸ of the ICCPR respectively. Nowak suggested that Article 21 is specifically directed at assemblies concerned with the discussion or proclamation of ideas.⁴⁹

An assembly must be an *intentional* and *temporary* gathering in a *private or public space* for a *common expressive purpose*.⁵⁰ In *Coleman v Australia* (1157/03) the HRCtee established that if one is acting alone it does not constitute an assembly.⁵¹ Assemblies include both static and moving gatherings such as: public meetings, pickets⁵², sit-ins, flash mobs, demonstrations⁵³, processions⁵⁴, rallies⁵⁵, pilgrimages and convoys.⁵⁶ The definition of 'assembly' varies across jurisdictions; in some instances national courts apply an overly restrictive reading, limiting the scope of the right.⁵⁷ For example, articles 137 and 138 of the Oman Penal Code criminalise seditious assembly, which is defined as 'a private gathering including at least 10 individuals with a view to committing a riot or a breach of public order.'⁵⁸ Similarly, in India section 144(6) of the Code of Criminal Procedure gives the government the power to make an assembly of ten or more people in certain cases an unlawful assembly.⁵⁹ In the UK, the Antisocial Behaviour Act (2003) reduced the number of participants required in an assembly before the police may impose restrictions from 20 to 2.⁶⁰

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-

⁴⁶ Sarah Joseph, Jenny Schulz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (3rd Edition, 2013)* accessed online <http://opil.ouplaw.com.virtual.anu.edu.au/view/10.1093/law/9780199641949.001.0001/law-9780199641949-chapter-19> [19.04].

⁴⁷ Article 18 of the ICCPR protects the freedom of religion, belief and conscience. The HRCtee has held that the right is 'far reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief...'. See UN Human Rights Committee, *CPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4.

⁴⁸ Article 17 of the ICCPR holds that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

⁴⁹ M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel, 2005), pg. 484.

⁵⁰ OSCE/ODIHR/Venice Commission Guidelines p. 15, para 1.2.

⁵¹ Ibid.

⁵² *Youbko v. Belarus*, Comm. No. 1903/2009. CCPR/C/110/D/1903/2009 (2014).

⁵³ *Alekseyev v. Russia*, (ECtHR), Application No. 4916/07, 25924/08 and 14599/09, 21 October 2010.

⁵⁴ *Christians against Racism and Fascism v United Kingdom*, (ECtHR), Application No. 8440/1978, 16 July 1980.

⁵⁵ *Kasparov and Others v. Russia*, (ECtHR), Application No. 21613/07, 3 October 2013.

⁵⁶ A/ HRC/20/27, p 7, para. 24.

⁵⁷ O Salat "*The Right to Freedom of Assembly - A Comparative Study*", Chapter I, I.

⁵⁸ The Omani Centre for Human Rights, '*Oman's new Penal Code: A Bonfire of Human Rights*', 2018, pg.12, available at: <https://ochroman.org/eng/penalcode/>.

⁵⁹ Datta, S., '*Freedom of assembly is our fundamental right, but Indian police just won't let us exercise it*', 24 February 2015, available at: <https://scroll.in/article/706193/freedom-of-assembly-is-our-fundamental-right-but-indian-police-just-wont-let-us-exercise-it>.

⁶⁰ O Salat "*The Right to Freedom of Assembly - A Comparative Study*" Chapter II, A.

permanent structures.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.⁶² In the case of *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.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.⁶⁴ States should always seek to facilitate public assemblies at the organiser's preferred location.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.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.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 *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.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.⁶⁹ This approach is in stark contrast to the Supreme Court

⁶¹ *Cisse v. France*, Application No. 51346/99, 9 April 2002.

⁶² *Balcik and Others v. Turkey*, (ECtHR), Application No. 25/02, 29 November 2007 & *Patyi and Others v Hungary*, (ECtHR), Application No. 5529/05, 7 October 2008.

⁶³ *Éva Molnár v. Hungary* (ECtHR) Application No. 10346/05, 7 October 2008.

⁶⁴ *Evgeny Basarevsky and Valery Rybchenko v. Belarus*, Communication No. 2108/2011-2109/2011, CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011, (2014), para. 9.5.

⁶⁵ D Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Oxford: Hart Publishing, 2010), pp.101-2.

⁶⁶ *Balcık and Others v. Turkey*, (ECtHR), 29 February 2008, para 52.

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.'

⁶⁸ *Heathrow Airports Ltd and Bullock v Garman and Others* [2007] EWHC 1957 (QB).

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.⁷⁰

2.4 Online Assemblies

The right to freedom of peaceful assembly also extends to online spaces,⁷¹ 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.⁷² 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 ICCPR⁷³ and must be undertaken by a competent judicial authority or body that is independent of political, commercial, or other unwarranted influences.⁷⁴ States should ensure that Internet access is maintained at all times, including during times of political unrest.⁷⁵

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.⁷⁶ The exercise of this freedom can have both symbolic and instrumental significance.⁷⁷ International jurisprudence suggests that while the right may extend to assemblies that are social in nature, especially when exercised by groups or organisations⁷⁸, gatherings that are 'purely social' in character are unlikely to attract protection.⁷⁹ Assemblies ought to have some meaningful common economic, political, cultural or religious purpose.⁸⁰

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.⁸¹ Weapons or items that might be used as weapons should not be taken to assemblies.⁸² The peacefulness of assemblies should be presumed by authorities.⁸³ 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 21.⁸⁴ As in the case of

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).

⁷¹ UN General Assembly, Human Rights Council: resolution / adopted by the General Assembly, 8 October 2013, A/HRC/RES/24/5.

⁷² A/HRC/17/27, para. 67 & UN Human Rights Council, The rights to freedom of peaceful assembly and of association: draft resolution / adopted by the Human Rights Council, 11 October 2012, A/HRC/RES/21/16.

⁷³ A/HRC/17/27, para. 69.

⁷⁴ A/HRC/20/27, p 9-10, para 32.

⁷⁵ A/HRC/17/27, para. 79.

⁷⁶ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly. Second Edition (Warsaw: ODIHR, 2010), para. 3.

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.

⁸¹ *G v. The Federal Republic of Germany*, (ECtHR), Application No. 130779/87, 6 March 1989.

⁸² OSCE/ODIHR, *Handbook on Monitoring Freedom of Assembly*, (Warsaw: ODIHR, 2011), p 13.

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.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.⁸⁶ However, propaganda for war or advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence⁸⁷ or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law⁸⁸ should always be deemed unlawful.⁸⁹

Sporadic violence does not make the entire assembly non-peaceful.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.⁹¹

Importantly, the unlawful or violent actions of a few during an otherwise peaceful assembly should not form basis of ending the entire assembly⁹² 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.⁹³ In all cases, States should be guided by the principle of abstaining from unjustified interference with the right.⁹⁴

The State response to disorder and violence ought to always be proportionate to the actions taken by the protestors.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.⁹⁶

2.7 Industrial Action & Strikes

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

⁸⁵ *Handyside v. the United Kingdom*, Application No. 5493/72, (ECtHR), 7 December 1976, para. 49.

⁸⁶ *Cisse v. France*, Application No. 51346/99, (ECtHR) 9 April 2002, para. 37.

⁸⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 20.

⁸⁸ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 5.

⁸⁹ A/HRC/20/27, p 6, para 18.

⁹⁰ *Ziliberg v. Moldova*, Application No. 61821/00, (ECtHR) 1 February 2005, para 52. This approach has been endorsed by the HRCtee in A/HRC/20/27, p 8, para. 25.

⁹¹ *Ezelin v. France*, Application No. 11800/85, (ECtHR), 26 April 1991. This approach has been endorsed by the HRCtee in A/HRC/20/27, p 8, para. 25.

⁹² OSCE/ODIHR/Venice Commission Guidelines Section B para. 159.

⁹³ OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines on Freedom of Peaceful Assembly* para. 5.3.

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://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstWB50JfDOQhMEkiX20XNhlfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUArBGIBJo5DzI4ZqOZa12FMGUZJqFSjwciYP>.

⁹⁵ OSCE/ODIHR, "Handbook on Monitoring Freedom of Assembly", (Warsaw: ODIHR, 2011), p. 13.

⁹⁶ *Ouranio Toxo and Others v. Greece* (ECtHR) Application No. 74989, 20 October 2005, para. 43.

⁹⁷ UN General Assembly, Rights to freedom of peaceful assembly and of association, 14 September 2016, A/71/385, para. 11.

⁹⁸ A/71/385, para. 56. See for example: Article 8(1)(d) of The International Covenant on Economic, Social and Cultural Rights of 1996, Article 6(4) of the European Social Charter of 1961(revised 1996), The Community Charter of Fundamental Social Rights of Workers of 1989, Article 27 of the Inter-American Charter of Social Guarantees of 1948. Articles 5, 10 & 15 (when read

Special Rapporteur on the rights to freedom of assembly and of association has observed that the right to strike has become customary international law.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.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.'*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.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.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.

⁹⁹ A/71/385, para. 56.

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

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.

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.'

¹⁰³ The Associated Press, 'Brazil's Indigenous Protest to Defend Their Rights, Lands', 26 April 2018, available at: <https://wtop.com/latin-america/2018/04/brazils-indigenous-protest-to-defend-their-rights-lands/> p.396 and Global Witness 'At

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

3.2 Rights without Assembly Notification / Permit

The domestic approach to the requirement for prior notification varies significantly.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'.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)¹⁰⁷ will not prevent individuals from relying on the protections afforded by the right.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 *organisation* of assemblies.¹⁰⁹ The ECtHR has held that where an individual is found administratively liable and fined for having breached the procedure for *organising* and holding a public assembly, the administrative prosecution will amount to an interference with the protester's right to freedom of assembly, interpreted in the light of his right to freedom of expression.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.¹¹¹ Restrictions such as on the ability of participants to reach an assembly are likely to violate the right to freedom of peaceful assembly.¹¹² Unless a clear and present danger of imminent violence exists, law-enforcement officials should not intervene to stop, search or detain protesters.¹¹³

What Cost - Irresponsible business and the murder of land and environmental defenders in 2017
<https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/> p15.

¹⁰⁴ Ibid.

¹⁰⁵ 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.

¹⁰⁶ OSCE/ODIHR/Venice Commission Guidelines pg. 63, para. 113 & UN Human Rights Committee (HRC), Communication No. 412/1990: Human Rights Committee: Decision adopted by the Committee at its 50th session, 31 March 1994, CCPR/C/50/D/412/1990 para. 9.2.

¹⁰⁷ A/68/299, para. 24.

¹⁰⁸ *Bączkowski and Others v. Poland*, (ECtHR), Application No. 1543/06, 24 September 2007.

¹⁰⁹ A/68/299, para 16.

¹¹⁰ *Sergey Kuznetsov v. Russia*, (ECtHR) Application No. 10877/04, 23 October 2008, para 36.

¹¹¹ *Nisbet Ozdemir v Turkey* (ECtHR) Application No. 23143/04, 19 January 2010.

¹¹² *Nisbet Ozdemir v Turkey* (ECtHR) Application No. 23143/04, 19 January 2010.

¹¹³ *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.¹¹⁴ 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.¹¹⁵ 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'*.¹¹⁶

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'*.¹¹⁷

4.2 Duty to Facilitate

States have a clear, positive obligation to facilitate peaceful assembly.¹¹⁸ 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.¹¹⁹

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.¹²⁰ Furthermore, the holding of a peaceful assembly should be regarded as a

¹¹⁴ OSCE/ODIHR/Venice Commission Guidelines pg. 60, para. 107.

¹¹⁵ *Ibid.*

¹¹⁶ UN General Assembly, Note by the Secretary-General: Human Rights Defenders, 5 September 2006, A/61/312, paras. 57-60.

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 *Plattform 'Ärzte Für Das Leben' v Austria* (ECtHR), Application no 10126/82 A/139 (1988), para. 32.

legitimate purpose for the use of public spaces such as squares, streets, parks, roads etc.¹²¹ Therefore, any restriction on organisers holding an assembly at their chosen location must be justified by the State.¹²² 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.¹²³

States must respect the right of peaceful assembly and refrain from unnecessary interference.¹²⁴ 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 proportionate¹²⁵ and tailored to the particular factual circumstances.¹²⁶

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.¹²⁷ 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.¹²⁸ Furthermore, laws must be of general application, without targeting particular groups, and may not be retroactive.¹²⁹ The Inter-American Commission on Human Rights (IACHR) has highlighted

¹²¹ OSCE/ODIHR/Venice Commission Guidelines Section B, para.1; ACHPR 'Report of the Study Group on Freedom of Association & Assembly in Africa' (2014) p.62, available at: http://www.achpr.org/files/special-mechanisms/human-rights-defenders/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf.

¹²² *Androsenko v. Belarus* CCPR/C/116/D/2092/2011 (2016) para.7.4.

¹²³ See section 11.1 of this paper for further discussion.

¹²⁴ *Elena Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, (2018) para.7.5; HRCtee 'Concluding observations on the seventh periodic report of the Russian Federation' (2015) CCPR/C/RUS/CO/7.

¹²⁵ *Ibid.* see also *Balçık and Others v. Turkey* (ECtHR) Application no. 25/02 (2007) para. 50.

¹²⁶ *Patyi And Others V. Hungary* Application no. 5529/05 (ECtHR) (2009) para. 42; *Oya Ataman v. Turkey*, (ECtHR), Application no. 74552/01, (2006) paras 38-42; *Ashughyan v. Armenia*, (ECtHR), Application No. 33268/03, (2008) para 90.

¹²⁷ *Andrei Sannikov v. Belarus*, CCPR/C/122/D/2212/2012, 2018.04.06 (2018) para 6.12.

¹²⁸ *Ibid.*

¹²⁹ *Constitutional Rights Project and Others v Nigeria*, ACHPR Comm No 102/93 (1998) para. 59.

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.¹³⁰

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.¹³¹

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.¹³² Importantly, any decisions to restrict or prohibit peaceful assembly must be transparent, to ensure action taken is compatible with Article 21.¹³³ 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.¹³⁴

Any restrictions on the right provided for in law must be necessary and comply with the proportionality requirements of Article 21 of the ICCPR.¹³⁵ 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.¹³⁶

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 defenders¹³⁷ 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.

¹³⁰ IACHR 'IACHR and Special Rapporteurship on Freedom of Expression express deep concern over decision to declare protests illegal in Nicaragua' (2018), available at: http://www.oas.org/en/iachr/media_center/PReleases/2018/222.asp.

¹³¹ *G v Federal Republic of Germany* no. 13079/87, European Commission decision of 6 March 1989 DR 60, p. 256; *Christians against Racism and Fascism v. United Kingdom* no. 8440/78, European Commission decision of 16 July 1980, Decisions and Reports (DR) 21, p. 138; *Ghazi Suleiman v Sudan (III)*, African Commission on Human and Peoples' Rights Comm No 228/99 (2003) para. 65.

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

¹³³ 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 37, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

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

¹³⁵ HRCtee, 'Concluding observations on the fourth periodic report of Uzbekistan' CCPR/C/UZB/CO/4 (2015) para 11(b), available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsj07MIYGKLOR0JAcDdFOt9808e6JD3r7xmvJkqv%2fU4eALL98u%2bUPA9ZF%2f7ioTjANpNqM97G9FBWOvdwxBqilbCRihLbNoGtX%2bfrut5yexTUj>.

¹³⁶ OSCE/ODIHR/Venice Commission Guidelines Section A para 2.2.; IACHR. 'Second Report on the Situation of Human Rights Defenders in the Americas' OEA/Ser.L/V/II. Doc. 66. (2011) para. 139, available at: <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>.

¹³⁷ https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

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 Bill¹³⁸ and Article 3(5) of the Nepalese Bill¹³⁹.

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.

¹³⁸ Avant-Projet de Loi Portant Protection des Défenseurs des Droits Humains au Burkina Faso (2012).
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.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.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

¹⁴⁰ Inter-American Commission on Human Rights 'Annual Report of the Inter-American Commission on Human Rights' OEA/Ser.L/V/II. Doc. 21/17 (2017) pg.418, available at: <http://www.oas.org/en/iachr/docs/annual/2017/docs/annexrele.pdf>; *Alekseev v. Russian Federation* CCPR/C/109/D/1873/2009 (2010) para. 9.6; *Informationsverein Lentia and Others v. Austria* Series A no. 276(1993) para 38; *Alekseyev v. Russia* Applications nos. 4916/07, 25924/08 and 14599/09 ECtHR (2010) para 73.

¹⁴¹ *Alekseev v. Russian Federation* CCPR/C/109/D/1873/2009 (2010) para. 9.6.

reactions by others.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.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.¹⁴⁴

This means that an unspecified or general risk of a hostile reaction or violent counter-demonstration is not sufficient to ban a demonstration.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.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.¹⁴⁷ States are required to facilitate the enjoyment of peaceful assembly without discrimination.¹⁴⁸

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.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

¹⁴² *Alekseev v. Russian Federation* CCPR/C/109/D/1873/2009 (2010) para. 9.6; UN General Assembly, Human Rights Council, 'Resolution 15/21: the rights to freedom of peaceful assembly and of association' A/HRC/RES/15/21 (2010) para. 1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

¹⁴³ *Bączkowski v. Poland*, (ECtHR), Application No. 1543/06. (2006), para. 64.

¹⁴⁴ The Report of the Special Rapporteur on the situation of human rights defenders, Situation of Women Human Rights Defenders, February 2019, A/HRC/40/60.

¹⁴⁵ OSCE/ODIHR/Venice Commission Guidelines Section B para.30.

¹⁴⁶ UN General Assembly, Human Rights Council, 'Resolution 25/38: the promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/25/38 (2014) para. 4 <https://www.ohchr.org/Documents/Issues/Executions/A-HRC-RES-25-38.pdf>.

¹⁴⁷ UN General Assembly, Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/20/27 (2012) para. 13 & CEDAW Committee, Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on violence against women, its causes and consequences; Working Group on the issue of discrimination against women in law and in practice 'Women human rights defenders must be protected, say UN experts' (2018), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23943&LangID=E>.

¹⁴⁸ UN General Assembly, Human Rights Council, 'Resolution 25/38: the promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/25/38 (2014) para. 4 <https://www.ohchr.org/Documents/Issues/Executions/A-HRC-RES-25-38.pdf>.

¹⁴⁹ 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 24 and footnote 14, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

face different degrees of restriction.¹⁵⁰ 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.¹⁵¹

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.*'¹⁵² 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.¹⁵³

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.¹⁵⁴

5.5 Precautionary Measures

The OSCE Guidelines direct States to also consider ensuring public safety and maintaining law and order while facilitating peaceful assemblies.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

¹⁵⁰ OSCE/ODIHR/Venice Commission Guidelines Section B para. 33.

¹⁵¹ *Ollinger v Austria*, (ECtHR), Application No. 76900/01 (2006) para. 43-50.

¹⁵² *Plattform 'Ärzte Für Das Leben' v Austria*, (ECtHR), Application No. 10126/82 (1988) para. 32.

¹⁵³ 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 24 and footnote 14, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

¹⁵⁴ *Alekseev v. Russian Federation*, CCPR/C/109/D/1873/2009 (2010) para. 9.6.

¹⁵⁵ OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines on Freedom of Peaceful Assembly* [80].

¹⁵⁶ OSCE/ODIHR/Venice Commission Guidelines para. 147; 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 40 https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

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 assembly¹⁶¹ 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,

¹⁵⁸ UN Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the OAS Inter-American Commission on Human Rights '*Joint declaration on violence against journalists and media workers in the context of protests*' (2013) <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=951&IID=1>.

¹⁵⁹ OSCE/ODIHR/Venice Commission Guidelines Section A para. 5.3.

¹⁶⁰ HRCtee '*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%2fPPRiCAqhKb7yhstWB5OJfDOQhMEkiX20XNhIfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUARBGIBJo5DzI4ZqOZA12FMGUZJqFSjwciYYP>; and

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%2fPPRiCAqhKb7yhsj07MIYGKLR0JAcDdFOt9808e6JD3r7xmvJkqv%2fU4eALL98u%2bUPA9ZF%2f7ioTjANpNqM97G9FBWOvdxwBqilbCRihLbNoGtX%2bfrut5yexTUj>.

¹⁶¹ UN General Assembly, Human Rights Council, Resolution 15/21 A/HRC/RES/15/21 (2010) para. 3, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>.

¹⁶² Article 28, The Kigali Declaration adopted at The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda available at: <http://www.achpr.org/instruments/kigali/>.

¹⁶³ OSCE/ODIHR/Venice Commission Guidelines Annex A pg. 101.

¹⁶⁴ UN Human Rights Council, '*Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*' (2013) A/HRC/23/39, para. 85, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

¹⁶⁵ Principles 17-21 of the UN Guiding Principles on Business and Human Rights https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf.

¹⁶⁶ UN Human Rights Council, '*Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*' (2013) A/HRC/23/39, para. 87, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

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?

¹⁶⁷ United Nations Special Rapporteur on the rights of indigenous people, 'Native American facing excessive force in North Dakota pipeline protests', Geneva, 15 November 2016, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20868&LangID=E>.

¹⁶⁸ UN Human Rights Council, 'Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee'. 7 August 2015, A/HRC/30/49, para. 10.

¹⁶⁹ UN Human Rights Council, 'Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee'. 7 August 2015, A/HRC/30/49, para. 10.

¹⁷⁰ Statement by the Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the Republic of Kazakhstan, 27 January 2015, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15517&LangID=E>.

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

¹⁷² *Alekseev v. Russian Federation*, CCPR/C/109/D/1873/2009 (2010), para 11.7.

¹⁷³ *Vitaly v. Belarus*, Views, CCPR/C/112/D/1952/2010, (2014), para. 7.4.

¹⁷⁴ IACHR and its Office of the Special Rapporteur for Freedom of Expression '*IACHR Expresses Concern over Police Actions in Protests and Attacks on Journalists in Argentina*' (2017) http://www.oas.org/en/iachr/media_center/PReleases/2017/214.asp.

¹⁷⁵ *Anatoly Poplavny and Leonid Sudalenko v. Belarus*, CCPR/C/118/D/2139/2012, para 8.5; *Alekseev v. Russian Federation* CCPR/C/109/D/1873/2009 para. 9.3; *Denis Turchenyak et al. v. Belarus*, Communication No. 1948/2010, U.N. Doc. CCPR/C/108/D/1948/2010 (2013), para. 7.4.

¹⁷⁶ Human Rights Committee, '*CCPR General Comment No. 27: Article 12 (Freedom of Movement)*' CCPR/C/21/Rev.1/Add.9. (1999) para. 14, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

¹⁷⁷ *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005) para. 6.8.

¹⁷⁸ UN Human Rights Council, '*Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*' (2013) A/HRC/23/39, para. 63. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

¹⁷⁹ *Androsenko v. Belarus* CCPR/C/116/D/2092/2011 and also para 11.8 *Belyazeka v. Belarus* CCPR/C/104/D/1772/2008.

¹⁸⁰ *Lee v. the Republic of Korea*, U.N. Doc. CCPR/C/84/D/1119/2002 (2005) para. 7.3.

¹⁸¹ *Alekseev v. Russian Federation*, CCPR/C/109/D/1873/2009 (2010) para 9.6; *Church of Scientology Moscow v Russia* Application no.18147/02 ECtHR (2007) para. 97; *Malawi African Association and Others v. Mauritania*, ACHPR, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000) para. 111.

considerations,¹⁸² that is to say, that '*national, political, economic or government interest is not synonymous with national security or public order.*'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.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.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.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).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 *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.*'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.¹⁸⁹

¹⁸² HRCtee '*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%2fPPRiCAqhKb7yhstWB5OJfDOQhMEkiX20XNhIfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUArBGIBJo5DzI4ZqOZa12FMGUZJqFsjwciYp>

¹⁸³ 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 31, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

¹⁸⁴ The report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the impacts of counter-terrorism and counter- extremism measures against civil society and human rights defenders (A/HRC/40/52).

¹⁸⁵ UN Security Council Resolution 2178, UN Doc. S/RES/2178 (24 September 2014), preambular paragraph 7.

¹⁸⁶ Report of the UN Special Representative of the Secretary-General on the situation of human rights defenders, UN Doc. E/CN.4/2005/101 (13 December 2004), para. 37.

¹⁸⁷ *G v Federal Republic of Germany*, (ECtHR), Application No. 13079/87, 6 March 1989, para. 256; *Christians against Racism and Fascism v. United Kingdom*, (ECtHR), Application No. 8440/78, 16 July 1980, para. 138; and *Law Office of Ghazi Suleiman v Sudan, Merits*, Comm no 222/98, Comm no 229/99, 33rd Ordinary Session (15-29 May 2003), 16th Annual Activity Report (2002-3), (2003) AHRLR 134 (ACHPR 2003), IHRL 3324 (ACHPR 2003), May 2003, African Commission on Human and Peoples' Rights [ACHPR,], para. 65.

¹⁸⁸ *Alekseev v. Russian Federation* CCPR/C/109/D/1873/2009 (2010) para 9.6.

¹⁸⁹ UN Committee on the Elimination of Racial Discrimination '*General Recommendation 20, The guarantee of human rights free from racial discrimination*' (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 124 (1996), available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7492&Lang=en.

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.¹⁹⁰

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.*'¹⁹¹ 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.¹⁹² Likewise, the HRCtee has urged States to consider the impact of implementing criminal laws against demonstrators on the duty to facilitate peaceful assembly.¹⁹³

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.¹⁹⁴

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;¹⁹⁵ organisers and individual participants should not be held responsible for violent or otherwise unlawful acts of others.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

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

¹⁹⁰ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 20 (2).

¹⁹¹ *Ezelin v. France*, (ECtHR), Application No. 11800/85, 26 April 1991, para. 53.

¹⁹² 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%20CIUDADANA%202009%20ENG.pdf>.

¹⁹³ HRCtee '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.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsvD39shLHTEERhsYOhFtDzh0PKyP5Ln5dAMExmmbJDMUKBSdAcAL%2bnki6L8giuu1mifUTDceJVsxPoPGiNHEZdqPZhVVoFqpFxoCox%2bQIjx>.

¹⁹⁴ 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.

¹⁹⁵ OSCE/ODIHR/Venice Commission Guidelines, Section B, para. 110.

¹⁹⁶ *Ezelin v. France*, (ECtHR), Application No. 11800/85, (1991) paras. 41 and 53.

¹⁹⁷ *Ibid.* OSCE/ODIHR/Venice Commission Guidelines, Section B, para 112,

¹⁹⁸ HRCtee, '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.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsvD39shLHTEERhsYOhFtDzh0PKyP5Ln5dAMExmmbJDMUKBSdAcAL%2bnki6L8giuu1mifUTDceJVsxPoPGiNHEZdqPZhVVoFqpFxoCox%2bQIjx>.

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.¹⁹⁹ However, exhaustion of administrative remedies should not be a prerequisite for an organiser or participant to seek judicial review.²⁰⁰

Proposed restrictions should therefore be communicated in a time frame that allows sufficient time for an appeal or urgent interim relief.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.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.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.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.²⁰⁵

Question 7.

What is the position as far as organiser accountability is concerned? Can the organisers 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 organisers where participants 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

¹⁹⁹ OSCE/ODIHR/Venice Commission Guidelines, Section A, para 4.6.

²⁰⁰ 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 36(d), available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx.

²⁰¹ UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' (2013) A/HRC/23/39, para. 36(c) available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

²⁰² *Bączkowski v. Poland*, (ECtHR), Application no. 1543/06 (2007), para 83.

²⁰³ *Bączkowski v. Poland*, (ECtHR), Application no. 1543/06 (2007), para 68.

²⁰⁴ UN Special Rapporteur on the rights to freedom of assembly and of association 'A step-by-step checklist for monitoring implementation of the practical recommendations on the management of assemblies report by United Nations Special Rapporteurs Maina Kiai and Christof Heyns' (A/HRC/31/66)' (2016) <https://www.ohchr.org/Documents/Issues/FAssociation/10PrinciplesProperManagementAssemblies.pdf>.

²⁰⁵ *Toregozhina v. Kazakhstan, Views, Comm. No. 2137/2012, CCPR/C/112/D/2137/2012*, para. 9.

reasonable efforts to do so.²⁰⁶ Organisers should not be liable for the actions of individual participants.²⁰⁷

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.²⁰⁸

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.²⁰⁹ The Venice Commission has criticised proposed domestic legislation imposing cleaning costs on organisers on numerous occasions.²¹⁰

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.²¹¹ 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.²¹² In other

²⁰⁶ OSCE/ODIHR/Venice Commission Guidelines, para. 197.

²⁰⁷ OSCE/ODIHR/Venice Commission Guidelines, para. 5.7.

²⁰⁸ Ibid, para 198.

²⁰⁹ Ibid, para 32.

²¹⁰ For example:

Belarus: European Commission for Democracy Through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), Joint Opinion on Mass Events of the Republic of Belarus Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012) , para. 103, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)006-e).

Kyrgyzstan: European Commission for Democracy Through Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), Joint Opinion on the Amendments to the Law of the Kyrgyz Republic on the Right of Citizens to Assemble Peaceably, without Weapons, to Freely Hold Rallies and Demonstrations, Adopted by the Venice Commission on 27 June 2008, para. 37, available at: <https://www.legislationline.org/documents/id/2020>.

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.²¹³ 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.²¹⁴ 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.²¹⁵

The HRCtee has previously held that notice requirements may be compatible with the permitted limitations laid down in Article 21 of the ICCPR.²¹⁶ However, while a system of prior notices may be important for smooth conduct of public demonstrations, *'their enforcement cannot become an end in itself'*.²¹⁷ 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.²¹⁸

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*²¹⁹, 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.²²⁰

8.3 Spontaneous Demonstrations

Individuals must be able to assemble spontaneously in reaction to certain incidents or events,²²¹ which the OSCE/ODIHR describe as *'...an expectable feature of a healthy democracy.'*²²² A system of prior notices may be important for the smooth conduct of public

²¹³ In Azerbaijan, Germany, Greece and the United Kingdom spontaneous assemblies are exempt from the notification requirement.

²¹⁴ Azerbaijan, Belgium, Bosnia and Herzegovina, Estonia, Germany, Greece, Hungary, Latvia, Montenegro, the Netherlands, Serbia, Turkey and Ukraine.

²¹⁵ *Lashmankin and others v. Russia*, (ECtHR) Application No. 57818/09, 7 February 2017, paras. 324.

²¹⁶ *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990, 31 March 1994, para. 9.2 and *Elena Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, 6 April 2018, para. 7.5.

²¹⁷ *Annenkov and others v. Russia* (ECtHR) No. 31475/10, 25 October 2017, para. 131(d).

²¹⁸ *Berladir and Others v. Russia* (ECtHR) no. 34202/06, 10 July 2012, paras. 40-41.

²¹⁹ *All Nigeria Peoples Party & 11 others v. Inspector General of Police* (2006) CHR 181-199 [Nigeria High Court].

²²⁰ F Falana *'Police Permit Not Required For Rallies in Nigeria'*, 23 January 2014, available at: <https://www.premiumtimesng.com/opinion/153860-police-permit-required-rallies-nigeria.html>.

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/SR.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,²²³ but their enforcement cannot become an end in itself.²²⁴ Laws and policies requiring prior notice therefore cannot amount to the effective banning of spontaneous assemblies.²²⁵ 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.²²⁶ 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.²²⁷

Furthermore, laws imposing heavy sanctions or onerous restrictions upon individuals exercising this right, is incompatible with the ICCPR.²²⁸ 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.²²⁹ Liability for failure to adhere to such provisions should be clearly stated in law, with a maximum penalty provided.²³⁰

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.²³¹

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.²³²

²²³ *Kivenmaa v. Finland* CCPR/C/50/D/412/1990 (1994) para 9.2.

²²⁴ *Elena Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, (2018) para. 7.5.

²²⁵ *Elena Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, (2018) para. 7.5; *Tatyana Severinets v Belarus* CCPR/C/123/D/2230/2012 (2018) para. 8.7.

²²⁶ *Bukta and Others v. Hungary*, (ECtHR), Application No. 25691/04, (2007) para. 36; *Malawi African Association and Others v. Mauritania*, ACHPR, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000) para. 111.

²²⁷ *Amnesty International and Others v. Sudan*, ACHPR, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999) para. 82.

²²⁸ HRCtee 'Concluding observations on the seventh periodic report of the Russian Federation' (2015) CCPR/C/RUS/CO/7, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstWB5OJfDOQhMEkiX20XNhIfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUArBGIBJo5Dzl4ZqOZa12FMGUZJqfSjwclYp>

²²⁹ HRCtee '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.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstWB5OJfDOQhMEkiX20XNhIfwS44vVjDCG9yOfCaGgJ%2b4aMVruPFpyUaMYJvfEOEBQCPHWJdUArBGIBJo5Dzl4ZqOZa12FMGUZJqfSjwclYp>

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

²³¹ *Tatyana Severinets v. Belarus*, CCPR/C/123/D/2230/2012, 19 July 2018, para. 8.9

²³² *Elena Popova v. The Russian Federation*, CCPR/C/122/D/2217/2012, 6 April 2018, para. 7.6 and *Tatyana Severinets v. Belarus*, CCPR/C/123/D/2230/2012, 19 July 2018, para. 8.9

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,²³³ 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.²³⁴

9.2 Limitations Relating to Location²³⁵

The HRCtee noted that legislation specifying a single remote area²³⁶ or stadium²³⁷ 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.²³⁸

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.²³⁹

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.²⁴⁰ Third party accounts of assemblies and associated

²³³ *Poplavny and Sudalenko v. Belarus*, CCPR/C/118/D/2139/2012, 3 November 2016, para. 8.5.

²³⁴ *Poplavny and Sudalenko v. Belarus*, CCPR/C/118/D/2139/2012, 3 November 2016, para. 8.5.

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.

²³⁶ *Zinaida Shumilina v. Belarus*, CCPR/C/120/D/2142/2012, 28 July 2017.

²³⁷ *Turchenyak et al. v. Belarus*, 1948/2010, 24 July 2013, para. 7.5

²³⁸ *Barankevich v. Russia* (ECtHR) no. 10519/03, 26 July 2007, para. 33.

²³⁹ *Sergei Androsenko v. Belarus*, CCPR/C/116/D/2092/2011, 20 June 2010, para. 7.6.

restrictions can often be perceived as independent and impartial and are particularly important when reporting on clashes between demonstrators, State officials and counter-demonstrators.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.²⁴² States must ensure that NHRIs and human rights defenders are able to carry out their monitoring activities safely.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.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.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.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.²⁴⁷

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'²⁴⁸ of an assembly and how it was

²⁴⁰ OSCE/ODIHR, Handbook on Monitoring Freedom of Peaceful Assembly. Second Edition (Warsaw: ODIHR, 2011) p 29.

²⁴¹ Ibid, p 31.

²⁴² UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai* (2013) A/HRC/23/39, paras. 70-71.
https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf.

²⁴³ OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders*, (Warsaw, 2014), para. 62.

²⁴⁴ African Commission on Human and People's Rights *'409: Resolution on the Need to Adopt Legal Measures for the Protection of Women Human Rights Defenders in Africa'* ACHPR/Res. 409 (LXIII) (2018).
http://www.achpr.org/sessions/63rd_os/resolutions/409/; CEDAW Committee *'Concluding observations on the combined sixth and seventh periodic reports of Thailand'* (2007) CEDAW/C/THA/CO/6-7 para 31, available at:
http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/THA/CEDAW_C_THA_CO_6-7_25136_E.docx.

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>.

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/jtselect/jtrights/47/4705.htm>.

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.

²⁴⁸ United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, *The Right to Freedom of Peaceful Assembly - Best Practices Fact Sheet*, (November 2014), available at:
<http://www.icnl.org/research/library/files/Transnational/factsheet.pdf>.

policed.²⁴⁹ This helps to inform public debate and hold the State accountable for violations.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.*'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.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.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'.²⁵⁴

A State actively discouraging participation in assemblies, whether through oppressive laws, threats or, in worst cases, violence and fear mongering of against prospective protesters will be in violation of Article 21 of the ICCPR.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.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 2003,²⁵⁷ 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.

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).

²⁵⁰ OSCE/ODIHR/Venice Commission Guidelines Annex A pg. 101.

²⁵¹ OSCE Representative on freedom of the media: '*Special Report: Handling of the media during political demonstrations*' (2007) p.1. <https://www.osce.org/fom/25744?download=true>.

²⁵² United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai '*10 Principles of Proper Management of Assemblies*', (September 2016), available at: <https://www.ohchr.org/Documents/Issues/FAssociation/10PrinciplesProperManagementAssemblies.pdf>.

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

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.

²⁵⁵ See decision in *Hmeed v Libya*, CCPR/C/112/D/2046/2011.

²⁵⁶ See OCSE 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/73405?download=true>.

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.²⁵⁸ 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.²⁵⁹

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.'²⁶⁰ 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.²⁶¹ This perhaps reflects the 'paradigmatic socio-economic shift in public ownership'²⁶² 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.²⁶³ Earlier cases from Germany have clarified that businesses owned solely by the State are bound by basic rights.²⁶⁴

Whilst the US Supreme Court has held that the First Amendment would not protect union members picketing in a shopping centre car park²⁶⁵, it found that a state could entertain a more expansive free speech constitutional guarantee, including as to granting limited and

²⁵⁸ See OSCE/ODIHR/Venice Commission Guidelines para 5.3.

²⁵⁹ OSCE/ODIHR/Venice Commission Guidelines para 5.3.

²⁶⁰ Mead, D., 'The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era', (2013) 134.

²⁶¹ *Appleby and Others v United Kingdom* (ECtHR), Application No. 44306/1998, 13 May 2003, para. 222.

²⁶² Ibid.

²⁶³ *BVerfGE* 128, 226 (2011), Fraport.

²⁶⁴ *BVerwGE* 113, 208, as cited by the GFCC in Fraport, para. 50.

²⁶⁵ *Hudgens v NLRB* 424 US 507 (1976).

reasonable access rights over private property to hand out leaflets.²⁶⁶ 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 designs²⁶⁷ 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 HRCtee²⁶⁸ 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.²⁶⁹ Five State parties have made reservations to Article 21 of the ICCPR.²⁷⁰

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*

²⁶⁶ *PruneYard Shopping Center v Robins*, 447 US 74 (1980).

²⁶⁷ See Timothy Zick, '*Speech Out of Doors: Preserving First Amendments Liberties in Public Places*' (New York: Cambridge University Press, 2009) p. 130-132.

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.

²⁷⁰ Martin Scheinin, *Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice* pp. 41-58, para. 7, in Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004).

*social origin.*²⁷¹ 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).²⁷²

The HRCtee has expressed concern in the case of Peru²⁷³, 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 HRCtee 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.*'²⁷⁴ 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.'²⁷⁵

16.2 Fatalities

According to General Comment No. 6 of the HRCtee 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.'²⁷⁶

²⁷¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 4(1).

²⁷² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 4(3).

²⁷³ HRCtee concluding observations of 2013 (CCPR/C/PER/CO/5).

²⁷⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions A/HRC/17/28 para 68.

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*'.²⁷⁷

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.'*²⁷⁸

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 Media²⁷⁹

States have an obligation to respect and fully protect assembly rights online as well as offline.²⁸⁰ 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

²⁷⁷ Art 2, Code of Conduct for Law Enforcement Officials
<https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx>.

²⁷⁸ C Heyns, '*How should States manage assemblies in the new age of protest?*', (Open Democracy, 2017), available at: <https://www.opendemocracy.net/protest/State-management-assemblies>.

²⁷⁹ For digital space, see answer at 2.4.

²⁸⁰ HRC Resolution 24/5 A/HRC/RES/24/5 <http://freeassembly.net/wp-content/uploads/2013/08/A-HRC-RES-24-5-ENG.pdf>.

have the right to assemble in virtual spaces, to gather online in order to express their opinion.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.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.*'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'²⁸⁴. For example, the Venezuelan Law (Article 49 of the Venezuelan Law on Political Parties, Public Meetings, and Protests)²⁸⁵ regulates that companies are not allowed to 'print or record announcements of public meetings or protests which are in violation of the law'.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'.²⁸⁷

State parties must respect the full right of assembly, ensuring the right of assembly also contains the right of 'free flow of information'.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.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

²⁸¹ HRC Resolution 21/16 A/HRC/RES/21/16 http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/21/16

²⁸² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/17/27 https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

²⁸³ UN Human Rights Council, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 26 July 2018, A/HRC/38/34, p 8, para 82.

²⁸⁴ Ibid.

²⁸⁵ Ley de Partidos Políticos, Reuniones Públicas y manifestaciones, Art. 49, available at: <http://www.icnl.org/research/library/files/Venezuela/LeyManifestacio.pdf>.

²⁸⁶ Global Trends in NGO Law: A quarterly review of NGO legal trends around the world '*Freedom of Assembly*' (2011), vol. 2, issue 4, found at: <http://www.icnl.org/research/trends/trends2-4.pdf?pdf=trends2-4>.

²⁸⁷ CIVICUS, '*Civil Society Watch Report*' 2016, p. 3, accessed at: http://www.civicus.org/images/CSW_Report.pdf.

²⁸⁸ Human Rights Council - Summary of the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests prepared by the Office of the United Nations High Commissioner for Human Rights (2011) para 52.

²⁸⁹ Frau, R., '*Unmanned Military Systems and Extraterritorial Application of Human Rights Law*', in the Groningen Journal of International Law, vol 1(1): Drones in International Law, 2013, Pg. 17.

peaceful assembly.²⁹⁰ 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.²⁹¹

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.²⁹² 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.²⁹³

The Network for Police Monitoring, a UK monitoring body, has argued that the intense focus on surveillance creates a 'chilling effect'²⁹⁴ 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.²⁹⁵ 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.²⁹⁶

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.'*²⁹⁷

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.

²⁹⁰ Directorate-General for External Policies of the European Union, 'Surveillance and censorship: The impact of technologies on human rights', 2015, pg. 6, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549034/EXPO_STU\(2015\)549034_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549034/EXPO_STU(2015)549034_EN.pdf).

²⁹¹ Amnesty International, 'Poland Peaceful protesters defy escalating assault on freedom of assembly', 25 June 2018, available at: <https://www.amnesty.org/en/latest/news/2018/06/poland-peaceful-protesters-defy-escalating-assault-on-freedom-of-assembly/>

²⁹² Aston, V., 'State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protester perspectives', in European Journal of Law and Technology, Vol 8, No 1, 2017, pg. 9.

²⁹³ Frau, R., 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law', in the Groningen Journal of International Law, vol 1(1): Drones in International Law, 2013, Pg. 15

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

²⁹⁵ Big Brother Watch, 'The State of Surveillance in 2018', 2018, pg. 14, available at: <https://bigbrotherwatch.org.uk/wp-content/uploads/2018/09/The-State-of-Surveillance-in-2018.pdf>

²⁹⁶ Aston, V., 'State surveillance of protest and the rights to privacy and freedom of assembly: a comparison of judicial and protester perspectives', in European Journal of Law and Technology, Vol 8, No 1, 2017, pg. 9.

²⁹⁷ Amnesty International, 'Autonomous Weapons Systems: Five Key Human Rights Issues For Consideration', p. 15, 2015, available at: https://www.amnesty.nl/content/uploads/2015/04/autonomous_weapons_systems.pdf?x41799.

See soft law instruments referred to throughout and in particular:

- (a) UN Declaration on human rights defenders,²⁹⁸
- (b) Model Law for the recognition and protection of human rights defenders,²⁹⁹
- (c) *Guidelines on Freedom of Association and Assembly in Africa* of the African Commission on Human and Peoples' Rights 2017³⁰⁰;
- (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, 2009³⁰¹;
- (e) *Human Rights Handbook on Policing Assemblies (2016) by the OSCE*³⁰²
- (f) *Guidelines on Freedom of Peaceful Assembly* - published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2nd ed, 2010³⁰³

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).

²⁹⁹ Model Law for the recognition and protection of human rights defenders, 2016, https://www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

³⁰⁰ Accessed at: http://www.achpr.org/files/instruments/freedom-association-assembly/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf.

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 This handbook provides guidance for the police in facilitating the right to assembly peacefully, accessed at: <https://www.osce.org/odihr/226981?download=true>.

³⁰³ Accessed at: <https://www.osce.org/odihr/73405?download=true>.