



The right to peaceful assembly

Issues for consideration by the Human Rights Committee

Submission to the Human Rights Committee in the context of the preparation for a General Comment on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights

13 March 2019

Table of Contents

1	Introduction.....	3
2	How should the term ‘peaceful assembly’ be understood? (Q.1)	4
2.1	On the definition of “Assembly”	4
2.2	On the definition of “peaceful”	5
2.3	Cyber gatherings (Q.2, Q.19).....	6
3	Scope of obligations under article 2 ICCPR (Q.4, 5)	8
3.1	Negative and positives obligations to respect, protect and fulfil the right to peaceful assembly.....	8
3.2	The duty to facilitate peaceful assembly.....	9
4	Limitations and derogations to the right to peaceful assembly	11
4.1	Limitations in the sense of article 21 (Q. 6, 9).....	12
4.2	Derogations under article 4: the issue of Complex and de facto emergencies	13
5	Prior notifications and authorization of peaceful assemblies (Q.8).....	14
6	Policing and crowd control measures (Q. 11)	15
6.1	Grounds for legitimate dispersal.....	16
6.2	Means of dispersal.....	17

1 Introduction

This submission is based on an analysis of laws and practices in the Middle East and North Africa (MENA) region, which remains characterised by a security-based legal framework and policies curbing fundamental freedoms, including freedom of peaceful assembly. Given the geographical scope of MENA Rights Group's mandate, this submission also aims at highlighting pressing issues in law and practice in the MENA region. Such practices may alert the members of the Human Rights Committee to persistent issues which lead to civil society space being severely restricted, and may also highlight the need for international legal standards to effectively protect the right to peaceful assembly in all contexts.

This submission includes references to relevant bodies of soft law such as the African Commission on Human and Peoples' Rights Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa,¹ the Guidelines on Freedom of Association and Assembly in Africa of the African Commission on Human and Peoples' Rights,² the OSCE-Office for Democratic Institutions and Human Rights (ODIHR) Guidelines of Peaceful Assemblies,³ as well as relevant scholarly literature. Cases documented to the Special Procedures and Treaty Bodies were also taken into consideration, particularly insofar as the repetition of certain violations can shed light on common and pressing challenges to the universal enjoyment of the right to peaceful assembly.

In the same vein, concluding observations of Treaty Bodies concerning laws and practices related to the right to peaceful assembly in countries of the MENA region were considered. Countries in the region share common features – although to a different extent – such as hybrid systems of notification/authorisation prior to holding an assembly, broad definitions of and overreliance on limitations clauses; criminalisation of peaceful, spontaneous or unauthorised gatherings, blanket bans and the use of a wide range of laws and regulations limiting freedom to assemble in public spaces and criminalising such acts. Such limitations also derive from proclaimed states of emergency in which derogatory rights are used by states without consideration for the conditions of necessity, proportionality, legality and non-discrimination, as well as from the integration into ordinary legislation of extraordinary provisions – particularly in laws related to counter-terrorism and national security – limiting disproportionately or emptying the right of its substance. Furthermore, case law from Universal, European and African human rights mechanisms were integrated in a comparative approach.

¹ African Commission on Human and Peoples' Rights Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, adopted by the African Commission on Human and Peoples' Rights (the African Commission), meeting at its 21st Extraordinary Session, held in Banjul, Gambia from 23 February 2017 to 4 March 2017, Resolution ACHPR/Res. 363(LIX) 2016, 114 p. (Hereinafter "Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa").

² The Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights (African Commission), adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, Resolution 319 (LVII) 2015. 34 p. (Hereinafter "Guidelines on Freedom of Association and Assembly in Africa").

³ OSCE/ODHIR Panel of Experts on the Freedom of Assembly, *Guidelines on freedom of peaceful assembly*, Second., Warsaw/Strasbourg, OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2010, 160 p. (Hereinafter "OSCE-ODHIR Guidelines").

2 How should the term ‘peaceful assembly’ be understood? (Q.1)

2.1 On the definition of “Assembly”

Can one person form an assembly? Does it require the expression of an idea through a gathering, and if so, what is the hallmark of such an expression of an idea (e.g. does it necessarily entail an appeal to the public opinion)? (Q.2)

The UN Special Rapporteur on the rights to freedom of peaceful assembly and association (SR FPAA) defined an “assembly” as “an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in”.⁴ The OSCE-ODHIR Guidelines adopt the same criteria of temporality, intentionality and for the purpose of a common expression of a message that might be aimed at “an individual, a group, an organization or at society in general”.⁵

Our comments will focus on the question of the numerical delimitation of an assembly as we have found that this issue raises a number of challenges in terms of the protection of the right to peaceful assembly as well other connected rights, particularly the right to freedom of expression. Whether one individual can be seen as an assembly should be understood considering the level of protection that a solo demonstrator would enjoy if they were to be considered as an assembly. If a solo demonstration is recognised as an assembly, this qualification would entail that a potential notification or authorisation requirement may be intentionally applied to this person by the authorities in order to qualify their act as illegal. This risk has been highlighted by the ECHR in a judgement concerning simultaneous solo demonstrations posted at a significant distance from each other. The court highlighted that the distance requirement imposed by authorities to allow individual protests to be still considered as legal in spite of an absence of notification was intended to “bringing into play the notification requirement, thus impinging upon the freedom of expression exercised by solo demonstrators”.⁶ In assessing whether solo protesters should be considered as an assembly, it is our opinion that due consideration be given to the consequences in terms of freedom of expression, particularly in countries imposing a notification or authorisation system for assemblies.

⁴ The right to freedom of peaceful assembly, published in April 2017 by Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, available online <http://freeassembly.net/wp-content/uploads/2018/01/FOAA-Online-The-Right-to-Freedom-of-Peaceful-Assembly-update-Nov-2017.pdf> (last accessed on 11 March 2019).

⁵ Handbook on Monitoring Freedom of Peaceful Assembly, OSCE- Office for Democratic Institutions and Human Rights (ODIHR), p. 11.

⁶ ECHR, *Zakharkin v. Russia*, Application no. 40377/10, third section, judgement of 18 July 2017, para. 198.

2.2 On the definition of “peaceful”

When is an assembly not ‘peaceful’, and fall outside the scope of the protection of the particular right? (Q.5)

The European Commission considered that an assembly would not be peaceful where the participants or organisers have “*violent intentions that result in public disorder*”, while the inevitable obstruction which derives from a public gathering does not strip an assembly of its peacefulness.⁷

Most countries in the MENA region consider any form of unauthorised gathering – including spontaneous and organised – as illegal regardless of their peaceful character. In light of cases of violations of article 21 documented in countries in the MENA region,⁸ we highlight that the intention to commit violence should also be materialised by the *actus reus* of committing violence.

On the other hand, such an approach would entail that the *likelihood* that an assembly might lead to violence should not enter into consideration in the assessment of its peacefulness. The likelihood that an assembly might turn violent should not be considered as an element to strip peaceful organisers and protesters of the protection of their right under article 21 – as well as their rights under article 6 and 7 in case of dispersal. Adopting a human rights approach under the spirit of a *lex favorabilis*⁹ would, in fact, entail that the assessment of the likelihood of violence should be considered as a positive step to be taken by the authorities in order to ensure, through the implementation of preventive measures, that persons participating in the assembly can carry on peacefully their demonstration, and that the latter as well as bystanders are protected from acts of violence and intimidation regardless of their perpetrator’s identity (state agents, participants, counter-demonstrators etc.).¹⁰ Moreover, adopting a most favourable approach to right-holders should equally entail that an assessment of the likelihood of violence should not constitute a sufficient legal basis to ban the protest but should rather be considered as a means to facilitate the realisation of the right to peaceful assembly.

Furthermore, in its case law related to article 11, the ECHR has considered as elements to assess the peaceful character of an assembly, *inter alia*, if the organisers of protests have showed their peaceful intentions, either by declaring it or by virtue of their behaviour.¹¹ Lastly,

⁷ ECHR *Steel and Others v UK*, Application n° 24838/94, judgement of 23 September 1998, para. 603; see also Helen Fenwick, *Civil Liberties and Human Rights*, Routledge, 2009, p. 684.

⁸ Cf. *infra* section 4.

⁹ Michel Hottelier, “Le principe de faveur, arbitre des droits fondamentaux et des droits de l’homme”, in *Droits de l’homme et la constitution: études en l’honneur du Professeur Giorgio Malinverni*, Genève, Schulthess, 2007, pp. 171-196.

¹⁰ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, para. 50.

¹¹ ECHR, *Stankov and the United Macedonian Organisation Illinden v Bulgaria*, Application. no. 29221/95 and 29225/95, ECHR 2001-IX, paras. 78, 85-90; ECHR *Cisse v France*, Application. no. 51346/99, ECHR 2002-III, para. 37; ECHR, *Schwabe and MG v Germany*, Application. no. 8080/08, 8577/08, ECHR 2011, para. 105; ECHR, *Christian Democratic People’s Party v Moldova*, Application. no. 25196/04 (no. 2), judgment of 2 February 2010, para. 23. See also: Kai Siegert, “The Police and the Human Right to Peaceful Assembly”, in Ralf Alleweldt et Guido Fickenscher (dir.), *The Police and International Human Rights Law*, Cham, Springer International Publishing, 2018, pp. 217-243, p. 222.

the burden of proof to disqualify a protest as peaceful lies with the state.¹² Moreover, the protection offered by article 11 does not cease if the organisers and/or protesters did not expressly declare their peaceful intention. It therefore appears that since the peacefulness of an assembly does not need to be declared in advance to ensure the application of article 11, it is correct to affirm that, *a contrario*, there is a ‘presumption’ under European law of “peacefulness” which benefits assemblies.¹³ A similar argument can be made *mutatis mutandis* for 21 ICCPR, reinforcing the SR FPAA and the Special Rapporteur on extrajudicial, summary or arbitrary executions (SR SUMX)’s recommendation that states “should establish in law a positive presumption in favour of peaceful assembly” so that “[n]o assembly should be treated as an unprotected assembly”.¹⁴

To what extent can the violent conduct of certain individuals participating in the assembly be attributed to the group as a whole and render an assembly as a whole not peaceful? (Q 2) What level of violence (or mere disruption?) is required not to consider it peaceful? (Q5)

This question would demand a two-pronged assessment: first, to what extent the conduct of an individual can be attributed to others in terms of individual responsibility of each person in the group; second, to what extent “isolated” or “sporadic” acts of violence in an assembly can strip the latter of its peaceful character and therefore its protection under article 21 ICCPR – triggering a dispersal and/or arrests.

The ECHR has clearly established in its case law *Ziliberg v. Moldova* that:

*[A]n individual does not cease to enjoy the right to peaceful assembly as a result of a sporadic violence or other punishable acts committed by other in the course of the demonstrations, if the individual in question remains peaceful in or her intentions or behaviour.*¹⁵

The question of the threshold of violence required to trigger the necessity for state forces to disperse remains, however, a more contentious issue and can be linked to another question raised by the Committee in its note concerning the nature of a duty to facilitate (cf. *infra* points 4.1 and 4.2).¹⁶

2.3 Cyber gatherings (Q.2, Q.19)

In order to qualify as an assembly, are there requirements about where should the gathering should take place – in public, private or on-line? (Q.2) Moreover, to what extent does the right of peaceful assembly apply in the digital space? Can ‘gathering’ online impose obligations on States and other actors to facilitate it? (Q.19)

¹² *Ibidem*.

¹³ ECHR, *Ziliberg v. Moldova*, application No. 61821/00 (2004).

¹⁴ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, para. 17 (a).

¹⁵ ECHR, *Ziliberg v. Moldova*, application No. 61821/00, inadmissibility decision of 4 May 2004.

¹⁶ (“Does it mean that, while people exercise this right, the focus of law enforcement officials should be primarily on protecting the rights of all concerned rather than upholding law and order? (Are States thus required to show a certain level of tolerance to conduct when engaged in as part of peaceful assembly, and not meet it with the same force of the law as it would otherwise do?)”, Q 4).

The SR FPAA has identified amongst its best practices on the right to peaceful assembly an obligation “to respect and fully protect assembly rights online”,¹⁷ highlighting that internet and communication platforms “are essential tools to facilitate peaceful assemblies in the real world”. However, as freedom to assemble in the physical space is under increased restriction in the countries of the MENA region, the internet platforms that allow for “online gathering” have become a preferred method for civil society and youth actors to engage in peaceful activism. Keeping in mind this particular dynamic, in which restrictions on the physical space leads to new forms of gatherings on internet platforms to convey ideas, it is worth considering extending the scope of protection of article 21 ICCPR to these new platforms. Understanding cyber gathering in this context shows that their protection is not just a matter of freedom of expression but also freedom to gather in a non-physical space. Furthermore, this dynamic is all the more crucial considering that in several countries of the MENA region, violations of article 21 ICCPR against assemblies in the physical space can take the form of outright bans on gatherings and demonstrations,¹⁸ the denial of authorisations to assemble even in notification-based systems,¹⁹ the excessive use of force against protesters leading to death, as well as torture, arbitrary arrests and detentions.²⁰

Most importantly, this increasing collective engagement has been met in several countries of the MENA region by the enactment and use of new pieces of cybercrime legislation in which restrictions and limitations applicable to peaceful assemblies in the physical space are replicated and transposed in the cyberspace. The latest and most striking examples of these legislative practices in the MENA region are to be found in Egypt,²¹ Jordan²² and Iraq.²³ Cybercrimes were based on broadly defined limitations already applicable to the physical space and which were *in fine* transposed to the cyberspace including: “provoking sectarian strife”, “disturbing the security and public order”, or “harming the reputation of the country” as well as overly broad definitions of “hate speech” and the criminalisation of “fake news”. These dispositions provide for heavy sentences – which in the case of Iraq can be as severe as life

¹⁷ Human Rights Council, Resolution 24/5, A/HRC/RES/24/5, adopted on 8 October 2013.

¹⁸ See Algeria, “unpublished decree of 18 June 2001, which prohibits demonstrations in the capital”, Human Rights Committee, Concluding observations on the fourth periodic report of Algeria, CCPR/C/DZA/CO/4, 17 August 2018, para. 45^a.

¹⁹ Human Rights Committee, Concluding observations on the fourth periodic report of Algeria, CCPR/C/DZA/CO/4, 17 August 2018, paras 45-46.

²⁰ “All According to Plan. The Rab’a Massacre and Mass Killings of Protesters in Egypt”, Human Rights Watch Report, 21 August 2014, available online: <https://www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt> (last accessed on 11 March 2019); “Sudan: UN experts urge halt to excessive use of force against peaceful protesters”, OHCHR, Geneva, 28 December 2018, available online: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24049&LangID=E> (last accessed on 11 March 2019).

²¹ Egypt’s new cybercrime law legalizes Internet censorship, IFEX, Reporters Without Borders (RSF), 24 August 2018, available online: <https://www.ifex.org/egypt/2018/08/24/cybercrime-law/> (last accessed on 11 March 2019).

²² “Amendments to Jordan’s Cybercrime Law risk curbing free speech online” MENA Rights Group, 21 November 2018, available online: <https://menarights.org/en/articles/amendments-jordans-cybercrime-law-risk-curbing-free-speech-online> (last accessed on 11 March 2019).

²³ “Concerned over restrictions to freedom of expression, 10 civil society organisations call on Iraq to withdraw draft Cybercrime Law”, MENA Rights Group, 1 March 2019, available online: <https://menarights.org/en/articles/concerned-over-restrictions-freedom-expression-10-civil-society-organisations-call-iraq> (last accessed on 11 March 2019).

imprisonment – and have a chilling effect on civil society’s ability to organise, share and express ideas on the internet.²⁴

In this regard, the SR FPAA had reaffirmed the right to assemble and gather in virtual spaces to express and share opinions,²⁵ entailing that states must not block online content or block access to the internet, including in times of political unrest.²⁶ Therefore, the legality, proportionality and necessity limitation in the cyberspace should also be reviewed by an independent judicial authority.²⁷

3 Scope of obligations under article 2 ICCPR (Q.4, 5)

The traditional tripartite typology of human rights obligations adopted by UN Treaty Bodies should be applied equally to all rights. As such, the right to peaceful assembly is no exception to the rule that state parties have the obligation to respect, protect and fulfil each right enshrined in the ICCPR as required by article 2(1).²⁸ The practical implementation of certain rights might imply the existence of a “duty of facilitate” by virtue of the performative nature of these rights and freedoms. In other words, rights such as peaceful assembly entail for the right-holder the capacity to perform an action which must be enabled by the state, in order for the right to be effective.

3.1 Negative and positive obligations to respect, protect and fulfil the right to peaceful assembly

What are the (negative and positive) obligations placed by the right of peaceful assembly on the State? How should the right be respected by the State (e.g. through the adoption of laws providing for and regulating its exercise in accordance with international law)? How should it be protected? (Q.5)

The duty to respect in International Human Rights Law (IHRL) – which entails that states must ensure that their agents do not deliberately violate rights – should be understood more largely in cases of rights which are performative, and entail the adoption of appropriate measures in order to prevent the occurrence of violations. As such, the duty to respect should not be merely

²⁴ MENA Rights Group, “Iraqi parliament must withdraw draft Cybercrime Law severely curbing free speech online”, 20 February 2019, available online : <https://menarights.org/en/articles/iraqi-parliament-must-withdraw-draft-cybercrime-law-severely-curbing-free-speech-online> and “Amendments to Jordan’s Cybercrime Law risk curbing free speech online”, 21 November 2018, available online : <https://menarights.org/en/articles/amendments-jordans-cybercrime-law-risk-curbing-free-speech-online>, (both accessed on 11 March 2019).

²⁵ Human Rights Council, Resolution 21/16, 27 September 2012.

²⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, para. 79.

²⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, para. 32.

²⁸ Frédéric Mégret, “Nature of Obligations”, in Daniel Moeckli, Sangeeta Shah et Sandesh Sivakumaran (dir.), *International human rights law*, Oxford ; New York, Oxford University Press, 2010, pp 101-102.

considered as a negative obligation to refrain from dispersing peaceful assemblies or using unnecessary or disproportionate force but to do everything reasonable to ensure that the right is not violated – neither by the authorities nor by third parties.²⁹ A duty to respect should also be understood as an obligation to refrain from enacting laws which constitute obstacles to the right to peaceful assembly, such as imposing bureaucratic notification procedures or hybrid systems of notification which function as *de facto* authorisation systems controlled by the executive.³⁰

The obligation to protect is understood by the OCDE-ODIHR Guidelines as “the responsibility of the state to put in place adequate mechanisms and procedures to ensure that the freedom of assembly is enjoyed in practice and is not subject to unduly bureaucratic regulation”.³¹ The obligation to fulfil can be analysed in light of the duty to facilitate peaceful assembly in both law and practice.

3.2 The duty to facilitate peaceful assembly

Does this in general terms mean that there is a duty on the State to ‘facilitate’ peaceful assembly, and what does such a duty to ‘facilitate’ entail? (Q.4)

Comparative analysis of regional human rights standards applicable to the right to peaceful assemblies – and similar freedoms – does point toward the existence of a duty to facilitate the exercise of a right which derives from the traditional state duties to respect, protect and fulfil, in IHRL. Our analysis would lead us to consider that the obligation to facilitate can be considered as entailing both positive and negative obligations and can be read as a practical translation of the tripartite obligations of the state under IHRL to prevent violations, and respect and fulfil the right to peaceful assembly. As stated above, a duty to facilitate derives from the performative nature of rights such as the right to peaceful assembly, which in turn entails that the duty-bearer must take appropriate measures to enable individuals to “perform” their right effectively. Furthermore, a duty to facilitate can be useful to interpret the state’s obligations to allow assemblies to take place within ‘sight and sound’ of its target audience (Q.4).

According to the OSCE-ODIHR Guidelines, public assemblies “should be facilitated within ‘sight and sound’ of their target audience” given that they are held to convey a message to a particular target person, group or organization”.³² In addition, and considering the interconnection between the freedoms of assembly and expression, it is worth highlighting that in its case law, the ECHR extends the protection of article 10 (freedom of expression) equally to both the substance of the opinions, ideas and information expressed and to the form in which they are conveyed, including through a protest.³³

²⁹ *Ibid.*, p. 126.

³⁰ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, paras 21-23.

³¹ OSCE/ODHIR Panel of Experts on the Freedom of Assembly, *Guidelines on freedom of peaceful assembly, op. cit.*, p. 14, ppe. 2.

³² *Ibid.*, p. 17, ppe. 3.5.

³³ ECHR, *Hashman and Harrup v. the United Kingdom* [GC], Application no. no. 25594/94, para 28, ECHR *Gough v. the United Kingdom*, Application no. 49327/11, 28 October 2014, para. 149.

The obligation to facilitate peaceful assembly should therefore be understood as entailing a positive duty to ensure that such assemblies can convey their messages to their target audience, including by refraining from impeding efforts to disseminate their message to said audience, and by allowing the choice of location, even when they such locations are symbolic or institutional infrastructures.³⁴ Moreover, since media coverage of protest is crucial to disseminate the message that the protesters are conveying – including through social media – a duty to facilitate must entail that authorities enable journalists to cover the demonstrations and do not restrict internet access. During the ongoing protests in Sudan³⁵ and Algeria,³⁶ NGOs monitoring the restriction of access to the internet by the two states have documented such restrictions.

Furthermore, facilitation is understood by the OSCE-ODHIR Guidelines as entailing a positive obligation to implement procedures and mechanisms that do not impede the enjoyment of the right to peaceful assembly by “undue bureaucratic regulation”³⁷. Such procedures should ensure that assemblies are held at the organiser’s “preferred location”, enabling them to disseminate their messages to their target audience.³⁸ Failing to put in place simple requirements in cases of a notification system can be considered a violation to the duty to facilitate peaceful assemblies, as can dispersing spontaneous peaceful assemblies, as well as wilfully obstructing access to public spaces, streets, roads and squares.³⁹

Additionally, such a duty could encompass positive obligations meant to facilitate the access to the right to freedom of assembly of particular categories of right-holders. An example of such measures can be found in connection to other rights, such as access to education for children with disabilities or special needs.⁴⁰ Under article 21 ICCPR, a duty to facilitate can therefore be read in conjunction with non-discrimination. The general principle of equality and non-discrimination is fundamental to IHRL and, in some cases, may require a state to take affirmative action measures to mitigate or eliminate factors that are at the origin of discrimination or contribute to its perpetuation.⁴¹ Examples of practical measures violating the duty to facilitate peaceful assemblies of particular groups of rights-holders to ensure non-discrimination can be understood as including *inter alia*: immobilising or obstructing assistive devices of persons with disabilities to impede them from participating in assemblies; failure to sanction intimidation and punishment by school authorities of minors and young people who organise or participate in peaceful protests; failure to protect LGBTQI persons

³⁴ OSCE/ODHIR Panel of Experts on the Freedom of Assembly, *Guidelines on freedom of peaceful assembly, op. cit.*, p. 160.

³⁵ “Amid countrywide protest, Sudan shuts down social media on mobile networks”, Access Now, 21 December 2018, available online: <https://www.accessnow.org/amid-countrywide-protest-sudan-shuts-down-social-media-on-mobile-networks/> (last access on 11 March 2019).

³⁶ “Multiple targeted internet disruptions in Algeria amid mass-demonstrations”, Netblocks, 22 February 2019, available online: <https://netblocks.org/reports/algeria-internet-disruptions-amid-mass-demonstrations-WJBZJMB6> (last access on 11 March 2019).

³⁷ *Ibid.*, ppe. 2.2.

³⁸ *Ibidem.*

³⁹ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/70/266, 4 August 2015, para. 100.

⁴⁰ Haidee Hicks and Phillip Swain, “Direct, Facilitate, Enable—the Juxtaposition of the Duty of Care and the Duty of Disclosure in Social Work Field Education”, *Social Work Education*, 1 February 2007, vol. 26, n° 1, pp. 69-85.

⁴¹ Human Rights Committee, “General comment No. 18: Non-discrimination”, Thirty seventh session (1989), para. 9.

protesting against harassment and intimidation by counter-demonstrators.⁴² While these failures are understood under the positive duty to protect the right to peaceful assembly, taking measures to ensure the participation of particular categories of rights-holders with vulnerabilities may be read under a duty to facilitate peaceful protest without discrimination. In their joint report on the proper management of assemblies, the SR FPAA and SR SUMX affirmed that “[p]articular effort should be made to ensure equal and effective protection of the rights of groups or individuals who have historically experienced discrimination; adding that “[t]his duty may require that authorities take additional measures to protect and facilitate the exercise of the right to freedom of assembly by such groups”.⁴³

4 Limitations and derogations to the right to peaceful assembly

Is it correct to say that ‘there is no such thing as an unprotected assembly’ because even if the assembly is no longer peaceful, those involved retain their other rights, such as their rights against ill-treatment and the right to life? (Q.4)

This question raises the more complex meaning of “protection” of the right to peaceful protest depending on whether it is considered in its definition as a collective right or as a collection of individuals right-holders with inalienable rights under articles 6 and 7 ICCPR. In this sense, it should be highlighted that the threshold of violence required to render an assembly illegal cannot be appreciated *in abstracto*, but requires an evaluation by the authorities of the legality of a dispersal and other measures based on the strict application of the principles of proportionality and necessity in law enforcement.

It is however worth highlighting that in *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* case, the ECHR stressed that “genuine, effective freedom of peaceful assembly could not be reduced to a mere duty not to interfere on the part of a State which had ratified the Convention; it was the State’s duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully”.⁴⁴ As a result, the Strasbourg Court found that the authorities “did not take all the appropriate measures which could reasonably have been expected from them under the circumstances” and therefore failed to discharge its positive obligations under Article 11”. It could be argued *mutatis mutandis* that even when violence occurs within an assembly, those who remain peaceful retain their collective protection and should not be constrained to stop the assembly. On the other hand, the authorities do retain a positive duty to isolate and extract individuals who are committing acts of violence – whether in a demonstration or in a counter-demonstration as it was the case in the *United Macedonian Organisation* decision. At the same time, the individual rights of each person involved –

⁴² Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea, A/HRC/32/36/Add.2, 15 June 2016, paras 44-45.

⁴³ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, para. 16.

⁴⁴ ECHR, *United Macedonian Organization Ilinden and Ivanov v. Bulgaria*, Application no. 44079/98, judgment of 20 October, 2005.

whether as a peaceful protester or as a person committing violence – under articles 6 and 7 remain unchanged: the authorities retain the responsibility to protect the right to life of each individual against state and third-person use of force. By deconstructing the issue and considering it in a more dynamic manner – as a collective right and an individual right – it is therefore possible to affirm that neither the assembly nor the individual involved in the assembly remain unprotected.⁴⁵

4.1 Limitations in the sense of article 21 (Q. 6, 9)

How should the procedural requirement for limitations on the right in sentence two of article 21 (that limitations can only be imposed 'by law') and the substantive requirements (this can be done only where it is necessary to protect national security, etc.) be understood? (Q.6)

A recurrent concern is the equation of unlawfulness with non-peacefulness in domestic legislation which strips *prima facie* an assembly of its peaceful character and its protection regardless of the behaviour of the organiser and participants. Unlawfulness can refer to spontaneous assemblies in countries with an obligatory notification or permission system, or when “gatherings” are criminalised. As the SR FPAA highlighted, “[u]sing national laws as the determinant for ‘lawfulness’ in order to guarantee rights is problematic because it suggests that the right to peaceful assembly is granted by national law. Internationally recognised human rights are inherent lawful entitlements, requiring authorities to take steps to respect and fulfil them. Their validity is not dependent on the discretion of lawmakers or of security agencies”.⁴⁶

Unlawfulness can also stem from the status of the organiser or demonstrators in domestic laws such as illegal immigrants or migrant workers in countries in which only citizens are given the right to assemble.⁴⁷ In the same vein, laws prohibiting public religious processions of persons of other faiths than the one recognised by the state, or expressing different religious views affect discriminatively minorities and dissenters in the enjoyment of their right to assembly and their absolute right to freedom of conscience and religion.⁴⁸ In these situations, the violation to the right to peaceful assembly should be considered in light of the peremptory prohibition of discrimination and the obligation of the State under article 2(1) ICCPR, since it is the very identity of the person which renders the assembly unlawful, triggering its ban and dispersal.

⁴⁵ See also: Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, para. 13. “States have an obligation not only to refrain from violating the rights of individuals involved in an assembly, but to ensure the rights of those who participate or are affected by them, and to facilitate an enabling environment”.

⁴⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea, A/HRC/32/36/Add.2, 15 June 2016, para. 21.

⁴⁷ For example, article 28 of the Arab charter for Human Rights states that: “Citizens have the freedom of assembly and association in peaceful manner. No restrictions shall be imposed on either of these two freedoms except when it is necessary for national security, or public safety, or the protection of the rights and freedoms of others” (we underline).

⁴⁸ For example, article 260 of the Qatari Penal Code states that: “Whoever holds a meeting for the purpose of opposing or challenging the basics or tenets of Islam or promoting another religion shall be punished with imprisonment for a term not exceeding five years. The same penalty shall be imposed on any person who participates in the preparation of the meeting or joins it while being aware of its purpose.”

4.2 Derogations under article 4: the issue of complex and de facto emergencies

Are there circumstances under which all peaceful assemblies may be prohibited for a certain period in connection with states of emergencies, or independently of states of emergency? Can all assemblies in particular places (e.g. 'neutral zones' around parliaments, courts or monuments) or during a specific time be prohibited? (Q.9)

"Complex" and *de facto* emergencies have been defined by the Special Rapporteur on the respect of human rights while countering terrorism as "situations of emergency that are frequently hidden by the exercise of restrictive powers without formal acknowledgment of the existence of an emergency".⁴⁹ In light of the practices of states in the MENA region, we identify several trends that closely correspond to the Special Rapporteur's description of complex or *de facto* emergencies. Besides the obvious and continuous renewal of states of emergency, some countries integrate in their ordinary laws dispositions that in fact make derogations permanent and unchecked. Such dispositions are usually enshrined in counter-terrorism laws but can also be extended to other legal regimes – such as those regulating the protection of public facilities and infrastructures. Thus, the Special Rapporteur highlighted the danger of an "increased tendency on the part of States to pass, *ab initio*, ordinary legislation that is exceptional in character and scope, premised on the fact or threat of a terrorist atrocity, which foregoes the subterfuge that it is a finite emergency piece of legislation and commits the State to long-term exceptionality".⁵⁰

In this sense, it remains crucial while assessing the compatibility of a domestic legal framework with international human rights standards applicable to the right to peaceful assembly, to consider not only laws regulating peaceful assemblies but also criminal codes, counter-terrorism laws and other pieces of legislation that may affect this right.

The example of Algeria following the end of the state of emergency in 2011 illustrates this pattern and its effects on the right to peaceful assembly. During the fourth periodic review of Algeria by the Human Rights Committee, the experts expressed their deep concerns over the "unpublished decree of 18 June 2001, which prohibits demonstrations in the capital, and by reports that the decree is being applied generally throughout the country".⁵¹

In the same vein, an "overreliance on and abuse of limitation clauses contribute sizeably to the phenomena of *de facto* emergencies",⁵² particularly when limitation clauses are broadly defined. The decree which remained applicable in Algeria after the lifting of the state of emergency establishes an outright ban, and is complemented by a set of dispositions in ordinary laws including Act No. 91-19 of 2 December 1991 on public meetings and

⁴⁹ Oren Gross et Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press, 2006, p. 69.

⁵⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, 27 February 2018, para 31.

⁵¹ Human Rights Committee, Concluding observations on the fourth periodic report of Algeria, CCPR/C/DZA/CO/4, 17 August 2018, para. 45.

⁵² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, A/HRC/37/52, *op.cit.*, para 32

demonstrations which sets an authorisation system based on vague criteria, such as “national principles” or “public decency” as well as the criminalisation of any public unauthorised assembly, including unarmed gatherings.⁵³

Lastly, the use by states of their derogatory rights, coupled with the integration of derogatory clauses within ordinary laws and the abuse of limitation clauses may lead to a *de facto* blanket ban on protests, regardless of the peaceful intent of their organiser and participants. Such bans can derive from the prohibition of unions and strikes,⁵⁴ or dispositions banning all gatherings in specific locations, such as the ban on demonstrations in Algiers. Blanket restrictions on assemblies inherently fail to meet the standards of proportionality under both derogatory and limitation clauses.⁵⁵

A significant practice which can be found in Egyptian law is the expansion of the military tribunal’s jurisdiction to prosecute civilians for organising or participating in protests under laws protecting public and state facilities. Law No. 136 of 2014 on the protection of public facilities provides that “the armed forces shall assist the police and fully coordinate with them to secure and protect public facilities and vital facilities, including stations and networks, electricity towers, gas lines and oil fields, railways, road networks, bridges and other facilities and public facilities and property”. The law further subjects these acts to the jurisdiction of military tribunals.⁵⁶ In practice, this law has enabled the mass prosecution by military courts of civilians who attended or documented mass protests following the 2013 military takeover.⁵⁷

5 Prior notifications and authorization of peaceful assemblies (Q.8)

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

⁵³ Human Rights Committee, Concluding observations on the fourth periodic report of Algeria, CCPR/C/DZA/CO/4, 17 August 2018, *op.cit.*, para. 45.

⁵⁴ See International Trade Union Confederation, “Internationally recognized core labour standards in Saudi Arabia”, report for the World Trade Organization (WTO) General Council review of the trade policies of Saudi Arabia, Geneva, 25 and 27 January 2012. Available from www.ituc-csi.org/internationally-recognised-core,10469, and “International recognized core labour standards in the United Arab Emirates”, report for the WTO General Council review of the trade policies of the United Arab Emirates, Geneva, 27 and 29 March 2012. Available from www.ituc-csi.org/internationally-recognised-core,10867.

⁵⁵ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, para. 25.

⁵⁶ Decree of the President of the Arab Republic of Egypt, Law No. 136 for the year 2014 in the affair and the protection of public facilities and vital to secure, article 1 and 2 available online <https://menarights.org/sites/default/files/2016-11/Presidential%20Decree%20-%20law%20136%20of%202014%20on%20referral%20to%20military%20courts.pdf> (last access on 13 March 2019).

⁵⁷ Sahar Aziz, The Expanding Jurisdiction of Egypt’s Military Courts, Sada, Carnegie Endowment for international Peace, 12 October 2016, available online: <https://carnegieendowment.org/sada/64840> (last access on 13 March 2019).

to be free from all requirements of notification and authorization; which the former and which the latter? (Q.8)

A common position to the OSCE/ODIHR guidelines,⁵⁸ the ECHR,⁵⁹ the SR FPAA⁶⁰ and the ACHPR⁶¹ can be found on the notification system according to which: first of all, freedom of assembly as a right should not require a prior authorisation from the state; secondly, any prior-notification system shall be nonburdensome; thirdly, such a system must not function as *de facto* authorisation but have sole *rationale* to allow authorities to facilitate the peaceful assembly and take measures to protect public safety and order, as well as the rights and freedoms of others.⁶² While a system of voluntary notification could also serve the purpose of ensuring a cooperation between organisers and authorities – in the sense that a voluntary notification would show a peaceful intent – the failure to notify the authorities, particularly in cases where such a notification would have been impracticable to ensure the realization of the demonstration, should not *prima facie* make an assembly illegal.⁶³

Systems of notification that impose a detailed list of names of organisers and/or participants or require organisers to specify flags or banners which will be used during the assembly are used in several countries of the MENA region. For example, in Morocco, the 1958 Law on public freedoms provides that only legally registered associations, trade unions, or political parties may organise a public demonstration and puts in place a prior notice system controlled by the Ministry of Interior which requires organisers to publish their full names, personal addresses, and national ID numbers in addition to specifying the purpose, date, time, and location of the demonstration.⁶⁴

6 Policing and crowd control measures (Q. 11)

What are the rules as far as the use of coercive measures against those engaged in assemblies is concerned, also if they turn violent? This includes detention, arrest and the use of force (articles 6, 7 and 9 of the ICCPR). How should the requirements of legality, precaution, necessity and proportionality in the context of the use of force be understood? What is the role of the various forms less-lethal weapons and equipment that are available, and how should they be regulated? May some such weapons never be used, or only under certain circumstances? Horses

⁵⁸ OSCE/ODHIR Panel of Experts on the Freedom of Assembly, *Guidelines on freedom of peaceful assembly, op. cit.*

⁵⁹ ECHR, Research division, Article 11, The conduct of public assemblies in the Court's case-law, 22 May 2013.

⁶⁰ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, para. 25.

⁶¹ The Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights (African Commission).

⁶² N. Jarman and M. Hamilton, "Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly", *Journal of Human Rights Practice*, 1 juin 2009, vol. 1, n° 2, p. 217.

⁶³ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, para. 24.

⁶⁴ Voices in the street, Mass social protests and the rights to peaceful assembly, a 12-country special report by Freedom House, January 2015, p 41.

and dogs? Firearms? Private security providers? Can dispersal ever be justified where an assembly is entirely peaceful/non-coercive? What are the alternatives to dispersal?

6.1 Grounds for legitimate dispersal

Can dispersal ever be justified where an assembly is entirely peaceful/non-coercive? (Q.11)

A comparison of domestic, regional and international standards shows the existence of a consensus that dispersal of assemblies – *a fortiori* when they are entirely peaceful – must remain a measure of last resort while the protection of the rights of participants under article 6 and 7 ICCPR must be protected by facilitating an orderly dispersal.⁶⁵ As highlighted by the SR FPAA and the SR SUMX in their joint report on the proper management of assemblies, “[t]he normative framework governing the use of force includes the principles of legality, precaution, necessity, proportionality and accountability”. Since use of force has to be of last resort, alternatives to dispersal should be sought beforehand and may include a redirection which must be agreed after a dialogue negotiation, and mediation with the organisers of the assembly⁶⁶. However, any change to the time, place or manner should still enable the assembly to remain within “sight and sound” of their target audience.⁶⁷ Other elements have been used by the ECHR in case of a spontaneous assembly which may create unpredictable situations for the authorities. In the case *Éva Molnár v. Hungary*, the court found that the dispersal of a spontaneous assembly after eight hours was not in violation of article 11 as it considered that the authorities had left a reasonable period of time for the participants to protest.⁶⁸ However, a distinction should be made between a dispersal that solely entails non-violent calls, and a dispersal by force, which remains regulated by the standards applicable to law enforcement included in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶⁹

An example of how the criminalisation of “unauthorised gathering” gives a legal basis in domestic law for law enforcement to systematically disperse by force peaceful demonstrations can be found in Sudanese law. This practice – which has led to a significant number of deaths and injuries since the beginning of the peaceful protests since November 2018 – should be understood in light of several dispositions regulating the use of force in the domestic legal framework, as well as laws that, by establishing immunity for such acts, enable a pervasive climate of impunity. In particular, article 129 of the 1991 Criminal Procedure Act provides that “[t]he officer in charge [...] shall have the power to order the use of firearms, or any other force, in cases of [...] dispersing an unlawful assembly in which firearm is used, or any tool as the use of which may likely result in causing death or grievous hurt, whenever the conditions require the same, for the purpose of arresting offenders, or preventing the occurrence of any offence.” By referring to “unlawful assemblies” as a legitimate grounds for

⁶⁵ ECHR, *Oya Ataman v Turkey*, Application. no. 74552/01, 5 December 2006, para. 42.

⁶⁶ Académie de droit international humanitaire et de droits humains à Genève, *Use of force in law enforcement and the right to life*, *op. cit.*, p. 7.

⁶⁷ OSCE- Office for Democratic Institutions and Human Rights (ODIHR), *Handbook on Monitoring Freedom of Peaceful Assembly*, Warsaw/Strasbourg, OSCE/ODIHR, 2011, p. 76.

⁶⁸ ECHR, *Éva Molnár v. Hungary*, Application no. 10346/05, judgment of 7 October 2008, para. 43.

⁶⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, principles 9-14.

security forces to use firearms, this disposition allows the use of firearms in crowd control regardless of the peaceful character of the assembly. Moreover, the vague wording of “for the purpose of arresting offenders, or preventing the occurrence of any offence” allows the authorities to use lethal force in a broad range of circumstances without explicitly requiring the existence of a real, direct and imminent threat to the life of the agents or other persons.

6.2 Means of dispersal

May some such weapons never be used, or only under certain circumstances? Horses and dogs? Firearms? (Q.11)

The SR FPAA and the SR SUMX have stressed that states “are required to procure less lethal weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury”.⁷⁰ In its concluding observations on the fifth periodic review of Sudan, the Human Rights Committee’s experts expressed their concerns that live ammunition, rubber bullets and tear gas were reportedly used against demonstrators, resulting in the death and injury of several protesters.⁷¹ It is important, therefore, to highlight that “less-lethal” weapons remain nonetheless lethal when used with the intent to harm or without any necessary precaution to avoid the death and injury of protesters. The use of less-lethal weapons does not, therefore, constitute *per se* a guarantee of respect of the obligation to prevent violations to the rights of assemblies and participants under articles 21, but also 6 and 7 ICCPR. Lastly, attention should be given to the type of forces in charge of managing and dispersing assemblies. The use of special forces with hybrid military-civilian status which are neither trained in law enforcement accordance with IHRL standards nor subjected to civilian control, but rather used in special operations or war should be considered as a form of disproportionate use of force *per se*.⁷² Similarly, the “militarisation” of police forces in the management of assemblies has been highlighted by the SR FPAA, particularly the use of “military-style tactics, full body armour and an arsenal of weaponry better suited to a battlefield than a protest”, which needlessly escalate tensions.⁷³

⁷⁰ *Ibidem*.

⁷¹ Human Rights Committee, Concluding observations on the fifth periodic report of the Sudan, CCPR/C/SDN/CO/5, 19 November 2018.

⁷² See notably: Human Rights Committee, Concluding observations on the fifth periodic report of the Sudan, CCPR/C/SDN/CO/5, 19 November 2018, para 37 (on the extended powers given to the National Intelligence and Security Service to engage in law enforcement)

⁷³ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his follow-up mission to the United States of America, A/HRC/35/28/Add.2, 12 June 2017, para 37.

MENA Rights Group is a Geneva-based legal advocacy NGO, focusing on the protection and promotion of fundamental rights and freedoms in the Middle East and North Africa. Adopting a holistic approach, we work at both the individual and structural level. We provide legal counselling to victims of human rights violations through recourse to international law mechanisms. In addition, we assess the human rights situation on the ground and bring key issues to the attention of relevant stakeholders to call for legal and policy reform.