**Written Submission of OSCE Office for Democratic Institutions and Human Rights to the Human Rights Committee: Drafting of the General Comment on Article 21 (Right to Peaceful Assembly) of the International Covenant on Civil and Political Rights**

18 March 2019

**Introduction**

1. Freedom of peaceful assembly is a fundamental freedom that has been recognized as one of the foundations of a functioning democracy. OSCE participating States are committed to guaranteeing the right to freedom of assembly to every individual without discrimination (Copenhagen Document 1990, para (9.2) Paris 1990 Charter for a New Europe (preamble) and the Helsinki Statement from the OSCE Ministerial Meeting 2008). Within its mandate to support OSCE participating States in implementing their human dimension commitments, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) has developed a range of tools to assist efforts of governments and civil society towards the full enjoyment of the freedom of peaceful assembly.
2. Together with the Council of Europe’s European Commission for Democracy through Law (Venice Commission), ODIHR issued *Guidelines on Freedom of Peaceful Assembly* (Guidelines).[[1]](#endnote-2) The Guidelines are based on relevant jurisprudence, particularly the case law of the European Court of Human Rights and of national constitutional courts and examples of good state practices. The work on third edition of the Guidelines is ongoing and is planned to be issued later this year. ODIHR provides legal reviews of draft and existing legislation of OSCE participating States upon their request. The reviews are usually published in cooperation with the Council of Europe’s Venice Commission,[[2]](#endnote-3) and supported by the ODIHR Panel of Experts on Freedom of Peaceful Assembly, officially established in 2006.[[3]](#endnote-4)
3. In line with its mandate to support participating States in the implementation of their commitments on freedom of peaceful assembly, ODIHR has been monitoring public assemblies across the OSCE space. Since 2011, ODIHR has monitored public assemblies in thirty OSCE participating States and published key findings and recommendations in regular thematic reports (please see under question 20). Moreover, ODIHR has developed tools and offered training programmes for law enforcement officials on the human rights compliant policing of assemblies[[4]](#endnote-5) and, for civil society and OSCE field operations, on the monitoring of public assemblies.[[5]](#endnote-6)
4. This submission draws on the second edition of the ODIHR / Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd edition, Warsaw, 2010) updated with information and research carried out since then. The sub-questions have been separated from the main questions when deemed most practical.
5. ***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?***
6. Freedom of peaceful assembly (FoPA) is a fundamental right and widely recognised as a cornerstone of a democratic society. It has been said that the fact that freedom of peaceful assembly is a ‘political right’ essential to a thriving democracy, gives it special status[[6]](#endnote-7) and potentially infers a need for not only greater protection but also a greater degree of positive measures of facilitation of the exercise of the right, undertaken by the State.
7. Its distinctive features include: being an individual right that is exercised collectively with others (also a feature of freedom of association); that it is often exercised in an open public place (although the right also includes freedom to assemble in buildings and private spaces, as well as online); providing an opportunity and means for those marginalised groups, individuals and peoples who might be excluded from power and wealth from expressing their views in public and thereby contributing to public discourse; an opportunity for people to hold the authorities publicly to account; a publicly visual means of assessing how far state authorities are willing to respect human rights in general.
8. ODIHR’s applies the following definition of the assembly is the following: An ‘assembly’ means the intentional gathering of a number of individuals in a publicly accessible place for a common expressive purpose.[[7]](#endnote-8)
9. The right to FoPA is of particular importance as it complements and intersects with several other civil and political rights. The right to freedom of expression is of particular relevance given the expressive nature of the many assemblies that impact public opinion (whereupon these two rights are engaged simultaneously).[[8]](#endnote-9) FoPA also interrelates with the right to freedom of association,[[9]](#endnote-10) the right to participate in public affairs,[[10]](#endnote-11) and the right to vote.[[11]](#endnote-12) In addition, it is one of a cluster of rights that underpins a broader ‘right to protest’.[[12]](#endnote-13) Recognizing the interrelation and interdependence of these different rights is vital to ensuring that the right to FoPA is afforded practical and effective protection.[[13]](#endnote-14)

***What is the function, added value and rationale for this right in a social system based on democracy and human rights?***

1. The right to FoPA protects the many ways in which people gather together in public and in private. It has been recognised as one of the foundations of a democratic, tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can interact peacefully with one another.[[14]](#endnote-15) The right to FoPA can thus help give voice to minority opinions and bring visibility to marginalized or underrepresented groups.
2. Effective protection of the right to FoPA can also help foster a culture of open democracy, enable non-violent participation in public affairs,[[15]](#endnote-16) and invigorate dialogue on issues of public interest. Public assemblies can help ensure the accountability of corporate entities, public bodies and government officials and thus promote good governance in accordance with the rule of law. Assemblies may also have symbolic importance for different sections of society in commemorating particular events, marking significant anniversaries, expressing political and religious views, as elements of ritual performance and as public demonstrations of culture and ethnicity.

***Does the scope of the right differ depending on the context (for example, is it the same during political transitions)?***

1. As FoPA is a fundamental freedom its scope is not impacted by the context. For example as the United Nations Special Rapporteur on Freedom of Assembly and of Association (UN SR) has commented the right should not be restricted during election periods, nor subject to specific and distinctive laws, since assemblies and other gatherings are a fundamental feature of election campaigns. Similarly, protests and other forms of assembly are often central to processes of political transition (e.g. Eastern Europe 1989; the Arab Spring 2011) and should therefore not be subject to additional restrictions at such times. The European Court of Human Rights noted in *Güneri v Turkey*[[16]](#endnote-17) that during times of political tension it is the responsibility of the authorities to facilitate and protect assemblies through appropriate levels of policing rather than use the tension to ban or restrict an assembly.

***2. How should the term ‘peaceful assembly’ be understood?***

1. The term ‘peaceful’ includes conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote.[[17]](#endnote-18) It also includes conduct that temporarily hinders, impedes or obstructs the activities of third parties, for example by temporarily blocking traffic.[[18]](#endnote-19)
2. An assembly may be entirely ‘peaceful’ even if it is ‘unlawful’ under domestic law, and the peaceful nature of an assembly should override any immediate issues of legality; peaceful but unlawful assemblies should be facilitated by the authorities. The peaceful intentions of organizers and participants in an assembly should always be presumed, unless there is compelling and demonstrable evidence of intent to use or incite imminent violence.[[19]](#endnote-20)

***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’?***

1. ODIHR presumes the centrality of an expressive component to a protected assembly. ODIHR and Venice Commission’s Freedom of Peaceful Assembly (2nd edition) defines an ‘assembly’ as the intentional gathering of a number of individuals in a publicly accessible place for a common expressive purpose. This includes planned and organised assemblies, unplanned and spontaneous assemblies, static and moving assemblies.[[20]](#endnote-21)
2. The expressive element should be acknowledged to include a diverse range of verbal, aural, musical elements (including acts of silence); visual activities (including use of flags, banners, clothing, masks, gestures); it should allow for moving and static actions, and both; assemblies that are brief and those that are of a longer duration (the duration of which should be determined by the organizers / participants). The expressive element may be politically orientated or may be focused on aspects of culture, ethnicity or religion.
3. An assembly may include a diverse form of actions of an expressive nature including strikes and pickets, and other forms of assembly related to industrial disputes; and cultural and religious gatherings all of which have an expressive component. Some sport related events may be considered as an assembly under Article 21, if they have a specific expressive component, as for example groups of supporters moving through public space to express support for their team, before or after a match or contest.
4. ODIHR normally distinguishes between expressive assemblies, which are protected, and those for a more utilitarian and/or incidental purpose such as shopping or waiting for a bus (which are not protected as assemblies, although may intersect with a number of other human rights); and also between those with a commercial and those with a non-commercial basis, with commercially orientated gatherings liable to be subject to a greater degree of regulation and restriction. However, such boundaries can never be completely set, since in some contexts and in some cases participation in routine daily activities and or commercial activities may have a symbolic or expressive dimension.

***Does it matter whether the organizers pursue a commercial interest?***

1. Gatherings held primarily for purposes other than expressing emotions, ideas or opinions on matters of public interest or concern (e.g. gatherings held purely for entertainment purposes and/or to make profit, such as for-profit sporting events or for-profit concerts) may not be covered by the definition of assembly, as they are often subject to other rules, in particular regarding permissions. The European Court of Human Rights has however acknowledged that Article 11 covers assemblies of an essentially social character.[[21]](#endnote-22)

***In order to qualify as an assembly, are there requirements about where should the gathering should take place – in public, private or on-line?***

1. In general the organizers should have the right to choose the ‘time, place and manner’ of an assembly, and often the location of an assembly is a critical element and central to the expressive rationale, e.g. an assembly protesting about parliamentary matters may need to be held in the close proximity to the national parliament and should not be to limited to arbitrary or distant sites by the state, since this would effectively undermine the expressive impact of the assembly.
2. The location or route may include, but need not be limited to, public parks, squares, streets, roads, avenues, sidewalks, pavement, footpaths, and open areas near public buildings and facilities.[[22]](#endnote-23) Buildings and structures that are physically suitable for assemblies (meaning capable of accommodating the anticipated number of participants) and that are ordinarily open to the public (such as publicly owned auditoriums, stadiums or open areas in public buildings) should also be regarded as legitimate locations for assemblies, and their use will similarly be protected by the rights to FoPA and expression.[[23]](#endnote-24)
3. The right to FoPA protects private meetings and meetings in or on private property as well as those held in publicly accessible places.[[24]](#endnote-25)
4. The Internet and social media have greatly facilitated the exercise of fundamental rights, including that of the right to freedom of peaceful assembly by buttressing the right to freedom of expression, which is inextricably linked with freedom of peaceful assembly. The Internet and social media can be used to discuss, prepare, organize and publicize assemblies, as well as to jointly exercise these right. It is hard to imagine an assembly that does not involve some reliance on the Internet.[[25]](#endnote-26)
5. Legislation and State policies should therefore ensure that the internet and social media can be used to prepare, mobilize and organize assemblies,[[26]](#endnote-27) which later take place on the real street.
6. In many areas, the Internet is accessible, cheap, fast, borderless and has reduced the cost of communicating with others.[[27]](#endnote-28) However, the so-called ‘digital divide’ continues to exist and States are under increasing obligations to reduce it, given the importance of the Internet to everyday life[[28]](#endnote-29) and to political participation in particular. The Internet can also carry a protest message, and even help to ‘create’ a protest message through access to information, including by enabling access to other jurisdictions and support from abroad.
7. Access to the Internet and social media have become important aspects of an assembly for organizers, participants, monitors and human rights defenders. This is clearly an area where the rights to freedom of expression and freedom of peaceful assembly intersect. Legislation should not prevent individual right to participate in or address assembly through internet or other technical means, protect collective online activities, such as online discussions or “gatherings” with a common expressive purpose.[[29]](#endnote-30)

***Can one person form an assembly?***

1. An assembly, by definition, requires the presence of at least two persons – though not every common act of expression involving two or more persons may be recognised as an assembly.[[30]](#endnote-31)
2. Nonetheless, an individual protester exercising his or her right to freedom of expression, where physical presence is an integral part of that expression, should at least be afforded protections equivalent to the protections afforded to persons who gather together as part of an assembly. Moreover, an individual protester should enjoy additional guarantees, such as, for example, exemption from the requirement to notify the authorities beforehand.

***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?***

1. Only peaceful assemblies are protected by the right to freedom of assembly. In determining whether a demonstration is peaceful, the ECtHR has focused on the intentions of the organizers as well as the conduct of the participants. It has held that: “[T]he right to peaceful assembly is secured to everyone who has the intention of organizing a peaceful demonstration […] [T]he possibility of violent counterdemonstrations or the possibility of extremists with violent intentions […] joining the demonstration cannot as such take away that right.”[[31]](#endnote-32)
2. It is important to acknowledge that if an assembly is a fundamental element of democratic society, then disruption will often be a natural result of an assembly, depending on location and context, and peaceful actions that cause disruption to others (including disruption to traffic, commuters, shoppers and business in general) should never be considered as violent (see under question 1).
3. Participants must refrain from using violence.[[32]](#endnote-33)There is no such thing as a violent assembly, only assemblies where some or more of the participants are acting violently (the majority of participants in so-called violent assemblies will remain peaceful). The right to freedom of peaceful assembly is held by each individual participating in an assembly. An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of a demonstration if the individual in question remains peaceful in his or her own intentions or behaviour.[[33]](#endnote-34) However, even when participants are not peaceful and, as a result, forfeit their right to peaceful assembly, they retain all the other rights that can be affected by their participation, including the rights to due process of law, bodily integrity, dignity and freedom from torture, cruel, inhuman or degrading treatment or punishment.

***To what extent can the violent conduct of certain individuals participating in the assembly be attributed to the group as a whole and render an assembly as a whole not peaceful?***

1. Individual participants in an assembly should be held responsible and liable for their own actions. The organisers or other participants should never be held liable for the actions of other individual participants.
2. The spectrum of conduct that either constitutes ‘violence’, or is regarded as capable of causing ‘violence’, should be narrowly construed, limited in principle to using, or overtly inciting others to use, physical force that inflicts or is intended to inflict injury or serious property damage where such injury or damage is intended or highly likely to occur.
3. The fact that certain forms of content or message may provoke strong reactions by non-participants does not make an assembly ‘non-peaceful’. Law enforcement officials must differentiate between peaceful and non-peaceful participants since only those who themselves take part in violence forfeit the legal guarantee of their right to assemble.[[34]](#endnote-35) Any state intervention should target individual wrongdoers, rather than all participants more generally.

***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?***

1. The right to peaceful assembly is an individual right but one that is exercised collectively. The organisers of an assembly (if there is one) have a right to assemble, but only as individuals and in the same way as other individuals have a right.
2. The right to FoPA should extend to all those living in a state, not just citizens, but the right should also include the right to participate in assemblies in other jurisdictions or countries, and this should include the right to cross international borders to participate in an assembly. Restrictions on freedom of movement to attend an assembly should be considered as a limitation on the right to assemble.
3. Article 25 of the ICCPR guarantees to citizens of a given state the right and opportunity to take part in the conduct of public affairs (relating to the exercise of political power)[[35]](#endnote-36) on an equal basis and without unreasonable restrictions. The right to participate in public life may be exercised by citizens directly (through voting and standing for public office), through dialogue with their chosen representatives, and through the ability to organize themselves. The right to peaceful assembly thus supplements other conventional methods of participation (such as party politics or periodic elections)[[36]](#endnote-37) and provides an essential means for individuals or groups to express their opinion on matters of public interest and to participate in public life.[[37]](#endnote-38) However, those organizing an assembly cannot be compelled to include individuals or groups whose message would interfere with the desired message of the event.[[38]](#endnote-39) Assembly organizers may thus exclude those whose message departs from, or who’s presence as participant would change, the message that the organizer wishes to be communicated.

***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?***

1. The planning and publicizing of an assembly are integral parts of the exercise of the rights to freedom of speech and assembly and should be facilitated and protected accordingly. Given the presumption in favour of peaceful assembly, organizers have the right to publicize the holding of an assembly ahead of time, both on and offline.[[39]](#endnote-40) Because of their importance in people’s everyday lives,[[40]](#endnote-41) the Internet and social media are often used to discuss, prepare, organize and publicize assemblies.[[41]](#endnote-42) Legal requirements to notify of an assembly should not impede the planning process.

***Does the right cover protection of participants on their way to and from an assembly?***

1. The State should not intervene to prevent individuals from participating in an assembly, either by detaining them in advance, or by restricting access to the site of the assembly via physical or administrative obstacles, simply on the grounds of the possible commission of an offence. Arguably, a group of individuals walking together to join an assembly, or to leave an assembly to go home, whether by design or by accident, should be regarded as a spontaneous assembly, and their action protected as such, rather than considered as disruption to public order or an illegal assembly. Unless a clear and present danger of imminent violence or of another crime can reasonably be deemed seen to exist, law enforcement officials should not intervene to stop, search and/or detain protesters *en route* to an assembly and there is reason to believe that those participants are going to participate in the violence or crime. The reason for the stopping, searching or detaining a participant should be particular to a person, and not merely because he or she is participating in an assembly.[[42]](#endnote-43) This should include not imposing restrictions on vehicles, whether private or public, from travelling to the location of an assembly either by stopping them leaving their point of origin or by being stopped *en route*; or from crossing borders or international travel to participate in an assembly. Exceptionally, in cases where there is compelling and demonstrable evidence of probable violence, including evidence that a significant proportion of assembly participants may be armed, police control points may be set up on the way to assembly locations where participants may be searched for weapons. Relevant laws and operating procedures should outline the criteria for conducting searches in such situations and the legal and practical consequences in cases where weapons are found.

***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?)***

1. States bound by human rights instruments that confer protection on the right to FoPA have a general legal obligation to ensure the protection of the rights contained therein for all individuals under their jurisdiction.[[43]](#endnote-44) As emphasized by the UN Human Rights Committee’s General Comment 31, these obligations extend to all branches of government – legislative, executive and judicial – ‘and other public or governmental authorities, at whatever level – national, regional or local’,[[44]](#endnote-45) including (for States Parties with a federal structure) ‘all parts of federal states without any limitations or exceptions’.[[45]](#endnote-46) It has been said that the fact that freedom of peaceful assembly is a ‘political right’ essential to a thriving democracy, gives it special status[[46]](#endnote-47) and potentially infers a need for not only greater protection but also a greater degree of positive measures of facilitation of the exercise of the right, undertaken by the State.
2. States have a positive duty to facilitate and protect the exercise of the right to FoPA.[[47]](#endnote-48) This duty should be reflected in the legislative framework and relevant law enforcement regulations and practices. The duty to protect also involves the protection of assembly organizers and participants from third party individuals or groups who seek to undermine their right to FoPA.[[48]](#endnote-49)
3. FoPA is recognised as a fundamental right in a democratic society and should be enjoyed, as far as possible, without regulation.[[49]](#endnote-50) This protective principle should be reflected in national constitutions and in relevant legislation and should be interpreted broadly by all state bodies.[[50]](#endnote-51) As a consequence, the relevant public authorities should remove all unnecessary legal and practical obstacles to the right to FoPA. In particular, the organization and conduct of assemblies should not be subject to burdensome bureaucratic requirements.
4. Moreover, the presumption in favour of (peaceful) assemblies also includes an obligation of tolerance and restraint towards peaceful assemblies in situations where relevant procedures and formalities have not been followed.[[51]](#endnote-52)

***How should the obligation to allow assemblies to take place within ‘sight and sound’ of its target audience be interpreted?***

1. Assemblies as collective activities with an expressive element should be able to effectively communicate their message to their intended target, and must therefore be facilitated within ‘sight and sound’ of their target audience[[52]](#endnote-53) unless compelling reasons (that conform with the permissible justifications for imposing limitations under Article 21 ICCPR or Article 11(2) ECHR) necessitate a change of venue. In those cases, alternative sites should be provided that are as close as possible to the initially proposed site.
2. Furthermore, individuals have a right to assemble as counter-demonstrators to express their disagreement with the views expressed at a public assembly.[[53]](#endnote-54) In such cases, the coincidence in time and venue of the two assemblies is likely to be an essential part of the message to be conveyed by the second assembly. Counter-demonstrations should be facilitated so that they occur within ‘sight and sound’ of their target in so far as this does not physically interfere with the other assembly.

***5. More specifically, what are the (negative and positive) obligations placed by the right of peaceful assembly on the State? 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)?***

1. As pointed out above under question 4, all public authorities, legislative, executive and judicial – ‘and other public or governmental authorities, at whatever level – national, regional or local’, including (for States Parties with a federal structure) ‘all parts of federal states without any limitations or exceptions’ are bound by the legal obligations of the State.
2. State actors have a negative obligation not to interfere where there is no need to do so, or to impose disproportionate demands, expectations or restrictions on an assembly or its organisers unless there is compelling evidence of need. This may include any legal requirements or expectations that organisers or participants should provide advance notification of an assembly to the state authorities.
3. There is a presumption in favour of (peaceful) assemblies, which is recognised as a fundamental right in a democratic society and should be enjoyed, as far as possible, without regulation.[[54]](#endnote-55) This protective principle should be reflected in national constitutions and in relevant legislation and should be interpreted broadly by all state bodies.[[55]](#endnote-56) As a consequence, the relevant public authorities should remove all unnecessary legal and practical obstacles to the right to FoPA. In particular, the organization and conduct of assemblies should not be subject to burdensome bureaucratic requirements. Moreover, the presumption in favour of (peaceful) assemblies also includes an obligation of tolerance and restraint towards peaceful assemblies in situations where relevant procedures and formalities have not been followed.[[56]](#endnote-57)
4. **Facilitation of counter-demonstrations**: Individuals have a right to assemble as counter-demonstrators to express their disagreement with the views expressed at a public assembly. In such cases, the coincidence in time and venue of the two assemblies may be an essential part of the message to be conveyed by the second assembly. Counterdemonstrations should be facilitated so that they occur within ‘sight and sound’ of their target in so far as this does not physically interfere with the other assembly and does not carry the immediate risk of imminent violence[[57]](#endnote-58) (See more under the answer to question 4).

1. However, assemblies should not be aimed at the destruction of the rights of others. International standards set limits on the exercise of the right to FoPA when it is aimed at the destruction of other rights and freedoms. As indicated in Article 5(1) ICCPR and Article 17 ECHR, no state, group or person may engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in these instruments. This means, for example, that counter-demonstrations organized with the sole, main or additional purpose of physically disrupting or preventing another assembly are not permissible.[[58]](#endnote-59)
2. **Facilitation of simultaneous assemblies**: Where prior notification is submitted for two or more assemblies at the same place and time, simultaneous events should be facilitated where possible.[[59]](#endnote-60) If this is not practical (for example, due to lack of space), the parties should be encouraged to explore alternative options that might yield a mutually satisfactory resolution. Where such a resolution cannot be found, the authorities should still seek to accommodate the different assemblies – ensuring, insofar as possible, that any alternative locations remain within sight and sound of the target audiences.
3. Attempts by assembly organisers to ‘block-book’ particular locations, especially for significant dates or anniversaries, may constitute an abuse of rights since they aim to exclude other assemblies from using that location at that time.[[60]](#endnote-61) As such, a ‘first come, first served’ rule must not be implemented in a way that enables some assembly organisers to ‘block-book’ particular locations. Simply prohibiting an assembly in the same place and at the same time as an already notified or planned public assembly in cases where both can reasonably be accommodated is likely to amount to a disproportionate and possibly discriminatory response.
4. **Facilitation of spontaneous and other non-notified assemblies:** Assemblies may take place without advance planning in direct response to some occurrence, incident, other assembly, or widely disseminated statement of public interest and a perceived need for an immediate reaction.[[61]](#endnote-62) The emergence of new technologies has greatly enhanced the possibilities of such occurrences. The need to protect spontaneous assemblies as an expected (rather than exceptional) feature of a healthy democracy has been recognized in numerous domestic laws and court decisions,[[62]](#endnote-63) and should be facilitated and protected in the same way as assemblies that are planned in advance. The domestic legal framework should ensure that spontaneous assemblies can lawfully be held and laws regulating FoPA should explicitly exempt such assemblies from prior notification requirements, for example, where timely notification has not been feasible or would have rendered such an event moot. [[63]](#endnote-64)

1. **Facilitation of repeat assemblies:** The State should respect the right to repeatedly hold assemblies in the same place. While repeat assemblies should not receive favourable treatment vis-à-vis other assemblies announced for the same time and place, they should not be limited solely because of their frequency, unless their frequency or cumulative impact disproportionately interferes with the rights of others. The announcement or presence of a repeat assembly should not automatically preclude the holding of simultaneous assemblies or counter-demonstrations at the indicated time and place, if both can be accommodated.
2. **Duty to protect and facilitate controversial but peaceful assemblies:** State authorities must protect the organizers and participants of peaceful assemblies that espouse views that are controversial or unpopular, and which may generate hostile opposition, and should also protect peaceful assemblies from any person or group that intentionally seeks to limit or destroy the rights of others to assemble. In cases where assemblies annoy or give offence to people opposing the message, the obligations of the state go beyond a mere duty not to interfere – rather, there may be a need for active police measures to protect assembly organizers and participants from attacks by third parties.[[64]](#endnote-65) Potential disorder arising from hostility directed against those participating in a peaceful assembly must not be used to justify disproportionate restrictions on the assembly.[[65]](#endnote-66) The State has the duty to ensure that counter-demonstrators do not constitute an undue and serious interference with the main event’s ability to convey its message.[[66]](#endnote-67)
3. **Duty to facilitate assemblies at the organiser’s preferred location and within ‘sight and sound’ of the intended audience:** Assemblies should be able to effectively communicate their message and must therefore be facilitated within ‘sight and sound’ of their target audience (see more under answer to question 4).
4. **Duty to facilitate access to public spaces and privately-owned equivalents:** State authorities should facilitate access to the respective public space,[[67]](#endnote-68) and should provide adequate security and safety measures, including traffic and crowd management[[68]](#endnote-69) and first-aid services.[[69]](#endnote-70) Similar facilitation duties may arise in cases of privately-owned spaces where these places are the physical and functional equivalents of public places.[[70]](#endnote-71) Thus, in the circumstances where the owner of such a space is capable of accommodating an assembly but does not give permission for an assembly and where the lack of access to property has the effect of preventing any effective exercise of freedom of expression or assembly, or where it destroys the essence of such rights, the state may have a positive obligation to ensure access to such a privately-owned place for the purposes of holding an assembly.[[71]](#endnote-72) This is particularly the case where public spaces suitable for assemblies, e.g. streets or squares, have been privatized, and where any prohibitions against assemblies would significantly reduce access to spaces otherwise suitable for peaceful assemblies.[[72]](#endnote-73) The same may apply to spaces open to the public (such as in privately-owned shopping centres), many of which fulfil a function similar to that of more traditional public spaces such as streets and squares. Prohibiting assemblies at such locations could seriously inhibit the rights to freedom of speech and assembly by precluding access to an intended audience.[[73]](#endnote-74) Generally, in cases where people are prevented from holding assemblies in privately owned places, the rights of the property owner must be balanced against the competing right to FoPA. The latter should prevail where there is no adequate alternative public space that would allow an assembly to take place in sight and sound of its intended audience and if the owner’s right to enjoyment of his or her private property will not be significantly disrupted.[[74]](#endnote-75) In this context, state authorities should ensure that facilitating the assembly does not impose out-of-pocket costs on the private property owner.[[75]](#endnote-76) On the other hand, the State should neither regulate nor interfere with private assemblies that take place inside buildings.
5. **Duty to investigate threats of violence**: Where the police are aware of any third-party threats against assembly participants, including those made through social media or the Internet, before, during or after an assembly,[[76]](#endnote-77) they have a duty to investigate and, if needed, take special protection measures, to ensure that organizers and participants may freely exercise their rights without fear.[[77]](#endnote-78)
6. **Duty to presume the peacefulness of an assembly:** All assemblies shall be presumed to be peaceful in the absence of compelling and demonstrable evidence that the organizers and/or a significant number of participants intend to use, advocate or incite imminent violence (see also under question 2.[[78]](#endnote-79)
7. **Duty to distinguish between peaceful and non-peaceful participants:** Law enforcement officials must differentiate between peaceful and non-peaceful participants since only those who themselves take part in violence forfeit the legal guarantee of their right to assemble[[79]](#endnote-80) (see also under question 2).
8. **Duty to de-escalate tensions**: If a dispute arises during the course of an assembly, communication between the organizer and the competent state authorities may be an appropriate means by which to reach an acceptable resolution. A number of countries have units within police forces specifically set up to deal with de-escalation through dialogue.[[80]](#endnote-81) At the same time, such dialogue will only be possible if both parties – law enforcement and organizers/participants – agree to it. If organizers or participants are unwilling to engage, then this should be accepted and should not, of itself, impact detrimentally on the performance of the State’s human rights obligations in relation to the assembly. Where voluntary dialogue is not possible, the relevant law enforcement bodies must still ensure that their actions are aimed at deescalating tensions. Public statements by State authorities and law enforcement in advance of demonstrations should clearly advocate for a tolerant, conciliatory stance and warn potential law-breakers about possible sanctions.[[81]](#endnote-82)
9. The responsibility to clean up after a public assembly should lie with the public authorities. As part of their obligation to facilitate assemblies, state authorities (usually municipal authorities) should retain the obligation for cleaning up after assemblies have taken place.[[82]](#endnote-83)
10. No financial charges in exchange for policing. Given its duty to facilitate assemblies, and its general public order mandate, the State may not levy charges on assembly organizers for providing adequate and appropriate policing, nor may it make facilitation of an assembly contingent on the payment of such a charge. Imposing such charges on assembly organisers may constitute a disproportionate prior restraint[[83]](#endnote-84) and may dissuade people from holding assemblies.

***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)?***

1. States have a positive duty to facilitate and protect the exercise of the right to FoPA.[[84]](#endnote-85) In general, this duty should be reflected in a constitution and or in the legislative framework, as well as relevant law enforcement regulations and practices.
2. Most states have primary legislation outlining rights and responsibilities relating to the exercise of the right to FoPA but in many cases states may also determine certain categories of assembly that are formally excluded from some legal requirements, particularly advance notification; this may be on the basis of scale (e.g. Armenia); on assemblies that remain static (e.g. United Kingdom); or urgency (many states have provision for non-notified and spontaneous assemblies).
3. In some cases the state may not have any legislation regulating freedom of peaceful assemblybut may rely on a constitutional right and international standards as a broad framework for both civilians and state actors (e.g. Ireland).

1. It is important that legislation and the wider legal framework provides for clarity for organisers and participants, such that municipal bye-laws do not contradict or clash with state legislation; that different laws ae not used to regulate different categories of assembly or assemblies in different contexts (such as during election periods).

***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?***

1. While there is no absolute legal obligation as such, there are several recommendations on ways to ensure that the duty to facilitate peaceful assemblies is respected. Clearly identifiable command structures and well-defined operational responsibilities enable proper coordination between law enforcement agencies and the assembly organisers and between law enforcement personnel themselves, before and during the event and help ensure accountability for operational decisions. The responsible public authority must be adequately staffed and resourced to enable it to effectively fulfil its obligations in a way that enhances co-operation between the assembly organiser and state authorities.
2. In order to properly facilitate a peaceful assembly, law enforcement officials, and other public authorities, including public safety agencies (fire and ambulance services, for example), must be able to communicate with one another and exchange data during public assemblies. It is also good practice for assembly organisers to cooperate with these agencies prior to and during an assembly as much as possible. Thorough inter-agency contingency planning can help ensure that lines of communication are maintained even in the case of unforeseen events.[[85]](#endnote-86)
3. It is essential that law enforcement authorities conduct sufficient outreach prior to assemblies taking place. They should contact any known assembly organizers early on, to learn more about the manner in which the organizers plan to conduct the assembly. Such outreach measures may help establish trust and ensure that there are no unnecessary surprises at a later stage. Where possible, it is good practice for law enforcement officials to agree with organisers of assemblies on the necessary security and public safety measures to be put in place prior to the event. Such discussions may, for example, cover stewarding arrangements and the size, positioning and visibility of the police deployment). Discussions might also focus upon contingency plans for specific locations or landmarks (such as monuments, transport facilities or hazardous sites), or upon particular concerns of the police or the organisers.[[86]](#endnote-87)
4. At the same time, while it is a good practice for public authorities to reach out to organizers or participants, the latter should not be under any obligation to meet with law enforcement prior to or during an assembly. Should the organizers refuse to meet, then this should not influence the way in which an assembly is managed and policed by the State, let alone negatively affect the facilitative approach of the authorities.
5. There should be a designated contact person or team within the responsible law enforcement agency whom organizers can liaise with before or during an assembly. Relevant contact details of the police contact point should be widely advertised.[[87]](#endnote-88) This person or team should serve as a contact point, and should not conduct other policing tasks, such as intelligence gathering, that could potentially restrict or affect the rights of the organizers or protesters, and fuel mistrust.[[88]](#endnote-89) Law enforcement officers should outline their intentions to the organisers, representatives and participants prior to the assembly in order to defuse tensions and reduce the risk of an escalation of the situation.
6. The designated public authorities and law enforcement officials should make every effort to reach a mutual agreement with the organizers of an assembly on the time, place, and manner of the event. Mediation procedures may be helpful to ensure that such dialogue results in a solution that is acceptable to all parties. Such procedures should be conducted on a purely voluntary basis and are usually best mediated by individuals or organizations not affiliated with either the state authorities, or the organizers. Mediation is usually most successful when conducted at the earliest possible opportunity, and often helps prevent the escalation of conflicts between the State and the organizers, and the ensuing imposition of potentially arbitrary or unnecessary restrictions. Law enforcement officers should send clear messages before and during assemblies that inform organizers and participants of the overall approach that the police will take in the management of the assembly (no surprises policy), to help reduce the potential for conflict escalation.[[89]](#endnote-90)

***Are organisers required to engage with the authorities?***

1. Due to the presumption in favour of (peaceful) assemblies, and state authorities’ obligation to facilitate and protect assemblies, legal provisions concerning advance notification for assemblies may require the organiser to submit advanced notice of intent to hold an assembly, but this should not constitute a request for permission. A notification regime should also not be turned into a *de facto* authorization procedure.[[90]](#endnote-91) In this context, it is significant that in a number of jurisdictions, authorization or permit procedures have been declared unconstitutional.[[91]](#endnote-92) Nonetheless, a permit requirement based on a legal presumption that a permit for use of a public place will be issued (unless the relevant state authorities can provide evidence to justify a denial) can serve the same purpose as advance notification.[[92]](#endnote-93) In addition, the criteria should be confined to considerations of time, place, and manner, and should not provide a basis for content-based regulation. Above all, state authorities shall not deny the right to assemble peacefully simply because they disagree with the merits of holding an event for the organiser’s stated purpose.[[93]](#endnote-94)

***Is there a special role for NHRIs in this regard?***

1. NHRIs or Ombudsman offices may have a positive role to play in facilitating, protecting and monitoring the right to peaceful assembly and in holding public authorities to account. This may include being consulted on existing or draft legislation; monitoring and reporting on the implementation of legislation; deploying people to be physically present to observe and monitor assemblies; reporting on such findings to the state authorities; receiving complaints from civil society about state actions at assemblies and investigating and reporting on such complaints; and including a review of state response to the right to assemble as part of a broader annual report. The effectiveness of such work may depend on how effectively independent the NHRI actually is; the priority given to FoPA issues by the NHRI; and the degree to which the government is prepared to respond to any reports and recommendations produced by the NRHI.

***And other stakeholders (such as local governments)?***

1. In many countries the primary responsibility for dealing with notifications of an intention to hold an assembly and to ensure that all assemblies are able to take place at the time, place and manner of the organizers choosing, rests with the municipal authorities as the local representative of the state. They may also be closely involved in negotiations and mediation efforts with (prospective) assembly organizers and participants and have practical responsibilities in facilitating assemblies, and an obligation to provide clean-up after such events. Local authorities may often have limited experience in dealing with assemblies, particularly localities outside of the capital or major urban areas; they may lack an understanding on human rights issues pertaining to FoPA and in some cases decision makers may be subjected to political pressure or interference.
2. Little attention has been given to the specific role that is played by municipalities in protecting and facilitating the right to assemble, including the good practices that may have been developed and the challenges that municipal authorities may face. With this in mind, ODIHR has developed following recommendations for future actions that would support the work, and help develop the capacity of municipalities to facilitate and protect the right to freedom of peaceful assembly:
* Municipalities should prioritise their responsibility to facilitate assemblies and ensure they are all treated in an equal manner.
* Municipal authorities should operate within a clear and precise legal framework relating to freedom of peaceful assembly, and should ensure that all decisions taken relating to assemblies have a clear legal basis and follow consistent criteria based on international human rights standards.
* Municipalities and the police should work in a co-ordinated manner to facilitate assemblies and the facilitation of assemblies according to their purpose must be an important element of the strategic objectives of these authorities.
* Where notification of assemblies is to be provided to municipal authorities, they should ensure that there is a clear and flexible process for notification of assemblies, including through use of social media and online, which is neither too onerous nor bureaucratic for organizers.
* Municipalities should develop a ‘one stop shop’ approach to the facilitation of assemblies and should ensure that all key agencies are involved in the dialogue, planning and decision making prior to assemblies taking place.
* Municipalities should participate in post-assembly debriefings with police, organizers and other relevant parties.
* Municipalities should be open and transparent in publishing information in an accessible manner about all aspects of assemblies, before, during and after the event.

***6. When and how may the right of peaceful assembly be limited?***

1. As a rule, peaceful assemblies should be facilitated without restriction. In some circumstances, however, it may be necessary for restrictions to be imposed. Restrictions are only permissible if they follow the requirements set out in international human rights instruments, namely the restrictions have a formal basis in law[[94]](#endnote-95), follow a legitimate aim, and are necessary and proportionate.
2. Any restrictions imposed on assemblies must have a formal basis in law, as must the mandate and powers of the restricting authority.[[95]](#endnote-96) The same applies to sanctions imposed after an assembly. Legislation itself must be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, and also to foresee the likely consequences of any such breach. Clear definitions in domestic legislation are vital to ensuring that the law remains easy to understand and apply, and that a regulation does not encroach upon activities that do not need to be regulated. Definitions, therefore, should neither be too elaborate nor too broad.[[96]](#endnote-97)
3. Restrictions of the right to FoPA should be based on one or more of the legitimate grounds prescribed by relevant international and regional human rights instruments. Notably, Article 21 ICCPR and Article 11 ECHR specify the following grounds: national security, public safety, ‘public order (*ordre public*)’ (ICCPR) / ‘the prevention of disorder or crime’ (ECHR), the protection of public health or morals, and the protection of the rights and freedoms of others. These grounds should not be supplemented by additional grounds in domestic legislation,[[97]](#endnote-98) and should be narrowly interpreted by the authorities.[[98]](#endnote-99)
4. Restrictions should be necessary and proportionate to achieving a legitimate aim. Restrictions to the right to FoPA, whether set out in law or applied in practice, must be both necessary to achieve a legitimate aim, and proportionate to such aim.[[99]](#endnote-100) Necessity denotes a ‘pressing social need’ for the restriction in question; this means that a restriction must be considered imperative, rather than merely ‘reasonable’ or ‘expedient’.[[100]](#endnote-101) The means used should be proportional to the aim pursued, which also means that where a wide range of interventions may be suitable, preference should always be given to the least restrictive or invasive means.[[101]](#endnote-102) The relevant state authorities should review and debate a range of restrictions, rather than viewing the choice as simply between non-intervention or prohibition. The reasons provided by the authorities for any restriction(s) should be relevant and sufficient,[[102]](#endnote-103) convincing and compelling,[[103]](#endnote-104) and based on a comprehensive assessment of the relevant facts.[[104]](#endnote-105) Moreover, the interference should go no further than is justified by a legitimate aim.[[105]](#endnote-106) The principle of proportionality requires that there be an objective and detailed evaluation of the circumstances affecting the holding of an assembly. Thus, the State must demonstrate that any restrictions promote a substantial interest that would not be achieved, or would be achieved less effectively, without the restriction. The principle of proportionality also requires that authorities should generally not impose restrictions which would fundamentally alter the character of an event (such as relocating assemblies to less central areas of a city).[[106]](#endnote-107)
5. **National security:** Restrictions on the right to FoPA on national security should be imposed only to protect the existence of the nation or its territorial integrity or political independence against violence, or the tangible threat of force.[[107]](#endnote-108) Thus, national security cannot be invoked to justify limitations to prevent merely local or relatively isolated threats to law and order. In addition, national security should not be used as a pretext for imposing vague or arbitrary limitations and should only be invoked in combination with adequate safeguards and effective remedies against abuse. Conversely, the systematic violation of human rights, including the right to FoPA, undermines true national security and may jeopardize international peace and security. A State responsible for such violations cannot invoke national security as a justification for suppressing political dissent or opposition of any kind or for perpetrating repressive practices against its population.[[108]](#endnote-109)
6. **Public safety**: Public safety concerns may arise when the presence or conduct of assembly participants creates a significant and imminent danger of physical injury for other participants, public authorities, or passers-by. Examples include cases where moving vehicles form part of an assembly and may pose dangers for individuals at an assembly, where pyrotechnics are used during assemblies, or where they pass by or are held close to potentially hazardous and secure facilities.[[109]](#endnote-110) In such instances, extra precautionary measures should generally be preferred over more extensive restrictions on the assembly itself. While organisers and stewards may assist in ensuring the safety of members of the public, the primary responsibility for the protection of public safety must always remain with the State, i.e. law enforcement; this duty should under no circumstances be assigned or delegated to the organiser or stewards of an assembly. Generally, public authorities should also ensure proper access to nearby emergency health care facilities during assemblies (both for people involved in an assembly and for the general public).
7. **Protection of public order/*ordre public:*** The term ‘public order/*ordre public’* is rather vague and has been interpreted in a variety of ways, but is generally understood to be wider than that of ‘prevention of disorder or crime’.[[110]](#endnote-111) However, there is broad consensus that a hypothetical risk of public disorder, or the presence of a hostile audience are not, by themselves, legitimate grounds for prohibiting a peaceful assembly.[[111]](#endnote-112) Public order grounds should be understood to involve an interest in preventing actual and imminent violent conduct.[[112]](#endnote-113) On the other hand, the mere fact that the content or manner in which an assembly is conducted may annoy, offend, shock or disturb others, or that such assembly may cause some temporary disruptions of daily life, or affect the aesthetic appearance of a public space, does not by itself amount to a disruption of public order. For that reason, prior restrictions imposed due to the possibility of minor, isolated or sporadic incidents of violence are likely to be disproportionate.[[113]](#endnote-114)
8. **Prevention of Crime:**[[114]](#endnote-115) The European Court of Human Rights has noted that the ECHR “obliges State authorities to take reasonable steps within the scope of their powers to prevent criminal offences of which they had or ought to have had knowledge.” At the same time, the Court has found that this “does not permit a state to protect individuals from criminal acts of a person by measures which are in breach of that person’s Convention rights”.[[115]](#endnote-116) Preventive restrictions of individual rights are thus only possible in exceptional cases where there is a clear and present danger that a crime will be committed. States should always seek to ensure that any preventive intervention that negatively impacts on an individual’s right to FoPA is based on objective evidence that without such intervention, the individual will commit a ‘concrete and specific’[[116]](#endnote-117)
9. **Protection of health:** Restrictions may be justified on occasion where the health of participants in an assembly, or of others, becomes, or risks becoming, seriously compromised.[[117]](#endnote-118) Thus, in the European Court of Human Rights’ case of *Cisse v. France* (2002), the intervention of the authorities was justified on health grounds given that the sanitary conditions had become “wholly inadequate” (para 51). However, such reasoning should not be relied upon by the authorities to pre-emptively break up an entire assembly, even where a hunger strike forms part of the protest strategy. Public health may at times be invoked to limit assemblies only where there is no alternative less restrictive means of safeguarding it.
10. **Protection of morals:** On the face of Article 21, ICCPR and Article 11(2) ECHR the protection of morals may be invoked by States as a ground for imposing restrictions on the right to FoPA. In practice, however, the protection of morals should rarely, if ever, be regarded as an appropriate basis for imposing restrictions on FoPA.[[118]](#endnote-119) As the UN Human Rights Committee has noted, ‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations [...] for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition […] Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.’[[119]](#endnote-120)
11. **Protection of the rights and freedoms of others:** Assemblies potentially impact on the rights and freedoms of those who live, work, shop, trade and carry on business in the same locality. However, balancing the right to assemble and the rights of others should always aim at ensuring that assemblies may proceed, unless they impose unnecessary and disproportionate burdens on others.[[120]](#endnote-121) Rights that may be claimed by non-participants affected by an assembly include, among others:[[121]](#endnote-122) the right to privacy (protected by Article 17 of the ICCPR and Article 8 of the ECHR),[[122]](#endnote-123) the right to peaceful enjoyment of one’s possessions and property (protected by Article 1 of Protocol 1 to the ECHR),[[123]](#endnote-124) the right to liberty and security of person (Article 9 of the ICCPR and Article 5 of the ECHR),[[124]](#endnote-125) and the right to freedom of movement (Article 12 of the ICCPR and Article 2 of Protocol 4 to the ECHR). Some degree of disruption with respect to these rights must be tolerated if the essence of the right to peacefully assemble is not to be deprived of any meaning. Where a State restricts an assembly for the purpose of protecting the rights and freedoms of others, the relevant public authority should explain in detail:
* which specific rights and freedoms of others are relevant to the particular circumstances;
* the extent to which the proposed assembly would, if unrestricted, interfere with these rights and freedoms;
* how any restrictions on the proposed assembly would serve to mitigate these interferences, and why less restrictive measures would not lead to the envisaged success.
1. See also under question 5 on “destruction of the rights of others” Restrictions can be used to protect the rights of other assemblies.

***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)?***

1. As noted above in some cases legislation may impose different demands for notification on some categories of assembly, but in principal the expectation is the limitations are reduced, due to scale or likelihood of public impact rather that increased.
2. There has been less attention given to assemblies inside public building compared with those in public open spaces. In general the assumption is that assemblies in building will have to comply with venue specific requirements for access and usage but should not be expected to provide wider notification to state authorities, since the rationale for advance notification is to enable the state to provide adequate safety and security and limit disruption for others, which are rarely factors of consideration in relation to assemblies inside buildings.
3. In relation to assemblies in public buildings the principle of equality to all should always apply, such that there is no scope for discrimination based on the nature of the group or the content of any message.
4. Assemblies in private spaces may be subject to different limitations such as having the permission of the owner for an assembly, however given the increasing privatisation of erstwhile public spaces (e.g. Zuccotti Park in New York, Paternoster Square in London) and the growth of privatised spaces in urban environments (e.g. shopping malls) there is a growing debate about potential restrictions on effective limitations on the right to assemble and arguably a need for greater authoritative consideration and clarification around this issue.
5. Increasing access to the Internet, is one of the ways in which States can partially discharge their duty to facilitate assemblies, and increasingly such access is becoming a right.[[125]](#endnote-126) Council of Europe and United Nations documents have been calling for “applying a human-rights based approach in providing and expanding Internet access”[[126]](#endnote-127) and highlighting the fundamental nature of Internet access as a conduit for the exercise of human rights and freedoms, in particular the right to freedom of opinion and expression[[127]](#endnote-128) – calling on State parties to “take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”[[128]](#endnote-129) Some UN consultative documents also mention (but do not define) the idea and nature of this new “human rights space”[[129]](#endnote-130) in the context of assemblies. Moreover, States should be particularly cautious in restricting Internet access in any way when it is being utilized for the purposes of facilitating an assembly or holding one online. Any interference with the freedom of expression and freedom of assembly online, for instance through blocking, filtering, slowing down or shutting down Internet services may amount to a disproportionate interference with the exercise of these rights. The UN Human Rights Committee has considered that any restriction on the operation of information dissemination systems is not legitimate unless it conforms with the test for restrictions on freedom of expression under international law.[[130]](#endnote-131)

***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?***

1. Yes, see above under question 5.

***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?***

1. See above under question 5

***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?***

1. There are a number of ways in which the right to peaceful assembly and the right to associate intersect. The right to associate is important in some contexts in relation to organising assemblies as some types of organisations, trade unions, parties, Civil Society Organisations (CSO), NGOs, are often involved in such activities and therefore limitations on the right to associate may have a knock on effect on the effective organisation of assemblies or even the willingness to organise assemblies.
2. There may also be reciprocal relationships between the rights whereby certain form of restrictions or responsibilities on assemblies or on the organisers of assemblies may have a negative impact on the right of association and a subsequent negative impact on future rights to assembly. For example, imposing financial responsibilities on organisers to pay for policing, traffic controls, insurance, medical facilities or cleaning may deter associations from organising an assembly, since the financial costs may impact their long term future. A responsibility or liability on organisers for the actions taken by others during an assembly may likewise expose an association to financial or other risks; high levels of potential penalties and fines for organisers may likewise create risks for associations and all such factors may serve to create a chill effect on the right to FoPA.
3. Similarly, there is a strong relationship between the right to assemble and the right to public participation (Article 25) as any assemblies contribute to public affairs and discourse and protesting and demonstrating are an important part of public participation as are voting or being involved in forms of consultation.
4. **Article 19:** The protected right to assemble is often limited to those public gatherings that have an expressive element and which in some contexts makes the right to assembly an aspect of the right to freedom of expression, but FoPA is also a distinctive form of expression due to such factors as the public and physical nature of its presence; the number and diversity of participants; or the form of expression as much as about the explicit verbal or visual messages. Assembly is also always a collective form of expression, an individual right that is exercised in conjunction with others. FoPA therefore involves elements of expression but the medium of an assembly is a particular and distinctive form of expression involving noise, visible expression, symbolism, physicality and usually some element of disruption to daily routines. These additional elements of an assembly on one hand reinforce its social importance and on the other frame the scope for restrictions; and may thus create tensions between forms of collective expression and public order that can only be resolved in context and not as a totality: e.g. from one perspective the wearing of a mask may be seen as a potential threat to order, while from the other it may simply be a form of expression. Any restrictions on assemblies should therefore only ever be imposed within the boundaries of the specific context rather than as a blanket or generalised prohibition.

***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?***

1. The issue of imposing penalties for actions related to events taking place during an assembly is addressed below in answers to question 13 below. This section of the submission deals with issues related to the decision making in relation to the imposition of restrictions imposed prior to an assembly taking place.
2. **Good administration:** Any decision to restrict or prohibit an assembly should be based on legislation that reflects applicable standards and that clearly describes the established decision-making procedures. The relevant state authority should ensure that these procedures are publicly available and accessible. Prior to making its decision, the state authority should fairly and objectively assess all available information in light of the applicable legislative standards, to determine any security issues (e.g. if despite the presumption of peacefulness, there are clear indications that imminent violence is likely), and to ascertain the probable impact of the event on the rights and freedoms of others. In determining whether to impose restrictions on an assembly, the public authority should liaise with law enforcement and other relevant authorities to assess potential risks. Before imposing restrictions on an assembly, the relevant state authority should communicate their concerns to the assembly organizers in order to solicit any further relevant information that may mitigate the concerns identified.
3. **Transparent decision-making:** The state authorities should keep records to ensure transparency in their decision-making processes. It is also good practice for the relevant state authority to submit an annual report on its activity. Such a report could include relevant statistics on, for example, the number of notified assemblies, the number of restricted assemblies, along with the reason and legal basis for such restrictions, and the number that were not restricted.[[131]](#endnote-132) This report, and other relevant information, should be accessible to the public.[[132]](#endnote-133)
4. Decisions taken by relevant authorities should be communicated and published in writing. The respective state authority should communicate its decisions and reasons for restricting assemblies to the assembly organizers in writing. Moreover, these decisions should be published (for example on a dedicated website)[[133]](#endnote-134) so that the public has access to reliable information about events taking place in the public domain. This will also enhance the perceived transparency of public decision-making.
5. **The right to access information related to assemblies:** The relevant state authorities should ensure that the general public has easy, prompt, effective and practical access to reliable information relating to assemblies,[[134]](#endnote-135) to relevant laws and regulations, and to the procedures and modus operandi of the authorities, including law enforcement bodies, in relation to facilitating and policing assemblies.[[135]](#endnote-136) Such information needs to be provided in an accessible format and language[[136]](#endnote-137) and pursuant to legislation facilitating public access to information.[[137]](#endnote-138) A variety of dissemination methods should also be considered to avoid the risk of a ‘digital divide’ where online tools are used to provide such information (i.e. to avoid the exclusion of certain categories of the population that may not have access to the internet and information technologies).[[138]](#endnote-139)
6. **Training for decision makers:** State officials responsible for taking decisions as part of the regulation of the right to FoPA should periodically receive training on the domestic legal framework regarding assemblies and on the implications of existing and emerging human rights case law.[[139]](#endnote-140) This should help ensure that they will better understand their obligations under human rights law.

***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?***

1. **Right to an effective remedy:** Those seeking to exercise the right to freedom of peaceful assembly should have recourse to a prompt and effective remedy against decisions disproportionately, arbitrarily or illegally restricting or prohibiting assemblies.[[140]](#endnote-141) The right to a remedy includes being able to access independent and impartial administrative and judicial appeals mechanisms. Where assemblies are prevented or unreasonably restricted due to potentially unlawful inaction or negligence of the administrative authorities, the organizers or representatives of the assembly should be able to initiate direct legal action in courts or tribunals. The relevant court decisions should be issued prior to the planned events. The availability of effective administrative review can reduce the burden on courts and help build a more constructive relationship between the authorities, the organizers, and the public in general. In both administrative and court proceedings, the burden of proof should be on the relevant state authority to prove that the restrictions imposed are justified.[[141]](#endnote-142) Courts or tribunals should have the authority to review all circumstances of the case, and to annul or, where applicable, correct any error or omission made at the administrative or first instance review stage.[[142]](#endnote-143) Legal aid should be available to those who do not have the funds to pay for legal representation themselves.
2. **Timeliness of court decisions:** Court decisions should be issued in a timely manner, so that the appeal or challenge, can be resolved before the assembly is planned to take place.[[143]](#endnote-144) In case of insufficient time, courts or tribunals should have the authority to issue interim orders or rulings pending final resolution of the case. A heavy case-load cannot serve as a justification for delays in judicial proceedings.[[144]](#endnote-145) This requirement for an expeditious appeal mechanism should be provided for in law.[[145]](#endnote-146)
3. **Access to evidence:** In the event of judicial proceedings, the parties and the court or tribunal should have full access to the evidence on which the relevant state authority based its initial decision (including, but not limited to, relevant police reports, risk assessments or other concerns or objections raised). Only then can the proportionality of the restrictions imposed be fully assessed. If such access is refused by the authorities, the parties should be able to obtain an expeditious judicial review of the decision to withhold the evidence. Officials should, in principle, not be able to rely on undisclosed evidence as a basis for imposing a restriction.

***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?***

1. State authorities should not make the policing or facilitation of a peaceful assembly contingent on the payment of the respective costs by the organizers. The facilitation of assemblies is an inherent part of the role of law enforcement and needs to be undertaken by the state regardless of the nature, size or other circumstances surrounding an assembly. Moreover, organisers of public assemblies should not be required to obtain public liability insurance prior to holding their event. Such a requirement conditions the right to FoPA on the ability of organizers or representatives to obtain insurance on the commercial, profit-making insurance market. Obliging assembly organisers to pay such costs would create a significant deterrent for those wishing to enjoy their right to FoPA and is likely to be prohibitively expensive.
2. Similarly organisers should not be required to pay for such as damage to property (which should be the responsibility of the individual who caused the damage); cleaning up services; provision of medical services; traffic management etc. The state has a responsibility to provide for first aid and access to emergency medical services at assemblies.[[146]](#endnote-147) This is particularly important in contexts where there is a potential for disorder or violence and the police are preparing to deploy with a range of crowd control weapons.
3. Any attempt to impose costs on organisers of assemblies risk limiting the range of organisations that may be willing and able to do so, and will thus serve as a chilling effect on the right to assemble. The imposition of such costs and charges may also serve to increase the number of non-notified assemblies, and which in turn may increase social costs due to an increase in levels of disruption and potentially disorder.
4. Stewards’ and ‘marshals’ may assist the organiser in facilitating an assembly.[[147]](#endnote-148) Stewards typically work in cooperation with assembly organizers to facilitate the event and to help ensure compliance with any lawfully imposed restrictions. Their primary role is to guide, orient, explain, and give information to assembly participants, as well as to identify potential risks and hazards before and during an assembly. The State retains a positive obligation to provide adequately resourced policing arrangements and stewards should not be regarded as a substitute for an adequate presence of law enforcement personnel, which bear overall responsibility for maintaining public order. Stewarding can help reduce the need for a heavy police presence at large or more controversial public assemblies, but this should never be an obligation on assembly organizers.
5. In situations where participants advocate hatred, intimidation or incitement of imminent violence it remains the responsibility of the police to intervene (in a proportionate manner) rather than the responsibility of the organisers or stewards.
6. In some jurisdictions, it is commonplace for professional stewards or private security firms to be contracted and paid to provide stewarding for assemblies. However, there should be no legal obligation requiring organisers to pay for stewarding or security arrangements. Overall, private security arrangements should never absolve the State from the duty to facilitate an assembly and make appropriate arrangements for policing such gatherings. In particular, the holding of assemblies should never be made contingent on the ability of organizers or participants to hire stewards, as this would constitute an excessive interference with their FoPA (and would essentially curtail the organization of assemblies by those unable to pay).[[148]](#endnote-149) While there is a practice of sharing costs for security in the case of some non-expressive mass events (e.g. commercial concerts, football matches or other commercial activities), these are born out of the specific character of such events. Generally, law enforcement agencies should work in partnership with event stewards, and each must have a clear understanding of their respective roles.

***How should concealment of their faces by participants be dealt with?***

1. The wearing of masks and face coverings at assemblies for expressive purposes is a form of communication protected by the rights to freedom of speech and assembly. It may occur in order to express particular viewpoints or religious beliefs or to protect an assembly participant from retaliation.[[149]](#endnote-150) The wearing of masks or other face coverings at a peaceful assembly should not be prohibited where there is no demonstrable evidence of imminent violence. An individual should not be required to remove a mask unless his/her conduct creates probable cause for arrest and the face covering prevents his/her identification.[[150]](#endnote-151)
2. There are many reasons why covering ones face during an assembly may be considered as reasonable and necessary including for symbolic purposes (certain forms of masks etc.); where participants may be at risk of identification, harassment and victimisation; or of discrimination and at risk of losing their job etc. Concealing of faces may also be undertaken for defensive purposes (for example when the authorities have a history of or are likely to use tear gas), and should not be automatically considered as an indicator of violent or unlawful intent.
3. Participants in an assembly should be presumed to be peaceful based on their actions and not whether their faces are covered or not. It is worth noting that in some contexts the police cover their faces to avoid being personally identified at assemblies.

1. If an individual has committed an offence or is suspected of having committed an offence he or she may be asked to remove any face covering for identification purposes. [[151]](#endnote-152)

***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?***

1. A prior notice requirement is a *de facto* interference with the right to FoPA, and any such requirement should therefore be prescribed by law, necessary and proportionate.[[152]](#endnote-153) Moreover, ‘regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly as protected by the Convention.’[[153]](#endnote-154) Furthermore, the enforcement of rules on prior notification may not become an end in itself; in other words, the failure to notify should not render the assembly unlawful and must not by itself lead to restrictions on participants or dissolution of a peaceful assembly.[[154]](#endnote-155)
2. It is not necessary under international human rights law for domestic legislation to require advance notification of an assembly. Thus, certain countries do not require advance notification for any type of assembly,[[155]](#endnote-156) and others require notification only for certain types of assembly. However, while the tendency is to exempt notification for smaller, static or urgent / spontaneous assemblies there are no agreed standards of what types should be exempt.
3. There may be legitimate reasons for requiring advance notification of certain types of assembly, depending on their size, nature and location. Prior notice can enable the State to better ensure the peaceful nature of an assembly[[156]](#endnote-157) and to put in place arrangements to facilitate the event, or to protect public order, public safety and the rights and freedoms of others. In consequence, a notification requirement will often be compatible with the permissible limitations laid down in Article 11 ECHR and Article 21, ICCPR.[[157]](#endnote-158)
4. In cases where domestic legislation imposes a notification requirement, the respective law should also take into account assemblies which, due to their nature or size, do not interfere significantly with the rights of others (and which, for that reason, require only minimal advance preparation by the relevant State authorities). These types of assemblies should be exempt from any prior notification requirement (so long as the definition of the exempted category is content-neutral and the exemption does not give rise to discriminatory treatment). A number of countries have expressly excluded a notification requirement for certain assemblies, including those involving a small number of persons, as they are not likely to cause significant disruption.[[158]](#endnote-159) Furthermore, individual demonstrators should not be required to provide advance notification to the authorities of their intention to demonstrate.[[159]](#endnote-160) Spontaneous assemblies should, by their very nature, also be exempted from any notification requirements. Where a lone demonstrator is unexpectedly joined by another or others, and the size of the assembly increases, then the event should be treated like a spontaneous assembly.
5. Due to the presumption in favour of (peaceful) assemblies, and state authorities’ obligation to facilitate and protect assemblies, legal provisions concerning advance notification for assemblies may require the organiser to submit a notice of intent to hold an assembly, but should not constitute a request for permission. A notification requirement should also not be turned into a *de facto* authorization procedure.[[160]](#endnote-161) In this context, it is significant that in a number of jurisdictions, authorization or permit procedures have been declared unconstitutional.[[161]](#endnote-162) Nonetheless, a permit requirement based on a legal presumption that a permit for use of a public place will be issued (unless the relevant state authorities can provide evidence to justify a denial) can serve the same purpose as advance notification.[[162]](#endnote-163) In addition, the criteria should be confined to considerations of time, place, and manner, and should not provide a basis for content-based regulation. Above all, state authorities shall not deny the right to assemble peacefully simply because they disagree with the merits of holding an event for the organiser’s stated purpose.[[163]](#endnote-164)

***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?***

1. Types of restriction imposed on an assembly should relate only to its ‘time, place, and manner’, not to the message that is being communicated.[[164]](#endnote-165) Unlike with content-based restrictions, States enjoy a certain margin of appreciation in relation to time, place and manner restrictions.[[165]](#endnote-166) However, blanket bans, including bans of assemblies at particular times or places, are intrinsically disproportionate, because they preclude consideration of the specific circumstances of each proposed assembly.[[166]](#endnote-167)
2. Restrictions imposed on the time or duration of an assembly must be based on an assessment of the individual circumstances of each case.[[167]](#endnote-168) The touchstone established by the European Court of Human Rights is that demonstrators ought to be given sufficient opportunity to manifest their views.[[168]](#endnote-169) In some cases, the protracted duration of an assembly may itself be integral to the message that the assembly is attempting to convey or to the effective expression of that message.
3. At the core of the right to FoPA is the ability of the assembly participants to choose the place where they can best communicate their message to their desired audience.[[169]](#endnote-170) It would be disproportionate if authorities categorically excluded places suitable and open to the public as sites for peaceful assemblies.[[170]](#endnote-171) The use of such suitable sites must always be assessed in the light of the circumstances of each case.[[171]](#endnote-172) The fact that a message could also be expressed in another place is by itself insufficient reason to require an assembly to be held elsewhere, even if that location is within sight and sound of the target audience.[[172]](#endnote-173) This means that legislators may not flatly exclude entire categories of locations for the holding of assemblies (such as in the vicinity of certain types of buildings,[[173]](#endnote-174) including presidential palaces or parliaments,[[174]](#endnote-175) hospitals,[[175]](#endnote-176) schools and educational institutions).[[176]](#endnote-177)
4. The same applies to privately owned spaces, where no restrictions beyond those which ordinarily apply to such spaces (for example, in buildings, fire codes, sanitation laws, escape routes, etc.) should be applied. This also includes prohibitions that exclude the use of the Internet as a place for holding an assembly, through shut-down or limitation of access thereto. If, however, having regard to all relevant factors of a specific case, the authorities reasonably conclude that it is necessary to change the place of an assembly, a suitable alternative place should be made available.[[177]](#endnote-178) Any alternative location must be such that the message which the assembly seeks to convey may still be effectively communicated to those at whom it is directed – in other words, the assembly should still take place within ‘sight and sound’ of the target audience. Other means of conveying expression, such as the placement of video screens near the target audience of the assembly, are not adequate substitutes for the physical presence of assembly participants within sight and sound of the intended audience.
5. The physical conduct associated with a peaceful assembly may be regulated where necessary to safeguard legitimate interests of the State, the public or the rights of other individuals, provided that the regulation is unrelated to the content of the assembly’s message. An example of ‘manner’ restrictions might relate to the use of sound amplification equipment, or lighting and visual effects,[[178]](#endnote-179) or the erection of protest camps or other non-permanent constructions.[[179]](#endnote-180) In this case, regulation may be appropriate because of the location or time of day for which the assembly is proposed. Such restrictions must likewise be proportionate, for example they may not render effective communication of the message of the assembly difficult or even impossible.[[180]](#endnote-181)
6. Display of symbols such as flags, insignia, and other expressive items is protected communication that is entitled to the same freedom of speech and assembly protections as other forms of communication. Even where the insignia, uniforms, costumes, emblems, music, flags, signs or banners played or displayed during an assembly conjure memories of a painful historical past, this should not of itself be a reason to interfere with the right to FoPA.[[181]](#endnote-182) In cases where the respective insignia or symbols are prohibited from being displayed by law, law enforcement should first attempt to confiscate the prohibited items, while letting the assembly proceed (provided it continues to remain peaceful). On the other hand, where this leads to violence, or where such symbols are intrinsically and exclusively associated with acts of physical violence, the assembly might legitimately be restricted to prevent the occurrence or reoccurrence of such violence, unlawful intimidation or other significant violations of valid criminal laws.
7. While expression should normally still be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, advocacy of national, racial or religious hatred that constitutes incitement to violence may be prohibited by law.[[182]](#endnote-183) Restrictions imposed on the visual or audible content of assemblies for this reason need to face heightened scrutiny – they should be necessary in a democratic society and proportionate to the legitimate aim that they pursue.[[183]](#endnote-184)
8. Domestic legislation designed to counter ‘terrorism’ or ‘violent extremism’ must not impose any limitations on fundamental rights and freedoms, including the right to FoPA, that are not strictly necessary for the protection of national security and the rights and freedoms of others. Any such legislation should therefore narrowly define the term ‘terrorism’ (or associated terms such as ‘extremism’) so as not to include a wide range of activities (for example, the organization of, or participation in, assemblies).[[184]](#endnote-185) Moreover, the designation of specific locations as prohibited areas, even on grounds of national security, constitutes a blanket prohibition. This is likely to be regarded as a disproportionate interference with the right to FoPA because it precludes consideration of the specific circumstances.
9. In times of war or public emergency threatening the life of the nation, States may take exceptional measures derogating from their obligation to guarantee FoPA (see Article 4 ICCPR and Article 15 ECHR). They may however do so only where this is strictly required by the exigencies of the situation, and if such measures are consistent with their other obligations under international law.[[185]](#endnote-186) In particular, the crisis or emergency must be actual or imminent, and one ‘which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’,[[186]](#endnote-187) meaning, essentially, that the fundamental capacity of a state to function effectively must be compromised.[[187]](#endnote-188) States seeking to derogate from their human rights commitments must officially proclaim a state of emergency[[188]](#endnote-189) in compliance with relevant constitutional and other legal provisions governing the exercise of emergency powers.[[189]](#endnote-190) Any derogation must be strictly limited temporally, geographically and materially.[[190]](#endnote-191) In situations that do not meet the high threshold for derogations, the possibility of imposing proportionate and content-neutral time, place and manner restrictions on public assemblies specifically tailored to the particular situation at hand should be sufficient.[[191]](#endnote-192) Generally, emergency powers must be tailored to an immediate and urgent crisis and shall not be used as a means to limit legitimate dissent, protest, expression and the work of civil society.[[192]](#endnote-193)
10. Thus, the scope of the right to assemble may be restricted during a state of emergency but even in such cases any restrictions should be proportionate and necessary. However, in certain circumstances, when this is strictly required by exigencies of the situation, blanket prohibitions on all assemblies may be justified.

***10. To what extent have general rules and good practices emerged on the facilitation of assemblies, to prevent an escalation of the situation, for example by not taking measures that might increase tensions, requiring law enforcement officials to be identifiable, etc.? How should the division of labour between the police and marshals be determined? What is the role of undercover policing?***

1. Law enforcement agencies should adopt a human rights-based approach to all aspects of the planning, preparation and policing of assemblies. This requires that they take into consideration and are fully aware of their duty to facilitate, enable and protect the right to FoPA. A human rights-based approach to policing assemblies should be based on four key principles which underpin all aspects of police planning, preparation, implementation and debriefing associated with facilitating assemblies. The four principles are (1) knowledge of the groups involved in assemblies; (2) a commitment to facilitating assemblies; (3) recognition of the value and importance of communication at all stages of the assembly process; and (4) acknowledgment of the diversity of participants in assemblies and the need to differentiate between them in active policing.[[193]](#endnote-194)
2. Law enforcement officials should be appropriately trained to deal with public gatherings, and on how to adequately prioritize human rights.[[194]](#endnote-195) The UN Code of Conduct for Law Enforcement Officials, together with relevant international human rights standards and publications,[[195]](#endnote-196) should form the core of any law enforcement training. Law enforcement officials should be fully aware of and understand their responsibility to facilitate and protect all peaceful assemblies. In particular, officials should be provided with the skills to police assemblies in a manner that avoids escalation of violence and minimizes conflict; including ‘soft skills’ such as negotiation and mediation. Training should cover the control and planning of policing operations, with special emphasis on the imperative of minimizing the use of force to the greatest extent possible; [[196]](#endnote-197) techniques of assembly management that minimize the risk of harm to all concerned; the use of various types of equipment available; and the rules governing their use. Such training should also aim to prevent discriminatory treatment and measures by the police,[[197]](#endnote-198) and should raise awareness of the special protection needs of, e.g., women, participants defending women’s rights and/or working on gender issues, youth, LGBTI people, persons with disabilities, minorities, or persons from other potentially marginalized or discriminated groups.[[198]](#endnote-199)
3. Once law enforcement agencies become aware of plans to hold an assembly they should prepare as far in advance as possible, to ensure the smooth conduct of the event.[[199]](#endnote-200) They will need to be aware of the estimated number of persons, planned location and/or route, the purpose of the assembly and, if possible, of the different organizing groups involved. This will help law enforcement officials assess how a particular assembly needs to be policed, in particular how many personnel are required, and which other measures need to be taken (e.g. blocking of roads, additional equipment, etc.). This could also include special protection measures for the organizers and/or participants, which may become necessary due to the circumstances in which the assembly is held.[[200]](#endnote-201)
4. New technologies play an important role in the organization of assemblies; social media and similar types of communication ensure that assemblies can be organized almost immediately, thus often providing authorities with little time to plan ahead. In the case of smaller gatherings, this will not be a problem, but it may become challenging to manage and police mass demonstrations that gather suddenly. If the police have not had an opportunity to plan for the event and allocate resources, an immediate police response may still be required. In general, the police should have contingency plans in place to cover such situations.[[201]](#endnote-202) Oftentimes, authorities may only find out about such assemblies because they trawled the Internet for relevant information. In such cases, it is important that any information gathered in this manner is used for the sole purpose of police preparedness and to prevent disorder during larger assemblies, and not for purposes of general profiling or monitoring or even surveillance of the activities of targeted individuals or groups.
5. The designated public authorities and law enforcement officials should make every effort to reach a mutual agreement with the organizers of an assembly on the time, place, and manner of the event. Mediation procedures may be helpful to ensure that such dialogue results in a solution that is acceptable to all parties. Such procedures should be conducted on a purely voluntary basis and are usually best mediated by individuals or organizations not affiliated with either the state authorities, or the organizers. Mediation is usually most successful when conducted at the earliest possible opportunity, and often helps prevent the escalation of conflicts between the State and the organizers, and the ensuing imposition of potentially arbitrary or unnecessary restrictions. Law enforcement officers should send clear messages before and during assemblies that inform organizers and participants of the overall approach that the police will take in the management of the assembly (no surprises policy), to help reduce the potential for conflict escalation.[[202]](#endnote-203)
6. Law enforcement personnel should visibly wear or display some form of identification (such as a nameplate or number) on their uniform and/or headgear during assemblies. Such identifying information should not be removed or covered during the event. Where law enforcement personnel present during an assembly are not identifiable in this manner, they should identify themselves by name and badge number when asked.[[203]](#endnote-204)
7. In some countries, law enforcement officers have, in the past, infiltrated assemblies and pretended to be participants. The use of undercover police officers, however, is only ever permissible (and only exceptionally so) if the purpose of collecting information during an assembly is to investigate specific criminal acts. In all cases, such practices must be subject to continuous and strict independent oversight and scrutiny. Collecting information on assembly participants in the absence of a concrete criminal investigation constitutes an interference with the participants’ rights to FoPA and privacy. As such, the exceptional circumstances in which undercover law enforcement officials may be deployed (before, during or after assemblies) should be fully and clearly regulated in law, following a published policy that is compatible with international human rights standards. Any such legislation and policy should specify the permissible methods of gathering information, the purposes for which any information gathered may be used, the specific law enforcement agencies/personnel that may obtain access, and for how long the data obtained may be stored.
8. Undercover police or other third parties who purposely infiltrate an assembly to entice participants to commit illegal acts, or to implicate them in such acts, are known as *agents provocateurs*. The use of *agents provocateurs* by the state is not permissible. Moreover, *agents provocateurs* acting at the behest of a State or other third party should face criminal prosecution in the same way as anyone who intentionally disrupts a peaceful assembly, or who encourages others to engage in illegal acts during an assembly. Where the evidence allows, criminal liability should also attach to those who deploy *agents provocateurs*.
9. In principle, even when facing a threat to national security, the state continues to bear the duty to guarantee the right to hold protests peacefully as well as that to protect without discrimination the rights of all persons under its jurisdiction. However, hostilities or lack of control of certain parts of the territory may justify an adjustment in the scope of the State’s human rights commitments. This may imply the temporary restriction of the exceptional suspension of certain rights until the situation of normality is fully re-established.[[204]](#endnote-205) However, practice shows that even in the event of an armed conflict the right may be guaranteed without particular restriction except in the areas controlled by the armed groups.[[205]](#endnote-206)

***11. What are the rules as far as the use of coercive measures against those engaged in assemblies is concerned, also if they turn violent? This includes detention, arrest and the use of force (articles 6, 7 and 9 of the ICCPR). How should the requirements of legality, precaution, necessity and proportionality in the context of the use of force be understood? What is the role of the various forms less-lethal weapons and equipment that are available, and how should they be regulated? May some such weapons never be used, or only under certain circumstances? Horses and dogs? Firearms? Private security providers? Can dispersal ever be justified where an assembly is entirely peaceful/non-coercive? What are the alternatives to dispersal?***

1. **Use of Force:** The authorities should always respond proportionately to any act of violence and should direct their response to those using force rather than more generally to the wider body of participants. During public assemblies, law enforcement officials should not use force unless strictly unavoidable.[[206]](#endnote-207) Force should only be applied to the minimum extent necessary, following to principles of restraint, proportionality, minimization of damage and the preservation of life.[[207]](#endnote-208) International documents give detailed guidance regarding the use of force when dispersing unlawful non-violent and violent assemblies.
2. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that “[i]n the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”[[208]](#endnote-209) Law enforcement officials should only employ force on an exceptional basis, and only after announcing this by issuing a clear and unambiguous warning, and providing the people present with sufficient time to heed any related police orders and to exit the area. Use of force should not be employed against people assembled in a non-violent manner.[[209]](#endnote-210)
3. Governments and law enforcement agencies should ensure that ethical issues associated with the use of force are kept constantly under review.[[210]](#endnote-211) States should comply with international standards concerning the use of force, including those regulating the use of potentially harmful techniques or tools of assembly management such as batons, tear gas or other chemical agents, water cannons, less lethal projectiles (rubber bullets) as well as horses and dogs. Given the extensive harm that such techniques may cause, water cannons, chemical agents, or less lethal projectiles should only be applied following a decision taken at the highest level of command, and by police officers who have received extensive prior training on their proper use in circumstances where their negative effects for the health of the assembly participants can be kept to a minimum (e.g. water cannons should never be used at temperatures)
4. Extract from the OSCE/ODIHR Human Rights Handbook on Policing Assemblies, p. 30 “On occasion, the police may consider it necessary to use force to deal with violent behaviour. The use of force should always be proportionate and the minimum necessary to restore order. Any use of force or escalation of deployment should be quickly followed by de-escalation of force as soon as the situation is resolved. Police organizations should always have a variety of options to draw upon in the policing of assemblies. If the police decide there is a need to use force, they should always bear in mind the diversity of participants and should differentiate between different groups within the assembly. […] The intention to use of force should always be communicated and explained prior to taking action, so as to generate transparency and maintain trust.”
5. **Dispersal:** Any actions by law enforcement personnel to intervene and/or disperse an assembly, or use force should always be applied with restraint. Where an assembly occurs in violation of applicable laws, but is otherwise peaceful, the police response should be guided by non-intervention or the de-escalation of tensions through voluntary dialogue, persuasion and negotiation.[[211]](#endnote-212) In many situations simply being patient and allowing time for people to leave of their own volition is preferable alternative to enforced dispersal and reduces the risk of an escalation of violence or a dispersal of violence to a wider area.
6. The enforced dispersal of an event may increase tensions or lead to violence and thus create more problems for law enforcement than its accommodation and facilitation. Furthermore, the costs of protecting FoPA and other fundamental rights are likely to be significantly lower than the costs of policing disorder borne of dispersal or suppression, even in the case of minor violations of the law.
7. **Mass Arrests:** Law enforcement should avoid mass arrests, which are frequently considered to be arbitrary under international human rights law[[212]](#endnote-213) and contrary to the presumption of innocence.[[213]](#endnote-214) Mass deprivations of liberty resulting from the simultaneous arrest of innocent persons and those believed to have violated the law should never be conducted simply because law enforcement agencies do not have sufficient resources to effect individual arrests of wrongdoers. Adequate resourcing forms part of the positive obligation that States are under to protect FoPA as well as the right not to be arbitrarily deprived of freedom.
8. **Containment:** During assemblies, individuals should only be confined to designated areas in exceptional circumstances, such as actual or imminent violence, and where no other measure short of dispersing the assembly would resolve the issue. Strategies requiring assembly participants to remain in one confined area under police control (often referred to as ‘kettling’ or ‘corralling’) should generally be avoided, as they do not distinguish between participants and non-participants, or between peaceful and non-peaceful participants.
9. **Arrest and Detention:** The arrest and/or detention of participants during an assembly (for committing administrative, criminal or other offences) should meet a high threshold of probable cause in each individual case and particularly in cases involving mere administrative offences.[[214]](#endnote-215) Where feasible, it may often be more appropriate to delay the arrest of assembly participants for illegal acts that took place prior to or during an assembly until after the event is over. Moreover, only individuals directly involved in illegal acts should be targeted for arrest,[[215]](#endnote-216) and they should be released as soon as the reasons for their detention are no longer applicable.
10. Even short periods of detention will directly affect participants’ right to assemble, their liberty of movement (Article 12 ICCPR and Article 2 of Protocol 4, ECHR), and may amount to a deprivation of liberty under Article 9 ICCPR and Article 5 ECHR (the right to liberty and security of person).[[216]](#endnote-217) Detention should thus be used only if there is a pressing need to prevent the commission of serious criminal offences and where an arrest is absolutely necessary (e.g. due to violent behaviour). States should ensure that protesters are not detained simply for expressing disagreement with police actions during an assembly.[[217]](#endnote-218) The UN Human Rights Committee has stated that ‘[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including [in cases involving] freedom of assembly.’[[218]](#endnote-219)

***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?***

1. In addition to the participants and law enforcement personnel a range of third party actors have a right to be present at an assembly to observe or monitor proceedings, to protect human rights, to report on what takes place and potentially to provide assistance to other participants and actors in case of injury or violence. These may include monitors and observers; media personnel (including citizen journalists); street medics and other civilians who choose to play an active role between those of participant and spectator. State authorities and law enforcement personnel should be aware of the work of these different actors and of the need to facilitate such work as part of the wider process of protecting the right to peaceful assembly.
2. The media has a pre-eminent role and performs essential functions in any State governed by the rule of law.[[219]](#endnote-220) The role of the media, as a ‘public watchdog’, is to gather and impart information and ideas on matters of public interest – information which the public has a right to receive.[[220]](#endnote-221) Media professionals therefore have an important role to play in providing independent coverage of public assemblies, as assemblies are often “the only means that those without access to the media may have to bring their grievances to the attention of the public”.[[221]](#endnote-222)
3. The police must not subject media actors to arbitrary arrest or unlawful detention in connection with their coverage of an assembly.[[222]](#endnote-223) Moreover, law enforcement must respect not only a media actor’s physical integrity but also that of his or her equipment and material. As stated by the OSCE Special Representative on Freedom of Media: “Willful attempts to confiscate, damage or break journalists’ equipment in an attempt to silence reporting is a criminal offence, […] and [c]onfiscation by the authorities of printed material, footage, sound clips or other reportage is an act of direct censorship.”[[223]](#endnote-224)
4. Individuals and groups should be permitted to operate freely in the context of monitoring assemblies, and the exercise of the right to FoPA. State authorities are obliged to protect the rights of assembly monitors, irrespective of whether an assembly has complied with the requisite notification requirements, or whether it is peaceful or not.[[224]](#endnote-225)
5. ODIHR promotes the recognition of the important contribution independent monitoring can have to the full enjoyment of the freedom of peaceful assembly and has been using assembly monitoring as an assistance tool. Based on its own monitoring experience ODIHR recommended the OSCE state authorities the following:
6. Recognize and raise awareness about the important contribution of independent monitoring of assemblies to the full enjoyment of the freedom of peaceful assembly;
7. Actively facilitate the independent monitoring of and reporting on the facilitation of assemblies by international and local monitors including by:
	* refraining from imposing unnecessary or disproportionate restrictions on assembly monitoring activities, and ensuring that any restrictions that may be imposed on monitored assemblies do not limit the ability of international or local monitors to carry out their activities unimpededly and observe all aspects of an assembly, such as during curfews, dispersals or arrests;
	* ensuring that assembly monitors are able to photograph or otherwise record actions and activities at public assemblies, including law-enforcement operations or individual law-enforcement officials and that such visual or audio recordings cannot be confiscated, seized and/or destroyed without due process and can be used as evidence in relevant disciplinary, administrative or criminal proceedings;
	* demonstrating willingness by the state authorities to engage with monitors before, during and after the assembly, where such engagement is sought, and give due consideration to their findings and recommendations resulting from their assessment of the facilitation of assemblies so as to inform institutional learning and, more broadly, in the definition of legislation and policies affecting the enjoyment of freedom of peaceful assembly;
	* facilitate the gathering of information by National Human Rights Institutions (NHRIs) or other relevant independent oversight or monitoring bodies, or civil society organizations working in the area of freedom of assembly about all anticipated assemblies.[[225]](#endnote-226)

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

1. **Sanctions of Participants:** After an assembly, the imposition of sanctions and penalties is only permissible if they were already prescribed by law at the time the assembly took place, as otherwise this may violate the principle that individuals may not be punished for acts that were not criminalized at the time when they were committed.[[226]](#endnote-227) The same applies to punishment based on a law that was insufficiently clear, which would violate the principle of legality and foreseeability of legislation; legislation that does not adhere to these principles would not be a justifiable basis by which to restrict important human rights such as FoPA.[[227]](#endnote-228)
2. **Penalties:** Penalties imposed for conduct occurring in the context of an assembly must be necessary and proportionate.[[228]](#endnote-229) This is particularly significant, since unnecessary or disproportionately harsh sanctions for behaviour during assemblies could, if known in advance, inhibit the holding of such events and have a chilling effect that may prevent participants from attending. Such sanctions could thus constitute an indirect violation of the FoPA.[[229]](#endnote-230) Penalties for minor offences that do not threaten to cause or result in significant harm to public order or to the rights and freedoms of others should accordingly be low and the same as minor offences unrelated to assemblies. Thus, minor offences such as the failure to provide advance notice of an assembly or the failure to comply with route, time and place restrictions imposed on an assembly (including trespassing) should not be punishable with prison sentences, or heavy fines. In cases involving minor administrative violations, it may be inappropriate to impose any sanction or penalty on assembly participants and organizers.[[230]](#endnote-231) Legislation setting out high penalties for minor misdemeanours committed prior to or during assemblies are incompatible with the principle of proportionality and other relevant international human rights standards. Criminal sanctions especially, given their serious and possibly long-term effect, need to be commensurate with the severity of the respective actions and behaviours.
3. **Liability of Organisers:** Organizers and stewards are obliged to make reasonable efforts to comply with legal requirements and to ensure that their assemblies are peaceful. However, they should not be held liable for the failure to perform their responsibilities in cases where they are not individually responsible, e.g. where property damage or disorder, or violent acts are caused by assembly participants or onlookers acting independently.[[231]](#endnote-232) Liability will only exist where organizers or stewards have personally and intentionally incited, caused or participated in actual damage or disorder.[[232]](#endnote-233) In particular, an organiser should not be liable for the actions of individual participants, or for the conduct of stewards who do not act in accordance with the terms of their briefing,[[233]](#endnote-234) unless, for example, he/she explicitly incited them to commit such acts (in this case the organizer would be responsible for his/her own actions - incitement- not for the action of the participants). Individual liability will arise for any steward or participant if he or she intentionally, or with criminal negligence, commits an offence during an assembly or intentionally fails to follow the lawful directions of law enforcement officials. However, if an assembly degenerates into serious public disorder, it is the responsibility of the State, not the organiser, representative, or event stewards, to limit the damage caused. Assembly organisers and representatives should under no conditions be obliged to pay for damages caused by other participants in an assembly (unless they incited, or otherwise directly caused them).
4. Where organizers do not, by action or omission, fully comply with the requirement of notification, or with conditions imposed on assemblies during the notification process, this shall only be punished if there is evidence to prove that they have done so intentionally, and where the non-compliance is substantial. The burden of proof in such cases, however, rests with the public authorities. Thus, it would be inappropriate to punish an assembly organizer if the expected and notified number of participants unexpectedly rises above the threshold for notification. Moreover, if there are reasonable grounds for non-compliance with a notification or permit requirement, then no liability arises, and no sanctions should be imposed.
5. **Participation in a Peaceful Assembly:** Participation in a peaceful assembly, even if unauthorized, should never be treated as a serious offence that leads to severe penalties.[[234]](#endnote-235) Participants in a peaceful assembly should not be subject to criminal sanctions[[235]](#endnote-236) or deprivation of liberty merely for participating in an assembly.[[236]](#endnote-237) The European Court of Human Rights has held that, “[w]hile rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public demonstrations, since they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself”.[[237]](#endnote-238) Moreover, the European Court of Human Rights has considered it disproportionate to sanction participants in an assembly that has not been prohibited if they themselves did not commit any reprehensible act on such occasion,[[238]](#endnote-239) nor be punished for taking part in an unlawful assembly if they were not aware of the unlawful nature of the event.[[239]](#endnote-240)
6. Imposing punishment on organizers or participants for failure to comply with a dispersal order if the order was given with insufficient clarity would violate a persons’ right to freedom of assembly (and related rights). Likewise, punishment for failure to comply with a dispersal order without having been given a reasonable opportunity to do so will constitute an unnecessary interference with FoPA.[[240]](#endnote-241) Organizers of an assembly should never be held liable for failure of others to comply with a dispersal order.
7. **Civil disobedience** (i.e., non-violent actions that, while in violation of the law): are undertaken for the purpose of amplifying or otherwise assisting in the communication of a message, may also constitute a form of assembly. If those who incite, or engage in, acts of civil disobedience are subject to legal punishment for their acts, this should always be proportionate.[[241]](#endnote-242) Sanctions shall take the nature of the unlawful conduct into account, but neither the offense nor the penalty must ever be increased due to the content of the expression or message that accompanies the unlawful conduct. Under no circumstances should a protestor engaged in civil disobedience be punished more severely than a person who committed the identical offense without expressive intent.
8. A participant should not be held liable for anything done under the direction of a law enforcement official. This means, for example, that if a location for a public assembly was initially approved, and later arbitrarily revoked, participants in the assembly will not be liable for violating the law.[[242]](#endnote-243)
9. **Content:** A penalty should not be imposed or enhanced based on the content of the message communicated by an assembly or the viewpoints expressed by its participants, unless this message constitutes incitement to violence, hatred or discrimination.[[243]](#endnote-244) While expression should normally be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, the advocacy of national, racial or religious hatred that constitutes unlawful incitement to discrimination or violence should be punishable by law.[[244]](#endnote-245) Moreover, specific instances of hate speech “may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.”[[245]](#endnote-246) Even then, the mere act of resorting to such speech by participants in an assembly does not justify the dispersal of the event. In such cases, law enforcement officials should take measures only against the particular individuals involved.[[246]](#endnote-247)
10. After assemblies, organizers or participants may be taken to court to establish potential wrongdoing. All proceedings that may affect the civil rights and obligations of these individuals, or relate to criminal charges levelled against them, should provide basic fair trial rights as set out in relevant international instruments.[[247]](#endnote-248) These include access to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law. Similar considerations apply in the case of certain administrative procedures that are comparable to criminal procedures by nature and based on the severity of potential sanctions.[[248]](#endnote-249) In the case of criminal charges, additional fair trial guarantees apply, including the right to be informed promptly and in a language that one understands of the charges, to be given adequate time to prepare one’s defence, the right to defence council, equality of arms with respect to the examination of evidence, and, where needed, free interpretation.[[249]](#endnote-250)

**Accountability of state authorities and/or state officials**

1. **Types of liability:** Public authorities must comply with their legal obligations and should be accountable for any failure – procedural or substantive – to do so, regardless of whether this omission takes place before, during or after an assembly. Individual liability should be gauged according to the relevant principles of administrative or criminal law. When it comes to the use of excessive force, depending on the level of seriousness of the offence, various forms of liability may be appropriate. This may include civil liability to compensate victims for injuries and, in more serious cases, disciplinary liability of the law enforcement officer(s) involved. Excessive use of force may also constitute ill-treatment within the meaning of Article 3 of the ECHR.[[250]](#endnote-251) Where certain acts amount to torture, inhuman or degrading treatment or punishment, criminal liability, in combination with adequate compensation for injuries and suffering, is the only appropriate response. Civil, disciplinary and criminal liability may also be appropriate, depending on the circumstances and gravity of the individual case. These types of liability may also arise where injuries result from a lack of police response, for example where insufficient protection is given to assembly participants against violent third parties.
2. **Monitoring and evaluation of state conduct during and after an assembly:** The compliance of law enforcement officials with international human rights standards should be closely monitored and evaluated after the event.[[251]](#endnote-252) It is good practice for an independent oversight body to review and report on any large scale or contentious policing operation relating to public assemblies.[[252]](#endnote-253) The respective complaints mechanism should be adequate, prompt, subject to public scrutiny (open and transparent), and should ensure the victim’s/complainant’s involvement in the process.[[253]](#endnote-254) In Northern Ireland, for example, human rights experts from the police oversight body (the Policing Board) routinely monitor all elements of police operations related to controversial assemblies.[[254]](#endnote-255) It is also good practice for such a body to publish statistics on the number of complaints received, their nature and consequences, to ensure transparency.[[255]](#endnote-256) In certain cases, there may also be a monitoring role for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[[256]](#endnote-257) or for national human rights institutions. The expectation that criminal or disciplinary proceedings will be brought against a police officer against whom there is evidence of misconduct is an important protection against impunity and essential for public confidence in the police complaints system. The prosecution authority, police and independent police complaints body should give reasons for their decisions relating to criminal and disciplinary proceedings for which they are responsible.
3. **Duty to conduct an effective investigation into abuse of power, including violent incidents and to provide effective remedies to victims:** Any abuse of state powers and violations of the law by state officials, including instances of unlawful dispersal or early termination of assemblies, should lead to prompt and independent investigations. This applies equally to acts of violence, threats of violence, or incitement to hatred against participants in an assembly by other participants, counter-demonstrators, law enforcement officials or third persons. Those responsible should be sanctioned in an appropriate manner and victims should be informed about possible remedies.[[257]](#endnote-258) When investigating such cases, the authorities should, as the European Court of Human Rights has held, "do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination".[[258]](#endnote-259) Where there are allegations of excessive or otherwise unlawful use of force by law enforcement officers, the authorities should conduct effective investigations[[259]](#endnote-260) into such actions in such a way as to ensure the accountability of the relevant police officers.[[260]](#endnote-261)
4. **Use of standards and need for investigations:** When judging whether a state action or reaction was reasonable and proportionate, it is necessary to conduct an objective and real-time evaluation of the totality of circumstances.[[261]](#endnote-262) The European Court of Human Rights has, in recent case law, ordered States to develop clear sets of rules concerning the implementation of directives relating to the use of force, including tear gas, as well as a system guaranteeing adequate training of law enforcement personnel and sufficient control and supervision of such personnel during assemblies. Moreover, the European Court of Human Rights has required States to conduct an effective ex post facto review of the necessity, proportionality and reasonableness of any use of force, especially against people who do not put up violent resistance.[[262]](#endnote-263)
5. **Accountability for violations of the right to life:** The right to life (Article 6 ICCPR, Article 2 ECHR) covers not only cases of intentional killing, but also cases where the use of force unintentionally results in the deprivation of life. The protection of this right entails ‘a stricter and more compelling test of necessity’.[[263]](#endnote-264) This means that the Government will need to demonstrate with convincing arguments that the use of force was necessary in the given circumstances and not excessive, meaning that other, less invasive measures would not have achieved the intended effect.[[264]](#endnote-265) As the European Court of Human Rights has held, “there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.”[[265]](#endnote-266) Any finding of civil or criminal liability for breach of the right to life on the side of the State should lead to compensation of the affected individual’s next of kin, independent of the need to identify an individual criminally responsible for the respective act.
6. **Liability of law enforcement officials:** Law enforcement officials are liable for any failure to fulfil their positive obligations to respect, facilitate and protect the right to FoPA. Moreover, liability should also extend where “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility”.[[266]](#endnote-267) Where a complaint is received regarding the conduct of law enforcement officials or where a person has been seriously injured or deprived of his or her life as a result of the actions of law enforcement officers, an ‘independent and effective official investigation’ must be conducted.[[267]](#endnote-268) The core purpose of any investigation should be to protect the right to life and physical integrity, and in those cases involving State agents or entities, to ensure their accountability for deaths or physical injuries occurring under their responsibility. The particular form of investigation required to achieve those purposes may vary according to the circumstances.[[268]](#endnote-269) If the use of force is not authorized by law, or if the resort to force is in violation of domestic legislation or international human rights law, law enforcement officers should face civil and/or criminal liability as well as disciplinary action.[[269]](#endnote-270) The relevant law enforcement personnel should also be held liable for failing to intervene where this may have prevented other officers, or third parties from using excessive force. The individuals responsible for the investigation and those carrying out the inquiries should be independent from those involved in the events, which presupposes not only a lack of hierarchical or institutional connection but also a practical independence.[[270]](#endnote-271)

***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?***

1. The right to assemble is as much a feature of contemporary society as the right to shop, the right to drive a car, or the right to run a business. The temporary and occasional nature of assemblies means that at times they will have a temporary if negative impact on other users of public space, but this a price to be paid in a democratic society.
2. There has been an increasing privatisation of erstwhile public space in urban areas and also radical transformations in the fabric of urban areas, which has transformed the scale, range and scope of traditional public fora, and that arguably human rights jurisprudence has not kept abreast of. The presumption should be that rights to assemble should be related to the nature of public usage of space rather than the ownership, and. Thus spaces to which people have routine access to walk, shop, access etc. should also be spaces where people have a right to assemble.
3. In part the deficit in human rights thinking is due to the focus on the right to assemble in open public spaces, rather than the right to assemble in public space per se, or the right to assemble in the interior of public buildings, or on the contexts in which there may be a right to assemble on privately owned spaces.
4. If spaces are publicly owned in full or in part, the right to assemble should be presumed, although the right should not be unlimited but may be subject to the same range of restrictions and limitations as assemblies in open public spaces.

**Relationship of article 21 with other provisions of the ICCPR**

***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?***

1. **Derogations from international human rights obligations must be exceptional, temporary, and both geographically and materially limited:**

In times of war or public emergency threatening the life of the nation, States may take exceptional measures derogating from their obligation to guarantee FoPA (see Article 4 ICCPR and Article 15 ECHR). (See also under question 8 and 9.)They may however do so only where this is strictly required by the exigencies of the situation, and if such measures are consistent with their other obligations under international law.[[271]](#endnote-272) In particular, the crisis or emergency must be actual or imminent, and one ‘which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’,[[272]](#endnote-273) meaning, essentially, that the fundamental capacity of a state to function effectively must be compromised.[[273]](#endnote-274) States seeking to derogate from their human rights commitments must officially proclaim a state of emergency[[274]](#endnote-275) in compliance with relevant constitutional and other legal provisions governing the exercise of emergency powers.[[275]](#endnote-276) Any derogation must be strictly limited temporally, geographically and materially.[[276]](#endnote-277) In situations that do not meet the high threshold for derogations, the possibility of imposing proportionate and content-neutral time, place and manner restrictions on public assemblies specifically tailored to the particular situation at hand should be sufficient.[[277]](#endnote-278) Generally, emergency powers must be tailored to an immediate and urgent crisis and shall not be used as a means to limit legitimate dissent, protest, expression and the work of civil society.[[278]](#endnote-279)

***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?***

1. It is extremely rare that all participants in an assembly are involved in acts of violence, but situations may develop where a peaceful assembly degenerates from occasional acts of violence to a situation that may be considered as a riot rather than an assembly. However, even in situation of public disorder and riot, individuals retain certain rights, including the right to life (Art 6 ICCPR), freedom from torture etc. (Art 7 ICCPR); right to liberty and security of the person (Art 9 ICCOR); respect for dignity (Art 10 ICCPR). The police or other agencies have a responsibility to protect such rights even during outburst of rioting and disorder and should be held accountable for breaches of such rights.
2. For the Human Rights Committee situations of violent demonstrations could usually be handled with normal possibilities for limitation and without resorting to derogation. A lasting total prohibition of the right to hold assemblies would be therefore very rarely necessary and proportionate.[[279]](#endnote-280) In any case this could not affect the enjoyment of other “core rights” such as the right to life or the prohibition of torture that must be respected under any circumstances. States parties may under no circumstances invoke art. 4 ICCPR as justification for acting in violation of International Humanitarian Law or peremptory norms of international law, for instance, by taking hostages, by imposing collective punishments, through arbitrary deprivation of liberty of by deviating from fundamental principles of fair trial, including the presumption of innocence.[[280]](#endnote-281)

***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).***

1. This has been addressed in the responses to other questions. Issues of equality for different groups and constituencies have been extensively covered in the 2nd edition of the ODIHR Guidelines on Freedom of Peaceful Assembly, see reference under question 20.

***18. In interpreting article 21 of the ICCPR, should any weight be attached to possible differences between the right of peaceful assembly (droit de réunion); peaceful demonstration (or peaceful protest) (droit de manifestation) and the right of peaceful gathering (droit de rassemblement)?***

1. The ODIHR Panel of Experts on Freedom of Assembly and Association has not addressed this issue in any depth. Generally, the Panel accepts that there is an overlap between assemblies and protests in so far as not all assemblies will involve acts of protest, while not all protests are assemblies. Protests are in some ways a broader category in so far as they do not necessarily require the presence of two or more people, and do not necessarily involve collective action in public space. The OSCE has also established a link between the “right of peaceful assembly and to demonstrate” in the Copenhagen in para (9.2) as they are mentioned together and that restrictions of this right must have a basis in law.
2. Similarly, one could consider gatherings as broader category than assemblies in so far as they do not require an expressive element but rather the term may be used to include all forms of activity that involve people being present in a public space for a broadly common purpose, e.g. waiting for a bus; queuing to enter a shop or building; or watching street entertainment.

***19. In all of the above please keep in mind the role of gender in assemblies and the role of new technologies: the use of social media to organise and advertise assemblies; the use of mobile phones and other devices (CCTV cameras, satellites) to record assemblies; the use of body-worn cameras; etc. Moreover, to what extent does the right of peaceful assembly apply in the digital space? Can ‘gathering’ online impose obligations on States and other actors to facilitate it? May unmanned weapon or surveillance systems (remote or autonomous) be used by law enforcement officials during demonstrations?***

1. **Online:** (see also above answers to question 2 and 6) Internet-based technologies play an increasingly instrumental part in the exercise of the right to FoPA and it is hard to imagine an assembly that does not involve some form of reliance on the Internet.[[281]](#endnote-282) In many areas, the Internet is accessible, cheap, fast, and borderless and has reduced the cost of communicating with others.[[282]](#endnote-283) However, the so-called ‘digital divide’ continues to exist and States are under increasing obligations to reduce it, given the importance of the Internet to everyday life[[283]](#endnote-284) and to political participation in particular.
2. The role social media in the mobilisation of assemblies is increasingly pivotal to the exercise of the right to assemble. In particular this raises the issue of the ease of organising assemblies horizontally without the need for formal organisations or organisers; and which in turn makes it easier to mobilise at short notice and without formal notification. Social media is also increasingly used during an assembly via forms of visual recording or live streaming of and from assemblies.
3. These developments in turn have led to state responses such as in closing down access to the internet; blocking sites and other forms of surveillance, including using technology to identify participants via recording of the presence of their mobile phones; and even charging people who retweet or publicise information about an assembly as an organiser.
4. Furthermore, it requires consideration of the role of ISPs which can be encapsulated in the following manner:

While States have the ultimate obligation to protect human rights, the obligations to respect, protect and fulfil, extend also to third parties, which in this case also means, ISPs[[284]](#endnote-285) which, while privately owned companies, host the publicly available space for expression and assembly. In co-operation with the ISPs, States should ensure that self-regulation does not lead to a censorship of content which would ordinarily be permissible and acceptable in a democratic society. This also applies to assemblies expressing views that may ‘offend, shock or disturb’ the State or any sector of the population[[285]](#endnote-286) for as long as they do not incite violence[[286]](#endnote-287) – and that these Internet Services Providers do not interfere with the message sought to be conveyed by the expression and/or assembly, through catch-all algorithms or unwarranted take down of content. On the other hand, ISPs may also be held accountable where they do not react to or remove content or expression or an online assembly which amounts to an incitement to violence or hate speech.[[287]](#endnote-288) ISPs should also respect and protect the privacy of users, and should not be compelled by the State to divulge information thereon without a court order.

1. Scope of application of the Article 21, parameters and essence of online assembly is contested and remains to be clarified and determined. These include such issues as scope of protection of “online assemblies”, rights to privacy for participation in such “assemblies” (if there are to be considered as similar to assemblies in closed spaces / buildings); access to public space (internet) that is effectively privately owned, thus, the rights and responsibilities of Internet Service providers (ISPs); and the legitimacy of some forms of online protests (DDOS attacks) etc.
2. **Surveillance:** Digital images of organizers and participants in an assembly should not be recorded except where specifically authorized by law and necessary in cases where there is probable cause to believe that the planners, organizers or participants will engage in serious unlawful activity. In general, intrusive overt or covert surveillance methods should only be applied where there is clear evidence that imminent unlawful activities, such as violence or use of fire arms are planned to take place during an assembly.[[288]](#endnote-289) The use of image recording for the purpose of identification (including facial recognition software)[[289]](#endnote-290) should be confined to those circumstances where criminal offences are actually taking place, or where there is a reasonable suspicion of imminent criminal behaviour. In all situations, there should be adequate safeguards against abuse.[[290]](#endnote-291) The taking and retention of digital imagery for purposes of identifying persons engaged in lawful activities, or the retention of data extracted from such images (such as details of an individual’s presence at an assembly) in a permanent or systematic record may give rise to violations of the right to privacy.[[291]](#endnote-292)
3. Moreover, the use of digital image recording devices by law enforcement officers during a public assembly may have a ‘chilling effect’ on FoPA and curtail the exercise of this right.[[292]](#endnote-293) Laws, and policies of law enforcement agencies should codify operating procedures relating to digital recording at public assemblies, including a description of the (lawful and legitimate) purposes for and the circumstances in which such activities may take place, and procedures and policies for the retention and processing of resulting data.[[293]](#endnote-294) The information obtained in this manner should be destroyed after a reasonable period set out in law.[[294]](#endnote-295)
4. While the benefits of amplifying the message of assemblies through technology are numerous, the same technology can also be used against protesters who use it to co-ordinate their efforts. Traditional assemblies, allow participants if they so desire, a certain level of anonymity or at least a smaller likelihood of being ‘singled out’ or identified – due to the presence of other people. However, the use of new technologies does not always offer the same due to the availability of surveillance and tracking tools by the State or third parties. States should therefore refrain from using surveillance tools to track (or less still, persecute) persons taking part in assemblies and protest actions. Such technologies include facial recognition tools, surveillance of the Internet portals and social media sites used by activists and identification of a person’s whereabouts through location tracking (to establish attendance at a demonstration or rally). Such tools should only be employed where such interference can be justified based on strictly proven and proportional grounds of national security or public order and should be subject to judicial review.

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

In addition to soft law documents, relevant Guidelines from ODIHR and joint Guidelines from ODIHR and the Venice Commission have been added.

*In progress/awaiting adoption:* ODIHR/Venice Commission Guidelines on Freedom of Peaceful Assembly 3rd Edition. *(Reference will be provided following adoption and publication)*

ODIHR / Venice Commission (2010) Guidelines on Freedom of Peaceful Assembly (2nd Edition) <https://www.osce.org/odihr/73405?download=true>

ODIHR (2016) Human Rights handbook on Policing Assemblies. <https://www.osce.org/odihr/226981?download=true>

ODIHR and Venice Commission (2011): Handbook on Monitoring Freedom of Peaceful Assembly: <http://www.osce.org/odihr/82979?download=true>

ODIHR Reports on Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States:
2012: <http://www.osce.org/odihr/97055>
2014: <http://www.osce.org/odihr/132281?download=true>
2016: <https://www.osce.org/odihr/289721?download=true>

United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Article 5)

United Nations Code of Conduct for Law Enforcement Officials

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

1. OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, 2nd edition (2010), available here: <http://www.osce.org/odihr/73405> [↑](#endnote-ref-2)
2. All reviews can be found here: <http://www.legislationline.org/topics/topic/15> [↑](#endnote-ref-3)
3. Factsheet: <https://www.osce.org/odihr/41784?download=true> [↑](#endnote-ref-4)
4. ODIHR Human Rights Handbook on Policing Assemblies, 2016: <http://www.osce.org/odihr/226981?download=true> [↑](#endnote-ref-5)
5. Handbook on Monitoring Freedom of Peaceful Assembly in 2011, <http://www.osce.org/odihr/82979?download=true>. [↑](#endnote-ref-6)
6. As proposed by M Nowak, *“U.N. Convention on Civil and Political Rights, CCPR Commentary”* 2nd revised edition, N.P.Engel, Publisher 2005, page 482 [↑](#endnote-ref-7)
7. *Op. cit.* note 1, Section A, para 1.2, *op. cit.* note 6, p.373: ‘The term “assembly” is not defined but rather presumed in the Covenant. Therefore, it must be interpreted in conformity with the customary, generally accepted meaning in national legal systems, taking into account the object and purpose of this traditional right. It is beyond doubt that not every assembly of individuals requires special protection. Rather, only *intentional*, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly.’ See Human Rights Committee Views (on the merits) *Kivenmaa v. Finland* (412/1990) 31 March 1994, CCPR/C/50/D/412/1990 para.7.6, where the Committee stated that “public assembly is understood to be the coming together of more than one person for a lawful purpose in a public place that others than those invited also have access to.” See also Human Rights Committee Views (on the merits) *Levinov v. Belarus* (1867/09) 19 July 2012, CCPR/C/105/D/1867/2009, 1936, 1975, 1977-1981, 2010/2010, where the Committee declared inadmissible the author’s claim under Article 21 ICCPR because he ‘intended to conduct the … pickets on his own’ (para 9.7) and the Committee instead considered his claim under Article 19 ICCPR. [↑](#endnote-ref-8)
8. Article 19 (2) and (3) of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966; Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950 (as amended by Protocols 11 and 14). [↑](#endnote-ref-9)
9. Article 22, ICCPR and Article 11, ECHR. [↑](#endnote-ref-10)
10. Article 25(a), ICCPR. [↑](#endnote-ref-11)
11. Article 25(b), ICCPR and Article 3 of Protocol 1, ECHR. [↑](#endnote-ref-12)
12. *Eva Molnár v. Hungary*, Application No 10346/05, 7 October 2008, para. 42: ‘The Court also emphasises that one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest.’ [↑](#endnote-ref-13)
13. Other rights that may be affected before, during or after peaceful assemblies include the right to establish and maintain contacts within the territory of a state (see Article 17 of the Council of Europe Framework Convention on National Minorities, which draws upon paras 32(4) and 32(6) of the 1990 OSCE Copenhagen Document); freedom of movement (see, Article 12(1) ICCPR and Article 2(1) of Protocol No. 4, ECHR and UN Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 2 November 1999; the right to cross international borders (see, Article 12(2) UDHR and Article 2(2) of Protocol No. 4, ECHR); freedom of religion or belief (see, Article 18, ICCPR and Article 9, ECHR); and the rights to liberty (see, Article 9 ICCPR and Article 5 ECHR); and to be free from ill-treatment and torture (see, Article 7 ICCPR and Article 3 ECHR). [↑](#endnote-ref-14)
14. See, for example, *Djavit An v. Turkey*, Application No 20652/92, 20 February 2003, para. 56. [↑](#endnote-ref-15)
15. “Report on factors that impede equal political participation and steps to overcome those challenges”, UN Doc. A/HRC/27/29, Office of the United Nations High Commissioner for Human Rights, (OHCHR), 30 June 2014, para. 22. [↑](#endnote-ref-16)
16. *Guneri v Turkey* (2005): Application no 42853/98, 43609/98 and 44291/98. [↑](#endnote-ref-17)
17. *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*; Applications nos. 29221/95 and 29225/95) judgment 2 October 2001, para. 86,  *Plattform “Ärzte für das Leben” v. Austria* (1988), para. 32. Similarly, the European Court of Human Rights has often stated that, subject to Article 10(2), freedom of expression ‘…is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”’, *Handyside v. The United Kingdom* (*The United Kingdom*, Application no. 5493/72, 7 December 1976, para. 49.See also, *Bayev and Others v. Russia*, Application Nos 67667/09, 44092/12 and 56717/12, 20 June 2017, para. 70: “The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority”. See also *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949): “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” [↑](#endnote-ref-18)
18. The European Court of Human Rights has often reiterated that a demonstration in a public place “may cause a certain level of disruption to ordinary life”; see for example *Nurettin Aldemir and Others v. Turkey*, (Application Nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18 December 2007, para. 43; *Körtvélyessy v. Hungary* Application No 7871/10, 5 April 2016), para. 28. See also the judgment of the German Federal Constitutional Court, BVerfGE 69, 315(360) at Fn.3, regarding roadblocks in front of military installations: “Their sit-down blockades do not fall outside the scope of this basic right just because they are accused of coercion using force. See also *Annenkov and Others v. Russia* 31475/10 and 16849/11(2017), paras 124-126, where the Court emphasized that any conduct alleged to be violent must be of a certain nature or degree before it will suffice to remove an assembly from the scope of protection of Article 11. [↑](#endnote-ref-19)
19. See, for example, *Saghatelyan v. Armenia,* Application No 23086/08, 20 September 2018, paras. 230-233; *Karpyuk and others v. Ukraine*, Applications Nos 30582/04 and 32152/04, 6 October 2015, paras. 198-207, 224 and 234. See Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Funding of associations and holding of peaceful assemblies), A/HRC/23/39, 24 April 2013, para. 50. See also Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Best practices that promote and protect the rights to freedom of peaceful assembly and of association), A/HRC/20/27, 21 May 2012, para. 25. [↑](#endnote-ref-20)
20. *Op. cit.* note 1*, para 1.2.* [↑](#endnote-ref-21)
21. The European Court of Human Rights has however acknowledged that Article 11 covers assemblies ‘of an essentially social character’: *Friend and Others v. UK*, Application Nos 16072/06 and 27809/08, 24 November 2009 (admissibility), para. 50; *Huseynov v. Azerbaijan*, Application No 59135/09, 7 May 2015, para. 91. See further, Helen Fenwick and Michael Hamilton, “Freedom of Protest and Assembly”, Chapter 9 in *Fenwick on Civil Liberties and Human Rights* (5th edition) (Oxford: Routledge, 2017), pp 576-577 (fn. 172) and p. 601 (fn. 339, citing David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*, (Oxford: Hart 2010), p. 137). [↑](#endnote-ref-22)
22. This definition is based on language found in the US judgments of *International Society of Krishna Consciousness v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J. concurring) and *Grayned v. Rockford*, 408 U.S. 104, 116 (1972) (dictum). It is not the definition adopted by the U.S. Supreme Court which has defined ‘public forum’ quite restrictively by looking at the history of the site. Thus, in the view of the Supreme Court a public forum is a site that has ‘immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussion public questions*’; International Society of Krishna Consciousness v. Lee*, at 679. See also German Federal Constitutional Court, Judgment of 22 February 2011 (Frankfurt Airport Decision), 1 BvR 699/06, para. 70: "A public forum is characterised by the fact that it can be used to pursue a variety of different activities and concerns leading to the development of a varied and open communications network. Public forums must be distinguished from locations which due to external circumstances are only available to the general public for specific purposes and which are designed accordingly. If in actual fact a place serves only or mainly one purpose, individuals may not request that they be allowed to conduct assemblies there pursuant to Article 8.1 [Basic Law] - except where they have private rights of use in respect of such place. This is different, however, in places where the combination of shops, service providers, restaurants and recreational areas provide an opportunity for strolling and thus result in the creation of a place for people to spend time and meet. If space is made available in this way for the coexistence of different uses, including communicative uses, and becomes a public forum, it is not possible according to Article 8.1 [Basic Law] to exclude from it political debate in the form of collective expressions of opinion through assemblies." See also German Federal Constitutional Court, Order of 18 July 2015, (Beer Can Flashmob for Freedom decision), 1 BvQ 25/15, in which the Court held, concerning a planned flash-mob on a privately owned square, that in the instant case the *de facto* prohibition of conducting assemblies constituted a serious infringement of the applicant’s rights. The Court noted that the location of the assembly was particularly meaningful given the aim of the planned assembly, which was to protest against the increasing limitation of individual freedoms and the privatization of national security. Compared to this, the interference with the rights of the property owner was considered to be relatively minor, as the assembly would be limited to 15 minutes and static. [↑](#endnote-ref-23)
23. *Szel v. Hungary* Application No  44357/13, 16 September 2014; *Sergey Kuznetsov v. Russia* (Application No 10877/04, 23 October 2008, *Acik v. Turkey* Application No 31451/03, 13 January 2009; *Barankevich v. Russia* Application No 10519/03, 26 July 2007, para. 25: “The right to freedom of assembly covers both private meetings and meetings in public thoroughfares …” See also the discussion of ‘quasi-public space’ in the report by the UK Joint Committee on Human Rights, Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest (Volume 1) (London: HMSO, HL Paper 47-I; HC 320-I, 23 March 2009), pp.16-17; ‘Public and Private Space’.See further *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1974) (stating that a municipality cannot selectively exclude an organization from the use of a public auditorium based on its objections to the message communicated). [↑](#endnote-ref-24)
24. *Op. cit.* note 18 (*Annenkov and Others v. Russia*), para. 122, See also *Rassemblement Jurassien Unité Jurassienne v. Switzerland* Application No 8191/78, Commission Decision of 10 October 1979, p. 119. See also, Max Planck Institute for Comparative Public and International Law, “Comparative Study on National Legislation on Freedom of Peaceful Assembly” (endorsed by the Venice Commission on 19 June 2014), CDL-AD(2014)024, paras. 489-492, which describes the range of different regimes that apply to assemblies in public and private spaces. [↑](#endnote-ref-25)
25. W L Youmans, J C York, “Social Media and the Activist Toolkit: User Agreements, Corporate Interests and the Information Infrastructure of Modern Social Movements”, *Journal of Communication* Vol. 62, 2012, p 315. In *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), the US Supreme Court analogized the internet to the “essential venues for public gatherings.” [↑](#endnote-ref-26)
26. Recommendation CM/Rec (2016) 5 of the Committee of Ministers to member States on Internet freedom (13 April 2016), para. 3.3: “Individuals are free to use Internet platforms, such as social media and other ICTs in order to organise themselves for purposes of peaceful assembly.”  [↑](#endnote-ref-27)
27. Jonathon Zittrain, “Ubiquitous human computing”, *Philosophical Transactions of the Royal Society A* Vol. 366 No.188, 2008 pp. 3813-3821. [↑](#endnote-ref-28)
28. *Kalda v. Estonia* (2016), Application No 17429/10, 19 January 2016, para. 52, where the Court explicitly recognized the importance of the Internet for the enjoyment of a range of human rights. “The Court cannot overlook the fact that in a number of Council of Europe and other international instruments the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. Internet access has increasingly been understood as a right, and calls have been made to develop effective policies to attain universal access to the Internet and to overcome the “digital divide”…The Court considers that these developments reflect the important role the Internet plays in people’s everyday lives.” [↑](#endnote-ref-29)
29. See 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, para. 10: "Although an assembly has generally been understood as a physical gathering of people, it has been recognized that human rights protections, including for freedom of assembly, may apply to analogous interactions taking place online."

 *Op. cit.* note 26

See also Appendix to Recommendation of Committee of Ministers CM/Rec(2018)2 Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities: 1. Obligations of States with respect to the protection and promotion of human rights and fundamental freedoms in the digital environment - 1.1.3.:” States have the ultimate obligation to protect human rights and fundamental freedoms in the digital environment. All regulatory frameworks, including self- or co-regulatory approaches, should include effective oversight mechanisms to comply with that obligation and be accompanied by appropriate redress opportunities”.

Recommendation CM/Rec (2014) 6 of the Committee of Ministers to member States on a Guide to human rights for Internet users: everyone has “the right to peacefully assemble and associate with others using the internet.” See further para 00027 below. Also, Human Rights Council, Resolution 21/16, (October 2012), UN Doc. A/HRC/RES/21/16, and Resolution 24/5 (October 2013), UN Doc. A/HRC/RES/25/5, both entitled *The rights to freedom of peaceful assembly and of association.* See also the 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, of 4 February 2016, para. 10: “Although an assembly has generally been understood as a physical gathering of people, it has been recognized that human rights protections, including for freedom of assembly, may apply to analogous interactions taking place online.”

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Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom (3 April 2016) para. 3 of the Annex reads:“3. The right to freedom of peaceful assembly and association; 3.1.  Individuals are free to use Internet platforms, such as social media and other ICTs in order to associate with each other and to establish associations, to determine the objectives of such associations, to form trade unions, and to carry out activities within the limits provided for by laws that comply with international standards. 3.2. Associations are free to use the Internet in order to exercise their right to freedom of expression and to participate in matters of political and public debate. 3.3. Individuals are free to use Internet platforms, such as social media and other ICTs in order to organise themselves for purposes of peaceful assembly. 3.4. State measures applied in the context of the exercise of the right to peaceful assembly which amount to a blocking or restriction of Internet platforms, such as social media and other ICTs, comply with Article 11 of the Convention. 3.5. Any restriction on the exercise of the right to freedom of peaceful assembly and right to freedom of association with regard to the Internet is in compliance with Article 11 of the Convention, namely it: is prescribed by a law, which is accessible, clear, unambiguous and sufficiently precise to enable individuals to regulate their conduct; pursues a legitimate aim as exhaustively enumerated in Article 11 of the Convention; is necessary in a democratic society and proportionate to the legitimate aim pursued. There is a pressing social need for the restriction. There is a fair balance between the exercise of the right to freedom of assembly and freedom of association and the interests of the society as a whole. If a less intrusive measure achieves the same goal, it is applied. The restriction is narrowly construed and applied, and does not encroach on the essence of the right to freedom of assembly and association.” [↑](#endnote-ref-30)
30. *Tatár and Fáber v. Hungary*, Application nos. 26005/08 and 26160/08, 12 June 2012, para. 29. [↑](#endnote-ref-31)
31. *Christians against Racism and Fascism v. The United Kingdom* (1980), p. 148. [↑](#endnote-ref-32)
32. The Strasbourg Court has differentiated between a disturbance and violence. In *Taranenko v. Russia* (2014), it opined that pushing past a guard is not considered to be violence, para. 93. [↑](#endnote-ref-33)
33. ECtHR, decision on admissibility, *Ziliberberg v. Moldova*, No 61821/00, admissibility decision of 4 May 2004; also “Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai”, United Nations Human Rights Council, A/HRC/20/27, p. 8, para. 25. [↑](#endnote-ref-34)
34. See *Solomou and Others v. Turkey* (Application no. 36832/97, 24 June 2008), paras 77-78. Here, the Court found a violation of Article 2 in relation to the shooting of an unarmed demonstrator. The Turkish government argued that the use of force by the Turkish-Cypriot police was justified under Article 2(2) ECHR. In rejecting this argument, however, the Court regarded it to be of critical importance that, despite the fact that some demonstrators were armed with iron bars, Mr. Solomou himself was not armed and behaved in a peaceful manner. [↑](#endnote-ref-35)
35. UN Human Rights Committee, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, CCPR/C/21/Rev.1/Add.7, 12 July 1996, para. 5. [↑](#endnote-ref-36)
36. As Professor Eric Barendt has argued, ‘put most radically’, the right of assembly is valuable for active citizens who ‘are unwilling to participate in conventional party politics’ – it serves precisely to challenge ‘the exclusivity of conventional modes of civic activity’. Eric Barendt, “Freedom of Assembly” in Jack Beatson and Yvonne Cripps, *Freedom of Expression and Freedom of Information:Essays in Honour of Sir David Williams* (Oxford: Oxford University Press, 2000), p.168. [↑](#endnote-ref-37)
37. See *Op. cit.* note 35 (UN Human Rights Committee General Comment No. 25) [↑](#endnote-ref-38)
38. See, for example, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (sponsors of an expressive parade cannot be compelled to include groups whose message would interfere with or change the overall message of the parade). [↑](#endnote-ref-39)
39. UN Human Rights Committee Views (on the merits): *Tulzhenkova v. Belarus* (1226/03) 26 October 2011, CCPR/C/103/D/1838/2008, para. 9.3. The Committee stated its view that the circulation of publicity for an upcoming assembly cannot legitimately be penalized in the absence of a “specific indication of what dangers would have been created by the early distribution of the information.” [↑](#endnote-ref-40)
40. *Op. cit* note 28 (*Kalda v. Estonia)*, para. 52. See also *Jankovskis v. Lithuania* Application No 21575/08, 17 January 2017), para.62. [↑](#endnote-ref-41)
41. *Op. cit.* note 26 [↑](#endnote-ref-42)
42. A violation of Article 11 ECHR was found in the ECtHR case of *Nisbet Özdemir v. Turkey*, Application No 23143/04, 19 January 2010, (only in French), where the applicant was arrested while on her way to an unauthorised demonstration to protest against the possible intervention of US forces in Iraq. See also the facts of *Gasparyan v. Armenia (No.2)*, Application No 22571/05, 16 June 2009;, referring to *R (on the application by Laporte) (FC) v. Chief Constable of Gloucestershire* [2006] HL 55; and the report by the U.N. Special Representative ofthe Secretary-General on the Situation of Human Rights Defenders, *Human Rights Defenders: Note by the Secretary-General* U.N. Doc. A/61/312, 5 September 2006, at paras.57-60. See also *McCarthy v. Barrett*, 804 F. Supp. 2d 1126, 1135-1138 (W.D. Wash. 2011) (finding that the implementation of a ban preventing demonstrators from entering a protest zone violates freedom of speech and association). [↑](#endnote-ref-43)
43. See, for example, Article 2 ICCPR (Obligation to respect Human Rights), Article 40 ICCPR (State reports) and the first Optional Protocol to the ICCPR (Individual communications). See similarly, Article 1 ECHR (Obligation to respect Human Rights) in conjunction with Article 46 ECHR (Binding force and execution of judgments). In *Vyerentsov v. Ukraine*, Application No 20372/11, 11 April 2013, paras. 93-95, the Court explained the application of Article 46 in relation to problems of a structural nature (here, a legislative lacuna concerning freedom of assembly). [↑](#endnote-ref-44)
44. UN Human Rights Committee, General Comment, No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 4. [↑](#endnote-ref-45)
45. *Ibid.* [↑](#endnote-ref-46)
46. *Op. cit* note 6 [↑](#endnote-ref-47)
47. See *Oya Ataman v. Turkey* Application No 74552/01,5 December 2006), para. 35; *Gün and Others v. Turkey*, Application No 8029/07, 18 June 2013 (only in French), para. 69. Also see *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (the state has a responsibility to protect and not interfere with the expression of ideas even when the ideas are provocative). Note that in the U.S., the failure of state officials to protect and not interfere with freedom of expression or other fundamental rights does not necessarily create a claim enforceable in court; see *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189 (1989). See also *Op. cit.* note 44 (UN Human Rights Committee, General Comment No. 31), para. 6): in relation to the ICCPR: “The legal obligation under article 2, paragraph 1, is both negative and positive in nature.” See also the Report of the UN Special Rapporteur (2013), A/HRC/23/39, paras. 2 and 3; and (in relation to the US), Glenn Abernathy, *The Right of Assembly and Association* (Columbia: University of South Carolina Press: 1961), p. 49: “The constitutional guarantee of freedom of assembly means more than merely the absence of improper restrictive measures; it means also the positive protection by responsible officials against hostile groups who would interfere.” [↑](#endnote-ref-48)
48. See *Promo Lex and Others v. Moldova*, Application No 42757/09, 24 February 2015, paras. 22-28, where the Court found that the state had been in violation of its positive obligations under Article 11 of the ECHR due to its failure to protect assembly organizers and participants from violent attack and to effectively investigate the circumstances of the incident. See also *Identoba and Others v. Georgia*, Application No 73235/12, 12 May 2015, paras. 93-100. [↑](#endnote-ref-49)
49. Applications Nos 16072/06 and 27809/08, 24 November 2009, para. 50. New York Times v. United States 403 US 413 (1971): “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." See also, Report of the UN Special Rapporteur (2012), A/HRC/20/27, para. 16, which states that, “[the] freedom [of peaceful assembly] is to be considered the rule and its restriction the exception." This principle is reaffirmed in the Report of the Special Rapporteur A/HRC/23/39 (2013), para. 47. [↑](#endnote-ref-50)
50. *Op. cit.* note 32, para. 65; *Op. cit.* note 24 (*Rassemblement Jurassien & Unité Jurassien v. Switzerland*), pp. 93 and 119. [↑](#endnote-ref-51)
51. See for example, *Navalny v. Russia* (2014), para 150: “While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public events since they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself.” [↑](#endnote-ref-52)
52. See UN Human Rights Committee Views (on the merits), *Turchenyak v. Belarus*, (1948/2010), 10 September 2013, CCPR/C/108/D/1948/2010, para. 7.4; ‘The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience’, *Lashmankin and Others v. Russia* (2017), para. 405. See also, for example, Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), at para. 29.3 (English translation): “The state has the duty not only to ensure that a meeting, picket or a procession takes place, but also to see to it that freedom of speech and assembly is effective, namely – that the organized activity shall reach the target audience.” See also *Students Against Apartheid Coalition* *v. O’Neil*, 660 F.Supp. 333 (W.D. Va. 1987) (the court decision voids a restriction on the construction of a temporary protest structure on public space because there was no adequate alternative channel of access to the protestors’ intended audience). [↑](#endnote-ref-53)
53. See *Öllinger v. Austria*, Application No 76900/01, 29 June 2006, paras. 43-51. This case provides guidance as to the factors potentially relevant to assessing the proportionality of any restrictions on counter-demonstrations. These include whether the coincidence of time and venue is an essential part of the message of the counter-demonstration, whether the counter-protest concerned the expression of opinion on an issue of public interest, the size of the counter-demonstration, whether the counter-demonstrators have peaceful intentions, and the proposed manner of the protest (use of banners, chanting etc). *Olivieri v. Ward*, 801 F.2d 602,606-608(2d Cir. 1986) and O’Neill & Vasvari 23 *Hastings Const. L.Q.* at 100. Also see *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990) (overturning the decision on a buffer zone that prevented the message of protestors from being observed) [↑](#endnote-ref-54)
54. *Op. cit.* note 49 (New York Times v. United States) “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." See also, *Op. cit* note 49 (Report of the UN Special Rapporteur), para. 16, which states that, “[the] freedom [of peaceful assembly] is to be considered the rule and its restriction the exception." This principle is reaffirmed in the Report of the Special Rapporteur A/HRC/23/39 (2013), para. 47. [↑](#endnote-ref-55)
55. *Op. cit* note 32, para. 65; *Op. cit.* note 24 (*Rassemblement Jurassien & Unité Jurassien v. Switzerland)*, pp. 93 and 119. [↑](#endnote-ref-56)
56. See *Op. cit*. note 51 [↑](#endnote-ref-57)
57. See *Op. cit* note 53*,* paras. 43-51. This case provides guidance as to the factors potentially relevant to assessing the proportionality of any restrictions on counter-demonstrations. These include whether the coincidence of time and venue is an essential part of the message of the counter-demonstration, whether the counter-protest concerned the expression of opinion on an issue of public interest, the size of the counter-demonstration, whether the counter-demonstrators have peaceful intentions, and the proposed manner of the protest (use of banners, chanting etc). *Olivieri v. Ward*, 801 F.2d 602,606-608(2d Cir. 1986) and O’Neill & Vasvari 23 *Hastings Const. L.Q.* at 100 . Also see *Op. cit.* note 53 (*Bay Area Peace Navy v. United States*) (overturning the decision on a buffer zone that prevented the message of protestors from being observed). [↑](#endnote-ref-58)
58. *Op. cit*. note 48 (*Promo Lex and Others v. Moldova*), paras. 22-23. [↑](#endnote-ref-59)
59. See, for example, *Hyde Park v. Moldova* (*No.2)*, Application No 45094/06, 31 March 2009, para.26: “There was no suggestion that the park in which the assembly was to take place was too small to accommodate all the various events planned there. Moreover, there was never any suggestion that the organisers intended to disrupt public order or to seek a confrontation with the authorities or other groups meeting in the park on the day in question. Rather their intention was to hold a peaceful rally in support of freedom of speech. Therefore, the Court can only conclude that the Municipality’s refusal to authorise the demonstration did not respond to a pressing social need.” See O'Neill & Vasvari, “Counter-Demonstration As Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law”, *Hastings Constitutional Law Quarterly* Vol. 23, 1995, p88 [↑](#endnote-ref-60)
60. See further, Article 5(1) ICCPR and Article 17 ECHR (the ‘abuse of rights’ clauses). [↑](#endnote-ref-61)
61. *Op. Cit.* Note 12, para. 38: *the right to hold spontaneous demonstrations may override the obligation to give prior notification to public assemblies only in special circumstances, if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete*.; *NAACP v. City of Richmond*, 743 F.2d 1346, 1355-1358 (9th Cir. 1984). See also *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1045 (9th Cir. 2006) (where the court approved a two day advance notice requirement because it contained an exception for spontaneous events described as, “…events which are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event [that] may be conducted on the lawn of City Hall without the organizers first having to obtain a Community Event Permit.” See also the judgment of the Hungarian Constitutional Court, *Decision 75/2008, (V.29) AB*, which established that the right of assembly recognized in Article 62 para.(1) of the Hungarian Constitution covers both the holding of peaceful spontaneous events (where the assembly can only be held shortly after the causing event) and assemblies held without prior organisation. The Court stated that “it is unconstitutional to prohibit merely on the basis of late notification the holding of peaceful assemblies that cannot be notified three days prior to the date of the planned assembly due to the causing event.” See also the *Brokdorf* decision of Federal Constitutional Court of Germany, BVerfGE 69, 315 (353, 354). [↑](#endnote-ref-62)
62. For example, the second sentence of Article 44(2) Armenian Constitution: ‘In cases stipulated by law, outdoor assemblies shall be conducted on the basis of prior notification given within a reasonable period. No notification shall be required for spontaneous assemblies.’ See also, Human Rights Committee, Communication No. 2217/2012, *Popova v. The Russian Federation*, Views adopted on 6 April 2018, para 7.5 (references omitted): ‘… while a system of prior notices may be important for the smooth conduct of public demonstrations, their enforcement cannot become an end in itself. Any interference with the right to peaceful assembly must still be justified by the State party in the light of the second sentence of article 21. This is particularly true for spontaneous demonstrations, which cannot by their very nature be subject to a lengthy system of submitting a prior notice.’ UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report to the UN Human Rights Council (Best practices that promote and protect the rights to freedom of peaceful assembly and of association),* UN Doc. A/HRC/20/27, 21 May 2012, para. 29, available at <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf>>. Polish Constitutional Tribunal, Judgment of 10 July 2008 No. P 15/08 (105/6/A/2008). [↑](#endnote-ref-63)
63. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 91 recommends that, “[s]pontaneous assemblies should be recognized in law, and exempted from prior notification.” [↑](#endnote-ref-64)
64. Op. cit. note 48 (*Promo Lex and Others v. Moldova*) paras. 22-23. [↑](#endnote-ref-65)
65. See, for example, *Christian Democratic People’s Party v. Moldova (No. 2)*(2010), para. 27. Finding a violation of Article 11 ECHR, the Court stated that, “the applicant party’s slogans, even if accompanied by the burning of flags and pictures, was a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova.” *See also Feiner v. New York*, 340 U.S. 315 (1951) (while a breach of peace conviction of a speaker at a public forum was upheld given that the individual had refused to cease speechmaking, which was found to create a clear and present danger that a hostile audience would attack him, the public meeting itself was considered lawful). [↑](#endnote-ref-66)
66. *Ibid.* (*Christian Democratic People's Party v. Moldova (No. 2)*, para.28. Here the Court held that it “was the task of the police to stand between the two groups and to ensure public order … Therefore, this reason [the risk of clashes between protesters and members of the governing party] for refusing authorisation could not be considered relevant and sufficient within the meaning of Article 11 of the Convention.” See also *Olivieri v. Ward*, 801 F.2d 602,606-608 (2d Cir. 1986); also see *Grider v. Abramson*, 994 F. Supp. 840, 845 (W.D. Ky. 1998) aff'd 180 F.3d 739 (6th Cir. 1999) [↑](#endnote-ref-67)
67. UN Human Rights Council, Resolution on the Promotion and Protection of Human Rights in the Context of Peaceful Protests, A/HRC/RES/22/10, 9 April 2013, recommendation at para. 4; see also *Oliveri v. Ward*, 801 F.2d 602 (2d Cir. 1986) (approval of a requirement that officials designate space to accommodate counterdemonstrators during a gay rights parade). [↑](#endnote-ref-68)
68. In *Gülec v. Turkey*, Application No 21593/93, 27 July 1998 para 71, the Court emphasized the importance of law enforcement personnel being appropriately resourced: “gendarmes used a very powerful weapon because they did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province […] is in a region in which a state of emergency has been declared.” see also *Forsyth County, Ga. V. Nationalist Movement*, 505 U.S. 123 (1992) (charges for police services based on costs for maintaining public peace violate right to freedom of assembly). [↑](#endnote-ref-69)
69. See, for example, *Balçık and Others v. Turkey* (2007), para. 49. Here, the Court suggests that State provision of such preventive measures is one of the purposes of prior notification. [↑](#endnote-ref-70)
70. *Op. cit.* note 18 (*Annenkov and Others v. Russia*), para. 122. [↑](#endnote-ref-71)
71. *Appleby and Others v. United Kingdom*, Application no. 44306/98, 6 May 2003, paras. 47 and 52. [↑](#endnote-ref-72)
72. See *Marsh v. Alabama*, 326 U.S. 501 (1946), where the Supreme Court stated that “[w]hether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free”. [↑](#endnote-ref-73)
73. *Op. cit.* note 71, para. 39, a case concerning freedom of expression in a privately owned shopping centre, the Court stated that the effective exercise of freedom of expression, “may require positive measures of protection, even in the sphere of relations between individuals”, citing *Özgür Gündem v. Turkey*, Application No 23144/93, 16 March 2000, paras. 42-46, and *Fuentes Bobo v. Spain*, Application No 39293/98, 29 February 2000 (only in French), at para.38. It is noteworthy that the applicants in *Appleby* cited relevant case law of Canada (para.31) and the United States (paras. 25-30, and 46). The Court considered (a) the diversity of situations obtaining in contracting States; (b) the choices which must be made in terms of priorities and resources (noting that the positive obligations ‘should not impose an impossible or disproportionate burden on the authorities’); and (c) the rights of the owner of the shopping centre under Article 1 of Protocol 1. In *Cisse v. France,* Application 51346/99 judgement 9 july 2002, para 24: *“the applicable domestic laws stated that, “[a]ssemblies for the purposes of worship in premises belonging to or placed at the disposal of a religious association shall be open to the public. They shall be exempted from [certain requirements], but shall remain under the supervision of the authorities in the interests of public order.”* [↑](#endnote-ref-74)
74. *Op. cit* note 71. [↑](#endnote-ref-75)
75. See *Marsh v. Alabama*, 326 U.S. 501 (1946); See also the case of the *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir 2002), the court found that free speech rights also remained on a portion of the city main street that had been closed to all traffic including speech activities after the City had transferred its ownership to the Church of Latter Day Saints and where the City had retained an easement that explicitly excluded speech activities. The owner of private property has much greater discretion to choose whether to permit a speaker to use his or her property than the government has in relation to publicly owned property. Compelling the owner to make his or her property available for an assembly may, for example, breach their rights to private and family life (Article 8 ECHR), or to peaceful enjoyment of their possessions (Article 1 of Protocol 1, ECHR). See, for example, Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003); Margaret Kohn, *Brave New Neighbourhoods: The Privatization of Public Space* (New York: Routledge, 2004); Kevin Gray, and Susan Gray, “Civil Rights, Civil Wrongs and Quasi-Public Space”, EHRLR 46 [1999]; “Ben Fitzpatrick and Nick Taylor, Trespassers Might be Prosecuted: The European Convention and Restrictions on the Right to Assemble”, EHRLR 292 [1998]; Jacob Rowbottom, “Property and Participation: A Right of Access for Expressive Activities”, 2 EHRLR 186-202 [2005]. [↑](#endnote-ref-76)
76. See for example, UN General Assembly, Resolution on the Protection of Women Human Rights Defenders, UN Doc. A/RES/68/181, 18 December 2013. [↑](#endnote-ref-77)
77. Report of the UN Special Rapporteur (2014)A/HRC/26/29. See, in this context*, Op. cit* note 48 (*Promo Lex and Others v. Moldova*) paras. 22-23. [↑](#endnote-ref-78)
78. See *Maleeha Ahmad et al. v. City of St Louis*, Missouri (Case No. 4:17 CV 2455 CDP), where, in a preliminary injunction, the court ordered the defendant City of St. Louis to not enforce any rule, policy, or practice that would allow law enforcement officials to, among others, declare an assembly unlawful, “unless the persons are acting in concert to pose an imminent threat to use force or violence or to violate a criminal law with force or violence”. See also *op. cit.* note 65 (*Christian Democratic People’s Party v. Moldova* *(No.2)*, para. 23: “The burden of proving the violent intentions of the organisers of a demonstration lies with the authorities.” [↑](#endnote-ref-79)
79. *Op. cit.* note 34 [↑](#endnote-ref-80)
80. For example the ‘Peace Unit’ in Amsterdam (The Netherlands), Anti-conflict-teams in Germany, and Dialogue police in Sweden [↑](#endnote-ref-81)
81. *Op. cit.* note 48 (*Identoba and Others v. Georgia)*, para. 99. [↑](#endnote-ref-82)
82. See, for example, OSCE/ODIHR -Venice Commission, 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 (Strasbourg/Warsaw, 27 June 2008, Opinion-Nr.: FOA – KYR/111/2008), at para. 37.See also *Schneider v. State of New Jersey*, 308 U.S. 147, 152 (1939) (government may not prohibit the distribution of leaflets in traditional public forums, even if it results in a governmental burden of clean-up costs). [↑](#endnote-ref-83)
83. See *Occupy Minneapolis, et al. v. County of Hennepin*, et al. Civ. No. 11-3412, US District Court for the District of Minnesota (Decided November 23, 2011). See also *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), where the law imposing charges to assembly for police services based on costs for maintaining public peace was considered to violate the right to freedom of assembly. [↑](#endnote-ref-84)
84. See *Op.cit.* note 47 (*Oya Ataman v Turkey)* para. 35; (*Gün and Others v. Turkey*) para. 69. Also see *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (the state has a responsibility to protect and not interfere with the expression of ideas even when the ideas are provocative). Note that in the U.S., the failure of state officials to protect and not interfere with freedom of expression or other fundamental rights does not necessarily create a claim enforceable in court; see *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189 (1989). See also *Op. cit.* note 44 (UN Human Rights Committee, General Comment No. 31, para 6). See also the *Op. cit.* note 47 (Report of the UN Special Rapporteur (2013) paras. 2 and 3; and (in relation to the US), Glenn Abernathy, *The Right of Assembly and Association* (Columbia: University of South Carolina Press: 1961), p. 49: “The constitutional guarantee of freedom of assembly means more than merely the absence of improper restrictive measures; it means also the positive protection by responsible officials against hostile groups who would interfere.” [↑](#endnote-ref-85)
85. See OSCE, *Good Practices in Building Police-Public Partnerships by the Senior Police Adviser to the OSCE Secretary General* (2008). [↑](#endnote-ref-86)
86. For example, the organiser may fear that a heavy police presence in a particular location would be perceived by participants as unnecessarily confrontational, and might thus request that the police maintain low visibility# [↑](#endnote-ref-87)
87. Joint Committee on Human Rights, Demonstrating Respect for Rights? Follow-up(London: HMSO, HL Paper 141/ HC 522, 14 July 2009), at para.14. [↑](#endnote-ref-88)
88. Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland, A/HRC/23/39/Add.1, 17 June 2013. [↑](#endnote-ref-89)
89. See “Recommendations for policing political manifestations in Europe”, May 2013, produced by the GODIAC project (Good practice for dialogue and communication as strategic principles for policing political manifestations in Europe), a project managed by the Swedish National Police Board, pp. 42-43, which gave an example where mounted and foot officers were deployed to separate a group of counter protesters who had engaged in verbal aggression and used banners with abusive language. The intervention gave a clear sign that such behaviour would not be tolerated, while at the same time, dialogue officers were deployed to interact with those counter protesters behaving appropriately to reassure them and explain the police action. See also a publication by Her Majesty’s Chief Inspector of the Constabulary (HMIC), *Adapting to Protest: Nurturing the British Model of Policing* (London: HMIC, November 2009), p.54. Moreover, in one UK example, the Metropolitan Police Service used Bluetooth messaging as a means to communicate with protesters during the Tamil protests in 2009, ‘explaining the policing approach and stating their intention not to disperse protesters and to allow the protest to continue. See Joint Committee on Human Rights, Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest? Follow-up: Government’s Response to the Committee’s Twenty-Second Report of Session 2008-09 (London: HMSO, HL Paper 45; HC 328, 3 February 2010) at p.7. [↑](#endnote-ref-90)
90. Report of the UN Special Rapporteur (2016), A/HRC/32/36/Add.2, para. 19: “Notification regimes for assemblies may be permitted under international law norms […]. But such regimes – regardless of how they are labelled – may become de facto authorization requirements if notification is mandatory, particularly when they leave no room for spontaneous assemblies, which are also protected by international human rights law.” [↑](#endnote-ref-91)
91. The Constitutional Court of Georgia annulled part of a relevant law (Article 8, para.5) which allowed a body of local government to *reject* a notification (thus effectively creating a system of prior license rather than prior notification) – see *Georgian Young Lawyers’ Association Zaal Tkeshelashvili, Lela Gurashvili and Others v. Parliament of Georgia* (5 November 2002) N2/2/180-183. The European Court of Human Rights has held that whether an authorization or notification procedure is applied, the purpose of the procedure should be “to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering’”; see *Op. cit.* note 23 (*Sergey Kuznetsov v. Russia*), para. 42. [↑](#endnote-ref-92)
92. See generally *Forsyth County, Georgia v. The Nationalist Movement* 505 U.S. 123 (1992). Such a system derives from US jurisprudence, and approximates a notification system because there is a legal presumption against denial of a permit absent a sufficient showing by the government. See also Nathan Kellum, See also Tabatha Abu El Haj, “All Assemble: Order and Disorder in Law, Politics, and Culture”, *University of Pennsylvania Journal of Constitutional Law*, Vol. 16, No.4, 2014 pp. 949-1040, especially the historical account of permit requirements in the US from p. 970. [↑](#endnote-ref-93)
93. (*Hyde Park v. Moldova (no 3) (2009)* para. 26; *Edwards v. S. Carolina*, 372 U.S. 229, 236-237 (1963). [↑](#endnote-ref-94)
94. Copenhagen Document on the Human Dimension of the Conference of Security and Cooperation in Europe (CSCE), 29 June 1990, para (9.2) [↑](#endnote-ref-95)
95. See *Op. cit.* note 59 (*Hyde Park v. Moldova*), para. 27 in this case, it was emphasized that the reasons for restrictions must be provided by the legally mandated authority. The Court noted that the reasons cited by the Municipality for restricting a demonstration were not compatible with the relevant Assemblies Act, and it was not sufficient that compatible reasons were later given by the Court since the Courts were not the legally mandated authority to regulate public assemblies and could not legally exercise this duty either in their own name or on behalf of the local authorities. [↑](#endnote-ref-96)
96. The terms used in domestic legislation to differentiate between types of assembly must be defined with sufficient clarity – see, for example, *Chumak v. Ukraine* (2018), para. 47. [↑](#endnote-ref-97)
97. See Article 17 of the ECHR stating that “[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at [the] limitation [of the rights and freedoms set forth in the Convention] to a greater extent than is provided for in the Convention”. Also, state authorities should not supplement the permissible legitimate aims set out in international instruments, particularly with arguments based on their own view of the merits of a particular protest, seealso *Op. cit.* note *93 Hyde Park v. Moldova (No.3)* (2009), para26. [↑](#endnote-ref-98)
98. This point has been emphasized by the Council of Europe’s Committee of Ministers. See Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010), para. 16. [↑](#endnote-ref-99)
99. See for example, *op. cit* note 24 *Rassemblement Jurassien Unité Jurassienne v. Switzerland*. [↑](#endnote-ref-100)
100. See e.g. *mutatis mutandis*, *Chassagnou v. France,* Application nos. 25088/94, 28331/95 and 28443/95). [↑](#endnote-ref-101)
101. As such, for example, the dispersal of assemblies must only be used as a measure of last resort (see further paragraphs 165-168, and 173). See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). [↑](#endnote-ref-102)
102. See, for example, *Makhmudov v. Russia* (2007), para. 65. [↑](#endnote-ref-103)
103. *Ibid.*, para. 64. [↑](#endnote-ref-104)
104. *Op. cit.* note 17 (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*), para. 87. See also, *United Communist Party of Turkey and Others v. Turkey*, Application No 19323/92, 30 January 1998, para. 47. For the U.S. standard, see *U.S. v. Alvarez*, U.S., 132 S.Ct. 2537, 2549-2551 (2012) and *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (where the court invalidated an ordinance banning picketing near a school on the ground that the ordinance contained only a ban on labor picketing which was considered discriminatory). [↑](#endnote-ref-105)
105. Hoffman, D. and Rowe, J. *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (2nd edition) (Harlow: Pearson, 2006), p.106. Importantly, the only purposes or aims that may be legitimately pursued by the authorities in restricting freedom of assembly are provided for by Article 21 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11(2) of the ECHR. Thus, the only objectives that may justify the restriction of the right to peaceably assemble are the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) stating that content neutral regulations of public assemblies must be narrowly tailored to serve a significant government interest. [↑](#endnote-ref-106)
106. See, for example, Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), at paras. 29.1 and 32 (English translation): “(29.1)…The extensive prohibitions in the very centre of the city essentially restricts the right of the persons to hold meetings, processions and pickets … (32) … *If protesting is envisaged to take place in the centre, then it is not possible to make the procession move through the outskirts so that it does not disrupt the movement of traffic*…” (emphasis added)); See also the case of *Million Youth March, Inc. v. Safir*, 18 F.Supp.2d 334, 347-348 (S.D.N.Y. 1998), where the court invalidated a restriction requiring a procession to use another venue because the restriction would prevent communication with the intended audience. [↑](#endnote-ref-107)
107. See for example, *Op. cit*. note 17 (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria)*, para. 97, in which the Court held that “the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstra­tions does not automatically amount to a threat to the country’s territorial integrity and national security. […] In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the ex­ercise of the right of assembly as well as by other lawful means.” [↑](#endnote-ref-108)
108. United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985). See also the link between human rights and security made in OSCE commitments, for example, the Charter of Paris (1990) (preamble), noting that “[h]uman rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over mighty State. Their observance and full exercise are the foundation of freedom, justice and peace.” [↑](#endnote-ref-109)
109. OSCE/ODIHR & Venice Commission, Joint Opinion on the Law on Mass Events of the Republic of Belarus, 20 March 2012, para. 933: “The only legitimate restriction on the place of an assembly may be near hazardous facilities that pose a threat to life or safety but only in cases where they are generally not accessible to the public.” [↑](#endnote-ref-110)
110. For a comparison of the English and French texts of the ECHR (and the terms ‘prevention of disorder’, ‘protection of public order’, ‘la défense de l’ordre’ and ‘’ordre public’), see *Perinçek v. Switzerland*, Application No 27510/08, 15 October 2015, paras. 146-151. In the *Brokdorf* decision of the German Federal Constitutional Court (1985) (1 BvR 233, 341/81), for example, ‘public order’ was understood as including the totality of unwritten rules, obedience to which is regarded, as an indispensable prerequisite for an orderly communal human existence within a defined area according to social and ethical opinions prevailing at the time. See also *Kunz v. People of State of New York*, 340 U.S. 290 (1951). [↑](#endnote-ref-111)
111. See *Alekseyev v. Russia* (2010), para. 77, where the Court reiterated that “if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion (see also *Op. cit.* note 17 (*Stankov and the United Macedonian Organisation Ilinden)*, See further UN Human Rights Committee Views (on the Merits) *Nikolai Alekseev v. Russian Federation* (1873/2009), 2 December 2013, U.N. Doc. CCPR/C/109/D/1873/2009, para. 9.6: “[...] an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration. The State party has not provided the Committee with any information in the present case to support the claim that a “negative reaction” to the author’s proposed picket by members of the public would involve violence or that the police would be unable to prevent such violence if they properly performed their duty"; Cf. also *op. cit.* note 102.  [↑](#endnote-ref-112)
112. Op. cit note 47 (*Gün and Others v. Turkey*) paras. 49-50. [↑](#endnote-ref-113)
113. *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (No. 2)*, Application No 37586/04, 8 October 2011*),* para. 134. [↑](#endnote-ref-114)
114. While Article 11(2) ECHR speaks of ‘the prevention of disorder or crime’, Article 21 ICCPR does not specifically mention the prevention of crime as a legitimate aim. [↑](#endnote-ref-115)
115. *Schwabe and M.G. v. Germany* (2011), para. 85. [↑](#endnote-ref-116)
116. *Shimovolos v. Russi*a, Application No 30194/09, 21 June 2011, para. 55. [↑](#endnote-ref-117)
117. Manfred Nowak’s commentary on the ICCPR cites assemblies near or passing ‘natural-protection or water-conservation grounds’ (in relation to public health) as a particular example. See Nowak, p. 493. [↑](#endnote-ref-118)
118. For criticism of a legislative provision relating to morality, see <<http://www.bahrainrights.org/node/208>> and <<http://hrw.org/english/docs/2006/06/08/bahrai13529.htm>>. Manfred Nowak’s commentary on the ICCPR cites assemblies near or passing ‘holy locations or cemeteries’ (in relation to morality) as a particular example. See Nowak, p. 493. [↑](#endnote-ref-119)
119. UN Human Rights Committee, General comment No. 34, para. 32. See also *Norris v. Ireland*, Application No 10581/83, 26 October 1988, paras. 44-46. It is noteworthy that ‘public morals’ as a legitimate ground for limiting freedom of assembly is not synonymous with the moral views of the holders of political power: see Judgment of the Polish Constitutional Tribunal, 18th January 2006, K 21/05, *Requirement to Obtain Permission for an Assembly on a Public Road* (English translation), available at <<http://trybunal.gov.pl/fileadmin/content/omowienia/K_21_05_GB.pdf>>. But see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, (1952) (holding that a statute authorizing denial of permits to show films that are “sacrilegious” violates the right to freedom of speech). [↑](#endnote-ref-120)
120. In the American case of *Schneider v. State of New Jersey*, 308 U.S. 147 (1939), it was held that there was a right to distribute leaflets even though the leafleting caused litter. In *Collin v. Chicago Park District*, 460 F.2d 746 (7th Cir. 1972), it was held that there was a right to assemble in open areas that the park officials had designated as picnic areas. In *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Osterreich* (C-112/00, judgment of 12 June 2003), the Court of Justice of the European Union (hereinafter CJEU) held that allowing a demonstration which blocked the Brenner Motorway between Germany and Italy for almost 30 hours was *not* a disproportionate restriction on the free movement of goods under Article 28 EC Treaty. This was for three reasons: (1) the disruption was a relatively short duration and on an isolated occasion; (2) measures had been taken to limit the disruption caused; (3) excessive restrictions on the demonstration could have deprived the demonstrators of their rights to expression and assembly, and indeed possibly caused greater disruption. In the case of *Shell Netherlands v Greenpeace*,the Amsterdam District permitted protests to be held on privately owned property (garage forecourts) even where these disrupted the commercial activity of the garages (by blocking access to the petrol pumps). The Court noted that “[a] company such as Shell, which performs or wishes to perform activities that are controversial in society, and to which many people object, can and must expect that action will be taken to try to persuade it to change its views.” While the Court did impose a number of stringent conditions on such protests, Shell’s proprietary interests were not viewed as an automatic bar on protest activity. See, *Case number: 525686/KG ZA 12-1250*. The judgment (in Dutch) is available at: <<http://uitspraken.rechtspraak.nl/#ljn/BX9310>>. For a summary (in English) see, ‘Dutch court rejects Shell protest ban’ (5 October 2012), available at: <<http://www.bbc.co.uk/news/world-europe-19853007>>. [↑](#endnote-ref-121)
121. Rights that may be claimed may also extend beyond those enumerated in the ICCPR or ECHR. However, insofar as other non-­Convention rights are concerned, only ‘indisputable imperatives’ can justify the imposition of restrictions on public assemblies. See, for example, *op. cit*. note 100, para.113: “It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect ‘rights and freedoms’ not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.” This clearly sets a high threshold: there must be a verifiable impact (‘indisputable’) on the lives of others requiring that objectively necessary (‘imperative’) steps be taken. It is not enough that restrictions are merely expedient, convenient or desirable. [↑](#endnote-ref-122)
122. *Király and Dömötör v. Hungary*, Application No 10851/13, 17 January 2017, paras. 80-82. The right to ‘private life’ covers the physical and moral integrity of the person, see for example, *X and Y v. The Netherlands*, Application No 8978/80, 26 March 1985, para. 22. The State must not merely abstain from arbitrary interference with the individual, but also positively ensure *effective* respect for private life. This can extend even in the sphere of relations between individuals. Where it is claimed that a right to privacy is affected by freedom of assembly, the authority should seek to determine the validity of that claim, and the degree to which it should tolerate a temporary burden. The case of *Moreno Gómez v. Spain*, Application No 4142/02, 16 November 2004, might give some indication of the high threshold that must first be overcome before a violation of Article 8 can be established.In the case of *Frisby v. Schultz*, 487 U.S. 474 (1988), the court upheld a statute prohibiting protest activities focused on a private home because it was limited to activities that invaded the privacy of the home’s occupants. [↑](#endnote-ref-123)
123. See, for example, *op. cit*. note 100, see *Gustafsson v. Sweden,* Application No 15573/89, 25 April 1996). The right to peacefully enjoy one’s possessions has been strictly construed by the European Court of Human Rights so as to offer protection only to proprietary interests. Moreover, a particularly high threshold must first be met before the exercise of this right would justify restrictions on peaceful assemblies. Businesses, for example, benefit from being in public spaces and, as such, should be expected to tolerate alternative uses of that space. See also, however, the case of *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), where the court upheld the right of owners of a shopping center to exclude protesters pursuant to state trespass laws. However, in the U.S., states can define private property rights to include a right of access for protestors where the property has been opened to the general public, see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). [↑](#endnote-ref-124)
124. Note, however, that Article 5 ECHR is concerned with the total deprivation of liberty, not with mere restrictions upon movement (which might be covered by Article 2 of Protocol 4 on the freedom of movement). This distinction between deprivation of, and mere restriction upon, liberty has been held to be ‘one of degree or intensity, and not one of nature or substance’. See *Guzzardi v. Italy*, Application No 7367/76, 6 November 1980, para. 92, and *Ashingdane v. the United Kingdom*, Application No 8225/78, 28 May 1985, para. 41. See also *R (on the application of Laporte) v. Chief Constable of Gloucester Constabulary* [2006] UKHL 55; and *Austin and Saxby v. Commissioner of Police of the Metropolis* [2009] UKHL 5. For critique of the latter judgment, see David Mead, “Of Kettles, Cordons and Crowd Control: Austin v. Commissioner of Police for the Metropolis and the Meaning of ‘Deprivation of Liberty” 3 *EHRLR* 376-394 (2009); Helen Fenwick, *Marginalising human rights: breach of the peace, “kettling”, the Human Rights Act and public protest*. Public Law, 2009, pp. 737-765. [↑](#endnote-ref-125)
125. As already stated by the European Court of Human Rights, albeit in the limited circumstances of the case of *Op. cit* note 28and *Janskovsis v. Lithuania* (2017), [↑](#endnote-ref-126)
126. UN General Assembly resolution of 27 June 2016 on the Promotion, protection and enjoyment of human rights on the Internet”, A/HRC/32/L.20, para. 5. [↑](#endnote-ref-127)
127. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, in particular, paras. 67, 78, 79 and 85. [↑](#endnote-ref-128)
128. *Op. cit.* note 119 (UN Human Rights Committee, General Comment No. 34), para. 15. [↑](#endnote-ref-129)
129. M O’Flaherty, “Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests: a background paper”, 2014, p. 9, section 3.7: “[…] these modern technologies have changed traditional notions of the “human rights space” – in this regard it has been suggested that the right to peaceful assembly also applies to online protests.” Available at: <<https://www.ohchr.org/documents/issues/fassociation/seminar2013/backgroundpaperseminar.doc>>. [↑](#endnote-ref-130)
130. *Op. cit.* note 119 (UN Human Rights Committee, General Comment No. 34), para. 34. [↑](#endnote-ref-131)
131. The European Court of Human Rights has articulated a broader interpretation of the ‘freedom to receive information’, thereby recognizing a right of access to information; see *Op.cit.* note 17 (*Handyside v. the United Kingdom*) para. 49, and *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, Application No 38433/09, 7 June 2012,para. 131. [↑](#endnote-ref-132)
132. See, Part 1 (Measures to Ensure Public Access to Laws, Policies and Information Necessary to Safeguard Protest Rights) of the Principles and Guidelines on Protest and the Right to Information: Information that the Police, Prosecuting and Other Decision-Making Authorities should generate, and make available to the Public, concerning the Management of Protests, Open Society Justice Initiative (OSJI) and the Committee on the Administration of Justice (CAJ), 2018. [↑](#endnote-ref-133)
133. See, for example, the website of the Parades Commission in Northern Ireland, at: <<http://www.paradescommission.org>>. [↑](#endnote-ref-134)
134. See Joint Report of the UN Special Rapporteurs (2016) A/HRC/31/66, para. 80. See also Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression. One example of good practice is provided by the Northern Ireland Parades Commission which publishes details of all notified parades and related protests in Northern Ireland categorized according to the town in which they are due to take place. See further <<http://www.paradescommission.org>>. [↑](#endnote-ref-135)
135. ‘Principles and Guidelines on Protest and the Right to Information’. [↑](#endnote-ref-136)
136. *Op. cit.* note 77 (Report of the UN Special Rapporteur), paras. 34 and 40. [↑](#endnote-ref-137)
137. See *Joint report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, A/HRC/31/66, of 4 February 2016, para. 80. [↑](#endnote-ref-138)
138. See for example, Report of the UN Special Rapporteur (2011), A/HRC/17/27, paras. 61-66; and OSCE Recommendation 25 on Access to Information from the Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes, Vienna 15-16 April 2015. [↑](#endnote-ref-139)
139. The UN Code of Conduct for Law Enforcement Officials, (UN General Assembly resolution 34/169 of 17 December 1979), together with relevant international human rights standards and publications should form the core of any law enforcement training. See also OSCE Guidebook on Democratic Policing (2008); UN, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Council of Europe, European Code of Police Ethics (2001); UN OHCHR, Commentary to the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, July 2011, p. 32. See also, for example, Article 15, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which provides that “[t]he State has the responsibility to promote and facilitate the teaching of human rights and fundamental freedoms at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teaching in their training programme.” See also OSCE Guidelines on HRE for law enforcement officials p. 16: “Considering the pivotal role law enforcement officials play in respecting, protecting and fulfilling human rights, human rights should be an integral part of all training for law enforcement officials such as in investigation and arrest, the use of firearms and force, and reporting and communication with the public. This is necessary in order to ensure human rights-based training does not become dissociated from operational reality. Thus, an integrated holistic approach, rather than just teaching human rights as a separate subject, is encouraged.” See also, UN OHCHR Code of Conduct for Law Enforcement Officials, 17 December 1979. [↑](#endnote-ref-140)
140. See for example, *Op. cit.* note 67 (UN Human Rights Council, Resolution on the Promotion and Protection of Human Rights in the Context of Peaceful Protests), para. 15. [↑](#endnote-ref-141)
141. See, for example, *op. cit*. note 102, para. 68. [↑](#endnote-ref-142)
142. *Op. cit.* note 52 (*Lashmankin and Others v. Russia*), para. 343. [↑](#endnote-ref-143)
143. Concluding observations of the Human Rights Committee, Poland, CCPR/C/POL/CO/6, 27 October 2010, para. 23 (on the 2010 Assemblies Act): “the length of the appeals procedure against a prohibition to hold an assembly may jeopardize the enjoyment of the right of peaceful assembly.” In light of this, the Committee recommended that Poland, “should introduce legislative amendments to the Assemblies Act in order to ensure that appeals against a ban to hold a peaceful assembly are not unnecessarily protracted and are dealt with before the planned date.” See also, *Bączkowski and Others v. Poland* (2007), paras. 68-78, affirming that the organisers of a public event were entitled to judicial remedy before the date of the planned event. See also Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), paras. 24.4. See further *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (requiring an expeditious review of a court decision upholding a permit denial). [↑](#endnote-ref-144)
144. *Op. cit.* note 52 (*Lashmankin and Others v. Russia*), para. 350. [↑](#endnote-ref-145)
145. *Ibid.* See also *Bączkowski v. Poland* (2007), paras. 81-84. [↑](#endnote-ref-146)
146. *Op.cit.* note 69*.* [↑](#endnote-ref-147)
147. For example, Article 3, Law on Assemblage and Manifestations in the Republic of Georgia (1997, as amended 2009) defines separate roles for ‘Principal’, ‘Trustee’, ‘Organiser’, and ‘Responsible Persons’. [↑](#endnote-ref-148)
148. See, for example, Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), at para.34.4 (English translation): “… The requirement to appoint extra keepers of public order in all the cases, when peaceful process of the activity is endangered, exceeds the extent of the collaboration duty of a person.” [↑](#endnote-ref-149)
149. See also *Op. cit.* note 77 (Report of the UN Special Rapporteur, paras. 32-33. For a discussion of this issue, see also Network for Policing Monitoring, 22 May 2015, “Why Cover up? The need for Protest Anonymity”, <<https://netpol.org/2015/05/22/why-cover-up-the-case-for-protest-anonymity/>>. [↑](#endnote-ref-150)
150. See, for example, the Polish Constitutional Court judgment of 10 July 2004 (Kp 1/04); *Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004) (upholds an anti-mask statute where use of masks had no expressive value); *Ryan v. Cnty. of DuPage*, 45 F.3d 1090 (7th Cir. 1995) upholds the prohibition of the use of masks where the mask implied intimidation). However, see *City of* *Dayton v. Esrati*, 125 Ohio App. 3d 60, 707 N.E.2d 1140 (1997) (overturning a conviction for wearing a “ninja” mask at a government commission meeting because the prosecution was based on the purely expressive nature of the conduct). [↑](#endnote-ref-151)
151. *Ibid.* [↑](#endnote-ref-152)
152. The European Court of Human Rights has previously considered that “notification, and even authorisation procedures, for a public event do not normally encroach upon the essence of the right under Article 11 of the Convention *as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly*” (emphasis added). See, amongst other authorities, *Op, cit.* note 52 (*Lashmankin and Others v. Russia*), para. 147. See also the Human Rights Committee’s Concluding Comments on Morocco [1999] UN doc. CCPR/C/79/Add.113, para. 24: “The Committee is concerned at the breadth of the requirement of notification for assemblies and that the requirement of a receipt of notification of an assembly is often abused, resulting in de facto limits of the right of assembly, ensured in article 21 of the Covenant. The requirement of notification should be restricted to outdoor assemblies and procedures adopted to ensure the issue of a receipt in all cases.” [↑](#endnote-ref-153)
153. *Op.cit..* note 47 (*Oya Ataman v Turkey*) para. 38. [↑](#endnote-ref-154)
154. , *Novikova and Others v. Russia,* Application Nos 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, 26 April 2016, para. 163. [↑](#endnote-ref-155)
155. For example in Ireland. At the same time, organisers in Ireland may of their own accord notify the appropriate local police station prior to conducting an assembly. 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 of the 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. See, in relation to the United States, Nathan W. Kellum, “Permit Schemes: Under Current Jurisprudence, what Permits are Permitted?”, *Drake Law Review*, Vol. 56, No.2, 2008, p. 381. [↑](#endnote-ref-156)
156. *Op. cit.* note 24 *Rassemblement Jurassien Unité Jurassienne v. Switzerland* p. 119. U.S. courts have approved a permit requirement which does not include assessment of the content of the assembly’s message and which presumes a right of access to public forums. See *Cox v. State of New Hampshire*, 312 U.S. 569, 573-575 (1941) (stating that any permit requirement must be limited to considerations of time, place, and manner restrictions unrelated to content). **C. Edwin Baker proposed a system of voluntary (rather than mandatory) notification whereby those who do provide advance notification might obtain additional benefits by doing so. See, “Mandatory Parade Permits”, chapter 7 in C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press**, 1993), pp.138-160. See also Tabatha Abu El-Haj. “All Assemble: Order and Disorder in Law, Politics, and Culture” *University of Pennsylvania Journal of Constitutional Law* Vol. 16, 2014, p. 949. [↑](#endnote-ref-157)
157. See Op. cit. note 7 (U.N. Human Rights Committee, *Kivenmaa v. Finland,* para 9.2. The European Court of Human Rights has held that since States have a right to require notification, ‘they must be able to apply [proportionate] sanctions to those who participate in demonstrations that do not comply with the requirement’. See *Op. cit.* note 33 (*Ziliberberg v. Moldova*, admissibility decision). Similarly, in *Rai and Evans v. United Kingdom*, Application nos. 26258/07 and 26255/07, admissibility decision of 17 November 2009, the imposition of a low-level fine for failure to comply with a lawful authorization requirement covering assemblies in a limited, security-sensitive area, was held to be proportionate and so did not constitute a violation of Article 11 ECHR. [↑](#endnote-ref-158)
158. The United Kingdom does not impose a prior notification requirement for static assemblies (s.11 of the *Public Order Act* 1986 requires advance notification only for certain public processions), while Armenia does not require notification for assemblies with fewer than 100 participants (Article 9, Law on Freedom of Assembly, Republic of Armenia, adopted 14 April 2011). See, further, Neil Jarman and Michael Hamilton, “Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly”, *Journal of Human Rights Practice* Vol. 1 No.2, 2009, pp. 208-235 at p.218; and Chicago Park District Code Chapter 7 C.3.8 (1) (stating that no permit or notice is required for an assembly of less than 50 persons); See also *Cox v. City of Charleston*, 416 F.3d 281, 284-287 (4th Cir. 2005). [↑](#endnote-ref-159)
159. See, for example, Nathan Kellum, p.425, concluding that “authoritative precedent supports the view that permit schemes should be limited in scope” and ‘[“[i]ndividuals and small group gatherings should never be subjected to such tedious requirements.” See *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005), where the court stated that “permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.” [↑](#endnote-ref-160)
160. *Op. cit.* note 90 Report of the UN Special Rapporteur (2016), para. 19. [↑](#endnote-ref-161)
161. The Constitutional Court of Georgia annulled part of a relevant law (Article 8, para.5) which allowed a body of local government to *reject* a notification (thus effectively creating a system of prior license rather than prior notification) – see *op. cit.* note 91 (*Georgian Young Lawyers’ Association Zaal Tkeshelashvili, Lela Gurashvili and Others v. Parliament of Georgia*)(5 November 2002) N2/2/180-183; see *Op. cit.* note 23 *Sergey Kuznetsov v. Russia* (2008), para. 42. [↑](#endnote-ref-162)
162. See generally *Forsyth County, Georgia v. The Nationalist Movement* 505 U.S. 123 (1992). Such a system derives from US jurisprudence, and approximates a notification system because there is a legal presumption against denial of a permit absent a sufficient showing by the government. See also Nathan Kellum, see also Tabatha Abu El Haj, “All Assemble: Order and Disorder in Law, Politics, and Culture”, *University of Pennsylvania Journal of Constitutional Law*, Vol. 16, No.4, 2014 pp. 949-1040, especially the historical account of permit requirements in the US from p. 970. [↑](#endnote-ref-163)
163. *Op. cit.* note 97, para. 26; *Edwards v. S. Carolina*, 372 U.S. 229, 236-237 (1963). [↑](#endnote-ref-164)
164. *Sáska v. Hungary* (2012), para. 21: “[f]or the Court, the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of Article 11.” [↑](#endnote-ref-165)
165. *Op. cit.* note 52 (*Lashmankin and Others v. Russia*) para 417. [↑](#endnote-ref-166)
166. Joint Report of the UN Special Rapporteurs (2016), A/HRC/31/66, para. 30. At the same time, as noted in *Cox v. Louisiana,* 379 U.S. 536 (1965): “The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.” [↑](#endnote-ref-167)
167. See, for example, *Çiloğlu and Others v. Turkey*, Application no. 73333/01, 6 March 2007, (in French only), in which the Court noted that unlawful weekly sit-ins (every Saturday morning for over three years) of around 60 people in front of a High School in Istanbul had become an almost permanent event which disrupted traffic and clearly caused a breach of the peace. It thus found that when dispersing the assembly, the authorities had reacted within the margin of appreciation afforded to States in such matters. Similarly, in *Op. cit.* note 73 (*Cisse v. France*), paras. 39-40, the evacuation of a church in Paris which a group of 200 illegal immigrants had occupied for approximately two months was held to constitute an interference (albeit justified on public health grounds, para.52) with the applicant’s right to freedom of peaceful assembly. Also worth noting is the UK case concerning ‘Aldermaston Women’s Peace Camp’ (AWPC) which, over the past 23 years, had established a camp on government owned land close to an Atomic Weapons Establishment. The women camped on the second weekend of every month during which time they held vigils, meetings and distributed leaflets. In the case of *Tabernacle v. Secretary of State for Defence* [2009], a 2007 by-law which attempted to prohibit camping in tents, caravans, trees or otherwise in ‘controlled areas’ was held to violate the appellant’s rights to freedom of expression and assembly. The court noted that the particular manner and form of this protest (the camp) had acquired symbolic significance inseparable from its message. [↑](#endnote-ref-168)
168. *Op. Cit* note 12, para. 42, and *Barraco v. France* (2009),Application 31684/05, Judgment of 5 March 2009, see press statement: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-2657205-2899486&filename=003-2657205-2899486.pdf> . In finding a violation of Article 11 ECHR in the case of *Balcik and Others v. Turkey* (2007), para 51: “the Court noted that since the rally at issue in the case began at about noon and ended with the group's arrest within half an hour at 12.30 p.m., it was “particularly struck by the authorities’ impatience in seeking to end the demonstration.” [↑](#endnote-ref-169)
169. See, for example, *Op. cit.* note 52 (UN Human Rights Committee No 1948/2010 (10 September 2013), *Turchenyak et al v. Belarus)*: [↑](#endnote-ref-170)
170. See Report *Op. cit* note 49 (Report of the UN Special Rapporteur), paras.39-41. As another example, see Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), para. 29.1 (English translation): ‘Inelastic restrictions, which are determined in legal norms as absolute prohibitions, are very rarely regarded as the most considerate measures.’See also *United States v. Grace*, 461 U.S. 171, 103 (1983), which invalidates a statute banning displays of protest signs and banners on the public sidewalks and grounds adjacent to the U.S. Supreme Court for lack of appropriate justification; *Op. cit.* note 49 (*New York Times v. United States)* )and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971). [↑](#endnote-ref-171)
171. Joint Report of UN Special Rapporteurs (2016), A/HRC/31/66, para. 30: “To this end, blanket bans, including bans on the exercise of the right in specific places […], are intrinsically disproportionate, because they preclude consideration of the specific circumstances of each proposed assembly.” [↑](#endnote-ref-172)
172. Republic of Latvia Constitutional Court, Judgment in the matter No. 2006 - 03 - 0106 (23 November 2006) [paras.29.1 and 32; English translation]: “If protesting is envisaged to take place in the centre, then it is not possible to make the procession move through the outskirts so that it does not disrupt the movement of traffic…” *Schneider v. State of New Jersey*, 308 U.S. 147, 151-52 (1939) cited in footnote 69. (“[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”). See also, Armijo, Enrique, ‘The Ample Alternative Channels Flaw in First Amendment Doctrine’, 73 *Wash. & Lee L. Rev.* 1657 (2016). [↑](#endnote-ref-173)
173. OSCE/ODIHR 10 February 2014, Opinion on Amendments to Certain Laws of Ukraine Passed on 16 January 2014, Opinion-Nr.: GEN -UKR/244/2014 [RJU], para. 59: “[…] imposing criminal liability for all activities that block access to public and private buildings, however temporary, would potentially criminalize any larger assembly that takes place near a building. At the same time, depending on the circumstances, smaller assemblies would also be affected, e.g. if there is only one access road to a particular government building which forms the target of the message of participants in a peaceful assembly.**”** [↑](#endnote-ref-174)
174. OSCE/ODIHR Venice Commission 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 (Strasbourg/Warsaw, 27 June 2008), Opinion-Nr.: FOA – KYR/111/2008), para. 26. [↑](#endnote-ref-175)
175. *Yilmaz Yildiz and others v. Turkey*, Application No 4524/06, 14 October 2014, para. 43: “The Court observes that although the applicants gathered to demonstrate in an area that had been prohibited by the relevant authorities, their intention was to participate in a debate on matters of public interest, namely the transfer of SSK hospitals to the Ministry of Health. The participants held a peaceful demonstration and did not cause any disruptions in the entrance of the hospitals; they also allowed patients to enter the hospitals. Moreover, there is no evidence to suggest that the demonstrators either presented a danger to public order or engaged in acts of violence.” [↑](#endnote-ref-176)
176. OSCE/ODIHR Venice Commission 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 (Strasbourg/Warsaw, 27 June 2008), Opinion-Nr.: FOA – KYR/111/2008), at paras. 23-28. [↑](#endnote-ref-177)
177. See *Op. cit.* note 53 (*Bay Area Peace Navy v. United States)*, where a restriction preventing protestors from entering a government designated buffer zone was declared null and void because it denied protestors access to their audience. [↑](#endnote-ref-178)
178. *Ward v. Rock Against Racism* 491 U.S. 781 (1989):“The city's sound amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert-ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression.” [↑](#endnote-ref-179)
179. In this context, see *Frumkin v. Russia*, Application No 74568/12, 5 January 2016, para. 107: “The Court notes that although Article 11 of the Convention does not guarantee a right to set up a campsite at a location of one’s choice, such temporary installations may in certain circumstances constitute a form of political expression, the restrictions of which must comply with the requirements of Article 10 § 2 of the Convention”. See also, *Nosov and Others v. Russia*Applications Nos 9117/04 and 10441/04, 20 February 2014 [↑](#endnote-ref-180)
180. OSCE/ODIHR 10 February 2014, Opinion on Amendments to Certain Laws of Ukraine Passed on 16 January 2014, Opinion-Nr.: GEN -UKR/244/2014 [RJU], <<http://www.legislationline.org/documents/id/18720>>, para. 50: “[t]he amendments introduce a permission system for a number of means of organizing assemblies, meaning that any kind of structure or sound equipment used for assemblies, be it a more short-term structure such as a stage, or amplifiers, or a potentially longer-term structure such as tents, would require prior authorization by the interior authorities. Such regulation significantly affects the ability to organize large-scale assemblies, which rely on stages, and sound amplifiers to convey their message”; and para. 52: “[t]he blanket limitation of such devices, which practically renders every large-scale public assembly dependent on the authorization of the police, is a disproportionate...” [↑](#endnote-ref-181)
181. *Fáber v. Hungary* (2012), paras. 56-59; cf. also the ‘Red Star’ case of *Vajnai v. Hungary*, Application No 33629/06, 8 July 2008, para. 49, where the Court found that there was ”no real and present danger of any political movement or party restoring the Communist dictatorship.”; cf. *Lehideux and Isorni v. France,* (55/1997/839/1045)*,* 23 September 1998. In the case of *Op. cit.* note 17 (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*), the Court rejected the Bulgarian government’s assertion that national security concerns arose, noting that “the context of the difficult transition from totalitarian regimes to democracy, and due to the attendant economic and political crisis, tensions between cohabiting communities … were particularly explosive.” See also *Association of Citizens Radko & Paunkovski v. the Former Yugoslav Republic of Macedonia*, Application No [74651/01](http://hudoc.echr.coe.int/eng#{"appno":["74651/01"]}), 15 January 2009. [↑](#endnote-ref-182)
182. Article 20(2) ICCPR. See also Article 4 a) of the CERD, which requires states to declare all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, as well as any assistance to racist activities, as offences punishable by law. [↑](#endnote-ref-183)
183. Op. cit. note 119 (Human Rights Committee, General Comment 34, para. 50-52):

As the Human Rights Committee has noted in the context of freedom of expression, “Articles 19 and 20 [ICCPR] are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19”. [↑](#endnote-ref-184)
184. UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, “Report on Ten Areas of Best Practices in Countering Terrorism” A/HRC/16/51, 22 December 2010, paras. 27-28 (and Practices 7 and 8), where the Special Rapporteur notes that it is important for States to ensure that terrorism and associated offences are properly defined, accessible, formulated with precision, non-discriminatory, and non-retroactive. See also *Op. cit* note 49 (Report of the UN Special Rapporteur), para. 84(d) which recommends “[t]o strictly and narrowly define the offence of terrorism in line with international law”. See also *Op. cit.* note 119 (UN Human Rights Committee, General Comment 34, para. 46): “[s]uch offences as ‘encouragement of terrorism’, and “extremist activity” as well as offences of ‘praising’, ‘glorifying’, or ‘justifying’ terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression”; and OSCE/ODIHR, *Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism* (Warsaw: ODIHR, 2014), p. 27-30. [↑](#endnote-ref-185)
185. See also paragraph 25 of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. [↑](#endnote-ref-186)
186. *Lawless v. Ireland* (No. 3), Application No 332/57, 1 July 1961, para. 28. See also, UN Human Rights No. 29, Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, especially para. 3. The Siracusa Principles, Annex, UN Doc E/CN.4/1984/4 (1984) at paras. 40-41, emphasize that neither ‘[e]conomic difficulties per se’ nor ‘[i]nternal conflict and unrest that do not constitute a grave and imminent threat to life of the nation’ can justify derogations under Article 4. See also, the Questiaux Principles: Nicole Questiaux, Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, UN doc. E/CN.4/Sub.2/1982/15, 27 July 1982. [↑](#endnote-ref-187)
187. UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, of 27 February 2018, paras. 7 and 12. [↑](#endnote-ref-188)
188. UN Human Rights Committee, General Comment No. 29, para. 2; notified to other State parties through the intermediary of the UN Secretary General (Article 4(3) ICCPR), the Secretary General of the Council of Europe (Article 15(3) ECHR) and the OSCE (Paragraph 28.10, Moscow Meeting of the Conference on the Human Dimension, 1991). The human rights and fundamental freedoms to be restricted must be explicitly mentioned. [↑](#endnote-ref-189)
189. *Ibid*, (UN Human Rights Committee, General Comment No. 29), para. 2. [↑](#endnote-ref-190)
190. *Ibid,* para. 4. [↑](#endnote-ref-191)
191. *Ibid*, para. 5: “the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations [of emergency] and no derogation from the provisions in question would be justified by the exigencies of the situation.” [↑](#endnote-ref-192)
192. See, Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, A/HRC/37/52, 27 February 2018, para. 49. [↑](#endnote-ref-193)
193. *Op. cit.* note 4 [↑](#endnote-ref-194)
194. See, for example, Mary O’Rawe, “Human Rights and Police Training in Transitional Societies: Exporting the Lessons of Northern Ireland”, *Human Rights Quarterly*, Vol. 27, No. 3, 2005, pp. 943-968; Mary O’Rawe, “Transitional Policing Arrangements In Northern Ireland: The Can’t And The Won’t Of The Change Dialectic”, *Fordham International Law Journal*, Vol. 26, No.4, 2003, pp.1015 -1073. [↑](#endnote-ref-195)
195. For example, *Op. cit.* note 139 (OSCE *Guidebook on Democratic Policing)*; (UN, “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials)”; [↑](#endnote-ref-196)
196. The extent and nature of police training may be relevant in assessing whether a State has fulfilled its positive obligations under Article 2 ECHR – see, for example, *McCann v. United Kingdom*, Application No 18984/91, 27 September 1995, para.151. [↑](#endnote-ref-197)
197. *Op. cit* note 49 (Report of the UN Special Rapporteur), para. 47. [↑](#endnote-ref-198)
198. See for example, *Op. cit.* note 77 (Report of the UN Special Rapporteur, para. 74 (e); and *Op. cit* note 49 (Report of the UN Special Rapporteur), para. 47; Council of Europe, European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, 29 June 2007; recommendation 17, available at: <<https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.11>> , see op. cit note 139 OSCE, (*Guidebook on Democratic Policing)*, paras. 133 and 150; OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders* (ODIHR: Warsaw, 2014), paras. 59-60; and OSCE, *Annex to Decision No. 3/03 on Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area*, MC.DEC/3/03, 2 December 2003, para. 26, which calls upon OSCE participating States to “[d]evelop policies that promote awareness among law enforcement institutions regarding the situation of Roma and Sinti people and that counter prejudice and negative stereotypes". [↑](#endnote-ref-199)
199. Op. cit. note 48 (*Identoba and Others v. Georgia*): where the Court noted the lack of “careful preparatory work” of state authorities despite the “generous period of nine days”. [↑](#endnote-ref-200)
200. Special measures may also be taken to address the rights and needs of persons with disabilities and groups at risk, such as women, indigenous peoples and groups who face discrimination on the grounds of sexual orientation and/or gender identity; *Op. cit* note 47 (Report of the UN Special Rapporteur (2013), para. 69. [↑](#endnote-ref-201)
201. *Op. cit.* note 4*,*p. 50. [↑](#endnote-ref-202)
202. *Op. cit.* note 89 (“Recommendations for policing political manifestations in Europe”, and (*Adapting to Protest: Nurturing the British Model of Policing*. Moreover, in one UK example, the Metropolitan Police Service used Bluetooth messaging as a means to communicate with protesters during the Tamil protests in 2009, ‘explaining the policing approach and stating their intention not to disperse protesters and to allow the protest to continue. See Joint Committee on Human Rights, Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest? Follow-up: Government’s Response to the Committee’s Twenty-Second Report of Session 2008-09 (London: HMSO, HL Paper 45; HC 328, 3 February 2010) at p.7. [↑](#endnote-ref-203)
203. See the European Code of Police Ethics, Recommendation Rec(2001)10, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, para. 45 and related explanatory memorandum, which state that during police interventions, police personnel shall normally be in a position to give evidence of their police status and professional identity, “as otherwise personal accountability, seen from the perspective of the public, becomes an empty notion”. The identification of the police officer does not, however, imply that his/her name will be revealed. [↑](#endnote-ref-204)
204. M. Costas Trascasas, “Protecting the right to protest in armed conflict”, in *The War Report 2014*. Oxford, 2015, p. 545. [↑](#endnote-ref-205)
205. OHCHR, Report on the Human Rights situation in Ukraine, 16 September 2014, par. 178 r. [↑](#endnote-ref-206)
206. *Op. cit* note 49 (Report of the UN Special Rapporteur), para. 36. [↑](#endnote-ref-207)
207. *Op.* cit note 139 (UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), Principle 5 and paras, 13-14. [↑](#endnote-ref-208)
208. *Ibid*, Principle 13. *Graham v. Connor*, 490 U.S. 386 (1989) (objectively unreasonable use of force by police gives rise to a claim for damages by victim). [↑](#endnote-ref-209)
209. See, in this context, *Op. cit*. note 78 (*Maleeha Ahmad et al. v. City of St Louis, Missouri*). See also *Op.* cit. note 4, pp. 71-72 and 76-81. [↑](#endnote-ref-210)
210. *Op. cit*. note 139 (UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials), para.1. [↑](#endnote-ref-211)
211. See *op. cit.* note 4, p. 30. [↑](#endnote-ref-212)
212. See HRC Concluding Observations: Canada, UN Doc. CCPR/C/CAN/CO/5 (2005) para. 20. [↑](#endnote-ref-213)
213. HRC Concluding Observations, Burkina Faso, UN Doc. CCPR/C/BFA/CO/1 (2016), para 37: “concern that punishment of acts of vandalism committed during demonstrations on the public highway, is not in conformity with the Covenant, and notably with the principle of the presumption of innocence and individual criminal responsibility, as it allows for every member of a group to be held criminally responsible, regardless of whether the perpetrator of the offence has been identified or not.” [↑](#endnote-ref-214)
214. See for example, U.S. District Court, Southern District of New York, 30 September 2012, *Hacer Dinler et al. v. The City of New York,* No. 04 Civ 7921 (unpublished) pp. 4-7, regarding the unconstitutional nature of ‘group probable cause’. Also see *Ybarra v. Illinois,* 444 U.S. 85, 91 (1975) (individualized, not group, probable cause required to search or seize an individual)*.*  [↑](#endnote-ref-215)
215. “Climate conference mass arrests illegal, court upholds”, January 25, 2012 <<http://cphpost.dk/news/climate-conference-mass-arrests-illegal-court-upholds.628.html>>; “More demonstrators may receive police compensation”, February 3, 2012 <<http://cphpost.dk/news/more-demonstrators-may-receive-police-compensation.717.html>>, “Mass arrests after football game may have been illegal”, December 3, 2013 <<http://cphpost.dk/news/mass-arrests-after-football-game-may-have-been-illegal.7977.html>>. [↑](#endnote-ref-216)
216. See further, UN Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and Security of Person), CCPR/C/GC/35, 16 December 2014; *Brega and Others v. Moldova*, Application No 61485, 24 January 2012, paras. 37-44. [↑](#endnote-ref-217)
217. US Justice Department (Civil Rights Division), Investigation of the Ferguson Police Department”, March 4, 2015: “Even profane backtalk can be a form of dissent against perceived misconduct. In the words of the Supreme Court, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” [citing Hill, 482 U.S. at 463]. Ideally, officers would not encounter verbal abuse. Communities would encourage mutual respect, and the police would likewise exhibit respect by treating people with dignity. But, particularly where officers engage in unconstitutional policing, they only exacerbate community opposition by quelling speech.” <<https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf>>. [↑](#endnote-ref-218)
218. *Op. cit.* note 216 (UN Human Rights Committee, General comment No. 35), para. 17. [↑](#endnote-ref-219)
219. As also noted in the EU Human Rights Guidelines on Freedom of Expression Online and Offline (adopted by the Council of the European Union on 12 May 2014), para. 4: “[B]y facilitating the free flow of information and ideas on matters of general interest, and by ensuring transparency and accountability, independent media constitute one of the cornerstones of a democratic society.” [↑](#endnote-ref-220)
220. See, *inter alia*, *Castells v. Spain*, Application No 11798/85, 23 April 1992, para. 43; *Thorgeir Thorgeirson v. Iceland*, Application No 13778/88, 25 June 1992, para. 63. See generally Potter Stewart, “Or of the Press”, *Hastings Law Journal*, Vol. 26, 1975, p. 631. [↑](#endnote-ref-221)
221. Justice Thomas Berger, Justice of the Supreme Court of British Columbia (1980). [↑](#endnote-ref-222)
222. See OSCE Representative on Freedom of the Media, *Safety of Journalists Guidebook* (2nd edition), pp. 68-69 [↑](#endnote-ref-223)
223. OSCE Representative on Freedom of the Media, Summary of Recommendations, para. 4. [↑](#endnote-ref-224)
224. *Op. cit.* note 137, para. 70. [↑](#endnote-ref-225)
225. OSCE/ODIHR Report “Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States, Warswa, 16 December 2016, pp. 128-129. [↑](#endnote-ref-226)
226. Article 15, ICCPR: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” [↑](#endnote-ref-227)
227. *Mrktchyan v. Armenia* (2007), paras. 40-43. [↑](#endnote-ref-228)
228. In this context, see *Murat Vural v. Turkey*, Application no. 9540/07, 21 October 2014, partly concurring and partly dissenting opinion of Judge Sajó, who agrees that a 13 year prison sentence for pouring paint over a statue was disproportionate, but likewise argued that the more fundamental issue was that a whole class of expression (namely “insults to memory”) and related expressive acts were considered to be crimes for their content. This, in his opinion, raised issues of legality of the underlying law, and the question of whether the sanction was necessary in a democratic society to achieve a legitimate aim. [↑](#endnote-ref-229)
229. *Op.* cit. note 47 *Gün and Others v. Turkey*, paras. 82-84; see also *Op. cit.* note 175*,* paras. 34 and 48; see also UN Human Rights Committee, Views (on the merits): *Igor Bazarov v. Belarus* (1934/2010) 24 July 2014, CCPR/C/111/D/1934/2010, paras. 7.2-7.4. [↑](#endnote-ref-230)
230. See *Kudrevičius and Others v. Lithuania* (2015)**,** para. 149: “At the same time, the freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act on such an occasion”, citing *Ezelin v. France* (1991), para. 53; The Court has held that this is true also when the demonstration results in damage or other disorder (see *Op. cit.* note 32, para. 88. [↑](#endnote-ref-231)
231. *Op.* cit. note 137, para. 26: “While organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights.” [↑](#endnote-ref-232)
232. See *Op. cit.* note 230 (*Ezelin v. France*), para. 53, where the Court found that even though the applicant had not disassociated himself from criminal acts committed during an assembly, he had not committed any of these acts himself; the imposition of the administrative fine against him was thus not necessary in a democratic society; and *Op. cit.* note 23 (*Sergey Kuznetsov v. Russia*), paras. 43-48. [↑](#endnote-ref-233)
233. See, for example, Republic of Latvia Constitutional Court, *Judgment in the matter No. 2006-03-0106* (23 November 2006), at para.34.4 (English translation): “If too great a responsibility before the activity, during it or even after the activity is laid on the organiser of the activity … then at other time these persons will abstain from using their rights, fearing the potential punishment and additional responsibilities.”; *NAACP v. Claiborne Hardware*, 458 U. S. 886, 922-932 (1982). [↑](#endnote-ref-234)
234. *Op. cit* note 47 (*Gün and Others v. Turkey*); *Akgöl and Göl v. Turkey*, Application Nos 28495/06 and 28516/06, 17 May 2011. [↑](#endnote-ref-235)
235. *Op. cit*. note 235 (*Akgöl and Göl v. Turkey* (2011), para. 43. [↑](#endnote-ref-236)
236. *Op. cit* note 47 (*Gün and Others v. Turkey*) para. 83. [↑](#endnote-ref-237)
237. *Primov and Others v. Russia* (2014), para. 118. [↑](#endnote-ref-238)
238. *Op. cit.* note 230 (*Ezelin v. France*)*,* para. 53; *NAACP v. Claiborne Hardware*, 458 U. S. 886 (1982). [↑](#endnote-ref-239)
239. An example of such a defence is contained in Sections 6(7) and 6(8), Public Processions (Northern Ireland) Act 1998. There may be a number of ways to provide for the ‘reasonable excuse’ defence in the law, but good practice suggests that words such as ‘without reasonable excuse’ should be clearly identified *as a defence* to the offence where it applies, and not merely as an element of the offence which would have to be proved or disproved by the prosecution. See Preliminary Comments on the Draft Law “On Amendments to Some Legislative Acts of the Republic of Kazakhstan on National Security Issues”’, OSCE-ODIHR Opinion-Nr. GEN-KAZ/002/2005, 18 April 2005. See also *Op. cit.* note 166. [↑](#endnote-ref-240)
240. Op. cit. note 179 (*Frumkin v. Russia*), para. 166. [↑](#endnote-ref-241)
241. See for example, UN High Commissioner for Human Rights, Report on Effective measures and best practices to ensure the promotion and protection of human rights in the context ofpeaceful protests, A/HRC/22/28, 21 January 2013, para. 51. See *Steel and Morris v. United Kingdom* (2005),; and regarding specifically online civil disobedience, see for example, Council of Europe MSI-INT, “Report on Freedom of Assembly and Association on the Internet”, 10 December 2015, paras. 58-61. [↑](#endnote-ref-242)
242. See *Op. cit*. note 166. [↑](#endnote-ref-243)
243. See for example, *Rufi Osmani and Others v. the former Yugoslav Republic of Macedonia*(2001), In *Gregory v. City of Chicago*, 394 U.S. 111 (1969), the court found that the mere presence of hostile onlookers was insufficient evidence to sustain a conviction of protestors for disorderly conduct. Similarly, in *Cantwell v. Connecticut*, 310 U.S. 296, (1940) provocative speech in front of hostile onlookers was not considered to be a valid basis for a disorderly conduct conviction. [↑](#endnote-ref-244)
244. Article 20(2) ICCPR. [↑](#endnote-ref-245)
245. Principle 4 of the Council of Europe Committee of Ministers Recommendation No. R(97)20. The appendix to Recommendation No. R(97)20 defines ‘hate speech’ as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.” See further, the UN Convention on the Elimination of All Forms of Racial Discrimination, and Resolution (68) 30 of the Committee of Ministers on Measures to be taken against incitement to racial, national and religious hatred. See, for example, the Austrian Constitutional Court judgment of March 16 2007 (B 1954/06) upholding a prohibition on an assembly because (in part) national-socialist slogans had been used at a previous assembly (in 2006) with the same organiser. The Austrian National-Socialist Prohibition Act 1947 prohibited all national-socialist activities. See also the Holocaust denial cases: UN Human Rights Committee, *Ernst Zündel v. Canada* (953/2000, admissibility) 27 July 2003, UN Doc. CCPR/C/78/D/953/2000, para. 5.5: “The restriction ... served the purpose of protecting the Jewish communities’ right to religious freedom, freedom of expression, and their right to live in a society free of discrimination, and also found support in article 20, paragraph 2, of the Covenant”; and *Robert Faurisson v. France* (No.550/1993, admissibility), 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, para. 9.6: “Since the statements ... read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.” For the U.S. rule, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (noting that a hate speech law only directed at race-based fighting words violates the right to freedom of speech because it is discriminatory and did not uniformly prohibit all fighting words). [↑](#endnote-ref-246)
246. In the case of *Incal v. Turkey*, Application No 22678/93, 9 June 1998, for example, the applicant’s conviction for helping to prepare a political leaflet which urged the population of Kurdish origins to band together and ‘set up Neighbourhood Committees based on the people’s own strength’ was held by the Court to have violated the applicant’s freedom of expression under Article 10. Read in context, the leaflet could not be taken as an incitement to the use of violence, hostility or hatred between citizens.In this context, see *Op. cit* note 181 also (*Virginia v. Black)*, (regarding a case where the expressive burning of a Ku Klux Klan cross not actually proven be intentional intimidation of identifiable persons constituted protected speech and could thus not be punished on the grounds it was legally presumed to be an intimidating act.) In the case of *Gregory v. City of Chicago*, 394 U.S. 111 (1969), the mere presence of hostile onlookers was insufficient evidence to sustain a conviction of protestors for disorderly conduct; In *Cantwell v. Connecticut*, 310 U.S. 296, (1940), provocative speech in front of hostile onlookers was not considered to be a valid basis for a disorderly conduct conviction. In the case of *Op. cit.* note 73 *Cisse v. France*, para. 50, the European Court of Human Rights stated that “[t]he Court does not share the Government's view that the fact that the applicant was an illegal immigrant sufficed to justify a breach of her right to freedom of assembly, as ... [*inter alia*] ... peaceful protest against legislation which has been contravened does not constitute a legitimate aim for a restriction on liberty within the meaning of Article 11(2).” See also *Op. cit* note 17 (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria)*, paras. 102-3, and *United Macedonian Organisation Ilinden and Others v. Bulgaria*, Application No 59491/00, 19 January 2006, para. 76. In the case of the *Christian Democratic People’s Party v. Moldova*, Application No 28793/02, 14 February 2006, the Court was ‘…not persuaded that the singing of a fairly mild student song could reasonably be interpreted as a call to public violence.’ In the following European Court of Human Rights case of the *Christian Democratic People’s Party v. Moldova (No.2)* (2010), para. 27, the Court rejected the Moldovan government’s assertion that that the slogans, “Down with Voronin’s totalitarian regime, ‘”Down with Putin’s occupation regime)”, even when accompanied by the burning of a picture of the President of the Russian Federation and a Russian flag, amounted to calls to violently overthrow the constitutional regime, to hatred towards the Russian people, or to an instigation to a war of aggression against Russia. The Court noted that these slogans should rather “be understood as an expression of dissatisfaction and protest” – “a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova.” See also *op. cit.* note 181 (*Fáber v. Hungary)*, para. 56: where the Court stated that: “even assuming that some demonstrators may have considered the flag as offensive, shocking, or even ‘fascist’, for the Court, its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators’ right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons (see *Sürek v. Turkey* *(No. 1*), Application No 26682/95, 8 July 1999, para. 62. The Court stresses that ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10 para. 2, especially in view of the fact that the flag in question has never been outlawed.”See also*Brandenburg v. Ohio*, 395 U.S. 444 (1969). [↑](#endnote-ref-247)
247. See Article 14 of the ICCPR and Article 6 of the ECHR. [↑](#endnote-ref-248)
248. See, *mutatis mutandis,* *Engel and Others v. the Netherlands*, Application Nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, 8 June 1976, para. 82. [↑](#endnote-ref-249)
249. For further detail, see Article 14 para. 3 of the ICCPR and Article 6 para.3 of the ECHR. [↑](#endnote-ref-250)
250. *Huseynov v. Azerbaijan* (2015), paras. 51-76. [↑](#endnote-ref-251)
251. In a number of countries (including Hungary, Sweden, Moldova and the United Kingdom) high profile inquiries have been instigated in the aftermath of misuse of police powers during public demonstrations. Their recommendations have emphasized, amongst other things, the importance of narrowly framed powers), and rigorous training of law enforcement personnel (see paragraphs 147-148). See, for example, “Report of the Special Commission of Experts on the Demonstrations, Street Riots and Police Measures in September-October 2006: Summary of Conclusions and Recommendations” (Budapest: February 2007), <<http://www.gonczolbizottsag.gov.hu/jelentes/gonczolbizottsag_jelentes_eng.pdf>>; Joint Committee on Human Rights, Demonstrating Respect for Rights: A Human Rights Approach to Policing Protest(Volume 1) (HL Paper 47-I; HC 320-I, 23 March 2009), and Follow-up Report (London: HMSO, HL Paper 141/ HC 522, 14 July 2009); Her Majesty’s Chief Inspector of the Constabulary (HMIC), *Adapting to Protest: Nurturing the British Model of Policing* (November 2009). In Moldova, in the aftermath of violence occurring at the election related demonstrations on 6-7 April 2009, a parliamentary commission was established to investigate the causes and effects of the events. The commission was comprised of the deputies and civil society representatives. Its report examined the police response during and after the demonstrations and made a number of recommendations aimed at improving policing practices in Moldova. [↑](#endnote-ref-252)
252. Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4,12 March 2009:“An independent and effective police complaints system is of fundamental importance for the operation of a democratic and accountable police service. Independent and effective determination of complaints enhances public trust and confidence in the police and ensures that there is no impunity for misconduct or ill-treatment. A complaints system must be capable of dealing appropriately and proportionately with a broad range of allegations against the police in accordance with the seriousness of the complainant’s grievance and the implications for the officer complained against. A police complaints system should be understandable, open and accessible, and have positive regard to and understanding of issues of gender, “race”, ethnicity, religion, belief, sexual orientation, gender identity, disability and age. It should be efficient and properly resourced, and contribute to the development of a caring culture in the delivery of policing services. [↑](#endnote-ref-253)
253. See Council of Europe Commissioner for Human Rights, Opinion concerning Independent and Effective Determination of Complaints against the Police,CommDH(2009)4, 12 March 2009; and Council of Europe, Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, para. 61. [↑](#endnote-ref-254)
254. For further details, see <<http://www.nipolicingboard.org.uk/index/publications/human-rights-publications/content-previous_hr_publications.htm>>. [↑](#endnote-ref-255)
255. UNODC, *Handbook on Police Accountability, Oversight and Integrity* (2011), page 36, available at <<http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf>>. [↑](#endnote-ref-256)
256. See, for example, the CPT report on its visit to Italy in 2004, published on 17 April 2006 regarding the events that took place in Naples (on 17 March 2001) and in Genoa (from 20 to 22 July 2001) and actions taken in response to the allegations of ill-treatment made against the law-enforcement agencies. The CPT stated that it wished “to receive detailed information on the measures taken by the Italian authorities to prevent the recurrence of similar episodes in the future (relating, for instance, to the management of large-scale public-order operations, training of supervisory and operational personnel and monitoring and inspection systems).” [↑](#endnote-ref-257)
257. See for example, *op. cit* note (67 UN Human Rights Council, Resolution on the Promotion and Protection of Human Rights in the Context of Peaceful Protests, para. 156); and UN High Commissioner for Human Rights*,* Report on Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity, A/HRC/29/23, 4 May 2015, para. 18, which specifically states that States should, “protect LGBT persons exercising these rights from attacks and reprisals through preventive measures and by investigating attacks, prosecuting perpetrators and ensuring remedy for victims”. See also UN Special Rapporteur on the Situation of Human Rights Defenders, Report on the Situation of Women Human Rights Defenders and Those Working on Women's Rights or Gender Issues, A/HRC/16/44, 20 December 2010, para. 109. See also *op. cit.* note 48 *and Others v. Georgia*, paras. 75-78. [↑](#endnote-ref-258)
258. *Op. cit.* note 48 *Identoba and Others v. Georgia* , para. 67. [↑](#endnote-ref-259)
259. The European Court of Human Rights has established five principles for the effective investigation of complaints against the police that engage Article 2 (right to life) or 3 (right to be free from torture or ill-treatment) of the European Convention on Human Rights: 1) Independence: there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence; 2) Adequacy: the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible; 3) Promptness: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law; 4) Public scrutiny: procedures and decision-making should be open and transparent in order to ensure accountability; and f) Victim involvement: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests. These five principles must be adhered to for the investigation of a death or serious injury in police custody or as a consequence of police practice. [↑](#endnote-ref-260)
260. *İzci v. Turkey* (2013), para. 98. [↑](#endnote-ref-261)
261. In this regard, the European Court of Human Rights has held that ‘the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified … where it is *based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken*. To hold otherwise would be to impose an unrealistic burden on the State and its law‑enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.’ See, for example, *Giuliani and Gaggio v. Italy* (2011), para. 178, and the cases cited there. The US standard applicable to official use of excessive force is that the use of force must be objectively reasonable: see *Graham v. Connor*, 490 U.S. 386 (1989). [↑](#endnote-ref-262)
262. *Op. cit,* note 260, paras. 98-99. [↑](#endnote-ref-263)
263. See *Washington v. Glucksberg*, 521 U.S. 702, 710-17 (1997) (stressing that the government has a compelling interest in preserving human life). [↑](#endnote-ref-264)
264. See for example, *Güleç v. Turkey* (1998), where the applicant’s son was killed by security forces who fired on unarmed demonstrators (during a spontaneous, unauthorised demonstration) to make them disperse. The Court found a violation of Article 2 also because there was no thorough investigation into the circumstances, which needs to take place even in circumstances involving illegal assemblies, violent armed clashes or a high number of fatalities.’ (para.81). See also *Washington v. Glucksberg*, 521 U.S. 702, 710-17 (1997) (stressing that the government has a compelling interest in preserving human life). [↑](#endnote-ref-265)
265. *Nachova and Others v. Bulgaria* (2005), para. 95 [↑](#endnote-ref-266)
266. *Op. cit.* note 34, para.46. [↑](#endnote-ref-267)
267. *Shanaghan v. United Kingdom*, Application No 37715/97, 4 May 2001, para.88. For cases involving violence against women, see also Report of the UN Special Rapporteur (2010), A/HRC/16/44, para. 109. [↑](#endnote-ref-268)
268. *Kelly and others v. United Kingdom* (Application No 30054/96 4 May 2001, para.94; *McShane v. United Kingdom*, Application No [43290/98](http://hudoc.echr.coe.int/eng#{"appno":["43290/98"]}), 28 May 2002, para. 94. [↑](#endnote-ref-269)
269. Harlow v. Fitzgerald, 457 U.S. 800 (1982). [↑](#endnote-ref-270)
270. In the case of *Saya and Others v. Turkey*, Application No 4327/02, 7 October 2008, a legal Health Workers’ Trade Union march (for which authorization had been obtained) was stopped by police on May Day and forcefully dispersed. The applicants were taken into custody and released the next day. The European Court of Human Rights found that there had been a failure to carry out an effective and independent investigation into their allegations of ill-treatment. In particular, it found that the ‘Administrative Councils’ investigating the cases were not independent since they were chaired by governors and composed of local representatives of the executive and an executive officer linked to the very security forces under investigation. Cf. *Barbu Anghelescu v. Romania*, Application No 46430/99, 5 October 2004 (only in French), *Muradova v. Azerbaijan*, Application No 22684/05, 2 April 2009, para. 99. [↑](#endnote-ref-271)
271. See also paragraph 25 of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. [↑](#endnote-ref-272)
272. *Op. cit.* note 186 (*Lawless v. Ireland* (No. 3)), para. 28. See also, UN Human Rights No. 29, Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001, especially para. 3. See also, the Questiaux Principles: Nicole Questiaux, Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, UN doc. E/CN.4/Sub.2/1982/15, 27 July 1982. [↑](#endnote-ref-273)
273. UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, of 27 February 2018, paras. 7 and 12. [↑](#endnote-ref-274)
274. *Op.* cit. note 188 (complete note). [↑](#endnote-ref-275)
275. *Ibid.* (UN Human Rights Committee, General Comment No. 29), para. 2. [↑](#endnote-ref-276)
276. *Ibid*, para. 4. [↑](#endnote-ref-277)
277. *Ibid.* para. 5: “the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations [of emergency] and no derogation from the provisions in question would be justified by the exigencies of the situation.” [↑](#endnote-ref-278)
278. *Op. cit.* note 192 [↑](#endnote-ref-279)
279. *Op. cit.* note 188 (UN General Comment No. 29), para. 5. *Op. cit.* note 6, paras. 90-91. [↑](#endnote-ref-280)
280. *Op. cit.* note 188 (UN General Comment No. 29), para. 11 see also 7 and 16. [↑](#endnote-ref-281)
281. W L Youmans, J C York, “Social Media and the Activist Toolkit: User Agreements, Corporate Interests and the Information Infrastructure of Modern Social Movements”, *Journal of Communication* Vol. 62, 2012, p 315. In *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), the US Supreme Court analogized the internet to the “essential venues for public gatherings.” [↑](#endnote-ref-282)
282. Jonathon Zittrain, “Ubiquitous human computing”, *Philosophical Transactions of the Royal Society A* Vol. 366 No.188, 2008 pp. 3813-3821. [↑](#endnote-ref-283)
283. *Op. cit.* note 28 [↑](#endnote-ref-284)
284. Appendix to Recommendation CM/Rec(2018)2 Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities 1. Obligations of States with respect to the protection and promotion of human rights and fundamental freedoms in the digital environment, which states that “1.1.3. States have the ultimate obligation to protect human rights and fundamental freedoms in the digital environment. All regulatory frameworks, including self- or co-regulatory approaches, should include effective oversight mechanisms to comply with that obligation and be accompanied by appropriate redress opportunities” [↑](#endnote-ref-285)
285. *Op.cit.* note 17 (*Handyside v. the United Kingdom*), para. 49. [↑](#endnote-ref-286)
286. See *Delfi AS v. Estonia* Application No 64569/09, 16 June 2015; *Smajić v. Bosnia and Herzegovina*, Application No 48657/16, January 2018. [↑](#endnote-ref-287)
287. *Ibid.* [↑](#endnote-ref-288)
288. *Op. cit.* note 171 [↑](#endnote-ref-289)
289. Concerns regarding the use of facial recognition software (specifically ‘Vedemo 360’) have, for example, been raised by the Hamburg Commissioner for Data Protection and Freedom of Information in relation to investigations into public order offenses during the 2017 G20 summit in Hamburg. See, for example, ‘The Hamburg Committee objects to the use of facial scans by the police’, 3 September 2018 <<http://techn4all.com/the-hamburg-committee-objects-to-the-use-of-facial-scans-by-the-police/>>; ‘Grote hält an “Videmo 360” fest’, 2 October 2018, <https://www.welt.de/print/welt\_kompakt/hamburg/article181735976/Grote-haelt-an-Videmo-360-fest.html> [↑](#endnote-ref-290)
290. See for example, *Op. cit*. note 138 (Report of the UN Special Rapporteur (2011), paras. 61-66. [↑](#endnote-ref-291)
291. The existence of a reasonable expectation of privacy is a significant, though not conclusive, factor in determining whether the right to private and family life protected by Article 8 ECHR is, in fact, engaged. See *P.G and J.H. v. United Kingdo*m, Application no. 44787/98, 25 September 2001, para. 57. At the same time, a person’s private life *may* be engaged in circumstances outside their home or private premises. See, for example, *Herbecq and Another v. Belgium*, Application nos. 32200/96 and 32201, Commission decision of 14 January 1998. In the case of *Friedl v. Austria*, Application no. 15225/89, 26 January 1995, the police photographed a participant in a public demonstration in a public place, confirmed his identity, and retained a record of his details. They did so only after requesting that the demonstrators disperse, and the European Commission held that the photographing did not constitute an infringement of Article 8. On the other hand, warrantless electronic monitoring of genuinely private activities violates the right not to be subjected to arbitrary searches and seizures; see *United States v. Jones*, \_\_U.S. \_\_, 132 S.Ct. 935 (2012) (stating that the GPS monitoring of an individual’s movement constitutes search and seizure governed by guarantees against unreasonable searches and seizures). In the case of *Amann v. Switzerland,* Application No 27798/95, 16 February 2000), paras.65-67, the compilation of data by security services was held to constitute an interference with the applicants’ private lives despite the fact that covert surveillance methods were not used. See also the UK case of *Wood v. MPC* [2009] EWCA Civ 414. See also the European Commission on Human Rights in *Friedl v. Austria* , Application No 15225/89, Commission decision of 31 January 1995, cited in the judgment (see above) regarding the *use* of photographs. [↑](#endnote-ref-292)
292. Joint report of the UN Special Rapporteurs (2016), UN Doc. A/HRC/31/66, para. 76. [↑](#endnote-ref-293)
293. *Ibid*, para. 78. [↑](#endnote-ref-294)
294. *Ibid*. [↑](#endnote-ref-295)