

# The Right to Protest Principles: Background paper

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2016

## Executive summary

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In this Background paper, ARTICLE 19 summarises our concerns and experience that led to the development of the Right to Protest Principles, a set of policy recommendations to elaborate a set of minimum standards for the respect, protection and fulfilment of the right to protest. As part of that process, ARTICLE 19 carried out extensive research into the regulation and protection of protest around the world and engaged with practical assistance to protesters at national level and with advocacy on the right to protest at national, regional and international levels.

This document is intended as a complement to the Principles, justifying, substantiating and clarifying the standards contained therein. To this purpose, it considers a wide range of materials and evidence. These include, but are not limited to: relevant international standards, and international jurisprudence; national legislation and jurisprudence, both civil and criminal; the actual practice of law enforcement and administrative bodies (e.g. the police), interventions by the UN special mandates and the Human Rights Committee. While much of this evidence gives examples of bad practice (if this were not the case, there would be little point in formulating a set of principles), there is also much commendable practice gathered herein. Indeed, this is a forward-looking document, which aims not only to address gaps and discrepancies in current protection of the right to protest, but also, significantly, seeks to assess the impact of new digital technologies.

The paper starts with conceptual issues, putting the right to protest in a human rights context; it then develops thematically, highlighting concerns over violations, legal ambiguities, and international best practice, before offering ARTICLE 19's recommendations, which are elaborated more concisely in the Principles.

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# Introduction

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We are living in an age of protest: from widespread calls for justice across the Middle East and North Africa, to protests in Turkey against the privatisation of public space; from Greek protests against austerity measures, to Cambodian protests against land grabbing; from US protests in Ferguson against police violence and Occupy Wall Street, to protests in Mexico against impunity for attacks on journalists and human rights defenders.

Throughout history, protests have played a crucial role in challenging repression and demanding democratic and accountable governments: these challenges include the fight against colonialism, labour struggles and strikes, the civil rights movement, anti-apartheid and anti-communism movements, feminist movements, anti-war and anti-capitalist mobilisations and protests against “stolen elections” – to name but a few. Protest often becomes the default political action in seeking to change social, political and economic systems. The list of countries hit by major protests over the last decade is long and diverse – Armenia, Azerbaijan, Bosnia, Moldova, Macedonia, Russia, Ukraine, Venezuela, Brazil, Mexico, USA, Canada, Japan, Taiwan, Myanmar, Malaysia, the Gambia, Nigeria, Uganda, the Democratic Republic of Congo, Lebanon, the Occupied Palestinian Territories, and others – which suggests that this trend is not slowing.

Protests are important in all societies, as they provide individuals and groups with an opportunity to have a say in public life through means that are often more direct and effective than electoral and formal participatory processes. Although demonstrators may be neither progressive nor pro-rights (e.g. Pegida in Germany, pro-Sisi in Egypt, anti-Ukraine in Russia, anti-LGBT in Uganda), it has been recognised that protests are especially important

[I]f the representative organs do not recognise possible abuses and mistakes or do not recognise them in time or accept them out of regard to other interests. [They] function as a necessary condition of a political early warning system, indicate potential for trouble, make lack of integration visible and thereby also facilitate adjustments to the course of official politics.<sup>1</sup>

However, instead of viewing protests as a legitimate part of democratic society and an exercise which ensures good governance and accountability, states often treat protests as a threat; something to be controlled, discouraged or eliminated, through legislation, policy and practice.

Protests do not necessarily take the form of demonstrations, marches or parades. With issues such as nuclear weapons, the environment, animal cruelty, war, globalisation, or minority rights, one preferred mode of protest has been “non-violent direct action” or “civil disobedience.” While such actions may violate laws unrelated to the cause of the action (e.g. protecting property from damage or trespass), state responses to such protests often disregard the fact that they involve the exercise of rights and may benefit society, and instead consider them as a threat.

The expansion of digital technologies has brought new opportunities and challenges to protests:

- *First*, digital technologies are used as a **medium** for protest. They play an important role in enabling protests to take place, by helping individuals and groups to organise and plan effectively and quickly, respond to certain events, or document and report on protests.



However, measures to limit the use of digital technologies for protest purposes are on the rise.

- *Second*, the Internet is increasingly being used as a **platform** for protest. Protests no longer need to take place in physical spaces, such as public places, squares, roads or parks. Instead, technology makes it possible for people to “gather” in online spaces and engage in new forms of “virtual” protest. Calls are repeatedly being made for recognition of the right to protest “online”, without actually specifying what this entails; the scope of protection for such protests has yet to be defined. At the same time, criminal laws in many jurisdictions outlaw various forms of virtual protest that might be termed “electronic” direct action/civil disobedience, without consideration of the impact of restrictions on freedom of expression and other human rights.
- *Third*, technology has also increased ability of governments to **restrict protests**.

At the same time, new opportunities for improving the protection of human rights in the context of protests have emerged over the last few years; in particular:

- The UN Human Rights Council (HRC) has created the mandate of **Special Rapporteur on the rights to freedom of peaceful assembly and of association** (Special Rapporteur on FOAA)<sup>2</sup> – who has contributed through his annual thematic reports to the development of “soft law” in this field;
- In 2010-2014, the **HRC** adopted **multiple resolutions** specifically addressing the protection of human rights in the context of protests;<sup>3</sup> several other thematic and country mandate holders and UN bodies have also addressed the topic in their reports<sup>4</sup> or statements.<sup>5</sup> These have played an important role in underlining the responsibilities of states to protect the human rights of protesters, and laid the groundwork for greater guidance on how to implement these protections.
- In March 2014, in HRC Resolution 25/38, the HRC, *inter alia*, requested the relevant special procedures to prepare **guidelines for facilitating and protecting peaceful assemblies** based on international good practice, in consultation with civil society and other stakeholders. The Special Rapporteurs on FOAA and the Special Rapporteur on extrajudicial, summary or arbitrary executions conducted extensive research in the process of elaborating these guidelines (March 2015 – December 2015)<sup>6</sup> and issued the Joint Report on the proper management of assemblies at the HRC session in March 2016.<sup>7</sup>
- It has been further suggested that the Human Rights Committee (HR Committee) should draft a **general comment on Article 21** of the International Covenant on Civil and Political Rights (ICCPR), regarding the protection of the right to peaceful assembly.<sup>8</sup> The HR Committee has not yet prioritised this initiative;
- At a **regional level**, the African Commission on Human and People’s Rights has conducted a study on freedom of association and assembly in Africa, which is to be used as the basis for specific guidelines on the subject.<sup>9</sup> The Organisation for Security and Cooperation in Europe (OSCE) has been updating its Guidelines on Freedom of Peaceful Assembly for a third edition;<sup>10</sup> and both the Council of Europe<sup>11</sup> and the Organisation of American States (OAS) have been addressing the issue through various instruments.<sup>12</sup>

ARTICLE 19 has been engaging with the protection of human rights in the context of protests at both national and international levels. ARTICLE 19’s offices, especially in Mexico, Brazil,

Tunisia and Myanmar,<sup>13</sup> grapple with the day-to-day reality of defending the rights of protesters in their regions. At the UN, we have been advocating for strong resolutions related to protest; we have contributed to the development of the joint report on the proper management of assemblies by two special mandates (see above). We have also been supporting individual cases of protesters at national and regional courts.

In ARTICLE 19's experience, efforts to improve the protection of human rights within protests have not been uncontroversial.<sup>14</sup> Hence, we believe that it is important for civil society organisations to join forces in supporting and influencing ongoing initiatives and processes at UN and regional levels, to ensure that gaps in protection are properly addressed, and that the highest possible standards are adopted. It is also important to apply existing standards of protection in advocacy and litigation.

The aim of this Background Paper is to present ARTICLE 19's perspective on the subject, and to provide a more detailed justification of the Right to Protest Principles, which have been elaborated in cooperation with international experts and other partners. We hope that both documents will be used in national, regional and international advocacy to improve the protection of human rights in this complex area.

Originally, the Background Paper – as well as the accompanying Right to Protest Principles – were developed to provide the basis for discussion at a meeting in London on 15-16 May 2014, bringing together international experts in the field of human rights, freedom of expression, media freedom and freedom of peaceful assembly. Since then, they have been used as a resource for various international and regional bodies, in particular the joint report of two special rapporteurs on the proper management of assemblies. They have also been subject to extensive consultation – both during regional meetings (organised by ARTICLE 19 Brazil and Southern America and ARTICLE 19 Mexico and Central America) and online, through a consultation website – to ensure input from a wide range of stakeholders. The final versions of the Principles and the Background Paper have incorporated suggestions and recommendations received in this process.

# The right to protest: conceptual issues

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## Legal definition of “protest”

The term “protest” is not defined in international law, despite its frequent use in both legal and non-legal discourse. In national legal frameworks and practice, it is often equated with the right to freedom of assembly.

ARTICLE 19 finds that the terms “protest” and “assembly” are not necessarily interchangeable. Protest, unlike assembly, implies an element of dissent, opposition, confrontation, response, or reaction. Unlike assembly, protest is therefore not entirely content-neutral. In addition, while assembly is always collective, protest can also be individual; it may include an individual’s political speech or action, as well as collective political expression.

The term protest is also an emotive one: for many, it evokes social justice movements and the positive exercise of rights. For others, in particular repressive governments and conservative elements in society, the word is associated with disorder, chaos, unrest, and challenges or threats to authority. To some groups (e.g. LGBT people in Russia or Uganda, the Roma in Hungary, and other discriminated-against minorities), protests can also represent the opposite of social justice. The language used to describe the exercise of this fundamental right, therefore, as well as the emotion evoked by that language, has ramifications for how conduct is regulated in law and in practice, and how it is perceived by society at large.

For present purposes, ARTICLE 19 suggests that the term “protest” should be understood as encompassing a range of individual and collective expressive conduct manifesting oppositional or reactive views, values or interests. As such, the term “protest” refers to:

- Various **forms** of individual but primarily collective expression: gatherings or assemblies (e.g. demonstrations, parades, marches, vigils, pickets or public rallies) of different duration, static or moving, undertaken by individuals united by shared objectives;<sup>15</sup> this includes associated verbal and non-verbal forms of expression (e.g. pamphlet distribution, performance of music, dance or theatre, satire, graphics, posters or slogans or engaging in other visual forms of communication). It also encompasses actions that may be characterised as “non-violent direct action” or “civil disobedience” (e.g. blockades, sit-ins, occupations or boycotts);
- Various **causes** of common interest: for example, participants may be gathering, standing or otherwise acting in opposition to specific official policies, or expressing a specific identity, expressing grievance, supporting others, drawing attention to the disadvantaged or marginalised position of certain groups in a society, or enabling a community-formation;
- Various **targets**: protests may target government officials and public institutions, alternatively, they may target the general public, certain private associations, or corporations;
- Various **locations** or spaces: protest may take place in roads, squares, streets, parks, corporately regulated open spaces (e.g. pedestrian malls), and spaces designated for a specific purpose (e.g. parliamentary precincts). These include both public and privately owned public spaces.<sup>16</sup> Increasingly, protest may also occupy virtual or “online” spaces.

- Various degrees of **organisation**: some protests have formal coordinators, an organisational structure, stewards, and a pre-determined form or duration; others have no clear organisational structure, hierarchy, or pre-determined form or duration.

### Recognition of “the right to protest”

International human rights instruments do not explicitly recognise a “right to protest” *per se*. It has been widely acknowledged, however, that protest encompasses the exercise of a variety of interlinked and interdependent human rights. The right to protest, therefore, does *exist* as the amalgamation of these various fundamental rights:

- Rights essential to the actual exercise of activity of protest: the right to freedom of expression<sup>17</sup> and the right to freedom of peaceful assembly and association,<sup>18</sup> the right to take part in the conduct of political affairs,<sup>19</sup> the right to strike (in the context of labour relations),<sup>20</sup> the right to take part or participate in cultural life,<sup>21</sup> and the right to freedom from discrimination;<sup>22</sup>
  - It should be noted that the rights to freedom of expression and freedom of assembly significantly overlap in the protection that they provide, and cannot always be separated when applied to protests.<sup>23</sup> “Expression” is more often used in relation to individual acts of protest, and sometimes in relation to an individual’s rights when participating in a protest with others; “assembly”, meanwhile, requires more than one person, usually some unity of time and place, and a common expressive purpose. Restrictions on assemblies almost always involve a violation of one or more individuals’ expression rights. In the national legislation of some countries, the right to freedom of assembly is not explicitly distinguished, but rather subsumed under the right to freedom of expression;
- Rights that are often violated when protests are suppressed: in particular the rights to life, privacy, liberty and security of a person, and freedom from discrimination.<sup>24</sup>
- Rights that protests are essential to securing: all human rights, but in particular social, economic and cultural rights, such as the rights to water and sanitation, health and education.

### “Peaceful protest”

ARTICLE 19 notes the prevalence of the term “peaceful protest” in human rights discourse, and believes that this may cause confusion regarding the application of human rights protections to protests not characterised as “peaceful”.

Several issues should be highlighted here:

- Under international law, the right to 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.”<sup>25</sup> Disruptive protests are thus specifically protected;
- The term “peaceful protest” is frequently used to describe protests that are not violent, mirroring the treaty language which determines the scope of the right to freedom of *peaceful* assembly (Article 21 of the ICCPR and Article 20 of the Universal Declaration of Human Rights). Notably, the term “peaceful” is absent from the guarantee to “the right to assemble freely” in the African Charter on Human and Peoples’ Rights (Article 11);

- In existing international standards, the definition of “peaceful assembly” has been elaborated to take account of intention. For example:
  - o The jurisprudence of the European Court of Human Rights (ECtHR) indicates that only assemblies in which the participants or organisers have “violent intentions” are excluded from protection;<sup>26</sup>
  - o Similarly, the OSCE Guidelines define non-peaceful assemblies as “those in which the organisers and participants *intended* to use violence”; the burden of proving violent intentions lies with the authorities.<sup>27</sup>

However, sporadic or isolated incidents of violence during an otherwise peaceful protest should not deprive individuals of their rights to freedom of peaceful assembly or other human rights.<sup>28</sup> Passive resistance, including non-violent direct action in the form of sit-ins and blockades, falls under the definition of “peaceful”.<sup>29</sup> Furthermore, the fact that protesters are in possession of protective equipment (such as helmets or gas masks) does not deprive an assembly of its peaceful character.<sup>30</sup> Indeed, even if some individuals are carrying weapons, this does not mean that the protest should be automatically considered as having violent intentions (for example, some protesters may carry traditional arms such as spears or home-made tools intending to use them only in self-defence or to protect others from unlawful aggression).

- Even in a situation where a protest escalates into violence to the extent that dispersal is justified, other rights – such as the rights to life, to liberty, to a fair trial, to freedom from torture – remain in play.

Since international protection of human rights continues to apply during protests, whether they are characterised as peaceful or non-peaceful, both this Background Paper and the Right to Protest Principles deliberately avoid using the term “peaceful protest”.

### **Protests involving some type of physical harm to oneself**

Various forms of self-harm, such as self-immolation, “hunger strike” or mouth-sawing, are also used as a means of protest. Notable precedents include: the hunger strikes of suffragettes in the late 19<sup>th</sup> and early 20<sup>th</sup> century, the Irish and South African hunger strikes in the 1980s, by Turkish prisoners in 1996 and 2000-2003, and the hunger strikes at Guantanamo Bay, Cuba; the wave of Tibetan self-immolations from 2009; or the self-immolation of the Tunisian street vendor in December 2012.

This form of protest – when protesters are willing to die or suffer a serious harm to achieve their goal, though these are rarely attempts to commit suicide – raises ethical questions about whether state and medical professionals should intervene to save the life of an individual who chooses such a protest to secure an explicit political goal while fully aware of the potentially fatal consequences.

ARTICLE 19 notes that international law does not restrict the form of free expression, except of permissible limitations on the right (outlined in detail below). We also note that in certain situations, such as for people deprived of liberty, “typical” or conventional means of expression are impractical, diminished or impossible. Under some circumstances, self-harm can be one of very few, limited tools for protest.

At the same time, under international law, states not only have to refrain from intentional and unlawful deprivation of life, but must also take appropriate steps to safeguard the lives of those within their jurisdiction. Also, numerous human rights treaties and instruments and international humanitarian law provide standards on the protection of the rights and health of those deprived of liberty; some of these standards touch upon the situation of hunger strike (or self-harm), but only few international documents directly address it. The existing standards mainly deal with the role and obligations of medical personnel and medical ethics, and do not address all relevant problems in their complexity.<sup>31</sup>

However, international human rights standards establish that involuntary medical treatment in the case of this type of protests (such as force-feeding prisoners, handcuffs, chains, large feeding tubes, or constraint chairs) administered by state authorities might amount to cruel, inhumane or degrading treatment or punishment, and even torture. They require that in situations where individuals engage in extreme forms of protests, medical personnel must aim to protect “the health and welfare of [individuals] and avoid loss of life to the extent that such services are not contrary to compelling internationally accepted standards of medical ethics or binding rules of international law.”<sup>32</sup>

In the case of hunger strikes in prisons or places of detention, the principle of an individual’s right to informed and voluntary refusal of medical measures must be respected. This principle is reiterated in several UN human rights documents, which consider a lack of free and informed consent as a clear violation of an individual’s right to health. Several medical organisations have proposed principles for the conduct of the physician–hunger striker relationship.<sup>33</sup> These advocate respect for a free and informed choice to make this form of protest. ARTICLE 19 believes that these standards should be fully observed in extreme types of protests involving self-harm.



# International protection of the right to protest

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Some human rights involved in protests – provided for in international and regional treaties<sup>34</sup> – are not guaranteed in absolute terms, in particular the right to freedom of expression and freedom of assembly and association. However, they may be subject to narrowly defined limitations, which must function in strict compliance with the treaty's provisions. In relation to freedom of expression and freedom of assembly, the requirements for a permissible restriction are similar. A “three-part test” stipulates that any restriction of either must:

- Conform to the principle of **legality**: restrictions on the right to freedom of expression must be “provided by law”, while limitations on the right to freedom of peaceful assembly must be “in accordance with law;”
- Be in pursuit of a “**legitimate aim**”: legitimate aims include respect for the rights or reputations or others, the protection of national security or of public order, or the protection of public health or morals; the right to freedom of peaceful assembly may also be restricted to protect public safety;
- Be **proportionate and necessary** for the protection of the established legitimate aim.

Additionally, under Article 20(2) of the ICCPR, states are obliged to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (incitement).

Due to the importance of these rights in the context of protest, states have “very narrow margins for justifying restrictions to the right to freedom of expression and freedom of assembly and association. Restrictions must be construed narrowly so that the rights are “practical and effective” not “theoretical or illusory”.<sup>35</sup>

Despite these guarantees, at the *international level*, ARTICLE 19 finds that a clear elaboration of state obligations in protecting the right to protest is needed for several reasons:

- *First*, a determination of the precise contours of acceptable limitations on **the right to peaceful assembly**, with the exception of efforts by UN special procedures, is somewhat lacking: clear and authoritative statements are fragmented and irregular in comparison to those relating to other rights. For example, the HR Committee has devoted two General Comments to the right to freedom of expression (Article 19) and one General Comment to the right to political participation (Article 25); but none to Articles 21 or 22; it also has relatively limited jurisprudence in relation to either Article.

Regional jurisprudence is also limited: the European Court of Human Rights (ECtHR) has treated the right to peaceful assembly (under Article 11 of the European Convention) as *lex specialis* in relation to the right to freedom of expression (Article 10 of the European Convention); it has, in a number of cases, found it “unnecessary” to assess complaints on the protection of the right to peaceful assembly where a violation of the right to freedom of expression has already been decided.<sup>36</sup> There have been few decisions on violations of the right to protest at the Inter-American Court on Human Rights, the African Court on Human and People’s Rights, and in other regional courts.<sup>37</sup>

- *Second*, General Comment 34 on the **right to freedom of expression** under Article 19 of the ICCPR has not specifically dealt with acts of protest, individual or collective, *per se*, and does not elaborate guidelines relevant to the protection of protests;
- *Third*, it is necessary to clarify that some absolute human rights which are by default protected at all times (such as the right to life or freedom from torture and other cruel, inhuman and degrading treatment) may nevertheless require increased efforts to ensure effective protection during protests, given the particular vulnerability of participants at this time.

ARTICLE 19 believes that this international protection gap in part explains the divergence in approaches to protest taken at the national level, and the frequency of violations. It has been widely documented that many states abuse this international ambiguity, introducing illegitimate and disproportionate restrictions on the right to protest.<sup>38</sup>

Some of these protection gaps have been recently addressed in the joint report of the two special rapporteurs on the proper management of assemblies (SRs Guidelines on managing assemblies). There is also the potential for an HR Committee General Comment on Article 21 of the ICCPR in the near future, alongside ongoing regional initiatives.

ARTICLE 19 fully supports these efforts and in particular notes:

- It is important to provide comprehensive recommendations on how to maximise enjoyment of the right to protest, going beyond specifying permissible “time, place and manner” restrictions and rules for the policing of assemblies; we need to provide thorough **recommendations for the protection of all human rights engaged in protest**;
- There is still a protection gap in the area of **new technologies, which on the one hand provide the means and virtual platforms for exercising the right to protest**, while on the other significantly enhance the ability of law enforcement agencies to infringe and potentially violate human rights;
- We believe it is important to protect, at an international standards level, the right to protest through **non-violent direct action/civil disobedience**.
- It is also important to consider the specific obligations on states which are necessary in order to **respect, protect and fulfil the right to protest**.<sup>39</sup> We note that these obligations include establishing an enabling environment for protests, refraining from violations of the right to protest, and preventing third parties from violating the right to protest, including by specifying the responsibilities of non-state actors, such as businesses.

We examine each of these areas separately in the following sections, highlighting the gaps in the existing framework and offering some suggestions as to how these should be resolved. More specific recommendations are then elaborated in The Right to Protest Principles.



# Restricting protests

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National legislation and practice in the regulation of protests that take the form of public assemblies is complex, and includes a combination of general and specific criminal, administrative and civil laws, often with considerable discretion allowed to authorities exercising law enforcement duties. Regulations may include, for example, a prior-authorisation system or excessive notification requirements, pre-emptive measures (prior restraint), or ‘time, place and manner’ prescriptions. Many of these restrictions fail to meet the requirements of the three-part test for limitations on freedom of expression and freedom of peaceful assembly established under international law.

The aim of this section is to highlight areas in which the existing protection of protests in the form of assemblies should be improved at the normative level. Examples are used for illustrative purposes only.

## Advance authorisation or notice requirements

Many states require organisers to seek authorisation for any protest or assembly;<sup>40</sup> typically, permissions must be obtained within a designated period in order for them to be lawful. It is well-established that such authorisation regimes are not compatible with international standards.

In other states, participants are required to provide “advance notice” to the authorities, either for all protests, or in specific cases (e.g. notification is sometimes only required for marches and parades, and not for static assemblies).<sup>41</sup> However, in ARTICLE 19’s experience, “notification” requirements in many countries function as *de facto* authorisation regimes, with significant discretion given to the State to fundamentally change the nature of a proposed protest by prescribing its time, place or manner. In other countries, the form and quantity of information required are often unnecessarily bureaucratic. The discretion granted to authorities can often be abused to discriminate against organisers based on their identity.

ARTICLE 19 is mindful that several international bodies have stated that prior notification procedures are permissible only to the extent that they allow states to adequately facilitate the assembly.<sup>42</sup> The OSCE Guidelines stipulate that international human rights law does not require advance notification of assemblies, and that in many cases official regulation is entirely unnecessary. The Special Rapporteur on FOAA has stressed that states should not impose prior-authorisation requirements, and should, at most, require simple notice of assemblies.<sup>43</sup> He stated that any notification procedure should be subject to a proportionality assessment, should not be unduly bureaucratic, and should not be required more than 48 hours prior to the day the assembly is planned to take place; the OSCE Guidelines specify that the notice period should not be “unnecessarily lengthy”, and “normally no more than a few days prior to the event.”<sup>44</sup>

It has also been recommended that spontaneous assemblies should be exempt from prior-notification requirements,<sup>45</sup> and that the absence of a notification should not be used to justify the dispersal of an assembly.<sup>46</sup>

Hence, ARTICLE 19 believes that “notification regimes” should be an exceptional measure, and prefers a default position that non-notified assemblies are lawful and permitted.

Notification should be encouraged, rather than required, in particular where organisers determine that the assistance of law enforcement is necessary to facilitating the assembly.

## Bans on protests

Various bans on protests have been applied by states in recent years, in law and in practice. These include:

- Absolute and indefinite bans on all protests in the country,<sup>47</sup> in specific areas for an indefinite period,<sup>48</sup> or in specific areas for the duration of specific (and often politically sensitive) events;<sup>49</sup>
- Blanket bans on protesting at certain times, e.g. after daylight hours;<sup>50</sup>
- Bans on protests, or types of protest, in specific areas due to the political nature of the area;<sup>51</sup>
- Restrictions on protests in places that are privately owned or managed but which are functionally public (e.g. parks or malls);<sup>52</sup>
- Prohibitions on protests around politicians' homes and offices.<sup>53</sup>

While these restrictions are often justified as mere limitations on the “time, place and manner” of protests, and as in pursuit of legitimate interests, they are often in fact designed to limit space for political dissent; in most cases, their necessity and proportionality is doubtful. In particular, we often see such limitations as intended to thwart the individual or collective expressive purpose of an assembly. As such, several aspects of protection must be highlighted:

- In principle, protesters should not face blanket restrictions on **protesting in public spaces**: international standards recognise a presumption that using public spaces for the purpose of protest is as legitimate, if not more so, than other uses of the same spaces, for a “reasonable period”. The ECtHR recognised that a “certain degree of tolerance” towards disruption to ordinary life caused by demonstrations is necessary “if the freedom of assembly is not to be deprived of all substance.”<sup>54</sup> The European Court of Justice (ECJ) stipulated that inconvenience caused to others by some protests does not render them unlawful.<sup>55</sup> The OAS Special Rapporteur for Freedom of Expression also highlighted that disproportionate restrictions on protest, in particular when groups have no other way to express themselves publicly, seriously jeopardise the right to freedom of expression.<sup>56</sup>
- In some cases, states may be under a positive **obligation to create space for protests**: ARTICLE 19 observes that, under available standards, protection is unlikely to be granted to assemblies held in privately owned places against the wishes of an owner, or if alternative means of expressing such views are available outside of private premises.<sup>57</sup> However, it has been recognised that “the state may, on occasion, have a positive obligation to ensure access to privately owned places for the purposes of assembly or expression”, although the extent of this obligation requires further elaboration.
  - ARTICLE 19 believes that this issue should be addressed through the concept of “**quasi-private places**” or “privately owned public places” to ensure that protests are not automatically restricted or prevented from taking place in spaces that are privately owned or managed (e.g. parks, shopping malls) but which are typically used for public purposes.
  - We also note that general restrictions on all protests in the vicinity of **official residences** (e.g. a Presidential Palace) **and offices of key politicians or institutions** are not permissible under international human rights law. We also recall that international

courts have consistently held that public bodies and officials should tolerate a wider degree of criticism, and display a greater degree of tolerance, than ordinary citizens.<sup>58</sup> Hence, a general ban on protests outside a politician's family home would not be justified when other, more proportionate measures can be used to protect politicians' families.

- It has also been proposed that international standards should elaborate on the obligation of international bodies and institutions to enable **protests during and within sight and sound of international conferences and political events**,<sup>59</sup> in order to ensure effective communication between the event's participants and protesters. It has been pointed out that "demonstration" or "free speech zones," often set up near meetings of international organisations (e.g. WTO or G8) or political parties, should be abolished, as they severely restrict protesters' ability to get their message out, as well as limiting the crucial value of physical proximity to the relevant location.<sup>60</sup>
- **Long-term protests:** Several recent protests (e.g. Gezi Park in Turkey, Euromaidan in Ukraine, Tahrir Square in Egypt, Hong Kong "umbrella" protests in China or the Occupy Movement in various countries) have been characterised by their indeterminate length. Maintaining a sustained presence in one place over a long period of time can broaden the audience of a protest and enhance its impact. Duration may also be a key component of the expressive purpose of a protest, symbolising that an issue cannot be ignored, or symbolically reclaiming control of spaces. The protracted nature of these forms of protest has called into question how permissible legal restrictions on the duration of protests should be imposed, in light of how authorities in some countries have relied on legal restrictions to curtail protests.

ARTICLE 19 reiterates that any limitation on the duration of a protest must meet the three-part test, in particular the requirement of necessity. To justify any interference, a state must be acting in response to a pressing social need, not merely for convenience's sake: authorities should demonstrate, with evidence, that the long-term presence of protesters poses a real danger to legitimate interests. Authorities should also have to demonstrate that less restrictive means to achieve the desired aims are not available.

### **Abuse of legitimate grounds for restrictions – criminalisation of protests**

A plethora of criminal laws are being used by states to restrain or punish the exercise of protests in the name of public order or national security. These include national security and anti-terrorism laws, laws targeting organised crime, and criminal laws of a general nature, for example punishing disorderly conduct, breach of the peace or public nuisance.

Moreover, minority groups, especially those expressing minority identities or controversial viewpoints, often face particular obstacles when organising protests and exercising their right to protest. Administrative regimes are sometimes applied in such a way as to discriminate against these groups, and obstruct or frustrate their protests. Assemblies to promote the rights of lesbian, gay, bisexual and transgender (LGBT) persons have been specifically targeted.<sup>61</sup>

ARTICLE 19 believes that it is necessary to reiterate and further develop specific requirements, above baseline principles in the ICCPR and regional treaties: in particular,

- Reliance on **national security** grounds cannot be exploited to justify the prohibition or dispersal of protests. Here, we propose to consider standards of intent, likelihood and

nexus of incitement to imminent violence, developed in *The Johannesburg Principles* (these also define the term “national security”);<sup>62</sup>

- Similarly, reliance on **public order** grounds cannot be exploited to justify the prohibition or dispersal of protests. ARTICLE 19 recalls that the Siracusa Principles define public order as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).”<sup>63</sup> The Siracusa Principles also highlight that the term “shall be interpreted in the context of the purpose of the particular human right which is limited on this ground” (in this case protest) and that the state authorities responsible for the maintenance of public order must be accountable for their actions.<sup>64</sup> Hence, ARTICLE 19 suggests that public order could be invoked if protests threatened the very functioning of society. Non-violent protests, including spontaneous, simultaneous and counter protests, should be considered an essential characteristic of public order and not a *de facto* threat to it, even where the protest causes inconvenience or disruption.
- In terms of protecting **public morals**, it must be re-emphasised that majoritarian prejudices and predisposed biases cannot justify limitations on the freedom of peaceful assembly or free expression rights of minority groups or their supporters.<sup>65</sup> In the Right to Protest Principles, we elaborate instances of “public morals” that can never be used to exclude groups from the protection of the right to protest.

## Incitement

Protests that advocate the violation of the rights of others, in particular minorities and vulnerable or disadvantaged groups, have been an issue of concern in several countries recently, including Myanmar, Bangladesh, Hungary and Egypt. They are often supported by extremist associations, including political parties, that engage in “hate speech” through activities other than protest.

We recall that states are required by international law to prohibit the advocacy of racial, national or religious hatred that constitutes incitement to hostility, violence or discrimination (Article 20(2) of the ICCPR). Elaboration on what this requires from states has been comprehensively set out in the recent *UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*. This plan provides a detailed and comprehensive roadmap for tackling the most serious forms of intolerance and hatred, addressing the roles of state and non-state actors.<sup>66</sup> The Rabat “six-part test” for incitement (originally developed by ARTICLE 19), also provides a framework for assessing individual incitement cases.<sup>67</sup>

The recommendations of the Rabat Plan and its test must be considered in the context of all protests, and we elaborate on the application of the six-part test in the context of protests in the Right to Protest Principles.

## Violence against women in protests

Women are often specifically targeted for their participation in protests. For example, in Egypt, armed forces and riot police have a record of violence against women during protests; women protesters have received brutal treatment from these security forces, including beatings, threats of sexual abuse, and forced “virginity tests”.<sup>68</sup> Similar cases have been recorded in Bahrain throughout 2011.<sup>69</sup>

In light of existing international standards, in particular the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>70</sup> more guidance is needed regarding measures to prevent gender-based violence and discrimination against women in the context of protests.

### **Children and protests**

There has been only limited examination of rights of children (usually defined as those under the age of 18) to participate in protests, and limited substantive guidance by regional human rights courts in this area.

This is despite the fact that children have been prominently engaged in many protests, both historically and recently (either on their own or being brought there by their parents or relatives),<sup>71</sup> and despite specific guarantees of the rights engaged in protests in the Convention on the Rights of the Child (Articles 13 and 15). It has been argued that protests are particularly important for children who lack the right to vote and have limited opportunities to assert their interests as compared with adults.

The Committee on the Rights of the Child (the RC Committee) has on several occasions emphasised the presumption in favour of the right of children to take part in protests on an equal basis with adults,<sup>72</sup> the positive obligation of states to facilitate children's exercise of freedom of assembly and association, and the obligation to ensure that officials protect the rights of children in the context of protests. It has also been recommended that states refrain from considering the safety of children at protests, recognising that guaranteeing a child's safety is a matter solely for their parent, and refrain from requiring parental consent to be obtained by the child in order to take part in protests.<sup>73</sup> In some cases, the Committee has elaborated recommendations for states which specifically address the rights of children during protests.<sup>74</sup>

However, further guidance is needed, including elaboration on specific obligations which take into account the vulnerabilities of children at protests,<sup>75</sup> while still giving attention to their autonomy.



# Restrictions on protests in the form of non-violent direct action

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## Concept of non-violent direct action

As already highlighted, protests encompass a variety of actions, not limited to “assemblies”. They can also take the form of “non-violent direct action” (also referred to as “civil disobedience”), in which protesters collectively engage in acts that consciously and deliberately violate the law. Such actions usually aim at changing policies and practices of governments or non-state actors, such as businesses.<sup>76</sup>

Violation of the law is not necessarily directly related to the object or aim of the protest: instead, the purpose is usually to bring attention to a particular issue, and to create some form of publicity for the underlying cause. Protesters hope that their conduct will make a dramatic appeal to the conscience of the public, affect public awareness of a particular issue and/or motivate others to demand change.

The basis for non-violent direct action and civil disobedience can be linked to the Preamble of the UDHR, which states, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, ... human rights should be protected by the rule of law.” It has been noted that its philosophy

[E]mbodies the recognition that obligations beyond those of the law might compel law breaking, but the doctrine steers that impulse toward a tightly-cabined form of illegal protest nevertheless consistent with respect for the rule of law. As such, civil disobedience serves as a firebreak between legal protest and rebellion, while simultaneously providing a safety valve through which the profoundly disaffected can vent dissent without resorting to more extreme means.<sup>77</sup>

Examples of this form of protest are numerous throughout history and some of the most important advancements in human rights protection have been a product of such action; e.g. the anti-slavery movement, the Suffragette movement, fights against colonial oppression, civil rights movements to end racial segregation, the organised labour movement. Protest through non-violent direct action continues to be a widely practiced form of political expression, with the most prominent protests being anti-war and anti-nuclear protests (e.g. the Ploughshare movement), anti-globalisation protests (e.g. Occupy Movement), and the protests of environmental activists (e.g. Greenpeace Rainbow Warrior or Sea Shepherd) as well as various feminist protests (e.g. FEMEN or Pussy Riot). In some instances, they can also take the form of self-imposed suffering (such as a hunger strike).

In general, there are two types of protests that involve law-breaking:

- **Direct**, involving intentional violations of a specific law that, in and of itself, is challenged as unjust; for example the violation of slavery or racial segregation laws, the violation of marijuana possession laws, or the violation of so-called “homosexual propaganda” laws.
- **Indirect**, involving the violation of a law which is not itself the object of protest; instead, protesters seek to mobilise public opinion, typically through symbolic action (for example trespassing on a government facility or private property, blocking access to buildings, obstruction of passage, or engaging in disorderly conduct). In these cases, protesters do not necessarily contest the validity of laws under which they are charged but believe their

acts are necessary as a means to pressure officials to change a separate policy, legislation or practice.

### Human rights standards and non-violent direct action

Although regional bodies and some national courts have recognised the expressive dimension of such protests,<sup>78</sup> courts in general refuse to recognise the human rights dimensions therein and do not extend protections to them. Three main arguments against protecting these forms of protest are often relied upon:

- The **rule of law**: there can be no legal justification for breaking the law whether such a breach is based on deep moral conviction or indifference. Non-violent direct action/civil disobedience would easily lead to lawlessness<sup>79</sup> or would allow the judiciary to avoid the application of laws or apply their personal moral views (following a logic of “the ends justify the means”), with preferences to particular causes;
- **Democratic governance**: protection of such action would negate the values of democracy, as it would allow individuals to impose their values through intimidation and obstruction, rather than through established political channels;
- **Harassment and intimidation of individuals**: this type of protest often targets private companies (e.g. multinational companies or polluters) or even individuals (e.g. those seeking abortion services) and can result in coercion or violation of their rights.

On the other hand, it should be recognised that:

- Protests in the form of non-violent direct action include the **exercise of human rights**, especially freedom of expression, and allow individuals to engage in political processes which they otherwise have only limited possibility to influence effectively (e.g. through elections);
- This form of protest coexists with the rule of law and can contribute to **pluralism and diversity**: it enables the voicing of minority views (e.g. those discriminated against or marginalised or those most frustrated by the workings of a political system or a mainstream media), and helps to reduce the risks of conformity which might deprive the public of necessary or useful information.<sup>80</sup>
- It also allows individuals to **vent concerns** without resorting to more extreme means, including violence. As such, it is one of the features of democracy that balances dissent with order.<sup>81</sup>
- Non-violent direct action differs from other non-protest acts that violate the law - protesters are not acting with malicious **motivations**; instead, they are seeking objectives larger than their own immediate self-interest. In contrast to “ordinary” criminals, they are not rejecting the fundamental social and constitutional order, they are trying to reform it. Often, they are not seeking to avoid detection for their law-breaking and they accept the risk of sanction for so doing.
- Although the protesters can use other means to raise their concerns and correct the alleged wrongs, these **alternatives** may not offer a reasonable hope of resolution or real **remedies**. In the absence of such alternatives, it can be argued that it is justified to utilise civil disobedience as a legitimate form of protest.

Only limited guidance is provided by international and regional human rights bodies and national courts in assessing restrictions on non-violent direct action:

- The **international and regional jurisprudence** is limited to a few cases of the ECtHR, in which the court recognised that protest through non-violent direct action falls under the scope of the respective articles of the European Convention (Articles 10 and 11).<sup>82</sup> Still, it allows states to apply fairly wide margins of appreciation in such cases and states are not typically required to demonstrate the possible measures which might have been less restrictive than those actually used against specific protests.
- In some countries, the **‘necessity’ defence** has been invoked in non-violent direct action cases. The defence is based on the premise that it would be unjust to penalise someone for violating the law when the action produced a greater good or prevented a greater harm. For example, the US courts have repeatedly allowed this defence in direct non-violent direct action cases (“direct” means cases where breaking a law that is the object of the protest).<sup>83</sup> In order to invoke this defence, defendants must prove that a) they were faced with a choice of evils and chose the lesser evil, b) they acted to prevent imminent harm, c) they reasonably anticipated a causal relation between their conduct and the harm to be avoided, (d) that there were no other legal alternatives to violating the law, and e) the legislature has not acted to preclude the defence by a clear and deliberate choice regarding the values at issue. Courts generally require that all these criteria must be proven in order for the defendant to succeed on the basis of this “necessity” defence. The necessity must also be established by objective criteria and not be merely the opinion of defendants.<sup>84</sup>

However, the “necessity” defence is typically not allowed in indirect civil disobedience cases: courts tend to see that the harm protesters are trying to prevent is speculative or uncertain, or that it is not immediate (defendants have ample time and other means at their disposal), even if such efforts might well be futile. Courts also typically find that there is a lack of proof of causal effect between the protest action and the harm being diverted: these acts are deemed not likely to abate the protested harms by effecting a policy reversal. Some courts have displayed sympathy towards protesters (or imposed minimal fines),<sup>85</sup> but this is the exception. For example, in a case regarding trespassing in protest against nuclear proliferation, a US court found that this action was the only effective option available:

There isn’t another thing these two people can do. A letter to Congress has been sent and has not accomplished anything. The Congress voted for nuclear freeze in one vote and voted for the arms race in another. There are some who say that there is absolutely no prospect of the administration or the Congress to bring [sic] this matter to a successful conclusion and that the track record proves it and that the only possibility, however, remote, the only possibility of survival lies in protest. If people believe that, who can say they are wrong?<sup>86</sup>

Similarly, in a case of trespassing at a nuclear facility, aimed at demonstrating the serious security risks posed by the nuclear reactor, an Australian Court stated that:

[T]he objectives and motives of the defendants could [not] have been achieved by demonstrating at the front gate. ... One of [their] major objectives and motives was that the woeful security inherent in the facility should be demonstrated in graphic terms. That they did by entering and scaling the buildings within the facility, seemingly without obstructions.<sup>87</sup>



- Some useful guidance has been provided in the jurisprudence of some national courts on the application of necessity and **proportionality** tests for restrictions, when assessing damage caused by the protesters. For example, when assessing Greenpeace protesters' liability for damages, after they had blocked fuel sales in several dozen Shell petrol stations, the District Court of Amsterdam highlighted that companies that engage in controversial activities must tolerate a higher degree of criticism, and "can and must expect that action will be taken to try to persuade it to change its views."<sup>88</sup> The Court found that the deciding factor in the assessment of damage caused by a protest was not whether the company suffered damage but whether the damage is "unduly substantial."<sup>89</sup>

Similarly, in a case of the blockage of the unloading of illegal timber from Cameroon, the Antwerp Court found no obligation to pay damages, since protesters conducted the protests in the least harmful manner and "without threat of a significant bill for damages."<sup>90</sup> It explicitly stated that "it would be absurd to state that the defendant could achieve the same result with a press release as it could with a more noticeable demonstration ... in a way that appeals to public."<sup>91</sup>

### Assessing non-violent direct action under the three-part test

ARTICLE 19 does not wish to suggest that international standards should stipulate that violation of general laws in cases of non-violent direct action purposes should be permitted. By definition, non-violent direct action/civil disobedience is an action not based on the law but on a moral and political stance. It would be conceptually problematic for the law to sufficiently and comprehensively define the conditions of its own violation, without ceasing to be the law. Moreover, by the nature of their action, such protesters are aware of the consequences and, also, mostly accept the *risk* of punishment.

However, since non-violent direct action involves the exercise of the right to freedom of expression, we believe that all restrictions on protests in this form must be reviewed under the three-part test for limitations to this right. Assuming the restrictions pursue a legitimate aim (such as public order or rights of the others), the focus should be on the necessity and proportionality of restrictions in the form of sanctions or liability (either criminal, civil or administrative ones).

ARTICLE 19 proposes that the following aspects should be considered here:<sup>92</sup>

- **Public interest considerations** should have weight in the wielding of any discretion possessed by authorities over whether sanctions or liability in these cases should be imposed. This might not be currently possible in some civil law countries that formally require law enforcement to pursue all cases that were reported to them or of which they are aware. In particular, prosecutorial discretion should always be available in criminal cases.
- When imposing restrictions, judiciary or adjudicatory authorities should treat any expressive nature of the conduct involved in non-violent direct action as a specific **mitigating circumstance**.

In both of these instances, authorities could consider factors such as:

- **Public interest in allowing exercise of fundamental rights:** non-violent direct action protests are acts of political conscience grounded in a desire for societal improvement, and not personal gain i.e. the underlying reason for violation of the law was related to an issue that should legitimately be openly contested and debated in society. Hence, the public interest considerations would take into account that the action was conducted in the context of

allowing the discursive space necessary for political debate on issues of public interest, as well as raising awareness.

- **Excluded acts of non-violence:** this would exclude civil disobedience protests that involved unprovoked violence by protesters (e.g. that is not needed in self-defence), non-violent direct actions that involve serious threats against individuals exercising their human rights (e.g. harassment of those seeking or providing essential health-related services, such as abortions) and significant damage to property where this is not justified in self-defence.
- **Nature of the protest action:** here, considerations could be made for non-violent direct actions that are of symbolic nature and cause relatively little disruption as compared to those that have significantly disruptive impact upon the activity in question. The ECtHR case, *G v. Germany*, can illustrate this point: protesters organised a sit-in that blocked the road to a US Army barracks in a protest against nuclear weapons, which lasted for only 12 minutes in every hour, but ignored orders to leave the road; they were arrested and convicted of the offence of coercion by force or threats.<sup>93</sup> Here, we also recall that standards already recognise that protests are inherently disruptive and that a certain degree of tolerance is expected.<sup>94</sup>
- **Actual damage or harm** caused by the protest action: the authorities should consider whether substantial damage or harm was actually caused to the targeted entity. The test of substantial damage should not be one of mere embarrassment, disruption or discomfort: actual harm should be required. Further, authorities should consider actual harm in the context of the type of the entity targeted (e.g. governmental institutions or large for-profit commercial enterprise, such as a multinational oil company), and the resources of that entity. For example, a whaling fleet of a large marine company (as compared to an individual fisherman) or multinational pharmaceutical plant (as compared to a small animal research laboratory) have at their disposal resources to contain protesters; moreover, the impact on their activities by protesters might be negligible as a proportion of their overall operations.

Another relevant issue here could be whether protests disrupted only the activity complained of, or whether they have a wider disruptive impact on the public, or sections of it (e.g. preventing delivery of essential services).

**Proportionality of sanctions:** In general, law enforcement should consider whether strict application of criminal law is an appropriate and proportionate form of restriction to be used against protesters in these cases, and where proportionate civil or administrative sanctions might be more appropriate. Based on the above assessment, judicial and administrative authorities should be allowed to apply lenience in punishment (e.g. in the sentencing guidelines).

# Restricting online protests

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In the “digital age”, protests are no longer limited to assemblies and gatherings in physical spaces but are increasingly taking place, in whole or in part, online. While digital technology is used as a medium for protests, as discussed above, the Internet is also used as a **venue or a platform for protest**.

As already noted, calls have been made to recognise and protect the right to freedom of assembly and association online, without elaborating what such online protests actually entail:

- The Special Rapporteur on FOAA has called on states “to recognize that the rights to freedom of peaceful assembly and of association can be exercised through new technologies, including through the Internet;”<sup>95</sup>
- The UN Special Rapporteur on FOE, in relation to an on-going crackdown against Tibetan minorities by China, recommended that restrictions should not be placed on the Internet or mobile messaging in order to disrupt collective calls by the Tibetan Buddhist community for greater respect for their rights;<sup>96</sup>
- The OAS Special Rapporteur on FOE raised concerns about “disproportionate restrictions to protest, in particular in cases of groups that have no other way to express themselves publicly”;<sup>97</sup>
- In her speech in January 2010, the then US Secretary of State Hillary Rodham Clinton stressed that “the Internet is a network that magnifies the power and potential of all others... This freedom is no longer defined solely by whether citizens can go into the town square and criticize their government... Cyber space, after all, is the public square of the 21st century.”<sup>98</sup>

ARTICLE 19 suggests that two types of online protest can be distinguished, each of them requiring different considerations:

- **Virtual protests** that involve the simultaneous use of social media and other web platforms to engage in collective action, for example the “black out” protests against SOPA and PIPA,<sup>99</sup> or setting up a dedicated website to discuss certain issues, or organising online petitions;
- **Electronic direct action/civil disobedience** (also “*hacktivism*”) – actions by technologically-skilled individuals (“hacktivists”) using digital technologies to protest without actually gathering in person. Various techniques can be distinguished here, some of which could fall under the virtual protest category above, but most of which are considered as an online form of non-violent direct action or as “electronic” civil disobedience, due to their violation of the law.

ARTICLE 19 believes that international law necessarily requires these actions to be considered as forms of freedom of expression and association and assembly. When it comes to limiting protests, given the arrival of the digital age and the right to protest online, we need limitations to be tailored to the unique characteristics of the Internet, taking into account its hugely positive role.

## Virtual protests

ARTICLE 19 suggests that these forms of action should be considered an **online equivalent to protest in physical space**. International standards give protection to a wide variety of means of collective action on the Internet, although in terms of peaceful assembly, further elaboration is needed:

- **Definitions of spaces available for protests** need to be expanded to explicitly include virtual protests, as such an interpretation might not always be automatic. Some national legislations define a place of assembly as a public place that is “not a building or structure;” e.g. in the UK, an assembly is “a place which is wholly or partly open to the air;”<sup>100</sup> in the US, the Supreme Court rejected an argument that computer communication resembled town meetings in the broad sense<sup>101</sup> and rejected an argument that the Internet constituted “a traditional public forum”.<sup>102</sup>

However, ARTICLE 19 believes that the definition of “assembly” in existing standards allows for an expansive understanding: both the OSCE Guidelines and the 2012 Report of the Special Rapporteur on FOAA state that “the right to freedom of peaceful assembly protects any intentional and temporary presence of a number of individuals in a private or public space for a common expressive purpose”,<sup>103</sup> as outlined above.

- We also point out that in physical space, the right to assembly is unlikely to be protected if the protest is held in a **privately owned space** against the wishes of the owner. As online protests take place in space which exists on privately owned servers (over which protesters have limited control), some may argue that only limited protection to such protest can be given. At the same time, we recall that protesters should be granted access to certain privately owned places if they are intended for typical and routine public use. Similarly, the ECtHR recognises the principle that the right to freedom of association might involve access to private property if it was the only effective way of exercising the right.<sup>104</sup> An argument can be made by analogy that the Internet is a global public square and is the only “effective” means of organising a protest on an issue globally. Additionally, it should be considered that there is no “public space” alternative, i.e. private owners have a monopoly over online space which would not be considered acceptable or tolerable in “physical” space.

Hence, ARTICLE 19 suggests that for the protest purposes, the Internet should be considered a public space.

These forms of protest can be restricted by both governments and private parties through various means, including the blocking, filtering, or removal of online content; these actions can be taken against individuals or Internet Service Providers (ISPs). Such measures should be prohibited: these are almost always likely to be disproportionate, as there is a significant danger of over-blocking. In addition, intermediary liability regimes in some countries can also be used to encourage ISPs to prevent such protests; greater protection must be specified to counter this.

Another aspect of this protection needs to take into account the right to privacy in protests and elaborate specific recommendations that should apply (see the Right to Protest Principles).

## Electronic direct action

Just as in “offline” non-violent direct actions, protesters do not engage in the “electronic” equivalent for malicious personal and financial motives (e.g. to misuse information or to cause serious harm). Instead, they undertake them for communicative goals, in order to highlight political or social causes. International standards on cybercrime<sup>105</sup> and national legislation largely do not distinguish between motives for action, and criminalise these methods and techniques. Such actions online may also give rise to civil liability.

However, ARTICLE 19 observes that the Council’s of Europe Convention on Cybercrime (the only binding international treaty on cybercrime adopted so far) does not expressly address electronic direct action protests. Electronic direct action is also not explicitly recognised in national cybercrime or communication laws. Rather, the Convention proposes laws that, when applied to the circumstances in which these techniques are used, renders them illegal.

Electronic direct action can take several forms:<sup>106</sup>

- **Virtual sit-ins** (through distributed denial of service, or DDoS) overwhelm or crash targeted servers by artificially creating extremely high demand for its content.<sup>107</sup> This is done either by manually and repeatedly reloading the targeted website or by downloading special code that automatically and repeatedly reloads the targeted site. This tactic has been employed by activists groups since the mid-90s and has significantly increased recently. For example, the Electronic Disturbance Theatre (EDC) used a DDoS action in support of the Zapatista movement and “took down” the websites of the President of Mexico, the Frankfurt Stock Exchange and the US Department of Defence in September 1998.<sup>108</sup> The Anonymous movement has also carried out DDoS actions, e.g. Operation Payback, targeting the Motion Picture Association of America and the Record Industry Association of America, the Spanish police, the Tunisian, North Korean, Myanmar and US governments, the Westboro Baptist Church, PayPal, and the Church of Scientology.<sup>109</sup>
- **Site defacement and redirects** are tactics which involve seizing temporary control of the entrance to high-visibility websites and replacing or altering the contents, or redirecting users to another site with a particular message, without damaging the targeted site. The offline equivalent would be protesting within sight and sound of a building or location relevant to the subject of the protest, or blocking the doors/gates of a business or factory or hanging a banner in a highly visible place so that all visitors to the business or factory must see it. The tactic has been used against several Indonesian government websites; by British anti-nuclear activists; Kosovo Albanians against Serbian websites, and by Anonymous against various governmental and corporate sites.<sup>110</sup>
- **Infrastructure-based techniques** involve the creation of alternate systems to replace those that have been compromised by state or corporate information-gathering schemes, and circumventing internet restrictions imposed by the government (banned websites – Facebook, YouTube etc.); these have been used, among other places, in Vietnam and in Turkey.<sup>111</sup>

Currently, these protest actions broadly constitute criminal offences under cyber-crime and communications legislation. They have also become subject to various retaliatory and selective prosecutions that are likely to increase in the future. It has been also noted that sentences are harsh in comparison to other types of direct action protest.<sup>112</sup>

At the same time, it can be argued that electronic direct action presents a **form of censorship** (or “hacker’s veto”); it can stifle others in the exercise of their right to freedom of expression



through an online presence. Moreover, DDoS actions are not employed only by “hacktivists”: some authoritarian governments use the same tactic against independent media activists, NGOs or dissidents; indeed, anyone can use this tactic to target ideas and activities with which they do not agree.<sup>113</sup> These actions may compromise the integrity of the network, and some may argue the unfettered flow of information should have precedence over political activism.

ARTICLE 19 believes that any restrictions on protests in the form of electronic direct action, when used for expressive purposes, must be assessed under the three-part test for permissible restrictions on freedom of expression. Where there is no expressive function, and in particular where perpetrated by governments, these acts should be unlawful. It should also be noted that the use of these techniques by governments clearly does not fall within the parameters of the right to protest or the right to freedom of expression (as governments and public institutions do not exercise rights).

In applying restrictions on protests in the form of electronic direct action, we reiterate our suggestions regarding direct action offline and prosecutorial and judicial discretion in the pursuit of criminal charges, and judicial and administrative discretion when imposing damages. Some of the mitigating factors that pertain to physical protest involving non-violent direct action will generally not apply. Violence to persons and the fear of physical harm will not be relevant, and so electronic non-violent direct action is more likely to be accepted as non-violent.

Additionally, the following considerations should also be weighed by law enforcement:

- **Power balance:** Protection would apply only for protests against the authorities or other powerful institutions in society. Hence, DDoS action against a governmental website should fall under the ambit of protest and represent an exercise of the right to freedom of expression and freedom of assembly online;
- The availability of **alternative means of communication** for a targeted entity: this is especially important to ensure that the protest does not result in a violation of the right of freedom of expression of others online. Here, we observe that electronic direct action, albeit disruptive, does not always result in a total denial of freedom of expression for an individual or entity, but rather a temporary interference in relation to one means of communication. Although it may temporarily hamper certain aspects of their online presence, the targeted entity (e.g. government or corporation) usually still has at its disposal many alternative outlets of communication; this often includes access to the media. The same arguments do not apply if such action was employed against an institution which has no other channel of communication, or if the action resulted in permanently removing its capacity to exercise the right to freedom of expression online. The law should also take into account access to the resources to “fix” the consequences of the direct action (this may be difficult for an individual or NGO, for example).
- **Actual harm:** authorities should also consider whether a targeted entity exists primarily online, and whether the action impacted significantly upon that existence. For example, the German Higher Regional Court in Frankfurt in May 2006 decided that the Deportation Class Action, a collective blockade of Lufthansa’s website (low level of DDoS action), in the context of protest against the company’s participation in the deportation of asylum-seekers, was a legitimate exercise of freedom of expression.<sup>114</sup> While the action made the website temporary inaccessible, it did not impact the ability of the company to fly aeroplanes and maintain other operations.

Another relevant consideration would be whether this form of protest had a disruptive impact on the public at large or sections of it (i.e. crashing a server that is necessary for delivery of essential medical services).

# Policing and sanctioning protests

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A human rights approach to policing requires that law enforcement authorities consider their duty both to facilitate the enjoyment of human rights engaged in protest and to ensure respect for the rights of others. However, ARTICLE 19's experience suggests that law enforcement agencies often employ various measures which restrict the rights of protesters, taking preventative measures, during the protests or afterwards, that undermine, rather than facilitate, protests.<sup>115</sup>

We are aware that since the approaches to protests employed by law enforcement often mirror the state of human rights protection in a particular society, improvements to the policing of protests will require broad reforms to all aspects of policing.

For the purpose of this paper, we find it is necessary to:

- Assess the impact of overbroad and vague legislation that enables law enforcement to unduly interfere with the rights of protesters;
- Elaborate standards related to the use of policy and legal actions that inhibit protests;
- Expand the guidance on the use of force, containment and other control mechanisms used against protesters;
- Stress the importance of training and properly equipping police and law enforcement to understand their obligations in relation to protests.

This section highlights key concerns in this area, especially from the perspective of ARTICLE 19's regional offices.

## Border checks

Preventing individuals from entering the country is a common measure to prevent protests before international events, summits, sport events or high-level political meetings that attract people from around the world to take part in demonstrations. For example, restrictions on border-crossings were applied before the World Bank and IMF summit in 2001 in Prague, the G8 Summits in Italy in 2001 and 2009, and in Germany in 2007, the COP15 conference in Denmark in 2009, the NATO summit in Lisbon in 2009 and the Winter Olympics in Russia in 2014.<sup>116</sup>

Although states are granted broad discretion in the regulation of their borders, the impact of these measures on the exercise of fundamental rights should be considered. In a case concerning France's expulsion and prohibition to re-enter of an applicant (a German citizen and a member of the European Parliament) due to her participation in a demonstration in French Polynesia, the ECtHR held that the lack of country citizenship did not authorise the State to restrict her exercise of the right to freedom of expression.<sup>117</sup>

## Surveillance powers and protests

The available reports show that law enforcement use both overt and covert surveillance techniques against protesters, including:<sup>118</sup>

- Routinely taking photographs; CCTV and other filming of protests; recording the identifying information of protesters, bystanders and observers, often without due cause; as well as analysing and indefinitely retaining this data;



- Misuse of police powers to stop and search individuals who plan to or take part in protests, without reasonable suspicion;
- Harassment and interrogation of individuals engaged in protests, where no criminal conduct is suspected or alleged;
- Use of undercover police officers to covertly infiltrate protest groups, where no criminal conduct is suspected or alleged;
- Surveillance of communications, including email, text messages, and phone calls.<sup>119</sup>

It has been widely reported that surveillance techniques can result in large scale “preventative” arrests under vague references to internal security and public order (e.g. the UN COP15 Conference in Copenhagen<sup>120</sup> or Brussels<sup>121</sup>). Preventative arrests frequently involve instances of intimidation or lengthy periods of detention with the purpose of thwarting a protest, but not necessarily proving inchoate criminal liability. Where charges are imposed, individuals may be pressured into accepting administrative or criminal responsibility to avoid lengthy legal proceedings.

It has been acknowledged that such tactics raise fundamental issues for the protection of human rights in the context of protests: apart from the rights to freedom of expression and freedom of peaceful assembly, they often violate the right to privacy and the right to a fair trial. They have “a chilling effect” on protesters who may fear to hold further protests,<sup>122</sup> and represent a “function creep,” especially when police or intelligence agencies have employed their powers under vaguely drafted anti-terrorism legislation during protests, and against protesters.<sup>123</sup>

### ***Protesting anonymously***

Surveillance techniques are often accompanied with, and facilitated by, blanket prohibitions on concealing one’s identity at a protest; this concealment is most typically achieved by wearing masks, hoods or other face coverings, but can include other means (e.g. devices disguising a person’s voice). Such measures have been introduced recently in a number of countries, for example Brazil, Egypt, Australia (during G20 protests in 2014) and the USA.<sup>124</sup> Some countries have introduced narrower restrictions, and allow masks for specific expressive purposes (e.g. wearing Guy Fawkes masks for Anonymous or balaclavas in protest in support of Pussy Riot would be permitted); or permit cases in which the identity is concealed only incidentally (e.g. with a scarf on cold days or protective masks worn for health purposes).

ARTICLE 19 notes that the right to “anonymity” in general has not yet been explicitly recognised as part of the right to freedom of expression under international law. International law has recognised only that some aspects of communication should remain anonymous and undisclosed to others, notably regarding the protection of confidentiality of journalists’ sources.

Similarly, the right to protest anonymously has not been explicitly recognised. For example, the OSCE Guidelines allow wearing of masks for *expressive* purposes unless the mask or costume is “worn for purposes of preventing the identification of a person whose conduct creates probable cause for arrest and as long as the mask does not create a clear and present danger of imminent unlawful conduct.” It is not clear what is meant by “expressive” purposes here; one interpretation might be that it applies only to instances where a mask is an important aspect of the expression aimed at by the protest (e.g. protesters against austerity in the UK covering their faces with a picture of the finance minister). However, these

standards would not provide a general right of individuals to conceal their identity during protests.

The issue of anonymity presents further complexities when applied to online protests – both in using digital technologies as a medium as well as a platform for protest.<sup>125</sup>

ARTICLE 19 believes that anonymity – the decision of an individual not to be identified – is a key concept in the protection of freedom of expression, as well as privacy, and should be protected in a protest context. While the identification of protesters may be required in some contexts (i.e. where there is reasonable suspicion of a criminal offence), anonymity should be granted broadly. Any limitations on freedom of expression and privacy must be narrowly construed in compliance of international human rights standards. Blanket prohibitions on concealing one's identity would therefore be disproportionate.

### **Sanctions for participating in protests**

Authorities in several countries have recently resorted to arbitrary arrest and prosecution merely for participating in unauthorised assemblies which did not meet certain conditions imposed upon them, or on entirely spurious charges – e.g. in Russia, China, Turkey, Brazil, Algeria, Cambodia and Azerbaijan.<sup>126</sup> These arrests, methods of questioning and interrogation, subsequent legal proceedings, and conditions of detention raise a number of separate human rights concerns.

Several countries have significantly increased the penalties for people convicted under criminal or public order laws: these range from heavy fines which are larger than the average monthly wage, to prison sentences (for example in Azerbaijan,<sup>127</sup> Myanmar<sup>128</sup> and Egypt<sup>129</sup>). In some cases, the laws allow for the protest organizers to be held liable for the unlawful conduct of other people who attend the protests (e.g. UK or Bahrain). In Thailand, authorities even threatened to use the death penalty for those protesters taking part in the shutdown of Bangkok on 13 January 2014.<sup>130</sup>

In many cases, such penalties are unjustified, or fail to meet the requirements of necessity and proportionality. For example, the OAS Special Rapporteur on freedom of expression repeatedly raised concerns about the existence of criminal provisions that make mere participation in public demonstrations a criminal offence, and also about the intimidating effect this has on participatory expression.<sup>131</sup>

### **Civil law suits**

Civil law actions or suits are increasingly used as a mechanism to deter and obstruct protest through private law. For example, “Strategic Lawsuits Against Public Participation” (SLAPPs) have been used by public authorities and by private parties (such as corporations or real-estate developers) against protesters who oppose them, especially environmental activists. Such suits are based on civil claims such as nuisance, trespass, interference with contract and/or economic advantage, usually to intimidate activists with claims for large damages, or for the purpose of seeking injunctions to prevent future protests.

For example, in Australia in 2004, 20 environmental activists and organisations were sued by the Tasmanian logging company Gunns Ltd., who claimed the protesters' actions caused damages to their business and reputation to the amount of AU\$6.9 million.<sup>132</sup> In the UK, in

2013, the energy company EDF sought more than £5m in damages from a group of 20 activists, who had occupied one of its power stations for a week.<sup>133</sup>

Although such suits are often unsuccessful or abandoned, they require a substantial investment of money, time, and resources from the defendants. As such, they can have a chilling effect not only on those who are directly targeted, but also those who, fearful of becoming a target of similar actions in the future, might be deterred from participating in protests or other actions.

International and regional bodies have not yet addressed this issue, but several states in the USA and Canada have passed laws prohibiting this form of suit, thus providing some protection to protesters.

### **Use of force**

The inappropriate, excessive or unlawful use of force against protesters by authorities with law enforcement powers, involving in some cases the military or the use of military-grade equipment, is an issue of serious concern raised by UN special rapporteurs.<sup>134</sup> The type of force applied varies from country to country – from the use of batons to water cannon, tear gas, rubber bullets and even live ammunition.

ARTICLE 19 is concerned that in some countries, a legislative basis for inappropriate and excessive use of force has been recently introduced (as in Egypt, where legislation confers an extremely broad mandate for police to fire on “crowds” of more than five people<sup>135</sup>); in other countries, however, it has been proven the police have exceeded their legislative mandate in resorting to the use of force (Cambodia,<sup>136</sup> Mexico,<sup>137</sup> Venezuela,<sup>138</sup> Turkey<sup>139</sup> or Ukraine<sup>140</sup>). Impunity for abuses of the law by enforcement authorities in resorting to force, and violations of the rights of protesters or bystanders in this context, is an increasing problem.

These practices are obviously in violation of existing international standards in this area, such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles)<sup>141</sup> and the UN Code of Conduct for Law Enforcement Officials.<sup>142</sup> Given the prevalence of violations of these standards, we believe it is necessary to strengthen them, while closely examining the structural problems that may lead to violations.

In particular, we believe that stricter guidance should be elaborated for certain containment tactics (e.g. “kettling,” in which law enforcement does not seek to disperse protesters, but rather contains them for an indefinite period, often without access to food or sanitation facilities). Incidences of kettling in the UK have been criticised by the UN Special Rapporteur, and were subject to review at the ECtHR, although, on the facts of that case, it was found to have been a proportionate measure.<sup>143</sup>

# Reporting on and monitoring of protests in the new media environment

Media play a crucial role in all protests: the ability of the media to freely report on protests is key to ensuring that both information about protests and protesters' own messages reach the public, who have a right to receive them. It is also an important mechanism for promoting the accountability of law enforcement agencies and other actors for their conduct during protests.<sup>144</sup>

Given the importance of the media, specific recommendations have been developed to enable the media and journalists to carry out their work, access protests and enable the flow of information. In particular, authorities exercising law enforcement duties are obliged to refrain from obstructing the work of the media during protests, and, furthermore, to refrain from attempts to confiscate, damage or destroy their equipment.<sup>145</sup> In order to benefit from this protection, journalists should identify themselves, refrain from becoming involved in protests and report accurately on the events.<sup>146</sup> Importantly, accreditation schemes should be necessary only in exceptional circumstances, when required by available resources.<sup>147</sup>

Over the last two decades digital technologies have transformed the way in which people communicate with each other: these changes have had a profound impact on protests.

- Digital technologies (especially mobile phones with photography equipment, the Internet and social media) are now a common, indeed preferred, medium for **organising protests**,<sup>148</sup> and help protesters to directly mobilise their supporters or to expose and validate their cause;
- Digital technologies enable a broader range of **actors** to be engaged in “journalistic” activity. Protesters can now directly bring external attention to their actions, both within and outside their country, and digital technologies help to provide more **diverse coverage** of protests. As recent examples from Turkey<sup>149</sup>, Ukraine,<sup>150</sup> Belarus<sup>151</sup> and Egypt<sup>152</sup> show, reportage on protests is especially important in countries where the legacy media are heavily controlled. Increasingly, coverage by the mainstream media relies heavily on content created by protesters.<sup>153</sup> This trend is already reflected in international standards, in which “journalism” is no longer seen as a “profession” but as a “function”.<sup>154</sup> It has been well established that mandatory licensing or registration of journalists is incompatible with the right to freedom of expression.<sup>155</sup>
- The importance of digital technologies in protests has been widely acknowledged, including through HRC resolutions<sup>156</sup> and the UN Special Rapporteur on FOE.<sup>157</sup> Moreover, in some cases, the ability to communicate information about protests via the Internet has protected dissident groups from retaliation by governments (e.g. Cuba).<sup>158</sup>

The new media environment has brought new possibilities of censorship and surveillance, as well as new challenges for the protection of actors involved. We believe that recommendations tailored to these new forms of censorship are required, and that existing recommendations on protection must be adapted for the digital context.

## Censorship

### ***Restriction on the use of digital technology in relation to protests***

Attempts to curtail the use of digital technologies in relation to protests have been increasing (to undermine both the organisation, and the reporting, of protests); these include but are not limited to:

- Confiscation or damage of protesters' digital technologies by authorities exercising law enforcement duties;
- Shutting down public access to the Internet – the so called “kill switch” – during protests (e.g. Egypt,<sup>159</sup> Pakistan<sup>160</sup> and Syria<sup>161</sup>) or suspending some digital technology services (e.g. Bahrain<sup>162</sup>);
- Filtering or blocking certain websites, portals or online tools used for reporting on protests (e.g. UK<sup>163</sup> and Turkey<sup>164</sup>);
- Prohibition of the use of social media for protest activities (e.g. Brazil<sup>165</sup>);
- Removal of content related to protest activities (e.g. Belarus<sup>166</sup>);
- Attempts to introduce an obligation on private companies to comply with such measures (e.g. US<sup>167</sup>);
- Liability placed on intermediaries, such as service providers or telecommunication carriers, for issues related to protest (e.g. India<sup>168</sup>);
- Instances of private censorship of protest activities through removal of content or banning certain applications.<sup>169</sup>

ARTICLE 19 believes that authoritative guidance regarding the permissibility of these restrictions in the context of protests is needed, in particularly regarding public order restrictions.

### ***Censorship of legacy media in relation to protests***

Legacy media are not immune to censorship in relation to protest: for example, in Venezuela,<sup>170</sup> a private television channel was recently taken off the air and privately owned media have been targeted in retaliation for their coverage of protests.

It should also be noted that legacy media, where there are not sufficient safeguards for their independence, can be used as a tool to stigmatise protests and protesters, in particular state-owned broadcasters. Even in democratic countries, lack of pluralism (in particular in relation to ownership) leads to a dominant anti-protest narrative emerging through many outlets. The chilling effect of general freedom of expression restrictions on media has been also well attested in times of unrest.

Additionally, the use of various “jamming” mechanisms (deliberate disruption of a broadcaster’s satellite signals), a Cold War practice thought to have disappeared with the fall of the Berlin Wall, has been revived, particularly in response to coverage of protests. For example, satellite jamming has been used in Bahrain (Lualua TV), Iran (BBC World Service), China (Voice of America, Deutsche Welle) and the Middle East (Al Jazeera).<sup>171</sup> States which resort to jamming foreign broadcasters often justify the activity on the grounds of national sovereignty, and maintain that the aim is to prevent unwanted foreign “propaganda” from reaching their citizens. They also claim that foreign broadcasters can be prevented from transmitting their signals into their national territories since their laws require broadcasters to obtain a licence from a public body. If broadcasters operate without such a licence, they are violating the law.



## Independent monitoring, “journalism” and protection in the digital age

### *Protection of “journalists”*

Despite ongoing initiatives to improve protection, there has been an increase in the number of attacks against journalists during coverage of protests, including verbal and physical attacks, confiscation or destruction of equipment, and killings around the world. Such cases have been reported in Angola, Belarus, Egypt, Georgia, Iraq, Kazakhstan, Libya, Malawi, Malaysia, the Maldives, Mexico, the Russian Federation, Spain, Sri Lanka, Sudan, Syrian Arab Republic, Tunisia, Yemen, Ukraine and Brazil.<sup>172</sup> Many of these journalists were deliberately targeted, being clearly distinguished from protesters.

In several countries, journalists have also been arrested, prosecuted and harassed in relation to covering protests, or denied access altogether, most recently in Belarus,<sup>173</sup> Angola,<sup>174</sup> Uganda,<sup>175</sup> Chile,<sup>176</sup> Venezuela,<sup>177</sup> Russia<sup>178</sup> and Turkey.<sup>179</sup> This is a striking violation of international law, under which states have both a duty to prevent attacks, and a duty to tackle impunity through independent, speedy and effective investigation. In this respect, we highlight *the UN Plan of Action on the Safety of Journalists and the Issue of Impunity*<sup>180</sup> and the 2012 Joint Declaration on Crimes Against Freedom of Expression,<sup>181</sup> which provide guidelines regarding measures for the protection of journalists. These recommendations should be applied in relation to violence against journalists during protests, and consequently in relation to impunity. Here, we also note the expansion of regional jurisprudence on impunity for violence against journalists in relation to protests specifically, including the recent decision of the Inter-American Court of Human Rights, concerning the 1996 attack on a video journalist who was attempting to film a demonstration.<sup>182</sup>

### *Protection of all people engaged in journalism*

As noted above, the ability of protesters to carry out functions traditionally restricted to professional journalists blurs the conceptual boundary between journalists as observers and other social commentators that may also be participants in protests. Put simply, with digital phones and access to the Internet, anyone can be a journalist and a protester at the same time.

In our experience, two problems should be considered here:

- This conceptual blurring has rendered many journalists and other communicators **vulnerable to attacks** due to the reporting activities that they carry out during protests. For example, in Mexico, attacks against “citizen journalists” documenting protests (i.e. those not affiliated with professional media outlets) have been increasing in number.<sup>183</sup> However, it is not clear how protection mechanisms should respond to these threats.
- On the other hand, international standards regarding protection and obligations to carry out effective investigation into attacks must apply to other social communicators when targeted. First, states must ensure that measures aimed at protecting journalists are not exclusively restricted to journalists affiliated with legacy media outlets. This also means that law enforcement authorities must neither inhibit the work of these individuals, nor damage/seize their equipment. Secondly, specific measures facilitating the monitoring of protests must be extended to social communicators. This means, for example, that accreditation schemes (if needed) must provide that all applicants who meet minimum requirements should be allowed to take part in them: conditions must not be based on considerations of professional association, or academic, educational or professional qualifications.

# About ARTICLE 19

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ARTICLE 19: Global Campaign for Freedom of expression (ARTICLE 19) is an international human rights organization that works globally to promote and protect freedom of expression and information. It was founded in 1987 and has international office in London and regional offices in Bangladesh, Brazil, Kenya, Mexico, Senegal, Tunisia and Myanmar.

The ARTICLE 19 advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in national legal systems. It has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals, as well as existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing national legislation. All legal and policy materials are available at <http://www.article19.org/resources.php/legal>.

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<sup>1</sup> Decision of Federal Constitutional Court of Germany (First Senate) 14 May 1985, 1 BvR 233, 341/81.

<sup>2</sup> HRC [Resolution 15/21](#), 30 September 2010, A/HRC/RES/15/21.

<sup>3</sup> *Ibid.*; also HRC [Resolution 19/35](#), 18 April 2012; [Resolution 28/16](#), 7 September 2012; [Resolution 22/10](#), 21 March 2013; HRC [Resolution 24/5](#), 8 October 2013; and [Resolution 25/38](#), 28 March 2014.

<sup>4</sup> The [Report on situation of human rights defenders in India](#) of the Special Rapporteur on situation of human rights defenders, 6 February 2012; the [2011 Report](#) of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 23 May 2011; the [Report on situation in Morocco](#) of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment and punishment, 28 February 2013; the [Report on violence against women, its causes and consequences](#) of the Special Rapporteur on violence against women; or the Special Rapporteur on Belarus.

<sup>5</sup> See, e.g. [UN experts urge Tasmania to drop its anti-protest bill](#), 9 September 2014; the UN High Commissioner for Human Rights, [Zeid says Israel must take action to curb rise in protest fatalities in Occupied Palestinian Territory](#), 12 December 2014; or the Special Rapporteur on FOIA, [Australia: UN rights expert welcomes Victoria State's moves to repeal restrictive laws on protest](#), 4 March 2015.

<sup>6</sup> [Special Rapporteurs Kiai and Heyns join forces to draft recommendations on managing protests](#), 17 March 2015.

<sup>7</sup> [Joint Report of the Special Rapporteurs on FOIA and the Special Rapporteur on extrajudicial, summary or arbitrary executions on proper management of assemblies](#), A/HRC/31/66, 4 February 2016 (SRs Guidelines on managing assemblies).

<sup>8</sup> See, e.g. the Joint Letter of the Civic Space Initiative to the Human Rights Committee to consider the elaboration of General Comments on Articles 21 and 22 of the ICCPR, 6 October 2014 (copy available upon request).

<sup>9</sup> See African Commission on Human and Peoples' Rights, Resolution ACHPR/Res.151 (XLVI) 09 on the need to conduct a study on freedom of association in Africa, and Resolution ACHPR/Res.261 (LIV) 13.

<sup>10</sup> The [2007 Guidelines on Freedom of Peaceful Assembly of the Venice Commission](#); and subsequent OSCE [Guidelines on Freedom of Peaceful Assembly](#) of 2010 (OSCE Guidelines). They summarise the best practices from national legislations in OSCE states and the case-law of the European Court of Human Rights (ECtHR) to illustrate various options used to regulate issues pertaining to the freedom of peaceful assembly.

<sup>11</sup> See, e.g. Committee of Ministers, [Declaration on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers](#), 7 December 2011; or the Parliamentary Assembly of the Council of Europe, Resolution 1947 (2013): Popular protest and challenges to freedom of assembly, media and speech, 27 June 2013.

<sup>12</sup> E.g. Annual reports of the Special Rapporteur for Freedom of Expression at the Organisation of American States or the work of the Human Rights Commissioner of the Council of Europe.

<sup>13</sup> See ARTICLE 19 materials; e.g. [Brazil: A month of protests and violations](#), 9 February 2014; Brazil website on [the rights of protesters](#); [Brazil's own goal: Protests, police and the World Cup](#), 29 May 2014; [How to protect yourself during protests: A19 Video Tutorial](#), December 2013; [Mexico: Police attack journalists and human rights defenders at protest over 43 missing students](#), 21 November 2014; [Myanmar: Crackdown on protests shows Special Rapporteur still needed](#), 11 March 2015; [Tunisia: Decision in FEMEN protest violates freedom of expression](#), 14 June 2013; or [Egypt: Constitution must protect freedom of expression and the right to demonstrate peacefully](#), 24 October 2013.

<sup>14</sup> See, e.g. ARTICLE 19, [Human Rights Council: States must protect rights during protests](#), 31 March 2014.

<sup>15</sup> The [2012 Report of the Special Rapporteur on FOAA](#), 21 May 2012, A/HRC/20/27, para 24.

<sup>16</sup> Term privately-owned public space usually refers to a physical place located on private property to which the owner has granted legally binding rights of access and use to members of the public, most often in return for something of value from the City to the owner;" see, e.g. Jerrold S. Kayden, The New York City Department of City Planning, and The Municipal Art Society of New York, *Privately Owned Public Space: The New York City Experience*, 2000, p. 301.

<sup>17</sup> Freedom of expression is guaranteed in Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the ICCPR and in regional human rights instruments - Article 9 of the African Charter on Human and People's Rights, Article 13 of the American Convention on Human Rights, and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>18</sup> The rights to freedom of peaceful assembly and association are guaranteed in Article 20 of the UDHR, given legal force through Articles 21 and 22 of the ICCPR respectively, and reflected in many other human rights treaties, e.g. Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 7(c) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 15 of the Convention on the Rights of the Child (CRC); International Labour Organization Convention (ILO) No. 87 concerning Freedom of Association and Protection of the Right to Organise or the ILO Convention No. 98 concerning the Application of the Principles of the Right to Organise and Bargain Collectively.

<sup>19</sup> The right to participate in the conduct of political affairs refers to citizens' right to seek to influence public affairs and can take various forms, including participation in protests. It is guaranteed in Article 21 of the UDHR and Article 25 of the ICCPR as well as in regional treaties (Article 23 para 1 of the American Convention and Article 13 of the African Charter) and non-binding declarations (e.g. Harare Commonwealth Declaration, 20 October 1991).

<sup>20</sup> Article 8 para 1d) of ICESCR contains an obligation to "ensure the right to strike, provided it is exercised in conformity with the laws of the particular country." Also, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, monitoring the compliance with the standards of the ILO conventions, have made clear that "the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests;" see [Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee of the Governing body of the ILO](#), 5<sup>th</sup> Ed., 2006, para 522. Article 6(4) of the European Social Charter protects "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." Also, Article 28 of the Charter of Fundamental Rights of the European Union protects the right of workers, employers or their respective organisations in cases of conflicts of interests to "take collective action to defend their interests, including strike action."

<sup>21</sup> The right to take part or participate in cultural life is recognized in Article 27 of the UDHR and Article 15 para 1a) of the ICESCR, further clarified in General Comment No. 21 by the Committee on ESCR.

<sup>22</sup> See Article 2 of the ICCPR and various other conventions on human rights.

<sup>23</sup> See, e.g. ECtHR, *Kuznetsov vs Russia*, App. No. 10877/04 (2008).



<sup>24</sup> See, e.g. the right to life: Article 3 of the UDHR, Article 6 of the ICCPR or Article 6 of the CRC; the right to privacy - Article 12 of the UDHR and Article 17 of the ICCPR; the right to liberty and security of person – Article 9 of the ICCPR and General Comment No. 35 of the HR Committee; non-discrimination – Article 2 of the ICCPR and various other conventions on human rights.

<sup>25</sup> See, e.g. HR Committee, [General Comment No. 34](#), CCPR/C/GC/34, 12 September 2011, para 11; or ECtHR, *Handyside v. the UK*, Appl. no. 5493/72 (1976), para 49; *Otto-Preminger-Institut v. Austria*, Appl. no. 13470/1987 (1994), para 49.

<sup>26</sup> See, e.g., ECtHR, *G. vs Germany*, Appl. no. 13079/87 (1989); ECtHR, *Plattform "Ärzte für das Leben" vs Austria*, Appl. no. 10126/82 (1988), para 32.

<sup>27</sup> OSCE Guidelines, *op.cit.*, para 25; see also ECtHR, *Christian Democratic People's Party vs Moldova*, App. No 28793/02 (2006).

<sup>28</sup> See, e.g. ECtHR, *Christians against Racism and Fascism vs the UK*, Appl. no 9440/78 (1980).

<sup>29</sup> See, e.g. OSCE Guidelines, *op.cit.*, para 26; M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, p. 487; ECtHR, *G. vs Germany*, *op.cit.*

<sup>30</sup> M. Novak, *Ibid.*

<sup>31</sup> See, e.g. U.N. Office of the High Commission for Human Rights, Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A Res. 37/194, December 18, 1982, U.N. Doc. A/RES/37/194.

<sup>32</sup> *Prosecutor v Seselj*, International Tribunal for the Former Yugoslavia, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused, December 6, 2006.

<sup>33</sup> See, the World Health Organization (WHO), [Health in prisons: A WHO guide to the essentials in prison](#), WHO Regional Office for Europe (2007), including on forced feeding of prisoners on hunger strike; or the [Revised World Medical Association's Declaration of Malta](#) (Declaration on Hunger Strikers).

<sup>34</sup> See above section, "Recognition of the right to protest".

<sup>35</sup> See, e.g. Inter-American Commission on Human Rights, Report on the Situation of Human Rights Defenders in the Americas, 7 March 2006, para 60; ECtHR, *Djavit An vs Turkey*, App. No. 20652/92 (2003), para 56; Venice Commission Opinion on the Law Making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations in Armenia, 2005, para 30.

<sup>36</sup> See, e.g. ECtHR, *Steel & Morris vs the UK*, Appl. No. 68416/01 (2005).

<sup>37</sup> The cases usually address violations of human rights in the context of assemblies. See, e.g. Inter-American Court, *Velez Restrepo and Family vs Colombia*, Series C No. 248, 3 September 2012. In 2013, the African Human Rights Commission ruled as admissible a landmark case, *WOZA vs Zimbabwe*; see, e.g. R.F. Kennedy Center, [Landmark Case to Protect Right to Protest in Africa Accepted by Human Rights Commission](#), November 2013. In 2011, a joint [Request for provisional measures to the African Commission on Human and Peoples' Rights](#) was filed regarding alleged human rights abuses in Egypt following anti-government protests. Also, on 10 June 2014, the ECOWAS Court of Justice ruled that the failure by the Nigerian government to investigate and prosecute members of the security forces who killed and injured protesters in Bundu community in Port Harcourt, Rivers State, violated the right to protest; see ECW/CJ/APP/10/10.

<sup>38</sup> The 2012 report of the Special Rapporteur on FOAA, *op.cit.*

<sup>39</sup> The framework of duty to "respect, protect, fulfil" rights is often referred to in the context of economic, social, and cultural rights; however, it is now accepted that it also applies to civil and political rights, merging the concept of both positive and negative obligations of states.

<sup>40</sup> Such requirements have been recently enacted in Myanmar, Egyptian, Turkish or Ugandan laws. See the Right to Peaceful Assembly and Peaceful Procession [Act No. 15/2011](#) of Myanmar; Egypt Law 107/2013 on the Right to Public Gatherings, Processions and Peaceful Protests of 24 November 2013; the Turkish Penal Code and Section 10 of the Law on Meetings and Demonstration Marches (Law no. 2911); or the 2013 Public Order Management Bill of Uganda.

<sup>41</sup> See, e.g. Section 11 of the [UK Public Order Act 19](#).

<sup>42</sup> HR Committee, *Kivenmaa vs Finland*, *op. cit.*; Inter-American Commission for Human Rights report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.LV/II.124, para 57.

<sup>43</sup> The 2012 Report of the Special Rapporteur on FOAA, *op. cit.*, para. 28.

<sup>44</sup> *Ibid.*, p. 64.

<sup>45</sup> *Ibid.*, para 29; see also and the [Venice Commission's statements](#) on the right to spontaneous protests; ECtHR, *Eva Molnar vs Hungary*, Appl. no. 10346/05 (2009); *Ezelin vs France*, Appl. no. 11800/85 (1991) or *Christians against Racism and Fascism vs the UK*, *op.cit.*

<sup>46</sup> ECtHR, *Bukta & Others vs Hungary*, Appl. no. 25691/04 (2007), para 36.

<sup>47</sup> E.g. on 29 September 2011, Sierra Leone police announced an indefinite ban on all political rallies and public meetings in the country; ARTICLE 19, [Sierra Leone: Blanket ban on political rallies and public meetings illegal](#), 13 October 2011.

<sup>48</sup> E.g. in the UK, extended protests in Parliament Square, London, are prohibited by bylaws specifically targeted at preventing “staying in a place for any period.” The Police Reform and Social Responsibility Act 2011 imposes an absolute prohibition on the use of tents or structures for any period in Parliament Square Gardens or surrounding pavement. In 2013, the UK legislation was unsuccessfully challenged by activists after terminating their “6 year peace vigil” outside Parliament. Also, the 2013 Egyptian law, *op.cit.*, bans overnight sit-ins and gatherings in a place of worship, a regular meeting place for all protests in Egypt and one heavily used by Islamist groups. It also grants security agencies the right to bar any protests or public gatherings, including election-related meetings of political parties, if they “pose a serious threat to security or peace”.

<sup>49</sup> During the 1999 WTO meetings in Seattle, USA, a 25-block “restricted zone” was imposed on all protests. During the 2005 presidential inauguration, protests were restricted in areas more than 100ft from the inauguration parade route. The New York City applied a 1/2 block “frozen zone” or “bubble” to shield the Mayor from union members protesting at the 2004 Republican National Convention. On 8 March 2012, in Tunisia, the Ministry of the Interior issued an indefinite ban on all demonstrations, marches and forms of collective expression on Habib Bourguiba Avenue, a focal point for demonstrations during the revolution.

<sup>50</sup> E.g. in Bahrain, the Law 32/2006, Article 11 stipulates that demonstrations cannot start before sunrise or continue after sunset except by special written permission from the general director of the police or his deputy; the Governor may specify a number of public areas in his province to hold demonstrations, for which organizers must apply for permission. In August 2013, the King issued a decree amending the law to ban demonstrations in the capital Manama (the August 2013 amendment of the Decree 18/1973 on public gatherings and demonstrations).

<sup>51</sup> For example, in the UK, extended protests in Parliament Square, London, are prohibited by bylaws specifically targeted at preventing “staying in a place for any period.” The Police Reform and Social Responsibility Act 2011 imposes an absolute prohibition on the use of tents or structures for any period in Parliament Square Gardens or surrounding pavement. The UK legislation was recently unsuccessfully challenged by activists after terminating their “6 year peace vigil” outside Parliament. Also, the 2013 Egyptian law, *op.cit.*, bans overnight sit-ins and gatherings in a place of worship, a regular meeting place for all protests in Egypt and one heavily used by Islamist groups. It also grants security agencies the right to bar any protests or public gatherings, including election-related meetings of political parties, if they “pose a serious threat to security or peace”.

<sup>52</sup> The US and UK authorities and private companies relied on land use regulations and zoning codes against Occupy Movement in Zuccotti Park in New York and in front of Saint Paul’s Cathedral in London.

<sup>53</sup> See, e.g. Spain, Circular of the Ministry of Interior against gatherings fewer than 300 metres from the dwellings of public officials and politicians.

<sup>54</sup> ECtHR, *Balçık et al vs Turkey*, Appl. no. 25/02 (2007), para 52; *Ashughyan vs Armenia*, Appl. no. 33268/03 (2008), para 90.

<sup>55</sup> ECJ, *Eugen Schmidberger vs Republic of Austria*, Case C-112/00, 12 June 2003.

<sup>56</sup> The [Report of the Office of the Special Rapporteur for Freedom of Expression](#), OAS, 25 February 2009, para 70.

<sup>57</sup> ECtHR, *Appleby & Others vs the UK*, Appl. no. 44306/98 (2003).

<sup>58</sup> See, e.g. ECtHR, *Lingens v. Austria*, App. No. 9815/82 (1986), para. 42.

<sup>59</sup> See, e.g. Greenpeace International response to OHCHR invitation for information on best practices in field of peaceful protests, November. 2012.

<sup>60</sup> T. Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places*, Cambridge University Press, 2009, p.105.

<sup>61</sup> E.g. in July 2013, the Russian Federal Parliament adopted [Federal Law](#) “On Introducing Amendments to Article 5 of the Federal Law ‘On the Protection of Children from Information Harmful to their Health and Development’ and Miscellaneous Legal Acts of the Russian Federation for the Purpose of Protecting Children from Information Advocating a Denial of Traditional Family Values;” the law makes it effectively illegal to hold any gay pride events. Similar prohibitions have been adopted in recently Nigeria and Uganda; they have been considered in Ukraine (in October 2012, the Draft Law No. 10290 prohibiting the “propaganda of homosexuality” received a broad support from Ukrainian MPs), and Lithuania (the Law on the “protection of minors against the detrimental effect of public information, adopted in March 2010, and attempts to amend the Administrative Offences Code to the same effect) and have been adopted and then repealed in Moldova (e.g. on 23 February 2012, the city of Bălţi adopted provisions to ban “propaganda of non-traditional sexual orientations” in a form of assembly; similar measures were subsequently adopted by other cities, e.g. Cahul, Ceadr Lunga, Drochia and Soroca, or the districts of Anenii Noi and Basarabasca)).

<sup>62</sup> *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, UN Doc. E/CN.4/1996/39 (1996).

<sup>63</sup> See, UN 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), para 22.

<sup>64</sup> *Ibid.*, paras 23-24.

<sup>65</sup> HR Committee, *Alekseyev vs Russia*, Appl. Nos. 4916/07, 25924/08, 14599/09, para 97.

<sup>66</sup> [Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.

<sup>67</sup> ARTICLE 19, [Prohibiting incitement to discrimination, hostility or violence](#), December 2012.

<sup>68</sup> Amnesty, [Egypt's Women Must Be Allowed to Protest in Peace](#), 23 December 2011.

<sup>69</sup> Islamic World Peace Forum, [The Incapacitation of Women's Rights in Bahrain Protests](#).

<sup>70</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol. 1249, p. 13.

<sup>71</sup> E.g., during the anti-apartheid movement in South Africa, in the Occupied Palestinian Territories, the Arab Spring protest in MENA region, protests for immigrant rights or Occupy Wall Street in the US or protests against university fees in England.

<sup>72</sup> See, the RC Committee, Concluding Observations on Japan, UN Doc. CRC/C/15/Add.231, 26 February 2004, paras 29-30.

<sup>73</sup> See, the RC Committee, Concluding Observations on Myanmar 1997, UN. Doc. CRC/C/15/Add.69, 24 January 1997, para 28; Concluding Observations on Belarus, UN Doc. CRC/C/BLR/CO/3-4, 8 April 2011, para 35; or Concluding Observations on Turkey, UN Doc. CRC/C/R/CO/2-3, 20 July 2012, para 39.

<sup>74</sup> See, the RC Committee, Concluding Observations on Syrian Arab Republic, UN Doc. CRC/C/SYR/CO 3-4, 9 February 2012, para 47; Concluding Observations on Bahrain, UN Doc. CRC/C/BHR/CO/2-3, 3 August 2011, paras 40-41.

<sup>75</sup> These include being at greater risk than adults due to being smaller in stature, the rights of being manipulated by adults or lack of voluntary participation in protests.

<sup>76</sup> Several philosophical and political sources deal with protest through disobedience of the law, e.g. Thoreau, Gandhi, M.L. King or John Rawls. For example, it has been defined as a "public, non-violent political act contrary to law carried out with the aim of bringing about change in law or policy by making an appeal to conscience, the conscience of the authorities and especially the conscience of the majority of the public – the conscience, in short, of whoever it is that issues, enforces, and supports the law being broken;" see Hugo Bedau, *On Civil Disobedience, Morality and the Law*, 1988, para 69.

<sup>77</sup> M. Hall, *Guilty But Civilly Disobedient: Reconciling Civic Disobedience and the Rule of Law*, 2004 Cardozo L.Rev., Vol. 28.5.

<sup>78</sup> See, e.g. the ECtHR, *Steel and Morris vs. the UK*, *op.cit.* Also, the German Supreme Court stipulated that participation in this form of protest represents "active engagement in the life of the community and as a means in which people could participate directly in the political process;" 69 Bverfge 315, 343-347 (1985). In *R v. Jones*, [2006] UKHL 16, Lord Hoffmann stated that it is the "mark" of a civilized community to accommodate protest and civil disobedience and added that "there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account;" para 89.

<sup>79</sup> See, e.g. *People vs. Weber*, 208 Cal. Rptr. 719, 721 (Cal. App. Dep't Super. Ct. 1984).

<sup>80</sup> C. R. Sunstein, *Why Societies need Dissent*, (2003), p. 6.

<sup>81</sup> *Ibid.*, p. 7.

<sup>82</sup> See, *Plattform 'Arztefiirdas Leben' vs Austria*, *op.cit.*; *Ezelin vs France*, *op.cit.*; *Steel v UK*, *op.cit.*; *Chorherr vs Austria*, Appl. no. 13308/87 (1993); *Hashman&Harrup vs the UK*, Appl. no. 25594/94 (1999); or *G. vs Germany*, *op.cit.*. Most of the jurisprudence consists of admissibility decisions in the Commission, finding that the application was manifestly ill-founded.

<sup>83</sup> See, e.g. *US vs Schoon*, 971 F.2d 193, 1992 U.S. App. 17598.

<sup>84</sup> E.g. *US v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). See also, *State vs Diener* (706 S.W.2d 582 (Mo. Ct. App. 1986) which found that the occurrence of nuclear catastrophe was speculative); *US vs Maxwell* (254 F.3d 21, 27 (1st Cir. 2001) and *US vs May* (622 F.2d 1000, 1008-09 (9th Cir. 1980) which found that existence of nuclear weapons did not satisfy the requirement of imminent harm); *State vs Dorsey* (395 A.2d 855, 857 (N.H. 1978) which ruled that the necessity defence was limited to acts directed to the prevention of harm that is *reasonably certain to occur*); or *People v. Scutari* (560 N.Y.S.2d 943 (N.Y. Crim. Ct. 1990) which found that trespass in the Congress was not necessary in relation to the US foreign policy and was not an emergency matter).

<sup>85</sup> See, e.g. UK, Canterbury Magistrates' Court, *Regina v. Peter Gary Tatchell*, 1 December 1998. In this case, LGBTI protesters interrupted the Archbishop of Canterbury's Easter sermon in Canterbury Cathedral to protest against his support for anti-gay discrimination. They were subsequently charged with "indecent behaviour in a church", contrary to section 2 of the 1860 Ecclesiastical Courts Jurisdiction Act, formerly part of the Brawling Act of 1551. The Court imposed a fine of £18.60.

<sup>86</sup> *State vs Keller*, No. 1372-4-84 (Vt. Dist. Ct. Nov. 17, 1984).

<sup>87</sup> *Regina vs Kirkwood et al.*, New South Wales District Court, 15 May 2002, DCZ 2293 EF-C, p. 5; cited in Greenpeace International submission to OHCHR, *op.cit.*

<sup>88</sup> District Court of Amsterdam, *Shell (various entities) vs Greenpeace Netherlands and Greenpeace International*, LJN: BX9310, 5 October 2012; cited in the Greenpeace International submission to OHCHR, *op.cit.*

<sup>89</sup> *Ibid.*, para 5.9.

<sup>90</sup> The Antwerp Court of First Instance, *N.V. Abes VV.Z.W vs Greenpeace Belgium*, Case No. 99-6628-A, p. 4 [7]; cited in the Greenpeace International submission to OHCHR, *op.cit.*

<sup>91</sup> *Ibid.*, p. 5 [1].

<sup>92</sup> This section is based on various proposals in the political theory; in particular, J. Rawls, *Theory of Justice* (rev. ed. 1999); Marshall Cohen, *Liberalism and Disobedience* (1972), M. DeForrest, *Civil Disobedience: Its Nature and Role in the American Legal Landscape*, 33 Gonz. L.REV. 653, 658 (1997-98), 660-63; M. Hall, *op.cit.*; Fenwick & Phillipson, *Direct action, Convention values and the Human Rights*, 21 Legal Stud. 535 2001.

<sup>93</sup> ECtHR, *G. v Germany*, *op.cit.*

<sup>94</sup> C.f. ECtHR, *Balçık v Others vs Turkey*, *op.cit.*, para 52; *Ashughyan vs Armenia*, *op.cit.*, para 90.

<sup>95</sup> The 2012 Report of the Special Rapporteur on FOAA, *op.cit.*, para 84.

<sup>96</sup> The 2012 Report of the Special Rapporteur on FOE, *op.cit.*, para 22.

<sup>97</sup> The 2009 report of the Special Rapporteur, *op.cit.*, para 70.

<sup>98</sup> Hillary Clinton, [Remarks on Internet Freedom](#), 21 January 2010.

<sup>99</sup> On 18 January 2012, app. 115,000 websites, including English Wikipedia, Google, Mozilla, Flickr, Reddit and others "blackened" their sites, changing their main image to black, and explaining this was done in disagreement with the proposed Stop Online Piracy (SOPA) and Protect IP Act (PIPA).

<sup>100</sup> UK [Criminal Justice and Public Order Act 1994](#).

<sup>101</sup> See, e.g. *US vs Fernandez*, 1993 WL 88197 (SDNY 1993).

<sup>102</sup> Applying the historical confines standard (created in *Forbes*, 523 U.S. 666, 678 (1998)), the Court ruled that because Internet access did not exist until recently, it had not "immemorially been held in trust for the use of the public" for purposes of free expression; *US vs Am. Library Ass'n*, 539 U.S. 194, 205-06 (2003), 205-06.

<sup>103</sup> Proposal of the 2012 Report of the Special Rapporteur ("an intentional and temporary gathering in a public space for a specific purpose"), *op. cit.*, para 24; and the OSCE Guidelines ("the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose.")

<sup>104</sup> ECtHR, *Appleby vs the UK*, *op.cit.*

<sup>105</sup> C.f., the UN General Assembly [Resolution 55/63](#) Combating the criminal misuse of information technologies, A/RES/55/63, 22 January 2001 and [Resolution A/Res/65/230](#), the 12<sup>th</sup> UN Congress on Crime Prevention and Criminal Justice, 1 April 2011; or the Council of Europe, [Convention on Cybercrime](#), 23 November 2001, 2296 U.N.T.S. 167. There is also a draft African Union Convention on Cyber Security, which intends to introduce regional regulation.

<sup>106</sup> Other forms include "cyber sabotage" and "information theft," the illegality of which is more obvious.

<sup>107</sup> Wray, *op.cit.*

<sup>108</sup> Stefan Wray, *The Electronic Disturbance Theater and Electronic Civil Disobedience*, June 1998.

<sup>109</sup> For comprehensive list of attacks by Anonymous, see e.g. New York Times, [Anonymous](#) (Internet Group).

<sup>110</sup> S. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, Un.Pen.L.R., 150-1.

<sup>111</sup> J. Phillips, *The Civil Disobedience of the 21st Century': How Vietnamese Bloggers Evade Controls*, October 2013.

<sup>112</sup> E.g., one study observed that in the US a sit-in would typically result in a charge of trespass with a fine and short term imprisonment. However, DDOS actions are prosecuted as fraud under Section 1030 (a)(5) of the Computer Fraud and Abuse Act, and under US Sentencing Commission Guidelines Manual can result with sentence of up to 11 years for an individual with no previous criminal record; see M.Sauter, *Distributed Denial of Service Actions and the Challenge of Civil Disobedience on the Internet*, 2013.

<sup>113</sup> See, e.g. H. Roberts, E. Zuckerman, R.Faris, J. York & J. Palfrey, [The Evolving Landscape of Internet Control](#), Berkman Center, 2011.

<sup>114</sup> Higher Regional Court in Frankfurt, [No. 1 Ss 319/05](#), 22 May 2006.

<sup>115</sup> C.f. UK, Joint Committee on Human Rights, 2009, *Demonstrating respect for rights? Human Rights approach to policing protests*, London 7<sup>th</sup> Report of Session 2008-2009, para 66.



- <sup>116</sup> See, e.g. Statewatch News Online reports from [2001](#) and [2009](#) in Italy and [2009](#) in Denmark; Julio Godoy, 'Dissent Within, Confrontation Without', *Inter Press Service*, June 2007.
- <sup>117</sup> *Piermont vs France*, Appl. nos. 15773/89 and 15774/89 (1995), paras 60 – 64.
- <sup>118</sup> See, e.g. UK Joint Committee Report, *op.cit.*; or the 2012 Report of the Special Rapporteur on FOAA, *op.cit.*
- <sup>119</sup> E.g., in the UK, the organisation [Fitwatch](#) documented excessive collection of intelligence on peaceful protesters and the methods used to gain such materials during student protests on tuition fees in November – December 2012.
- <sup>120</sup> [Amnesty blasts Denmark's COP15 policing](#), 27 May 2010 (968 protesters were held under a special law here).
- <sup>121</sup> Statewatch News Online, Policing of 'noborder camp' in Brussels violates basic civil rights', October 2010.
- <sup>122</sup> *Ibid.*
- <sup>123</sup> The [2009 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism](#), Martin Scheinin, A/HRC/13/37, para 36.
- <sup>124</sup> See e.g., ARTICLE 19, Brazil's Own Goal, *op.cit.*; ARTICLE 19, [Egypt: Law Relating to the Regulation of the Right to Demonstrate in Public](#), 2013; Guardian, [G20 blanket ban on masks is not supported by security laws, expert says](#), 11 November 2015; or the [Code of the District of Columbia](#) § 22–3312.03: Wearing hoods or masks.
- <sup>125</sup> C.f. ARTICLE 19, [Response to UN Special Rapporteur's Call for Comments on Encryption and Anonymity Online](#), February 2015.
- <sup>126</sup> BBC, [Mass arrest of protesters at rallies in Russia](#), 25 February 2014; The Guardian, [China: arrests follow protests over response to catastrophic floods](#), 26 January 2014; NY Times, [Turkish Protesters Defy Government's May Day Ban](#), 1 May 2014; RT, [Hundreds arrested in Brazil as protest against World Cup spending grows violent](#), 23 February 2014; HRW, [Algeria: Arrests at Protest Against President](#), 2 May 2014; Reuters, [Azerbaijan police arrest youths at anti-government protest](#), 26 January 2013; OMCT, [Cambodia: Ongoing arbitrary detention of 21 protesters and fear for their safety](#), 28 March 2014.
- <sup>127</sup> The 2013 [amendments](#) to the Criminal Code of Azerbaijan increased the maximum fine for participating in unsanctioned public gatherings from 955 EUR to 7600 EUR; similarly, the amendments to the Administrative Code increased fines from between 7 and 12 EUR to between 480 and 1,050 EUR for participants and between 1,400 and 2,900 EUR for organisers.
- <sup>128</sup> The 2012 Right to Peaceful Assembly and Peaceful Procession Act and Article 505(b) of the Penal Code.
- <sup>129</sup> The 2013 Egyptian law imposes severe fines and prison sentences for violators (7 years imprisonment for using violence in a protest or for protesting in or around a place of worship, up to one year imprisonment for covering the face during a protest, and fines up to £27,000 for being violent in a protest and £925 for protesting without a permit.
- <sup>130</sup> Thai PBS, [CAPO to use combined forces against capital shutdown](#), 4 January 2014.
- <sup>131</sup> IACHR, 2005, Annual Report of the Office of the Special Rapporteur for Freedom of Expression," paras 96 and 97.
- <sup>132</sup> See, e.g. The Age, [The Feeling of Gunns](#), 12 March 2011.
- <sup>133</sup> See, e.g. [No Dash For Gas](#), EDF Law suit.
- <sup>134</sup> The 2011 report of the SR on extrajudicial, summary or arbitrary executions, *op.cit.*, para 13.
- <sup>135</sup> The 2013 Egypt law on protest, *op.cit.*
- <sup>136</sup> See ARTICLE 19, [Cambodia: UN human rights review as protest crackdown continues](#), 27 January 2014.
- <sup>137</sup> ARTICLE 19, [Mexico: Increasing violence against protesters](#), 31 October 2013.
- <sup>138</sup> ARTICLE 19, [Venezuela: Government must put an end to the repression of protesters and guarantee free flow of information](#), 21 February 2014.
- <sup>139</sup> ARTICLE 19, [Authorities arrest 'orchestrators' of Gezi Park protests under guise of combating terrorism](#), 17 July 2013.
- <sup>140</sup> ARTICLE 19, [Ukraine: Excessive use of force against protests must stop](#), 3 December 2013.
- <sup>141</sup> Adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders Havana, Cuba, 27 August to 7 September 1990; in particular: Principles 5, 9, and 12 – 14.
- <sup>142</sup> Adopted by the UN General Assembly in resolution 34/169 of 17 December 1979.
- <sup>143</sup> The report of the Special Rapporteur on FOAA to the UK, *op.cit.*
- <sup>144</sup> See, e.g. Vélez Restrepo and Family vs. Colombia, *op.cit.*
- <sup>145</sup> OSCE Representative on Freedom of the Media, [Special Report: Handling of the media during political demonstrations, Observations, and Recommendations](#) (June 2007)
- <sup>146</sup> *Ibid.*
- <sup>147</sup> *Ibid.*
- <sup>148</sup> E.g. R. Safranek, The Emerging Role of Social Media in Political and Regime Change, March 2012; Hanrath & Claus Leggewie, [Revolution 2.0? The Role of Digital Media in Political Mobilisation and Protest](#), 2012.
- <sup>149</sup> There was no reporting in Turkish TV stations of protests on 31 May 2013, when the protests broke in Gezi Park, Istanbul.

<sup>150</sup> See, e.g. the [briefing of Ivan Šimonović](#), Assistant Secretary-General for Human Rights on situation in Ukraine, which mentions “biased media reporting, fuelling fear and insecurity among the ethnic Russian community,” 16 April 2014.

<sup>151</sup> John McCarthy and Others, Selection Bias in the Newspaper Coverage of Protests in Minsk, Belarus, 2008.

<sup>152</sup> Al Jazeera, [Al Jazeera staff resign after 'biased' Egypt coverage](#), 8 July 2013.

<sup>153</sup> The BBC’s Persian and Arabic language services drew heavily on content created by ordinary citizens to cover events in the respective countries.

<sup>154</sup> E.g. General Comment No. 34, *op.cit.*: “journalism is a function shared by a wide range of actors, including ... bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.” It also states that general State systems of registration or licensing of journalists are incompatible with freedom of expression guarantees of Article 19 (3) of the ICCPR, para. 44. The Committee of Ministers of CoE Recommendation No. R (2000)7 from 8 March 2000 defines journalist as “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.”

<sup>155</sup> HR Committee, Concluding observations on Lesotho, 08/04/1999, UNDoc. No. CCPR/C/79/Add.106, para 23; or [Joint Declaration](#) of 18 December 2003.

<sup>156</sup> See the Resolution 25/36, *op.cit.*

<sup>157</sup> The 2011 Report of the Special Rapporteur on FOE, *op.cit.*, in which he highlighted that blocking access to associations’ websites and communications tools, can have a significant negative impact on assembly and association, and also the danger of “just-in-time” blocking at “key political moments, such as elections, times of social unrest, or anniversaries of politically or historically significant events; para 30.

<sup>158</sup> Riego & Rodriguez, *Ladies in White: The Peaceful March Against Repression in Cuba and Online*, 24 Harv. HR. J. 221 2011.

<sup>159</sup> On 28 January 2011, Egyptian President ordered shutting off the Internet for five days across the country; ARTICLE 19, [Human Rights Council: Rights to peaceful assembly and association online recognised](#), 1 October 2012.

<sup>160</sup> On 21 September 2012, Pakistan authorities blocked all mobile telephone reception in 15 cities to prevent demonstrations against the film, *The Innocence of Muslims*. Similar “kill-switch” tactics were used to control national celebrations in the country, including Eid on 20 August 2012, Independence Day on 14 August 2012, and Pakistan Day on 23 March 2012.

<sup>161</sup> On 3 June 2011, Syrian authorities blocked all internet services the day before more than 50,000 protesters took to the streets to mark “Children’s Friday” in honour of children killed during the uprising.

<sup>162</sup> Global Voices, [Bahrain Bans BlackBerry Chat Groups](#), 12 April 2010.

<sup>163</sup> In the UK in 2010, the website Fitwatch, which was giving advice to those participating in student protests, was blocked by Metropolitan police; see e.g. ARTICLE 19, [UK: Police Monitoring Website Takedown Illegal](#), 16 November 2010.

<sup>164</sup> The Turkish authorities previously blocked large sites used by protesters, such as YouTube and Google Sites; while the ECtHR found such “wholesale blocking of access” incompatible with the guarantees of the European Convention; *Yildirim v. Turkey*, Appl. no. 3111/10 (2012).

<sup>165</sup> In March 2013, the 34th Civil Court of São Paulo issued a decision forbidding Ricardo Fraga de Oliveira, a campaigner challenging the construction of a new property development, *inter alia*, from posting anything about this subject on Facebook, under the threat of a fine of 10,000 Reais (\$5,000) for each infraction. The order was later upheld by the Court of Justice in the State of São Paulo. See, e.g. ARTICLE 19, [Brazil: Court approves ban on development protester](#), 21 May 2013.

<sup>166</sup> In August 2012, in Belarus, the State Security Committee arrested a number of moderators of online communities. They interrogated and beat them, searched their apartments and confiscated their laptops. Pavel Yeutsikhiyeu, a moderator of the “We’ve had enough of this Lukashenko” group on the Russian social network *Vkontakte*, was sentenced by Minsk’s Kastychnitski district court to five days in prison. The government is also reported to have hacked into a number of online discussion forums to remove content and to libel forum administrators; ARTICLE 19, *op.cit.*

<sup>167</sup> See, the attempts to introduce the Protecting Cyberspace as National Asset Act of 2010, S. 3480, 11<sup>th</sup> Congress (2010).

<sup>168</sup> India’s IT Amendment Act, passed quickly in the aftermath of the Mumbai terror attack, states that executives of domestic and international Web companies can be held accountable for failing to uphold “public order, decency or morality”; those vague clauses could be extended to protest related content.

<sup>169</sup> In 2011, Apple Inc. blocked “ThirdIntifada,” an application used to stream news stories and editorials in Arabic and announce upcoming protests; see e.g. [Apple Removes Anti-Israel 'ThirdIntifada' App From App Store](#), 22 June 2011.

<sup>170</sup> WSJ, Venezuela Media Largely Ignored Protests, 14 February 2014.

<sup>171</sup> ARTICLE 19, [World Television Day: Satellite jamming and freedom of expression](#), 21 November 2011.



<sup>172</sup> See, Report of the Special Rapporteur on FOE, 4 June 2012, A/HRC/20/17, para. 50. See also, RSF, [Resolution recognizes role of journalists covering protests](#), 1 April 2014 (observing that at least 58 journalists were injured in Ukraine from the start of the Euromaidan protest movement between November 2013 till 19 January 2014; around 100 journalists have been the victims of violence in the wave of protests that began in Brazil in June 2013).

<sup>173</sup> In 2011, in Belarus, more than 100 journalists and bloggers were arrested and around 30 received criminal sentences

<sup>174</sup> Journalists were arrested when covering protests in September 2011.

<sup>175</sup> In Uganda, in February 2011, journalists were targets of violence and surveillance during the presidential election and were targeted again during the brutal crackdown on the “Walk to Work” protests later in the year, when dozens of journalists were arrested.

<sup>176</sup> In Chile, where student protesters questioned the over-concentration of media ownership, violence against journalists included beatings, cyber-attacks and attacks on editorial staffs. Many of these assaults, often accompanied by heavy-handed arrests and destruction of equipment, were carried out by abusive armed police who were rarely called to account.

<sup>177</sup> In February 2014, at least 13 journalists were harassed and assaulted by law enforcement in Venezuela, when covering protests in Caracas. Seven journalists were also arrested.

<sup>178</sup> In Russia, during demonstrations in Moscow between 6–9 May 2012, at least a dozen citizen journalists were arrested and four reporters were injured by the police while reporting on protests.

<sup>179</sup> In Turkey, media reported that at least 153 journalists had been injured and 39 detained in relation to the Gezi park protests. Although there have been calls for a Parliamentary enquiry, nobody has been brought to account through the criminal law for these violations.

<sup>180</sup> The [UN Plan of Action on the Safety of Journalists and the Issue of Impunity](#) was endorsed by the UN Chief Executives Board on 12 April 2012. The Plan was prepared during the 1<sup>st</sup> UN Inter-Agency Meeting on this issue, convened by the Director General of UNESCO.

<sup>181</sup> [Joint declaration on crimes against freedom of expression](#), issued by four special mandates on freedom of expression, June 2012.

<sup>182</sup> *Vélez Restrepo and Family vs. Colombia*, *op.cit.*.

<sup>183</sup> In Mexico, ARTICLE 19 recorded 46 direct attacks against journalists while reporting on a massive demonstration that took place on 2 October 2013 in which citizen journalists and freelancers were specially targeted. 32 of these attacks were committed by law enforcement.