



INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANISATIONS

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**WRITTEN CONTRIBUTION ON THE PREPARATION OF A GENERAL COMMENT ON ARTICLE 21 (RIGHT OF PEACEFUL ASSEMBLY) PREPARED BY THE INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANISATIONS (INCLO)**

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Re: Written contribution on the preparation of a General Comment on Article 21 (Right of Peaceful Assembly)

Date: 11 March 2019

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## A. INTRODUCTION

1. This written contribution is submitted to the United Nations Human Rights Committee (“**Committee**”) by the International Network of Civil Liberties Organisations (“**INCLLO**”) in response to the *Note by the Rapporteur: Issues for consideration during a half-day general discussion in preparation for a General Comment on article 21 (right to peaceful assembly) of the International Covenant on Civil and Political Rights* (“**ICCPR**”). This written contribution is endorsed by all INCLLO member organisations. It relies on in-text hyperlinks for ease of reference.

## B. ABOUT INCLLO

2. INCLLO is a network of 13 independent, national human rights organizations<sup>1</sup> from different countries in the North and South that work together to promote fundamental rights and freedoms by supporting and mutually reinforcing the work of member organizations in their respective countries, and collaborating on a bilateral and multilateral basis.<sup>2</sup> INCLLO works on four thematic issues: (1) protest rights and policing; (2) information rights; (3) religious freedom and equal treatment; and (4) protecting civic space.
3. In terms of protest rights and policing, INCLLO has become a recognised voice in regional and international fora and has produced three comprehensive research reports on matters related to protest:
  - 3.1. *Take Back the Streets: Repression and Criminalization of Protest Around the World* (2013) (“**Take Back the Streets**”) (accessible [here](#));
  - 3.2. *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons* (2016), prepared in partnership with Physicians for Human Rights (“**Lethal in Disguise**”) (accessible [here](#)); and
  - 3.3. *Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest* (2018), prepared in partnership with the International Human Rights Clinic at the Law School of the University of Chicago (“**Defending Dissent**”) (accessible [here](#)).
4. This written contribution is based on the joint work of INCLLO on the aforementioned reports, various submissions that INCLLO has made to regional and international fora, and the unique expertise of its members, based on the domestic contexts within which they operate.

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<sup>1</sup> INCLLO’s 13 member organizations are: Agora International Human Rights Group (Russia), the American Civil Liberties Union (ACLU, United States), the Association for Civil Rights in Israel (ACRI, Israel), the Canadian Civil Liberties Association (CCLA, Canada), Centro de Estudios Legales y Sociales (CELS, Argentina), Dejusticia (Colombia), the Egyptian Initiative for Personal Rights (EIPR, Egypt), the Human Rights Law Network (HRLN, India), the Hungarian Civil Liberties Union (HCLU, Hungary), the Irish Council for Civil Liberties (ICCL, Ireland), the Kenya Human Rights Commission (KHRC, Kenya), the Legal Resources Centre (LRC, South Africa) Liberty (United Kingdom).

<sup>2</sup> Learn more at <https://inclo.net>.

## C. RESPONSES TO THE NOTE PREPARED BY THE RAPPORTEUR

*If freedom of expression is the grievance system of democracies, the right to protest and peaceful assembly is democracy's megaphone. It is the tool of the poor and the marginalized – those who do not have ready access to the levers of power and influence, those who need to take to the streets to make their voices heard.<sup>3</sup>*

### **Question 1: Unique features of the right to peaceful assembly**

5. Public demonstrations are a fundamental tool of democratic engagement. Free, and public, speech and protests are a central tool of public expression and engagement, often serving as the only avenue for advocacy seeking political, social, or economic reform, and for allowing individuals and communities to express their grievances and their claims for recognition of individual and group rights. Historically, public speech has driven progress on labour rights, women's and migrants' rights, prompted an end to apartheid and racial segregation, corruption and discriminatory practices, opened the door to enhanced political freedoms and equality in political representation, mobilised access to land, resisted exploitation of natural resources, and demanded solutions to housing shortages and the absence of basic social services.<sup>4</sup>

### **Question 2: Defining "Peaceful Assembly"**

6. An assembly can be defined as "an intentional and temporary gathering in a private or public space for a specific purpose, and can take the form of demonstrations, meetings, strikes, processions, rallies or sit-ins with the purpose of voicing grievances and aspirations or facilitating celebrations."<sup>5</sup> Assemblies may take place in "[a]ny public or common area open to the public (i.e. streets, sidewalks, parks, plazas, state buildings etc.) including privately owned spaces [which] are open to the general public and serve similar functions as public spaces,"<sup>6</sup> and may include other urban or rural private spaces which may be used for the vindication of rights.<sup>7</sup> Assemblies may also include "sporting events, music concerts and other such gatherings."<sup>8</sup>
7. While an assembly is defined as a temporary gathering, this may include long term demonstrations, including extended sit-ins and 'occupy'-style manifestations. 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."<sup>9</sup>

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<sup>3</sup> *Take Back the Streets*, page 1.

<sup>4</sup> *Defending Dissent*, page 18.

<sup>5</sup> *Defending Dissent*, page 16, confirming the definition in the *Proper Management of Assemblies Report* (2016), para 10.

<sup>6</sup> *Proper Management of Assemblies*, para 10.

<sup>7</sup> *Defending Dissent*, page 15.

<sup>8</sup> *Proper Management of Assemblies*, para 10.

<sup>9</sup> *Defending Dissent*, footnote 1, relying the *Proper Management of Assemblies Report*, para 10.

8. International, regional, and national legal frameworks “should . . . indicate that actions of individual protesters or a sub-group participating in a protest do not render the protest itself or other individual or sub-group participants “illegal” – even where such actions may be violent.”<sup>10</sup> As such, the right to protest must be respected, protected, and promoted by policing institutions, even in instances where sub-groups are engaged in violent conduct. In these instances, policing institutions should ensure that the free exercise of the right continues.

***Question 3: Individuated nature of the right***

9. The right to peaceful assembly is a right that is held by individuals but which can have collective dimensions or application. For example, criminalisation of protests leaders may have a “chilling effect” on other protesters, rendering reliance on the right ineffective. INCLO recommends that “all people have an inalienable right to assemble. The state must protect and promote all forms of assembly by any individual without discrimination on the basis of any prohibited ground.”<sup>11</sup>
10. The right also protects individuals during the organising and advertising stages. This is regardless of whether the planning takes place before or after the notification requirements have been complied with. This position aligns with the Human Rights Committee jurisprudence on this question. The Committee has held that the arrest of the organiser of an assembly, for which prior permission had not yet been sought, while advertising the event, was an unjustified restriction of the right to peaceful assembly.<sup>12</sup>

***Question 4: The duty to facilitate assemblies***

11. All people have an inalienable right to peacefully assemble. The state must protect and promote all forms of assembly by any individual “without discrimination on the basis of any prohibited ground.” This should be read as placing an obligation to facilitate such assemblies on the state. For groups, communities, sectors, and individuals “who have historically experienced discrimination” or experience current marginalization, institutional racism or other disadvantage, policing and security institutions must take affirmative actions to ensure equal protection and rectify any past discriminatory dynamics.<sup>13</sup>
12. INCLO further recognises that “laws that specifically regulate police action in the protest and public demonstration context can ensure a democratic approach to protests by creating mandates for all relevant branches of the government to promote and protect the rights to protest.”<sup>14</sup>
13. Jurisprudence from the Committee alludes to this position on facilitation. In many cases, the Committee has remarked that “when a State party imposes restrictions with the aim of

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<sup>10</sup> *Defending Dissent*, recommendation 2, page 35.

<sup>11</sup> *Defending Dissent*, principle 1, page 36.

<sup>12</sup> *Melnikov v Belarus*, para 8.6.

<sup>13</sup> *Defending Dissent*, principle 1, page 36.

<sup>14</sup> *Defending Dissent*, practice 1, page 30.

reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the *objective of facilitating the right*, rather than seeking unnecessary or disproportionate limitations to it."<sup>15</sup> (Emphasis added).

**Question 5: Positive and negative obligations**

14. In *Defending Dissent*, INCLO documented 12 guiding principles which clarify the positive and negative obligations placed upon states to ensure that they respect the right to peaceful assembly.
  - 14.1. The role of legislation, leadership and culture in the respecting of the right should be acknowledged. Effective protection and promotion of the rights to protest and assembly necessitate a foundational legal and institutional framework that prepares and equips policing institutions (and other government services) to engage appropriately with protests and public assemblies. States must adopt strong, clear, and stable legislation, regulations, and policies that commit the state and its security institutions to safeguard the rights to protest.<sup>16</sup>
  - 14.2. The principles of non-discrimination and equality must be respected. When designing institutions to address concerns around protest, police should consider the interests of minority groups. For example, policing institutions should take steps to recruit police officers representative of the communities that they serve and ensure diversity in leadership. Moreover, non-discrimination and equality principles should be incorporated into officer training and supervision, and officers should receive comprehensive and ongoing instruction and training on structural inequality and implicit bias.<sup>17</sup>
  - 14.3. If a notification system is in place, it should only be used to enable facilitation of public gatherings. Notification processes should be simple, quick, widely accessible, and free.<sup>18</sup>
  - 14.4. Police training should prepare officers to exercise good judgment and to engage in balanced decision-making aimed at protecting and promoting the right to protest.<sup>19</sup>
  - 14.5. Policing institutions should adopt de-escalation and non-escalation techniques, which require designing operations with an understanding of crowd dynamics and anticipation of the likely impact of police behaviour on protesters and bystanders.<sup>20</sup>

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<sup>15</sup> See *Androsenko v Belarus*, para 7.6; *Korol v Belarus*, para 7.5; *Basarevsky and Rybchenko v Belarus*, para 9.5; *Evrzozov v Belarus*, para 8.4; *Poplavny and Sudalenko v Belarus*, para 8.5; *Melnikov v Belarus*, para 8.5; *Shumilina v Belarus*, para 6.4; and *Koreshkov v Belarus*, para 8.5.

<sup>16</sup> *Defending Dissent*, page 7.

<sup>17</sup> *Defending Dissent*, page 8.

<sup>18</sup> *Defending Dissent*, page 8.

<sup>19</sup> *Defending Dissent*, page 8.

<sup>20</sup> *Defending Dissent*, page 9.

- 14.6. Specialised dialogue officials should be enlisted to ensure that genuine and transparent engagement occurs between officials and protesters, provided that these officials do not engage in intelligence gathering activities or act to undermine assembly rights. Moreover, journalistic activity during assemblies is to be encouraged as it enhances transparency and accountability.<sup>21</sup>
- 14.7. The decision to use force must be evaluated for their consequences and compliance with the principles of legality, precaution, necessity, proportionality, accountability, and non-discrimination. Policing institutions should have extensive precautionary measures in place and sufficient tools to ensure appropriate and graduated responses to serious security concerns. Legal infractions or acts of disrespect should not trigger the use of force.<sup>22</sup>
- 14.8. Good practices require policing institutions to engage in data tracking and reporting. Legislation should mandate collection and reporting of data on the use of force, including: numbers and types of weapons deployed; arrests; stops and searches conducted; and the training that officers have received on the use of less-lethal weapons and equipment.<sup>23</sup>
- 14.9. Surveillance practices can have a chilling effect on protest,<sup>24</sup> infringe privacy rights, and violate associated human rights of protesters and bystanders. The state and its security institutions should comply with the principles of legality, necessity, and proportionality and not conduct indiscriminate surveillance such as the collection, retention, and use of personal information absent individualised suspicion that a crime has been (or is reasonably expected to be) committed.<sup>25</sup>
- 14.10. Well-resourced and staffed independent oversight mechanisms need to be established. Such bodies should investigate all uses of force during protests and assemblies as well as allegations of police misconduct or criminality. Such bodies should also conduct systematic reviews of police policies and practices to ensure compliance.<sup>26</sup>
- 14.11. Policing institutions should establish policies and procedures for effective internal investigations. Internal investigations should be carried out by a high-ranking officer, team, or department with no involvement in the incident under review.<sup>27</sup>
- 14.12. Transparency is essential. Policies for training, use of force manuals, and reports and statistics on police practices should be made publicly available and easily

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<sup>21</sup> *Defending Dissent*, page 10.

<sup>22</sup> *Defending Dissent*, page 10.

<sup>23</sup> *Defending Dissent*, page 11.

<sup>24</sup> See the INCLO Joint Submission to the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association in regards to his thematic report on the rights to freedom of peaceful assembly and of association in the digital age (March 2019).

<sup>25</sup> *Defending Dissent*, page 11.

<sup>26</sup> *Defending Dissent*, page 12.

<sup>27</sup> *Defending Dissent*, page 13.

accessible. The state should similarly have an open and documented process for determining whether less-lethal weapons and equipment should be acquired, developed, or traded. Reporting on the deployment and use of less-lethal weapons, equipment, and all uses of force should be mandated and describe the circumstances justifying the use of the weapon, equipment, or force.<sup>28</sup>

15. It is INCLO's position that those engaged in protest should be protected while exercising this right. This protection is often performed by police officers or other state officials and should be mindful of the complicated relationship between protesters and police. Resultantly, it is recommended that "when there is no threat of violence, visibly disproportionate police presence is likely to have an escalating or provocative effect, or a chilling effect on expressing opinions and participating freely. Police planning for such events should take into account how police presence is understood, and whether the same aims of protecting and promoting the rights to protest could be achieved through greater reliance on dialogue officials and emergency services (e.g. paramedics or fire services). Additionally, when police are present in large groups, regulating their presence around protesters might help avoid direct contact and intimidation that may have an escalating effect. This regulation should also take into account that in certain circumstances a visible police presence is necessary to protect the rights of protesters, particularly in instances where there are aggressive or antagonistic counter-protesters."<sup>29</sup>
16. The state should take precautionary measures to prevent the violation of rights and protect those involved in protest. States must adopt clear legislation, regulations, and policies that commit the state and its security institutions to safeguard the rights to protest.<sup>30</sup> Internal police policies and mechanisms should be designed to ensure that police understand the human rights laden context within which protests occur. These mechanisms should create 'pause points' that evaluate consequences for rights protection at each step of planning and executing protest engagement and be supported by transparent instructions and chains of command.<sup>31</sup>
17. As with all policing duties, police engagement with protests and public assemblies should involve consideration of the rights and needs of community members, including marginalised groups. Police should serve and address these needs in the design and implementation of relevant protest and public assembly-related operations.<sup>32</sup> Policing institutions must also ensure equality and non-discrimination among its officers and staff in assignments, duties, and departments.<sup>33</sup>

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<sup>28</sup> *Defending Dissent*, page 13.

<sup>29</sup> *Defending Dissent*, page 60, based on an interview with Imani Robinson, Activist and Organizer, Black Lives Matter, in London, England (15 December 2017).

<sup>30</sup> *Defending Dissent*, page 7.

<sup>31</sup> *Defending Dissent*, page 7.

<sup>32</sup> *Defending Dissent*, page 8.

<sup>33</sup> *Defending Dissent*, page 8.



18. Training must be balanced with training that prioritises communication, dialogue, de-escalation and graduated use of force. Special emphasis should be placed on training operational level commanders on human rights standards.<sup>34</sup>

**Question 6: Limitations on the right to protest**

19. INCLO does not have express views on the limitation of this right. However, it is guided by the Human Rights Committee jurisprudence on this subject which specifies that the right of peaceful assembly, as guaranteed under article 21 of the ICCPR, is a fundamental human right that is essential for public expression of one's views and opinions and indispensable in a democratic society. When a State party imposes restrictions on the right to assembly, it should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21.<sup>35</sup>
20. The Committee has determined that “no restriction to this right is permissible unless it is: (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order (ordre public), protection of public health or morals or protection of the rights and freedoms of others.”<sup>36</sup>
21. INCLO deems certain kinds of limitation unacceptable. For instance, it views containment, “in its various guises, [a]s a particularly problematic tactic. The tactic involves a cordon of police officers, often in crowd-control equipment, surrounding a group of protesters to restrict or prevent their movement. If it is used, it should be limited to circumstances where separating crowds is necessary for preventing an imminent risk of harm to others – and there must always be a route open for participants to exit. However, when the tactic is used inappropriately it infringes peoples’ right to liberty and security of person. Many of the criticisms of containment stem from the excessive use of the tactic against protesters; the practice of holding protesters for extended periods of time without access to restrooms, food, or medication; and the common practice of arresting contained protesters en masse.”<sup>37</sup>
22. States must have a legal and institutional framework in place that protects and facilitates the rights to protest. International law requires that “[s]tates shall respect and ensure all rights of persons participating in assemblies.”<sup>38</sup> Regionally, the Inter-American Commission on Human Rights (IACHR) states that “social and political participation through the right of freedom of assembly is an essential element to the consolidation of the democratic life of

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<sup>34</sup> *Defending Dissent*, pages 8-9.

<sup>35</sup> See *Valentin Evrezov v Belarus*, para 7.4.

<sup>36</sup> See *Androsenko v Belarus*, para 7.4; *Korol v Belarus*, para 7.5; *Basarevsky and Rybchenko v Belarus*, para 9.5; *Evzrezov v Belarus*, para 8.4; *Poplavny and Sudalenko v Belarus*, para 8.5; *Melnikov v Belarus*, para 8.5; *Shumilina v Belarus*, para 6.4; and *Koreshkov v Belarus*, para 8.5.

<sup>37</sup> *Defending Dissent*, page 62, based on an interview with Dr. Adam Elliott-Cooper, King’s College London, in London, England (12 December 2017); Interview with Raju Bhatt, Solicitor, Bhatt Murphy Solicitors, in London, England (15 December 2017).

<sup>38</sup> *Defending Dissent*, principle 1, page 27, based on the *Proper Management of Assemblies* Report, para 10.

societies.”<sup>39</sup> This “implies that a presumption exists in favour of the exercise of the right”<sup>40</sup> and that states must “act on the assumption that [protests] do not constitute a threat to public order.”<sup>41</sup>

23. Textually, the second sentence of article 21 creates two requirements that must be met before the right to assembly may be limited. The first requires that limitations are imposed only by law. This is understood as “require[ing] that states develop and enact a legal framework that is compliant with international standards, protecting the rights to protest in their constitutional, statutory, or administrative law.”<sup>42</sup> The second requirement is substantive and creates certain reasons why limitations may take place – such as for national security reasons. Substantive limitations, where adopted, must be justifiable and subject to administrative and judicial review. Substantive reasons “should neither be supplemented by additional grounds in domestic legislation nor loosely interpreted by authorities. The regulatory authorities must not raise obstacles to freedom of assembly unless there are compelling arguments to do so. Legitimate aims, as provided for in the limitations clause in Article 21 of the ICCPR, are not a licence to impose restrictions, and the onus rests squarely on authorities to substantiate any justifications for the imposition of restrictions.”<sup>43</sup> Equally, substantive limitations, where adopted, must be justifiable and subject to administrative and judicial review. The burden of proof should be on the regulatory authority to show that the restrictions imposed are reasonable in the circumstances.<sup>44</sup>
24. When enforcing limitations to the right to peaceful assembly, criminal sanction should play a limited or no role at all. There should be no convenor or organiser liability imposed as this has a chilling effect on protest. Moreover, “legal loopholes in the protection of the rights to protest should also be addressed. Such loopholes can be used to weaken these rights, especially by states and government actors lacking political commitment to protect the rights to protest. Imprecise constitutional or statutory authority granting broad emergency or public order powers, criminalisation for minor offences committed in the context of protests, or the undermining of accountability mechanisms are all legal loopholes that compromise the protection of these fundamental rights.”<sup>45</sup>

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<sup>39</sup> *Defending Dissent*, principle 1, page 27, based on CIDH, Segundo informe sobre la Situación de las Defensoras y los Defensores de Derechos Humanos en las Américas, 31 de diciembre de 2011, OEA/Ser.L/V/II. Doc. 66, párr. 129.

<sup>40</sup> *Defending Dissent*, principle 1, page 27, based on CIDH, Informe Anual 2015, capítulo 4A, párrafos 65. See also African Commission on Human and Peoples’ Rights (ACHPR). Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, para 2.1.1, which states that the enactment, interpretation, implementation and enforcement of national laws and regulations governing the right to assemble freely with others must require law enforcement responses that favour the presumption of the exercise of the right to assemble freely (ACHPR Guidelines). Further, see Organization for Security and Co-operation in Europe (OSCE), Guidelines on Freedom of Peaceful Assembly (OSCE/ODIHR Guidelines), para 2.1.

<sup>41</sup> *Defending Dissent*, principle 1, page 27, based on CIDH, Informe Anual 2015, capítulo 4A, párrafos 64.

<sup>42</sup> *Defending Dissent*, page 20.

<sup>43</sup> OSCE/ODIHR Guidelines, paras 69-70.

<sup>44</sup> OSCE/ODIHR Guidelines, para 135. According to the Hungarian Constitutional Court this requirement flows from the principle of *in dubio pro libertate*, see Decision 30/2015. (X. 15.), para 32.

<sup>45</sup> *Defending Dissent*, page 31.

25. By way of example, a positive example of state-organiser interaction occurred in Argentina in 2017. The organisers of protest on Women's Day held various meetings with state agencies about the presence and duties of policing institutions during the march. State agencies besides the police were present during the march to oversee police activity. The protest proceeded peacefully, without the active intervention of the police.<sup>46</sup>
26. It is important to note that when police are overly involved in enforcing limitations of the right to protest, women are disproportionately the victims. This victimisation often takes the form of sexual abuse either at the hands of other protesters or the police themselves. Because police sexual violence shatters trust in a particularly acute and personal manner, investigators must protect complainants from retaliation, re-traumatisation, and criminalisation. For instance, in the case of complaints of sexual violence, any information that might disclose the identity of the complainant should not be disclosed without the consent of the complainant. Unfortunately, in practice the provision of systemic support to sexual violence complainants remains largely aspirational.<sup>47</sup>
27. In terms of accountability measures and in addition to effective independent judicial oversight bodies providing the right to an effective legal remedy, it is suggested that the following additional safeguarding mechanisms be established.
  - 27.1. Independent oversight bodies should be set up. Such bodies should investigate all limitations to the rights to protest, uses of force during protests and assemblies, as well as allegations of police misconduct or criminality. They should have sufficient authority to effectively investigate complaints, including funding, resources, the power of subpoena, and the ability to impose disciplinary measures and initiate prosecutions for violations. Policing institutions should be required by law to report uses of force to these bodies, and to cooperate with investigations.<sup>48</sup>
  - 27.2. Policing institutions should establish policies and procedures for effective internal investigations.<sup>49</sup> Internal investigations should be carried out by a high-ranking officer, team, or department with no involvement in the incident under review.<sup>50</sup> Moreover, Departments should implement post-event debriefing to review decisions and identify successes, failures, and areas for improvement. In ordinary performance reviews, police should be evaluated in light of human rights-based standards.<sup>51</sup>
28. Transparency of decision making in relation to assemblies is essential. The operational roles and responsibilities of law enforcement officials within the chain of command should

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<sup>46</sup> *Defending Dissent*, page 47.

<sup>47</sup> *Defending Dissent*, page 100, based on an article by Zoë Carpenter, *The Police Violence We Aren't Talking About*, (Aug.27,2014), <https://www.thenation.com/article/police-violence-we-arent-talking-about/>.

<sup>48</sup> *Defending Dissent*, pages 97-8, based, in part, on the *Proper Management of Assemblies* Report, para 96(d).

<sup>49</sup> *Defending Dissent*, page 103, based on the *Proper Management of Assemblies* Report, para 96(b).

<sup>50</sup> *Defending Dissent*, page 103, based on Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 112-13, U.N. Doc. A/ CONF.144/28/Rev.1 (1991).

<sup>51</sup> *Defending Dissent*, page 103, based on ACHPR Guidelines, para 24.1.

be clearly established, articulated, and publicly known to ensure a single chain of accountability. Additionally, policies for training, use of force manuals, and reports and statistics on police practices should be made publicly available and easily accessible.<sup>52</sup> The state should similarly have an open and documented process for determining which less-lethal weapons and equipment to acquire, develop, or trade.<sup>53</sup> Reporting on the deployment and use of less-lethal weapons, equipment, and all uses of force should be mandated and describe the circumstances justifying the use of the weapon, equipment, or force.<sup>54</sup>

29. Without releasing personal identifying information or other information that might place people in danger, policing institutions should inform the public about the number of people arrested and hospitalised during a protest, and the places and reasons for detention, with due regard to safety considerations.<sup>55</sup> The reasons for certain limitations should also be made public to ensure that such decisions were taken rationally.

### ***Question 7: Organiser liability***

30. Convenors or organisers of protests should not be liable for administrative or other offences committed by others within a demonstration, since it generates a chilling effect on the exercise of the right. Equally, it is impermissible to require organisers or convenors to cover the cost of policing for an assembly or make assurances regarding the provision of medical care, cleaning up services and reparation for damage caused. Requiring this of a convenor is tantamount to requesting payment for the exercise of a fundamental right.
31. Moreover, “the process [of notification systems] must be free as individuals cannot be required to pay to engage in the exercise of their rights. Many complaints regarding the permitting systems in England pertain to police asking organisers to pay fees or insurance charges, creating a chilling effect for people seeking to exercise their rights. This is impermissible under both international and English law.”<sup>56</sup>

### ***Question 8: Should authorisation or notification be preferred?***

32. INCLO’s position is that requiring prior authorisation for assemblies is impermissible. “Freedom of peaceful assembly is a right and not a privilege and as such its exercise should not be subject to prior authorization by the authorities.”<sup>57</sup> Where notification systems are used, they should be quick, efficient, and easy to access and use.<sup>58</sup> This helps ensure that notification systems do not become a barrier to the free exercise of the right to assemble. Notification should be allowed in multiple urban and rural locations, have concise forms in

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<sup>52</sup> *Defending Dissent*, page 109 based on Interview with Corey Stoughton, Advocacy Director, Liberty, in London, England. (13 December 2017); Interview with Daniel Holder, Deputy Director, Committee on the Administration of Justice, in Belfast, Northern Ireland (18 December 2017).

<sup>53</sup> *Defending Dissent*, page 110.

<sup>54</sup> *Defending Dissent*, page 111.

<sup>55</sup> *Defending Dissent*, recommendation 3, page 112.

<sup>56</sup> *Defending Dissent*, page 48 based on an interview with Corey Stoughton, Advocacy Director, Liberty, in London, England (13 December 2017).

<sup>57</sup> *Proper Management of Assemblies*, page 6.

<sup>58</sup> *Defending Dissent*, pages 47-8, based on the *Proper Management of Assemblies* Report, para 28.

multiple languages, and allow multiple options for submissions.<sup>59</sup> Some jurisdictions, for example, take submissions through the internet and social media. While the feasibility of such a system will depend on the wider infrastructure and resources available to the population, any mechanism that makes the process more accessible is a welcome development.”<sup>60</sup>

33. Where they are in place, prior notification systems must reflect a “presumption in favour of assemblies” and must not be used as an authorisation system. There are assemblies that are inherently unable to participate in notification systems due to their nature. These assemblies include spontaneous assemblies or “flash mobs” and those that are organised as a way to resist an action by the state, or even address the police itself. Regardless of the nature of the protest, protesters who have notified authorities and those who have not should be equally protected and the rights to protest should be equally promoted.
34. Notification procedures should not actually amount to permission requirements in disguise. In Egypt, under the protest and assemblies law passed in 2013, organisers are required to file a notification at their nearest police precinct. In the vast majority of cases, the protest permission is “denied” by the police citing national security concerns. Despite the wording of the law only referring to a notification requirement, the police regularly use the language of authorisation and permission - even in media statements.<sup>61</sup>
35. There are a number of legitimate reasons why assembly organisers may not want to participate in a notification system or otherwise engage with state representatives prior to a protest. This might especially be the case when protests are expressing critical views about the police or other state agencies. Organisers have expressed concerns that permission requirements and pre-event communications have been used by authorities in their jurisdictions as a way to impose unjustifiable limitations on the rights to protest. Resultantly, while notification may be required in certain contexts, organisers should not be compelled to seek permission to assemble. In addition, it is important to note that notification systems work best in cultures, or in those circumstances where a high level of organisation on part of protest movements is the norm. In political cultures or circumstances where protest is predominantly spontaneous or reactive, notification systems may not be useful, or effective.<sup>62</sup>

#### ***Question 9: Limiting the form taken by assemblies***

36. Any restrictions placed on assemblies in terms of their form and content should be reasonable, necessary and proportionate and subject to judicial and administrative review. INCLO takes the view that “a notification should only need to include the date, estimated time, and location of the assembly. Where appropriate, the organiser’s contact information may be required (though not mandatory) to facilitate engagement and communication

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<sup>59</sup> *Defending Dissent*, pages 47-8, based on GENEVA ACAD. OF INT’L. LAW AND HUM. RTS., Facilitating Peaceful Protests, Academy Briefing No. 5, 13 (January 2014).

<sup>60</sup> *Defending Dissent*, pages 47-8.

<sup>61</sup> *Defending Dissent*, page 48.

<sup>62</sup> *Defending Dissent*, page 45.

prior to and during the event. A response from authorities should not be required for the assembly to proceed as planned. If restrictions are placed on an event with respect to location, route, time, place, or target, there must be an urgent appeal process in place for independent review and oversight. For example, in Hungary, in instances where a ban is imposed by the police following notification, the organiser may challenge that restriction in court, which must render a decision within three calendar days.”<sup>63</sup>

37. In terms of reasonableness, it is INCLOs position that “if there are restrictions placed on an event, the restrictions must be reasonable and not overly burdensome, they must not prevent protesters from effectively exercising their rights to protest, and they must not be selectively enforced or otherwise applied in a discriminatory manner. Urgent internal and external appeal processes must be in place to guarantee independent review of the legality of any restrictions imposed.”<sup>64</sup> For example, since 2018 legal representation has been required in Hungary in the judicial review of restrictions placed on assemblies, and due to the short time limits in the procedure, this requirement results in a disproportionate burden being placed on the organiser.

#### ***Question 10: Emergence of good practices***

38. There are a number of good practices that should guide the facilitation of, and responses to, protests to ensure that they do not escalate.
- 38.1. Police protection and promotion of the rights to protest should be mandated in domestic law and these rights should be enforced with a strong normative framework.<sup>65</sup>
- 38.2. The protection and promotion of the rights to protest must be incorporated into police culture, including an appreciation of the importance of dissenting views in a democratic society.<sup>66</sup>
- 38.3. A clear chain of command within the police force must be established and should incorporate multiple points of review and assessment, and foster a culture of accountability.<sup>67</sup>
- 38.4. Specialised and ongoing training should be provided to all police officers charged with dealing with assemblies, but particularly should target the institutional leadership within the police.<sup>68</sup>

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<sup>63</sup> *Defending Dissent*, page 48.

<sup>64</sup> *Defending Dissent*, recommendation 7, page 50.

<sup>65</sup> *Defending Dissent*, page 30.

<sup>66</sup> *Defending Dissent*, page 32, based, in part, on Interview with Igor Nikolayevich Burmistrov, former Senior Instructor at the Training Centre of Sankt Petersburg Directorate of Interior.

<sup>67</sup> *Defending Dissent*, page 32.

<sup>68</sup> *Defending Dissent*, page 34, based on an interview with Owen West, Chief Superintendent, West Yorkshire Police Department, in West Yorkshire, England. (14 December 2017); Interview with Stephen White, OBE, Vice President for Europe, the Soufan Group, in Belfast, Northern Ireland (19 December 2017).

- 38.5. A conscious effort should be made to ensure that policing institutions are representative of the communities they serve.<sup>69</sup>
- 38.6. Non-discrimination and equality principles should be incorporated into departmental culture and officer training including implicit bias training.<sup>70</sup>
- 38.7. Policing institutions should acknowledge and address the power imbalance and the coercive relationship between them and communities, and work to promote meaningful co-operation.<sup>71</sup>
- 38.8. In instances where prior notification of an assembly was required but not sought, the rights of protesters should still be protected and promoted.<sup>72</sup>
- 38.9. All personnel involved in protests should receive comprehensive, effective, and ongoing training on human rights-compliant principles and practices as well as implicit bias training.<sup>73</sup> All training should emphasise non-violent forms of intervention, including non-escalation and effective de-escalation techniques.<sup>74</sup>
- 38.10. Police presence and visibility in the context of protests should be regulated and be subject to the obligation to protect the rights of protesters.<sup>75</sup> In Argentina in 2012, the National Ministry of Security created the program on the reasonable use of arms and firearms. This program aimed to provide training to police officers to reduce the use of force. This was a welcome initiative. However, in 2018 the program was discontinued and Argentina has lost a crucial educational and accountability mechanism.<sup>76</sup>
- 38.11. It should be mandated that members of policing institutions attend events in regular police uniforms, limiting the visibility of weapons and equipment.<sup>77</sup>
- 38.12. The use of indiscriminate tactics and strategies should be prohibited.<sup>78</sup>
39. In terms of undercover policing, INCLO believes that the recognition of the need for some policing and regulation of protest is not a green-light for indiscriminate undercover policing

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<sup>69</sup> *Defending Dissent*, page 38, based on Paul Bass, The Promise and Challenges of a Representative Police Force, NY TIMES (Aug. 17, 2016, 3:20 AM), <https://www.nytimes.com/roomfordebate/2016/08/17/how-can-police-do-a-better-job-of-recruiting-officers/the-promise-and-challenges-of-a-representative-police-force> (last visited 11 March 2019).

<sup>70</sup> *Defending Dissent*, page 39.

<sup>71</sup> *Defending Dissent*, page 40.

<sup>72</sup> *Defending Dissent*, page 45.

<sup>73</sup> *Defending Dissent*, page 52.

<sup>74</sup> *Defending Dissent*, page 54, based on the *Proper Management of Assemblies* Report, para 67.

<sup>75</sup> *Defending Dissent*, page 59.

<sup>76</sup> *Defending Dissent*, page 54. Creation of the Program on the Use of Force and the Use of Firearms in Argentina, Resolution 933/2012, available at: <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do%3bjsessionid=71EA927F426C9C106F64B30F6D26C4F4?id=204821>.

<sup>77</sup> *Defending Dissent*, page 60, based on an interview with Clifford Stott, Professor of Social Psychology, Keele University, in London, England. (15 December 2017).

<sup>78</sup> *Defending Dissent*, page 61.

– this would further undermine trust between policing institutions and protesters and raise concerns about privacy, freedom of expression and association rights.<sup>79</sup>

**Question 11: Coercive measures, legality, and less-lethal weapons**

40. It is generally understood that “policing and security institutions should approach community engagement with an understanding of the coercive nature of policing and the social context of police and community engagement. Communities should not be obligated or compelled to engage with policing and security institutions in dialogue-building programs, and an unwillingness to engage should never be a justification for non-service, escalation, or violence by policing institutions.”<sup>80</sup>
41. In Argentina in 2011, the new National Ministry of Security established a democratic security system that understood protests as part of socio-political dynamics and not as an obstacle to democracy or public order. Towards that end, Administrative Resolution 199 of 2011<sup>81</sup> reformed the police educational system. It established guidelines for a new training and professional intervention model that incorporated a human rights and conflict management perspective in initial training, continuous training, and higher education. The training included modules with a humanistic profile taught by non-security professionals intended to counteract the traditional training provided to police officers. However, since 2016, this initiative has been greatly curtailed and this has raised fears that Argentina is returning to the use of more coercive measures of policing protest.<sup>82</sup>
42. When force is used against protesters, the following principles should be borne in mind: legality, precaution, necessity and proportionality.
  - 42.1. Legality requires that states develop and enact a legal framework that is compliant with international standards, protecting the rights to protest in their constitutional, statutory, or administrative law.<sup>83</sup>
  - 42.2. Precaution requires that “all feasible steps be taken in planning, preparing, and conducting an operation related to an assembly to avoid the use of force or, where force is unavoidable, to minimize its harmful consequences.”<sup>84</sup> The principle of precaution may involve ensuring effective institutional design, proper training, use of force policies, command structures, and tactical decisions in the field. The principle obligates the state to take precautionary measures before and during an event to make sure that interventions by law enforcement officers protect and promote assemblies and the assembled.<sup>85</sup>

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<sup>79</sup> *Defending Dissent*, page 59.

<sup>80</sup> *Defending Dissent*, recommendation 7, page 43.

<sup>81</sup> Resolution 199/2011 of the Ministry of National Security of Argentina on reforms of the police education system.

<sup>82</sup> *Defending Dissent*, page 42.

<sup>83</sup> *Defending Dissent*, page 20.

<sup>84</sup> *Defending Dissent*, page 20, based on the *Proper Management of Assemblies* Report, para 52.

<sup>85</sup> *Defending Dissent*, page 21.



- 42.3. Necessity and proportionality determine the legality of certain actions taken by policing and security institutions. Each action must seek to achieve a legitimate goal and employ the least intrusive and restrictive means necessary and appropriate to achieve that goal.<sup>86</sup>
43. INCLO is of the view that accountability and non-discrimination be added to the list of principles guiding the use of force, which should only be used as a last resort.
- 43.1. Accountability requires that the state establish a clear and transparent command structure to minimise the use of force and to facilitate effective reporting of misconduct. Accountability also requires the establishment of effective review processes for assessment and investigation of abuses and violations of the law in the management of assemblies. Accountability would counsel that any violations of the rights to protest are recorded, reported, credibly investigated, effectively remedied, and sanctioned.<sup>87</sup>
- 43.2. Non-discrimination requires the equal protection of the law and the enjoyment of one's rights without discrimination on "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>88</sup>
44. In terms of less-lethal weapons, INCLO submits that where they are used, the use of less-lethal weapons in protests should *always* be a last resort and must *always* meet the tests of proportionality, necessity, legality, and accountability. The fact that an assembly may be considered unlawful does not justify the use of less-lethal weapons. The explicit goal of any intervention in a protest situation should be to de-escalate the situation and promote and protect the safety and the rights of those present.<sup>89</sup>
45. INCLO has concerns about the health impacts of less-lethal weapons such as chemical irritants (i.e. tear gas), kinetic impact projectiles and disorientation devices. Moreover, the indiscriminate use, or misuse, and abuse of other less-lethal weapons such as water cannons amounts to group or collective punishment and should be avoided.<sup>90</sup> The indiscriminate use of pellet guns by the Indian government is a common occurrence in Kashmir. On 12 July 2016, 15-year-old Insha Mushtaq was hit by a hail of over 100 pellets while observing a protest from her family's balcony. She permanently lost her vision. This is not an isolated incident as many other boys and girls have been victim to the indiscriminate use of this crowd-control weapon.<sup>91</sup>

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<sup>86</sup> *Defending Dissent*, page 21, based on the *Proper Management of Assemblies* Report, para 52.

<sup>87</sup> *Defending Dissent*, page 21.

<sup>88</sup> *Defending Dissent*, page 21, based on article 26 of the ICCPR.

<sup>89</sup> *Lethal in Disguise*, page 8.

<sup>90</sup> *Lethal in Disguise*, pages 8 and 21-89.

<sup>91</sup> *Defending Dissent*, page 62

**Question 12: Observers and the right to record**

46. The work of journalists and photojournalists is fundamental to the exercise of rights by protesters. Attendance at events by journalists and photojournalists operates as a form of oversight and control of state action.<sup>92</sup> Transparency and engagement can be promoted through sharing of information via social media, traditional media, independent monitors, or designated point of contact officers. Importantly, this should not be limited to traditional media. Citizen journalism, or “independent reporting, often by amateurs on the scene of an event, which is disseminated globally through modern media, most often the Internet”, is legitimate and should be unobstructed by policing institutions. This includes the right to “record back”, a person’s right to record “an interaction in which he or she is being recorded by the state agent”.<sup>93</sup>
47. As way of an example, Standing Order 156 in the South African Police Service provides guidance on how the police service should engage with the media when exercising their duties. The order provides that police officials have a duty to treat media officials with dignity and courtesy and the media may not be prohibited from taking photographs or making visual recordings. However, the definition of media officials in the order does not include citizen journalists. Further, the order is not always adequately implemented by police officials. Journalists are often prevented from covering protests or manhandled by police officials. For example, journalists were intimidated and harassed by the police as well as some protesters during #FeesMustFall movement’s protest outside the South African Union Buildings in 2015.<sup>94</sup>

**Question 13: Accountability**

48. It is crucial that when rights are violated during an assembly, the victims are able to access some form of accountability. The establishment of independent oversight mechanisms which have the power to investigate the use of force and other rights violating behaviour on the part of the police is crucial,<sup>95</sup> and should be available in addition to effective independent judicial oversight bodies. Moreover, the police should set up internal review procedures which evaluate responses to assemblies and hold police officers and commanders accountable for carrying out or ordering rights violations.<sup>96</sup> The independent oversight mechanisms should have the power to review these internal police procedures.<sup>97</sup>

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<sup>92</sup> *Defending Dissent*, page 70.

<sup>93</sup> *Defending Dissent*, page 67 based on the *Proper Management of Assemblies* Report, para 71; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Use of Information And Communications Technologies to Secure the Right to Life 118, U.N. Doc. A/HRC/29/37 (24 April 2015).

<sup>94</sup> *Defending Dissent*, page 68.

<sup>95</sup> *Defending Dissent*, page 96 based on the following international standards: Universal Declaration of Human Rights (10 December 1948) at article 12; ICCPR at article 17; American Declaration on the Rights and Duties of Man at article V; European Convention for the Protection of Human Rights and Fundamental Freedoms at article 8; and American Convention on Human Rights at article 11.

<sup>96</sup> *Defending Dissent*, recommendation 1, page 108.

<sup>97</sup> *Defending Dissent*, page 97, based on U.N. OFF. ON DRUGS AND CRIME, HANDBOOK ON POLICE ACCOUNTABILITY, OVERSIGHT AND INTEGRITY, at 10, U.N. Sales No. E.11. IV.5 (2011) at 71.

Separate mechanisms should be established to deal with gender-based violence perpetrated during assemblies.<sup>98</sup>

49. Any internal police process which slows down or frustrates the ability of victims to hold perpetrators of rights violations accountable should be eliminated. An officer under investigation for an offence committed in the context of a protest should not engage in policing protests until the investigation is complete, and the officer has been cleared of any wrongdoing. Law enforcement officials should have access to structural, mental health, and social support systems.<sup>99</sup>

**Question 14: Private actors**

50. Assembly spaces are defined as “any public or common area open to the public (i.e. streets, sidewalks, parks, plazas, state buildings etc.) including privately owned spaces [which] are open to the general public and serve similar functions as public spaces and may include other urban or rural private spaces which may be used for the vindication of rights.”<sup>100</sup> This implies that there is an obligation to facilitate protests placed on private actors if they are in control of a space which constitutes an assembly space. However, this obligation to facilitate protests must be balanced against the role of policing institutions in facilitating protests: it should not permit non-state actors to facilitate protests or act on delegated authority from policing or security institutions.<sup>101</sup>

**Question 16: Unprotected assemblies**

51. It is correct to say that there is no such thing as an unprotected assembly. This is because other protected rights, such as the rights to life and security of the person and freedom from torture and cruel, inhuman, and degrading treatment, or any combination of them, may – depending on context – protect attendees, bystanders, monitors, journalists and people engaged in journalistic activity, and members of policing and security institutions. In circumstances when a restraint of one of these rights can be justified by the proper human rights analysis, the other rights remain applicable and protect the people involved. In the words of the Special Rapporteurs, “[n]o assembly should . . . be considered unprotected.”<sup>102</sup>

**Question 18: Distinguishing features**

52. When interpreting the right to peaceful protest, no distinction should be made between the right to peaceful assembly, peaceful demonstration and peaceful gathering. All fall within the definition of the article 21 of the ICCPR discussed in answer to question 2 above.

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<sup>98</sup> *Defending Dissent*, page 99.

<sup>99</sup> *Defending Dissent*, recommendation 8, page 108.

<sup>100</sup> *Defending Dissent*, Glossary of Acronyms and Terms, page 15.

<sup>101</sup> See para 57.2.

<sup>102</sup> *Defending Dissent*, page 20, based on the *Proper Management of Assemblies* Report, para 9.

**Question 19: Gender and Technology**<sup>103</sup>

53. The indiscriminate use of surveillance technologies during assemblies should be prohibited. Indiscriminate surveillance technologies that facilitate the mass capture and retention of personal information violate privacy and other individual and collective rights.<sup>104</sup> Further, where targeted surveillance technologies are used, a legal framework that regulates and limits the retention and use of personal information as well as complies with the principles of necessity, proportionality and non-discrimination should be introduced.<sup>105</sup>
54. Any recording of a protest by police institutions should be open, transparent, publicised, and for the purpose of protecting the protest and the protesters with the goal of using the material for review and evaluation of the police intervention in a protest. A clear protocol about how to save, store, preserve, access, and delete the material should be in place as well as mechanisms and processes to promote public access to the recordings, particularly in instances of the use of force.<sup>106</sup>
55. The use of unmanned (autonomous or remote) weapon or surveillance systems by law enforcement officials during assemblies is a question yet to be resolved in international law. INCLO's present position is that "[a]longside the detrimental health effects of CCWs, remotely piloted aircraft or drones are increasingly deployed in the context of protests to discharge CCWs, such as tear gas. These armed or weaponised drones often discharge CCWs from the air which predispose their discharges, in the form of projectiles or canisters, to striking protesters in the upper portions of their bodies or their heads, which can lead to death or serious injury. Accordingly, the discharge of CCWs from armed drones may fall foul of the legality, necessity, and proportionately principles governing the use of force. In the absence of legal certainty from the international community on the interpretation of the principles of the use of force relating to armed drones, their use should be prohibited in the context of protests."<sup>107</sup>

**Question 20: Soft-law Instruments**

56. The following soft law instruments may be of relevance for the purpose of fully understanding the right to peaceful assembly:
- 56.1. "Policing Assemblies in Africa- Guidelines for the Policing of Assemblies by law Enforcement Officials in Africa" (2017) compiled by the Special Rapporteur on Human Rights in Africa and ACHPR.

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<sup>103</sup> Contributions on gender have been made in paras 5, 26 and 57.1. Accordingly, this section focuses solely on technology. See also the INCLO Joint Submission to the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association in regards to his thematic report on the rights to freedom of peaceful assembly and of association in the digital age (March 2019).

<sup>104</sup> *Defending Dissent*, page 87.

<sup>105</sup> *Defending Dissent*, page 88.

<sup>106</sup> *Defending Dissent*, recommendation 4, page 93.

<sup>107</sup> *Defending Dissent*, page 77, based on Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) (by Christof Heyns), para 135-141.

- 56.2. "Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa" (2017) compiled by the ACHPR.
- 56.3. "Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No.11 and No.14" (2010) passed by the Council of Europe.
- 56.4. "Urgent need to prevent human rights violations during peaceful protests" (2016) compiled by Parliamentary Assembly -Council of Europe.
- 56.5. "Human Rights Handbook on Policing Assemblies" (2016) compiled by Office for Democratic Institutions and Human Rights (ODIHR).
- 56.6. "Compilation of Venice Commission Opinions Concerning Freedom of Assembly" (2014) compiled by European Commission for Democracy through law - Venice Commission.
- 56.7. "Comparative Study on National Legislation on Freedom of Peaceful Assembly" (2014) Requested by Venice Commission; Prepared by Anne Peters and the Max Planck Institute.
- 56.8. "Guidelines on Freedom of Peaceful Assembly" (2nd Edition) (2010) compiled by ODIHR - Venice Commission.
- 56.9. "Guidebook on Democratic Policing" (2008) authored by Senior Police Adviser to the OSCE Secretary General.
- 56.10. "Rights to freedom of peaceful assembly and of association~" (2010) compiled by Special Rapporteur on the rights to freedom of peaceful assembly and of association-Maina Kiai.
- 56.11. "Joint report of the Special Rapporteur on the rights to freedom of assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies" (2016) compiled by the relevant Special Rapporteurs.
- 56.12. "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials" (1990) compiled by 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
- 56.13. "Code of Conduct for Law Enforcement Officials" (1979) U.N. General Assembly Resolution 34/169.
- 56.14. "Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association" (2012) compiled by Human Rights Council / Special Rapporteur Maina Kiai.
- 56.15. "Resolution 25/38 - The promotion and protection of human rights in the context of peaceful protests" (2014) resolution taken by the Human Rights Council.
- 56.16. "Expert Testimony of UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Professor Christof Heyns" (2013) submissions made at The Judicial Commission of Inquiry into the Events of Marikana.
- 56.17. "ASEAN Human Rights Declaration" (2012) adopted by ASEAN.
- 56.18. "Report on Citizen Security and Human Rights" (2009) compiled by Inter-American Commission on Human Rights.
- 56.19. "The American Convention on Human Rights" (1969) adopted by the Organization of American States.

## **D. ADDITIONAL MATTERS FOR CONSIDERATION**

57. In addition to the responses to the note prepared by the Rapporteur, INCLO urges the Committee to consider the following additional contributions for inclusion in the General Comment.

### ***Non-discrimination and equality***

- 57.1. The state must protect and promote all forms of protest by any individual “without discrimination on the basis of any prohibited ground.”<sup>108</sup> It should be affirmed that the freedom to organise and participate in public assemblies must be guaranteed to: individuals, groups, unregistered associations, legal entities, and corporate bodies; members of minority ethnic, national, sexual, and religious groups; nationals and non-nationals (including stateless persons, refugees, foreign nationals, asylum seekers, migrants, and tourists); children, women, and men; law-enforcement personnel; and persons without full legal capacity, including persons with mental illnesses.<sup>109</sup>

### ***The role of non-state actors***

- 57.2. The deployment of non-state actors, such as private security services, is particularly worrying as it is often difficult to hold them accountable for rights violations and ensure that they have adequate training to facilitate a protest appropriately. Resultantly, it should be mandated that non-state actors are only deployed in the context of protests where there is express enabling legislation and policies that subject them to the same, if not more restrictive, principles than those governing policing and security institutions.<sup>110</sup>

### ***Urban / rural divide***

- 57.3. It should be recognised that people in both rural and urban areas require and exercise the right to protest. The differing infrastructure available in rural and urban areas should be considered when mechanisms are designed for notification, reporting, and accountability. Some jurisdictions take submissions for notification or complaints about police responses to protests through the internet and social media. While the feasibility of such a system will depend on the wider infrastructure and resources available to the population, any mechanism that makes the process more accessible is a welcome development.<sup>111</sup>

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<sup>108</sup> *Defending Dissent*, page 36, based on the *Proper Management of Assemblies* Report, para 15.

<sup>109</sup> *Defending Dissent*, page 36, based on the OSCE Guidelines, para 2.5.

<sup>110</sup> *Defending Dissent*, page 90.

<sup>111</sup> *Defending Dissent*, pages 47-8.

### ***Data tracking and reporting***

57.4. As part of states' responsibility to ensure accountability, "[s]tates must establish effective reporting and review procedures to address any incident in relation to an assembly during which a potentially unlawful use of force occurs."<sup>112</sup> Satisfying this requirement includes gathering and reporting "relevant information, including statistics on when and against whom force is used."<sup>113</sup> The African Commission on Human and Peoples' Rights (ACHPR) has specified that state parties should establish processes for the systematic collection and public dissemination of disaggregated data and other information about the policing of assemblies on an annual basis.<sup>114</sup>

### ***Institutional design***

57.5. States must provide the support, infrastructure and services necessary to implement the relevant legal and institutional framework. This means "[s]tates should provide the necessary support to, and sufficient oversight of, the authorities involved in the management of assemblies, at all levels of government. This includes sufficient training and necessary financial and human resources."<sup>115</sup> This also includes the provision of basic government services necessary for individuals to exercise the rights to protest – such as traffic regulation, medical assistance and cleaning services.<sup>116</sup> Legislation, procedures, and codes of conduct should be publicly accessible, including regulatory instruments and information about law enforcement procedures relating to assemblies. Effective reporting and accountability mechanisms must be put in place to ensure security interventions protect and facilitate the rights to protest.<sup>117</sup>

### ***Police training***

57.6. Members of policing institutions must have the professional skills for facilitating assemblies. This applies to both those in charge of planning (how best to engage in the context of an assembly, establish a dialogue with organisers, prevent problems from occurring, anticipate risks and avoid or prepare for them, etc.), and officials policing the event (how to communicate with participants to reduce tension, negotiate, peacefully settle conflicts, and assist people in need, etc.). Training should be ongoing and continuous and should include implicit bias training. Law enforcement officials should be trained to differentiate between individual and group behaviour, and to identify and respond to specific persons

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<sup>112</sup> *Defending Dissent*, page 81, based on the *Proper Management of Assemblies* Report, para 50.

<sup>113</sup> *Defending Dissent*, page 81, based on the *Proper Management of Assemblies* Report, para 49(h).

<sup>114</sup> *Defending Dissent*, page 81, based on the ACHPR Guidelines, para 8.5.

<sup>115</sup> *Defending Dissent*, page 27, based on CIDH, Informe Anual 2015, capítulo 4A, párrafos 17(d).

<sup>116</sup> *Defending Dissent*, page 27, based on the *Proper Management of Assemblies* Report. the ACHPR Guidelines state, at para 17.3, that the provision of first aid and other essential services during an assembly must be provided free of charge to assembly participants. Further, the OSCE Guidelines state, at para 2.2, that "[i]t is the primary responsibility of the state to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed and not subject to undue bureaucratic regulation."

<sup>117</sup> *Defending Dissent*, page 28.

acting in an unlawful or violent manner while continuing to facilitate the enjoyment of the right to assemble freely with others for all other persons.<sup>118</sup>

### ***Genuine engagement and dialogue***

57.7. Dialogue and exchange of information between state institutions and, “where identifiable, assembly organizers before, during and after an assembly enable a protective and facilitative approach to be taken, helping to diffuse tension and prevent escalation.”<sup>119</sup> During an assembly, law enforcement agencies should attempt to engage in continuous dialogue and negotiation with assembly organisers and participants to proactively address any issues that may arise and should maintain open communication with all relevant stakeholders. Journalists and NGOs should be allowed to perform watchdog functions and record any dispersal of an assembly.<sup>120</sup>

### ***De-escalation and non-escalation***

57.8. Tactics used by police should emphasise non-violent intervention, non-escalation and de-escalation, and promote communication and engagement. Communication involves genuine dialogue and also nonverbal presentation. This includes the appearance of officers, “the presence or use of certain [crowd-control] equipment and the body language of officials”,<sup>121</sup> and other elements that “may be perceived by organizers and participants as intimidation.”<sup>122</sup> Operational commanders must give priority to de-escalation tactics that favour the presumption of the right to assemble freely with others. Dispersal of an assembly should be a last resort and intervention should only take place in circumstances in which it is legal, necessary, proportionate, and non-discriminatory to do so.<sup>123</sup> The state has a duty to design operating plans and procedures to facilitate the exercise of the right of assembly. This includes everything required for the activities in the assembly to take place, such as rerouting pedestrian and vehicular traffic in a certain area and escorting those participating in the gathering or demonstration to guarantee their safety.<sup>124</sup>

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<sup>118</sup> *Defending Dissent*, page 51, based on Amnesty International, Use of Force – Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by law enforcement officials at page 151. The ACHPR Guidelines state, at para 21.3.4, that law enforcement officials must receive training on the lawful, proportionate, and necessary use of force and on alternatives to the use of force, such as understanding crowd behaviour and techniques in crowd facilitation and management, de-escalation, a graduated response to tension or violence, and on first aid.

<sup>119</sup> *Defending Dissent*, page 66, based on *Proper Management of Assemblies* Report, para 38.

<sup>120</sup> *Defending Dissent*, page 66, based on OSCE Guidelines, para 5.9, read with ACHPR Guidelines, para 22.7.

<sup>121</sup> *Defending Dissent*, page 58, based on the *Proper Management of Assemblies* Report, para 67(b).

<sup>122</sup> *Defending Dissent*, page 58, based on the *Proper Management of Assemblies* Report, para 38.

<sup>123</sup> *Defending Dissent*, page 59, based on ACHPR Guidelines, para 22.1.

<sup>124</sup> *Defending Dissent*, page 59, based on the IACHR, Report on Citizen Security and Human Rights, 31 December 2009, OEA/Ser.L/V/II. Doc. 57, which states: the planning of operations must consider, especially, the State’s duty of protecting, during a protest, the physical integrity of protesters and bystanders that are close by, even in relation to acts committed by private or non-state actors.



## **E. CONCLUSION AND ORAL CONTRIBUTION**

58. INCLO is thankful to the Committee, and its Rapporteur, for its consideration of this contribution, and it requests an opportunity to present an oral contribution to the Committee during the General Discussion on 20 March 2019 to further clarify its various positions.