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**The obligation to respect the right to assembly in Kenya**

**Submitted in partial fulfilment of the LL M in Human Rights and Democratisation in  
Africa**

**Submitted by: Kadima Cedric (u24094138)**

**Under the supervision of**

**Prof Elvis Fokala**

**Faculty of Law, University of Pretoria**

**Centre for Human Rights**

**and**

**Prof Gentian Zyberi**

**Faculty of Law, University of Oslo**

**Norwegian Centre for Human Rights**

**10 October 2024**

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**Dated 10 October 2024 at Oslo, Norway**

  
Kadima Cedric

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## Chapter 1 – Introduction

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### 1.0 Background

#### 1.0.1 Brief history of the right to assembly

The fundamental right to assembly is significant in mobilising the population, facilitating the expression of grievances and aspirations, influencing public policies, and providing a platform for commemorating significant events.<sup>1</sup> Paul M Taylor captures the idea that the right to assembly is a distinct expression in a democratic society.<sup>2</sup> Often, when people exercise this right, state authorities respond with the arrest and detention of demonstrators arbitrarily and use of force against demonstrators disproportionately.<sup>3</sup> At times, state authorities also prohibit the gathering of people.<sup>4</sup> However, why is this right important?

The history of the right to assembly has its origins in the struggle of European aristocracies in the 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> centuries to limit the autocratic powers of their monarchs.<sup>5</sup> This right was enshrined in the manifestos of the French and American revolutions.<sup>6</sup> The First Amendment of the United States' Bill of Rights guarantees the right of the people to assemble peaceably.<sup>7</sup> In the 19<sup>th</sup> century, many European countries, including Sweden, Denmark, Switzerland, and Norway, emphasised freedom of belief, equality before the law, freedom of

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<sup>1</sup> Human Rights Council (HRC) 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' UN Doc A/HRC/20/27 24 (2012) (Special Rapporteur - Kiai).

<sup>2</sup> MP Taylor *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (2020) 591-609.

<sup>3</sup> Resolution on peaceful demonstrations, ACHPR/Res 281, 12 May 2014; Press release 'The African Commission on Human and Peoples' Rights expresses deep concern over human rights violations and growing tensions amid mass protests in the republic of Kenya' 26 June 2024 <https://achpr.au.int/en/news/press-releases/2024-06-26/deep-concern-over-human-rights-violations-growing-tensions-amid-mass> (accessed 6 July 2024).

<sup>4</sup> *Law Office of Ghazi Suleiman v Sudan (II)*, 2003 AHRLR 144 (ACHPR 2003) para 56.

<sup>5</sup> A Ancheita & MRN Cárdenas 'The right to freedom of peaceful assembly and association' in CR Humberto *The Universal Declaration of Human Rights (UDHR): A commentary* (2023) 472-475; see also R Godrick 'The right of peaceful protest in international law and Australian obligations under the International Covenant on Civil and Political Rights' [https://humanrights.gov.au/sites/default/files/HRC\\_assembly\\_Goodrick.pdf](https://humanrights.gov.au/sites/default/files/HRC_assembly_Goodrick.pdf) (accessed 6 July 2024). 3; J Cameroon 'Freedom of Peaceful Assembly and Section 2(c) of the Charter: Report for the Public Order Emergency Commission' (2022) *Osgoode Digital Commons* 10; O Salát *The right to freedom of assembly: A comparative study* (2015) 18.

<sup>6</sup> Ancheita & Cardenas (n 5) 472; Goodrick (n 5) 3.

<sup>7</sup> Goodrick (n 5) 6; see N Katrina 'The contested right of public meeting in England from the Bill of Rights to the public order acts' (2022) 32 *Transactions of the Royal Historical Society* 199-221.

movement, and freedom from arbitrary arrest rather than freedom of assembly.<sup>8</sup> However, the recognition of assembly as a fundamental human right gained momentum in the 19<sup>th</sup> and 20<sup>th</sup> centuries, with states' constitutions incorporating these rights as general principles of the law.<sup>9</sup>

### 1.0.2 *International protection*

The Universal Declaration of Human Rights (UDHR), adopted in 1948, acknowledges the right to peaceful assembly, among other rights.<sup>10</sup> According to it, everyone has the right to peaceful assembly and association. Although the UDHR is not legally binding *per se*, it incorporates rights and principles founded on human rights standards in other legally binding international instruments.<sup>11</sup> The International Covenant on Civil and Political Rights (ICCPR), which followed the UDHR, also included provisions for peaceful assembly.<sup>12</sup> Negotiations and discussions among states during the drafting of these provisions led to the inclusion of limitations on the exercise of these rights, such as restrictions for national security, public order, and the protection of the rights and freedoms of others.<sup>13</sup>

The right to assembly is addressed differently in the UDHR and the ICCPR.<sup>14</sup> The UDHR combines assembly and association in a single provision, stating in Article 20(1): 'Everyone has the right to freedom of peaceful *assembly* and *association*'. In contrast, the ICCPR has separate provisions for assembly and association. Article 21 protects the freedom of assembly, while Article 22 protects association. Aoife Daly wrote that the drafters of the ICCPR considered this distinction necessary to address the pressing issue of trade unions and to ensure that the right to association includes forming and joining one.<sup>15</sup>

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<sup>8</sup> Goodrick (n 5) 3.

<sup>9</sup> Ancheita & Cardenas (n 5) 472.

<sup>10</sup> UDHR art 20.

<sup>11</sup> United Nations (UN) 'The foundation of international human rights law' <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (accessed 13 August 2024).

<sup>12</sup> International Covenant on Civil and Political Rights (ICCPR) art 21.

<sup>13</sup> Goodrick (n 5) 7; Ancheita & Cardenas (n 5) 472-475;

<sup>14</sup> A Daly *Article 15: The right to freedom of association and to freedom of peaceful assembly* (2016) 11.

<sup>15</sup> Dally (n 14) 12; International Labour Organisation (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) art 2.



### 1.0.3 Regional protection

The drafters of the African Charter on Human and Peoples' Rights (African Charter) enshrined the right to and restriction of assembly in Article 11.<sup>16</sup> The Charter adopts the ICCPR approach to separate the rights of assembly (Article 11) and association (Article 10). Michelo Hansungule notes that most provisions were taken from existing international human rights law treaties, particularly first-generation rights.<sup>17</sup> He points out that a closer observation reveals that the African Charter amended some borrowed provisions from existing international documents, such as the UDHR and the ICCPR.<sup>18</sup> These amendments weaken African standards on some rights compared to United Nations (UN) instruments-based.<sup>19</sup> He gives an example of Article 13 of the African Charter compared to Article 21(1) of the UDHR on the right to participate in government.

Unlike the UDHR, the drafters of the African Charter left out Paragraph 3 of Article 21 of the UDHR, which prescribes expressing the people's will through periodic and genuine elections by universal and equal suffrage.<sup>20</sup> Taking this approach, a comparison between Article 21 of the ICCPR and Article 11 of the African Charter shows that the drafters of the African Charter, in describing the limitation of the right, omitted the words '*...in a democratic society*'. Nonetheless, The African Commission of Human and Peoples' Rights (African Commission) interprets the assembly as the right to enjoy demonstrations, protests, meetings, processions, rallies, sit-ins, funerals, online platforms, or any other way people choose.<sup>21</sup>

Article 15 of the American Convention on Human Rights (American Convention) and Article 11 of the European Convention on Human Rights (European Convention) guarantee the right to assembly. The American Convention recognises this right separately, while the European

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<sup>16</sup> African Charter on Human and Peoples' Rights (African Charter) art 11.

<sup>17</sup> H Michelo 'African Charter on Human and Peoples Rights: Critical Review' 8 (2000) *African Yearbook of International Law* 285.

<sup>18</sup> As above.

<sup>19</sup> As above.

<sup>20</sup> As above.

<sup>21</sup> R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 307-309; African Commission on Human and Peoples' Rights, policing assemblies in Africa, guidelines for the policing of assemblies by law enforcement officials in Africa, 4 March 2017, para 1.1; Report of the Study Group on Freedom of Association and Assembly in Africa, 'Freedom of association, as pertaining to civil society, and freedom of assembly in Africa: A consideration of selected cases and recommendations', April 2014, para III C 2.

Convention combines the recognition of assembly and association in the same article. Like the ICCPR, the American Convention defines the limitation of the right in the context of ‘a *democratic society*,’ unlike the African Charter, which excludes ‘*democratic society*’. When the African Charter was adopted in 1981 and entered into force in 1986, many leaders elected into office in elections supervised by their exiting colonial governments retained their seats until their death or military overthrow, and very few resigned.<sup>22</sup> By 1980, only Mauritius had experienced a change in power through constitutional elections, as the ruling party was voted out and replaced by another.<sup>23</sup> Makau Mutua argues that most African states at the time were also egregious human rights violators, as inherited from their colonial governments.<sup>24</sup> This may justify why the term ‘*democratic society*’ was left out of the African Charter, speculatively.

#### 1.0.4 Domestic protection

Most constitutions worldwide protect the right to assembly. About 178 countries have this right in their constitutions.<sup>25</sup> This includes most African countries, such as Burkina Faso, Cameroon, Egypt, Nigeria, Uganda, and South Africa.<sup>26</sup> However, this part of the chapter focuses on the country of study, Kenya. Article 37 of the Constitution of Kenya, 2010, guarantees that every person has the right, peaceably and unarmed, to assemble, demonstrate, picket, and present petitions to public authorities. The right to assemble, mentioned in Article 37 of the Constitution, is at the core of the rights outlined in Article 21 of the ICCPR and Article 11 of the African Charter.

Although the terminology differs between the two documents, the ICCPR uses ‘*peaceful assembly*’, and the African Charter uses ‘*right to assemble freely*’- they both refer to the same fundamental right. ‘*Peaceably*’ and ‘*peacefully*’ are used in the Constitution of Kenya and the

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<sup>22</sup> S Ellis ‘Elections in Africa in historical context’, in HCM Abbink & G Hesselting (eds) *Election observation and democratisation in Africa* (2000) 38.

<sup>23</sup> As above.

<sup>24</sup> M Mutua ‘The African human rights system: A critical evaluation, prepared for United Nations Development Programme, Human Development Report (2000) 3.

<sup>25</sup>Constitute Project, [https://constituteproject.org/constitutions?lang=en&q=assembly&status=in\\_force](https://constituteproject.org/constitutions?lang=en&q=assembly&status=in_force) (accessed 20 August 2024).

<sup>26</sup> J Biegon and others ‘Domestic adherence to continental and international norms in the Practice of policing assemblies in Africa’ [https://policehumanrightsresources.org/content/uploads/2017/07/policing\\_assemblies\\_africa.pdf?x49094](https://policehumanrightsresources.org/content/uploads/2017/07/policing_assemblies_africa.pdf?x49094) (accessed 20 August 2024).

ICCPR, respectively, but mean an assembly deficient in severe widespread violence.<sup>27</sup> The African Charter does not use the term 'peaceful'. This research has found no target document explaining why '*freely*' was preferred over '*peacefully/peaceably*'. However, Judge Fatsah Ouguerouz describes that the African Charter's omissions and inclusions were no mistake by the drafters. They were deliberate.<sup>28</sup>

As identified above, the drafters chose lower standards for certain rights than UN-based documents like the ICCPR.<sup>29</sup> Thus, could it be that the 'peaceful' was omitted to provide more justification for restricting the right, even if a protest is peaceful? This mini-dissertation uses the term 'right to assembly', focusing on the state's obligation to uphold this right rather than the obligation of participants. However, both sets of obligations are discussed in Chapters 2 and 3.

## 1.1 Problem statement

In a 2023 report, the Kenyan National Human Rights Commission (KNHRC) referred to an outright assault on Article 37 of the Constitution on the right to assemble, demonstrate and picket.<sup>30</sup> In 2023, political parties, coalitions, civil society organisations, and other groups organised protests on different thematic areas, including electoral justice and high living costs.<sup>31</sup> Between January and September 2023, there were 840 demonstration events, and the police interfered with more than half.<sup>32</sup> The first response of the State authorities was to

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<sup>27</sup> Human Rights Committee (HRCtt) General Comment (GC) 37 on Article 21 of the ICCPR, para 15.

<sup>28</sup> International Justice Resource Centre 'African Court Judge Ouguerouz reviews history of African Charter on Human and Peoples' Rights at 30<sup>th</sup> anniversary <https://ijrcenter.org/2011/11/09/achpr-speech/> (accessed 24 August 2024).

<sup>29</sup> Michelo (n 17).

<sup>30</sup> Kenya National Commission on Human Rights (KNCHR) 'Assault on article 37 of the Constitution of Kenya, 2010' (2023), <https://www.knchr.org/Portals/0/Assault%20on%20Article%2037%20of%20the%20Constitution%20in%20%20Kenya.pdf> (accessed 4 May 2024).

<sup>31</sup> Jemimah Mueni 'Raila flags off countrywide protests against government' (2023), <https://www.capitalfm.co.ke/news/2023/03/raila-flags-off-countrywide-azimio-protests-over-iebc-selection-process/>. (accessed 4 May 2024).

<sup>32</sup> Armed Conflict Location & Event Data Project (ACLED) 'Kenya: police use excessive force in response to anti-government demonstrations' (2023), <https://acleddata.com/2023/09/26/kenya-situation-update-september-2023-police-use-excessive-force-in-response-to-anti-government-demonstrations/> (accessed 4 May 2024).

declare the protests illegal.<sup>33</sup> The leaders of the demonstrations maintained that the protests were legal and proceeded on several occasions with the assembly and demonstration.<sup>34</sup> More often, against international, regional, and domestic obligations, the State authorities interfered with the demonstrations, including blocking access to roads and using water cannons, teargas, live bullets, and batons, among other tactics, to ensure that the protests did not occur.<sup>35</sup> Also, recently, in 2024, State authorities in Kenya unleashed disproportionate force against protesters and even deployed the military.<sup>36</sup> KNHRC reported that in one month of protests, about 50 people died, with another 59 abductions and more than 680 arbitrary arrests.<sup>37</sup>

This has been the situation long, even after Kenya ratified the ICCPR in 1972 and the African Charter in 1992.<sup>38</sup> Kenya has had four reporting cycles under the ICCPR, the last of which was concluded in 2021. In its concluding observations on Kenya's fourth periodic report, the Human Rights Committee (HRCtt) concluded that Kenya should amend existing legislation, such as the Public Order Act of 1950, that requires authorisation for peaceful assemblies.<sup>39</sup> It also drew attention to the excessive use of force and recommended that Kenya comply with its General Comment 37 of 2020 on Article 21 of the ICCPR - right of peaceful assembly (General Comment 37). A deeper problem arose in the 2008-2014 reporting cycles under the

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<sup>33</sup> Sharon Resian 'Nairobi police chief says planned Azimio protests illegal, cites order act' (2023), <https://www.capitalfm.co.ke/news/2023/03/nairobi-police-chief-says-planned-azimio-protestsiillegal-cites-order-act/>. (accessed 4 May 2024).

<sup>34</sup> KNHCR (n 30) 11.

<sup>35</sup> As above.

<sup>36</sup>W Muia 'Kenyan court allows military deployment to quell protests', <https://www.bbc.com/news/articles/c897gnr9z4vo> (accessed 24 August 2024).

<sup>37</sup> Statement on Mukuru murders and updates on the anti-Finance Bill protests (2024) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1201/Statement-on-Mukuru-Murders-and-Updates-on-the-Anti-Finance-Bill-Protests> (accessed 24 August 2024).

<sup>38</sup> Human Rights Watch 'Human rights in Kenya (2002)', <https://www.hrw.org/reports/2002/kenya2/Kenya1202-02.htm> (accessed on 4 May 2024); Willy Mutunga 'Demonstrations should not be individualised, it is a right for all' (2022), <https://www.the-star.co.ke/opinion/columnists/2022-12-11-willy-mutunga-demonstrations-should-not-be-individualised-it-is-a-right-for-all/> (accessed 4 May 2024).

<sup>39</sup> HRCtt 'Concluding observations on the fourth periodic report of Kenya (2021)' 10, paras 44 & 45.

African Charter. The African Commission was concerned that Kenya failed to submit sufficient information on implementing the right to assembly.<sup>40</sup>

This research examines why the Kenyan state authorities have long maintained a repulsive attitude and assess the country's progress in implementing international law obligations on the right to freedom of assembly. It also evaluates compliance during various reporting periods under the ICCPR and the African Charter.

## **1.2 Objectives of the research**

This research significantly contributes to the ongoing debate on the legality of legislation and practices governing the freedom of assembly in Kenya. It provides a comprehensive understanding of the State authorities' behaviour towards assemblies and demonstrations and compares it to its binding obligations on the freedom of assembly under international law.

Four overarching objectives guide the study: -

- a) To map the content, scope and obligations of the right to assembly under the ICCPR and the African Charter.
- b) To trace the history that informs Kenyan State authorities' repressive conduct on the right to assembly.
- c) To evaluate how the Constitution of Kenya of 2010, other enabling legislation(s), and judicial decisions have incorporated the right to assembly as required by the ICCPR and the African Charter.
- d) To evaluate Kenya's missed opportunities in implementing its obligation to respect the right to peaceful assembly outlined in the ICCPR and the African Charter from 1972 to 2024 while drawing positive lessons from other jurisdictions.

Generally, this research serves as a reference for international human rights law scholars and bodies, shedding light on the progress of implementing treaty obligations on the freedom of assembly in Kenya. It prompts stakeholders to review the constitutionality of provisions and

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<sup>40</sup>African Commission on Human and Peoples' Rights (ACHPR) 'Concluding observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya (2016)' para 41 & 57.

actions related to the right of assembly and proposes solutions to promote and protect this right, offering a roadmap for a more rights-respecting Kenya.

### 1.3 Research question

To achieve these objectives, the research inquires: To what extent has Kenya implemented its international obligations to respect the right to freedom of assembly between 1972 and 2024? The following sub-questions guide the answer to the leading question: -

- a) What is the understanding of the definition, content, scope of protection and obligation of State Parties regarding the right to assembly under the ICCPR and the African Charter?
- b) What underlying factors shape the law, resulting in a repressive approach to the right of assembly in Kenya?
- c) To what extent is Article 37 of the Kenyan Constitution, enabling legislation, and judicial decisions congruent with the content, scope and obligations of the right to assembly under the ICCPR and the African Charter?
- d) While drawing positive lessons from other jurisdictions, what proposals can relevant stakeholders adopt and implement to comply with international obligations on the freedom of assembly?

### 1.4 Literature review

*Construction of a repressive state: - colonial period 1887-1963 and post-colonial period 1963 – 2010*

Oloka Onyango conceptualises three factors that possibly led to the formation of a police power state in pre- and post-colonial Kenya that is oppressive:<sup>41</sup> (i) the background, training and social development; (ii) discretionary control by self-interested persons or the ruling class in the process of production; and (iii) the evolution of social relationships or allegiances outside the sphere of production. This research adopts this approach to trace the State's behaviour towards the freedom of assembly. The framework is helpful as it contextualises police powers, correlating with enjoying the freedom of assembly. Additionally, Onyango and

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<sup>41</sup> J Oloka-Onyango 'Police powers, human rights, and the state in Kenya and Uganda: A comparative analysis' (1990) 9 *Third World Legal Studies* 1-36.

Otuya's piece on perceptions and attitudes of the police in managing assemblies is also significant.<sup>42</sup> They narrate the militarisation of the police by the executive in colonial and post-colonial Kenya and their organisational culture. The piece also relies on works like Martins and Terbalanch to show that organisational culture is passed down to succeeding administrations.<sup>43</sup> Organisational culture is also informative in this research. Their research does not include how the abuse of police powers by a state violates international human rights law. This mini-dissertation introduces that approach.

### *Assessing the State's obligations on the freedom of assembly under international law*

Oxford Pro Bono Publico (OPBP) has published a framework for assessing a State's obligation to freedom of assembly.<sup>44</sup> It provides for the following criteria to deduce the obligation of the State, especially under Article 21 of the ICCPR: - "(i) *the scope of the right; (ii) the scope of corollary State obligations; (iii) how other rights overlap with the right to peaceful assembly; (iv) how the exercise of various police powers impacts the right; and (v) how the protection against discrimination interacts with the right.*" This approach inspires this research and is comprehensive in analysing the obligation of Kenya under international law on the freedom of assembly.

This research also references the works of Manfred Nowak, 2005<sup>45</sup> and William Schabas, 2019,<sup>46</sup> who discuss developments under Article 21 of the ICCPR from its drafting stages and examine practices before the Human Rights Committee (HRC). However, they overlook recent updates in General Comment 37 on Article 21, which this research aims to address. Moreover, Sarah Joseph and Melissa Castan's commentary covers HRC decisions only until 2013, missing significant changes in state practice since then.<sup>47</sup> This research seeks to fill that gap as well. Additionally, Rachel Murray's work provides important context on the drafters' intentions for Article 11 of the African Charter.<sup>48</sup> This research will evaluate whether countries

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<sup>42</sup> D Onyango & P Otuya 'Police perceptions, attitude and preparedness in managing public assemblies' in M Rutere & P Mutahi (eds) *Policing protests in Kenya* (2019) 6-21.

<sup>43</sup> E Martins & F Terblanche 'Building organisational culture that stimulates creativity and innovation' (2003) 6 *European Journal of Innovation Management* 64-74.

<sup>44</sup> Oxford Pro Bono Publico (OPBP) *The law on policing peaceful protests* (2020).

<sup>45</sup> M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 481-494.

<sup>46</sup> W Schabas *UN Covenant on Civil and Political Rights: Nowak's CCPR commentary* (2019) 592-612.

<sup>47</sup> S Joseph & M Castan *The International Covenant on Civil and Political Rights: cases, materials and commentary* (2013) 645-666.

<sup>48</sup> Murray (n 21) 307-317.

like Kenya have implemented their obligations under the Charter. Despite Walter Khobe's, 2022 work discussing the historical background of the right to assembly in Kenya and its limitations as the national courts have interpreted it, the work does not introduce an extensive discussion on compliance with international obligations.<sup>49</sup>

### *Executive exclusion and judicial leniency*

The writings of Mungai,<sup>50</sup> Ogeto and Wanyoike are essential in analysing the executive's intolerance and the judiciary's permissiveness and leniency regarding the freedom of assembly in Kenya. They document a few instances in which the judiciary in Kenya had adopted progressive views on the freedom of assembly. On the other hand, their writings expose how the police engaged in discretionary limitation of assemblies and adoption of practices below world standards and State obligations under international law. However, at the time of their writing, new developments such as the exercise of the right to assembly digitally were not a going concern, as they are now. Part of the new angle this research introduces is the missed opportunities the judiciary and the executive had to advance the enjoyment of the right to assembly. Further, this research examines whether the actions of the executive and the judicial decisions are congruent with international law obligations. This analysis is not covered in the writings of Mungai, Ogeto and Wanyoike.

## **1.5 Methodology**

The design of this study is doctrinal in approach. It collects data from desk-based research, examining existing literature and qualitative data. It relies on primary sources, such as constitutions, treaties, legislation, and case law, and secondary sources, such as policies, journal articles, reports from international, government and non-government organisations, and books. This method is suitable for tracing the impact and compliance with international

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<sup>49</sup>W Khobe 'The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa' in LS Enonchong, E Fokala & AK Abebe (eds) *Democracy in Africa: Regression and resilience* (2002) 37-55.

<sup>50</sup> M Mungai 'Manoeuvring through legal ambiguity: Dispersing unlawful protests in Kenya' in M Rutere & P Mutahi (n 42) 44-54.



obligations by State authorities and whether people enjoy the right to assembly within the international law standards in Kenya.<sup>51</sup>

This mini-dissertation takes a comprehensive approach to understanding Kenya's authorities' repressive behaviour and their implementation of the right to assembly.<sup>52</sup> It examines various sources, including ratified treaties and resolutions, guiding documents such as general comments and concluding observations, works by special rapporteurs and working groups on the right to assembly under the Human Rights Council (HRC) and the African Commission, the Constitution, enabling legislation, and national court decisions, to analyse whether State authorities comply with international treaty obligations.<sup>53</sup>

The research also uses secondary materials to trace, analyse, and draw conclusions on compliance with international human rights obligations and determine whether individuals benefit from the existing international obligations on the right to assembly.<sup>54</sup> These include books, journal articles, and reports of non-governmental organisations (NGO). Importantly, its novelty is that it explores the underlying factors that drive state authorities' repressive conduct. It proposes solutions that promote this right rather than restrict it, offering a roadmap for a more human rights-compliant Kenya. Additionally, it addresses the unexplored area of conducting online assemblies in Kenya.

## 1.6 Limitations and scope of the study

This research focuses only on the right of assembly. However, General Comment 37 on Article 21 of the ICCPR recognises how other rights are interconnected to enjoy the right to assembly effectively. Therefore, rights such as freedom of expression, freedom of association, freedom of movement, and security of person, among others, are also essential in this mini-dissertation.<sup>55</sup> Further, the research majors on the State's obligation to respect, which requires the State to refrain from interfering but also acknowledges and discusses the

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<sup>51</sup> M Langford *et al* 'Introduction: From Jurisprudence to compliance' in M Langford *et al* (eds) *Social rights judgements and the politics of compliance: Making it stick* (2017) 7, 11, 17, 21 & 25.

<sup>52</sup> BA Anderson *et al* 'Introduction to research methods in human rights: approaches and trends in human rights methodology and methods' BA Anderson *et al* in *Research methods in human rights: A handbook* (2024) 4.

<sup>53</sup> As above.

<sup>54</sup> F Viljoen 'Exploring the theory and practice of the relationship between international human rights law and domestic actors' 22(2009) *Leiden Journal of International Law* 179-180.

<sup>55</sup> GC 37 (n 27) paras 98-102.

obligation to protect and fulfil. It focuses on the obligation to respect because the State usually takes action to stop the enjoyment of this right outside its obligations that demand to refrain.

## 1.7 Chapter breakdown

This research comprises five distinct chapters that aim to achieve its objectives.

**Chapter 1** is introductory. It outlines the background of the problem, the research problem, the objectives, the research questions, the methodology and approach, the literature review, and the breakdown of chapters.

**Chapter 2** analyses the framework for the right to assembly in international law, particularly those from the 1966 ICCPR and the 1981 African Charter. It focuses explicitly on existing international obligations, especially respecting the right to assembly. It has a framework that international law has developed sufficient safeguards for the enjoyment of the right to assembly.

**Chapter 3** evaluates how Kenya has incorporated the right to assembly in domestic laws and judicial decisions. It also examines the underlying factors that shape the law, resulting in a repressive approach to freedom of assembly in Kenya. The overarching framework is that Kenyan State authorities do not approach the right to assembly from a human rights perspective; instead, they approach it from a command-and-control system and authoritarian political culture.

**Chapter 4** examines missed opportunities to implement the right to assembly in Kenya and draws best practices from other jurisdictions on how best to implement its obligations. It also introduces a novel analysis of the conduct of online assemblies in Kenya and proposes policy and legislative considerations. It adopts a human rights approach in examining the missed opportunities and suggesting areas of improvement.

**Chapter 5** concludes this mini-thesis and designs recommendations that the state and relevant stakeholders can adopt to realise freedom of assembly while adhering to international law obligations.

## Chapter 2 - The right to assembly under international law

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### 2.0 Introduction

This Chapter delves into the content, scope, and obligations under the ICCPR and the African Charter regarding the right to assembly in three sections. It first explores the extensive protection of the assembly rights under the ICCPR and the African Charter. Second, it outlines the crucial obligations of the State regarding the right to assembly. Third, it examines the permissible limitations under the ICCPR and the African Charter. The chapter aims to map the protection of the right to assembly specifically under the ICCPR and the African Charter, thereby addressing the question of understanding the right to assembly under international law. This approach is crucial as it forms the basis for evaluating Kenya's incorporation of the right of assembly and its compliance with international obligations in Chapters 3 and 4 of this mini-dissertation.

The attention on the ICCPR and the African Charter is based on Kenyan accession to both treaties. It ratified the ICCPR in 1972<sup>56</sup> and the African Charter in 1992.<sup>57</sup> Additionally, both treaties have separate supervisory bodies. The HRCt oversees the ICCPR, while the African Commission monitors the implementation of the African Charter. These bodies play a crucial role in interpreting and monitoring the right to assembly, enhancing the likelihood of effective implementation.<sup>58</sup> Chapter 1 of this research (parts 1.1, 1.2, and 1.3) details how the right to assembly was included in international human rights treaties, specifically the UDHR, the ICCPR, and the African Charter.

### 2.1 Scope of protection of the right to assembly

This part covers three essential aspects of protecting the right to assembly in international law, specifically the ICCPR and the African Charter: (i) the recognition of the right to assembly, (ii) the definition of the right, and (iii) the context in which the right can be exercised.

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<sup>56</sup>United Nations treaty collection' [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (accessed 30 August 2024).

<sup>57</sup> ACHPR 'Ratification table' <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights> (accessed 30 August 2024).

<sup>58</sup> CH Heyns and others (eds) *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (2024) 5.

### 2.1.1 *Recognition of the right to assembly under international law*

The right to assembly is widely recognised in various international human rights documents. Article 20 of the UDHR, Article 21 of the ICCPR, and Article 11 of the African Charter recognise the right to peaceful assembly. Additionally, the Convention on the Rights of the Child (Article 15) guarantees children the freedom to assemble peacefully, while the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Article 5) acknowledges the right of defenders to assemble and associate peacefully. The African Youth Charter also provides for the right expressly in Article 5(1), providing for the freedom of peaceful assembly in conformity with the law. Furthermore, this right can also be inferred from other instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 4 and 5), which restricts assemblies that may promote the violation of other people's human rights. Generally, this wide recognition underscores the importance of this right.

### 2.1.2 *Definition of the right to assembly*

Neither the ICCPR nor the African Charter defines the term assembly. However, important non-binding legal documents on the two treaties have defined it. According to the United Nations (UN) Joint Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, an assembly is defined as an "*intentional and temporary gathering in a private or public space for a specific purpose.*"<sup>59</sup> The African Commission Guidelines on Freedom of Association and Assembly define an assembly as "*...an intentional gathering, in private or in public, for an expressive purpose and for an extended duration.*" General Comment 37 on Article 21 of the ICCPR also builds on this definition.<sup>60</sup> It defines it as entailing: -

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<sup>59</sup> UNHRC Joint report of the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies (2016) (Special Rapporteur – Kiai & Heyns) para 10; K Siegert 'The police and the human right to peaceful assembly, in A Ralf & F Guido (eds) *The police and international human rights law* (2018) 221.

<sup>60</sup> Guidelines on Freedom of Association and Assembly in Africa, adopted at the 60th ordinary session of the African Commission on Human and Peoples' Rights held in Niamey, Niger, 8 to 22 May 2017 (ACHPR Guidelines on Assembly); M Kiai & W Kaguongo 'Freedom of peaceful assembly and of association:

*... a gathering of persons for a purpose such as expressing oneself, conveying a position on a particular issue or exchanging ideas. The gathering can also be intended to assert or affirm group solidarity or identity. Assemblies may, in addition to having such aims, serve other goals, such as an entertainment, cultural, religious or commercial objective, and still be protected under article 21.*<sup>61</sup>

According to the African Commission, the definition of an assembly above should be for an '*...extended duration...*', while the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association definition includes '*...temporary gathering...*'.<sup>62</sup> This difference raises the question of whether the duration of an assembly matters; General Comment 37 addresses this by not including the duration in its definition. Therefore, the duration of a gathering might be irrelevant for it to be recognised as an assembly.

However, an assembly that does not fall within the definitions above could still be protected under other international human rights law provisions.<sup>63</sup> Taylor M observes that the definition of HRCtt might have excluded accidental gatherings, such as people waiting for a bus or listening to a band.<sup>64</sup> Additionally, Sarah Joseph and Melissa Castan analyse that Article 21 protects assemblies not covered by the ICCPR in Articles 17 on gatherings of friends and family, Article 18 on religious assemblies and Article 22 on assemblies by associations.<sup>65</sup> Nonetheless, the definition of an assembly should not be overstated.

Further, an assembly is often considered a physical gathering and protected as such; however, human rights protections also apply to similar online interactions.<sup>66</sup> It also requires several persons for it to be considered as such, but the right to conduct one or participate is an individual right.<sup>67</sup> Racheal Murray believes that the right to assembly has a collective dimension in the context of Article 11 of the African Charter.<sup>68</sup> According to the HRCtt in

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Practices and obstacles' in B Andreassen (ed) *Research handbook on the politics of human rights law* (2023) 102.

<sup>61</sup> GC 37 (n 27) para 12.

<sup>62</sup> Nowak (n 45) 484.

<sup>63</sup> Siegert (n 59).

<sup>64</sup> Taylor (n 2) 595.

<sup>65</sup> Joseph & Castan (n 47) 645 para 19.02.

<sup>66</sup> GC 37 (n 27) para 13; Special Rapporteur – Kiai & Heyns (n 55) para 10.

<sup>67</sup> As above.

<sup>68</sup> Murray (n 21) 308.

*Coleman v Australia*,<sup>69</sup> an individual acting alone is not protected by the right to assembly but rather by the freedom of expression.<sup>70</sup> The HRCtT declined that the communication met the material elements of the right to assembly because the applicant, acting alone, had alleged a violation of Article 21 of the ICCPR. It observed that the specific elements of an assembly requiring protection under Article 21 needed to be met in the communication. These elements include intentional, temporary gatherings of several persons for a specific purpose.

### 2.1.3 *What is a peaceful assembly?*

An assembly is considered peaceful if the organisers and participants have peaceful intentions.<sup>71</sup> General Comment 37 elaborates that Article 21 of the ICCPR does not cover assemblies that become violent, where participants use physical force likely to cause injury, death, or severe property damage.<sup>72</sup> Especially when the use of violence is severe and widespread.<sup>73</sup> Nonetheless, it acknowledges that acts of violence may occur without forfeiting the protection of the assembly.<sup>74</sup> Violence against participants in a peaceful assembly by the authorities, individuals acting on their behalf, other members of the public, or participants in counterdemonstrations does not change the peaceful nature of the assembly.<sup>75</sup> If participants bear arms, such as stones and sticks, the assembly is considered non-peaceful, even if the weapons are not used.<sup>76</sup> However, defensive gear like helmets does not negate the peaceful nature of the assembly; it should be determined on a case-by-case basis, depending on local regulations or cultural practices among others.<sup>77</sup> Nevertheless, whether assemblies are peaceful or not, the participants continue to enjoy other fundamental rights and freedoms, such as liberty, the right to life, and dignity.<sup>78</sup>

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<sup>69</sup>*Coleman v Australia*, Communication 1157/03, UNHR Committee (17 July 2006) UN Doc CCPR/C/87/D/1157/2003 (2006) para 6.4

<sup>70</sup> Schabas (n 46) 596 para 7.

<sup>71</sup> *Kiai & Kaguongo* (n 59) 103.

<sup>72</sup> GC 37 (n 27) para 15-20.

<sup>73</sup> As above, para 15.

<sup>74</sup> As above.

<sup>75</sup> UN Office of the High Commissioner on Human Rights (OHCHR) 'The right to peaceful assembly' [The Right of Peaceful Assembly - OHCHR](#) (accessed 30 August 2024).

<sup>76</sup> n 62, 486 para 9; Schabas (n 46) 600 para 13.

<sup>77</sup> As above, 487 para 10; GC 37 (n 27) para 20.

<sup>78</sup> H Davis *Human rights law* (2013) 377.

Unlike Article 21 of the ICCPR, Article 11 of the African Charter does not include the term 'peaceful'. However, the same principles in General Comment 37 are replicated by the African Commission, which also defines 'peaceful assembly' as conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties.<sup>79</sup> Thus, obstructive behaviour in an assembly can be considered peaceful.<sup>80</sup> Christof Heyns underscores that despite the absence of the term peaceful, such a requirement could be inferred from the limitations in Article 11, i.e. national security.<sup>81</sup>

According to Nowak, the term 'peaceful' refers to an assembly that occurs without uproar, disturbance, or the use of arms.<sup>82</sup> He criticises this narrow definition but acknowledges that the 'peacefulness of an assembly' pertains to the conduct of the assembly and not the opinions expressed.<sup>83</sup> The restriction of the content of the views expressed in an assembly is addressed in the second sentence of Articles 21 and 19(3) of the ICCPR. This distinction is appealing. However, how can one determine if an online assembly is peaceful based on its conduct and not the opinions expressed?

#### 2.1.4 *What are the forms of an assembly?*

General Comment 37 provides a comprehensive recognition of the various forms that assemblies can take.<sup>84</sup> These include demonstrations, protests, pickets, meetings, processions, rallies, sit-ins, candlelit vigils, and flash mobs.<sup>85</sup> The African Commission also adopts the same forms in its Guidelines and includes 'funerals' as one way to exercise the right to assembly.<sup>86</sup> These forms of assemblies may either be stationary or mobile.<sup>87</sup> While the focus is primarily on assemblies designed to serve a collective expressive purpose, the

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<sup>79</sup> ACHPR Guidelines on Assembly, para 70(a).

<sup>80</sup> Davis (n 78) 377.

<sup>81</sup> CH Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 170.

<sup>82</sup> n 62, 486 para 9; Schabas (n 46) 599 para 12.

<sup>83</sup> As above.

<sup>84</sup> GC 37 (n 27) para 6.

<sup>85</sup> As above.

<sup>86</sup> ACHPR Guidelines on Assembly, para 3.

<sup>87</sup> GC 37 (n 27) para 6; Joseph & Castan (n 47) 646 para 19.04.

scope also extends to sporting events, music concerts, family gatherings and similar gatherings that involve a collective congregation of individuals.<sup>88</sup>

As mentioned above, most of these forms of assemblies are considered in the context of a physical gathering. However, the HRCtT noted that the rise of new communication technologies such as social media platforms, Facebook, Instagram, X (formerly Twitter) and YouTube, among many others, is changing the conduct of assemblies outside their usual context.<sup>89</sup> Thus, the right to assembly can be exercised online and is protected under Article 21 of the ICCPR. Similarly, exercising the right to assemble online/digitally is protected under Article 11 of the African Charter.<sup>90</sup>

### *2.1.5 Context of exercise of the right to assembly*

The context of the right to assembly has arisen in political demonstrations and in expressing dissent against State authorities.<sup>91</sup> It has also been considered in the context of elections.<sup>92</sup> For instance, the African Commission stated that the credibility and legitimacy of elected authorities depend on the effective participation of citizens, including respect for their fundamental rights, such as assembly.<sup>93</sup> Peaceful assemblies can serve as a public participation tool or a means to ensure accountability.<sup>94</sup> In general, it has been more effectively understood within the framework of democracy.<sup>95</sup> Institutions such as the Inter-American Court of Human Rights have maintained that rights, such as assembly, which support democracy, should receive the highest level of protection.<sup>96</sup>

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<sup>88</sup> Special Rapporteur – Kiai & Heyns (n 59) para 11.

<sup>89</sup> GC 37 (n 27) paras 10-13.

<sup>90</sup> ACHPR Guidelines on Assembly, para 3.

<sup>91</sup> Schabas (n 46) 592, para 1; Murray (n 21) 308.

<sup>92</sup> Resolution on the human rights situation in the Kingdom of Swaziland, ACHPR/Res.216, 2 May 2012.

<sup>93</sup> Statement on the situation of human rights in Burundi in the upcoming presidential elections, 3 May 2015.

<sup>94</sup> UN HRCtT General Comment 25 on Article 25 (Participation in public affairs and the right to vote), the right to participate in public affairs, voting rights and the right of equal access to public service (1996) para 8; UN OHCHR and Centre for Social, Economic and Cultural Rights 'Who will be held accountable? Human Rights and the Post-2015 Development Agenda' 5, [https://www.ohchr.org/sites/default/files/Documents/Publications/WhoWillBeAccountable\\_summary\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/WhoWillBeAccountable_summary_en.pdf) (accessed 30 August 2024).

<sup>95</sup> B Orai 'The use of force and firearms in the context of assemblies in Kenya: Rules and accountability' PhD thesis, University of Pretoria, 2023 142 (on file with the author) 15.

<sup>96</sup> *Lopez Lone et al v Honduras*, IACHR (5 October 2015) Series C No 302 para 160.



## 2.2 Relationship with other rights

The right to assembly is not enjoyed independently.<sup>97</sup> The HRCtT has emphasised its interdependence with the right to freedom of expression.<sup>98</sup> Assemblies expressive and might even surpass ‘mere speech’ on their terms, providing a potent communicative tool for demonstrating the intensity of support.<sup>99</sup> The African Commission has also shown the interdependences of the right to assembly, expression and association.<sup>100</sup>

In General Comment 34 on Article 19 of the ICCPR on the right to freedom of opinion and expression, the HRCtT recognised that freedom of expression is fundamental to the enjoyment of the right to assembly and association.<sup>101</sup> In General Comment 37 on Article 21, the HRCtT emphasised that the right to peaceful assembly can only be protected if other overlapping rights, such as freedom of expression and association, are protected.<sup>102</sup> Additionally, it recognised that peaceful assemblies have expressive functions and, therefore, should enjoy a heightened degree of accommodation and protection when it comes to speeches.<sup>103</sup>

However, the relationship between freedom of expression and the right to peaceful assembly is complex and challenging.<sup>104</sup> A model example is the case of *Kivenmaa v Finland*, before the HRCtT.<sup>105</sup> In that case, a foreign Head of State was visiting Finland. The applicant and 25 others attended, distributed leaflets, and raised a banner critical of the visiting Head of State. The police took down the banner and fined the applicant for holding a public meeting without prior notification. The applicant alleged a violation of Article 19 and denied organising a public meeting. The HRCtT found that gatherings such as welcoming heads of state, publicly

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<sup>97</sup> Orao (n 95) 73.

<sup>98</sup> *Praded v Belarus*, Communication 2029/2011 UNHR Committee (10 October 2014), UN Doc CCPR/C/112/D/2029/2011 (2014) paras 4-7.4.

<sup>99</sup> *Tatár and Fáber v Hungary* ECHR (12 June 2012) para 38.

<sup>100</sup> *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), para 110; ACHPR Guidelines for the policing of assemblies by law enforcement officials in Africa, para 1.2.1.

<sup>101</sup> General Comment (GC) 34 on Article 19 of the ICCPR: Freedoms of opinion and expression para 4.

<sup>102</sup> As above, para 9.

<sup>103</sup> As above, para 32.

<sup>104</sup> *Gryb v Belarus*, Communication 1316/2004 UNHR Committee (26 October 2011) UN Doc CCPR/C/103/D/1316/2004 (2011) para 13.2-13.4.

<sup>105</sup> *Kivenmaa v Finland*, Communication 412/1990 UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/412/1990 (1994).

announced in advance by state authorities, cannot be regarded as a demonstration. Despite this finding, the HRCtT found a violation of Articles 19 and 21.

According to William Schabas,<sup>106</sup> there are cases where Articles 19 and 21 completely overlap, so a violation of one also constitutes a violation of the other. Additionally, Schabas points out that in some situations, the HRCtT has found a violation of Article 19(2) and decided not to investigate a claim under Article 21.<sup>107</sup> As referred to earlier, Nowak discerned that the content of opinions during assemblies is assessed under the second sentence of Article 21, which is also subject to the limitation of Article 19(3).<sup>108</sup> Thus supporting the complex interdependence of the two rights.

On the other hand, the African Court of Human and Peoples' Rights (African Court) in *Law Office of Ghazi Suleiman v Sudan*, found a violation of Articles 10 (association) and 11 (assembly) of the African Charter, where the State authorities had prevented the applicant from gathering with others to discuss human rights violations.<sup>109</sup> Similarly, the African Commission in *Jawara v the Gambia* held that a ban on political parties (an association) violates the right to assemble freely with others.<sup>110</sup> This shows the interdependence between the right to assembly and association. Nevertheless, the right to association is generally understood as the right to form a voluntary association, such as political parties and trade unions.<sup>111</sup>

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<sup>106</sup> n 69, 598 para 11; *Katosora v Belarus*, Communication 1836/2008 UNHR Committee (24 October 2012) para 7.6.

<sup>107</sup> As above.

<sup>108</sup> n 62, 487 para 9; Schabas (n 46) 599 para 12.

<sup>109</sup> *Ghazi Suleiman v Sudan (II)* (n 4).

<sup>110</sup> (2000) AHRLR 107 (ACHPR 2000) para 69; CH Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) (n 81) 170.

<sup>111</sup> H Michael 'The meaning and scope of 'assembly' in international human rights law' (2020) 69 *International and Comparative Law Quarterly* 531.

## 2.3 State's obligations regarding the Right to Assembly

Generally, in international human rights law, states have three obligations: to respect, protect, and fulfill human rights.<sup>112</sup> The State's obligation under the African Charter stems from Article 2,<sup>113</sup> while under the ICCPR, it is Article 2(1).<sup>114</sup>

### 2.3.1 *Obligation to respect*

The duty to respect obligates States to refrain from directly or indirectly interfering with the enjoyment of rights.<sup>115</sup> Thus, refraining prescribes a negative obligation.<sup>116</sup> The obligation to respect also has a positive connotation.<sup>117</sup> The State should ensure that all branches of government do not violate human rights.<sup>118</sup> Regarding the right to peaceful assembly, the HRCtt stated that the obligation to respect imposes negative and positive duties on States before, during, and after assemblies.<sup>119</sup> The negative duty entails that peaceful assemblies be free from unwarranted interference; not to ban, restrict, block, disperse, or disrupt peaceful assemblies without compelling justification or to sanction participants or organisers without legitimate cause.<sup>120</sup> Positive obligations may require the State to pass legislation and establish institutional frameworks to support the right to peaceful assembly and create an environment where participants can achieve their objectives.<sup>121</sup>

### 2.3.2 *Obligation to protect*

The obligation to protect necessitates that the State undertakes measures to prevent violations, even if it or its agents are not the direct cause of such violations.<sup>122</sup> This includes measures such as regulating and monitoring activities that may impact the enjoyment of

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<sup>112</sup> E Fokala *Implementing children's right to participation in family decision-making processes in Africa* (2017) 18.

<sup>113</sup> Murray (n 21) 16-23.

<sup>114</sup> Schabas (n 46) 41-42.

<sup>115</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 152.

<sup>116</sup> *Association of Victims of Post Electoral Violence & Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) para 88; Murray (n 21) 24.

<sup>117</sup> Murray (n 21) 24.

<sup>118</sup> As above.

<sup>119</sup> GC 37 (n 27) Para 23; Michael (n 111) 525.

<sup>120</sup> GC 37 (n 27) para 23.

<sup>121</sup> As above, para 24.

<sup>122</sup> Murray (n 21) 26-27; *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* 2008) AHRLR 43 (ACHPR 2008) para 83.

human rights.<sup>123</sup> Furthermore, it involves the deployment of law enforcement to monitor activities, protect individuals from violations, and mitigate imminent risks.<sup>124</sup> In General Comment 34, the HRCt identified actions such as arbitrary arrests, torture, threats to life, and killing as incompatible with the ICCPR.<sup>125</sup> African Commission even recognises that protecting marginalised and subjugated groups from attacks and intimidation during assemblies is part of the obligation to protect.<sup>126</sup>

### 2.3.3 *Obligation to fulfil/ promote*

The obligation to promote requires the State to sensitise the public to their rights and corresponding obligations thoroughly.<sup>127</sup> The obligation to fulfil also imposes a positive duty upon the State to use its machinery to realise rights.<sup>128</sup> This could include rerouting traffic and not discriminating or arbitrarily denying access to public spaces for holding assemblies, among other things.<sup>129</sup>

## 2.4 **Permissible limitations of the right to assembly**

### 2.4.1 *General limitation on unpeaceful assemblies*

Assemblies that are not peaceful do not qualify for protection under Article 21 of the ICCPR and 11 of the African Charter.<sup>130</sup> According to the Study Group on Freedom of Association and Assembly in Africa, under the African Charter, there should be an assumption in favour of assemblies, with limitations being the exception or used as a last resort.<sup>131</sup> Thus, if an assembly is peaceful, the only other possible limitations on the right are the second sentence of the ICCPR in Article 21 and the African Charter in Article 11.<sup>132</sup> The ICCPR and the African Charter state that the right of peaceful assembly can only be limited under the grounds stated in the second sentence of the respective Articles. These grounds are: - national security interests, public safety, public order, public health or morals or protection of the rights of

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<sup>123</sup> Murray (n 21) 26-27.

<sup>124</sup> As above, 27-28.

<sup>125</sup> GC 34 (n 101) para 23; Schabas (n 46) 605.

<sup>126</sup> ACHPR Guidelines on Assembly, para 94.

<sup>127</sup> Murray (n 21) 28.

<sup>128</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 115) para 152.

<sup>129</sup> Schabas (n 46) 605 para 21.

<sup>130</sup> As above.

<sup>131</sup> n 21.

<sup>132</sup> Schabas (n 46) 488 para 14.

others. Thus, any restriction should have a legal basis, serve the listed purposes, and be necessary to attain the intended purposes; these restrictions should be drawn narrowly and aim to facilitate the right rather than limit it disproportionately.<sup>133</sup>

#### 2.4.2 *Legal basis requirement*

This requirement may be interpreted differently under the ICCPR and the African Charter. Schabas analyses the language used in the ICCPR: the restriction can only be imposed '*in conformity with the law*'.<sup>134</sup> He revisits the preparatory work and reveals that this requirement does not necessitate a formal law but allows for legitimate administrative action.<sup>135</sup> Thus, police authorities can independently disperse a demonstration or procession that threatens public order and safety based on the general statutory authorisation.<sup>136</sup> If France's draft that captured '*...prescribed by law*' passed, it would have required a formal law.<sup>137</sup> Conversely, the African Charter provides that necessary restrictions on Article 11 should be '*...provided for by the law*'. If Nowak's analysis stands, it means the African Charter has a stricter requirement for a formal law. However, administrative acts should not breach a formal law or be imposed without any basis in law.<sup>138</sup>

Another way to approach the legal basis requirement is to consider paragraphs 15-18 of the Siracusa Principles, which provide a non-binding interpretative guide on limitations and derogations under the ICCPR. To meet the principle of legality, legislation should be specific and succinct to prevent arbitrary decision-making and clearly define the prohibited conduct.<sup>139</sup> This approach, followed by General Comment 37, involves a specific formal law that does not grant unrestricted or broad discretion to those responsible for its enforcement.<sup>140</sup>

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<sup>133</sup> ICCPR art 21; African Charter art 11; GC 37 (n 27) para 8 & 36; Schabas (n 46) 488 para 14.

<sup>134</sup> Schabas (n 46) 606-607 para 25.

<sup>135</sup> As above.

<sup>136</sup> As above.

<sup>137</sup> As above.

<sup>138</sup> As above.

<sup>139</sup> Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, paras 15-18; O De Schutter 'The application of human rights in private relationships and the obligation to protect' in O De Schutter (ed) *International human rights law: Cases, materials, commentary* (2010) 365-366.

<sup>140</sup> GC 37 (n 27) para 39; *Nepomnyashchiy v Russia*, *Communication 2318/2013*, UNHR Committee, (17 July 2018) UN Doc CCPR/C/123/D/2318/2013 (2018) para 7.7.

The HRCtT has previously considered that when a state justifies a limitation by claiming that it is 'provided by law', that law should adhere to the strict limitation requirements outlined in the ICCPR.<sup>141</sup> This means it should be compatible with the provisions, aims, and objectives of the ICCPR, including the principle of non-discrimination.<sup>142</sup>

### 2.4.3 *Legitimate purpose*

The restriction to the right must be justified.<sup>143</sup> Concerning the ICCPR (Article 21) and the African Charter (Article 11), the justification for limiting the right to assembly should be under one of the reasons listed in the second sentence of both treaties.<sup>144</sup> The HRCtT has found the list to be exhaustive.<sup>145</sup> It also violates Article 21 when a State fails to justify or explain how 'in practice' a demonstration would interfere with any of the grounds listed in the second sentence of the ICCPR.<sup>146</sup>

Restrictions may only be imposed in the interest of national security in credible, serious political or military threats to the nation.<sup>147</sup> For instance, this might include a demonstration advocating for the violent overthrow of the government during political unrest or disseminating propaganda for war.<sup>148</sup> Specific real and significant threats to property or a person's life, physical integrity, or health may justify restrictions on public safety grounds, even occasioning assembly prohibitions.<sup>149</sup> This is especially true where there are clashes between opposing groups, the plundering of businesses, and the police are unable to guarantee the safety of participants and the general public.<sup>150</sup>

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<sup>141</sup> *Fedotova v Russia*, Communication 1932/2010, UNHR Committee (31 October 2012), UN Doc CCPR/C/106/D/1932/2010 (2010) Para 10.4; *Toonen v Australia*, Communication 488/1992, UNHR Committee (31 March 1994), UN Doc CCPR/C/50/D/488/1992 (1994) para 8.3.

<sup>142</sup> GC 34 (n 36) para 26; HRCtT GC 18 on non-discrimination (1989) para 13

<sup>143</sup> Davis (n 78) 377.

<sup>144</sup> *Abildayeva v Kazakhstan*, Communication 2309/2013, UNHR Committee (4 April 2019), UN Doc CCPR/C/125/D/2309/2013 para 8.7.

<sup>145</sup> GC 37 (n 27) para 41.

<sup>146</sup> As above, para 8.6.

<sup>147</sup> Siracusa Principles, para 29; GC 37 (n 27) para 42; Nowak (n 45) 492 para 24; Schabas (n 46) 609 para 33.

<sup>148</sup> As above.

<sup>149</sup> GC 37 (n 27) para 43.

<sup>150</sup> Nowak (n 45) 492 para 24-26; Schabas (n 46) 609 para 33.

Restrictions on the grounds of public order can only be imposed based on the purpose of the assembly and the orderly conduct of gatherings to enable the authorities to effectively fulfil their obligation to protect public safety, including human rights.<sup>151</sup> Therefore, it may be necessary to notify the police about the assembly's date, time, location, and agenda.<sup>152</sup> However, this does not imply that the state should require a license for an assembly.<sup>153</sup> State authorities must show a significant degree of tolerance and refrain from relying on vague notions of public order.<sup>154</sup> Public health and public morals restrictions can only be invoked in exceptional circumstances.<sup>155</sup> Critical areas such as water conservation areas or outbreaks of infectious diseases dangerous to gatherings can justify public health restrictions. In contrast, political assemblies at cemeteries may justify restrictions on public morals. However, 'morals' can only be considered in the context of the universality and pluralism of human rights and the non-discrimination principle.<sup>156</sup>

On the rights and freedoms of others, it is only permissible if state authorities provide detailed justifications for restrictions that involve a demonstration of a disproportionate burden imposed by participants of an assembly on the rights of non-participants.<sup>157</sup>

#### 2.4.4 *Necessity and proportionality*

Necessity requires a judgment of proportionality based on the specific facts of the situation.<sup>158</sup> Therefore, any imposed limitations must be justified by one of the grounds outlined in Article 21. State authorities should also consider the significance of the right and ensure that any restriction is necessary to address a genuine and well-established public or social need.<sup>159</sup> If the justifications are relevant and sufficient, then it can be seen as pursuing a legitimate aim.

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<sup>151</sup> As above.

<sup>152</sup> *Kivenmaa v Finland* (n 105) para 7.

<sup>153</sup> *Nowak* (n 45) 492 para 24.

<sup>154</sup> GC 37 (n 27) para 44.

<sup>155</sup> *Nowak* (n 45) 593 para 28; *Schabas* (n 46) 611 para 38.

<sup>156</sup> *Fedotova v Russia* (n 141) paras 10.5-10.6; *Alekseev v Russia*, Communication 1873/2009, UNHR Committee (24 October 2013), UN Doc CCPR/C/109/D/1873/2009 (2013) para 9.6; GC 37 (n 27) para 46.

<sup>157</sup> *Stambrovsky v Belarus*, Communication 1987/2010, UNHR Committee (24 October 2014), UN Doc (CCPR/C/112/D/1987/2010) (2014) para 7.6; *Pugach v Belarus*, Communication 1984/2010, UNHR Committee (15 July 2015), UN Doc (CCPR/C/114/D/1984/2010) (2015) para 7.8.

<sup>158</sup> *Davis* (n 78) 380.

<sup>159</sup> *Kasparov v Russia* ECHR (Application 21613/07), (3 October 2013) para 86.

The least intrusive method of achieving a valid goal should always be prioritised.<sup>160</sup> For instance, dispersing a gathering using force should only be considered after all gentler methods, such as negotiation with organisers or issuing prior warning, have been tried. This could involve the police monitoring a gathering to prevent disruptions by opponents or participants rather than immediately breaking up the gathering.<sup>161</sup> The HRCtT prefers the necessity and proportionality test to be applied based on democracy, the rule of law, political diversity, and human rights rather than being merely reasonable or convenient.<sup>162</sup>

## 2.5 Conclusion

The ICCPR and the African Charter are foundational pillars for safeguarding the right to assembly. In examining the provisions of both treaties, concerning the right to assembly, it becomes evident that they adopt a human rights-oriented approach. This approach should aim to facilitate and nurture the exercise of the right rather than unduly curtailing it. Notably, General Comment 37 on Article 21 of the ICCPR provides valuable insights into this human rights approach, shedding light on interpreting and implementing the right to assembly. Furthermore, the African Commission's Guidelines on the right to freedom of assembly and association offer comprehensive principles and standards that further underscore the human rights approach to the right to assembly within the African context.

The state is bound by clear obligations to respect, protect, and fulfill the right to assembly for its effective implementation. It is commendable that the limitations on this right are also clearly defined in the two treaties. If State Parties align their domestic laws with the international understanding of the content of the right to assembly, the scope of its protection, the obligations, and the permissible limitations, citizens would be better equipped to exercise their fundamental and democratic rights effectively. This leads to whether Kenya has fully incorporated these international obligations in the next chapter (Chapter 3).

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<sup>160</sup> GC 37 (n 27) para 37.

<sup>161</sup> Nowak (n 45) 491 para 21; Schabas (n 46) 607 paras 28-31.

<sup>162</sup> GC 37 (n 27) para 40.





## **Chapter 3 - Incorporating the right to assembly in Kenya: The practice and the law**

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### **3.0 Introduction**

The preceding chapter (2) examined the right to assembly from an international law perspective, focusing on the ICCPR and the African Charter. The examination reveals that these treaties embrace a human rights-oriented approach to the right, aiming to facilitate the exercise rather than unduly restricting it. This chapter (3) extends the research by examining the extent to which the Constitution of Kenya, enabling legislation and judicial decisions, incorporates the right to assembly as required by the ICCPR and the African Charter. To achieve this, the Chapter appreciates that the history of the conduct of assemblies in Kenya influences the existing legal framework. This history also informs the approach that state authorities take towards the right.

The analysis is structured in two sections. Section A revisits the history of the practice of assemblies in Kenya under different government administrations, from the Colonial Government (1895 -1963) to Post-Colonial Governments (1963-2024). This is important because it forms the basis for the State authorities' interpretation of the right to assembly and subsequent compliance with international obligations. Section B analyses how the right to assembly is incorporated in Kenya through the legal framework and judicial decisions and answers whether they are congruent with the ICCPR and the African Charter. The framework presented in this chapter provides a basis for discussing missed opportunities and emerging issues in implementing the right to assembly in chapter 4.

### **Section A - The practice of assemblies in Kenya (1895-2024)**

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#### **3.1 Colonial period**

Kenya's history is marked by restrictions on rights and freedoms that protect political liberty. During the colonial period in Kenya, 1895-963, there were severe human rights violations, racial segregation, and the exclusion of the African majority from political participation.<sup>163</sup> According to Makau Mutua, the British Colonial Government in Kenya was structured to

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<sup>163</sup> Khobe 'The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa' in LS Enonchong, E Fokala & AK Abebe (eds) (n 49) 42.

enable political repression to foster economic exploitation.<sup>164</sup> As a result, the Government showed little regard for protecting human rights.<sup>165</sup> For example, apart from killings, freedom of movement was restricted, and gatherings were monitored strictly.<sup>166</sup> Furthermore, even settlers who petitioned taxation without representation were dismissed and classified as ‘unrepresentative agitators.’<sup>167</sup>

Government employees like Harry Thuku,<sup>168</sup> who protested and organised gatherings and petitions against unfair labour practices between 1920s and 1950s were labelled as ‘dangerous to the peace and good order’.<sup>169</sup> In March 1922, Thuku was arrested and deported to Kismayu.<sup>170</sup> His arrest sparked a protest in Nairobi, during which the police fired and killed 25 Kenyans.<sup>171</sup> According to Bennett, the Colonial Office responded harshly to subsequent protests or uprisings unless a missionary intervened and raised concerns.<sup>172</sup>

In the 1920s, native communities protests led to increased uprisings due to the continued oppression.<sup>173</sup> The British Colonial Government responded by enacting laws restricting freedoms, including assembly and movement.<sup>174</sup> For example, native in townships were required to wear identification cards and obtain permission before entering certain areas.<sup>175</sup> These measures controlled the labour of natives, restricted their movement, and prevented any assemblies in the townships.<sup>176</sup> Other ordinances, including the Vagrancy Ordinance of 1920 and the Municipal Cooperation Ordinance of 1922, were also implemented to restrict

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<sup>164</sup> M Mutua ‘Justice under siege: The rule of law and judicial subservience in Kenya’ (2001) 23 *Human Rights Quarterly* 97.

<sup>165</sup> Khobe ‘The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa’ in L Enonchong and others (n 163) 42.

<sup>166</sup> As above.

<sup>167</sup> As above.

<sup>168</sup> As above, 45-46.

<sup>169</sup> As above.

<sup>170</sup> As above.

<sup>171</sup> As above.

<sup>172</sup> As above.

<sup>173</sup> As above.

<sup>174</sup> D Ciekawy ‘Constitutional and legal reforms in the post colony of Kenya’ (1997) 25 *A Journal of Opinion* 16.

<sup>175</sup> The Native Authority (Amendment) Ordinance of 1922; R Home ‘Colonial township laws and urban governance in Kenya’ (2012) 56 *Journal of African Law* 179.

<sup>176</sup> Ciekawy (n 174).

African movements and gatherings further.<sup>177</sup> The Government justified these restrictions based on suspicions of a plot to overthrow the government.<sup>178</sup>

Additionally, the Government introduced and implemented the Penal Code of 1930<sup>179</sup> and the Public Order Act of 1950 to control and punish gatherings, among other things.<sup>180</sup> These laws are still in effect in Kenya today. Section 78 of the Penal Code defines 'unlawful assembly' as a gathering of three or more people intending to breach the peace in public.<sup>181</sup> If an assembly is declared unlawful and still proceeds,<sup>182</sup> It is classified as a riot, and participants are punished with one year of imprisonment with no option for a fine.<sup>183</sup> Section 81 addresses the dismissal of unlawful assemblies. It authorises military or police officers to issue a proclamation declaring an assembly illegal. Section 82 absolves the police or military from liability for using force to disperse an unlawful assembly. On the other hand, the Public Order Act also required notifying the police at least 72 hours before any planned assembly is held.

As noted by Charles Hornsby, colonial systems were established using command-and-control systems and an authoritarian political culture.<sup>184</sup> The brief history above supports his assertion. During the Colonial Government, there was a pattern of dismissing and suppressing any challenges, questions, or participation from citizens. Strict measures were implemented to restrict the movement and anything that could facilitate their assembly or expression. These restrictions were incorporated into domestic legislation, including the Penal Code and the Public Order Act.

### **3.2 Post-colonial period (1963-2024)**

Kenya obtained its independence from Britain in 1963, and the first Constitution was adopted at the sitting of the first independent assembly that same year.<sup>185</sup> This Constitution contained a bill of rights recognising a range of rights, including civil and political rights, such as the right

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<sup>177</sup> Home (n 175) 187-188.

<sup>178</sup> As above.

<sup>179</sup> Penal Code Act (PCA) 10 of 1930 (Revised 2014) Laws of Kenya.

<sup>180</sup> Public Order Act (POA), Cap 56 1950 (Revised 2018) Laws of Kenya.

<sup>181</sup> PCA (n 179) secs 78 (1) & (2).

<sup>182</sup> As above, Sec 78(3).

<sup>183</sup> As above, Sec 79.

<sup>184</sup> C Hornsby *Kenya: A history since independence* (2013) 5

<sup>185</sup> Britannica 'World war II to independence' <https://www.britannica.com/place/Kenya/World-War-II-to-independence> (accessed 20 August 2024).

to assembly, in section 24.<sup>186</sup> As Walter Khobe observes, despite the 1963 Independence Constitution containing a bill of rights aimed at protecting human rights, unlike in the Colonial Government, the restrictions on the right to assembly persisted throughout different administrations.<sup>187</sup>

### 3.2.1 *Jomo Kenyatta (1963-1978)*

During Jomo Kenyatta's administration, 1963 to 1978, individuals participating in public gatherings and processions and political opponents were arrested and detained.<sup>188</sup> Beryl O'rao highlighted that amendments were made to the laws governing public gatherings to favour those in power.<sup>189</sup> She notes that in 1968, the Public Order Act, a law from the colonial era, was amended to prohibit the display or wearing of flags, banners, badges, or any symbol indicating affiliation with or support for a political cause.<sup>190</sup> Moreover, in 1966, after a demonstration was held against Kenyatta, amendments to the Preservation of Public Security Act allowed for detention without trial, specifically targeting political rivals who organised gatherings.<sup>191</sup>

### 3.2.2 *Daniel Troitich arap Moi (1978-2002)*

Walter Khobe writes that President Moi viewed human rights as being Eurocentric and incompatible with African values and culture.<sup>192</sup> During his tenure, Moi introduced section 5 of the Public Order Act, which, among many other requirements, required notification and licensing before an assembly was held.<sup>193</sup> For instance, in July 1996, 21 people were arrested and detained for two weeks for planning a cultural event without a licence to commemorate their colleagues who were murdered.<sup>194</sup>

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<sup>186</sup> Constitution of the Republic of Kenya, 1963, sec 24(2) (a) & (b).

<sup>187</sup> Khobe (n 163) 43; BJ Ratcliffe 'The spelling of Kenya' (1943) 42 *Journal of the Royal African Society* 42.

<sup>188</sup> As above.

<sup>189</sup> O'rao (n 95) 142.

<sup>190</sup> The Public Order (Amendment) Act 12 of 1968, clause 2.

<sup>191</sup> O'rao (n 95) 142.

<sup>192</sup> Khobe (n 163) 43.

<sup>193</sup> The Statute Law (Repeals and Miscellaneous Amendments) Act 10 of 1997.

<sup>194</sup> Amnesty International 'Kenya: Violations of human rights—communications between Amnesty International and the Government of Kenya' (1997) 2.

The Public Order Act was used to deny opposing political gatherings and civic engagement.<sup>195</sup> Some education seminars and workshops organised by church groups and other entities were restricted, citing that they posed ‘a danger to the state’.<sup>196</sup> Even gatherings to watch plays critical of the Government were banned, such as Ngugi Wathiong’o’s play ‘I Will Marry When I Want’ and George Orwell’s ‘Animal Farm’.<sup>197</sup> The incumbent administration politically motivated these restrictions to suppress opposition and maintain power.<sup>198</sup>

### 3.2.3 Mwai Kibaki (2002-2013)

According to Khobe, President Kibaki shifted radically from President Moi’s tactics by choosing an open democratic path.<sup>199</sup> The public discussed reviewing the 1963 Constitution to ensure better governance than that experienced during Kenyatta and Moi’s administration.<sup>200</sup> However, during the 2007-2008 post-election crisis, the Government banned public demonstrations, using section 5 of the Public Order Act to prevent violence following the polls.<sup>201</sup> The policing of demonstrations involved excessive force, resulting in death and injury, including children.<sup>202</sup> Yet, only one police officer was investigated for brutality.<sup>203</sup> Human Rights Watch reported that it interviewed some policemen who revealed they had received an ‘unofficial shoot to kill order’.<sup>204</sup>

Given the historical legacy of abuse and denial of freedom of assembly and the right to assemble during the colonial and post-independence periods, the Constitution of Kenya, 2010, was promulgated on 27 August 2010 during Kibaki’s tenure. Article 37 guarantees the right in clear and precise terms: ‘Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities’.<sup>205</sup>

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<sup>195</sup> POA (n 180) sec 5.

<sup>196</sup> Amnesty International (n 195) 3-4.

<sup>197</sup> G Korwa & M Munyae ‘Human rights abuse in Kenya under Daniel Arap Moi: 1978-2001’ 8 <https://static.csbsju.edu/Documents/Peace%20Studies/pdf/Human%20Rights%20Abuse%20in%20Kenya%20Under%20Moi.pdf> (accessed 22 August 2024).

<sup>198</sup> As above, 1.

<sup>199</sup> Khobe (n 163) 44.

<sup>200</sup> As above.

<sup>201</sup> N Cheeseman ‘The Kenya elections of 2007’ (2008) 2 *Journal of Eastern African Studies* 164.

<sup>202</sup> UN OHCHR *Report from OHCHR fact-finding mission to Kenya* (2008) 15.

<sup>203</sup> As above.

<sup>204</sup> Human Rights Watch ‘Use of excessive force by the police’ <https://www.hrw.org/reports/2008/kenya0308/7.htm> (accessed 22 August 2024).

<sup>205</sup> Constitution of Kenya, 2010, art 37.

Additionally, the National Police Service Act (NPSA) 11A was enacted in 2011.<sup>206</sup> The Sixth Schedule was introduced to prescribe conditions for police officers' use of force, considering their history of excessive and unwarranted force.<sup>207</sup> However, implementing the Schedule is still an ongoing concern, as instances of excessive force are still being recorded.

### 3.3.4 *Uhuru Kenyatta (2013-2022)*

Between 2013 and 2014, State authorities often outlawed assemblies even before they happened.<sup>208</sup> The authorities focused more on disrupting or attacking organisers than on protecting the assembly participants.<sup>209</sup> After the 2017 General Elections in Kenya, widespread protests highlighted the State's treatment of citizens' right to assemble.<sup>210</sup> A Human Rights Watch 2018 report documented at least 67 individuals across the country losing their lives and many others sustaining injuries due to the police's actions to quell the demonstrations.<sup>211</sup> The UN expressed serious concerns about the ban on assemblies in certain areas and the police's use of force during demonstrations.<sup>212</sup> The police disrupted demonstrators, beat them with batons, robbed others, threatened sexual violence, and even used tear gas against primary school children and medical officers.<sup>213</sup> The police justified their actions under the Public Order Act, the Penal Code, and the Sixth Schedule of the National Police Service Act.<sup>214</sup>

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<sup>206</sup> National Police Service Act (NPSA) 11A of 2011 Laws of Kenya.

<sup>207</sup> Amnesty International 'police reform in Kenya: A drop in the ocean' (2013).

<sup>208</sup> KNCHR 'The fourth state of human rights report post promulgation 2010-2014: Human rights the elusive marriage?' 41, <https://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf> (accessed 20 August 2024).

<sup>209</sup> As above.

<sup>210</sup> US State Department 'Kenya 2018 human rights report' (2018), <https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf> (accessed 20 August 2024).

<sup>211</sup> Human Rights Watch 'World report, 2018, Kenya', <https://www.hrw.org/world-report/2018/country-chapters/kenya> (accessed 20 August 2024).

<sup>212</sup> UN OHCHR 'Lift protest ban, protect judiciary and preserve civil society role, UN rights experts urge Kenya', <https://news.un.org/en/story/2017/10/568642> (accessed 20 August 2024).

<sup>213</sup> As above.

<sup>214</sup> Article 19 'Time to defend protest for all', [https://www.article19.org/wp-content/uploads/2024/01/A19-Protests-under-threat\\_flagship\\_Nov22.pdf](https://www.article19.org/wp-content/uploads/2024/01/A19-Protests-under-threat_flagship_Nov22.pdf) (accessed 20 August 2024).

### 3.2.5 William Ruto (2022-to date)

President William Ruto assumed public office in 2022 and has exercised it to date. His administration faces significant criticism for handling the demonstrations related to the Finance Bill 2024 and the costs of living demonstration 2023.<sup>215</sup> In 2023, the main accusations against his administration were the use of police to declare peaceful assemblies as unlawful,<sup>216</sup> refusal to accept notifications, failure to facilitate and protect the assemblies, and excessive use of force.<sup>217</sup> During the 2024 anti-Finance Bill demonstrations, participants were arrested and detained arbitrarily, and the police provoked them by deploying tear gas and water cannons, opening fire, and using truncheons at close range.<sup>218</sup>

As reported on 1 July 2024 by the KNCHR, at least 59 people were killed, and over 361 were injured in the anti-Finance Bill demonstration from June to July 2024.<sup>219</sup> Additionally, there were over 32 cases of suspected protest organisers being involuntarily disappeared, and more than 627 people were arrested.<sup>220</sup> In a controversial move, the military was deployed to support the National Police Service in maintaining national security.<sup>221</sup> This aimed to protect

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<sup>215</sup> Bloomberg 'Ruto says 'no blood on my hands' after 24 die in Kenya protests' (30 June 2024), <https://www.bloomberg.com/news/articles/2024-06-30/kenyan-president-defends-handling-of-deadly-youth-protests?embedded-checkout=true> (accessed 6 July 2024).

<sup>216</sup> As above; A Wasike 'Kenyan police ban anti-government protests as death toll rises,' (Anadolu Agency, 19 July 2023), <https://www.aa.com.tr/en/africa/kenyan-police-ban-anti-government-protests-as-death-toll-rises/2949051> (accessed 23 August 2024).

<sup>217</sup> KNCHR (n 30) 11.

<sup>218</sup> KNCHR 'Statement on the aftermath of protests against the Finance Bill 2024 dubbed 'Occupy Parliament' (18 June 2024), <file:///C:/Users/HP/Downloads/KNCHR%20Press%20Statement%20-%20Occupy%20Parliament%20Protests%20-%20Against%20Finance%20Bill%202024.pdf> (accessed 23 August 2024).

<sup>219</sup> KNCHR 'Update on the status of human rights in Kenya during the anti-Finance Bill protests (Monday 1 July 2024), <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1200/Update-on-the-Status-of-Human-Rights-in-Kenya-during-the-Anti-Finance-Bill-Protests-Monday-1st-July-2024> (accessed 23 August 2024); Joint statement by the human rights community in Kenya on the state of the nation following protests on the 2024 Finance Bill, <https://icj-kenya.org/news/a-call-for-accountability-return-to-constitutionalism-and-cessation-of-violations/> (accessed 23 August 2024).

<sup>220</sup> Amnesty International 'Kenya: abductions of citizens suspected of involvement in protests violate human rights', <https://www.amnesty.org/en/latest/news/2024/06/kenya-abductions-of-citizens-suspected-of-involvement-in-protests-violate-human-rights/> (accessed 23 August 2024).

<sup>221</sup> The Capital news 'The Kenya Defence Forces (KDF) personnel will be deployed in all 47 counties to aid police in reinforcing security in the country following Tuesday's deadly protests that left at least 23 dead.' <https://www.capitalfm.co.ke/news/2024/06/kdf-deployment-to-cover-47-counties-with-focus-on-critical-infrastructure-duale/> (accessed 23 August 2024).



critical infrastructure and uphold law and order in response to identified threats from online platforms.<sup>222</sup> Under Ruto's administration, the use of social media and other online platforms for assembly has increased. During the protests in June 2024, Safaricom, Kenya's leading mobile network provider, was accused of internet throttling, resulting in slow networks.<sup>223</sup>

### 3.3 Observations

Since colonial times, State authorities have sought to limit the right to assembly to suppress challenges to their authority. They use laws like the Public Order Act and Penal Code, as well as the police force, to achieve this. State authorities' harsh responses to demonstrators reveal a political control approach rather than a human rights-based approach to the right. The lack of an accountability mechanism adds insult to injury. Further, this research suggests that owing to the history of fierce response by State authorities, when participants show up at an assembly, they may have a defensive mindset, while the police could have an offensive mindset. The following section interrogates the congruence of the existing laws on the right to assembly with international law.

## **Section B - International standards in domestic law on the right to assembly**

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### 3.4 Reception of international law in Kenya

Different states have varying approaches to incorporating international law into their laws. Some follow a monist approach, while others follow a dualist approach.<sup>224</sup> Articles 2(5) and 2(6) of the Constitution of Kenya recognise that treaties ratified by Kenya form part of domestic law. Kenya ratified the ICCPR (1972) and the African Charter (1992). However, Kenya's Supreme Court seems to have degraded the hierarchy and application of international law in Kenya when examining the term '*part of the law*'. The Supreme Court

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<sup>222</sup> As above.

<sup>223</sup> The Standard 'Safaricom scrambles to shore up Gen Z market in wake of protest' <https://www.standardmedia.co.ke/enterprise/article/2001498683/safaricom-scrambles-to-shore-up-gen-z-market-in-wake-of-protests> (accessed 23 August 2024).

<sup>224</sup> M Killander & H Adjohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 4; D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) 4.

interpreted Articles 2(5) and 2 (6) to mean that international law applies if it does not conflict with the Constitution, statutes, or a final judicial decision.<sup>225</sup>

Scholars like Ian Mwititi criticise this Supreme Court finding as erroneous.<sup>226</sup> The Constitution itself does not create a hierarchy regarding international law, and the Court did not give any justification in its finding to place international law below statutes and domestic judicial decisions.<sup>227</sup> This research suggests that this approach is dangerous because, for instance, a country like Kenya has ratified but not domesticated the ICCPR or the African Charter. This places the applicability of these essential human rights instruments subordinate to judicial decisions and acts of parliament, potentially making international law ineffective and at the rank of subsidiary legislation. Frans Viljoen holds that such a position negates the potential of international law.<sup>228</sup>

Nonetheless, domestic laws cannot be used to justify non-compliance with treaty obligations.<sup>229</sup> In General Comment 31 on the Nature of obligations under the ICCPR, the HRCtT elaborates that Article 2(1) requires State Parties to give effect to their obligations under the Covenant in good faith.<sup>230</sup> It also disregards the justification by a State Party to invoke domestic law for non-performance of treaty obligations.<sup>231</sup>

### **3.5 Scope of protection of the right to assembly in Kenya**

In Kenya, citizens can assemble and express their opinions, encourage public discussion, seek the truth, and participate in public affairs.<sup>232</sup> For instance, in June 2024, protests against the proposed Finance Bill of 2024 led the President of Kenya to decide not to sign the Bill into

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<sup>225</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* [2021] KESC 34 (KLR) 130.

<sup>226</sup> IM Mathenge 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in *Mitu-Bell Welfare Society*' (2022) 6 *Kabarak Journal of Law and Ethics* 2 & 7.

<sup>227</sup> As above.

<sup>228</sup> F Viljoen *International human rights law in Africa* (2012) 526.

<sup>229</sup> *Kenneth Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) paras 237-244; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 59.

<sup>230</sup> HRCtT General Comment (GC) 31 (80) on the nature of the general legal obligation imposed on States Parties to the Covenant para 3; HRCtT GC 33 on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paras 14, 15 & 20.

<sup>231</sup> As above, GC 31 (80) para 4.

<sup>232</sup> *Hussein Khalid & 16 others v Attorney General & 2 others (Hussein Khalid CoA)* [2017] eKLR 8.

law.<sup>233</sup> Similarly, in 2016, after several weeks of protests against electoral injustices, the legislature considered electoral reforms.<sup>234</sup> Thus, the context of the right is universal. However, defining the right, its peaceful nature and incorporating international obligations could be challenging.

### 3.5.1 Recognition of the right

As Nowak observed, the first sentence of Article 21 of the ICCPR requires State parties to acknowledge the right to peaceful assembly.<sup>235</sup> This right protects the organisation, conduct, and participation in an assembly.<sup>236</sup> Similarly, the African Charter under Article 1 obligates member states to recognise the rights enshrined in the Charter, including Article 11. Consequently, State Parties should undertake legislative or other measures to effect the rights.<sup>237</sup> The 2010 Constitution of Kenya recognises the right to assembly. Article 37 states, 'Every person has the right, peaceably and unarmed, to assemble, demonstrate, picket, and present petitions to public authorities'. In the case of *Ngunjiri Wambugu v Inspector General of Police & 2 others*,<sup>238</sup> the High Court of Kenya recognised that this provision reflects the fundamental right to the assembly under Article 21 of the ICCPR and Article 11 of the African Charter.<sup>239</sup> Thus, the right is recognised in Kenya, and its content in the text reflects the ICCPR and African Charter.

### 3.5.2 Definition of assembly

First, neither the Constitution of Kenya nor the Public Order Act,<sup>240</sup> which seeks to regulate assemblies in Kenya, defines the term assembly. The Public Order Act only defines a 'public gathering' in section 2 as a 'public meeting, a public procession, or any other meeting,

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<sup>233</sup> 'President Ruto declines to sign Finance Bill, calls for its withdrawal' <https://www.president.go.ke/president-ruto-declines-to-sign-finance-bill-calls-for-its-withdrawal/> (accessed 30 August 2024).

<sup>234</sup> G Obulutsa 'Kenyan lawmakers propose electoral reforms after weeks of protests', <https://www.reuters.com/article/world/kenyan-lawmakers-propose-electoral-reforms-after-weeks-of-protests-idUSKCN0YZ1HV/> (accessed 30 August 2024).

<sup>235</sup> Nowak (n 45) 483; Schabas (n 46) 594 para 4.

<sup>236</sup> Murray (n 21) 308.

<sup>237</sup> Resolution on integration of the provisions of the African Charter on Human and Peoples' Rights into National Laws of States, ACHPR/Res 3, 14 April 1989.

<sup>238</sup> [2019] eKLR (*Ngunjiri case*).

<sup>239</sup> As above, para 10.

<sup>240</sup> POA (n 180).

gathering, or concourse of ten or more persons in any public place'. It can be concluded that the meaning of the term assembly has been understood in terms of its ordinary meaning. Therefore, definition(s) of assembly adopted by various international bodies and other soft law documents have had little influence in Kenya.<sup>241</sup> Whether an assembly is intentional, temporary or extended, whether there is a specific purpose, Article 37 of the Constitution accords such gatherings protection.<sup>242</sup>

The research suggests that the Public Order Act may limit the right to assembly by failing to define what constitutes an assembly. So, whether an assembly is deliberately intended for an expressive purpose does not matter.<sup>243</sup> This lack of clarity could give authorities unchecked discretion to label any meeting as an 'unlawful assembly' under section 5 (10) of the Act. Additionally, the Act contains restrictive definitions of gatherings exempt from its regulations, such as meetings of political parties that discuss the affairs of the party only and nothing else.<sup>244</sup> This could lead to disruptions if the meeting discusses anything beyond the party's affairs.<sup>245</sup>

Second, the Court of Appeal in Kenya has a slightly different interpretation of the right to assembly.<sup>246</sup> It recognises that the right is meaningful when exercised in association with others. Still, it also holds that a lone individual might exercise the right to 'demonstrate, picket, and petition' without vocal expression.<sup>247</sup> This interpretation may appear progressive, but it contradicts international law developments.<sup>248</sup> For example, if one person wants to 'demonstrate' using a placard, would they need to notify the police under section 5 of the Public Order Act? Instead of seeing a lone person exercising their freedom of expression,<sup>249</sup> such individuals can be arrested and charged for holding an unlawful assembly under the Public Order Act, section 5.

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<sup>241</sup> Refer to part 2.2.1 of Chapter 2 of this research.

<sup>242</sup> *Hussein Khalid CoA* (n 232) 6.

<sup>243</sup> GC 37 (n 27) para 12.

<sup>244</sup> POA (n 180) sec 2.

<sup>245</sup> M Mutua 'Human rights and state despotism in Kenya: Institutional problems' 4th Quarterly (1994) *Africa Today* 53 & 55.

<sup>246</sup> *Hussein Khalid (CoA)* (n 232) 5.

<sup>247</sup> As above.

<sup>248</sup> Schabas (n 46) 596 para 7.

<sup>249</sup> As above.

### 3.5.3 On peaceful assemblies

The Kenyan State authorities, including courts, tend to assume that gatherings and demonstrations always become "*violent, unruly, and unlawful*." As a result, they often restrict the right to assemble instead of regulating the conduct and monitoring the expression of participants.<sup>250</sup> For example, a court stated, "*I find it necessary to have regulations in place to limit the right to picket, demonstrate, and present petitions to public authorities in certain cases.*"<sup>251</sup> Again, neither statute nor court defines or sets the threshold for the peacefulness of an assembly.<sup>252</sup> The police have discretion. State authorities and courts could refer to General Comment 37 or the Right to Assembly and Association. However, the Supreme Court held that such soft law documents cannot be used to fill an existing gap in the law.<sup>253</sup> Therefore, the unrestricted discretion in classifying an assembly as not peaceful will continue.

In addition, courts have implemented even stricter criteria for what constitutes 'peaceful and unarmed'. While General Comment 37 allows for protestor defensive gear on a case-by-case basis,<sup>254</sup> the courts in Kenya have broadened the definition of weapons to encompass defensive and protective equipment.<sup>255</sup> Thus, assemblies can be dismissed if demonstrators are seen wearing or carrying protective equipment. Furthermore, courts sometimes categorise peaceful assembly participants based on their social and economic status. For example, a High Court ruling once issued an injunction to stop a demonstration because the participants were 'financially desperate' and, therefore, unable to conduct a peaceful demonstration.<sup>256</sup> Instead of adopting a presumption favouring the right, the courts limit it. As if the above were not enough, neither legislation nor court decisions have adopted a severe and widespread violence threshold to categorise an assembly as non-peaceful.<sup>257</sup> If section 78 of the Penal Code were to go by, as long as three people in an assembly of many are

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<sup>250</sup> *Ngunjiri case* (n 238) para 35; M Mbodenyi & J Osogo *The new constitutional law of Kenya: Principles of government and human rights* (2012) 180

<sup>251</sup> As above.

<sup>252</sup> *Orao* (n 95) 155-156.

<sup>253</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (Petition 3 of 2018) [2021] KESC 34 (KLR) para 143.

<sup>254</sup> GC 37 (n 27) para 20.

<sup>255</sup> *Ngunjiri case* (n 238) para 38.

<sup>256</sup> *Fredrick Ngari Muchira & 99 others v Pyrethrum Board of Kenya* [2012] eKLR (*Fredrick Ngari case*) para 11.

<sup>257</sup> GC 37 (n 27) para 15.

armed or express violent conduct, such an assembly could be classified as unlawful, and if it continues, it becomes a riot. This is not a rights-oriented approach.

### 3.6 Relationship with other rights

As chapter 2 discusses, separating the right to assembly from other rights, such as expression and association, can be complex.<sup>258</sup> The Supreme Court of Kenya recognised the relationship between the right to assembly and expression in an appeal in *Hussein Khalid and 16 others v Attorney General*.<sup>259</sup> However, this research has uncovered that in multiple cases, courts in Kenya have interrogated the violations of the two rights separately.<sup>260</sup> Thus, a petitioner before the court must independently prove a violation of both rights.<sup>261</sup>

Additionally, State authorities have not been able to differentiate between two limitations on the right to assembly: first, on the conduct (which requires participants to be peaceful and unarmed), and second, on the expressive part (which is subject to scrutiny based on the content expressed in the assembly)<sup>262</sup> This research suggests that if this were the approach, assemblies would not be subject to as many restrictions, especially if they are presumed to be peaceful in the first place.

### 3.7 Obligations of the right

From the historical analysis in section A of this chapter, the obligation to respect has been a significant shortcoming of State authorities, particularly the negative duty that requires refraining from unwarranted interference in peaceful assemblies, i.e., not to prohibit, restrict, block, disperse, or disrupt peaceful assemblies without compelling justification or to sanction participants or organisers without legitimate cause.<sup>263</sup> As mentioned earlier, there is a lack of domestic legislation, regulation, or court decisions that clearly define peaceful assemblies. This lack of clarity is problematic because it gives the police broad discretion and a low

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<sup>258</sup> *Gryb v Belarus* (n 104) para 13.2-13.4.

<sup>259</sup> *Hussein Khalid & 16 others v Attorney General & 2 others* [2019] eKLR (*Hussein Khalid SC case*) para 66.

<sup>260</sup> *Ngunjiri case* (n 238); *Boniface Mwangi v Inspector General of Police & 5 others* [2017] eKLR.

<sup>261</sup> *Kasina v Attorney General & another* (Petition E369 of 2021) [2024] KEHC 7573 (KLR) para 27-28.

<sup>262</sup> Schabas (n 46) 488 para 14.

<sup>263</sup> GC 37 (n 27) para 23.

threshold to disperse an assembly. Consequently, this situation undermines the obligation to respect this right.

Further, courts questioned colonial legislation, such as the Penal Code and the Public Order Act, which the State authorities used to prohibit, restrict, block, disperse, and disrupt peaceful assemblies, on whether it complied with Article 37 of the Constitution, which guarantees the right to peaceful assembly.<sup>264</sup> The courts have determined that the legislation is constitutional. However, they did not consider recent developments in international law regarding the right to assembly, which take a more permissive and pro-human rights approach despite invoking Article 24 of the Constitution on the limitation of rights. Therefore, State authorities continue to rely on colonial-crafted legislation, which did not take a human rights-based approach while crafting to regulate assemblies. Generally, this makes the State non-compliant with the obligation to respect.

According to the HRCtT's in *Turchenyak et al v Belarus*,<sup>265</sup> States should aim to facilitate assemblies when responding to them. State authorities are required to show support for this approach. Common to all administrations discussed in Section A, the State authorities' first step is to declare assemblies unlawful even before they happen. States are discouraged from adopting a discriminatory approach when dealing with assemblies.<sup>266</sup> While anti-government protests receive fierce responses from State authorities, counter-protests, usually pro-government, are granted free passes and free from any interference.<sup>267</sup> Yet, the State authorities apply the same Public Order Act to regulate the assemblies.

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<sup>264</sup> *Law Society of Kenya v Attorney General & another* [2021] eKLR; *Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR; *Kenya National Commission on Human Rights v Attorney General & 2 others* [2020] eKLR.

<sup>265</sup> *Turchenyak et al v Belarus*, Communication 1948/2010, UNHR Committee (24 July 2013), UN Doc (CCPR/C/108/D/1948/2010 (2013) para 7.4.

<sup>266</sup> *Fedotova v Russia* (n 141) para 10.4.

<sup>267</sup> The East African 'Kenya: Protesters defy William Ruto, pro-State groups counter them', <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-protesters-defy-ruto-pro-state-groups-counter-them-4699716> (accessed 8 September 2024); See also Voice of Africa 'Kenya's turmoil widens as anti-government protesters clash with emerging pro-government group' <https://www.voanews.com/a/kenya-s-turmoil-widens-as-anti-government-protesters-clash-with-emerging-pro-government-group-/7709661.html> (accessed 8 September 2024).

The State authorities should protect journalists and human rights defenders while covering assemblies.<sup>268</sup> However, they have faced confiscation of cameras, arrests, and beatings during demonstrations.<sup>269</sup> This is yet another frontier in which the State authorities fail in their obligation to respect the right to assembly.

### 3.8 On permissible limitations

Article 37 of the Kenyan Constitution recognises that only peaceful and unarmed protesters are protected under the right to assembly, similar to Article 21 of the ICCPR. The definition of peaceful assembly is still a significant issue in Kenya. Expanding the definition of weapons to include defensive gear may be considered excessive. Therefore, aligning Kenya's current domestic standards with international ones is essential. Additionally, if assemblies in Kenya were presumed to be peaceful,<sup>270</sup> limiting the right would then derive from Article 24 of the Constitution.

Article 24 specifies the criteria for any limitation on constitutional rights. A limitation must be legally prescribed, reasonable and justifiable in a democratic society.<sup>271</sup> On legality, Kenyan courts have adopted an interpretation that laws limiting the right must be drafted clearly to direct certain conduct to an individual.<sup>272</sup> The Public Order Act and the Penal Code regulate assemblies. Despite the loopholes within, as spotlighted earlier in this chapter, courts, including the Supreme Court, find these two colonial legislations valid.<sup>273</sup>

Further, the Constitution considers the significance of the limitation's purpose and the availability of less restrictive methods to achieve that purpose when determining its reasonableness and justifiability.<sup>274</sup> In essence, the Constitution mandates that restrictions on

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<sup>268</sup> GC 37 (n 27) para 30.

<sup>269</sup> Amnesty International 'Kenya: Security services must respect fundamental rights during nationwide protests', <https://www.amnesty.org/en/latest/news/2024/07/kenya-security-services-must-respect-fundamental-rights-during-nationwide-protests/> (accessed 8 September 2024).

<sup>270</sup> ACHPR (n 21).

<sup>271</sup> *Hussein Khalid SC case* (n 259) para 70.

<sup>272</sup> *Aids Law Project v Attorney General & others* [2015] eKLR; *Geoffrey Andare v Attorney General* [2016] eKLR.

<sup>273</sup> *Hussein Khalid SC case* (n 259) paras 70-71.

<sup>274</sup> Constitution of Kenya art 24 (1) (a-e).



rights must be necessary and proportional and imposed in pursuit of a legitimate aim, just like in international law.<sup>275</sup>

The High Court in *Wilson Olal & 5 others v Attorney General & 2 others (Wilson Olal case)*<sup>276</sup> held that Part III of the Public Order Act and Sections 78 and 83 of the Penal Code that regulates the right to assembly have met the above test as they aim to prevent public disorder and protect public safety. The Court also went ahead to recognise that the legitimate aim of limiting the right to assembly includes ‘the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others’.<sup>277</sup> However, the Court failed to indicate whether these grounds were exhaustive, unlike the HRCt.<sup>278</sup>

Additionally, unlike the HRCt, the courts in Kenya missed an opportunity to explain the legitimate grounds and provide clear interpretations. For example, the court could have clarified that relying on national security should be based on credible, serious political or military threats to the nation to be valid.<sup>279</sup> Additionally, the court could have set a standard for public order, requiring state authorities to demonstrate a significant degree of tolerance and refrain from using vague notions of public order.<sup>280</sup> Also, regarding the rights and freedoms of others, the court could have required State authorities to provide detailed justifications for restrictions demonstrating a disproportionate burden imposed by participants of an assembly on the rights of non-participants.<sup>281</sup> Without such prescriptive standards in law, state authorities like the police can determine what amounts to national security, even with much lower tolerance or less credible information. Nonetheless, Chapter 4 discusses such missed opportunities.

### 3.9 Conclusion

The Constitution of Kenya, specifically Article 37, protects the right to assembly, similar to the ICCPR and the African Charter. However, the supporting legislation, such as the Penal Code

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<sup>275</sup> [2017] eKLR (*Wilson Olal case*) 11; Orao (n 95) 180.

<sup>276</sup> As above, 11.

<sup>277</sup> As above, 6.

<sup>278</sup> GC 37 (n 27) para 41.

<sup>279</sup> Siracusa Principles para 29; GC 37 (n 27) para 42; Nowak (n 45) 492 para 24.

<sup>280</sup> GC 37 (n 27) para 44.

<sup>281</sup> *Stambrovsky v Belarus* (n 157) para 7.6; *Pugach v Belarus* (n 157) para 7.8.

and the Public Order Act, does not align with the evolving international standards for protecting this right. There is a lack of clear definition for assemblies and the distinction between expressive assemblies and other forms of assemblies. Even the threshold for a non-peaceful assembly must be revisited to conform to international standards. Furthermore, the response by the State authorities to assemblies, over time, demonstrates non-compliance with the required human rights-based approach.

Despite existing jurisprudence, such as the case of *Wilson Olal case*,<sup>282</sup> which reflects international standards on limiting the right to assembly; the Kenyan High Court fails to clarify concepts such as national security and public order, allowing the police significant discretionary powers. Even when the relationship of the right to assembly with other rights, such as freedom of expression, is recognised by the courts, there is a lack of in-depth examination of how they are related. Furthermore, decisions from the same Court classified protestors based on their socioeconomic status and concluded that their economic vulnerability prevented them from holding peaceful protests.<sup>283</sup>

Based on the findings above, this research concludes that the 2010 Constitution of Kenya, enabling legislation, and court decisions are only partially compliant with the ICCPR and the African Charter regarding the right to assembly. There is still work to be done to align domestic standards with international law in Kenya. Chapter 4 of this research discusses the shortcomings of state authorities and areas for improvement to realise this right fully.

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<sup>282</sup> *Wilson Olal case* (n 275) 11.

<sup>283</sup> *Fredrick Ngari case* (n 253) para 11.

## Chapter 4 - Best practices on the right to assembly in Kenya

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### 4.0 Introduction

This chapter plays a crucial role in identifying and discussing the opportunities that State authorities in Kenya have missed over the years to observe the right to assembly. It covers the period between 1972 and 2024, as Kenya acceded to the ICCPR in 1972. In 1992, it ratified the African Charter. As discussed in Chapter 2, the ICCPR and African Charter protect the right to the assembly under Articles 21 and 11, respectively. So, between those years to date, did Kenya use available opportunities to adopt best practices that comply with international law regarding the right to assembly, and to what extent? This chapter responds to this question while referring to other jurisdictions' best practices. It is essential as it provides a reference for relevant stakeholders, including State authorities, to redirect the course on the right to assembly to a human rights-based approach.

### 4.1 Background on missed opportunities

First, between 1972 and 1996, when Kenya acceded to the ICCPR and ratified the African Charter during the presidencies of Kenyatta and Moi, respectively, the legislature had the opportunity to repeal the 1950 Public Order Act and enact legislation that would have facilitated the enjoyment of the right to assembly. President Uhuru's administration also missed the opportunity after Kenya ratified the Africa Youths Charter in 2014.

Second, another missed opportunity when legislation could have been enacted to facilitate assemblies according to international standards was in 1992 when Kenya amended 1963 to permit multiparty democracy.<sup>284</sup> The suppression of the right persisted, and in 2005, during President Kibaki's administration, the HRCt raised concerns about section 5 of the 1950 Public Order Act in Kenya, which requires at least three days' notice before holding an assembly.<sup>285</sup> Additionally, it noted that the authorities needed to authorise assemblies, and their reasons for not approving them were unrelated to Article 21 of the ICCPR.<sup>286</sup> Other

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<sup>284</sup> Constitution of Kenya Amendment Act 6 of 1992.

<sup>285</sup> Concluding observations on the second report of Kenya, UNHR Committee (29 April 2005) UN Doc CCPR/CO/83/KEN (2014) (HRCt CoKe 2005) para 23.

<sup>286</sup> As above.

concerns included the lack of a remedy for denied authorisation and unauthorised meetings being disrupted with violence.<sup>287</sup>

During the third periodic review in 2012, Kenya convinced the HRCtT that the concerns about the right to assembly occurred under the 1963 Constitution.<sup>288</sup> With the 2010 Constitution, the right is now guaranteed and implemented.<sup>289</sup> The promulgation of the 2010 Constitution presented an opportunity for President Kibaki's administration to reform legislation and practice regarding assemblies, similar to the reforms the administration made; for example, regarding Articles 40 and 68 of the Constitution on property rights, the Land Act was enacted.<sup>290</sup> The administration missed this opportunity. Despite the African Commission praising Kenya for the guarantees in the 2010 Constitution relating to the right to the assembly under Article 37,<sup>291</sup> it expressed concerns about the apparent lack of information on implementing this right.<sup>292</sup> Nonetheless, it recommended that all laws and other measures comply with international and regional standards regarding the right to assembly.<sup>293</sup> Again, Kenya could have acted upon the recommendations of the African Commission.

Further, in 2019, the High Court observed the need for proper and comprehensive legislation on conducting peaceful assemblies and ordered State authorities to formulate and/or amend the law.<sup>294</sup> The order has yet to be complied with. When Kenya submitted its report to the African Commission in 2020, it maintained that the Public Order Act was still in force.<sup>295</sup> Moreover, State authorities attempted to draft regulations that created civil and criminal liabilities for demonstration organisers.<sup>296</sup> However, Parliament declared it unconstitutional.

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<sup>287</sup> As above.

<sup>288</sup> UNHR Committee 'Replies from the Government of Kenya to the list of issues (CCPR/C/KEN/Q/3) to be taken up in connection with the consideration of its third periodic report (CCPR/C/KEN/3)' para 113.

<sup>289</sup> Concluding observations on the third report of Kenya, UNHR Committee (31 August 2012), UN Doc CCPR/C/KEN/CO/3 (2015) (HRCtT CoKe 2012).

<sup>290</sup> Act 6 of 2012, Chapter 280 Laws of Kenya.

<sup>291</sup> ACHPR 'Concluding observations and recommendations on the 8-11 periodic report of the Republic of Kenya' 41st ordinary session, 16-30 May 2007, Accra, Ghana para 18.

<sup>292</sup> As above, para 41.

<sup>293</sup> As above para 57.

<sup>294</sup> *Wilson Olal case* (n 275) para 50(b).

<sup>295</sup> Republic of Kenya 'The 12-13 periodic reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020) 28-29, para 65.

<sup>296</sup> Concluding observations on the fourth periodic report of Kenya, UNHR Committee (11 May 2021), UN Doc CCPR/C/KEN/CO/4 (2021) (HRCtT CoKe 2021) para 44.

The HRCtT welcomed Parliament's decision in its 2021 concluding observations.<sup>297</sup> The HRCtT also raised concerns about the existing 1950 Public Order Act, which requires prior notification for assemblies and has been used to deny authorisations.<sup>298</sup> It also highlighted issues of excessive use of force and detention of demonstrators and human rights defenders during assemblies.<sup>299</sup> It recommended that Kenya align all its laws with the ICCPR, considering General Comment 37.<sup>300</sup> Nonetheless, as uncovered in chapter 3, since 2022, the state has been regressive on the right.<sup>301</sup>

The previous discussion, along with an analysis of international law requirements and the regulation of the right to assembly under domestic law in Kenya as covered in chapters 2 and 3, highlights important aspects that have been overlooked regarding the State authorities' obligation to protect the right to assembly. These should be reviewed to ensure compliance with international obligations. These missed aspects are the law on authorisation (disguised as notification) of assemblies, violence by demonstrators during demonstrations, use of force by State authorities in countering demonstrations, protection of assemblies during a state of emergency or armed conflict, and lastly, protection of online assemblies in Kenya. There could be other aspects that State authorities in Kenya need to address to implement the right to assembly even better. However, this research discusses the five identified above.

### **4.3 Best practices**

#### *4.3.1 Reconsidering the law on notification before assemblies*

Organisers of an assembly in Kenya must notify the police at least seventy-two hours before a planned assembly.<sup>302</sup> The notice should contain the date, time and place of the intended assembly.<sup>303</sup> The HRCtT flagged three challenges to this requirement, which has existed in the legislation since 1950.<sup>304</sup> First, the notification is mandatory. Second, the notification

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<sup>297</sup> As above.

<sup>298</sup> As above, paras 44-45.

<sup>299</sup> As above.

<sup>300</sup> As above.

<sup>301</sup> Chapter 3 of this research, part 3.3.

<sup>302</sup> POA, sec 5(2) & (6).

<sup>303</sup> POA, sec 5(3).

<sup>304</sup> HRCtT CoKe 2012 (n 289) para 23.

requirement is used to deny assemblies for reasons unrelated to the ICCPR. Third, there is no administrative remedy if police deny authorisation.

What could have been done better? Notifying authorities before a planned assembly is not itself a bad practice. It complies with the ICCPR (Article 21) and the African Charter (Article 11).<sup>305</sup> However, an advance notification must not be an ‘excessive requirement’, thus implying an authorisation by State authorities. Schabas,<sup>306</sup> while compiling examples of countries that have placed an excessive requirement on notification, therefore implying an authorisation included Moldova with a fifteen-day requirement,<sup>307</sup> Kenya has a three-day requirement, and even Switzerland has a one-month notice requirement.<sup>308</sup>

Notification in Kenya is an excessive requirement as the law makes it mandatory. Therefore, an organiser must notify the authorities,<sup>309</sup> and an assembly is unlawful without notification.<sup>310</sup> On the other hand, the HRCt and the African Commission recommend that the lack of notification does not render an assembly illegal, as the State authorities are not absolved from their obligation to facilitate a peaceful assembly within their abilities.<sup>311</sup> The Special Rapporteur on the rights of freedom of peaceful assembly and association has commended countries like Austria and Armenia. Estonia and Germany have best-practice legislation that does not require prior notification that amounts to authorisation, thus permitting spontaneous assemblies.<sup>312</sup>

Additionally, it is essential to ensure that any limitations on the right to assembly align with the reasons outlined in Article 21 of the ICCPR and Article 11 of the African Charter, as discussed in chapter 2. Makau Mutua points out that the obligation to give prior notification, which means seeking authorisation, has been used to restrict the gatherings of political

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<sup>305</sup> *Kivenmaa v Finland* (n 105) para 9.2. See also ACHPR Guidelines on Assembly, para 72; GC 37 (n 27) para 70.

<sup>306</sup> Schabas (n 46) 603.

<sup>307</sup> Report of the UNHRCt (2002) Moldova, A/57/40 (Vol I) para 84 [https://ccprcentre.org/files/hr\\_committee/annual\\_report/A\\_57\\_40Vol-I\\_en\\_\(2\).pdf](https://ccprcentre.org/files/hr_committee/annual_report/A_57_40Vol-I_en_(2).pdf) (accessed 23 September 2024).

<sup>308</sup> Concluding observations on the fourth periodic report of Switzerland, UNHR Committee (22 August 2017), UN Doc CCPR/C/CHE/CO/4 (2017) para 48.

<sup>309</sup> POA sec 5(1).

<sup>310</sup> POA sec 5(10).

<sup>311</sup> GC 37 (n 27) para 71; ACHPR Guidelines on Assembly, para 71(b).

<sup>312</sup> Special Rapporteur - Kiai (n 1) paras 28-29.

parties and groups that do not support the current government.<sup>313</sup> State authorities should abandon this practice and confine themselves to the ICCPR and the African Charter.

Finally, while a person can approach the High Court if a notification is declined, state authorities in Kenya should consider implementing an internal appeal mechanism.<sup>314</sup> For instance, in *Boniface Mwangi v Inspector General of Police & 5 others*,<sup>315</sup> an assembly was to be held on 9 December 2015, but the police denied authorisation. The matter was taken to court, and it was decided two years later that the denial of authorisation was unconstitutional. Should petitioners wait for two years before exercising their right to assembly? Organisation for Security and Co-operation in Europe (OSCE) recommends that good practice dictates that administrative and judicial review measures should resolve the appeal before the proposed date of the assembly.<sup>316</sup>

#### 4.3.2 Addressing violence during assemblies

Based on the observations above, assemblies in Kenya are typically marked by the police forcefully dispersing them.<sup>317</sup> The police argue that the participants are often violent, which justifies their response.<sup>318</sup> The Kenyan High Court recognises that while peaceful assemblies have the potential to become violent, the focus should not dwell on this aspect. Instead, efforts should be directed towards ensuring that such assemblies remain peaceful.

To ensure peaceful assemblies, State authorities should focus on viewing assemblies as an exercise of a democratic right rather than a challenge to the administration's authority.<sup>319</sup> This requires a human rights approach. Law enforcement officials should differentiate between peaceful and non-peaceful participants.<sup>320</sup> Acts of violence by a few individuals during assemblies should not justify broad restrictions on peaceful demonstrators.<sup>321</sup> Thus, law

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<sup>313</sup> Mutua (n 163) 97.

<sup>314</sup> Constitution of Kenya, art 22.

<sup>315</sup> [2017] eKLR.

<sup>316</sup> OSCE Guidelines on peaceful assemblies (2010) 70 paras 137-138.

<sup>317</sup> HRCt CoKe 2012 (n 285) para 23; HRCt CoKe 2021 (n 292) para 44.

<sup>318</sup> *Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others* [2016] eKLR para 37

<sup>319</sup> ACHPR Guidelines on Assembly, para 90.

<sup>320</sup> GC 37 (n 27) para 17.

<sup>321</sup> As above, paras 18-20.

enforcement should avoid treating a crowd as uniform when apprehending individuals or,<sup>322</sup> if necessary, dispersing a gathering violently.<sup>323</sup>

If an assembly is without prior notification, a non-interventionist or actively facilitative approach may be the best action as long as the assembly remains peaceful despite breaking the law.<sup>324</sup> Mediation or negotiation can reduce tensions where possible, even in situations involving tensions between opposing assemblies or between participants and state authorities. For example, the OSCE has praised the Municipality of Warsaw for using experienced civil servants to facilitate communication between law enforcement and assembly organisers where there is tension.<sup>325</sup> Thus, such measures can be adopted.

#### *4.3.3 Concerns regarding the use of force in countering demonstrations*

The HRCtT,<sup>326</sup> the African Commission,<sup>327</sup> the UN Secretary-General,<sup>328</sup> and even the UN Office of the High Commission for Human Rights<sup>329</sup> have expressed concern over the excessive use of force by the State authorities in Kenya when responding to assemblies.<sup>330</sup> O'rao extensively discusses the legality, necessity, proportionality, precaution, and non-discrimination that state authorities must consider when using force.<sup>331</sup> The analysis reveals that existing legislation, such as section 61 and the Sixth Schedule of the National Police

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<sup>322</sup> OSCE Guidelines (n 314) para 164; GC 37 (n 27) paras 15-18.

<sup>323</sup> GC 37 (n 27) paras 23,27 & 38.

<sup>324</sup> OSCE Guidelines (n 314) para 155.

<sup>325</sup> As above, para 157.

<sup>326</sup> HRCtT CoKe 2012 (n 289) para 24(c).

<sup>327</sup> 'The African Commission on Human and Peoples' Rights expresses deep concern over human rights violations and growing tensions amid mass protests in the Republic of Kenya, 26 June 2024' <https://achpr.au.int/en/news/press-releases/2024-06-26/deep-concern-over-human-rights-violations-growing-tensions-amid-mass#:~:text=In%20view%20of%20the%20foregoing,%2C%20peaceful%20assembly%2C%20and%20a%20association>. (accessed 23 September 2024).

<sup>328</sup> 'Secretary-General deeply concerned over reported deadly violence related to protests, street demonstrations in Kenya, 25 June 2024' <https://press.un.org/en/2024/sgsm22286.doc.htm> (accessed 23 September 2024).

<sup>329</sup> UN Office of the High Commissioner on Human Rights <https://news.un.org/en/story/2023/07/1138742> (accessed 23 September 2024)

<sup>330</sup> KNCHR 'How long must excessive force target peaceful protesters? 1 March 2024' <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1185/How-Long-Must-Excessive-Force-Target-Peaceful-Protesters-Condensation-of-Excessive-Use-of-Force-Against-KMPDU-Members> (accessed 23 September 2024).

<sup>331</sup> O'rao (n 95), chapter 4.



Service Act (NPSA), provide elaborate guidelines on using non-violent and violent force. Additionally, the National Police Service Standing Orders (2017), the Public Order Act, and the Penal Code require necessity and proportionality in using force.<sup>332</sup> Orao concludes that domestic legislation on the use of force primarily reflects international standards,<sup>333</sup> such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>334</sup> However, she points out that domestic laws are more permissive when it comes to the use of firearms.<sup>335</sup>

Despite the legislation on using force, there is still significant public outcry. This research suggests that the root of the problem may lie in the organisational culture of State authorities, particularly the police. It is possible that, as discussed in chapters 1 and 3 of this research, state authorities have inherited colonial tactics of command and control over a long time.<sup>336</sup> Additionally, the training of police officers tends to be primarily paramilitary, combative, and aggressive, with insufficient focus on human rights and citizen interaction training.<sup>337</sup> Therefore, their approach and use of force usually quell and suppress assemblies rather than monitor and facilitate them. The OSCE has recognised countries such as Denmark, Malaysia, Nepal, New Zealand, Slovenia, and the United Kingdom for adopting good practices in training and follow-up training on using lethal and non-lethal force in a human rights context.<sup>338</sup> The United Kingdom, for example, seeks advice from lawyers on anticipated crowd management operations to avoid excessive use of force.<sup>339</sup>

Lastly, the 2024 order by the Kenyan High Court (pending case) is timely and highly appreciated as it aims to improve accountability.<sup>340</sup> The Court noted instances of excessive use of force during the June 2024 demonstration and expressed concern over State authorities covering their faces and concealing their identification while unleashing brutal force in demonstrations. It ordered the State authorities to follow the Sixth Schedule of the

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<sup>332</sup> As above.

<sup>333</sup> GC 37 (n 27) para 78.

<sup>334</sup> Orao (n 95) 213

<sup>335</sup> As above.

<sup>336</sup> See chapter 3, parts 3.1-3.3.

<sup>337</sup> Biegon & others (n 26) 22.

<sup>338</sup> Special Rapporteur - Kiai (n 1) paras 45-46.

<sup>339</sup> As above, 46.

<sup>340</sup> *Law Society of Kenya vs Martin Mbae Kithinji & Isaiah Ndumba Murangi & 6 Others* (HCHRPET/E373/2024) (unreported) order by Justice Bahati Mwamuye dated 14 August 2024.

NPSA strictly, ensuring that police officers, both uniformed and non-uniformed, are identifiable and recognisable.<sup>341</sup>

#### 4.3.4 *Implementing the right during a state of emergency or armed conflict*

The right to assembly is not a non-derogable right under the ICCPR. However, states of emergencies or armed conflict should not be used to justify derogating the right if objectives can still be met using the restrictions in Article 21.<sup>342</sup> In Kenya, a state of emergency typically involves the military deployed to take charge of internal security, as in 1982.<sup>343</sup> In June 2024, following a series of anti-Finance Bill demonstrations, the military was deployed to assist the police in maintaining order.<sup>344</sup> Although no state of emergency was declared, the Gazette Notice deploying the military in the country specified it as a ‘security emergency’. The High Court reasoned that deploying the military without limits of operation is dangerous as it can lead to militarisation and potentially silence the right to assembly.<sup>345</sup> Though no formal state of emergency is declared, a *de facto* state of emergency arises when emergency powers are incorporated into ordinary law, often in response to actual or perceived threats to national security and public safety.<sup>346</sup> The military deployment in Kenya could be a *de facto* state of emergency, as the Gazette Notice supported it as a response to a ‘security emergency’.

#### 4.4.5 *Management of online assemblies: Emerging unanswered questions*

The right to assembly also covers online assemblies in digital platforms.<sup>347</sup> Thus, it is protected under Article 21 of the ICCPR and Article 11 of the African Charter,<sup>348</sup> and

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<sup>341</sup> As above.

<sup>342</sup> HRCt General Comment 29 of 2001 on derogations from provisions of the Covenant during a state of emergency, para 5; GC 37 (n 27) para 96.

<sup>343</sup> Amnesty International ‘Military must operate within the bill of rights, 1 July 2024’ <https://www.amnestykenya.org/military-must-operate-within-the-bill-of-rights/> (accessed 23 September 2024); C Rickard ‘Long struggle for justice after failed Kenya coup, 8 October 2021’ <https://africanlii.org/articles/2021-10-08/carmel-rickard/long-struggle-for-justice-after-failed-kenya-coup> (23 (accessed 23 September 2024).

<sup>344</sup> Kenya gazette notice 7861 of 25 June 2024.

<sup>345</sup> *Law Society of Kenya v Attorney General & 4 others* (Petition E307 of 2024) [2024] KEHC 7702 (Ruling) paras 50-51.

<sup>346</sup> Committee on Human Rights in Times of Emergency ‘Assessment of state practice in respect to times of emergency *International Law Association* (2024) para 22.

<sup>347</sup> GC 37 (n 27) para 13; Special Rapporteur – Kiai & Heyns (n 55) para 10.

<sup>348</sup> ACHPR Guidelines on assembly, para 3.

international human rights standards must apply to such assemblies.<sup>349</sup> However, it is widely recognised that major digital platforms worldwide are privately owned, including social media platforms such as Facebook and WhatsApp (owned by Meta), X (owned by Elon Musk) and YouTube (owned by Alphabet).<sup>350</sup> Therefore, business owners are responsible under the global framework for assessing digital technology companies to respect human rights, which the Guiding Principles on Business and Human Rights provide.<sup>351</sup> However, the focus is on the state's obligation rather than the business owners.

In June 2024, the anti-Finance Bill assemblies in Kenya also took place online on social media platforms such as X. The impact of these online gatherings was significant, to the point that President Ruto had to convene an online assembly where citizens protested, expressed their views, and demanded accountability from the president.<sup>352</sup> Many more sessions were held, and even the Gazette Notice deploying military after the June demonstrations showed that the assemblies were organised online.<sup>353</sup> So, how does the state implement the right to assembly online?

Schabas discerns that the peacefulness of an assembly relates to its conduct and not the opinions expressed.<sup>354</sup> The views expressed are subject to limitations under the second paragraph of Article 21 and Article 19(3) of the ICCPR. It is already discernable that the contents expressed through digital platforms are subject to the standards and restrictions on freedom of expression.<sup>355</sup> An online assembly may be restricted if it incites war propaganda,

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<sup>349</sup> Special Rapporteur - Kiai (n 1) para 11.

<sup>350</sup> Nathan Reiff 'Social networking companies and what they own' [Social Networking Companies and What They Own \(investopedia.com\)](https://www.investopedia.com) (accessed 9 October 2024).

<sup>351</sup> HRC (A/HRC/17/31) Guiding principles 11-24; HRCTt 'Resolution on the promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/38/7) para 5(d); Special Rapporteur - Kiai (n 1) paras 18-20; GC 37 (n 27) para 34.

<sup>352</sup> L Fleming & W Muia 'Kenyan leader faces furious young people in online debate, 5 July 2024' <https://www.bbc.com/news/articles/ce58y8ngdk5o> (accessed 9 October 2024).

<sup>353</sup> n 344.

<sup>354</sup> Schabas (n 46) 599 para 12.

<sup>355</sup> UN General Assembly 'Resolution on promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association (A/RES/73/173).

advocates discrimination, hostility, or violence based on nationality, race, or religion,<sup>356</sup> or even breaches the right to privacy of others.<sup>357</sup>

However, how should states regulate the conduct of online assemblies to ensure they are peaceful? Can it be assumed that online assemblies are peaceful? Instead, at what point should an online assembly be declared non-peaceful? Additionally, if declared not peaceful, or its contents expressed fail to comply with Article 19 or 20 or even paragraph two of Article 21 of the ICCPR, what should be the State's response? As of now, these questions might not have conclusive answers. While this research acknowledges that shutting down access to communication networks, internet throttling and blocking websites are part of the strategies states have used to regulate freedom of expression and assembly online, these methods have been condemned.<sup>358</sup> Other methods include adopting vague anti-terrorism, anti-media and even cybercrime laws.<sup>359</sup>

If participants are armed in a physical assembly, the assembly loses protection of Article 21 of the ICCPR and Article 11 of the African Charter. What about an online assembly? There's context to this, in 2024, in Britain, there's an ongoing investigation of a minor (16 years) who claimed to have been raped on Metaverse – an online virtual platform.<sup>360</sup> Another similar case was recorded in 2022.<sup>361</sup> This shows the potential for physical violence in online virtual platforms. It cannot be ruled out that people can participate in an online virtual assembly, and many people show up at the assembly with virtual weapons such as machetes. Recently, it has been reported that digital texts, including emojis, are forms of expression and can convey the sender's intent. For example, a Canadian court reportedly found a respondent liable for breach of contract after they sent a thumbs-up emoji as a response. What happens in an online assembly where many participants send emojis with guns, machetes, and stones,

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<sup>356</sup> GC 37 (n 27) para 50; GC 34 (n 104) paras 50-52; *Konate v Burkina Faso* [2013] AfCHPR 39; Special Rapporteur - Kiai (n 1) para 62.

<sup>357</sup> Special Rapporteur - Kiai (n 1) para 16.

<sup>358</sup> As above, para 3.

<sup>359</sup> As above, paras 3, 29, 32, 36, 51-52.

<sup>360</sup> N Sales 'A girl was allegedly raped in the metaverse: Is this the beginning of a dark new future?' <https://www.theguardian.com/commentisfree/2024/jan/05/metaverse-sexual-assault-vr-game-online-safety-meta> (accessed 24 September 2024).

<sup>361</sup> A Smith 'Woman says she was virtually 'raped' in the metaverse while others 'passed around a bottle of vodka' <https://www.independent.co.uk/tech/rape-metaverse-woman-oculus-facebook-b2090491.html> (accessed 24 September 2024).

among other weapons in the digital platform? Does it communicate that their intention is not to be peaceful? How can a state intervene to stop such an online assembly? Is it by deleting the hashtag or thread where the participants engage?

This research recommends more scholarly works and debates on such emerging issues, leading to proper regulations that comply with agreed-upon international standards. Kenya should not be left out, considering that in 2024, when the military was deployed to monitor assemblies, the Gazette Notice recognised that assemblies were organised mainly on digital platforms.<sup>362</sup>

#### **4.5 Conclusion**

Since Kenya ratified the ICCPR and the African Charter, it has had numerous occasions to implement its obligations fully. However, many aspects remain unaddressed, and this chapter discusses five. Over time, the notification requirement in Kenya has been used as an authorisation requirement. In practice, this can be termed an excessive requirement, as it is used to decline assemblies that the State authorities think challenge them, thus suppressing expression. Additionally, the lack of expedient administrative review or appeals makes it more excessive. Kenya needs to reconsider the current position on notification, amend or repeal the existing legal framework, and create one that complies with international standards. The same applies to addressing violence during assemblies. State authorities should focus on facilitating an assembly that starts peacefully.

Concerning the use of force to counter assemblies, state authorities need to shift the organisational culture of the police. This needs to change from command and control to facilitating assemblies. Training and retraining of police on relevant human rights standards should be prioritised. Even though the NPSA contains the Sixth Schedule of the use of force that complies with international standards, State authorities should cultivate a culture of respect for the rule of law. Additional interventions could include seeking advice from human rights lawyers before major operations in monitoring demonstrations. Lastly, even though a state of emergency has not been declared in Kenya since 1982, deploying the military to monitor demonstrations may create a tense situation, thus muzzling the enjoyment of rights as if it were a state of emergency.

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<sup>362</sup> n 344.

This chapter has also raised questions that might spike debate in Kenya and globally as more technologies arise supporting the right to assembly. Though it has yet to answer some satisfactorily or raise a question in response, more scholarship and progressive discussions should be considered regarding managing online assemblies.

## Chapter 5 - Conclusion

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### 5.0 Summary of findings and recommendations

This research identifies a problem in Kenya: international standards exist on the right to assembly, yet the State authorities' response towards assemblies has been wanting. Many assemblies have been suppressed, characterised by violence and questionable use of force. This research has sought to examine why the state authorities exhibit this repressive behaviour towards assemblies, evaluate domestic compliance with international obligations, and discuss the opportunities Kenya has missed in fully implementing its obligations while referring to best practices. The research has made the following findings and recommendations: -

#### *The right to assembly under the ICCPR and the African Charter*

Chapter 2, while interrogating international obligations regarding the right to assembly under the ICCPR and the African Charter, found clear obligations to respect, protect, and fulfil the right to assembly for its effective implementation. The limitations to the right are defined clearly in the two treaties. If State parties align their domestic laws with the international understanding of the content of the right to assembly, the scope of its protection, the obligations, and the permissible limitations, citizens would be better equipped to exercise their fundamental and democratic rights effectively.

#### *Concerning the domestic implementation of international human rights obligations*

Chapter 3 observes that in Kenya, State authorities have aimed to restrict the right to assembly to suppress challenges to their authority, using laws and the police since the colonial period. This indicates a focus on political control rather than a human rights-based approach to the right to assembly. It also finds that while the 2010 Constitution complies with Article 21 (ICCPR) and Article 11 (African Charter), legislation and court decisions fail to clearly define the restrictions on the right to assembly, allowing the police unfettered discretion. This discretion has often been used to deny authorisations to assemblies.

Additionally, the Public Order Act fails to define what constitutes an assembly. This gives State authorities unchecked discretion to label any meeting as an 'unlawful assembly' under section

5 (10) of the Act. This research recommends that Parliament should enact a law with proper definitions.

The Court of Appeal interpreted that an individual could exercise the right to 'demonstrate, picket, and petition' without vocal expression.<sup>363</sup> It failed to consider international developments that a lone individual is deemed to exercise their freedom of expression rather than an assembly. The Court of Appeal should correct this position.

The High Court also broadened the definition of weapons to encompass defensive and protective equipment.<sup>364</sup> It failed to consider that defensive gear such as helmets and bulletproof vests are not weapons. The High Court also should define defensive weapons within international standards. Additionally, it issued a decision categorising participants into an assembly based on their social and economic status.<sup>365</sup> It should review that aspect in its decision or the Court of Appeal to overrule that position.

Further, legislation and court decisions should restrict the use of force to violent protestors only according to international standards. Generally, the colonial legislation that regulates assemblies - the Public Order Act and the Penal Code - should be repealed, and a fresh human rights-based approach to legislation should be enacted according to international standards.

#### *On four areas of improvement*

In chapter 4, the text discusses four thematic areas related to the right to assembly that Kenya has failed to fully implement since ratifying the ICCPR and the African Charter. These areas include: -

- a) The notification requirement, which is excessive and lacks expedient administrative appeal mechanisms.
- b) Violence in assemblies, where state authorities focus on dismissing assemblies rather than maintaining peace.

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<sup>363</sup> *Hussein Khalid (CoA)* (n 232) 5.

<sup>364</sup> *Ngujiri case* (n 238) para 38.

<sup>365</sup> *Fredrick Ngari case* (n 256) para 11.



- c) NPSA has detailed guidelines on the use of force. However, there are still instances of excessive force, indicating an issue with organisational culture and disrespect for the rule of law by state authorities.
- d) Implementing the right to assembly during a state of emergency when the military is deployed creates fear and restricts the enjoyment of rights.

The research finds that Kenya's current practices are non-compliant with the international obligation to respect the right to assembly. In line with General Comment 37, the research recommends that Kenya reconsiders its current position on authorisation (disguised as notification) requirement in the Public Order Act, amend or repeal the existing legal framework, and create one that complies with international standards. The same applies to addressing violence during assemblies, as state authorities should focus on facilitating peaceful assemblies. Generally, most developments in international law in these areas are found in soft law documents such as guidelines and general comments. However, as discussed in chapter 2, the Kenyan Supreme Court degraded the position of international law, making it challenging to rely on such soft law instruments as authoritative in Kenya.

Lastly, it also questions the existing insufficient protection of online assemblies. It noted that in the future, the peacefulness of an online assembly might need to be addressed to match the growing influence of technologies, such as virtual argumentation, and the existing challenges of hate speech, violent language and even propaganda.

## Bibliography

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### 6.0 Books

Daly, A *Article 15: The right to freedom of association and to freedom of peaceful assembly* (Brill Nijhoff 2016)

Fokala, E *Implementing children's right to participation in family decision-making processes in Africa* (Åbo Akademi University Press 2017)

Heyns, CH, Viljoen, F & Murray, R (eds) *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (Brill Nijhoff 2024)

Hornsby, C *Kenya: A history since independence* (IB Tauris 2013)

Humberto, CR *The Universal Declaration of Human Rights: A commentary* (Brill Nijhoff 2023)

Joseph, S & Castan, M *The International Covenant on Civil and Political Rights: cases, materials and commentary* (Oxford University Press 2013)

Mbodenyi, M & Osogo, J *The new constitutional law of Kenya: Principles of government and human rights* (LawAfrica 2012)

Murray, R *The African Charter on Human and Peoples' Rights: A commentary* (Oxford University Press 2019)

Nowak, M *UN Covenant on Civil and Political Rights: CCPR commentary* (NP Engel 2005)

Salát, O *The right to freedom of assembly: A comparative study* (Bloomsbury Publishing 2015)

Schabas, W *UN Covenant on Civil and Political Rights: Nowak's CCPR commentary* (NP Engel 2019)

Shelton, D (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (Oxford University Press 2011)

Taylor, MP *A commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's monitoring of ICCPR rights* (Cambridge University Press 2020)

Viljoen, F *International human rights law in Africa* (Oxford University Press 2012)

## 6.1 Book chapters

Ancheita, A & Cárdenas, MRN 'The right to freedom of peaceful assembly and association' in Humberto, CR *The Universal Declaration of Human Rights: A commentary* (Brill Nijhoff 2023)

Anderson, BA, O'Brien, CM & Sano, HO 'Introduction to research methods in human rights: approaches and trends in human rights methodology and methods' Anderson, BA, O'Brien, CM & Sano, HO (eds) in *Research methods in human rights: A handbook* (2024) 4

Ellis, S 'Elections in Africa in historical context', in Abbink, HCM & Hesselings, G (eds) *Election observation and democratisation in Africa* (Palgrave Macmillan 2000)

Heyns, CH 'Civil and political rights in the African Charter' in Evans, M & Murray, R (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (Cambridge University Press 2002)

Khobe, W 'The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa' in Enonchong, LS, Fokala, E & Abebe, AK (eds) *Democracy in Africa: Regression and resilience* (juta 2002)

Kiai, M & Kaguongo, W 'Freedom of peaceful assembly and of association: Practices and obstacles' in Andreassen, B (ed) *Research handbook on the politics of human rights law* (Edward Elgar Publishing 2023)

Killander, M & Adjolahoun, M 'International law and domestic human rights litigation in Africa: An introduction' in Killander, M (ed) *International law and domestic human rights litigation in Africa* (Pretoria University Law Press 2010)

M Langford, M, Cesar, RG & Rossi, J 'Introduction: From Jurisprudence to compliance' in M Langford, M, Cesar, RG & Rossi, J (eds) *Social rights judgements and the politics of compliance: Making it stick* (2017) 7, 11, 17, 21 & 25

M Mungai 'Manoeuvring through legal ambiguity: Dispersing unlawful protests in Kenya' in Rutere, M & Mutahi, P (eds) *Policing protests in Kenya* (Centre for Human Rights and Policy Studies 2019)

Onyango, D & Otuya, P 'Police perceptions, attitude and preparedness in managing public assemblies' in Rutere, M & Mutahi, P (eds) *Policing protests in Kenya* (Centre for Human Rights and Policy Studies 2019)

Schutter, O 'The application of human rights in private relationships and the obligation to protect' in Schutter, O (ed) *International human rights law: Cases, materials, commentary* (Cambridge University Press 2010)

Siebert, K 'The police and the human right to peaceful assembly, in Ralf, A & Guido, F (eds) *The police and international human rights law* (Springer 2018)

## 6.2 Journal articles

Cameroon, J 'Freedom of Peaceful Assembly and Section 2(c) of the Charter: Report for the Public Order Emergency Commission' (2022) *Osgoode Digital Commons* 10

Cheeseman, N 'The Kenya elections of 2007' (2008) 2 *Journal of Eastern African Studies* 166

Ciekawy, D 'Constitutional and legal reforms in the post colony of Kenya' (1997) 25 *A Journal of Opinion* 16

H Michelo 'African Charter on Human and Peoples Rights: Critical Review' (2000) 8 *African Yearbook of International Law* 265

Home, R 'Colonial township laws and urban governance in Kenya' (2012) 56 *Journal of African Law* 175

Katrina, N 'The contested right of public meeting in England from the Bill of Rights to the public order acts' (2022) 32 *Transactions of the Royal Historical Society* 199

Martins, M & Terblanche, F 'Building organisational culture that stimulates creativity and innovation' (2003) 6 *European Journal of Innovation Management* 64

Mathenge, IM 'A critique of the Supreme Court's pronouncements on international law and the right to housing in Kenya in Mitu-Bell Welfare Society' (2022) 6 *Kabarak Journal of Law and Ethics* 1

Michael, H 'The meaning and scope of 'assembly' in international human rights law' (2020) 69 *International and Comparative Law Quarterly* 521

Mutua, M 'Human rights and state despotism in Kenya: Institutional problems' 4th Quarterly (1994) *Africa Today* 50

Mutua, M 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96

Mutua, M 'The African human rights system: A critical evaluation, prepared for United Nations Development Programme, Human Development Report 2000 *Digital Commons @ University at Buffalo School of Law* (2000) 1

Ratcliffe, BJ 'The spelling of Kenya' (1943) 42 *Journal of the Royal African Society* 42

Viljoen, F 'Exploring the theory and practice of the relationship between international human rights law and domestic actors' 22(2009) *Leiden Journal of International Law* 177

### **6.3 Official Documents**

#### **6.3.1 African Union & African human rights system**

African Charter on Human and Peoples' Rights (1981)

African Commission on Human and Peoples' Rights Guidelines for the policing of assemblies by law enforcement officials in Africa (2017)

African Commission on Human and Peoples' Rights, Concluding observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya (2016)

African Commission on Human and Peoples' Rights, Concluding observations and recommendations on the 8-11 periodic report of the Republic of Kenya' 41st ordinary session, 16-30 May 2007, Accra, Ghana

African Commission on Human and Peoples' Rights, Policing assemblies in Africa, guidelines for the policing of assemblies by law enforcement officials in Africa, 4 March 2017

African Commission on Human and Peoples' Rights, Resolution on integration of the provisions of the African Charter on Human and Peoples' Rights into National Laws of States, ACHPR/Res 3, 14 April 1989

African Commission on Human and Peoples' Rights, Resolution on peaceful demonstrations, ACHPR/Res 281, 12 May 2014

African Commission on Human and Peoples' Rights, Resolution on the human rights situation in the Kingdom of Swaziland, ACHPR/Res.216, 2 May 2012

African Commission on Human and Peoples' Rights, Statement on the situation of human rights in Burundi in the upcoming presidential elections, 3 May 2015

Report of the Study Group on Freedom of Association and Assembly in Africa, 'Freedom of association, as pertaining to civil society, and freedom of assembly in Africa: A consideration of selected cases and recommendations', April 2014

Republic of Kenya, The 12-13 periodic reports on the African Charter on Human and Peoples' Rights and the initial report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2020)

### **6.3.2 Domestic jurisdictions**

#### *Constitutions, Acts of parliament, and Reports*

Amnesty International, Kenya: Violations of human rights—communications between Amnesty International and the Government of Kenya (1997)

Amnesty International, Police reform in Kenya: A drop in the ocean (2013).

Constitution of Kenya Amendment Act 6 of 1992 Laws of Kenya

Constitution of Kenya, 2010

Constitution of the Republic of Kenya, 1963

Kenya Gazette Notice 7861 of 25 June 2024

Kenya National Commission on Human Rights (KNCHR), Assault on article 37 of the Constitution of Kenya, 2010 (2023),

Land Act 6 of 2012, Chapter 280 Laws of Kenya

National Police Service Act 11A of 2011 Laws of Kenya

Penal Code Act 10 of 1930 (Revised 2014) Laws of Kenya

Public Order Act Chapter 56 1950 (Revised 2018) Laws of Kenya

The Native Authority (Amendment) Ordinance of 1922 Laws of Kenya

The Statute Law (Repeals and Miscellaneous Amendments) Act 10 of 1997 Laws of Kenya

### **6.3.3 OSCE**

Organisation for Security and Co-operation in Europe (OSCE) Guidelines on peaceful assemblies (2010)

Organisation for Security and Co-operation in Europe Guidelines on freedom of peaceful assembly (2012)

### **6.3.4 United Nations**

Concluding observations on the fourth periodic report of Kenya, UNHR Committee (11 May 2021), UN Doc CCPR/C/KEN/CO/4 (2021)

Concluding observations on the second report of Kenya, UNHR Committee (29 April 2005) UN Doc CCPR/CO/83/KEN (2014)

Concluding observations on the third report of Kenya, UNHR Committee (31 August 2012), UN Doc CCPR/C/KEN/CO/3 (2015)

Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984)

General Assembly, Resolution on promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association (\* January 2019) Un Doc (A/RES/73/173) (2019)

Human Rights Commission, Joint report of the Special Rapporteur on the right to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies (4 February 2016) Un Doc A/HRC/31/66 (2016)

Human Rights Committee General Comment 34 on Article 19 of the ICCPR: Freedoms of opinion and expression

Human Rights Committee, Concluding observations on the fourth periodic report of Switzerland, UNHR Committee (22 August 2017), UN Doc CCPR/C/CHE/CO/4 (2017)

Human Rights Committee, General Comment 29 of 2001 on derogations from provisions of the Covenant during a state of emergency (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 (2001)

Human Rights Committee, General Comment 18 on non-discrimination under article 40, paragraph 4 of the International Covenant on Civil and Political Rights Un Doc CCPR/C/21/Rev.1/Add.1 (1989)

Human Rights Committee, General Comment 25 on Article 25 (Participation in public affairs and the right to vote), the right to participate in public affairs, voting rights and the right of equal access to public service (27 August 1966) UN Doc CCPR/C/21/Rev.1/Add.7 (1996)

Human Rights Committee, General Comment 31 (80) 31 on the nature of the general legal obligation imposed on States Parties to the Covenant (26 May 2004) Un Doc CCPR/C/21/Rev.1/Add.13 (2004)

Human Rights Committee, General Comment 33 on obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights (25 June 2009), Un Doc CCPR/C/GC/33 (2009)

Human Rights Committee, General Comment 37 on Article 21 of the International Covenant on Civil and Political Rights (17 September 2020) Un Doc CCPR/C/GC/37 (2020)

Human Rights Committee, Replies from the Government of Kenya to the list of issues (CCPR/C/KEN/Q/3) to be taken up in connection with the consideration of its third periodic report (CCPR/C/KEN/3) (2011)

Human Rights Committee, Resolution on the promotion, protection and enjoyment of human rights on the Internet (17 July 2018) UN Doc (A/HRC/RES/38/7) (2018)

Human Rights Council Human rights and transnational corporations and other business enterprises (15 July 2015) UN Doc (A/HRC/17/31) (2015)

Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai Un Doc A/HRC/20/27 (2012)



International Covenant on Civil and Political Rights (1966)

Office of the High Commissioner for Human Rights and Centre for Social, Economic and Cultural Rights, who will be held accountable? Human Rights and the Post-2015 Development Agenda is

Report from the Office of the High Commissioner for Human Rights fact-finding mission to Kenya (2008)

Report of the Human Rights Committee Moldova UN Doc A/57/40 (Vol I) (2002)

Universal Declaration of Human Rights (1948)

### **6.3.5 Others**

Biegon, J, Boru, A & Mawazo, D ‘Domestic adherence to continental and international norms in the practice of policing assemblies in Africa’ (2017)

Committee on Human Rights in Times of Emergency, Assessment of state practice in respect to times of emergency *International Law Association* (2024)

Godrick, R ‘The right of peaceful protest in international law and Australian obligations under the International Covenant on Civil and Political Rights’

International Labour Organisation Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87)

Orao, B ‘The use of force and firearms in the context of assemblies in Kenya: Rules and accountability’ PhD thesis, University of Pretoria (2023) - Thesis

Oxford Pro Bono Publico (OPBP) The law on policing peaceful protests (2020).

## **6.4 Judicial decisions and case law**

### **6.4.1 African Commission and the African Court**

*Association of Victims of Post Electoral Violence & Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009)

*Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* 2008) AHRLR 43 (ACHPR 2008)

*International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998)

*Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000)

*Kenneth Good v Botswana* (2010) AHRLR 43 (ACHPR 2010)

*Konate v Burkina Faso* [2013] AfCHPR 39

*Law Office of Ghazi Suleiman v Sudan (II)*, 2003 AHRLR 144 (ACHPR 2003)

*Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001)

*Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006)

#### **6.4.2 Domestic courts**

*Aids Law Project v Attorney General & others* [2015] eKLR; *Geoffrey Andare v Attorney General* [2016] eKLR

*Boniface Mwangi v Inspector General of Police & 5 others* [2017] eKLR

*Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others* [2016] eKLR

*Fredrick Ngari Muchira & 99 others v Pyrethrum Board of Kenya* [2012] eKLR (Fredrick Ngari case)

*Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR

*Hussein Khalid & 16 others v Attorney General & 2 others* [2017] eKLR

*Hussein Khalid & 16 others v Attorney General & 2 others* [2019] eKLR (Hussein Khalid SC case)

*Kasina v Attorney General & another* (Petition E369 of 2021) [2024] KEHC 7573 (KLR)

*Kenya National Commission on Human Rights v Attorney General & 2 others* [2020] eKLR

*Law Society of Kenya v Attorney General & 4 others* (Petition E307 of 2024) [2024] KEHC 7702 (Ruling)

*Law Society of Kenya v Attorney General & another* [2021] eKLR

*Law Society of Kenya vs Martin Mbae Kithinji & Isaiah Ndumba Murangi & 6 Others* (HCCHRPET/E373/2024) (unreported) order by Justice Bahati Mwamuye dated 14 August 2024

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (Petition 3 of 2018) [2021] KESC 34 (KLR)

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* [2021] KESC 34 (KLR)\

*Wilson Olal & 5 others v Attorney General & 2 others* [2017] eKLR

#### **6.4.3 European Court of Human Rights**

*Kasparov v Russia* ECHR (Application 21613/07), (3 October 2013)

*Tatár and Fáber v Hungary* ECHR (12 June 2012)

#### **6.4.4 Inter-American Commission of Human Rights**

*Lopez Lone et al v Honduras*, IACHR (5 October 2015) Series C No 302

#### **6.4.5 United Nations Treaty Body Mechanisms**

*Abildayeva v Kazakhstan*, Communication 2309/2013, UNHR Committee (4 April 2019), UN Doc CCPR/C/125/D/2309/2013

*Alekseev v Russia*, Communication 1873/2009, UNHR Committee (24 October 2013), UN Doc CCPR/C/109/D/1873/2009 (2013)

*Coleman v Australia*, Communication 1157/03, UNHR Committee (17 July 2006) UN Doc CCPR/C/87/D/1157/2003 (2006)

*Fedotova v Russia*, Communication 1932/2010, UNHR Committee (31 October 2012), UN Doc CCPR/C/106/D/1932/2010 (2010)

*Gryb v Belarus*, Communication 1316/2004 UNHR Committee (26 October 2011) UN Doc CCPR/C/103/D/1316/2004 (2011)

*Katosora v Belarus*, Communication 1836/2008 UNHR Committee (24 October 2012)

*Kivenmaa v Finland*, Communication 412/1990 UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/412/1990 (1994)

*Nepomnyashchiy v Russia*, Communication 2318/2013, UNHR Committee, (17 July 2018)  
UN Doc CCPR/C/123/D/2318/2013 (2018)

*Praded v Belarus*, Communication 2029/2011 UNHR Committee (10 October 2014), UN Doc  
CCPR/C/112/D/2029/2011 (2014)

*Pugach v Belarus*, Communication 1984/2010, UNHR Committee (15 July 2015), Un Doc  
(CCPR/C/114/D/1984/2010) (2015)

*Stambrovsky v Belarus*, Communication 1987/2010, UNHR Committee (24 October 2014),  
UN Doc (CCPR/C/112/D/1987/2010) (2014)

*Toonen v Australia*, Communication 488/1992, UNHR Committee (31 March 1994), UN Doc  
CCPR/C/50/D/488/1992 (1994)

*Turchenyak et al v Belarus*, Communication 1948/2010, UNHR Committee (24 July 2013),  
UN Doc (CCPR/C/108/D/1948/2010 (2013)

## 6.5 Internet sources

A Smith 'Woman says she was virtually 'raped' in the metaverse while others 'passed around a bottle of vodka' <https://www.independent.co.uk/tech/rape-metaverse-woman-oculus-facebook-b2090491.html>

A Wasike 'Kenyan police ban anti-government protests as death toll rises,' (Anadolu Agency, 19 July 2023) <https://www.aa.com.tr/en/africa/kenyan-police-ban-anti-government-protests-as-death-toll-rises/2949051>

ACHPR 'Ratification table' <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights>

Amnesty International 'Kenya: abductions of citizens suspected of involvement in protests violate human rights' <https://www.amnesty.org/en/latest/news/2024/06/kenya-abductions-of-citizens-suspected-of-involvement-in-protests-violate-human-rights/>

Amnesty International 'Kenya: Security services must respect fundamental rights during nationwide protests', <https://www.amnesty.org/en/latest/news/2024/07/kenya-security-services-must-respect-fundamental-rights-during-nationwide-protests/>

Amnesty International 'Military must operate within the bill of rights, 1 July 2024'  
<https://www.amnestykenya.org/military-must-operate-within-the-bill-of-rights/>

Armed Conflict Location & Event Data Project 'Kenya: police use excessive force in response to anti-government demonstrations' (2023) <https://acleddata.com/2023/09/26/kenya-situation-update-september-2023-police-use-excessive-force-in-response-to-anti-government-demonstrations/>

Article 19 'Time to defend protest for all' [https://www.article19.org/wp-content/uploads/2024/01/A19-Protests-under-threat\\_flagship\\_Nov22.pdf](https://www.article19.org/wp-content/uploads/2024/01/A19-Protests-under-threat_flagship_Nov22.pdf)

Bloomberg 'Ruto says 'no blood on my hands' after 24 die in Kenya protests' (30 June 2024)p  
<https://www.bloomberg.com/news/articles/2024-06-30/kenyan-president-defends-handling-of-deadly-youth-protests?embedded-checkout=true>

Britannica 'World war II to independence' <https://www.britannica.com/place/Kenya/World-War-II-to-independence>

C Rickard 'Long struggle for justice after failed Kenya coup, 8 October 2021'  
<https://africanlii.org/articles/2021-10-08/carmel-rickard/long-struggle-for-justice-after-failed-kenya-coup>

G Korwa & M Munyae 'Human rights abuse in Kenya under Daniel Arap Moi: 1978-2001'  
<https://static.csbsju.edu/Documents/Peace%20Studies/pdf/Human%20Rights%20Abuse%20in%20Kenya%20Under%20Moi.pdf>

G Obulutsa 'Kenyan lawmakers propose electoral reforms after weeks of protests'  
<https://www.reuters.com/article/world/kenyan-lawmakers-propose-electoral-reforms-after-weeks-of-protests-idUSKCN0YZ1HV/>

Human Rights Watch 'Human rights in Kenya (2002)'  
<https://www.hrw.org/reports/2002/kenya2/Kenya1202-02.htm>

Human Rights Watch 'Use of excessive force by the police'  
<https://www.hrw.org/reports/2008/kenya0308/7.htm>

Human Rights Watch 'World report, 2018, Kenya' <https://www.hrw.org/world-report/2018/country-chapters/kenya>

International Justice Resource Centre 'African Court Judge Ouguerouz reviews history of African Charter on Human and Peoples' Rights at 30th anniversary  
<https://ijrcenter.org/2011/11/09/achpr-speech/>

Jemimah Mueni 'Raila flags off countrywide protests against government' (2023)  
<https://www.capitalfm.co.ke/news/2023/03/raila-flags-off-countrywide-azimio-protests-over-iebc-selection-process/>.

Joint statement by the human rights community in Kenya on the state of the nation following protests on the 2024 Finance Bill, <https://icj-kenya.org/news/a-call-for-accountability-return-to-constitutionalism-and-cessation-of-violations/>

KNCHR 'How long must excessive force target peaceful protesters? 1 March 2024'  
<https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1185/How-Long-Must-Excessive-Force-Target-Peaceful-Protesters-Condemnation-of-Excessive-Use-of-Force-Against-KMPDU-Members>

KNCHR 'Statement on the aftermath of protests against the Finance Bill 2024 dubbed 'Occupy Parliament' (18 June 2024)  
<file:///C:/Users/HP/Downloads/KNCHR%20Press%20Statement%20-%20Occupy%20Parliament%20Protests%20-%20Against%20Finance%20Bill%202024.pdf>

KNCHR 'The fourth state of human rights report post promulgation 2010-2014: Human rights the elusive marriage?'  
<https://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>

KNCHR 'Update on the status of human rights in Kenya during the anti-Finance Bill protests (Monday 1 July 2024) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1200/Update-on-the-Status-of-Human-Rights-in-Kenya-during-the-Anti-Finance-Bill-Protests-Monday-1st-July-2024>

L Fleming & W Muia 'Kenyan leader faces furious young people in online debate, 5 July 2024'  
<https://www.bbc.com/news/articles/ce58y8ngdk5o>

N Sales 'A girl was allegedly raped in the metaverse: Is this the beginning of a dark new future?' <https://www.theguardian.com/commentisfree/2024/jan/05/metaverse-sexual-assault-vr-game-online-safety-meta>

Nathan Reiff 'Social networking companies and what they own' [Social Networking Companies and What They Own \(investopedia.com\)](#)

President Ruto declines to sign Finance Bill, calls for its withdrawal' <https://www.president.go.ke/president-ruto-declines-to-sign-finance-bill-calls-for-its-withdrawal/>

Press release 'The African Commission on Human and Peoples' Rights expresses deep concern over human rights violations and growing tensions amid mass protests in the republic of Kenya' 26 June 2024, <https://achpr.au.int/en/news/press-releases/2024-06-26/deep-concern-over-human-rights-violations-growing-tensions-amid-mass>

Secretary-General deeply concerned over reported deadly violence related to protests, street demonstrations in Kenya, 25 June 2024' <https://press.un.org/en/2024/sqsm22286.doc.htm>

Sharon Resian 'Nairobi police chief says planned Azimio protests illegal, cites order act' (2023), <https://www.capitalfm.co.ke/news/2023/03/nairobi-police-chief-says-planned-azimio-protestsillegal-cites-order-act/>

Statement on Mukuru murders and updates on the anti-Finance Bill protests (2024), <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1201/Statement-on-Mukuru-Murders-and-Updates-on-the-Anti-Finance-Bill-Protests>

The African Commission on Human and Peoples' Rights expresses deep concern over human rights violations and growing tensions amid mass protests in the Republic of Kenya, 26 June 2024 <https://achpr.au.int/en/news/press-releases/2024-06-26/deep-concern-over-human-rights-violations-growing-tensions-amid>

The Capital news 'The Kenya Defence Forces (KDF) personnel will be deployed in all 47 counties to aid police in reinforcing security in the country following Tuesday's deadly protests that left at least 23 dead.' <https://www.capitalfm.co.ke/news/2024/06/kdf-deployment-to-cover-47-counties-with-focus-on-critical-infrastructure-duale/>

The East African 'Kenya: Protesters defy William Ruto, pro-State groups counter them', <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-protesters-defy-ruto-pro-state-groups-counter-them-4699716>

The Standard 'Safaricom scrambles to shore up Gen Z market in wake of protest'  
<https://www.standardmedia.co.ke/enterprise/article/2001498683/safaricom-scrambles-to-shore-up-gen-z-market-in-wake-of-protests>

UN Office of the High Commissioner on Human Rights  
<https://news.un.org/en/story/2023/07/1138742>

UN OHCHR 'Lift protest ban, protect judiciary and preserve civil society role, UN rights experts urge Kenya', <https://news.un.org/en/story/2017/10/568642>

United Nations (UN) 'The foundation of international human rights law'  
<https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>

United Nations Office of the High Commissioner on Human Rights, The right to peaceful assembly <https://www.ohchr.org/en/peaceful-assembly>

United Nations treaty collection  
[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en)

US State Department 'Kenya 2018 human rights report' (2018), <https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf>

Voice of Africa 'Kenya's turmoil widens as anti-government protesters clash with emerging pro-government group' <https://www.voanews.com/a/kenya-s-turmoil-widens-as-anti-government-protesters-clash-with-emerging-pro-government-group-/7709661.html>

W Muia 'Kenyan court allows military deployment to quell protests', <https://www.bbc.com/news/articles/c897gnr9z4vo>

Willy Mutunga 'Demonstrations should not be individualised, it is a right for all' (2022), <https://www.the-star.co.ke/opinion/columnists/2022-12-11-willy-mutunga-demonstrations-should-not-be-individualised-it-is-a-right-for-all/>