# The Use of Force and Firearms in the Context of Assemblies in Kenya: Rules and Accountability

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**Declaration**

I declare that this thesis, which I submit for the degree Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria, is my own original work and has not previously been submitted to any other University for a degree.

Signature 

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## Acronyms and Abbreviations

| | |
|---|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| AG | Attorney General |
| APS | Administration Police Service |
| ASEAN | Association of Southeast Asian Nations |
| ASTU | Anti-stock Theft Unit |
| BBC | British Broadcasting Corporation |
| BPU | Border Patrol Unit |
| CAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CCIO | County Criminal Investigation Officer |
| CIPEV | Commission of Inquiry into the Post-election Violence |
| CIPU | Critical Infrastructure Protection Unit |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| DCI | Directorate of Criminal Investigations |
| DIG-APS | Deputy Inspector General-Administration Police Service |
| DIG-KPS | Deputy Inspector General-Kenya Police Service |
| Doc | Document |
| ECommHR | European Commission of Human Rights |
| ECtHR | European Court of Human Rights |
| GSU | General Service Unit |
| HRC | United Nations Human Rights Council |
| HRCttee | United Nations Human Rights Committee |
| IACtHR | Inter-American Court of Human Rights |
| IAU | Internal Affairs Unit |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| IG-NPS | Inspector General-National Police Service |
| IPOA | Independent Policing Oversight Authority |
| KNCHR | Kenya National Commission on Human Rights |
| KPS | Kenya Police Service |

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|---|---|
| LLWs | Less-Lethal Weapons |
| NACOSTI | National Commission For Science, Technology & Innovation |
| NPS | National Police Service |
| NPSC | National Police Service Commission |
| NPSSO | National Police Service Standing Orders |
| NYPD | New York Police Department |
| OAS | Organization of American States |
| OCPD | Officer Commanding Police Division |
| OCS | Officer Commanding Police Station |
| ODHIR | Office for Democratic Institutions and Human Rights |
| ODPP | Office of the Director of Public Prosecutions |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| OSCE | Organization for Security and Co-operation in Europe |
| Para | Paragraph |
| RCIO | Regional Criminal Investigation Officer |
| RDU | Rapid Deployment Unit |
| Res | Resolution |
| SCCIO | Sub-county Criminal Investigation Officer |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNAMI | United Nations Assistance Mission in Iraq |
| UNESCO | United Nations Educational, Scientific and Cultural Organisation |
| UNGA | United Nations General Assembly |
| UNMIK | United Nations Interim Administration Mission in Kosovo |
| UNODC | United Nations Office on Drugs and Crime |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| VOA | Voice of America |
| WHO | World Health Organization |

**Abstract**

The right of peaceful assembly is guaranteed under the Constitution of Kenya, and in international treaties that Kenya has ratified. However, its actual exercise has been inhibited by restrictive public order laws and permissive rules and regulations governing the use of force and firearms by law enforcement officials. As a result, cases of excessive use of force by the police during assemblies, sometimes leading to loss of lives and serious injuries, have been common. Accountability for such violations, on the other hand, has been rare. This thesis addresses how human rights violations by the police during assemblies in Kenya can be prevented and redressed. In doing so, it interrogates the international legal framework on the right of peaceful assembly and on the use of force and firearms by law enforcement officials, and assesses the compatibility of the domestic laws with international standards. The thesis also analyses the organisational and operational structures of Kenya's National Police Service (NPS) how they shape interactions between assembly participants and law enforcement officials. In addition, it assesses the existing police oversight and accountability mechanisms at the domestic level in Kenya.

The thesis finds that there are gaps in the Kenyan legal framework on the rright of peaceful assembly and on the use of force and firearms by law enforcement officials. It also finds that there are gaps in relation to the organisational and operational structures of the National Police Service, and in the police oversight and accountability mechanisms. It demonstrates how these gaps collectively influence the manner in which law enforcement officials in Kenya police assemblies, and the extent to which they are held accountable for human rights violations committed in the context of assemblies. The thesis then proposes recommendations on legal, administrative and other measures that should be taken to enhance the enjoyment of the right of peaceful assembly, prevent human rights violations by law enforcement officials during assemblies and enhance accountability for violations.

**Keywords:** assemblies; peaceful assembly; human rights violations; assembly participants; law enforcement officials; use of force and firearms; accountability.

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# Chapter 1: Introduction

## 1.1 Introduction and Background to the Research

The right of peaceful assembly is a fundamental human right guaranteed under international human rights law. It can be exercised in many ways, including through protests, demonstrations, sit-ins, meetings or rallies.[1] It is protected under regional and international human rights instruments, including the Universal Declaration of Human Rights (Universal Declaration),[2] the International Covenant on Civil and Political Rights (ICCPR),[3] the Convention on the Rights of the Child (CRC),[4] the Convention on the Rights of Persons with Disabilities (CRPD),[5] the European Convention on Human Rights (European Convention)[6] and the African Charter on Human and Peoples' Rights (African Charter).[7]

Other than being guaranteed in the above-mentioned instruments, it is also provided for in a total of 184 national constitutions.[8] For instance, Article 37 of the Constitution of Kenya provides that 'every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.' As per the wording in this provision, an assembly must be conducted peacefully and the participants must not be armed. The peacefulness requirement is also found in most of the international, including regional human rights instruments, save for the African Charter which does not mention the requirement but, nevertheless, expects assembly participants to exercise their rights having due regard to the

[1] UN Human Rights Committee, 'General Comment 37: Article 21 (The Right of Peaceful Assembly)' 2020, CCPR/C/GC/37, para. 6. Also see Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, para. 24.
[2] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Article 20.
[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 21.
[4] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 15.
[5] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc A/61/611, Article 21.
[6] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 222; 312 ETS 5, Article 11.
[7] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 11.
[8] General Comment 37 (n. 1), para. 3.

rights of others.[9] Apart from this precondition, the right is also subject to reasonable and justifiable restrictions permitted by law.[10]

The right of peaceful assembly has been recognised as 'an essential component of democracy'[11] and 'a vehicle for the exercise of many other civil, cultural, economic, political and social rights.'[12] It is a particularly important tool for those who may not have effective alternative ways of voicing their concerns.[13] While the right is held individually, it is exercised collectively.[14] Throughout history, communities across the globe have used their freedom of peaceful assembly to collectively express their discontent with various matters. In some cases, protests have led to radical changes in regimes. For example, in India, Mahatma Gandhi led a successful non-violent resistance against British colonial rule.[15] The civil rights movement in the 1960s also saw multiple protests that led to significant changes in various countries.[16] In South Africa, anti-apartheid

[9] Article 27(2) of the African Charter emphasises the need for rights holders to exercise their rights with 'due regard to the rights of others, collective security, morality and common interest.' Compliance with this provision requires participants in assemblies to refrain from engaging in conduct that is likely to violate the rights of others.

[10] Article 21 of the ICCPR states that restrictions on the exercise of the right of peaceful assembly must be 'those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.' Article 24 (1) of the Constitution of Kenya, 2010 contemplates restrictions on rights and fundamental freedoms generally. It provides that limitations must be prescribed by law, and they must also be reasonable and justifiable in an open and democratic society. Among the factors that should be taken into account when imposing limitations is the need to ensure that the enjoyment of fundamental rights and freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

[11] UN Human Rights Council, 'Resolution 15/21 on the rights to freedom of peaceful assembly and of association' A/HRC/15/L.23, 27 September 2010, preamble.

[12] 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, 21 May 2012, para. 12.

[13] See, for instance, *SATAWU and another v. Garvas and others* 2011 (6) SA 382 (SCA), paragraph 61 where the Constitutional Court of South Africa observed that the right of peaceful assembly 'exists primarily to give a voice to the powerless.'

[14] The UN Human Rights Committee has emphasised, on a number of occasions, that the right of peaceful assembly can only be exercised where a minimum of two people are involved. See, for instance, the Committee's decision in *Patrick John Coleman v. Australia,* Communication No. 1157/2003, UN Doc. CCPR/C/87/D/1157/2003 where the Committee stated that a protest by one person does not fall within the meaning of an assembly. Also see, NS Brod 'Rethinking a Reinvigorated Right to Assemble' (2013) 63 Duke Law Journal at 155. At page 166, the author argues that the right of peaceful assembly is aimed '…at facilitating individual participation in a physical collective with others….' He also makes reference to a statement by Justice Antonin Scalia (now deceased) of the US Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), at 579, where the Judge wrote that although "the right to assemble cannot be exercised alone . . . it is still an individual right…."

[15] M King, 'Mahatma Gandhi and Martin Luther King Jr: The Power of Non-violent Action' (UNESCO, 1999).

[16] BBC 'The People are revolting – the history of protest.' Available at https://www.bbc.com/timelines/ztvxtfr.

protests within and outside the country contributed to the collapse of the *apartheid* regime.[17] The practical importance of the freedom of peaceful assembly continues to be witnessed today. From Hong Kong,[18] to Puerto Rico,[19] to Malawi,[20] the Sudan[21] and many other countries, members of the public have used the power of their collective voices and the strength of their numbers to question authorities and express their dissatisfaction with the state of affairs in their respective countries. Admittedly, there are some cases where assemblies have been violent and have been used to negate or abuse human rights.[22]

In spite of its importance, the actual exercise of the right of peaceful assembly has faced many challenges in many countries. In the Sudan, for instance, at least 128 protesters were killed between February and July 2019 during anti-government demonstrations that began in February 2019 and saw the removal from power of long-serving Sudanese President, Omar al-Bashir.[23] In Kenya, members of the public exercising their right of peaceful assembly have equally faced challenges – with one of the major challenges being the frequent excessive or indiscriminate use of force by law enforcement officials during assemblies. There have been many cases of unarmed protesters, bystanders, and general members of the public, including children, being either shot or severely injured by the police.[24] Since assemblies that are held without prior notice having

[17] L Kurtz, 'The Anti-Apartheid Struggle in South Africa (1912-1992)' The International Centre for Non-violent Conflict (2010). Available at https://www.nonviolent-conflict.org/anti-apartheid-struggle-south-africa-1912-1992/.

[18] See Al Jazeera, 'Hong Kong Protests: All the Latest Updates.' Available at https://www.aljazeera.com/news/2019/06/hong-kong-protests-latest-updates-190612074625753.html.

[19] See New York Times, '15 Days of Fury: How Puerto Rico's Government Collapsed.' Available at https://www.nytimes.com/2019/07/27/us/puerto-rico-protests-timeline.html.

[20] See The East African, 'Fresh Protests over Disputed Elections in Malawi.' Available at https://www.theeastafrican.co.ke/news/africa/Fresh-protests-over-disputed-elections-in-Malawi/4552902-5182992-146lm61/index.html.

[21] BBC News, 'Sudan Crisis: What you need to Know.' Available at https://www.bbc.com/news/world-africa-48511226.

[22] For instance, during the 2012 protests in Pakistan over an anti-Islam film, at least 10 people were killed by the protesters and several properties were also set ablaze. See France 24, 'Protests over anti-Islam film turn deadly in Pakistan' 21 September 2012. Available at https://www.france24.com/en/20120921-protests-over-anti-islam-film-turn-deadly-pakistan-prophet-karachi-usa.

[23] N Ching, 'More deaths Reported in Sudan Protests' Voice of America, 1 July 2019. Available at https://www.voanews.com/africa/more-deaths-reported-sudan-protests. Government sources, however, put the death toll at 61, a figure which was disputed by the World Health Organization. See, Africa News, 'WHO rejects Sudan's Report on Death Toll of Protesters.' 14 June 2019. Available at https://www.africanews.com/2019/06/14/who-reject-sudan-s-report-on-death-toll-of-protesters-june-2019//.

[24] For instance, in early 2016 when the supporters of opposition parties staged weekly demonstrations calling for reforms in the Independent Electoral and Boundaries Commission, 4 people were shot dead while 88 were seriously

been given are considered per se unlawful under Kenyan law,[25] police officers usually disperse such assemblies.[26] Under international law, dispersal of assemblies can be a legitimate response where an assembly poses a serious threat to bodily safety or property,[27] or where the disruption caused by an assembly is so great that balancing of rights makes it necessary for an assembly to be dispersed.[28] However, dispersal should only be resorted to in exceptional cases.[29] Further, the use of force during dispersal should be avoided, and where this is not possible, only minimum necessary force should be used.[30]

Under Kenyan law, where an assembly is not held in full compliance with the provisions of section 5 of the Public Order Act, it may be dispersed whether or not it is peaceful.[31] As expected, in cases where force is used during the dispersal of the assemblies, the consequences of such use of force vary from minimal discomfort to death, depending on the nature of weapons used and how they are used. As discussed in chapter 4 and chapter 5, a combination of restrictive provisions in the Public Order Act, overly permissive domestic laws on the use of force and firearms, and inadequate operational structures for the policing of assemblies have created an

injured. See, The Independent Policing Oversight Authority, 'Monitoring Report on Police Conduct during Public Protests and Gatherings: A Focus on the Anti-IEBC Demonstrations (April – June 2016)' at p. 30. Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf . In his reaction to the protests, the then Cabinet Secretary for Interior and Coordination of National Government, Joseph Nkaissery stated that "the Ministry had enough teargas at its disposal and that the police had just acquired new equipment to deal with protesters." See Kiprotich Chepkoit, 'CS John Nkaissery Directive Comes to Pass' Standard Digital, 18 May, 2016) Available at http://www.standardmedia.co.ke/article/2000202179/cs-john-nkaissery-directive-comes-to-pass.

[25] See Public Order Act, Cap. 56, 1950, Laws of Kenya. Section 5(1) of the Act provides that must be held only in accordance with the provisions of the Act. Section 5(2) makes the requirement of notification mandatory.

[26] See Monitor, 'Dispersal of Protests Continues to be a Major Challenge to Peaceful Assembly.' Available at https://monitor.civicus.org/newsfeed/2019/05/23/dispersal-protests-continues-be-major-challenge-peaceful-assembly/.

[27] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns' A/HRC/31/66, para. 61.

[28] See ECtHR [GC], *Kudrevicius & others v. Lithuania,* Application No. 37553/05, Judgment of 15 October 2015, para. 173, where the court held that serious inconvenience to the activities of other members of the public may be sanctioned.

[29] General Comment 37 (n. 1), para. 86.

[30] n. 29.

[31] Section 5(8)(a) of the Public Order Act provides that 'the regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of— (a) any public meeting or public procession held contrary to the provisions of sub-sections (2) or (6);…and may, for any of the purposes aforesaid, give or issue such orders, including orders for the dispersal of the meeting, procession or gathering as are reasonable in the circumstances….'

enabling environment for the use of excessive force against assembly participants. For instance, the National Police Service Act[32] allows police officers wide discretion to use firearms.[33] Consequently, in many instances of the use of firearms, especially in the course of assemblies, their use will not be subject to sanction provided that it can be justified under domestic law.

This thesis thus argues that the Kenyan legal framework on the right of peaceful assembly does not adequately support the exercise of peaceful assembly, and that there is no clear regulatory framework for the policing of assemblies. It also argues that the police accountability framework in Kenya cannot adequately address human rights violations committed by law enforcement officials in the context of assemblies, especially of the right to life, the right to be free from torture and ill-treatment and the right of peaceful assembly itself. The thesis therefore makes recommendations on how human rights violations by law enforcement officials in Kenya in the context of assemblies can be prevented and redressed.

### 1.2 Statement of the Problem

Under international law, States have an obligation to respect and ensure the freedom to exercise the right of peaceful assembly.[34] The obligation to respect requires States to refrain from restricting the right except in cases where the restrictions have been prescribed by law.[35] The obligation to ensure requires States to take action to prevent the violation of this right by both State and non-state actors, and to create an enabling environment for its exercise.[36] This would

[32] National Police Service Act, No of 2011, Laws of Kenya.
[33] n. 32, 6th Schedule, Part B, Section 1. This provision is contrary to international human rights standards which requires that potentially lethal weapons should only be resorted to when strictly necessary in order to protect life or prevent serious injury from an imminent threat. See UN Human Rights Committee, 'General Comment 36: Article 6 (The Right to life)' 2018, CCPR/C/GC/36, para. 12. Also see African Commission on Human and Peoples' Rights, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 27. Notably, in the December 2022 decision in *Katiba Institute & AFRICOG v. Attorney-general & others, High Court Nairobi Petition No. 379 of 2017*, the High Court of Kenya declared amendments to the Sixth Schedule of the NPS Act which broadened the circumstnaces under which firearms may be used to be unconstitutional. While this marked an important step in aligning domestic standards to international human rights standards, the NPS Act had not been amended as of writing.
[34] UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clement Voule' A/HRC/41/41, 17 May 2019, para. 10.
[35] Joint report on the proper management of assemblies (n. 27), para. 14.
[36] n. 35.

include taking legislative and other measures to guarantee the right and to regulate the use of force by law enforcement officials in the context of assemblies.

Although Article 37 of the Constitution of Kenya[37] guarantees the right of peaceful assembly, its actual exercise has been constrained by restrictive public order laws and penal laws. In addition, domestic laws and regulations governing the use of force and firearms by the police do not meet international standards and therefore enable human rights violations against assembly participants.[38] There have been many cases of police officers using excessive force to disperse assembly participants, thereby causing serious injuries to the participants or bystanders, and in some cases causing the loss of lives.[39] A common response of the Kenyan government to complaints about human rights violations committed against assembly participants by the police has been to deny the existence of such violations and sometimes brand the participants as criminals.[40] As a result, violations committed by law enforcement officials in the context of assemblies are hardly ever addressed. Failure to hold perpetrators accountable and provide redress for victims not only breeds a culture of impunity within law enforcement agencies but also has the potential of instilling amongst members of the public the fear of exercising their right of peaceful assembly (the so-called 'chilling effect').

This thesis identifies how violations by law enforcement officials in the context of assemblies can be prevented and redressed in the particular context of Kenya. In doing so, it analyses the international legal framework on the right of peaceful assembly and on the use of force by law enforcement officials and assesses the compatibility of the domestic laws with international standards. This thesis also analyses the organisational and operational structures of the National Police Service (NPS) and how they shape the interactions between assembly participants and law enforcement officials. In addition, the study assesses the existing police

[37] The Constitution of the Republic of Kenya, 2010.
[38] These laws are discussed in detail in chapter 4.
[39] For instance, following the electoral dispute over the 2007 Presidential election, the Commission of Inquiry into the Post-election Violence which investigated the post-election violence found that 405 civilians were fatally shot by police. See Report of the Commission of Inquiry into Post-Election Violence, p. 417. Available at http://kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.
[40] See, for instance, The Star Newspaper, 'Matiang'i denies use of live bullets, deaths in post-election protests' 12 August 2017. Available at https://www.the-star.co.ke/news/2017/08/12/matiangi-denies-use-of-live-bullets-deaths-in-post-election-protests_c1615392.

oversight and accountability mechanisms at the domestic level in Kenya with a view to identifying gaps within these mechanisms.

### 1.3. Objective and Significance of the Research

Kenya has a progressive Constitution that dedicates a whole chapter to fundamental rights and freedoms. Since its promulgation in 2010, there have been a number of positive developments in relation to most of the rights guaranteed in it.[41] However, in relation to the right of peaceful assembly, apart from its inclusion in the Constitution as one of the fundamental rights, there have been no other significant changes in either law or practice. The provisions in the Public Order Act which regulate gatherings have remained the same. In fact, there seems to have been a general move towards further restriction of the right.[42] The use of excessive force against assembly participants, leading to violations of their right to life and bodily integrity, is also a persistent problem.

The objective of this research is to establish what legal, administrative or other measures should be taken to enhance the enjoyment of the right of peaceful assembly, prevent human rights violations by law enforcement officials in the context of assemblies and enhance accountability for such violations. In this sense, this research seeks to contribute to the creation of an environment that fosters the full enjoyment of the right of peaceful assembly in Kenya.

### 1.4. Research Questions

In light of the background painted above, this research revolves around the following central research question:

[41] For instance, police officers can no longer detain suspects for longer than 24 hours and there are cases where courts have compelled individual police officers to compensate those they detained for longer than 24 hours. Many pieces of legislation have also been enacted to give effect to some of the rights. For example, the Prevention of Torture Act was enacted in 2017 and it prescribes harsh penalties for persons found guilty of offences under the Act. There is also the Persons Deprived of Liberty Act, 2016 which has enhanced protections for detainees, the Access to Information Act of 2016 which provides a framework for realization of the right tof access to information, among other legislation.

[42] See *Ngunjiri Wambugu v. Inspector General of Police, & 2 others* [2019] eKLR, at para. 50 (c) and (d). There was also the Public Order (Amendment) Bill 2019 which sought to introduce penalties to participants and organizers of assemblies for damages caused during assemblies. The Bill was later rejected by Parliament.

1. How can human rights violations by law enforcement officials in Kenya in the context of peaceful assemblies be prevented and redressed?

To answer the question above, the following secondary questions are answered:

2. What is the international legal framework on the right of peaceful assembly and on the use of force by law enforcement officials?
3. What is the Kenyan legal framework on the right of peaceful assembly and on the use of force, and how have the laws shaped the interactions between law enforcement officials and assembly participants?
4. How has the organisational and operational structure of law enforcement agencies in Kenya influenced how they police assemblies?
5. In relation to violations committed by law enforcement officials during assemblies, what is the problem with the existing accountability mechanisms in Kenya?

### 1.5. Methodology

In this thesis, a doctrinal analysis of key legal instruments is conducted. This involves a descriptive and in-depth analysis of legal provisions on the right of peaceful assembly and on the use of force by law enforcement officials as set out in key international human rights instruments and relevant domestic laws. Soft law instruments are also analysed, having regard to their status under international law.

The thesis further relies on scholarly publications, reports from various institutions at the domestic and international level, and case law from national, regional and international courts to analyse various issues that are discussed in this research. Jurisprudence from the UN Human Rights Committee, the European Court of Human Rights, the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights are also used to illustrate how various aspects of the right of peaceful assembly and the use of force by the police have been interpreted in the context of assemblies. In the discussion on the Kenyan legal framework on both the right of peaceful assembly and the use of force by law enforcement officials, comparisons are made between the domestic and international framework with a view to

establishing the extent of compliance with international standards. Case law from Kenyan courts is also used in this analysis.

To explore how the organisational and operational structures of the National Police Service influence police response to peaceful assemblies, this thesis analyses secondary literature, including relevant legislation, information available on the official websites of the different components of the NPS, official reports of oversight institutions and internal NPS guidelines on the use of force and firearms and on public order management. In addition, the thesis relies on information obtained from structured face-to-face interviews with eight police officers (two police station commanders and six frontline officers), three officials from the Independent Policing Oversight Auhtority (IPOA) and one official from the Internal Affairs Unit (IAU). The interviews with officials from IPOA and IAU also aided in assessing accountability gaps in the existing police oversight and accountability mechanisms. Interviews were conducted after ethical clearance was obtained from the University of Pretoria and the National Commission for Science, Technology and Innovation. In relation to the interviews with police officers, additional permission was required from the Inspector-General of the NPS. Although permission was sought, the same was not obtained. Consequently, the information shared by the eight police officers who agreed to be interviewed does not necessarily reflect the official position of the NPS.

**1.6 Scope and Limitations**

This research primarily addresses accountability for the use of force and firearms by law enforcement officials in the context of assemblies in Kenya. It interrogates the scope of legal protection of the right of peaceful assembly in Kenya, domestic regulation of the use of force and firearms in the policing of assemblies and accountability for human rights violations that result from the unlawful use of force and firearms. The domestic legal standards are compared against international human rights standards. While many violations may occur during an assembly, the thesis pays particular attention to the right to life and the right to freedom from torture and ill-treatment since they are most at risk whenever police resort to the use of force and firearms.

A major limitation of this research was the failure to interview certain key officials of the NPS. The intention was to interview 40 officials of the NPS comprising of heads of operational

commanders at the national and county level, five trainers from the police training institutions, five station commanders and 25 frontline police officers. As stated earlier, additional permission was required from the head of the NPS. A request for permission to interview the police officers was submitted but was declined by the Inspector-General of the NPS. This meant that official information on training, equipping and general preparedness of police officers for public order operations was not obtained. This gap was however mitigated in two ways. First, through analysis of information retrieved from the NPS Draft Manual of Guidance on Public Order Management and the NPS Draft Manual of Guidance on the Use of Force and Firearms, both of which were shared with the author by the NPS.[43] Secondly, information was gathered from unofficial interviews with eight police officers who agreed to be interviewed even after being informed that the the Inspector-General's authorisation had not been obtained. The information they shared was then verified through a comparison with guidelines contained in the internal police guidelines, observations made by officials from IPOA who were interviewed, and information contained in monitoring reports of oversight agencies.

### 1.7 Outline of Chapters

This thesis is divided into seven chapters. The present chapter is the introduction. Chapter 2 discusses the international legal framework on the right of peaceful assembly. The chapter analyses the scope of the right of peaceful assembly under international law, State obligations in relation to the right, circumstances under which restrictions may be imposed against the exercise of the right, and the procedural requirements for its exercise.

Where the use of force in the context of an assembly becomes necessary, the question of how much force can be used and under what circumstances has to be considered. Chapter 3 therefore analyses the international legal framework on the use of force and firearms by law enforcement officials with a view to setting out the accepted human rights standards. Key principles governing the use of force by law enforcement officials, namely the principles of legality, precaution, necessity, proportionality, non-discrimination and accountability are discussed. The chapter also analyses standards on the use of specific less-lethal weapons

[43] As of writing, the guidelines had not been finalised.

commonly used during assemblies and tactical options for law enforcement officials. The overall purpose of chapter 3 is to set a standard against which law enforcement operations in the context of assemblies in Kenya can be measured.

Chapter 4 analyses the Kenyan legal framework on the right of peaceful assembly and on the use of force by law enforcement officials. The domestic standards are compared against the international standards set out in chapters 2 and 3 to assess their level of compliance with the international standards. The chapter also analyses how the domestic laws shape the interactions between assembly participants and law enforcement officials.

Aside from laws, other factors also influence how law enforcement officials police assemblies. One important factor is the operational capacity of law enforcement agencies to police assemblies within a human rights framework.[44] If, for instance, law enforcement officials have limited access to less-lethal weapons (particularly those that can operate at a distance), the likelihood of them resorting to lethal force during assemblies may increase. Chapter 5 therefore analyses the organisational and operational structures within the NPS and how the existing structures influence police response to assemblies.

As the preceding chapters demonstrate, the use of force and firearms by the police during assemblies may lead to violations, particularly of the right to life, the freedom from torture and ill-treatment and the right of peaceful assembly itself. Chapter 6 thus focuses on the question of police accountability for human rights violations committed in the context of assemblies in Kenya. It analyses the existing internal and external police oversight and accountability mechanisms at the domestic level and assesses their adequacy in ensuring accountability of law enforcement officials for lethal and non-lethal violence perpetrated against assembly participants. This discussion focuses on both legislative gaps as well as structural gaps within these oversight mechanisms.

[44] African Commission on Human and Peoples' Rights, 'Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa' (2017), pp 10-13.

Chapter 7 summarises the research findings and conclusions and proposes recommendations on how to increase the space within which the right of peaceful assembly can be exercised.

## Chapter 2: The International Legal Framework on the Right of Peaceful Assembly

### 2.1 Introduction

As noted in chapter 1, the right of peaceful assembly is guaranteed in various international, including regional human rights instruments. This chapter examines the legal framework establishing the right at the international level. It looks at the different components of the right, including: its definition; state obligations in relation to the right; procedural requirements for its exercise; and circumstances in which it can be restricted. The chapter also addresses the question of responsibility of organisers and participants for any harm or damage that may result from assemblies.

The discussion commences with an analysis of the formulation of the provisions on the right of peaceful assembly in key global human rights instruments. The primary document that is discussed is the International Covenant on Civil and Political Rights[1] (ICCPR or 'the Covenant'). On the regional front, the European Convention on Human Rights[2] (European Convention), the American Convention on Human Rights[3] (American Convention) and the African Charter on Human and Peoples' Rights[4] (African Charter) are the instruments that are considered throughout the chapter. The Arab Charter on Human Rights[5] (Arab Charter) and the ASEAN Human Rights Declaration[6] (ASEAN Declaration) are also briefly discussed in the analysis of the formulation of the right, though reference is not made to them in the rest of the chapter.[7]

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 222; 312 ETS 5.
[3] OAS, American Convention on Human Rights, (adopted 22 January 1969, entered into force 18 July 1978) 1144 UNTS 123.
[4] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[5] League of Arab States, Arab Charter on Human Rights, (adopted 22 May 2004, entered into force 15 March 2008).
[6] ASEAN Human Rights Declaration, adopted 18 November 2012.
[7] This is because the Arab Charter deviates from accepted international human rights standards and does not provide for a monitoring or complaints mechanism. It does not also have an enforcement mechanism, such as a regional court or commission of human rights. As such, there is no jurisprudence from the Arab human rights system that can be relied on for interpretation and application of the right of peaceful assembly as provided for in the Arab Charter. On the other hand, the ASEAN Declaration is not a legally binding instrument and therefore none of its provisions gives rise to binding legal obligations.

The chapter then proceeds to discuss the scope of the right of peaceful assembly. In this section, the chapter looks at the definitional elements of the right and the requirement of peacefulness. A discussion of the State obligations under Article 21 is followed by consideration of the procedural requirements in relation to the right and restrictions on its exercise. The chapter closes with a discussion of the relationship between the right of peaceful assembly and the freedoms of expression and association. In the analysis of the various aspects of the right, particular attention is paid to the jurisprudence of the United Nations (UN) Human Rights Committee (HRCttee or 'the Committee'). Jurisprudence from regional human rights systems is also used to highlight regional perspectives on the substance of the right of peaceful assembly. Notably, the jurisprudence of the European Court of Human Rights forms the bulk of references to regional case law. This is mainly because there is, to date, comparatively limited jurisprudence on the right of peaceful assembly from the Inter-American and African systems.

### 2.2 The significance of the right of peaceful assembly in international law

The democratic function of the right of peaceful assembly has been underscored by most of the literature on the right, including by the HRCttee.[8] The UN Human Rights Council has also adopted resolutions in which it has emphasised that assemblies can contribute to the development of strong and effective democratic systems, and to the realisation of other fundamental rights and freedoms.[9] Similarly, the UN General Assembly and the mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and association have also acknowledged this important role of peaceful assemblies.[10]

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UN News, 'Arab rights charter deviates from international standards, says UN official'. (30 Jan. 2008). Accessed at https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official.

[8] See, for example; *Praded v. Belarus*, Communication No. 2029/2011, 10 October 2014, CCPR/C/112/D/2029/2011, para. 7.4; *Abildayeva v. Kazakhstan*, Communication No. 2309/2013, 4 April 2019, CCPR/C/125/D/2309/2013, para. 8.5.

[9] UN Human Rights Council, 'Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/38/11, Adopted on 6 July 2018.

[10] UN General Assembly, 'Resolution 73/173 Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association' A/RES/73/173, Adopted on 17 December 2018. Also see, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns, UN Human Rights Council, A/HRC/31/66, 4 February 2016, para. 5.

Owing to its broad social and democratic function, it has been argued that States are under a stronger duty to ensure the exercise of the right of peaceful assembly than they are in relation to other civil and political rights which majorly serve private interests.[11] This is because the aim of the exercise of the right of peaceful assembly goes beyond the individual. Observing that the right of peaceful assembly, to freedom of expression, and to freedom of association are essential for democracy, the Inter-American Court of Human Rights has stated that 'protests and related opinions in favour of democracy should be ensured the highest protection.'[12] Noting that not all assemblies pursue causes that are in favour of democracy but nevertheless require facilitation and protection, the statement appears to contradict the principle of content neutrality discussed later in this chapter. Still, the point the Inter-American Court has emphasised is the fact that peaceful assemblies generally require a higher level of protection than certain other rights.

Peaceful assemblies can function as a public participation tool or an accountability tool.[13] As a public participation tool, assemblies provide space for the public to communicate, form and influence opinions about issues of concern and to pressurise the authorities—without any use of force—to address these concerns. As an accountability tool, peaceful assemblies have been used to question the conduct of authorities, and in some cases demand the removal from power those deemed to be of no use to the public. Consequently, they can contribute to the development of more just and accountable societies.[14]

Although the right of peaceful assembly can be used to purse a variety of causes, it has been widely used as an avenue for expressing political opinions or dissent especially against State

[11] W Schabas, 'UN Covenant on Civil and Political Rights: Nowak's CCPR Commentary' (3rd Revised Edition, N.P. Engel, 2019), p. 592, para. 1.
[12] IACtHR, *Lopez Lone et al. v. Honduras*, Series C No. 302, Judgment of 5 October 2015, para. 160.
[13] A/HRC/RES/38/11 (n. 9 above). On assembly as public participation too, also see; UN Human Rights Committee, 'General Comment No. 25: 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' 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 8.
[14] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns, UN Human Rights Council' A/HRC/31/66, 4 February 2016, para. 5.

authorities.[15] As such, the exercise of the right can face strong resistance from the State. As early as the year 1795, an American judge hearing a case in which the accused persons were charged with unlawfully and riotously assembling together, denounced the notion that individuals or sections of the society could intervene in the relationship between the government and the people.[16] In practice, this negative perception of assemblies has, arguably, not abated, given the violent suppression of protests in many parts of the world.[17] Although one may argue that peaceful assemblies can also destabilise democracies since some of them call for the removal from power of democratically elected leaders, the public should be allowed to freely and collectively express their discontent. In any event, those expressing their dissatisfaction can also be opposed through counter-assemblies by those happy with the prevailing state of affairs.

The effective exercise of the right of peaceful assembly is dependent on a State's willingness to protect the right, even in cases where the assemblies are against them. It is therefore important to establish a strong legal framework against which State action can be measured. For a long time, the right of peaceful assembly was only recognised in domestic legal instruments.[18] Over time, it has been entrenched in various key international human rights instruments, and in the domestic laws of most countries. The Human Rights Committee also adopted General Comment 37[19] on Article 21 of the ICCPR to guide States in meeting their obligations in relation to the right of peaceful assembly.

### 2.3 The Right of Peaceful Assembly in the ICCPR: An Analysis of the Language of Article 21

The first sentence of Article 21 states that 'the right of peaceful assembly shall be recognized.' This text is formulated differently from other provisions of the ICCPR. It calls on states to

[15] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 592, para. 1.
[16] *Pennsylvania v. Morrison*. 1 Addison 274 Pa. 1795, as cited in: Saul Cornell, '"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech' 84 Fordham L. Rev. 915 (2015), p. 928.
[17] See, for instance, UN News, 'Protests around the world: Politicians must address 'growing deficit of trust', urges Guterres' 25 October 2019. Available at https://news.un.org/en/story/2019/10/1050031. The UN Secretary General expressed concern about protests that had led to violence and loss of life.
[18] W Schabas, 'The European Convention on Human Rights: Oxford Commentaries on International Law' (Oxford University Press 2015) (Kindle Edition), p. 483.
[19] UN Human Rights Committee, 'General Comment 37: Article 21 (The Right of Peaceful Assembly)' 2020, CCPR/C/GC/37.

*recognise* the right. The question may be asked whether the terms 'shall be recognized' afford the same level of protection as, say, the provisions of Articles 19 and 22 on freedom of expression and association, respectively, which states that 'everyone has the right' in question.[20] Manfred Nowak has observed that Article 21 may be perceived to portray a weaker form of protection compared to other guarantees in the Covenant, but in actual sense, he believes it does not.[21]

The text of the first sentence was adopted after several proposals had been suggested during the early stages of drafting Article 21. An initial submission from the United Kingdom during the 1st Session of the Commission on Human Rights in 1947 proposed that Article 21 should be phrased as: 'all persons shall have the right to assemble peaceably….'[22] Subsequent proposals suggested that the right should be formulated in the same way as it is in the Universal Declaration of Human Rights[23] (UDHR or the Universal Declaration), namely; 'everyone has a right to freedom of peaceful assembly….'[24] This proposal was informed by the argument that such a formulation would make it clear that the right belongs to every person, as is the case in other comparable provisions of the Covenant.[25] More proposals were made and discussed in subsequent sessions and eventually the current text which was based on a proposal from the representative of France was adopted during the erstwhile Commission on Human Rights' 8th Session in 1952.[26] The accepted view was that the right of peaceful assembly is an inherent, natural law right which States cannot grant, but whose existence States are obligated to

[20] For example, Article 19 provides that 'Everyone has the right to hold opinions without interference…,' and Article 22 provides that 'Everyone has the right to freedom of association.' Other guarantees in the ICCPR, such as Articles 6,7,8,9,10,11,12,14,15,16,17 and 18 are also framed in terms expressly guaranteeing the respective rights to persons. Only Article 23 (2) on the right to found a family is framed in a language that is similar to Article 21.
[21] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 594, para. 4.
[22] UN Economic and Social Council, 'Report of the Drafting Committee to the Commission on Human Rights' 1 July 1947, E/CN.4/21, art. 15 [21], p. 36. For references to proposals made in the initial phase of the drafting, see MJ Bossuyt, 'Guide to the 'travaux preparatoires' of the International Covenant on Civil and Political Rights' (Dordrecht: Nijhoff, 1987) p. 413.
[23] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[24] See for example UN Economic and Social Council, Commission on Human Rights, 'Summary record of the 169th meeting' 5 May 1950, E/CN.4/SR.169, para. 25 (Lebanon's proposal); A/C.3/SR. 290, para. 46 (New Zealand proposal)
[25] M Bossuyt, 'Guide to the 'travaux preparatoires' of the International Covenant on Civil and Political Rights' (Dordrecht: Nijhoff, 1987) p. 415.
[26] UN Economic and Social Council, Commission on Human Rights, 'Summary record of the 325th meeting' 20 June 1952, E/CN.4/SR.325, para. 18.

recognise.[27] It is not clear why this view was adopted only in relation to the right of peaceful assembly and not the other rights.[28]

Article 21, read alongside Article 2 of the ICCPR, provides sufficient guarantee for the protection of the right of peaceful assembly. While Article 21 is uniquely phrased, its level of protection is not inferior to the protection afforded to other qualified rights, such as the freedom of expression and of association.[29] Further, it has been stated that the exhaustive listing of legitimate grounds for restriction of peaceful assembly demonstrates that the language of Article 21 does not portray a weaker obligation.[30] The Human Rights Committee has also emphasised that the duty to recognise the right of peaceful assembly requires States to respect and ensure the exercise of the right.[31] Similar obligations are expected of States in relation to other rights in the Covenant.

The second sentence of Article 21 reads as follows: 'No restrictions may be placed on the exercise of this right other than those imposed *in conformity with the law* and which are *necessary in a democratic society* in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.' Notably, the limitation clause uses the term 'in conformity with the law.' In other provisions of the Covenant, the terms 'prescribed by law' or 'provided by law' are used.[32] In earlier drafts of Article 21, China and the United States of America (USA) had proposed the use of the terms 'prescribed by law.'[33] France, on the other hand, proposed the use of the terms 'in pursuance of this law', arguing that the terms 'prescribed by law' were too narrow in light of Article 2 of the Covenant.[34] A Belgian delegate then proposed the replacement of the word 'pursuance' with the word 'conformity', a proposal which was accepted by the French delegate.[35] The delegates voted to adopt Belgium's proposal. It was thought by the negotiators that the

[27] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 594, para. 4.
[28] n. 27.
[29] n. 27.
[30] n. 27.
[31] General Comment 37 (n. 19 above), para. 8.
[32] See, for example, Articles 19 and 22 of the ICCPR.
[33] E/CN.4/SR.169 (n. 24 above), para. 26.
[34] n. 33, para. 74.
[35] n. 33, paras. 79–80.

words 'in conformity with the law' were more inclusive, as they would allow for legitimate administrative action.[36] Thus, restrictions in the context of assemblies may be expressly prescribed by law or may be as a result of administrative action based on law.[37] Arguably, the language of the limitation clause has broadened the scope of state discretion to impose restrictions on assemblies. As already explained above, this was intentional.[38]

Sentence two of Article 21 also requires restrictions to be 'necessary *in a democratic society*….' The only other provision of the Covenant where the terms 'necessary in a democratic society' are used is Article 22, on the freedom of association. During the drafting of Article 21, the initial proposals on the limitation clause did not include the terms 'in a democratic society'. This formulation was supported by delegates who argued that the right of peaceful assembly cannot be effectively protected unless recognised democratic principles guide the application of the limitation clause.[39] Although there was an objection based on the fact that there is no uniform understanding of what democracy means, the supporters of the proposal argued that a democratic State can be distinguished by its respect for the principles of the Charter of the United Nations[40] (UN Charter), the Universal Declaration and the international Covenants on human rights.[41] Over time, the essential democratic role of the right of peaceful assembly has been greatly emphasised.

### 2.4 The Right of Peaceful Assembly as Framed in Regional Human Rights Instruments

#### 2.4.1 The European Convention on Human Rights

The European Convention was opened for signature in 1950 and entered into force in 1953, making it the oldest, legally binding regional human rights instrument. Article 11 (1) provides that 'everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.'

[36] E/CN.4/SR.169 (n. 24 above), para. 26.
[37] General Comment 37 (n. 19 above), para. 39.
[38] E/CN.4/SR.169 (n. 24 above), para. 74
[39] Bossuyt, Guide to the 'travaux preparatoires' of the ICCPR (n. 25 above), p. 418.
[40] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[41] See E/CN.4/SR.169, paras. 28 and 49 for proposals on the insertion of the words 'in a democratic society.' See E/CN.4/SR.169, paras. 54 and 63 for how the delegates defined 'democracy'.

Unlike the ICCPR, which has two separate provisions for the right of peaceful assembly and the freedom of association, the European Convention thus addresses the two rights in one provision.

The language used in the European Convention is substantially similar to Article 20 of the Universal Declaration, which inspired the initial and final drafts of Article 11. At the first and second Sessions of the Committee of Experts that drafted the European Convention, in February and March 1950, respectively, proposals which did not combine the two rights were made.[42] In subsequent discussions, it was thought that it was better to adopt the exact wording in the Universal Declaration.[43] The final text was based on a proposal by the United Kingdom which was slightly amended by the Drafting Committee of the Committee of Experts to address the right of peaceful assembly and the freedom of association in the same sentence.[44] The final text also made reference to the terms 'in a democratic society', which were not in the British proposal.[45] These terms were not in the Universal Declaration, but were later to be included in the limitation clause of Article 21 of the ICCPR.

In relation to the limitation clause, where Article 11(2) of the European Convention uses the terms 'prescribed by law', Article 21 of the ICCPR uses instead the terms 'in conformity with the law'. As already explained, the language of Article 21 can be seen as broader in the sense that it gives State authorities a wider discretion to exercise administrative powers in the context of assemblies. Article 11 (2) requires that specific national laws clearly set out the restrictions and the circumstances under which they may be imposed. Compared to the ICCPR, it can be argued that restrictions under the European Convention are more narrowly circumscribed since they require greater precision. In practice, however, there is no significant difference in the interpretation of the terms. This is because, in both cases, it is required that laws granting authorities discretionary powers must be sufficiently precise.[46] As will be seen later in this

[42] W Schabas, The European Convention on Human Rights (n. 18 above), p. 487.
[43] n. 42.
[44] The UK had made a proposal in which the right of peaceful assembly and the freedom of association were provided for in separate provisions, but had similar limitation clauses. The Drafting Committee retained the substance of the limitation clause but addressed the two rights in one sentence, as is the case in the Universal Declaration. See, W Schabas, The European Convention on Human Rights (n. 18 above), pp. 484–85.
[45] W Schabas, The European Convention on Human Rights (n. 18 above), p. 488.
[46] n. 45.

chapter, the European Court of Human Rights' interpretation of the term 'law' is fairly broad and may include administrative actions as contemplated in the ICCPR. In addition, both the European Convention and the ICCPR have an exhaustive list of the legitimate aims that may prompt the restriction of the exercise of the right of peaceful assembly. Again, the legitimate aims are similar.

### 2.4.2 The American Convention on Human Rights

Article 15 of the American Convention provides that 'the right of peaceful assembly, without arms, is recognized.' The term 'without arms' emphasises the importance of the aspect of peacefulness of an assembly.

It is possible that a person who is armed may participate in an assembly and remain peaceful during such an assembly. For instance, the Second Amendment to the Constitution of the United States reflects the right to bear arms,[47] and it is therefore not unusual for members of the public to carry weapons in their daily life. At the same time, the First Amendment recognised the right 'peaceably to assemble'. The question may then be asked whether an individual who is in possession of a firearm, albeit concealed, and who participates in an assembly can be said to have breached the peacefulness requirement. Per a literal interpretation of Article 15, such an individual may be said to have acted contrary to the American Convention. The case may be different with respect to the ICCPR, especially if the individual in question ordinarily bears arms.

In General Comment 37 on the right of peaceful assembly, the Human Rights Committee has stated that the carrying of objects that are or could be viewed as weapons does not necessarily negate the peacefulness requirement. Factors such as cultural practices should be considered before placing a general prohibition on the carrying of arms.[48] To this extent, the ICCPR seems to be more permissive than the American Convention. As will be seen later, this provision in the General Comment was opposed by some States.

[47] The Constitution of the United States, U.S. Const. amend. II. reads 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'
[48] General Comment 37 (n. 19 above), para. 20.

The prohibition on the carriage of weapons by assembly participants can be considered a useful restriction given that assemblies may generate a lot of tension between the participants and other members of the public or law enforcement officials. Should a conflict arise during an assembly, the likelihood of participants using their weapons for violent purposes or to defend themselves can rise, even if there was no intention at the outset to use the weapons. The prohibition generally sits well with the legitimate aims for which restrictions may be imposed as it can enable States to effectively discharge their obligation to protect.

The limitation clause in Article 15 of the American Convention is largely similar to the one in the ICCPR. It also uses the terms 'in conformity with the law' in place of 'prescribed by law' or 'established by law'. The American Convention also has an exhaustive list of grounds of restrictions, which is similar to the list in the ICCPR and the European Convention.

### 2.4.3 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights has been ratified by all countries in Africa, except Morocco, which has neither signed nor ratified the Charter.[49] Article 11 of the Charter provides that 'every individual shall have the right to assemble freely with others.' Unlike the other regional treaties and the ICCPR, the African Charter's language does not incorporate the term 'peaceful' in the description of the right. This, however, does not mean that non-peaceful assemblies are protected by the Charter. Article 27(1) and (2) of the Charter provide that individuals have duties towards the society and the State, and all rights must be exercised with due regard to the rights of others. In this sense, the Charter requires that the rights of assembly participants must be balanced against those of non-participants. This means that assemblies in which violence is directed at the law enforcement officials, the public or their property would contravene the spirit of the Charter.

The second sentence of Article 11 provides for restrictions on the right of peaceful assembly and requires that they should be 'provided for by law'. The sentence also sets out the grounds for restrictions. Where the ICCPR, the European Convention and the American

[49] https://www.achpr.org/statepartiestotheafricancharter.

Convention use the terms 'necessary in a democratic society', the African Charter only uses the term 'necessary'. The grounds for restrictions are also slightly different, with the African Charter having 'ethics' in place of 'public morals'. Further, the Charter does not have the protection of public order as one of the grounds for restrictions.

#### 2.4.4 The Arab Charter on Human Rights

Article 24(6) of the Arab Charter provides that 'every citizen has the right to freedom of association and peaceful assembly.' A significant difference between the Arab Charter and the other treaties is that the Arab Charter guarantees the right of peaceful assembly only to citizens while the other treaties protect the right of peaceful assembly of all individuals. Thus, a person who is not a citizen of the States parties to the Arab Charter cannot rely on the Charter to claim a violation of their right of peaceful assembly. Like the other treaties, the Arab Charter has a restriction clause which provides that any limitation must be prescribed by law and be necessary in a democratic society.[50] The grounds for restrictions are also similar to those in the other treaties discussed above.

#### 2.4.5 The ASEAN Human Rights Declaration

Principle 24 of the ASEAN Declaration provides that 'every person has the right to freedom of peaceful assembly.' Although the Principle does not have a limitation clause that is specific to it, Principle 8 has a general limitation clause that applies to all the rights in the Declaration. One of the differences between the ASEAN Declaration's limitation clause and the other regional treaties is that its grounds for restrictions include the protection of the general welfare of the public, in addition to other grounds that are also contained in other treaties. To this extent, the scope of restrictions is broader and goes beyond the exhaustive list in Article 21. In addition, Principle 7 of the Declaration provides that '…the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.' This adds to the considerations ASEAN States may take into

[50] Arab Charter (n. 5 above), Article 24(7).

account when interpreting their obligations in relation to the right of peaceful assembly. As stated earlier, the ASEAN Declaration is not a binding instrument.

### 2.4.6 Remarks on the Provisions in the Regional Framework & the ICCPR

As discussed above, the ICCPR and the binding regional instruments have some similarities, but also differ in some respects. In terms of the substantive guarantee of the right of peaceful assembly, the treaties appear to guarantee the right to a similar extent (save for the Arab Charter which does not protect the right of non-citizens to peacefully assemble). Although the first sentences of the ICCPR and the American Convention are differently worded compared to the other regional treaties, as noted above, they do not portray a weaker obligation. In relation to the peacefulness requirement, the omission of the term 'peaceful' from Article 11 of the African Charter is not significant in practice.[51] Furthermore, the African Charter, read as a whole, does not contemplate the protection of violent assemblies.

The subtle differences in the language used should not hinder the effective protection of the right of peaceful assembly in practice, no matter the regime used. This is because of the universality of human rights and the need for judicial and quasi-judicial authorities to adopt interpretations that most favour the realisation of rights. In effect, the regional treaties and the ICCPR reinforce each other. As will be seen later, the HRCttee's interpretation of the normative content of the right of peaceful assembly is to a large extent similar to that of the European Court of Human Rights' (European Court). In the determination of disputes before them, the two bodies have in many cases borrowed from each other's jurisprudence.[52]

The jurisprudence of the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) also do not depart from the established understanding of the right of peaceful assembly. Neither does the

[51] For instance, in various decisions, the African Commission has constantly emphasised the obligation of States to protect peaceful assemblies. See, for instance, *George Kajikabi v. The Arab Republic of Egypt*, Communication No. 344/07, [2020] ACHPR, paras. 227-28.

[52] For instance, in 2019, out of 87 Views/Decisions adopted in respect of Communications before the Human Rights Committee, there were 25 references to regional materials, including cases and advisory opinions. 17 of these were from the European Court of Human Rights. For records of the jurisprudence of the Human Rights Committee, see https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=17 .

African Commission on Human and Peoples' Rights (African Commission) or the African Court on Human and Peoples' Rights (African Court). Worth noting is that the African Court's jurisprudence has still to address the right of peaceful assembly, perhaps because the African Court was only established in 2004 and access to the Court by individuals remains limited.[53] As of January 2023, the African Court had only delivered judgments (on the merits) in 104 applications touching on various provisions of the African Charter.[54] With such a thin jurisprudence, Article 11 has not, thus far, been greatly tested. Nevertheless, as will be seen in later discussions, the African Commission has delivered some key decisions on the right of peaceful assembly. In addition, it has developed guidelines to aid States in complying with their obligations under Article 11 of the African Charter.[55] The guidelines are, however, not legally binding.

## 2.5 The Scope of the Right of Peaceful Assembly

### 2.5.1 Defining an assembly

Neither the ICCPR nor the regional human rights instruments define an assembly. According to Nowak, since an assembly has not been specifically defined in the ICCPR, its interpretation should conform with its habitual meaning across national legal systems.[56] Although domestic legal systems vary in terms of how they regulate assemblies, generally there is a common understanding on what constitutes an assembly.

Maina Kiai, the inaugural holder of the mandate of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, described an assembly as 'an intentional and temporary gathering in a private or public space for a specific purpose.'[57] In General Comment 37, the HRCttee states that the right of peaceful assembly protects 'the non-

[53] As of January 2023, only 11 out of the 33 States Parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights had deposited their declarations permitting individual petition, but four (Tanzania, Rwanda, Cote d'Ivoire and Benin) had withdrawn their declarations. See https://www.african-court.org/wpafc/declarations/.
[54] See https://www.african-court.org/cpmt/decisions.
[55] ACHPR, 'Guidelines on Freedom of Association and Assembly in Africa' (2017); and ACHPR, 'Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa' (2017).
[56] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 595, para. 5.
[57] UN Human Rights Council, 'First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' UN Doc. A/HRC/20/27, 21 May 2012, para. 24.

violent gathering by persons for specific purposes, principally expressive ones.'[58] It added that peaceful assemblies may be in the form of demonstrations, meetings, strikes, processions, rallies, sit-ins or flash-mobs and may take place 'outdoors, indoors and online'.[59]

The above descriptions have certain elements in common. First is the notion of an *intentional gathering of persons*. Secondly, such persons should gather *for a specific purpose*, or what the Committee has termed as principally expressive purpose. Lastly, the gathering should be in a common space, which may either be a *public or a private space*. These elements are discussed in turn.

#### 2.5.1.1 Intentional gathering of persons

Not all gatherings of persons are protected under Article 21. Only an intentional gathering for a specific purpose is protected.[60] This means that a gathering must not be merely accidental. There has to be a deliberate choice on the part of those gathering to collectively pursue a particular cause. A group of people at a bus stop would, for instance, not require protection under Article 21. This is because assemblies, as they have been understood historically and interpreted by various courts at the national and international level, require some form of a link between those participating.[61] That link is the intention of the participants to pursue a common goal. The fact that a number of people are in one place at the same time is not sufficient. Using the example of people at a bus stop, if they learn that their bus fare has been hiked, and they decide to collectively protest against the increase, then the gathering is no longer a mere coincidence. It is an assembly, even though initially there was no intention on the part of the participants to assemble. The difference is that there is a common factor (the increase in their bus fare) which they individually choose to protest against collectively.

One may ask whether the case would be different if only one person protested against the increase in bus fare. The right of peaceful assembly, though held individually, is exercised

[58] General Comment 37 (n. 19 above), para. 4.
[59] n. 58.
[60] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 595, para. 5.
[61] In his dissenting opinion in *Kivenmaa v. Finland* (CCPR/C/50/D/412/1990), HRCttee member Kurt Herndl explained that the distinguishing feature between an accidental gathering and an assembly is the intention and purpose of a gathering.

collectively.[62] As such, an assembly must involve more than one person. In *Coleman v. Australia*,[63] the HRCttee stated that a protest by one person does not fall within the meaning of an assembly as contemplated in Article 21 of the ICCPR. In that case, Mr. Coleman stood on the edge of a water fountain in a mall and, while waving a flag, spoke for about 15 minutes on a variety of political issues. He was arrested and charged with expression of political speech in public without a permit. Upon conviction and sentence, he unsuccessfully appealed against the conviction and therefore approached the Committee for relief, alleging a violation of his rights under Articles 9, 19, and 21 of the ICCPR. In relation to his claim on the violation of his right of peaceful assembly, the HRCttee observed that the evidence presented showed that Mr. Coleman was acting alone and therefore he had not proved that an assembly, within the meaning of article 21 of the ICCPR, existed in law.[64]

Had Mr. Coleman's solo protest attracted the interest of other members of the public, would the Committee's decision have been different? This may depend on the level of involvement of the onlookers. Assemblies can be open to all, so it is not necessary that Mr. Coleman should have met or known other participants before staging his protest. If the onlookers listen and perhaps take pictures and videos which they share on social media, they could help advance Mr. Coleman's cause, but they are not necessarily participating in the protest. However, if they actively listen and perhaps start chanting slogans in support of his views then the solo protest may be said to have turned into an assembly. This is because in the latter case, their intention to jointly pursue a common goal with Mr. Coleman is clearer.

The reasoning in *Coleman* is the same position as that which a chamber of the European Court took in the case of *Novikova and Others v. Russia.*[65] In this case, one of the applicants, Mr. Valeriy Romakhin, staged a solo demonstration in front of a university to express his displeasure with the decision to close the university.[66] While he was demonstrating, another lone member

[62] General Comment 37 (n. 19 above), para. 4.
[63] *Coleman v. Australia,* Communication No. 1157/2003, Views adopted 17 July 2006, CCPR/C/87/D/1157/2003, para. 6.4.
[64] n. 63.
[65] ECtHR, *Novikova and Others v. Russia*, Applications Nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, judgement of 26 April 2016, para. 198.
[66] n. 65, para. 39.

of the public was also protesting against the closure of the University about 50 metres away from where Mr. Romakhin was.[67] Shortly after he started his demonstration Mr. Romakhin was arrested and charged with holding a public event without issuing a prior notification to relevant public authorities.[68] In an application to the European Court, Mr. Romakhin argued that since his was a solo demonstration and he had maintained a distance of about 50 metres from the other solo demonstrator as required by Russian law, the demonstration should not have been classified as an assembly.[69] The European Court agreed with him and stated that a solo demonstration should not be classified as an assembly even if the demonstration has attracted the attention of other members of the public.[70] As already suggested above, the difference may lie in the level of involvement of other members of the public. If members of the public join a sole protestor, one would still wonder whether it would be reasonable for authorities to penalise the originator of the protest for holding it without following due procedure, if their intention was to protest on their own without the help of the public. In such a case, the requirements of legality, necessity and proportionality, which are discussed later in this chapter, would have to be met.

#### 2.5.1.2 Gathering for a specific purpose

Noting the possibility that States may interpret the term differently, the drafters of Article 21 opted to leave the interpretation of the term assembly to States and to the case law of the HRCttee.[71] Similarly, the regional human rights instruments do not specify the type of gatherings that are protected in the respective provisions on the right of peaceful assembly. In some States, the right of peaceful assembly only applies where people gather to pursue a matter affecting the public interest.[72] However, the right is broader and covers a variety of purposes, including those

[67] *Novikova and Others v. Russia*, (n. 65 above), para. 40.
[68] n. 67, para. 41.
[69] n. 67, para. 104.
[70] n. 67, para. 204.
[71] W. Schabas, Nowak's CCPR Commentary (n. 11 above), pp. 596–97, para. 8.
[72] For example, Section 4 (1) of Uganda's Public Order Management Act defines a public meeting as 'a gathering, assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on a public matter.' Section 4(2) (d) specifically excludes meetings for 'social, religious, cultural, charitable, educational, commercial or industrial purposes' from the definition of a public meeting. Section 1(vi) of South Africa's Regulation of Gatherings Act also defines gatherings as assemblies or processions '…at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or held to form pressure groups, to hand over petitions to any person,

that do not necessarily pursue matters of public interest. In General Comment 37, the HRCttee states that assemblies may be aimed at '…conveying a position on a particular issue or exchanging ideas…,' asserting group solidarity or gathering for entertainment, cultural, religious or commercial purposes.[73] Sarah Joseph and Melissa Castan have also argued that all gatherings that are not protected under specific provisions of the ICCPR are covered under Article 21.[74] As per this reasoning, since fans at a football match intentionally gather for a specific purpose (that is, to cheer their football club), their gathering is protected under Article 21. This is in keeping with an initial formulation of the right of peaceful assembly, which covered sporting events.[75] A subsequent proposal removed sporting events from the list of purposes of an assembly.[76] Nowak, on the other hand, argues that the focus of Article 21 is on 'its democratic function in the process of forming, expressing and implementing political opinions.'[77] Arguments on the need for a heightened protection of peaceful assembly are also premised on this function.[78]

#### 2.5.1.3 Public or private spaces

Assemblies are mostly held in public spaces, but may also be held in private spaces, especially those that are ordinarily publicly accessible.[79] The important aspect is that assembly participants must be allowed to hold their assembly within the 'sight and sound' of their target audience.[80] In relation to assemblies in private spaces, it should be acknowledged that the owners of private spaces have rights which states are obliged to protect, namely, the right to privacy and the right to property. However, the increased privatisation of public spaces may leave assembly

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or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution; including any government, administration or governmental institution.'

[73] General Comment 37 (n. 19 above), para. 12.

[74] S Joseph and M Castan, 'The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary' (3rd Edn. OUP, 2013), p. 13, para. 19.05.

[75] See E/CN.4/21 (n. 22 above), p. 57. The proposed Art. 24 in the Draft International Bill of Rights read: 'The freedom of assembly and of association for *political, cultural, scientific, sporting, economic and social purposes* compatible with this Bill is recognized and guaranteed, subject only to the protection of public order.'

[76] E/CN.4/21 (n. 22 above), p.78. The proposal read: 'There shall be freedom of peaceful assembly and of association for *political, religious, cultural, scientific, professional and other purposes*.' While this proposal removed 'sporting' from the list of purposes, it left it open by using the terms 'and other purposes'.

[77] W Schabas, Nowak's CCPR Commentary, (n. 11 above), p. 592, para. 1.

[78] See, for example, *Lopez Lone et al. v. Honduras*, (n. 12 above), para. 160.

[79] General Comment 37 (n. 19 above), para. 57.

[80] *Strizhak v. Belarus,* Communication No. 2260/2013, 1 November 2018, CCPR/C/124/D/2260/2013 para. 6.5.

participants with no better alternatives. In *Appleby v. United Kingdom*,[81] a chamber of the European Court recognised that while there are no automatic rights of entry into private property, where the effect of a bar on entry is to curtail the essence of free expression, states are under an obligation to regulate private property rights in a manner that gives effect to free expression.[82] While the case is in reference to the freedom of expression, similar arguments would apply in the context of assemblies. Another reason why private property rights should not automatically restrict assembly rights is that private corporations have increasingly become very influential and their potential to adversely affect human rights has equally increased.[83] Protests may therefore be staged against them and it would be necessary for participants in such protests to access the private premises of the businesses against which the protests are staged.

Ultimately, States have to be able to strike a balance between the rights of private property owners and those of assembly participants. The decision that a state would make depends on the circumstances of each case. Using the words of an American Supreme Court judge, 'the more the owner opens up his property for use by the public in general, the more his rights become circumscribed by the rights of those who use it'.[84] Thus, property rights in relation to private premises that are generally accessible to the public are not an automatic bar to the exercise of the right of peaceful assembly.

#### 2.5.1.4 Online assemblies

Assemblies have commonly been understood to mean physical gatherings. However, the argument for the application of Article 21 of the ICCPR to certain online interactions has strengthened over the years, especially because of the power of online movements. Such movements have arguably had as great an impact as traditional physical assemblies.[85] Online

[81] ECtHR, *Appleby and others v. United Kingdom,* Application No. 44306/98, Judgment of 6 May 2003.
[82] n. 81, para. 47.
[83] See UN Human Rights Council, 'Resolution 26/22, Human rights and transnational corporations and other business Enterprises' A/HRC/RES/26/22, 15 July 2014. Also see UN Human Rights Council, 'Resolution 17/4, Human rights and transnational corporations and other business enterprises' A/HRC/RES/17/4, 6 July 2011.
[84] *Marsh v. Alabama,* United States Supreme Court, (*United States Reports*, vol. 326, 1946), p. 506. https://tile.loc.gov/storage-services/service/ll/usrep/usrep326/usrep326501/usrep326501.pdf.
[85] For instance, the #MeToo Movement which started in the US became a prominent global online campaign against sexual harassment. See https://metoomvmt.org/about/#history. In Nigeria, the #EndSars campaign on Twitter led to the reorganisation of a police unit accused of committing gross human rights violations against the public. See

platforms have also been used to mobilise participants and facilitate communication amongst assembly organisers and participants.

In a 2018 Resolution, the UN Human Rights Council noted that the protection of the right of peaceful assembly may apply to similar interactions online.[86] The application of Article 21 to online interactions was further strengthened by the HRCttee in General Comment 37.[87] The Committee did not, however, specify the nature or extent of online interactions that would be protected by Article 21. There may be conceptual differences between the application of Article 21 to online assemblies and its application to physical gatherings. For example, while physical assemblies require at least two participants, it is not clear what level of online engagement would be required for Article 21 to apply. If, for example, one Twitter user posts a view and it is retweeted by 100 other people (who share the same view), would such interactions require the protection of Article 21? And would the right of peaceful assembly be violated if the Twitter user and those who retweeted the tweet were directed to pull them down? Arguably, with respect to such interactions, Article 19 would be the more appropriate protection. The case may be different if, for example, an online meeting was scheduled to protest against a particular issue and on the day of the meeting, there is an internet shut-down. In such a case, a claim of violation of the right of peaceful assembly (and the freedom of expression) can be made. Similarly, since the right of peaceful assembly also protects activities that may occur online (such as online mobilisation of participants) before a physical assembly, a shut-down of the internet may be interpreted as a violation of the right of peaceful assembly.[88]

### 2.5.2 The 'peacefulness' requirement

The wording of most international law, including regional human rights instruments provide that only peaceful assemblies are protected. The ICCPR, the American Convention and the European Convention all refer to a right of peaceful assembly and not simply a right to assemble. The

BBC News, 'Nigeria's #ENDSARS campaign at police brutality video' 4 December 2017. Available at https://www.bbc.com/news/world-africa-42225314.

[86] A/HRC/RES/38/11 (n. 9 above).

[87] General Comment 37 (n. 19 above), paras. 6, 10 and 13. See also, HRC, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clement Voule' A/HRC/41/41, 17 May 2019, paras. 9-11.

[88] UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clement Voule' A/HRC/41/41, 17 May 2019, para. 52.

American Convention is even more specific, stating that persons have the right to assemble 'peaceably and without arms'. Peacefulness relates not to the views held, but to the manner in which they are expressed.[89] The discussion that follows demonstrates how the peacefulness requirement has been interpreted.

#### 2.5.2.1 The Human Rights Committee's interpretation of 'peaceful'

In its General Comment on the right of peaceful assembly, the HRCttee states that '…there is a presumption in favour of considering assemblies to be peaceful.'[90] The Committee distinguishes between peaceful (non-violent) assemblies and those in which violence is 'widespread and serious'. According to the Committee, violence in an assembly involves '…the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property.'[91] In this sense, the Committee's interpretation of the term 'peaceful' covers a broad range of conduct. Actions such as the disruption of traffic or pedestrian movement do not render an assembly violent.[92] If authorities interfere with an assembly due to the disruptions caused, the interference must be justified on the basis of the grounds listed in Article 21. The Committee has also stated that the fact that an assembly may provoke a hostile reaction from other members of the public does not deprive it of its peaceful nature. This was the Committee's position in *Alekseev v. Russia*,[93] where the assembly participants had sought to stage a demonstration condemning the persecution of sexual minorities in Iran. The demonstration was not authorised because it was feared that it could attract a negative reaction from other members of the public, which could jeopardise public order. The Committee emphasised that an assembly cannot be banned due to an 'unspecified risk of a violent counterdemonstration.'[94]

The fact that some individuals within an assembly are engaging in violent conduct is not sufficient to declare an entire assembly non-peaceful.[95] Authorities should isolate the violent participants and allow peaceful ones to proceed with their assembly. Admittedly, this may be

[89] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 599, para. 12.
[90] General Comment 37 (n. 19 above), para. 17.
[91] n. 90, para. 15.
[92] n. 91.
[93] *Alekseev v. Russian Federation*, Communication No. 1873/2009, 25 October 2013, CCPR/C/109/D/1873/2009.
[94] n. 93, para. 9.6.
[95] General Comment 37 (n. 19 above), para. 19.

practically difficult especially if an assembly has thousands of participants, many of whom are generally rowdy. Such difficulties do not, however, absolve states from their obligation to facilitate assemblies. It has been noted that 'assemblies can be facilitated on the basis of communication and collaboration among organizers, protesters, local authorities and officials exercising law enforcement duties.'[96] Thus, authorities should work with organisers and take measures to ensure that the assemblies are facilitated as much as possible and eventualities such as isolated acts of violence are appropriately addressed. If, however, the violence is widespread, the assembly can no longer be peaceful and is therefore not protected under Article 21.[97] The Committee has also emphasised that for an assembly to lose its peaceful character, the violence must originate from the participants and not other members of the public or law enforcement officials.[98]

A contentious question is whether an assembly whose participants are armed but remain peaceful is protected under Article 21. Nowak and Schabas have argued that if participants are armed, the assembly loses its peaceful nature and it does not matter whether the weapons are used or not.[99] Unlike the American Convention which expressly prohibits the carrying of arms, the ICCPR does not expressly prohibit the carrying of objects that are or could be viewed as weapons. In its General Comment on the right of peaceful assembly, the HRCttee has stated that the carrying of such objects is not necessarily sufficient to render an assembly violent.[100] The Committee contemplates situations where, for cultural or other reasons, participants may carry objects that could be viewed by others as weapons.[101] It advises that factors such as cultural practices, the violent intentions shown by the participants, and the risks resulting from the presence of such objects should be considered.[102]

[96] A/HRC/RES/38/11 (n. 9 above).
[97] General Comment 37 (n. 19 above), para. 19.
[98] n. 97, para. 18.
[99] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 600, para. 13.
[100] General Comment 37 (n. 19 above), para. 20.
[101] n. 100.
[102] n. 100.

During the drafting of the General Comment, this position attracted opposition from some of the states that submitted comments on the initial draft of General Comment 37.[103] The argument was that weapons or objects that could be viewed as weapons should not be allowed at all because they go against the requirement of peacefulness.[104] This is understandable because assemblies where tensions are high can degenerate into violence, even if there was no intention on the part of the participants to be violent. For instance, if there is a demonstration and a counter-demonstration where the participants all have objects that could be weaponised, the ability of law enforcement officials to control a violent confrontation between the participants may be diminished. One may argue that law enforcement authorities should, in the first place, prevent such confrontations. That is true, but in a case where law enforcement authorities genuinely do not have the resources that would enable them to contain such confrontations, the alternative could be to prohibit the assembly altogether or to disperse the participants. A less intrusive measure, such as prohibiting the carrying of arms, would be a more proportionate response.[105]

#### 2.5.2.2 The meaning of 'peaceful' in the jurisprudence of regional systems

Like the HRCttee, the regional systems also have a broad interpretation of the peacefulness requirement. The jurisprudence of the European Court on this subject is particularly well developed and largely similar to the Committee's position. On the presumption of peacefulness of assemblies, the European Court has found that assemblies are to be presumed to be peaceful.[106] In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* a chamber of the European Court emphasised that the right of peaceful assembly protects all gatherings except those where the organisers or participants have violent intentions.[107]

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[103] See, for example, the comments from Russia and Germany. Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.

[104] n. 103.

[105] General Comment 37 (n. 19 above), para. 37. The Human Rights Committee advises that where a prohibition or restriction is contemplated, the least intrusive measures should be applied first.

[106] ECtHR, *Lashmankin and others v. Russia,* Applications No. 57818/09, Judgment of 7 February 2017, paras. 402–03.

[107] ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001), para. 77; also see EctHR, *Cisse v. France,* Application No. 51346/99, 9 April 2002, para. 77.

The fact that an assembly may be infiltrated by hostile and violent individuals, or there is spontaneous violence by participants, does not take away its peaceful character. This was also emphasised by the European Commission of Human Rights in its decision on admissibility in the case of *Christians against Racism and Fascism (CARAF) v. United Kingdom.*[108] It stated that, if organisers of an assembly have peaceful intentions, the possibility of an assembly being infiltrated by persons with violent intentions does not take away the right of peaceful assembly.[109] The Commission also added that even if a real risk exists of a breach of public order as a result of actions beyond the control of assembly participants or organisers, the assembly is still protected under Article 11 of the European Convention.[110] Interestingly, the Commission subsequently departed from this position in the case of *Pendragon v. United Kingdom*.[111] In its admissibility decision on the case, the European Commission stated that a general ban on all gatherings around the Stonehenge cultural site was justified. The ban had been prompted by past assemblies of other groups that had caused disorder. The applicant, who was charged with holding an assembly within the prohibited zone of the Stonehenge, had in the past held several peaceful gatherings within the site and he therefore argued that the ban infringed on his freedom of religion and right of peaceful assembly, and that he was not to blame for past cases of disorder. The Commission nevertheless found that the authorities' prohibition of gatherings of more than 20 persons was reasonable since past assemblies at Stonehenge had resulted in violent disorder.[112] This reasoning went against the dicta of the European Court in the earlier case of *Plattform "Arzte fur das Leben" v. Austria*[113] where it was acknowledged that it is the responsibility of states to ensure that peaceful assemblies are not interfered with by the violent conduct of others.[114] Generally, the more recent position of the European Court seems to be that the past violent conduct of some participants in an assembly should not be the basis for

[108] ECommHR, *Christians against Racism and Fascism (CARAF) v. United Kingdom,* Application No. 8440/78, Admissibility decision of 16 July 1980.
[109] n. 108, p. 148.
[110] n. 109.
[111] ECommHR, *Pendragon v. United Kingdom,* Application No. 31416/96. Admissibility decision of 19 October 1998.
[112] n. 111.
[113] ECtHR, *Plattform "Arzte fur das Leben" v. Austria,* Application No. 10126/82, Judgment of 21 June 1988.
[114] *Plattform "Arzte fur das Leben" v. Austria* (n. 113 above), para. 34. The Court also recognized that the obligation to protect cannot be guaranteed absolutely.

interfering with the right of peaceful assembly. The 2014 decision of the First Section of the European Court in *Primov v. Russia*[115] is instructive. The Court in this case stated that an assembly should not be dispersed simply because some of its participants have engaged in violent conduct in the past.[116]

Like the Human Rights Committee, the European Court has also established that individual participants do not lose their right to peacefully assemble if, in the course of an assembly, some participants act violently. This was emphasised by a chamber of the Court in its judgment in the case of *Frumkin v. Russia.*[117] In the case, the applicant was arrested for participating in a march which gradually turned violent, with some participants throwing objects at the police.[118] The court emphasised that an individual does not lose their right to peacefully assemble as a result of the violent acts of others during an assembly if the individual remains peaceful in their intentions or conduct.[119]

The position of the European Court on obstructions is also similar to the Human Rights Committee's. The Court has found that the fact that an assembly is likely to cause disruptions such as blocking of highways does not necessarily negate its peaceful nature. This was stated by a chamber of the European Court in the case of *Karpyuk and Others v. Ukraine.*[120] In the case, the organizers of an assembly planned to prevent the President of Ukraine from laying flowers at a monument by surrounding the monument to block the President from accessing it.[121] Violent confrontations between the participants and law enforcement officials erupted, leading to the arrest of the organizers who were later charged with organising and participating in mass disorder.[122] The Court established that the planned obstruction was protected under Articles 10 and 11 of the European Convention.[123]

[115] ECtHR, *Primov v. Russia,* Application no. 17391/06, Judgment of 12 June 2014.
[116] n. 115, para. 152.
[117] ECtHR, *Frumkin v. Russia*, Application No. 74568/12, Judgment of 5 January 2016.
[118] n. 117, para. 38.
[119] n. 118.
[120] ECtHR, *Karpyuk and others v. Ukraine*, Application Nos. 30582/04 and 32152/04, Judgment of 6 October 2015.
[121] n. 120, para. 8.
[122] *Karpyuk and others v. Ukraine* (n. 120 above), para. 16.
[123] n. 122, para. 207.

On the other hand, if the level of disruption is extreme, restrictions may be justified. This was stated by the Grand Chamber of the European Court in *Kudrevicius and Others v. Lithuania*,[124] which involved the obstruction of a highway and the general disruption of the normal course of business, leading to great losses. The Court stated that while obstructive conduct is generally protected under Article 11 of the European Convention, '…the almost complete obstruction of three major highways in blatant disregard of police orders and of the needs and rights of the road users constituted conduct which, even though less serious than recourse to physical violence, can be described as "reprehensible".'[125] The Court agreed with the decision of the national authorities to convict the applicants. The K*udrevicius* decision is in line with the Human Rights Committee's position that, while disruptive conduct does not render an assembly violent, authorities may disperse such assemblies if the disruption is 'serious and sustained'.[126]

The Inter-American and the African human rights systems both have fairly limited jurisprudence on the right of peaceful assembly. Nevertheless, the African Commission has developed guidelines[127] which lay emphasis on the need for assemblies to be peaceful and the need for States to adopt a broad interpretation of the term 'peaceful'.[128] Although the guidelines are not binding, they provide a comprehensive framework that can guide African States in the implementation of their obligations under Article 21 of the ICCPR and Article 11 of the African Charter.

### 2.6 State Obligations in Relation to the Right of Peaceful Assembly

The ICCPR requires states to 'respect and ensure' all the rights guaranteed in the Covenant.[129] It also requires them to take legislative or other measures necessary to give effect to the rights recognised in the Covenant,[130] and to provide effective remedies where violations have been committed.[131] Next is a discussion on how these obligations apply in the context of assemblies.

[124] ECtHR [GC], *Kudrevicius & others v. Lithuania*, Application no. 37553/05, Judgment of 15 October 2015.
[125] n. 124, para. 174.
[126] General Comment 37 (n. 19 above), para. 85.
[127] ACHPR, 'Guidelines on Freedom of Association and Assembly in Africa' (2017).
[128] n. 127, para. 70.
[129] ICCPR, Article 2(1).
[130] ICCPR, Article 2(2).
[131] ICCPR, Article 2(3).

### 2.6.1 The Obligation to Respect

An important step towards fulfilling the obligation to respect is to adopt legislative or other measures to give effect to Article 21.[132] The domestic laws must comply with international standards and must clearly define the duties of all the relevant state authorities involved in the management of assemblies. Through its Concluding Observations, the HRCttee has emphasised the need for domestic legal frameworks to comply with international standards. For instance, it has called on States to amend legislation that restrict the right of peaceful assembly beyond the scope of restrictions allowed in Article 21. In its Concluding Observations on Tajikistan, the Committee expressed concern about Tajikistan's Meetings, Rallies, Demonstrations and Processions Act (2014), which provided for multiple restrictions, among them, the limitation of assemblies to certain areas and hours of the day, bans on assemblies at night, and restrictions on the participation of foreign nationals in assemblies.[133] It recommended the amendment of the said statute to align it to comply with the provisions of the ICCPR.[134]

The obligation to respect also requires States to refrain from interfering with the exercise of the right of peaceful assembly.[135] The interferences envisaged are restrictions that States may impose, and which may include: denial of permits to hold assemblies (for States that have authorisation regimes), designation of locations that are unfavourable to assembly participants, restrictions on the number of participants, and the threat of dispersal, among other interferences. To meet this obligation, states should not impose restrictions except on the grounds specified under Article 21 of the ICCPR. A similar obligation applies in the context of the regional human rights instruments.

Although peaceful assemblies can be used to pursue a variety of causes, they are in many cases political in nature and can include the expression of views that are anti-government.[136] In

[132] Article 2(2) of the ICCPR.
[133] UN Human Rights Committee, 'Concluding Observations, Tajikistan' (CCPR/C/TJK/CO/3), July 2019, para. 49. Also see Concluding Observations to the Netherlands concerning the Public Assemblies Act which allows Mayors to end or prohibit assemblies that are held without prior notification having been issued. 'Concluding Observations, Netherlands' (CCPR/C/NLD/CO/5), March 2020, paras. 60-61.
[134] CCPR/C/TJK/CO/3 (n. 133 above), para. 50.
[135] General Comment 37 (n. 19 above), para. 23.
[136] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 592, para. 1. Nowak observes that the focus of the right of peaceful assembly is on its democratic function in the process of forming or expressing political opinion.

spite of this, States are still under an obligation not to interfere with such assemblies unless there are compelling reasons to do so. In *Strizhak v. Belarus*, a case in which the author was denied permission for a picket, the HRCttee emphasised the need for states to justify any limitation imposed on the exercise of the right of peaceful assembly.[137] Similarly, in *Severinets v. Belarus*,[138] the Committee stated that 'when a State party imposes restrictions with the aim of reconciling an individual's right of peaceful assembly and interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.'[139] The jurisprudence of the regional systems in relation to the obligation not to impose restrictions unjustifiably is no different. In the case of *Media Rights Agenda (on behalf of Malaolu) v. Nigeria*,[140] the African Commission noted that restrictions must not negate the essence of the right of peaceful assembly, but must be aimed at facilitating its exercise.[141]

Interferences may also stem from the actions of law enforcement officials. In relation to the powers of law enforcement authorities to intervene during assemblies, they are expected to refrain from resorting to unnecessary dispersal of assemblies or using force against assembly participants unless circumstances justify the use of force.[142] In addition, assembly participants should not be subjected to arbitrary arrest.[143] If some participants commit offences, law enforcement officials should single them out and arrest only them. Indiscriminately arresting participants is by definition arbitrary.[144] In cases where domestic laws criminalise participation in assemblies that are held without prior notice or authorisation, authorities should only sanction participants or organizers if the benefit of imposing sanctions outweighs the harm caused by participation in an assembly that was held unprocedurally.[145] In this regard, the HRCttee has

[137] *Strizhak v. Belarus*, (n. 80 above), para. 6.6.
[138] *Severinets v. Belarus*, Communication. No. 2230/2012, 19 July 2018. CCPR/C/123/D/2230/2012.
[139] n. 138, para. 8.5. This same position has been taken by the Human Rights Committee in several cases is also reflected in General Comment 37 on the right of peaceful assembly.
[140] *Media Rights Agenda (on behalf of Malaolu) v. Nigeria,* ACHPR Communication No 224/98, 28th Ordinary Session (23 October-6 November 2000).
[141] n. 140, para. 65.
[142] The Human Rights Committee has stated that law enforcement officials are under an obligation to apply non-violent means before resorting to the use of force. See, General Comment 37 (n. 19 above), para. 78.
[143] A/RES/73/173 (n. 10 above), para. 2. The UN General Assembly called on states to desist from arbitrarily arresting assembly participants.
[144] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 45.
[145] *Popova v. Russian Federation*, Communication No. 2217/2012, 6 April 2018, CCPR/C/122/D/2217/2012, para. 7.4.

stated that a failure to notify should not form the sole basis of interfering with an assembly or its participants.[146]

Further, force should only be used where it is evidently necessary and even then, the use of force must always meet the dictates of the principles of legality, precaution, necessity, proportionality and non-discrimination.[147] The African Commission's Resolution 281 on the Right to Peaceful Demonstrations urges states 'to refrain from arbitrarily arresting and detaining demonstrators as well as from the disproportionate use of force against demonstrators.'[148] The Commission's General Comment No. 3 on the Right to Life also recognizes the integral role the right of peaceful assembly plays in ensuring democracy and the protection of human rights. In relation to the use of force during assemblies it provides that 'even if acts of violence occur during such events, participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality.'[149]

States are also expected to remain 'content-neutral' and to refrain from engaging in discriminatory practices when regulating assemblies.[150] For instance, authorities should not prohibit an assembly if the message sought to be expressed is hostile to the government. With regard to the use of technology, information about planned assemblies may be shared online. States should therefore refrain from restricting internet use or targeting organizers who are vocal online.[151] Any restrictions on the use of information dissemination systems must conform with the tests for restrictions on the freedom of expression.[152]

[146] General Comment 37 (n. 19 above), para. 71.
[147] n. 146, para. 78.
[148] ACHPR, 'Resolution 281 on the Right to Peaceful Demonstrations' ACHPR/Res. 281(LV) 2014.
[149] ACHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 28.
[150] See for example, Joint report on the proper management of assemblies (n. 14 above), paras. 15-16.
[151] Report of the Special Rapporteur on peaceful assembly and association, A/HRC/41/41 (n. 88 above), para. 70.
[152] UN Human Rights Committee, 'General Comment No. 34, Article 19, Freedoms of opinion and expression' 12 September 2011, CCPR/C/GC/3, para. 34.

### 2.6.2 The Obligation to Ensure

To ensure the right of peaceful assembly, States have a positive obligation to create an environment that is conducive for the full enjoyment of the right of peaceful assembly. This would require States to protect and facilitate assemblies.

The duty to protect requires States to take all reasonable measures to prevent violations against those exercising their right of peaceful assembly, and to provide remedies where preventive measures have failed.[153] The protection must be extended to all participants without discrimination, as well as to counter-demonstrators.[154] Unless the views expressed by participants are prohibited under Article 20 of the ICCPR, it should not matter that members of the public will react negatively to an assembly. This was emphasised by the HRCttee in the *Alekseev case* cited earlier where an assembly was planned to protest against the persecution of homosexuals in Iran.[155] Faulting the Russian authorities' refusal to authorise the protest, the HRCttee stated that 'State parties must put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression by means of an assembly.'[156] The Committee further noted that protection must be afforded even to assemblies that promote ideas that others find offensive.[157] It was also stated that in assemblies where participants are promoting ideas that may annoy or offend other members of the public, the State has a duty to take proactive measures to protect the participants against violent reactions from other members of the public.[158] Similarly, in its Concluding Observations on Indonesia, the Committee emphasised the need for the State party to 'protect protesters from harassment, intimidation and violence.'[159]

In some cases, measures to prevent violations may be unsuccessful. Where, in spite of all the preventive measures taken, violations are still committed, investigations should be

[153] O De Schutter, 'The application of human rights in private relationships and the obligation to protect' in International Human Rights Law: Cases, Materials, Commentary (pp. 365-460). (Cambridge University Press 2010), at pp. 365–66.
[154] General Comment 37 (n. 19 above), paras. 28 and 30.
[155] *Alekseev v. Russian Federation,* (n. 93 above), paras. 2.1-2.3.
[156] n. 155, para. 9.3.
[157] n. 155, para. 9.6.
[158] *Alekseev v. Russian Federation,* (n. 93 above), para. 9.6.
[159] UN Human Rights Committee, 'Concluding Observations, Indonesia' CCPR/C/IDN/CO/1, August 2013, para. 28.

conducted with a view to ensuring accountability and remedying the violations.[160] For instance, if private actors physically attack assembly participants, they should be apprehended and prosecuted. Equally, if law enforcement officials use excessive force against participants, the State must conduct investigations and ensure that the perpetrators of violations are held to account. For instance, in its Concluding Observations on Angola, the Committee expressed concern about the use of excessive force against peaceful protesters in Angola, and recommended the investigation and prosecution of the violators and compensation for those whose rights were infringed.[161] Similar concerns have been expressed in respect of many other States parties to the ICCPR.[162]

The question has been raised whether certain assemblies, especially those pursuing political causes, should have a higher level of protection. Many of the Communications handled by the Human Rights Committee have concerned political speech[163] and this is evidence that States are more likely to interfere with assemblies that pursue political causes than the non-controversial ones. In General Comment 34 on the freedom of expression the Committee noted that 'the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.'[164] The Committee further added that 'in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.'[165] Although these comments relate to the freedom of expression, they are also applicable in the context of peaceful assemblies. Indeed, in General Comment 37, the HRCttee has emphasised that '…assemblies with a political message should enjoy a heightened level of accommodation and protection.'[166]

[160] Joint Report on the Proper Management of Assemblies (n. 14 above), paras. 87-8.
[161] UN Human Rights Committee, 'Concluding Observations, Angola' (CCPR/C/AGO/CO/2) March 2019, paras. 45-6.
[162] See, for instance, UN Human Rights Committee, 'Concluding Observations, Mauritania' (CCPR/C/MRT/CO/2), July 2019, paras. 44–5; UN Human Rights Committee, 'Concluding Observations, Tunisia' (CCPR/C/TUN/CO/6), April 2020, paras. 47–8.
[163] W Schabas, Nowak's CCPR Commentary (n. 11 above), p. 553, para. 25.
[164] General Comment 34 (n. 152 above) paras. 13 and 20.
[165] n. 164, paras. 13 and 20.
[166] General Comment 37 (n. 19 above), para. 32.

The regional human rights systems have also stressed the importance of the obligation to protect. In the African Commission's decision in *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*[167] it was held that 'governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.'[168] And in *Velasquez-Rodriguez v. Honduras*,[169] the Inter-American Court's landmark case on enforced disappearances, the Court held that States must 'prevent, investigate and punish any violation of the rights recognized by the Convention and … provide compensation for damages resulting from the violation.'[170] While these two cases do not relate to the right of peaceful assembly, the obligation to protect applies across the entire spectrum of human rights.

In determining whether or not a state has fulfilled its obligation to protect, the criteria used is one of reasonableness.[171] As observed by the Fourth Section of the European Court in *Ozgur Gundem v. Turkey*,[172] a case concerning an alleged violation of the freedom of expression, the scope of the obligation to protect will vary, '…having regard to the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources….'[173] Thus, limitations such as inadequate resources may have an impact on a State's ability to effectively protect assembly participants. The HRCttee also recognises such limitations, as expressed in General Comment 37[174] and in its case law. For example, in the *Alekseev* case, the Committee expected the Russian authorities to present evidence showing that they would not have been able to prevent violence against the assembly participants, in spite of taking all precautions.[175] Essentially, a State can be said to have discharged its obligation to protect even if it was unable to prevent violations from occurring.[176] In the *Alekseev* case, if the Russian

[167] *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria,* ACHPR Communication No. 155/96, 13-27 October 2001.
[168] n. 167, para. 57.
[169] IACtHR, *Velasquez-Rodriguez v. Honduras*, Series C. No. 4 Merits 181, (1988).
[170] n. 169, para. 166.
[171] De Schutter, International Human Rights Law: Cases, Materials and Commentary (n. 153 above), p. 399.
[172] ECtHR, *Ozgur Gundem v. Turkey*, Application No. 23144/93, Judgment of 16 March 2000, para. 43.
[173] n. 172, para. 43.
[174] General Comment 37 (n. 19 above), para. 52.
[175] *Alekseev v. Russian Federation,* (n. 92 above), para. 9.6.
[176] De Schutter, International Human Rights Law: Cases, Materials and Commentary (n. 151 above), p. 415.

authorities had demonstrated that they would not have been able to protect the participants in spite of taking all precautions, the Committee may have made a different decision.

In addition to protecting participants in assemblies, States also have an obligation to facilitate the exercise of the right.[177] Facilitative measures may include re-routing traffic, and providing (not prescribing) spaces within which the right can be exercised, ensuring the availability of medical aid within the vicinity of the assembly, among other positive measures. The obligation to facilitate also covers preparatory activities, such as the dissemination of information about an assembly.[178] While it is easier to facilitate assemblies for which notices were issued to authorities, the absence of a notice does not absolve authorities from their duty to facilitate a spontaneous assembly within their abilities.[179]

### 2.6.3 Obligations in relation to counter-demonstrations

Those exercising their right of peaceful assembly may be challenged by other members of the public, for instance through counter-demonstrations. The State obligation to protect counter-demonstrations is as important as its obligation to protect assemblies opposed by the counter-demonstrations. To this extent, States should, as much as possible, facilitate counter-demonstrations and protect participants in both the counter-demonstrations and the assemblies to which they are opposed.[180] In addition, the counter-demonstrations should, as much as possible, be allowed to take place within the sight and sound of the assembly they are opposing.[181]

The HRCttee has stated that while it is important to protect the rights of counter-demonstrators, states should ensure that counter-demonstrations are not unduly disruptive of assemblies and they do not interfere with the effective exercise of the right of peaceful assembly.[182] This was also the position of the European Court in *Plattform "Arzte fur das Leben"*

[177] General Comment 37 (n. 19 above), para. 24.
[178] *Tulzhenkova v. Belarus,* Communication No. 1838/2008, 26 October 2011, CCPR/C/103/D/1838/2008, para. 9.3.
[179] General Comment 37 (n. 19 above), para. 71.
[180] n. 179, para. 26.
[181] n. 180
[182] n. 180.

*v. Austria* wherein it stated that 'in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.'[183]

The African Commission has also pronounced itself on the need for demonstrators to be protected from attacks by counter-demonstrators. In *Egyptian Initiative for Personal Rights and Interights v. Egypt,*[184] the Egyptian Movement for Change organised a demonstration to push for changes in Egypt's Constitution to allow multiple candidacies in the presidential elections.[185] The demonstrators, who were about 50 in number, were surrounded by riot police.[186] Some time after the demonstration started, supporters of the then president, Hosni Mubarak, clashed with the demonstrators.[187] The supporters of the President's National Democratic Party attacked the members of the Egyptian Movement for Change while the riot police looked on and did nothing.[188] It was alleged that some of the riot police joined the government supporters in the attacks against the demonstrators.[189] The African Commission noted that Egypt was under an obligation to put in place systems to protect the members of the Egyptian Movement for Change during the protest.[190]

### 2.6.4 Obligations in relation to peaceful but 'unlawful' assemblies

While international law distinguishes between peaceful and non-peaceful assemblies, domestic laws generally distinguish between lawful and unlawful assemblies. States may have laws that render assemblies held in breach of procedural requirements unlawful. For example, in Kenya, an assembly that is held in the absence of a notification is considered unlawful, irrespective of the peacefulness of the participants.[191] Participants in such assemblies can be charged with participating in an unlawful assembly.

[183] *Plattform 'Arzte fur das Leben' v. Austria* (n. 112 above), para. 32.
[184] *Egyptian Initiative for Personal Rights and Interights v. Egypt,* ACHPR Communication No. 223/2006.
[185] n. 184, para. 3.
[186] n. 185.
[187] n. 185.
[188] *Egyptian Initiative for Personal Rights and Interights v. Egypt* (n. 184 above), para. 4.
[189] n. 188, para. 11.
[190] n. 188, para. 274.
[191] Public Order Act, Chapter 56 (1950), Laws of Kenya, s. 5.

Irrespective of their domestic legislation, States have obligations in relation to all peaceful assemblies, including those that they consider unlawful. The HRCttee stressed this point in *Ukteshbaev v. Kazakhstan*,[192] where the author was sanctioned for participating in a peaceful but unauthorized assembly. The Committee stated that even where an assembly is held in the absence of a notice or an authorisation, any interference with the right of peaceful assembly must be justified under Article 21.[193] In *Frumkin v. Russia* the European Court also held that states should 'show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly … is not to be deprived of all substance.'[194] Therefore, the obligation to respect, protect and facilitate peaceful assemblies applies even if the assemblies are held in breach of domestic laws.

### 2.6.5 Dispersal of assemblies

Assemblies should only be dispersed in exceptional cases and as a last resort.[195] For instance, if an initially peaceful assembly becomes violent and there is an imminent threat of serious violence, the assembly may be dispersed.[196] In the circumstance where only a section of participants are engaging in violent conduct, the entire assembly should not be dispersed.[197] Dispersal should only be resorted to when the degree of lawlessness is so extreme that isolating individuals is impractical and incapable of restoring order or protecting the rights of others.[198] Assemblies where participants engage in incitement to discrimination, hostility or violence as prohibited in Article 20(2) of the Covenant may also be dispersed.[199] Such assemblies, in any case, are not protected under Article 21. In some cases, peaceful assemblies may also be dispersed if the assembly causes serious and sustained disruption that greatly impacts the rights of others in disproportionate way.[200] In such cases, the degree of disruption should be so high that a balance

[192] *Ukteshbaev v. Kazakhstan,* Communication No. 2420/2014, 17 July 2019, CCPR/C/126/D/2420/2014, para. 9.5.
[193] n. 192, para. 9.5.
[194] ECtHR, *Frumkin v. Russia* (Application No. 74568/12), Judgment of 5 January 2016, para. 97.
[195] General Comment 37 (n. 19 above), para. 85. Also see Joint Report on the Proper Management of Assemblies (n. 14 above), para. 61.
[196] n. 195.
[197] ACHPR, 'Guidelines for the Policing Assemblies by Law Enforcement Officials in Africa' (2017), para. 22.5.
[198] Joint Report on the Proper Management of Assemblies (n. 14 above), paras. 61–2.
[199] n. 198, para. 62.
[200] n. 199.

between the rights of assembly participants and those of non-participants can only be struck if the assembly is dispersed.

Domestic laws should not grant authorities wide discretionary powers to disperse assemblies. As John Inazu has observed, a broad discretion 'delegates significant authority to local officials who may undervalue expressive interests in their assessments.'[201] If law enforcement officials do not place sufficient value on the essential democratic role of peaceful assemblies, they may disperse them even in circumstances where such a measure would be lawful under domestic law, but unnecessary and disproportionate. The Committee has stated that law enforcement agencies should not disperse assemblies simply on the basis of technical violations such as the failure to notify authorities.[202] In its Concluding Observations on the Netherlands, it noted that the provision of the Netherlands' Public Assemblies Act, which allows mayors to end an assembly held in the absence of prior notification, is not consistent with the ICCPR.[203]

Overall, dispersal is considered a measure of last resort since it may have a chilling effect on the right to peacefully assemble. Additionally, it presents the risk of multiple human rights violations being committed, since in some cases force may have to be used. In all cases where dispersal is considered necessary, participants should be informed and given time to disperse voluntarily.[204] Law enforcement officials should only use force to disperse if the use of force is absolutely necessary. In such cases, the principles governing the use of force by law enforcement officials must be applied.

### 2.7 Procedural Requirements

The regulation of the exercise of the right of peaceful assembly varies from State to State. The legal regimes of some states require assemblies to be authorised before being held, while others

[201] J Inazu, 'Unlawful Assembly as Social Control' 64 UCLA Law Review, 2(2017), p. 7.
[202] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 62.
[203] UN Human Rights Committee, 'Concluding Observations, Netherlands' (CCPR/C/NLD/CO/5), July 2019, para. 60.
[204] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 63.

only require organisers to notify relevant authorities about a planned assembly.[205] The purpose of a notification system should be to enable the authorities to adequately prepare and put in place measures to protect and facilitate an assembly, while at the same time protecting the public.[206] What is required under such a regime is a simple notice to authorities about an upcoming assembly, and not a request for permission. Authorisation systems, on the other hand, require organisers to obtain permission from state authorities before proceeding with an assembly. Whichever regime a country has in place, it should not be implemented in a way that hinders the right of peaceful assembly. As discussed next, both the UN human rights system and the regional human rights systems have established standards on the two regimes.

### 2.7.1 Notification or authorisation under the UN human rights system

The UN human rights system generally considers the requirement of notification as a restriction on the exercise of the right of peaceful assembly.[207] Authorisation regimes, on the other hand, are seen as being contrary to the idea that peaceful assembly is a right and not a privilege, and should therefore not be in place. The Human Rights Committee has noted that, in practice, States that operate authorisation regimes sometimes deny organisers permission to hold assemblies on grounds that are not listed under Article 21. For instance, in *Amelkovich v. Belarus*,[208] the author had wanted to hold an assembly in support of political detainees in Belarus. He was denied permission on the ground that there were no political detainees in Belarus.[209] The Committee found that the refusal to allow the picket to be held was a violation of Article 21.[210]

In some cases, authorities routinely deny organizers permission to hold assemblies in particular locations. For instance, in *Chebotareva v. Russia*[211] the author was repeatedly denied permission to hold a picket at a preferred location to mark the anniversary of the murder of Anna Politkovskaya, a journalist and human rights activist, and to protest against political repression in

[205] For instance, in Morocco, prior authorisation must be obtained before assemblies are held. Kenya, Uganda, among other States have notification systems. For details by country of the domestic legal regimes on peaceful assembly, see https://rightofassembly.info.
[206] *Kivenmaa v. Finland,* Communication No. 412/1990, 31 March 1994, CCPR/C/50/D/412/1990, para. 9.2.
[207] General Comment 37 (n. 19 above), para. 70.
[208] *Amelkovich v. Belarus*, Communication No. 2720/2016, 29 March 2019, CCPR/C/125/D/2720/2016.
[209] n. 208, para. 6.2.
[210] n. 208, para. 6.5.
[211] *Chebotareva v. Russia*, Communication No. 1866/2009, 26 March 2012, CCPR/C/104/D/1866/2009.

Russia. The author had made several requests to relevant authorities and even proposed alternative locations but was never granted permission. The Committee stated that by refusing to authorise the picket, the Russian authorities had violated Article 21.[212] The *Chebotareva* case demonstrates that authorisation regimes may grant authorities excessive powers which may be abused. In this regard, the Committee stated in *Ukteshbaev v. Kazakhstan* that authorisation regimes in which the authorities have broad discretion whether or not to grant permission to assemble should generally not be imposed.[213] Where an authorisation regime exists, they should function as notification systems.[214]

In relation to notification systems, the Committee has acknowledged that such requirements may be justified in some cases. According to the Committee, notification systems are permissible if they are meant to aid State authorities in facilitating assemblies and ensuring the protection of the participants and non-participants.[215] They should not be used to unduly restrict the exercise of the right of peaceful assembly and should not, in practice, function as an authorisation system.[216] In its Concluding Observations on Jordan, the Committee observed that Jordan's laws on public gatherings required notification and not permission. However, in practice an authorisation system was in place, and many demonstrations had been prohibited by the authorities.[217]

Where a notification system is in place, the notification process should not be too burdensome and difficult to comply with. This was stated by the Committee in *Poliakov v. Belarus*,[218] where the organisers of an assembly were required to secure three written commitments from three different local government departments before holding an

[212] *Chebotareva v. Russia* (n. 211 above), para. 9.3.
[213] *Ukteshbhaev v. Kazakhstan,* (n. 192 above), para. 9.5.
[214] General Comment 37 (n. 19 above), para. 73.
[215] n. 214, para. 70.
[216] n. 215.
[217] UN Human Rights Committee, 'Concluding Observations, Jordan' CCPR/C/JOR/CO/5, 4 December 2017, para. 32.
[218] *Poliakov v. Belarus*, Communication Number 2030/2011, 17 July 2014, CCPR/C/111/D/2030/2011.

assembly.[219] The Committee noted that the requirements were burdensome and that the State party had failed to justify their need.[220]

The Committee has also determined that a failure to comply with notification requirements should not render an assembly, or participation in it, unlawful.[221] Further, it has stated that failure to notify should not be the sole reason for the dispersal of an assembly or the sanctioning of participants and organisers.[222] In addition, peaceful assemblies whose impact is reasonably expected to be minimal should be exempted from the requirement of notification.[223] In relation to the notice period, there is no standard prescribed period. However, the notice period should be reasonable enough to allow room for organisers to challenge decisions of the authorities. Nor should the notice period be too long since this may interfere with the effective exercise of the right of peaceful assembly. The Committee has, for example, found a notice period of one month to be excessive.[224]

### 2.7.2. Notification or authorisation in regional human rights systems

As is the case in the UN system, the requirement of notification is viewed as a tool for enabling states to facilitate and protect assemblies.[225] A significant difference, especially in relation to the European human rights system, is that while the European Court is more accepting of the requirement of authorisation, the HRCttee is not. In *Bukta and Others v. Hungary*,[226] a chamber of the European Court observed that '…the subjection of public assemblies to a prior-authorisation procedure does not normally encroach upon the essence of the right.'[227] In relation to notification requirements, the European Court position is similar to that of the HRCttee in the sense that it has also stated that the requirement of notification is reasonable, provided that it

[219] *Poliakov v. Belarus* (n. 218 above), paras. 2.1-3.1.
[220] n. 219, para. 8.3.
[221] General Comment 37 (n. 19 above), para. 71.
[222] Where administrative sanctions are imposed for the failure to notify, this must be justified by the authorities. See for example, *Popova v. Russian Federation*, (n. 145 above), para. 7.4, See also A/HRC/31/66 (n. 14 above), para. 23.
[223] General Comment 37 (n. 19 above), para. 72.
[224] UN Human Rights Committee, 'Concluding Observations, Uzbekistan' CCPR/C/UZB/CO/4, para. 24.
[225] See for instance, ECtHR, *Oya Ataman v. Turkey*, Application No. 74552/01. Judgment of 5 December 2006, para. 16.
[226] ECtHR, *Bukta and Others v. Hungary,* Application No. 25691/01, Judgment of 17 July 2007.
[227] n. 226, para. 35.

does not serve as an obstacle to the effective exercise of the right of peaceful assembly.[228] Notification is seen as a means through which the right of peaceful assembly can be reconciled with the rights of others.[229]

Although notification requirements are permitted, their enforcement should not be the primary objective of the State authorities. As is the case in the UN system, authorities should not always insist on receiving notifications even where an assembly is unlikely to have a major adverse impact on non-participants. In *Balcik and Others v. Turkey*, where authorities disrupted a demonstration which had been held in the absence of prior notification and arrested some participants, the Third Section of the European Court noted that the demonstrators were only 46 in number and they did not present a threat to public order or the rights of others.[230] As such, the disruption of the demonstration and the arrest of some participants within 30 minutes of its commencement was said to be an unnecessary and disproportionate response.[231] The Court further held that where participants do not engage in violent conduct, authorities should show '…a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.'[232] In contrast, in *Eva Molnar v. Hungary*, the European Court suggested that the absence of prior notice may form the basis for a dispersal of an assembly.[233] Essentially, the European Court has been more tolerant of notification and authorisation regimes than is the HRCttee.

The position of the European Court on requirements relating to the notice period is similar to that of the Human Rights Committee. For example, in *Lashmankin and others v. Russia* the European Court found that the inflexible application of a strict notice period amounted to a violation of the right of peaceful assembly.[234] It also appears that constructive notice is sufficient, meaning that authorities should not insist on a formal notification from the actual organisers of an assembly even if the law requires such. For example, if it is widely publicised through social

[228] ECtHR, *Balcik and Others v. Turkey,* Application No.25/02. Judgment of 29 November 2007, para. 49.
[229] ECtHR, *Eva Molnar v. Hungary*, Application No. 10346/05, Judgment of 7 October 2008 para. 38.
[230] *Balcik and Others v. Turkey* (n. 228 above), para. 53.
[231] n. 230.
[232] n. 230, para. 52.
[233] *Eva Molnar v. Hungary* (n. 229 above), n. 227, para. 37.
[234] *Lashmankin v. Russia*, (n. 106 above) para. 456.

media that an assembly will be held on a particular day at a specific time and place, State authorities should make arrangements to facilitate such an assembly even if they have not received a formal notice. The European Court suggested this in the *Balcik case* when it noted that there was evidence that the authorities in the case knew about the planned demonstrations even though the organisers had not issued a formal notice.[235] Therefore, they had an obligation to take measures to prevent disorder even in the absence of a formal notice.[236]

Neither the African Court nor the African Commission has addressed the issue of notification requirements in any of the Communications that have been submitted to the two bodies. However, the African Commission *Guidelines on Freedom of Assembly and of Association in Africa* recommend that notification should only be required when a substantial number of participants are expected, or only where substantial disruption is likely.[237] On authorisation, the Guidelines take a position that is similar to that of the HRCttee.[238]

In relation to spontaneous assemblies, both the UN human rights system and the regional human rights systems agree that such assemblies should be exempted from the requirement of notification.[239] This is because such assemblies occur in immediate response to an event and it is therefore not reasonable for authorities to expect to be notified. In such cases, the right to hold an assembly should prevail over the obligation to notify authorities or seek authorisation. In *Popova v. Russian Federation* where the author was sanctioned for participating in a spontaneous assembly, the Committee stated that the enforcement of notification systems should not be overly restrictive and that spontaneous assemblies should not be subjected to such systems.[240] These sentiments are also echoed in the Committee's General Comment 37. The European Court has also stated that notification should not be required in the context of spontaneous assemblies. In *Bukta and Others v. Hungary* where a demonstration was dispersed because notice had not been issued as required by Hungarian law, the Court stated that 'in special circumstances when

[235] *Balcik and Others v. Turkey,* (n. 228 above), para. 51.
[236] n. 235.
[237] ACHPR, 'Guidelines on Freedom of Association and Assembly in Africa' (2017), paras. 71–76.
[238] n. 237, para. 71.
[239] General Comment 37 (n. 19 above), para. 72. See also A/HRC/20/27 (n. 56 above), para. 91; Joint Report on Proper Management of Assemblies (n. 14 above) para. 23.
[240] *Popova v. Russian Federation*, (n. 145 above), para. 7.5.

an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.'[241]

## 2.8 Restrictions on Peaceful Assemblies

### 2.8.1 General Principles on Restrictions

The ICCPR and the regional human rights instruments all provide for the restriction of the right of peaceful assembly. Under Article 21, whenever restrictions are imposed, they must be in conformity with the law, necessary in a democratic society, and meant for the pursuit of legitimate aims.[242] Essentially, restrictions must pass the test of legality, necessity and proportionality. Next is a discussion of these principles.

#### 2.8.1.1 Legality

This principle requires States to develop domestic legislation which makes provision for circumstances when restrictions may be imposed.[243] For the principle of legality to be met, legislation should be precise enough to prevent arbitrary decision-making and to clearly define the nature of conduct that is prohibited.[244] The Human Rights Committee noted this point in the case of *Nepomnyashchiy v. Russian Federation*.[245] Although the case concerned a violation of Article 19, the Committee addressed the question of the quality of laws, stating that laws should be 'sufficiently precise to enable an individual to regulate his or her conduct accordingly and they may not confer unfettered discretion….'[246] The Inter-American Court has set particularly high standards in this regard. In its advisory opinion on the meaning of the word 'laws' as used in Article 30 of the American Convention, it expressed itself as follows: 'In order to guarantee human rights, it is … essential that state actions affecting basic rights not be left to the discretion

[241] *Bukta and Others v. Hungary* (n. 226 above), para. 36.
[242] Similar provision can be found in Article 11 of the African Charter, Article 11 (2) of the European Convention and Article 16 of the American Convention.
[243] De Schutter, International Human Rights Law: Cases, Materials and Commentary (n. 153 above), p. 293. Also see the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, paras. 15 - 18.
[244] De Schutter, International Human Rights Law: Cases, Materials and Commentary (n. 153 above), p. 296.
[245] *Nepomnyashchiy v. Russian Federation,* Communication No. 2318/2013, 17 July 2018, CCPR/C/123/D/2318/2013.
[246] n. 245 above, para. 7.7.

of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution….'[247]

In contrast, the European Court, has adopted a wider definition of what qualifies as 'law'. In *Gulcu v. Turkey*,[248] a chamber of the Court stated that the term 'law' is to be understood in its broad sense and not its 'formal' sense.[249] Thus, according to the European Court, laws include statutes passed by parliament as well as regulatory measures taken by regulatory bodies exercising powers delegated to them by Parliament.[250] In addition, laws include judge-made law.[251] Although this definition is wider in scope, the European Court has also stressed the need for any exercise of discretion by authorities to have a basis in domestic laws and to be sufficiently clear so as to make decision-making predictable and to prevent arbitrary exercise of power.[252]

The Inter-American Court's Advisory Opinion excludes the possibility of laws being made by courts or authorities other than Parliament. An advantage of this cautious approach is that it limits the discretion of state authorities and therefore guards against the assumption of powers that are not expressly provided for through Acts of parliament. It also prevents situations where different courts interpret human rights and state obligations differently, thereby causing ambiguity in the implementation of State obligations. This approach may, however, not always apply favourably in the context of peaceful assemblies. It may not be possible for Parliament to

[247] IACtHR, *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC -06/86, of 9 May 1986, paras. 22 and 24.
[248] ECtHR, *Gulcu v. Turkey,* Application No. 17526/10, Judgment of 19 January 2016.
[249] n. 248, para. 104.
[250] n. 249.
[251] *Gulcu v. Turkey* (n. 248 above), para. 104.
[252] This was stated in *Lashmankin v. Russia* (n. 106 above) where the European Court stated that '...the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to those concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...' (Para. 410.) The Court went further to state that domestic law '...must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention...and the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.'

contemplate and provide for every situation that may arise during an assembly. Judge-made law can fill such gaps. Secondly, the conduct of an assembly invariably involves a clash of rights and it therefore helps for authorities to have some margin of discretion, provided that the discretionary powers are not too broad, and the exercise of discretion can be justified.

In addition to developing unambiguous laws, states must ensure that national legislation imposing limitations is accessible to the public.[253] In the case of *Roman Zakharov v. Russia*,[254] where the accessibility of a law published in the official magazine of Russia's Ministry of Communications & Information Technologies was questioned, the Grand Chamber of the European Court stated that the law in question had not been made generally accessible to the public, especially since one had to pay subscription fees to read it. It added, however, that since the magazine was an official ministerial document and the law in question could also be accessed online, the requirements of accessibility had been met. This decision seems to suggest that the obligation to ensure accessibility only requires states to ensure that they create a platform through which the public can easily access legislation. Had the Russian Ministry made the legislation available only through the official magazine, the Grand Chamber would probably have decided differently.

#### 2.8.1.2 Necessity

The second sentence of Article 21 of the ICCPR, as well as similar provisions in regional human rights instruments, require restrictions on the right of peaceful assembly must be necessary in a democratic society.[255] The Siracusa Principles,[256] a non-binding instrument adopted by the United Nations Economic and Social Council in 1984, offer interpretive guidance on the limitation and derogation provisions of the ICCPR. The Principles provide that the term 'necessary' as used in the ICCPR implies that any limitation imposed must be based on one of the grounds justifying limitations in the Covenant; respond to a pressing public or social need; pursues a legitimate aim;

[253] Siracusa Principles on the on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN .4/1985/4, para. 17.
[254] ECtHR [GC], *Roman Zakharov v. Russia*, Application No. 47143/06, Judgment of 4 December 2015, para. 242.
[255] Note that the African Charter does not add the terms 'in a democratic society.'
[256] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4.

and must be proportionate to that aim.[257] The term 'in a democratic society' is interpreted as an additional restriction.[258]

In determining whether a restriction is necessary, the decision-making authority has to take into consideration the importance of the right of peaceful assembly and ensure that the restriction responds to a pressing social need.[259] In all cases where the right has to be restricted, it must be done in pursuit of any of the legitimate aims outlined in Article 21. It is also important that authorities clarify the exact need that has to be protected through the restriction.[260] It is not enough, for instance, to simply say the restriction is imposed to protect the public interest. The question of what the public interest is and why it has to be protected through the imposition of a restriction on the right of peaceful assembly has to be answered. In *Kasparov and Others v. Russia*,[261] Russian anti-riot police arrested the applicants who were a mix of passers-by and persons intending to participate in an anti-government march that was disrupted by the police. The Russian authorities had banned the march on the ground that it would cause disruptions to routine urban services and the movement of passers-by and had instead proposed that a meeting be held at a club.[262] The organisers of the march then proposed alternative routes but the authorities still denied them the permission to proceed with the march. On the day in question, anti-riot police were deployed in the area where the march was expected to be held. The participants were to congregate at a central point before proceeding with the march that the authorities had banned. The anti-riot police indiscriminately arrested pedestrians, some of whom had nothing to do with the planned march. The applicants were among those arrested and fined. The European Court, while acknowledging that the right of peaceful assembly is not absolute, stated that the exceptions to the exercise of the right '...must be narrowly interpreted and the necessity for any restrictions must be convincingly established.'[263] The Court further stated that 'an interference will be considered "necessary in a democratic society" for a legitimate aim if it

[257] Siracusa Principles (n. 256 above), para. 10.
[258] n. 257, para. 19.
[259] General Comment 37 (n. 19 above), para. 40.
[260] *Amelkovich v. Belarus,* Communication No. 2720/2016, 29 March 2019, CCPR/C/125/D/2720/2016, para. 6.3
[261] ECtHR, *Kasparov v. Russia*, (Application 21613/07), Judgment of 3 October 2013.
[262] n. 261, paras. 7 and 8.
[263] n. 261, para. 86.

answers a "pressing social need" and … if the reasons adduced by the national authorities to justify it are "relevant and sufficient".'[264]

The jurisprudence of the Human Rights Committee also demonstrates that states are held to a high standard when they impose restrictions on the right of peaceful assembly. On many occasions, the Committee has established that it is not enough for a state to simply cite one of the legitimate aims in Article 21 as the basis for a restriction. Evidence has to be adduced to show that the restriction imposed was necessary. For instance, in *Abildayeva v. Kazakhstan* where the author was detained for participating in a spontaneous assembly, the Committee noted that the State party failed to demonstrate why the author's detention was necessary in a democratic society.[265] Here, the terms 'in a democratic society' are of particular significance. By participating in a spontaneous assembly, the author contravened national laws requiring prior notification before participation in assemblies. Ordinarily, action would normally be taken against those who contravene laws. However, sanctioning assembly participants for minor infractions may have a chilling effect on the right.

#### 2.8.1.3 Proportionality

This principle is closely linked to the principle of necessity, and only comes into play if the requirement of necessity has been met. It requires authorities to ensure that any interference with the right of peaceful assembly does not go further than is strictly necessary to achieve the legitimate aims.[266] This was stated by the Human Rights Committee took in *Toregozhina v. Kazakhstan*,[267] where the author was arrested and heavily fined for holding an assembly that had not been permitted. The Committee determined that the author's right of peaceful assembly had been violated since the state had failed to demonstrate how the detention and imposition of a fine met the test of necessity and proportionality.[268]

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[264] *Kasparov v. Russia* (n. 261 above), para. 86.
[265] *Abildayeva v. Kazakhstan,* Communication No. 2309/2013, 4 April 2019, CCPR/C/125/D/2309/2013, para. 8.7.
[266] *Toregozhina v. Kazakhstan,* Communication No. 2137/2012, 20 November 2014, para. 7.4. Note, however, that the Committee expressed this view when determining whether the author's freedom of expression had been violated. The same principles would, nevertheless, apply in the context of assemblies.
[267] n. 266.
[268] n. 266, para. 7.6.

The Committee's views in *Lopasov v. Belarus* are also instructive. In this case, the author alleged that he was arrested and charged with participating in a peaceful but unauthorised assembly. It was noted that while the restrictions imposed were in conformity with the domestic laws of Belarus, the State did not explain why such restrictions were necessary and whether they were proportionate to one of the legitimate purposes set out in Article 21 of the Covenant. The Committee added that Belarus did not explain 'how, in practice, the author's participation in a peaceful demonstration in which only a few persons participated could have violated the rights and freedoms of others or posed a threat to the protection of public safety, public order or public health or morals.'[269] It further observed that the State party had to justify why apprehending the author and imposing an administrative fine on him were necessary and proportionate to that purpose.[270]

#### 2.8.1.4 Non-discrimination

The principle of non-discrimination is not expressly cited in Article 21. However, Article 2(1) of the ICCPR requires each State Party to the Covenant to respect and ensure to all individuals within their territories all the rights recognised in the Covenant without distinction of any kind. This provision is of particular importance in the context of assemblies, bearing in mind that some states have domestic laws that prohibit some groups from participating in assemblies. In its Concluding Observations on Kuwait, the HRCttee expressed concern about Kuwait's law on public gatherings which prohibited non-citizens from participating in assemblies.[271] The Committee has also called on States that restrict assemblies pursuing the interests of sexual minorities to ensure that their laws comply with international standards.[272] In respect of minorities or groups that have been historically subjected to discrimination, the Committee has stated that the state should enhance efforts to protect the right of peaceful assembly of such groups.[273] The principle of non-discrimination is also important in the context of assemblies that are political in nature and which are anti-government. States are under an obligation to facilitate and protect

[269] *Lopasov v. Belarus*, Communication No. 2269/2013, 25 July 2019, CCPR/C/126/D/2269/2013, para. 8.7.
[270] n. 269, para. 8.7.
[271] UN Human Rights Committee, 'Concluding Observations, Kuwait' CCPR/C/KWT/CO/3, July 2016, para. 42.
[272] UN Human Rights Committee, 'Concluding Observations, Azerbaijan' CCPR/C/AZE/CO/4, Nov. 2016, para. 8.
[273] General Comment 37 (n. 19 above), para. 25.

participants in such assemblies. As explained earlier, the obligation to protect and facilitate such assemblies is a heightened one.

### 2.8.2 Legitimate Grounds for Restrictions

Article 21 of the ICCPR specifies the grounds upon which the right of peaceful assembly may be restricted. They include national security or public safety, public order, the protection of health, the protection of morals, or the protection of the rights and freedoms of others. Similar grounds are found in the African Charter,[274] the American Convention[275] and the European Convention.[276] In *Vladimir Sekerko v. Belarus,*[277] the Human Rights Committee stated that it is the responsibility of a state imposing a restriction to demonstrate that it is doing so in pursuit of one or more of the legitimate aims set out in the ICCPR.[278] States should not come up with additional aims that fall outside the scope of those provided for in Article 21. These aims are discussed below.

#### 2.8.2.1 National Security

The Siracusa Principles state that national security may be invoked as a basis for restriction of rights only for the purpose of protecting '…the existence of the nation or its territorial integrity or political independence against force or threat of force.'[279] It cannot be invoked to prevent merely local or isolated threats to law and order.[280] Where this ground is invoked to restrict a peaceful assembly, the state must be specific on the threat sought to be averted. A general risk is not sufficient.[281] In *Lee v. the Republic of Korea*, where the author was convicted for being a member of an association that was said to be a threat to national security, the Human Rights Committee noted that the State needed to explain the precise nature of the threat posed to national security.[282] The limits to state discretion has also been emphasized by the European Court. In its judgment in *Roman Zakharov v. Russia*, the Court's Grand Chamber noted that in

[274] African Charter (n. 4 above), Article 11. The Charter does not, however, list the protection of public order as one of the grounds for restriction.
[275] American Convention (n. 3 above), Article 15.
[276] European Convention (n. 2 above), Article 11(2).
[277] *Vladimir Sekerko v. Belarus,* Communication Number 1851/2008, 28 October 2013, CCPR/C/109/D/1851/2008.
[278] n. 277, para. 9.4.
[279] Siracusa Principles, (n. 256 above), para. 29.
[280] n. 279.
[281] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 31.
[282] *Lee v. the Republic of Korea*, Communication No. 1119/2002, 20 July 2005, CCPR/C/84/D/1119/2002, para. 7.3.

matters affecting fundamental human rights, it would be against the rule of law for state discretion regarding national security to be unfettered.[283] Where there are systematic violations of human rights, States cannot use national security as a justification for imposing restrictions on those opposed to the violations.[284] This is because such violations are themselves a threat to national security.[285]

#### 2.8.2.2 Public Safety

According to the Siracusa Principles, public safety means '...protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.'[286] In the context of assemblies, this ground can be relied on only if a peaceful assembly poses a specific and imminent threat to the safety of persons or property.[287] For instance, if participants in an assembly engage in violent conduct and the violence cannot be contained by law enforcement authorities, the assembly may be dispersed to protect public safety. Assemblies that are yet to be held may also be prohibited on this ground if the risk of violence is high and law enforcement officials are not able to guarantee the safety of participants and non-participants.[288]

#### 2.8.2.3 Public Order

Public order has been defined as '…the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.'[289] It also includes the protection of human rights. In this regard, the requirement of notification or authorisation in the legislation of some states should be geared towards the maintenance of public order. As mentioned earlier in this chapter, such laws are meant to ensure the smooth conduct of assemblies. Assemblies, generally, can disturb the normal course of life in the areas where they take place. In particular, political assemblies in many cases attract thousands who occupy space that is ordinarily used for other purposes. However, as discussed earlier, States should generally tolerate disruptions and only intervene where the inconvenience caused by such disruptions is disproportionately high.

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[283] *Roman Zakharov v. Russia,* (n. 254 above), para. 247.
[284] Siracusa Principles, (n. 256 above), para. 32.
[285] n. 284.
[286] Siracusa Principles, (n. 256 above), para. 33.
[287] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 609, para. 34.
[288] n. 287.
[289] Siracusa Principles, (n. 256 above), para. 22.

States should also not interpret public order in a restrictive manner. For example, a crowd of loud and rowdy people chanting may create the impression of disorder as understood in the English language, but they are still protected under Article 21.[290]

#### 2.8.2.4 Public Health

Public health may be a basis for restricting the right of peaceful assembly only if there is a serious threat to the health of the public and gatherings may exacerbate the spread of an infectious disease. According to the Siracusa Principles, restrictive measures based on the protection of public health must be 'specifically aimed at preventing disease or injury or providing care for the sick and injured.'[291] For instance, due to the outbreak of Coronavirus pandemic in early 2020,[292] several states derogated from their obligations under Article 21.[293] Given the rapid spread of the virus[294] and the fact that assemblies generally have many people in close proximity, the decision to suspend gatherings could be justified as a necessary precautionary measure to prevent the spread of the deadly virus.

Having regard to the requirement of proportionality, restrictions imposed to protect public health should be lifted as soon as the risk is averted. There may be cases where states impose restrictions on public gatherings but the public is dissatisfied with the manner in which the State is handling a prevailing health risk.[295] In such cases, a State would have to balance between the right of peaceful assembly and the need to protect public health and safety. If there is a real likelihood of an assembly contributing to the worsening of a health situation, then restrictions may be imposed. However, if assembly participants are able to assemble while

[290] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 600, para. 13.
[291] Siracusa Principles, (n. 256 above), para. 25.
[292] WHO declared the virus a pandemic on 11 March 2020. See WHO-Timeline-COVID 19 Available at https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19.
[293] See https://www.rightofassembly.info/news/states-begin-to-derogate-from-the-right-of-assembly-owing-to-the-covid-19-pandemic.
[294] As of 12 February 2023, over 756 million confirmed cases of infections had been reported globally, out of which 6.8 million cases had resulted into deaths. See https://covid19.who.int/.
[295] Take, for instance, protests in various parts of the world to challenge lockdowns imposed by governments as part of the measures to curb the spread of the Coronavirus. See: DW News, 'Coronavirus latest: German anti-lockdown protests enter second round' 16 May 2020. Available at https://www.dw.com/en/coronavirus-latest-german-anti-lockdown-protests-enter-second-round/a-53460404.

complying with health regulations (such as physical distancing measures), the assembly should be facilitated as much as possible.

#### 2.8.2.5 Public Morals

As regards public morals, states generally enjoy a wide margin of discretion since there is no single moral standard that applies across all cultures. However, although morals vary, human rights are universal and the protection of the rights guaranteed in the Covenant should supersede narrow constructions of what particular societies or sections of society find morally acceptable.[296] For instance, the Human Rights Committee has found restrictions on assemblies organised by sexual minorities imposed for that reason to be unjustified.[297] The Siracusa Principles also states that a State imposing restrictions on this ground must demonstrate that the restriction in question '…is essential to the maintenance of respect for fundamental values of the community.'[298]

#### 2.8.2.6 Protection of the rights of others

Nowak and Schabas have observed that this ground should only be invoked where other fundamental rights guaranteed in the ICCPR are concerned.[299] Of particular importance are the rights to personal safety and physical integrity.[300] The Siracusa Principles also stipulate that special weight should be given to rights that are not subject to any limitations.[301] States are therefore expected to strike a balance between the rights of assembly participants and those of the rest of the public. For example, disruptions caused by assemblies should only be tolerated to the extent that they do not disproportionately burden or adversely impact the rights of others. The HRCttee held in *Stambrovsky v. Belarus*[302] that 'disruptions have to be accommodated, unless they impose a disproportionate burden, in which case the authorities must be able to provide detailed justification for any restrictions.'[303] Similarly, in the earlier-mentioned case of

[296] General Comment 37 (n. 19 above), para. 46.
[297] *Alekseev v. Russian Federation* (n. 93 above).
[298] Siracusa Principles, (n. 256 above), para. 27.
[299] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 611, para. 39.
[300] n. 299.
[301] Siracusa Principles, (n. 256 above), para. 36.
[302] *Stambrovsky v. Belarus,* Communication No. 1987/2010 24 October 2014, CCPR/C/112/D/1987/2010.
[303] n. 302, para. 7.6.

*Kudrevicius v. Lithuania*, the European Court, while acknowledging that the obstructions of a highway by the applicants also enjoyed protection under Article 11 of the European Convention, observed that such actions make it easier for restrictions to be imposed on assemblies.[304]

The right of peaceful assembly may also be restricted to protect private property.[305] Although Article 21 protects assemblies in both public and private property, the consent of the owner of the private property which is not accessible to the public is a prerequisite for the lawful conduct of an assembly. Without such consent, State authorities may break up an assembly held on private property.[306]

### 2.8.3 Nature of restrictions commonly imposed by States

Once it is established that the imposition of a restriction is justified, the form the restriction takes will vary depending on the circumstances of each case. The non-exhaustive list below discusses the nature of some of the restrictions that States commonly impose.

#### 2.8.3.1 Restrictions on content

Authorities should not impose restrictions on the basis of content provided that the content of an assembly is not prohibited under Article 20 of the ICCPR.[307] Assembly participants should be free to air their views even if other people find the views annoying. The need for restrictions to be content-neutral has been emphasised by the HRCttee. In *Alekseev v. Russian Federation* cited earlier, the Committee stated that 'a rejection of the author's right to organize a public assembly addressing the chosen subject…is one of the most serious interferences with the freedom of peaceful assembly.'[308] Similarly, in *Govsha, Syritsa and Mezyak v. Belarus*[309] a local government authority denied the authors permission to hold a meeting to discuss matters concerning a 'free, independent and prosperous Belarus.'[310] The Committee found that there had been a violation of both Article 19 and Article 21 of the ICCPR.[311] It noted that the restrictions on the authors'

[304] *Kudrevicius v. Lithuania* (n. 124 above), paras. 155-56.
[305] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 611, para. 40.
[306] n. 305.
[307] General Comment 37 (n. 19 above), para. 25.
[308] *Alekseev v. Russian Federation*, (n. 93 above), para. 9.6.
[309] *Govsha, Syritsa and Mezyak v. Belarus,* Communication No. 1790/2008, 27 July 2012, CCPR/C/105/D/1790/2008.
[310] n. 309, para. 2.1.
[311] n. 309, para. 9.4.

right of peaceful assembly were linked to the content of the discussions they were planning to hold, and such discussions are protected by Article 19 of the ICCPR.[312] In its Concluding Observations on Equatorial Guinea, the Committee also expressed concerns about the government's prohibition of demonstrations on the basis of content.[313]

Content-based restrictions may also relate to information shared online. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, has observed that States are increasingly interfering with interactions in online spaces.[314] In the context of assemblies, this may hamper online mobilisation of participants as well as discussions on some subjects.

#### 2.8.3.2 Restrictions on time and place

Participants in assemblies usually seek to convey their messages to targeted persons or authorities. Therefore, the place where and the time when an assembly is held plays a crucial role in either enhancing or diminishing the impact of their message. Whenever authorities seek to restrict the time and location of an assembly, they must ensure that assemblies take place within sight and sound of their target audience.[315]

The importance of the place and time of an assembly has been emphasized by various regional and international bodies. The HRCttee stated in *Denis Turchenyak and others v. Belarus*[316] that the organisers of an assembly have the right to choose a location 'within sight and sound' of their target audience.[317] This position was reinforced in the Committee's General Comment 37 on the right of peaceful assembly.[318] It is acknowledged that in some cases there may be a need to place restrictions on the location and time of an assembly. However, whenever restriction as to place and time of an assembly are imposed, authorities must still, as far as

[312] *Govsha, Syritsa and Mezyak v. Belarus* (n. 309 above), para. 9.4.
[313] UN Human Rights Committee, 'Concluding Observations, Equatorial Guinea' CCPR/C/GNQ/CO/1, July 2019, paras. 54-55.
[314] Report of the Special Rapporteur on peaceful assembly and of association, A/HRC/41/41 (n. 88 above), para. 29.
[315] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 24.
[316] *Denis Turchenyak et al. v. Belarus*, Communication No.1948/2010, 10 September 2013, CCPR/C/108/D/1948/2010.
[317] n. 316, para. 7.4.
[318] General Comment 37 (n. 19 above), paras. 22 and 53.

possible, allow the assemblies to take place within sight and sound of the target audience.[319] In the event that authorities provide the organisers with an alternative time and place, precaution must be taken to ensure that the impact of the intended message is not diminished.

At the regional level, the European Court has also noted the need for authorities to respect the rights of assembly participants to hold assemblies at a location and time of their choice. The fact that an assembly is likely to cause disruptions is not sufficient reason for authorities to refuse to allow an assembly to proceed at a preferred venue. Disruptions are expected consequences of assemblies, and it is the duty of authorities to take appropriate measures to minimise the impact of the disruption without negatively affecting the exercise of the right of peaceful assembly.[320]

Where the time and place of an assembly plays a particularly significant role in communicating the intended message, greater effort should be made to accommodate the choices of the assembly organizers. This was held in the judgment in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* wherein the applicants alleged that the refusal by Bulgarian authorities to allow them to hold commemorative meetings at the graves of some historical figures was a violation of their right of peaceful assembly.[321] The applicants were ethnic Macedonian minorities living in Bulgaria. The Bulgarian authorities argued that the chosen time and place was inappropriate since there had been hostile reactions from other members of the public in past commemorations and that another assembly by an opposing group would also be held at the same place and time as the one planned by the applicants.[322] A chamber of the European Court stated that the location and time chosen by the applicants was crucial to the applicants and that although another celebration was planned by a different group, the Bulgarian authorities should have put measures in place to ensure that both assemblies proceeded peacefully.[323]

[319] General Comment 37 (n. 19 above), para. 53.
[320] *Lashmankin v. Russia*, (n. 106 above), para. 423.
[321] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (n. 106 above) para. 3.
[322] n. 321, para. 74.
[323] n. 321, para. 109.

In cases where State authorities are compelled to restrict the place and time of an assembly, their actions and decisions must meet the tests of legality, necessity and proportionality. Even where circumstances necessitate the denial of the preferred location and time of an assembly, the failure to provide a suitable alternative will be considered disproportionate and the refusal will therefore amount to a violation of Article 21 of the ICCPR. This was the case in *Primov and others v. Russia* where an intended public demonstration aimed at criticizing the work of the head of a local authority over allegations of corruption and misuse of public funds was banned.[324] The demonstration which was expected to attract about 5,000 participants was to be held in a recreational park which could safely accommodate 500 people.[325] While recognising that the Russian authorities had legitimate reasons for refusing to allow the use of the park, the European Court found that completely banning the demonstration did not meet the test of proportionality.[326] Regarding the designation of particular locations for assemblies, the Human Rights Committee has stated that such measures do not meet the tests of necessity and proportionality.[327]

#### 2.8.3.3 Restrictions on duration

Peaceful assemblies are usually generally temporary in nature and there are no defined prescriptions on how long an assembly should take. Authorities may however restrict the duration of an assembly if its length and frequency disproportionately affect the rights of non-participants.[328] For instance, if assembly participants have blocked a major highway, allowing them to continue with their assembly for several days is likely to disproportionately affect the rights of others and may also greatly interfere with commercial activities. On the other hand, the inconvenience caused and the threat of economic loss may prompt authorities to quickly address the concerns of the participants, as it happened in the *Kudrevicius* case. In the event that a State is not able to immediately meet the demands of those protesting, the state may provide an

[324] *Primov and Others v. Russia* (n. 115 above), para. 5.
[325] n. 324.
[326] n. 324, para. 153.
[327] For example, in *Strizhak v. Belarus* (n. 80 above) the Committee stated that '…limiting pickets to certain predetermined and isolated locations does not appear to meet the standards of necessity and proportionality under article 21 of the Covenant.'
[328] General Comment 37 (n. 19 above), para. 54.

alternative location for the protest. Certainly, this may diminish the impact of the protest, but as discussed above, the protection of the rights of others and public order are legitimate grounds for restriction.

#### 2.8.3.4 Restrictions on manner

Assembly participants should be allowed to freely express themselves and use a variety of means to do so.[329] This may include the use of flags, masks, symbols, banners, posters and other objects. On the wearing of face masks, the HRCttee has stated that such coverings may form part of the expressive element of an assembly and may also be used to protect the identity of participants, especially in a context where State authorities may victimise participants.[330] The Committee has thus stated that there should be no prohibition on the wearing of masks, except in exceptional cases which must be justified.[331]

During the drafting of the General Comment, this view drew varying opinions from States parties to the ICCPR. In comments submitted before the second reading of the General Comment, Russia recommended that the wearing of masks should be completely disallowed.[332] Norway also argued that the wearing of masks could intimidate others.[333] Denmark, on the other hand suggested that the wearing of masks should not be allowed, except where they are essential to the expressive element of an assembly.[334] States opposed to the wearing of masks submitted that the concealment of faces presents a challenge to law enforcement officials who may want to apprehend participants or other persons who infiltrate assemblies and commit offences. States may also argue that their ability to effectively perform their obligation to protect participants and non-participants may be limited if assembly participants are allowed to conceal their identities. For instance, isolating violent individuals in an assembly may be difficult if they

[329] General Comment 37 (n. 19 above), para. 58.
[330] n. 329, para. 60.
[331] n. 330.
[332] Russia's Submission to the Human Rights Committee on the Revised Draft General Comment No. 37, Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.
[333] Norway's Submission to the Human Rights Committee, on the Revised Draft General Comment No. 37, Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.
[334] Denmark's Submission to the Human Rights Committee, on the Revised Draft General Comment No. 37, Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.

cannot be physically distinguished from other participants. In addition, investigations into criminal conduct can be hampered if identities are concealed.

The jurisprudence from the European Court also seems to support the idea that the ban on concealment of faces of participants may be allowed in some cases. In *S.A.S v. France*,[335] the Grand Chamber of the European Court considered a law that banned the concealment of one's face in public places. The Court accepted that the ban was justified since it pursued the legitimate aim of protecting the rights of others.[336] The applicants in the case had challenged the law in question, arguing that the scope of the ban was too broad as it did not take into account cultural and religious peculiarities, and was therefore disproportionate to the legitimate aims sought to be achieved. However, the Grand Chamber found that the ban was '…proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others"'.[337] Although the *S.A.S case* did not concern Article 21, the arguments raised touching on the protection of public order, public safety and the rights of others would also apply in the context of an assembly.

Still on the wearing of masks, the converse position is that States may, in some cases, require assembly participants to wear masks in order to protect public health. For instance, as part of measures to contain the spread of COVID-19, some States passed public order regulations requiring anyone in a public place to wear a face mask.[338]

#### 2.8.3.5 Restrictions on public employees

Article 21 does not provide for restrictions on the right of peaceful assembly of any category of persons. Neither do the relevant provisions of the African Charter and the American Convention. On the other hand, Article 11 of the European Convention makes provision for the imposition of lawful restrictions on the right of peaceful assembly of members of the armed forces, the police or administration of the State. Similar provisions are also reflected in the domestic laws of some

[335] ECtHR [GC] *S.A.S v. France*, Application no. 43835/11, Judgment of 1 July 2014.
[336] n. 335, paras. 140-141.
[337] n. 335, para. 157.
[338] For instance, in Kenya, Rule 6(b) of the The Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020 require any person in a public place to wear a face mask.

States. The HRCttee has stated that the right of peaceful assembly of certain categories of public employees should not be restricted beyond the need to ensure their impartiality and independence in the performance of their duties.[339] Similarly, in the case of *Lopez Lone et al. v. Honduras,*[340] the Inter-American Court considered the question of the right of peaceful assembly and the freedom of expression of judges. Citing the Bangalore Principles of Judicial Conduct,[341] the Court acknowledged that judges enjoy the freedom of expression and the right of peaceful assembly, but they have an obligation to conduct themselves in a manner that does not call their independence and impartiality into question.[342] The Court, however, noted that the State does not enjoy unfettered discretion to restrict judges' freedom of expression. It further stated that '…at times of grave democratic crises…the norms that ordinarily restrict the right of judges to participate in politics are not applicable to their actions in defense of the democratic order.'[343] Thus, restrictions on public employees exercising their right of peaceful assembly should not be absolute.

### 2.8.4. The question of responsibility of organizers

The proper management of peaceful assemblies can benefit from the collaborative efforts of both State authorities and organisers of assemblies. Compliance with notification procedures can give organisers an opportunity to explain their needs to law enforcement officials, thereby giving them time to make arrangements to facilitate the assemblies, and protect participants and the public. Organisers of assemblies, especially those that are likely to cause significant disruption, have a legal obligation to comply with procedural requirements prescribed by domestic law.[344] Failure to comply with such legal requirements may contribute to rights violations. In this regard, some States have domestic laws that penalise organizers of assemblies for damage caused during an assembly, whether the assembly was lawful or not.[345]

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[339] General Comment 37 (n. 19 above), para. 63.
[340] IACtHR, *Lopez Lone et al. v. Honduras*, Judgment of 5 October 2015.
[341] The Bangalore Code of Judicial Conduct 2002, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.
[342] *Lopez Lone et al. v. Honduras (*n. 340 above), para. 170.
[343] n. 342, para. 174.
[344] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 26.
[345] For instance, section 11 of South Africa's Regulation of Gatherings Act provides for civil liability of organisers of assemblies for foreseeable damage caused during assemblies.

International human rights law primarily places the obligation to protect on States. Therefore, in the context of assemblies, the authorities should take all necessary measures to protect participants and non-participants and their property. The Committee has stated that, as a general rule, organisers should not be held responsible for the unlawful conduct of other participants.[346] Organisers may only be held responsible for losses incurred from an assembly in exceptional cases, where they could have both foreseen and prevented unlawful conduct with reasonable effort.[347]

What is reasonably foreseeable and preventable depends on the circumstances of each case. In a case where an administrative decision finds an organiser culpable for the unlawful conduct of participants, there should be formal avenues to appeal such decisions. However, navigating the judicial system requires financial resources, which organizers may not have. To that extent, the imposition of sanctions are bound to have a chilling effect on the exercise of the right of peaceful assembly. Perhaps, a better standard is the one recommended by Maina Kiai and Christof Heyns in their Joint Report on the Proper Management of Assemblies whereby organisers should only be held civilly or criminally responsible for their own conduct and not for the conduct of other participants.[348]

Bearing in mind the essential democratic role of peaceful assemblies, not every infraction of procedural requirements should be penalised. The principles of necessity and proportionality should always be complied with whenever restrictions are imposed. The case of *Praded v. Belarus*[349] is instructive on this point. In the case, the author, Mr. Sergey Praded, participated in a peaceful assembly alongside a few other people in front of the Iranian Embassy in Belarus.[350] He was arrested and charged with participating in a public event without obtaining prior authorisation and fined 350,000 Belarusian rubles.[351] All his appeals against the decision were dismissed, prompting him to seek relief from the Human Rights Committee. He cited a violation

[346] General Comment 37 (n. 19 above), para. 65.
[347] n. 346.
[348] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 26.
[349] *Praded v. Belarus,* Communication No. 2029/2011, 10 October 2014, CCPR/C/112/D/2029/2011.
[350] n. 349, para. 2.1.
[351] n. 349, para. 2.2.

of his right of peaceful assembly and to freedom of expression. The HRCttee found that although the imposition of the fine in question met the principle of legality, since Belarusian laws provided for it, the authorities had failed to demonstrate why it was necessary to impose the fine and whether it was proportionate for the achievement of the legitimate aims set out in Article 21 of the ICCPR.[352] The Committee reiterated that when imposing restrictions, the guiding objective of States should be to facilitate the enjoyment of the right and not to limit its exercise.[353] Therefore, in the event that sanctions are imposed, they should not be disproportionate. For example, fines should not be excessive.

The regional human rights system's position on the responsibility of organizers reflects the Committee's position. The general rule is that organisers should not be held liable for damages caused by others. [354]

### 2.8.5 Prohibitions on assemblies

A complete prohibition on an assembly is an extreme measure which should only be resorted to where no other less intrusive response would achieve the legitimate aim being pursued. As a restriction, it may manifest as a ban preventing the conduct of an assembly, as bans preventing particular individuals from participating in assemblies, or as bans preventing the conduct of an assembly in particular places or particular times. Such bans have been said to be intrinsically disproportionate since they fail to take into account the particular circumstances of each case.[355] Whenever they are imposed, authorities must be able to justify them on the basis of the aims set out in Article 21.

A prohibition on holding an assembly may be justified, for example, where there is a real threat of widespread violence which authorities are not able to contain. However, even in such

[352] *Praded v. Belarus* (n. 349 above), para. 7.8.
[353] n. 352.
[354] See, for instance, ECtHR, *Ezelin* v. *France*, Application No 11800/85, Judgment of 26 April 1991. The applicant participated in a demonstration against the decision of a court to impose prison sentence on three members of a trade union. Some of the demonstrators painted graffiti on a court building. The applicant was subsequently sanctioned for not dissociating himself from the unlawful conduct of some of the demonstrators. The European Court found that the decision to penalise the applicant for the unlawful acts of some of the demonstrators amounted to an interference with his right of peaceful assembly.
[355] Joint Report on the Proper Management of Assemblies (n. 14 above), para. 30.

circumstances, it should be a measure of last resort. The Human Rights Committee has stipulated that the State has to demonstrate that in spite of the reasonable preventive measures it has taken, it is still not able to guarantee the protection of participants and the public generally, and there are no other less intrusive alternatives reasonably available.[356] The European Court holds a similar position, noting the need for authorities to take action to prevent violence rather than ban an assembly. In *Primov v. Russia*, it stated that when assessing whether or not to ban an assembly, '…the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralizing the threat of violent clashes….'[357] Thus, a ban should only be considered when authorities are genuinely unable to control serious incidents of violence.

As mentioned earlier, assembly participants should be left to choose the content of their messages, and therefore any prohibition based on content should be governed by Articles 19 and 20 of the Covenant. A prohibition should not, for instance, be based on State authorities' views that the views sought to be expressed by assembly participants are pointless. In *Vitaly Amelkovich v. Belarus*, which concerned a case where the author claimed that his right of peaceful assembly violated by the refusal of the local authorities to allow a picket to be held, the Committee noted that there was no justification or explanation for the prohibition of the author's right of peaceful assembly. In that case, the author had wanted to participate in an assembly calling for the release of political detainees in Belarus. The State authorities prohibited the assembly on the ground that there were no political detainees in Belarus. The Committee emphasized that '…both articles 19 and 21 cover situations where controversial ideas are conveyed, and restrictions must be justified by the authorities on the grounds elaborated in the Covenant.'[358]

The Human Rights Committee has also established that prohibitions on future participation in assemblies are generally unnecessary and disproportionate. For instance, in

[356] General Comment 37 (n. 19 above), para. 52.
[357] *Primov v. Russia* (n. 115, above), para. 150.
[358] *Vitaly Amelkovich v. Belarus*, Communication No. 2720/2016, 29 March 2019, CCPR/C/125/D/2720/2016, para. 6.6.

*Gimenez v. Paraguay* the author was prohibited from participating in assemblies of three or more persons for two years because he had allegedly incited members of his Tava'i community to forcibly enter a property. The Committee noted that Paraguay did not justify why such a prohibition was necessary for the achievement of the legitimate aims in Article 21. Accordingly, the Committee found that the prohibition unduly restricted the author's right of peaceful assembly.[359]

### 2.9 The Relationship between the Right of Peaceful Assembly and Other Rights

Given the interdependence of human rights, the right of peaceful assembly is linked to all the other rights in the ICCPR. For instance, restricting the freedom of movement can have an impact on the right of peaceful assembly. Protection of the right to privacy is also crucial in assemblies, for example in the context of surveillance by State authorities. Other rights, such as the right to life, and the right to liberty and security of the person, may also be affected by the manner in which States manage assemblies, or the conduct of participants. In terms of its practical application, the exercise of the right of peaceful assembly is most closely linked to the freedom of expression and association, as explained below.

#### 2.9.1 Freedom of expression

Assemblies are a form of expression, and therefore, in most cases, claims of infringement of the right of peaceful assembly usually also include claims of infringement of the freedom of expression. In order to communicate discontent, participants in assemblies sometimes wave placards or verbally express their views. In fact, assemblies are sometimes interfered with because of the content of the message the assembly participants are communicating. In General Comment 34 on the freedom of expression, the Human Rights Committee noted that the right is integral to the exercise of the right of peaceful assembly.[360] This link has also been noted in the jurisprudence of the Committee and in regional bodies such as the European Court and the African Commission.

[359] *Gimenez v. Paraguay,* Communication, No. 2372/2014, 25 July 2018, CCPR/C/123/D/2372/2014, para. 8.5.
[360] General Comment 34 (n. 152 above), para. 4.

The landmark case of *Kivenmaa v. Finland* cited earlier in this chapter demonstrates the close link between the right of peaceful assembly and the freedom of expression. In the case, the author and 25 members of her organization distributed leaflets and raised a banner criticising the human rights record of a visiting foreign head of state during a visit by the foreign head of state in question.[361] The Human Rights Committee established that the taking down of the banner and the subsequent charging of the author with the offence of holding a public meeting without prior notification violated both Article 19 and Article 21 of the ICCPR.[362] This was in spite of the Committee's finding that the author's actions, viewed by the State party as a demonstration, did not constitute an assembly and therefore the author was under no obligation to notify the authorities about her plans.[363] Finland, on the other hand, argued that there had been no violation of the author's freedom of expression and that her actions and those of the members of her group fell within the ambit of the Finnish Act on Public Meetings and they were therefore required to notify the authorities about their plans.[364] While acknowledging the fact that demonstrations involve the expression of opinions, Finland argued that demonstrations ought to be regarded as an exercise of the right of peaceful assembly.[365] It is not clear why the Committee disagreed with Finland's argument that there had been a demonstration, but still went ahead to find that Article 21 had been violated alongside Article 19. Perhaps this contradiction demonstrates that in most cases the two rights are inseparable.

In the jurisprudence of the European Court, when considering whether to apply Article 19 or Article 21, the court looks at the facts and determines which right is most relevant to them. This is the approach Finland suggested in the *Kivenmaa* case above. In the *Kudrevicius* case, the main issue of concern was the violation of the right of peaceful assembly and so that is what the Court considered. The Court, however, also pointed out that, in spite of the provision's independent role, 'Article 11 (freedom of assembly) must also be considered in the light of Article 10 (freedom of expression), where the aim of the exercise of freedom of assembly is the

[361] *Kivenmaa v. Finland*, (n. 206 above) para. 2.1.
[362] n. 361, para. 9.3 as read alongside para. 10.
[363] n. 361, para. 3.
[364] n. 363, para, 7.9.
[365] n. 364.

expression of personal opinions.'[366] The African Commission also acknowledged the close link between assembly and expression in the case of *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria.*[367] The Commission noted that the three freedoms of assembly, of expression and of association are closely related.[368] Evidently, it is important to distinguish between the freedom of expression and the right of peaceful assembly when determining cases where a violation of Article 21 or Article 19, or both, is invoked. That way, the interpretation of State obligations in relation to one will not be clouded in the interpretation of obligations in relation to the other.

### 2.9.2 Freedom of Association

Like the right of peaceful assembly, the freedom of association also plays a critical role in the democratic space. In the Universal Declaration and the European Convention, the right of peaceful assembly is guaranteed alongside the freedom of association in the same provision. The freedom of association relates not only to the right to form or join an association, but also the right to carry out or participate in the activities of an association.[369] Such activities include organising and participating in assemblies. Therefore, an interference with an assembly organised by an association would also amount to an interference with the freedom of association.

## 2.10 Conclusion

This chapter aimed to set out the legal framework on the right of peaceful assembly at the international level. The chapter focused primarily on Article 21 of the ICCPR, while at the same time analysing corresponding provisions and practices in the regional human rights systems. To begin with, the chapter analysed the language of Article 21, and compared it to the language used to frame the right of peaceful assembly in the regional instruments. It was pointed out that although there are textual differences, in practice the implications of the differences are not materially significant. It was shown, through the jurisprudence of the Human Rights Committee

[366] *Kudrevicius v. Lithuania*, (n. 124 above), para. 86.
[367] *International Pen and Others (on behalf of Ken Saro-Wiwa) v. Nigeria*, ACHPR, Comm Nos. 137/94, 139/94, 154/96 and 161/97 (1998).
[368] n. 367, para. 110.
[369] W Schabas, Nowak's CCPR Commentary (n.11 above), p. 616, para. 9.

and the regional human rights systems, that there are more similarities than differences in the interpretation of the content of the right of peaceful assembly. The Arab Charter was shown to be the only regional human rights instrument whose standards differ from the international standards, in the sense that it only protects citizens of its States parties. In addition, the Arab Human Rights Committee does not accept individual petitions on alleged human rights violations. This is a gap that can be abused by States whose domestic standards are lower than the Charter's standards.

To demonstrate the nature of gatherings that are protected under Article 21, the chapter also analysed what constitutes an assembly. It was shown that the intention and purpose of an assembly are key elements that distinguish assemblies from accidental gatherings. On the question of intention, there seems to be a consensus that an assembly should have at least two people who individually choose to gather in some space. The question of why they gather and whether their gathering is protected under Article 21 seems to not have a firm answer. As was discussed, the UN system has laid emphasis on the democratic function of assemblies, and so most of its literature, including resolutions of the General Assembly and the Human Rights Council, cite this democratic role. This is also the view taken by Manfred Nowak in his Commentary on the ICCPR. However, as noted, in its General Comment 37 on Assemblies, the Human Rights Committee has left some room for gatherings that are not ordinarily considered as peaceful assemblies to be protected under Article 21. Hence commercial gatherings can fall under Article 21 if they have an expressive purpose. In their Commentary on the ICCPR, Sarah Joseph and Melissa Castan, also argue that gatherings that are not protected under specific provisions of the ICCPR are protected under Article 21. It appears that for Joseph and Castan, an expressive purpose is not necessarily a condition that has to be met. Provided that a gathering is not protected under any other specific provision of the Covenant, it will fall under Article 21. As was noted, this greatly broadens the scope of Article 21 and risks stretching its coverage to gatherings that were not contemplated by the drafters.

It was also noted that peaceful assemblies are protected wherever they take place, be that in a public space or a private space. In relation to private spaces, it was stated that property rights are not an automatic bar on the exercise of the right of peaceful assembly on private

property. Of importance is that States balance the rights of assembly participants with those of private property owners. On the question of the peacefulness of an assembly, both the UN and the regional human rights systems agree that only peaceful assemblies are protected. This chapter analysed how the human rights systems have interpreted the term 'peaceful' and determined that term is not to be narrowly construed. It was shown, for instance, that disruptions do not negate the peaceful character of an assembly. This is important because, at the national level, authorities may arrest and charge assembly participants who cause disruptions with misdemeanours such as causing a disturbance.

The chapter also discussed State obligations in the context of peaceful assemblies. It divided the obligations into positive and negative obligations. The negative obligation is the duty not to interfere with the exercise of the right of peaceful assembly. It was shown that interferences could be in the form of restrictions imposed before, during or after an assembly. It was also shown that both the ICCPR and regional human rights instruments are explicit on the grounds that would warrant a limitation of the right. In relation to positive obligations, the chapter considered the obligation to protect and the obligation to facilitate assemblies. It noted that the duty to protect is discharged, not only through the enactment of legislation, but also by protecting assembly participants from attacks by third parties. It was noted that the obligation to protect is an onerous one, and a State will only discharge such an obligation if it can demonstrate that it took all available measures within its means but still could not guarantee the safety of assembly participants or the public. In relation to the obligation to facilitate, it was explained that States have to take measure to enable assembly participants to effectively exercise their rights. Such measures would, for instance, include clearing traffic. These obligations apply in the context of counter-demonstrations as well. However, through the *Egyptian Initiative for Personal Rights and Interights case*, it was noted that demonstrators must be protected from interference by counter-demonstrators.

The question of notification or authorisation was also discussed. As shown, in the UN human rights system, these requirements are seen as restrictions. In particular, the UN system discourages the requirement of authorisation. In relation to notification systems, it acknowledges that they are compatible with Article 21, but they should not be strictly enforced. The European

system on the other hand does not consider these requirements as restrictions. Nevertheless, as was seen in the *Lashmankin case*, it also considers the strict enforcement of notification or authorisation requirements as a violation of the right of peaceful assembly. Although no jurisprudence on this subject was traced in the African human rights system, the African Commission has developed guidelines on the freedom of assembly and association and the standards set reflect the international standards.

On restrictions, the chapter analysed the principles of legality, necessity and proportionality as they apply in the context of peaceful assemblies. It was shown that even where domestic procedural requirements are not complied with and domestic laws provide for sanctions, these sanctions must pass the tests of necessity and proportionality under international human rights law. The legitimate aims for imposing restrictions were also set out. It was stated that when imposing restrictions, States should be guided by the objective of facilitating rather than limiting the right. The chapter also discussed the nature of restrictions that states commonly impose. The examples of restriction discussed are not exhaustive.

In relation to the responsibility of organisers, it was noted that organisers may only be legitimately sanctioned for their own unlawful conduct and not those of participants. Only in exceptional cases may they be held responsible for damages they could have foreseen and prevented. Lastly, the chapter explored the link between the right of peaceful assembly and the freedoms of expression and association. It was shown that the exercise of the right of peaceful assembly involves expression and therefore guarantees relating to the freedom of expression also apply. On the other hand, the exercise of the freedom of expression does not necessarily involve peaceful assembly. In the context of peaceful assembly, Article 19 is secondary to Article 21. The protection of freedom of association was also shown to be essential to peaceful assembly since freedom of association also protects activities by an association, and such activities may include peaceful assemblies.

In spite of the guarantees on the right of peaceful assembly discussed in this chapter, the actual exercise of the right of peaceful assembly continues to face impediments. One of the challenges faced by assembly participants is the use of force by law enforcement officials

involved in the management of assemblies. Law enforcement officials have a crucial role to play in the realization of the right of peaceful assembly. Without them, assembly participants and the public lack protection and may be at risk of having their rights violated. At the same time, law enforcement officials may be an obstacle to the effective exercise of the right of peaceful assembly, especially if they do not adhere to international norms and standards on the use of force. The next chapter sets out the international standards on the use of force by law enforcement officials. Particular regard is given to the use of force in the context of peaceful assemblies.

## Chapter 3: International Legal Standards on the Use of Force by Law Enforcement Officials in the Context of Assemblies

### 3.1 Introduction

For many years, certain protests across the world have captured the attention of the global media. In a report analysing the prevalence of protests, SJ Brannen and others indicate that there has been an annual increase in the number of protests by 11.5% between 2009 and 2019.[1] They projected that the trend would continue through 2020 and beyond, though this projection may have been impacted by the COVID-19 pandemic which prompted the restriction of gatherings in most States.

As discussed in chapter 2, on the one hand the right of peaceful assembly plays an important democratic role and can contribute to the realisation of human rights. On the other hand, assemblies can be disruptive and may adversely affect the rights and freedoms of others. Consequently, State authorities and members of the public may perceive them negatively, and this can expose the participants to various violations.[2] In addition, authorities often do not like to be challenged. In response to the assemblies, States often resort to the use of force against the participants.[3] Such use of force has had drastic consequences such as serious injuries or even the loss of life among participants, members of the general public and police officers too. A breakdown of the death toll in some high-profile protests across the world conducted by *The Washington Post* indicates that in Iraq, at least 320 people were killed during demonstrations in 2019.[4] Further, a report by the United Nations Assistance Mission for Iraq (UNAMI) on human rights violations committed during protests indicates that at least 487 protesters were killed and

[1] S Brannen et al, 'The Age of Mass Protests: Understanding an Escalating Global Trend' Centre for Strategic and International Studies, March 2020. Available at https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf.

[2] S Hager, 'Furthering the Enjoyment of Freedom of Assembly in Sub-Saharan Africa through Its Legal Systems' Vol. 11 Intercultural Human Rights Law Review, 55 (2016), p. 30.

[3] See UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/17/28, para. 92. It is noted that the laws governing the use of force by law enforcement officials in some countries grant the police more powers to use force in the context of assemblies, compared to other contexts.

[4] M Berger, 'A breakdown of the death tolls in some of the more-high-profile protests around the world' The Washington Post, 15 November 2019. Available at, https://www.washingtonpost.com/world/2019/11/15/breakdown-death-tolls-some-more-high-profile-protests-around-world/.

7,715 were injured between 1 October 2019 and 30 April 2020, with 74% of the deaths and 89% of the injuries being attributed to security forces.[5] And in the October 2020 protests in Nigeria, at least 69 people had been killed as of 23 October 2020.[6] Among them were 12 civilians killed on 20 October after Nigerian Armed Forces opened fire on protestors with live ammunition.[7] Apart from leading to deaths and serious injuries, the use of force during assemblies can also have a chilling effect on the right of peaceful assembly. It is true that there are circumstances when events at an assembly may compel law enforcement officials to intervene through the use of force. However, even in such cases, law enforcement officials are required to exercise restraint and comply with international human rights standards related to the use of force in law enforcement.

Having set out the international legal framework on the right of peaceful assembly in chapter 2, this chapter focuses on the international legal standards on the use of force by law enforcement officials, with a particular focus on the context of assemblies. The chapter begins by discussing the responsibilities of law enforcement officials generally. This is followed by a discussion of their responsibilities in relation to the right of peaceful assembly, in particular under the right to life, the right to freedom from torture, cruel, inhuman or degrading treatment or punishment (also referred to as the freedom from torture and ill-treatment), and the rights to liberty and security of person. Although the entire spectrum of human rights may be affected if force is applied against a person, these rights have been selected because there is a direct and immediate effect on them if force is used.

Before analysing the international human rights framework on the use of force in law enforcement, the question of the appropriateness of force as a method of regulating assemblies is first considered. In the analysis of the framework on the use of force, the sources of law relied on are the ICCPR, customary international law and the global soft law instruments on the use of

[5] United Nations Assistance Mission for Iraq/Office of the United Nations High Commissioner for Human Rights, 'Human Rights Violations and Abuses in the Context of Demonstrations in Iraq- October 2019 to April 2020' (August 2020), p. 14. Available at https://www.ohchr.org/Documents/Countries/IQ/Demonstrations-Iraq-UNAMI-OHCHR-report.pdf.
[6] BBC News, 'Nigeria protests: President Buhari says 69 killed in unrest' 23 October 2020. Available at https://www.bbc.com/news/world-africa-54666368.
[7] n. 6.

force for law enforcement purposes. There is also a discussion on the principles of legality, necessity, proportionality, precaution and accountability, which must be complied with whenever force is used in the context of law enforcement.[8]

In the context of assemblies, whether or not force is used, and how much of it is used, depends on several factors, one of them being the type of assembly. Three types of assembly are considered, namely: lawful and peaceful assemblies; unlawful but peaceful assemblies; and non-peaceful assemblies. The chapter also analyses the specific standards on the use of firearms and less-lethal weapons. This includes a discussion of the circumstances when firearms may be used, the general principles on the use of less-lethal weapons and the use of various types of less-lethal weapons. The chapter concludes with a brief discussion on the use of force in assemblies during armed conflict. Throughout the chapter, the terms 'the police' and 'law enforcement officials' are used interchangeably, although the latter term is broader and refers to any state officer exercising police powers, including military officials.[9]

### 3.2 General responsibilities of law enforcement officials

The institution of the police did not exist as an organised professional unit globally until the year 1829 when Sir Robert Peel led efforts to establish the London Metropolitan Police.[10] Sir Robert conceived 9 principles of policing, the first one stating that 'the basic mission for which police exist is to prevent crime and disorder.'[11] This general objective has not changed, as reflected in the description of roles of various police services across the world. For example, the Constitution of the Republic of South Africa lists the responsibilities of the South African Police Service, among them, the prevention, combat and investigation of crime; the maintenance of public order, the

[8] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns' A/HRC/31/66, 4 February 2016, para. 50.
[9] Code of Conduct for Law Enforcement Officials (1979), UN General Assembly Resolution 34/169, Commentary to Article 1.
[10] S Maslen and S Connolly, 'Police Use of Force under International Law,' (Cambridge University Press 2017) p. 20.
[11] n. 10, pp. 53-64. Notably, the factual origin of Peel's Principles have been questioned by some scholars who argue that they were an invention of 20th Century textbook authors. See, for instance, S Lentz and R Chaires, 'The invention of Peel's principles: A study of policing 'textbook' history' (Journal of Criminal Justice Volume 35, Issue 1, January–February 2007, pp 69-79. Nevertheless, the fact that their origin has been questioned does not make the principles any less important.

protection of the public and their property, and the enforcement of the law.[12] In the UK, the Statement of Common Purpose and Values for the Police Service states that 'the purpose of the police service is to uphold the law fairly and firmly; to prevent crime; to pursue and bring to justice those who break the law; and to keep the Queen's Peace; to protect, help and reassure the community; and to be seen to do all this with integrity, common sense and sound judgement.'[13] The 1979 Code of Conduct for Law Enforcement Officials[14] (the Code of Conduct) and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[15] (the Basic Principles) adopted by the United Nations also recognise the duty of law enforcement officials to serve the public and protect them against illegal acts, particularly those involving violence.[16]

The obligation of the police to respect and protect rights requires them to not only refrain from engaging in conduct that could jeopardise those rights, but also to intervene to protect them from infringements by third parties. And in cases where an infringement has been committed, the police still have a duty to apprehend the suspected offender and, where appropriate, to initiate a criminal accountability process.

For the public to be able to effectively enjoy their rights, a degree of public order[17] is required. Article 28 of the Universal Declaration of Human Rights (UDHR)[18] states that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' Law enforcement officials play an important role in ensuring

[12] The Constitution of the Republic of South Africa, 1996, Chapter 11.
[13] UK Parliament, 'Select Committee on Home Affairs, 7th Report, Session 2007-08.' Available at https://publications.parliament.uk/pa/cm200708/cmselect/cmhaff/364/36406.htm.
[14] Code of Conduct for Law Enforcement Officials (1979), adopted by the UN General Assembly, 17 December 1979, A/RES/34/169.
[15] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990.
[16] See Code of Conduct for Law Enforcement Officials (n. 14 above), Article 1, and Basic Principles on the Use of Force and Firearms (n. 15 above), preamble.
[17] Public order has been defined as '…the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded….' See: Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN .4/1985/4, at para. 22.
[18] Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly Resolution 217 A(III) (UDHR).

public order. In addition, ensuring public safety[19] also helps to create a conducive environment for the exercise of rights. The maintenance of public order and public safety may require the restriction of some human rights through various means, including through the use of force where necessary. This may occur in many contexts, including in assemblies. As will be discussed later in this chapter, although the use of force is permitted in certain circumstances, it should always be a measure of last resort.

### 3.3 Specific Responsibilities of Law Enforcement Officials in the Context of Assemblies

It has been noted that policing assemblies presents significant challenges to law enforcement officials.[20] The police are required to carefully balance the rights of participants under Article 21 of the Covenant and the need to maintain public order and protect the rights of others. In some cases, this balance is not struck, with the scale weighing heavily downwards against the facilitation of peaceful assemblies. How the police handle assemblies may have a direct impact on a number of human rights, especially the right of peaceful assembly itself, the right to life and the freedom from torture, cruel, inhuman and degrading treatment or punishment. In addition, the rights to liberty and security of person are also commonly impacted. The responsibilities of law enforcement officials in relation to these rights are discussed below in turn.

#### 3.3.1 Responsibilities in relation to the right of peaceful assembly

As discussed in chapter 2, States have an obligation to respect and ensure the right of peaceful assembly.[21] Law enforcement officials play a critical role in the discharge of these duties, and there are a number of measures they can take to ensure the effective exercise of the right of peaceful assembly. In relation to the duty to respect, they have an obligation not to interfere with peaceful assemblies, even where the assemblies have not complied with domestic procedural requirements. They should instead be guided by the objective to facilitate the

[19] The Siracusa Principles (n. 17 above) defines public safety as '…the protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.' See para. 33.
[20] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' A/HRC/11/2, para. 60.
[21] UN Human Rights Committee, General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, CCPR/C/GC/37, para. 23.

exercise of the right of peaceful assembly.[22] A similar obligation would apply with respect to spontaneous assemblies. It is true that it may be practically difficult for law enforcement agencies to make elaborate plans to facilitate and protect spontaneous assemblies. However, such assemblies are not unusual events and therefore generic plans to facilitate them should be in place.[23]

The police also have a responsibility to facilitate assemblies and protecting them from interference by or as a result of violence from counter-demonstrators or the general public.[24] In addition, they have an obligation to protect third parties such as journalists and independent monitors. This duty has been emphasised by various mechanisms in the UN human rights system, including through various resolutions of the UN General Assembly and the Human Rights Council wherein they called upon States to pay particular attention to the safety of journalists covering peaceful protests.[25] The particular emphasis placed on the protection of journalists is important since their role in collecting and imparting information can act as a check on the actions of both law enforcement officials and assembly participants. It should be noted that the duty to facilitate and protect applies to counter-demonstrations, to the extent possible.[26] Effective facilitation of assemblies can benefit greatly from prior planning. Thus, once the police have notice about an upcoming assembly, they should establish channels of communication with the organisers in order to anticipate the law enforcement needs and plan to meet them. While this is helpful for both the police and organizers, it should not be a pre-condition to the exercise of the right of peaceful assembly.[27]

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[22] *Turchenyak et al. v. Belarus,* Communication No. 1948/2010, 10 September 2013, CCPR/C/108/D/1948/2010, para. 7.4.
[23] General Comment 37 (n. 21 above), para. 77.
[24] n. 23, para. 24.
[25] See UN General Assembly, 'Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association' A/RES/73/173, adopted on 17 December 2018, para. 3(c). Also see UN Human Rights Council, 'Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/38/11, adopted on 6 July 2018, para. 8.
[26] Joint report on the proper management of assemblies (n. 8 above), para. 24.
[27] General Comment 37 (n. 21 above), para. 75.

### 3.3.2 Responsibilities in relation to the right to life

The protection of the right to life in the context of assemblies has been an issue of great concern in the international human rights system. In its Resolution 73/173 of 2018, the General Assembly strongly condemned the use of '…extrajudicial, summary or arbitrary executions and killings by State and non-State actors to violently suppress and silence individuals…for participating in peaceful protests.'[28] The Human Rights Council also expressed similar concerns in Resolution 38/11.[29] In addition, through various concluding observations, the Committee has equally expressed concern about the use of excessive force against assembly participants, leading to their deaths in some cases.[30] *The Washington Post's* breakdown of the death toll in some protests and UNAMI's report on deaths during protests in Iraq, mentioned above, are indications that deaths in the context of assemblies continue to be a problem.

In an assembly, it is not just the lives of demonstrators that are at stake. There have been many cases where police officers and non-participants have been killed during assemblies. For example, in a report on protests in Nicaragua in 2018, the Office of the UN High Commissioner for Human Rights (OHCHR) noted that approximately 300 people were killed between April and August 2018, which included 22 police officers who were allegedly killed by protesters.[31] Similarly, in the 2019-2020 protests in Iraq, UNAMI reported that approximately 20 members of the security forces were among those killed.[32]

While the deaths of police officers should not be downplayed, the resounding concern as seen in the Resolutions mentioned above has been about the extrajudicial, summary or arbitrary killings of assembly participants, especially by the police. This concern stems from the

[28] UN General Assembly, 'Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association' A/RES/73/173, adopted on 17 December 2018, para. 3(a).
[29] UN Human Rights Council, 'Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/38/11, adopted on 6 July 2018, preamble and para. 1.
[30] See for example, UN Human Rights Committee, 'Concluding Observations, Mauritania, (CCPR/C/MRT/CO/2), 19 July 2019, para. 45(a).
[31] OHCHR, 'Human rights violations and abuses in the context of protests in Nicaragua-18 April-18 August 2018' paras. 103-107. Available at https://www.ohchr.org/Documents/Countries/NI/HumanRightsViolationsNicaraguaApr_Aug2018_EN.pdf.
[32] UNAMI/OHCHR, Human Rights Violations and Abuses in the Context of Demonstrations in Iraq (n. 10 above), p. 8.

fundamental duty of states to protect life against arbitrary deprivation by both state and non-state actors. The Special Rapporteur on extrajudicial, summary or arbitrary executions stated in his report on the use of lethal force during demonstrations that 'the primary purpose of the recognition of the right to life is to protect people from being killed by the State….'[33] He also described the deprivation of life by State authorities as 'a matter of utmost gravity.'[34] Indeed it is, because arbitrary deprivations by state actors run afoul of the State's primary obligation to respect and ensure.

Law enforcement officials have a duty to refrain from engaging in conduct that may lead to the arbitrary deprivation of life,[35] such as using excessive force to police assemblies. There are exceptional circumstances when force may be used. However, the general rule is that the use of force should only be resorted to when strictly necessary.[36] Lethal force, in particular, should be avoided unless necessary to protect life or prevent serious injury from an imminent threat.[37] The unlawful use of lethal force may amount to a breach of Article 6 even if no life is actually lost. This was the position of the HRCttee in *Chongwe v. Zambia*[38] where the author was shot and wounded when Zambian police fired at his car while he was on his way to attend a political rally.[39] He alleged that the incident was an assassination attempt and it constituted a violation of his right to life.[40] The Committee found that by using lethal force without lawful reasons, Zambia had breached its obligation to protect the author's right to life as required under Article 6(1) of the Covenant.[41]

Similarly, in *Makaratzis v. Greece*[42], the Grand Chamber of the European Court of Human Rights (European Court) also recognised that there may be a violation of the right to life even in

[33] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28 (n. 3 above) para. 43.
[34] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28 (n. 3 above), para. 45.
[35] UN Human Rights Committee, 'General Comment 36: Article 6 (The Right to life)' 2018, CCPR/C/GC/36, para. 7.
[36] Code of Conduct for Law Enforcement Officials, (n. 14 above), Article 3.
[37] General Comment 36 (n. 35 above), para. 12.
[38] *Chongwe v. Zambia*, Communication No.821/1998, 25 October 2000, CCPR/C/70/D/821/1998.
[39] n. 38, paras. 2.1-2.2.
[40] n. 38, para. 3.
[41] n. 38, para. 5.2.
[42] ECtHR [GC], *Makaratzis v. Greece*, App No 50385/99, 20 December 2004.

cases where there is no actual loss of life. The applicant in the case was chased by several police officers in cars who also fired several shots at his car. The officers continued firing even after he had stopped. He sustained at least 4 gunshot wounds as a result. The applicant claimed a violation of his rights under both Article 2 and 3 of the European Convention on Human Rights[43] (European Convention). While noting that the majority of cases where a person is ill-treated by the police fall under Article 3, the Court found that the circumstances of the use of force in the particular case revealed a violation of Article 2.[44] It stated that when determining whether injuries short of death fall under Article 2, factors that should be considered include the degree and type of force used and the objective behind the use of force.[45] Thus, in the context of an assembly, using firearms against participants whose conduct do not present an imminent threat of death or serious injury may be held to be a violation of the right to life even if no life is lost.

Another main duty of the police in the context of an assembly is to protect the lives of participants from unlawful deprivation by private individuals or entities. This obligation also covers the reasonably foreseeable threats to the lives of the participants and the general public, even if such threats do not in fact lead to the loss of life.[46] To effectively discharge this duty, actions on the part of the police should be preventive rather than reactive.[47] If, for example, the police are aware of plans to attack assembly participants, they are under an obligation to take steps to stop the attacks, and not ban the assembly. Measures that may be taken include gathering intelligence about who the potential attackers are and taking appropriate action beforehand. In addition, the police may also deploy an adequate number of trained police officers and equip them with appropriate weapons. As the HRCttee stated in *Alekseev v. Russian*

[43] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 222; 312 ETS 5.
[44] *Makaratzis v. Greece* (n. 42 above), paras. 51 and 72.
[45] n. 44, para. 51.
[46] General Comment 36 (n. 35 above), para.7.
[47] See, for example, ECtHR [GC], *Osman v. the UK*, App no 23452/94, Judgment of 28 October 1998, para. 115. The Grand Chamber stated that Article 2 (the right to life) of the European Convention may imply in some circumstances a positive obligation on the authorities to take preventive operational measures to protect the life of an individual from the criminal acts of another.

*Federation*,[48] prohibiting an assembly because of an unspecified risk of violence against participants is disproportionate.[49]

The question may arise as to the scope of the obligation of the police to take measures to prevent the arbitrary deprivation of life by private individuals. The decision of the Grand Chamber of the European Court in the case of *Osman v. UK*[50] is of particular note. The applicants in the case were the widow and son of a Mr. Ali Osman who was shot and killed by his son's teacher, a Mr. Paget-Lewis. Ali Osman's son, Ahmet Osman, was also shot and wounded by Paget-Lewis. Before the shooting, there had been a number of alarming incidents involving the teacher and Ahmet Osman, most of which were reported to the police. The applicants alleged that by failing to take adequate measures to protect the lives of Ali Osman and Ahmet Osman from the real and known danger which Paget-Lewis posed, the police had failed to comply with their positive obligation under Article 2 of the European Convention.[51] The Grand Chamber of the European Court stated that the positive obligation to take preventive measures to protect the right to life must be interpreted in a way that does not overburden authorities.[52] The Court further stated that '…where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their…duty to prevent and suppress offences against the person…it must be established to its satisfaction that the authorities knew or ought to have known…of the existence of a real and immediate risk to the life of an identified individual…from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[53] The Court ultimately found that there had been no violation of Article 2 of the European Convention by the authorities since there was no evidence that they knew or ought to have known that Paget-Lewis would kill Ali Osman and wound his son. This threshold is similarly reflected in the African

[48] *Alekseev v. Russian Federation*, Communication No. 1873/2009, 25 October 2013, CCPR/C/109/D/1873/2009.
[49] n. 48, para. 9.6.
[50] ECtHR [GC], *Osman v. the UK*, Application no 23452/94, Judgment of 28 October 1998.
[51] *Osman v. the UK* (n. 50 above), para. 101.
[52] n. 51, para. 116.
[53] n. 51, para. 116.

Commission's General Comment 3 on the right to life.[54] In addition, the Commission expressly stipulates that the State is responsible under international law for killings by private individuals that it does not adequately prevent.[55]

Although the *Osman* case does not relate to assemblies, the reasoning of the Court would still apply in the context of assemblies. The police cannot possibly prevent all loss of life, but as the Court reasoned, if they know or ought to know that there is a real risk to the lives of assembly participants from the criminal acts of others, then they have an obligation to take adequate measures to prevent the loss of life. In its reasoning, the Grand Chamber speaks of measures taken being 'within the powers' of the authorities. While this is an important caveat, bearing in mind the reality that some law enforcement agencies are better resourced than others, a concrete assessment is necessary to determine whether in a particular set of circumstances, action that could have prevented the loss of life was beyond the capacity of the police.[56]

In the context of assemblies, in rare cases where the police do not have the capacity to contain a present and severe threat to life and ensure public order and safety, they may impose restrictions on participation by, for example, asking the organisers to reschedule. However, as the Committee has stated, this should be done only in exceptional cases where '…the State is manifestly unable to protect the participants from a severe threat to their safety.'[57] It is worth noting that the Committee speaks of 'severe' threats and not simply any threat. Merely claiming the existence of a threat and the lack of capacity is not sufficient. The decision to restrict an assembly on this ground can only meet the test of necessity and proportionality if a State can demonstrate that it would not be able to contain the threat '…even if significant law enforcement capability were to be deployed.'[58] This is a very high threshold which will rarely be met.

[54] ACHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 38.
[55] n. 54, para. 39.
[56] Cf. General Comment 37 (n. 21 above), para. 52.
[57] n. 56.
[58] n. 56.

In the event of a potentially unlawful death, law enforcement officials have an obligation to investigate the deaths in line with international human rights standards, as set out in the Minnesota Protocol on the Investigation of Potentially Unlawful Death[59] and developed by various treaty bodies.[60] The duty to investigate is triggered where the State knew or ought to have known of a potentially unlawful death.[61] The fact that no complaint of a violation was lodged does not absolve the State from this duty. This has been reiterated in a number of cases in both the UN and regional human rights systems. For example, in *George Iyanyori Kajikabi v. The Arab Republic of Egypt*[62] where some protesters were killed when Egyptian police used force to disperse a protest, the African Commission stated that '…in relation to the right to life, the duty is on the State to initiate investigations and ensure that they are carried through….'[63] It has also been stated that the failure to investigate violations of the right to life is in itself a violation of the right.[64]

According to the HRCttee, '…the duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize.'[65] Deaths suspected to have been caused by law enforcement officials should be investigated by an independent body.[66] In the absence of an independent oversight mechanism, the independence of the investigation must still be ensured.[67] This can be done by, for example, ensuring that the implicated police officer is not involved in any way in the conduct of the investigations and that the same is done by police officers who ordinarily do not work alongside the suspect.

[59] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death' (2016).
[60] See, for example, General Comment 36 (n. 35 above), para. 27; ACHPR General Comment 3 (n. 54 above), para. 7.
[61] Minnesota Protocol (n. 59 above), para. 15.
[62] *George Kajikabi v. The Arab Republic of Egypt,* Communication 344/07, ACHPR (2020).
[63] *George Kajikabi v. The Arab Republic of Egypt* (n. 62 above), para. 185.
[64] ACHPR General Comment 3 (n. 54 above), para. 15.
[65] General Comment 36 (n. 35 above), para. 27.
[66] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/26/36, para. 84.
[67] Minnesota Protocol (n. 59 above), paras. 28-31.

### 3.3.3 Responsibilities in relation to the freedom from torture and ill treatment

Excessive use of force may lead to violations of the right to life, but short of that, to violations of the freedom from torture and ill-treatment, which is guaranteed under Article 7 of the ICCPR. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[68] (CAT or the Convention Against Torture) defines torture as: 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[69] Although this definition aids in the interpretation of Article 7 of the ICCPR, the HRCttee's interpretation of a violation of the provision extends to acts committed by persons in their private capacity, hence the involvement of a public official through acts of omission or commission is not necessary.[70] In addition, the Committee does not draw a sharp distinction between torture and other forms of ill-treatment. According to the Committee, the distinction, if it is to be made at all, depends on the nature, purpose and severity of the treatment in question.[71]

The prohibition of torture is a *jus cogens* norm from which States cannot derogate even during a state of emergency.[72] In General Comment 20 on the freedom from torture, the Committee affirmed that the aim of the prohibition on torture is to protect both the dignity and the physical and mental integrity of a person.[73] Like violations of the right to life, the torture and other cruel, inhuman or degrading treatment or punishment of persons exercising their right of peaceful assembly has caused great concern.[74]

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[68] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), UNTS vol. 1465, p. 85.
[69] Convention against Torture (n. 68 above), Article 1.
[70] UN Human Rights Committee, 'General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' 1992, para. 2.
[71] n. 70, para. 4.
[72] ICCPR, Article 4(2).
[73] General Comment 20 (n. 70 above), para.2.
[74] UN General Assembly Resolution 73/173 (n. 28 above), para. 3.

Protection against a violation of Article 7 of the ICCPR has implications on the responsibilities of law enforcement officials involved in the policing of assemblies. These responsibilities are similar to the responsibilities in the context of the right to life, especially because torture that severely affects the physical and mental integrity of an individual poses a threat to the life of the individual.[75] In the context of an assembly, torture or ill-treatment may be committed by law enforcement officials against participants while in police custody or through the use of force against the participants at an assembly. Under the Convention against Torture, the use of force that results in severe pain and suffering may amount to torture or ill treatment if such use of force is considered excessive.[76] For example, brutal attacks involving stabbing demonstrators and striking them with pieces of wood with nails sticking out of them at a stadium in Guinea was classified as torture.[77] As is the case with the right to life, the duty to investigate also applies in the context of the freedom from torture and ill-treatment. Such investigations must equally be done in line with international human rights standards, particularly as set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).[78]

### 3.3.4 Responsibilities in relation to the rights to liberty and to security of person

The rights to liberty and to security of person are guaranteed in Article 9 of the ICCPR. The right to liberty relates to the physical confinement of a person[79] while the security of person relates to bodily and mental integrity.[80] Article 9 is therefore closely linked to Article 7 to the extent that both involve the protection of physical and mental integrity of an individual. However, it is worth

[75] General Comment 36 (n. 35 above), para. 54.
[76] See, for example, the Committee against Torture's consideration of Bolivia's initial report where it expressed concern about the excessive and disproportionate use of force and firearms by Bolivia's National Police and the armed forces in suppressing protests. UN Committee against Torture (CAT), 'Report of the UN Committee against Torture: Twenty-fifth Session (13-24 November 2000) and Twenty-sixth Session (30 April-18 May 2001)' 26 October 2001, A/56/44, para. 95(i).
[77] UN Security Council, 'Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea' S/2009/693, annex, paras. 118-21.
[78] OHCHR, 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)' (Revised 2022).
[79] UN Human Rights Committee, General Comment 35: Article 9 (Rights to Liberty and Security of Person), 2014, CCPR/C/GC/35, para.3.
[80] n. 79.

noting that cases of excessive use of force short of violations of Article 6 are dealt with under Article 7, and not Article 9.

The power of law enforcement officials to deprive a person of their liberty is regarded as an important law enforcement tool.[81] In the context of assemblies, it can be used to isolate particular individuals engaging in unlawful conduct during an assembly in order to allow the peaceful participants to continue with the assembly. To this extent, it plays both a protective and facilitative function. However, there are many cases where law enforcement officials abuse their power to arrest, especially during assemblies. This has been highlighted by various human rights mechanisms at the international level. For example, in its concluding observations on Angola, Viet Nam, Canada and the former Yugoslav Republic of Macedonia, the HRCttee expressed concern about the inherently disproportionate nature of mass arrests and the arbitrary detention of demonstrators.[82]

In relation to what amounts to arbitrary deprivation of liberty, the Committee has defined arbitrariness to include elements of '...inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.'[83] It is thus broader in meaning than the concept of unlawfulness.[84] In its General Comment 35, the Committee has stated that an arrest or detention may be arbitrary even if it is authorised by domestic law.[85] This is an important interpretation especially in the context of policing assemblies where police officers frequently arrest participants merely for holding assemblies without complying with the procedural requirements under domestic law. Indeed, as stated earlier, law enforcement officials have a responsibility to ensure compliance with the law. However, the police, as an organ of the state, should consider what impact the strict enforcement of criminal law would have on the State obligation under international law to respect and ensure the right

[81] Joint report on the proper management of assemblies (n. 8 above), para. 44.
[82] See Human Rights Committee, 'Concluding Observations, Angola' CCPR/C/AGO/CO/2, March 2019, para. 45; 'Concluding Observations, Viet Nam' CCPR/C/VNM/CO.R.3, March 2019, para. 47; C'oncluding Observations, Canada' CCPR/C/CAN/CO/6, July 2015, para. 15; 'Concluding Observations, Former Yugoslav Republic of Macedonia' CCPR/C/MKD/CO/3, July 2015, para. 19.
[83] General Comment 35 (n. 79 above), para. 12.
[84] n. 83.
[85] n. 83.

of peaceful assembly. Hence, the police should not narrowly focus on upholding domestic law to the detriment of the State's international obligations. International standards applicable by virtue of ratification of the relevant instruments or the status of those standards as customary or even peremptory norms should equally be upheld. Thus, it is not enough for the police to claim, for example, that individuals took part in an unlawful assembly and therefore they committed an offence. Mass arrests, in particular, have been said to be arbitrary and in contravention of fundamental human rights.[86] It is crucial that the police ensure that any deprivation of liberty is necessary and proportionate to the legitimate aims under Article 21.[87]

Where a deprivation of liberty passes the test of legality, necessity and proportionality at the point of deprivation, it is still important for law enforcement officials to ensure that the deprivation lasts no longer than is necessary. According to the Committee, the longer a detention, the greater the burden on authorities to prove its necessity and proportionality.[88] In *Kozulina v. Belarus*, the Committee recalled that detention pending trial must be '…reasonable and necessary in all circumstances…' and authorities should examine whether there are alternatives to detention, which would render the detention in a particular case unnecessary.[89] In the context of assemblies, detention of participants as an administrative measure may be provided for in some domestic laws. The Committee emphasized in *Ukteshbaev v. Kazakhstan*[90] that in cases where assembly participants are detained for participating in an assembly, the state must demonstrate that such a measure was necessary in a democratic society or proportionate to the legitimate aims set out in the second sentence of Article 21. The author in the case had been detained for 15 days for participating in a peaceful but unauthorised assembly.

[86] Joint report on the proper management of assemblies (n. 8 above), para. 45. Also see General Comment 37 (n. 21 above), para. 82; and IACtHR, *Case of Servellón García et al. v. Honduras,* Merits, Reparations and Costs, Series C No. 152, Judgment of 21 September 2006, para. 93.
[87] See, for example, the Committee's views in *Lozenko v. Belarus*, Communication No. 1929/2010, 24 October 2014, CCPR/C/112/D/1929/2010. The author had been arrested and fined for participating in an unauthorized assembly. The Committee stated that Belarus had failed to show that the author's detention and fine, even if based on law, were necessary for one of the legitimate purposes of Article 19.' See para. 7.7.
[88] General Comment 35 (n. 79 above), para.15. Also see General Comment 37 (n. 21 above), para. 84.
[89] *Kozulina v. Belarus*, Communication No. 1773/2008, 21 October 2014, CCPR/C/112/D/1773/2008, para. 9.7.
[90] *Ukteshbaev v. Kazakhstan,* Communication No. 2420/2014, 17 July 2019, CCPR/C/126/D/2420/2014, para. 9.7.

### 3.4 The Use of Force by Law Enforcement Officials

The ability to use force where necessary enables the police to discharge their protective function. At the same time, the unlawful use of force poses a great threat to the right to life and the physical and mental integrity of the individuals against whom force is used.

The 'use of force' has been defined as '…any physical constraint imposed on a person, ranging from physical restraint by hand or with a restraining device, to use of firearms or other weapons.'[91] It has also been defined as 'the use of physical means that may harm a person or cause damage to property.'[92] There are also definitions of the use of force that are broader in the sense that they go beyond physical coercion. For example, Terrill defines force as 'acts that *threaten* or inflict physical harm on citizens.'[93] These definitions fall within the scope of the World Health Organization's (WHO) definition of violence as the '…intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.'[94] Force, then, can been interpreted to mean many levels of action which may start with non-physical acts such as mere police presence or verbal communication, and graduate to lethal force if necessary.[95]

Indeed, the mere presence of police officers in a particular context may serve to control the behaviour of individuals, especially because of the knowledge that the police have the ability to escalate their intervention from mere presence to actual use of physical force. In the context of an assembly, the mere presence of police officers would not raise concerns regarding the use of force since the police have an obligation to facilitate assemblies, and that includes being present. Neither would verbal orders, for example, to disperse. It's true that the threat of force

[91] International Committee of the Red Cross, 'The Use of Force in Law Enforcement Operations' 2019. Available at https://www.icrc.org/en/document/use-force-law-enforcement-operations-0.
[92] UNODC, 'Resource book on the use of force and firearms in law enforcement' Criminal Justice Handbook Series (2017), p. 1.
[93] I McKenzie, 'Policing force: Rules, hierarchies and consequences' (2000), cited in J Belur (ed.), 'Permission to Shoot: Police Use of Deadly Force in Democracies' (Springer, 2010), p. 2.
[94] E Krug, L Dahlberg, et al. eds. 'World report on violence and health' (World Health Organization, Geneva, 2002).
[95] W Terrill, 'Police coercion: Application of the force continuum' (New York: LFB Scholarly Publishing LLC, 2001), cited in J Belur (ed.), 'Permission to Shoot: Police Use of Deadly Force in Democracies' (Springer, 2010), p. 2.

is implicit in such orders, but until those threats are actualised at the scene of the assembly, questions touching on violation of the rights to life and to bodily integrity may not arise.

The UN human rights system has repeatedly underlined the importance of the proper management of assemblies. In Resolution 73/173, the General Assembly underlined the need to manage assemblies in a manner that contributes to their peaceful conduct and prevents injuries and loss of life.[96] It also encouraged States to avoid using force during assemblies and to ensure that where force is absolutely necessary, no one is subjected to excessive or indiscriminate use of force.[97] The Human Rights Council on its part has highlighted that "…assemblies can be facilitated on the basis of communication and collaboration among protesters, local authorities and officials exercising law enforcement duties."[98] Similarly, the HRCttee has emphasised that the basic approach of law enforcement officials during assemblies should be to facilitate the assemblies.[99]

Assemblies are generally large groups of people and therefore the risk of death or serious injuries to both participants and non-participants can increase significantly if force is used.[100] In the earlier mentioned report on the 2018 protests in Nicaragua, the OHCHR acknowledged that anti-government protesters had committed acts of violence against security forces and pro-government protesters. However, it also observed that as the police and armed militia intensified violence against the anti-government protesters, the level of resistance was increased and it included the use of violence.[101] This shows that the use of force against participants can attract a violent reaction which may put everyone involved at risk. As discussed earlier, law enforcement officials have a responsibility to protect assembly participants and the general public from violence or other interference. They equally need to protect themselves and also protect property. The use of force may therefore become necessary to deal with violence by or against

[96] UN General Assembly Resolution 73/173 (n. 28 above), para. 7.
[97] n. 96, preamble.
[98] UN Human Rights Council Resolution 38/11 (n. 29 above), preamble.
[99] General Comment 37 (n.7 above), para. 74.
[100] See for example, Berger, 'A breakdown of the death tolls in some of the more-high-profile protests around the world, (n. 4 above).
[101] OHCHR, Human rights violations and abuses in the context of protests in Nicaragua (n. 31 above), para. 103.

assembly participants. As mentioned earlier, even in such circumstances, the use of force must comply with the principles governing the use of force; these are discussed later in this chapter.

### 3.5. The International Human Rights Framework on the Use of Force in Law Enforcement

The use of force by law enforcement officials is governed by international human rights law and soft law instruments on the law of law enforcement. Although there is no single binding treaty that specifically addresses the issue of use of force in law enforcement, various human rights treaties impose obligations which would require the regulation of the use of force by law enforcement officials. Moreover, State human rights obligations may also be derived from human rights norms that have the status of customary international law. As highlighted earlier, the rights to life and to freedom from torture and ill treatment, both guaranteed in the ICCPR, can be infringed by the use of force. Consequently, any use of force must comply with State obligations in relation to these rights.

#### 3.5.1 Global soft law standards on the use of force by law enforcement officials

In addition to treaties and customary international law, the Code of Conduct and the Basic Principles lay down general principles and specific rules on the use of force by law enforcement officials. In 2020, the UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement[102] (the Guidance on Less-lethal Weapons) was developed under UN auspices to clarify standards on the use of less-lethal weapons in various law enforcement contexts, including assemblies. Although these instruments are not inherently binding, the Code of Conduct and the Basic Principles have been widely accepted as authoritative sources of the law of law enforcement.[103] For example, in General Comment 36, the HRCttee has underlined that the use of force by law enforcement officials must comply with the Code of Conduct and the Basic Principles.[104] The Guidance on Less-lethal Weapons has also already been relied on in various contexts, including by the Committee in General Comment 37[105] and by a South African Court in a case involving the

[102] OHCHR, 'UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement' (2020).
[103] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 44.
[104] General Comment 36 (n. 58 above), para. 13.
[105] General Comment 37 (n.7 above), para.78.

fatal assault of a civilian by law enforcement officials.[106] Key provisions in these documents relating to the use of force are highlighted below.

#### 3.5.1.1 The 1979 Code of Conduct for Law Enforcement Officials

Article 2 of the Code of Conduct requires law enforcement officials to respect and uphold human rights in all their operations. The human rights referred to are those contained in key human rights instruments, including regional treaties and national laws. Article 3 further states that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. This means that while law enforcement officials are allowed to use force, for example to prevent crime or apprehend suspected offenders, the circumstances of each case must warrant the resort to force. The commentary to Article 3 clarifies that the fact that law enforcement officials have the power to use force where necessary does not mean they can use force that is disproportionate to the law enforcement objective sought to be achieved. It also emphasizes the exceptionality of the use of firearms, stating that efforts should be made to exclude the use of firearms, especially against children. It further states that firearms should only be used where '…a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.'

Article 5 states in part that 'no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment…' Since the Code of Conduct was adopted before the adoption of the Convention against Torture in 1984, the commentary to Article 5 makes reference to the definition of torture contained in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[107] which is not as comprehensive (or as authoritative) as the definition contained in CAT. Specifically, the definition in the Torture Declaration does not include the infliction of pain or suffering on a person for any reason based on discrimination and for acts committed or suspected to have been committed by third parties.

[106] *Khosa and others v. Minister of Defence and others,* 2020 (7) BCLR 816 (GP), para. 124.
[107] UN General Assembly, 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' 9 December 1975, A/RES/3452(XXX).

The broader definition in CAT is relevant in the context of assemblies since it is not uncommon for police officers to indiscriminately use force against assembly participants. Further, violence from other third parties may be directed to certain groups advancing unpopular ideas.

Article 6 of the Code of Conduct requires law enforcement officials to ensure access to health services for those in their custody, and to take immediate action to secure medical attention whenever required. Being in custody has been interpreted to include 'restraint on freedom of movement of the degree associated with a formal arrest.'[108] In the context of an assembly, persons in custody may include participants who have been contained in some restricted space during an assembly.

#### 3.5.1.2 The 1990 UN Basic Principles

The Basic Principles were formulated to offer more detailed guidance to states in their task of ensuring and promoting the proper role of law enforcement officials.[109] Principle 1 requires States to formulate rules and regulations governing the use of force and firearms by law enforcement officials. Such legislation should be formulated with sufficient precision to be able to regulate the conduct of the police and to avoid arbitrary interpretation or application.[110] They should also specifically prohibit the unnecessary and disproportionate use of firearms.[111] In various concluding observations, the Committee has expressed concern about the inadequacy of domestic legislation on the use of force.[112] A consistent recommendation it has made is that States should ensure that their domestic legislation and regulations on the use of force comply with international standards.

Principle 2 requires States to equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. It also specifies that States should develop 'non-lethal' weapons in order to limit the use of weapons

[108] Maslen and Connolly, Police Use of Force under International Law (n. 15 above), p. 207.
[109] Basic Principles on the Use of Force and Firearms (n. 15 above), preamble.
[110] General Comment 36 (n. 35 above), para. 19.
[111] n. 110, para. 20.
[112] See, for example, Human Rights Committee, 'Concluding Observations, Liechtenstein' CCPR/CO/81/LIE, July 2004, para. 10; 'Concluding Observations, Mauritania' CCPR/C/MRT/CO/2, July 2019, para. 45; 'Concluding Observations, Tunisia' CCPR/C/TUN/CO/6, March 2020, para. 48.

capable of causing death or injury to persons. Over time, it was noted that the use of the term 'non-lethal' created the false impression that such weapons could not cause deaths or serious injuries. Experience has, however, shown that the use of such weapons can and do also cause deaths or serious injuries.[113] Developments in this regard led to the formulation of the 2020 Guidance on Less-lethal Weapons. Principle 2 also states that law enforcement officials should be equipped with protective equipment such as shields, helmets, and bullet-proof vests in order to limit the need to resort to the use of force. If 'non-lethal' weapons are used, law enforcement officials should control such use and ensure that those that are not targeted are not endangered.[114] Admittedly, certain weapons such as tear gas and acoustic devices are indiscriminate in nature, and it may not be possible for the police to ensure that persons who are not targeted are not affected. However, effort should be made to minimise harm to peaceful participants and other third parties.

Principle 4 requires that before resorting to the use of force, law enforcement officials should first apply non-violent means, and resort to force when such means are ineffective and incapable of achieving the intended result. Whenever force is used, law enforcement officials are required to use only the amount of force that is proportionate in the circumstances. In addition, they should minimize damage and injury, and respect and preserve human life.[115] In relation to the circumstances when firearms may be used, the Basic Principles provide that 'law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms

[113] See, for example, J Smith, 'Police Attacks on Protesters with "Less than Lethal" Weapons Result in Life-Threatening Injuries' The Intercept, 11 June 2020, available at https://theintercept.com/2020/06/11/police-less-than-lethal-weapons-protests/; Physicians for Human Rights, '"Less-lethal" weapons used with excessive force can cause serious injury, disability, and death.' Available at https://phr.org/issues/weapons/non-lethal-weapons-used-with-excessive-force/.
[114] Basic Principles on the Use of Force and Firearms (n. 15 above), Principle 3.
[115] Basic Principles on the Use of Force and Firearms (n. 15 above), Principle 5.

may only be made when strictly unavoidable in order to protect life.'[116] These circumstances are discussed later in the chapter.

The Basic Principles also recognise that every person has the right to participate in 'lawful and peaceful assemblies.' The Principles distinguish between unlawful but non-violent assemblies, and violent assemblies. In relation to non-violent assemblies, the Basic Principles require law enforcement officials to avoid using force to disperse such assemblies, and where that is not practical, to use only the minimum necessary force.[117] In relation to violent assemblies, it states that firearms may only be used to disperse such assemblies if less-lethal means are not practicable and only if the use of firearms is necessary to protect life.[118] Evidently, these provisions are not in line with contemporary international human rights standards relating to the right of peaceful assembly. In General Comment 37, the HRCttee has stated that a peaceful assembly should not be dispersed unless there is compelling justification to do so.[119] Any dispersal of an assembly should be necessary in a democratic society and proportionate to the legitimate aim to be achieved. The General Comment also clarifies that firearms should never be used merely to disperse an assembly.[120] Therefore, even if several assembly participants are engaging in violent conduct, using firearms to disperse them is disproportionate and thus unlawful. Instead, the use of a firearm should be directed at particular individuals posing an imminent threat of death or serious injury.

#### 3.5.1.3 The 2020 UN Human Rights Guidance on Less-Lethal Weapons

As shown above, the Code of Conduct and the Basic Principles established important standards on the use of force by law enforcement officials. However, as law enforcement practice continued to evolve with emergence of new technologies, it became evident that the existing legal framework did not provide adequate guidance to law enforcement officials as far as the use of less-lethal weapons are concerned. As noted above, weapons such as tear gas and rubber-

[116] n. 115, Principle 9.
[117] n. 115, Principle 14.
[118] n. 117.
[119] General Comment 37 (n. 21 above), para. 23.
[120] General Comment 37 (n. 21 above), para. 88.

coated bullets among others are referred to in the Basic Principles as 'non-lethal' weapons. However, it has been shown that these weapons can also be lethal if inappropriately used.[121]

In 2014, the Special Rapporteur on extrajudicial, summary or arbitrary executions recommended that the Human Rights Council appoint an expert body to develop guidelines on less-lethal weapons.[122] In Resolution 25/38,[123] adopted on 28 March 2014, the Council encouraged States "to make protective equipment and non-lethal weapons available to their officials exercising law enforcement duties, while pursuing international efforts to regulate and establish protocols for the training and use of non-lethal weapons."[124] And in 2016, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, in a joint report requested by the Human Rights Council, called upon the UN High Commissioner for Human Rights to convene an expert group to examine the application of the international human rights framework to less-lethal weapons, including with a focus on their use in the context of assemblies.[125] An expert team developed the Guidance on Less-lethal Weapons, which was published by the OHCHR in 2020.

In relation to assemblies, the Guidance states that law enforcement officials should respect and protect the right of peaceful assembly, and the rights of participants should be respected and protected even if an assembly is considered unlawful.[126] It also calls for the adoption of de-escalation measures and the avoidance of aggressive displays of less-lethal equipment.[127] If some assembly participants are acting violently, the Guidance provides that law enforcement officials should distinguish between those participants and the peaceful ones, and if the need to use less-lethal weapons against the violent participants arises, they should as much

[121] See, for example, UNAMI/OHCHR, Human Rights Violations and Abuses in the Context of Demonstrations in Iraq (n. 5 above). In the report, UNAMI documented the use of less-lethal weapons capable of causing unjustified and unnecessarily severe injuries. See pp. 6-7.
[122] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 119.
[123] UN Human Rights Council, 'Resolution 25/38, The promotion and protection of human rights in the context of peaceful protests' A/HRC/25/38.
[124] UN Human Rights Council Resolution 25/38 (n. 123 above), para. 14.
[125] Joint report on the proper management of assemblies (n. 8 above), para. 67(i).
[126] Guidance on Less-lethal Weapons (n. 102 above), para. 6.3.1.
[127] n. 126.

as possible ensure that such use does not affect peaceful participants or other third parties in close proximity.[128]

The Guidance also provides that assemblies should only be dispersed as a measure of last resort.[129] It further clarifies that the use of firearms to disperse an assembly is always unlawful.[130] To this extent, the text of the Guidance is more unequivocal than the text of Principle 14 of the Basic Principles which permits the use of firearms to disperse violent assemblies in circumstances where less harmful means are not practicable and there is an immediate need to protect life.[131] The Basic Principle do not, however, give police officers carte blanche to use firearms to disperse an entire assembly. Firearms may only be used against specific individuals under the conditions set out in Principle 9. Since the target has to be individualised, the Basic Principles preclude the use of firearms to disperse a whole assembly. However, in the absence of clear domestic regulations on the use of firearms, and in the face of overbroad interpretations of the meaning of violence in an assembly, the possibility of police officers seeking to rely on Principle 14 to justify the use of firearms to disperse a violent assembly cannot be ruled out. The clearer standards in the Guidance on Less-lethal Weapons are therefore very useful. The Guidance provides that where there are violent individuals within an assembly, efforts should be made to isolate such individuals and allow other participants to continue with the assembly, unless doing so would be ineffective.[132] If less-lethal weapons have to be used, a warning should be given unless it would be impractical or futile in the prevailing circumstances.[133] It further adds that, as much as possible, less-lethal weapons that can be individually aimed shall be used to target only those individuals that are engaged in acts of violence.[134] Where necessary, those that are potentially indiscriminate in nature, such as tear gas, may be directed at specific groups that are violent.[135]

[128] Guidance on Less-lethal Weapons (n. 102 above), para. 6.3.2.
[129] n. 128, para. 6.3.3.
[130] n. 128, para. 6.3.4.
[131] Basic Principles on the Use of Force and Firearms (n. 15 above), Principle 14.
[132] Guidance on Less-lethal Weapons (n. 102 above), para. 6.3.3.
[133] n. 132.
[134] n. 132.
[135] n. 132, para. 6.3.4.

### 3.5.2 Developments at the regional level

The international standards discussed above are reflected in some instruments at the regional level. As is the case with the ICCPR, the American Convention, the African Charter and the Arab Charter do not specifically address the question of the use of force by law enforcement officials. However, all of them guarantee the right to life and the freedom from torture and ill-treatment. On the other hand, the European Convention specifically sets out the circumstances when deprivation of life as a result of the use of force will not be considered unlawful. These circumstances dictate that force will not be unlawful when used: '…in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and in action lawfully taken for the purpose of quelling a riot or insurrection.'[136] These circumstances have been said to constitute the conditions under which the deprivation of life would be considered non-arbitrary under the ICCPR.[137]

Although no legally binding instruments have been developed that specifically address the use of force by law enforcement officials, the African Commission and the Organization for Security and Co-operation in Europe (OSCE) have both developed standards and guidelines on the right of peaceful assembly. In its General Comment 3 on the right to life under the African Charter, the African Commission underscores the responsibility of all states parties to prevent arbitrary deprivations of life by their own agents or by third parties.[138] In relation to the right of peaceful assembly, the General Comment recognises the integral role played by peaceful assemblies in the advancement of democracy and human rights and states that even where violence occurs during assemblies, participants retain their rights to bodily integrity and other rights, and force may not be used except in accordance with the principles of necessity and proportionality.[139] It also states that firearms may never be used simply to disperse an assembly.[140]

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[136] European Convention on Human Rights, Article 2(2).
[137] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28 (n. 3 above), para. 50.
[138] ACHPR, General Comment 3 (n. 54 above), para. 2.
[139] n. 138, para. 28.
[140] n. 139.

The African Commission has also developed the *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*[141] which address various issues touching on, among others, the use of force during assemblies. The OSCE has also developed the *Guidelines on Freedom of Peaceful Assembly.*[142] Both guidelines reflect the international standards discussed above and make the case for a human rights-based approach to the policing of assemblies.[143] The Council of Europe also formulated the European Code of Police Ethics[144] which offers practical guidance on policing practices in Europe (although this document is rather outdated now). For instance, it recommends that police should be trained on the use of force and on the limits imposed by human rights principles.[145]

The Inter-American Human Rights system is yet to develop similar guidelines. However, the jurisprudence of the Inter-American Court has generally highlighted the obligation of States to prevent arbitrary deprivations of life by both State actors and private individuals or entities. For example, in the case of *Caracazo v. Venezuela*[146] the Inter-American Court stated that the maintenance of public security cannot be invoked to violate the right to life.[147] It further added that States must ensure that its handling of public disturbances is adjusted to their obligation to respect and protect the right to life.[148]

### 3.5.3 Remarks on the framework

As discussed above, at the international level, there is an established legal framework on the use of force by law enforcement officials. This framework is primarily drawn from state obligations in relation to various rights guaranteed in the ICCPR and other key human rights instruments. The framework has continued to evolve, as seen in the adoption of General Comments 36 and 37 on the right to life and the right of peaceful assembly respectively, both of which provide guidance

[141] ACHPR, 'Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa' (2017).
[142] OSCE/ODHIR, 'Guidelines on freedom of peaceful assembly' (3rd Edition, 2019).
[143] See, for instance, OSCE Guidelines on freedom of peaceful assembly, para.31 and ACHPR Guidelines for the Policing of Assemblies, paras. 3-8.
[144] Council of Europe, Recommendation (2001) 10, adopted by the Committee of Ministers of the Council of Europe, 19 September 2001.
[145] Council of Europe, Recommendation (2001) 10 (n. 144) para. 29.
[146] IACtHR, *Caracazo v. Venezuela*, Series C, No. 95, Judgment of 29 August 2002.
[147] *Caracazo v. Venezuela* (n. 146 above), para. 127.
[148] n. 147.

on the use of force. In setting the standards on the use of force by law enforcement officials, it is noteworthy that the HRCttee has consistently referred to the Code of Conduct and the Basic Principles. Regional bodies like the European Court, the Inter-American Court and the African Commission have also referred to these documents in their jurisprudence. In essence, although the Code of Conduct and the Basic Principles are soft-law instruments, the practice within the UN and regional human rights systems has entrenched them as the standard-setting documents on the use of force. Granted, they are not perfect documents today. However, where they fall short, more protective interpretations have been adopted, for instance through the HRCttee's General Comments 36 and 37 and the formulation of the Guidance on Less-lethal Weapons.

### 3.6 Principles Governing the Use of Force by Law Enforcement Officials

The use of force by law enforcement officials is primarily governed by the law enforcement principles of legality, precaution, necessity, proportionality and accountability.[149] In addition, the principle of non-discrimination is also relevant.[150] These principles are discussed below in turn.

#### 3.6.1 Legality

This principle requires law enforcement action to be underpinned by domestic law. As stated before, the duty to prevent arbitrary deprivation of life requires states to put in place legislation regulating the use of force by law enforcement officials.[151] In the absence of such legislation, the loss of life through use of force by the police may be held to amount to arbitrary deprivation of life. This was stated by the Inter-America Court in the case of *Nadege Dorzema and others v. Dominican Republic*[152] which concerned the excessive use of force by Dominican Republic's soldiers against a group of Haitians, leading to the loss of seven lives and injuries to many. The soldiers had opened live fire on a truck that was being used to smuggle the Haitians into the Dominican Republic. The Court noted that at the time the events occurred, the Dominican Republic had no legislation regulating the use of force by state agents.[153] It held that by failing to adopt domestic legislation on the use of force, the Dominican Republic had failed to comply with

[149] Joint report on the proper management of assemblies (n. 8 above), para. 50.
[150] General Comment 37 (n. 21 above), para. 78.
[151] General Comment 36 (n. 35 above), para. 13.
[152] IACtHR, *Nadege Dorzema and others v. Dominican Republic*, Series C No. 251, Judgment of 24 October 2012.
[153] n. 152, para. 79.

its obligation to protect the right to life.[154] The Court also ordered the Dominican Republic to adapt its domestic laws to the American Convention and incorporate international standards on the use of force within a reasonable time.[155]

If the domestic laws exist but fall short of international standards, the use of force on the basis of such laws may still be considered arbitrary.[156] In the *Makaratzis case* cited earlier, the Grand Chamber of the European Court noted that at the time of the shooting of the applicant, the law that was being used to regulate the use of force during peacetime was '…obsolete and incomplete in a modern democratic society….'[157] Consequently, law-enforcement officials did not have clear guidelines governing the use of force and therefore Greece had failed to discharge its positive obligation to put in place an adequate legislative and administrative framework. The Court stated that '…the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens… the level of safeguards required and to avoid real and immediate risk to life….'[158] One can argue that in the absence of adequate legal safeguards at the domestic level, law enforcement officials should rely on international standards, especially if a peremptory norm is involved. In the context of assemblies, there should be a clear legal framework that restricts the use of certain weapons and tactics.[159] The domestic regulations developed should also be precise enough to be able to regulate conduct.

### 3.6.2 Precaution

The human rights principle of precaution requires law enforcement officials to plan their operations in a manner that minimises the need for them to resort to the use of force, especially potentially lethal weapons.[160] The Special Rapporteur on extrajudicial, summary or arbitrary executions stated that authorities should take 'all possible measures…"upstream" to avoid

[154] *Nadege Dorzema and others v. Dominican Republic* (n. 152 above), para. 82.
[155] n. 154, para. 275.
[156] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 56.
[157] *Makaratzis v. Greece,* (n. 42 above), para. 70.
[158] n. 157, para. 71.
[159] Joint report on the proper management of assemblies (n. 8 above), para. 51.
[160] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p.95.

situations where the decision on whether to pull the trigger arises.'[161] If lives are lost in a context where such loss could have been prevented if precautionary measures had been taken, the failure to take precaution would amount to a violation of the right to life.[162]

This principle was elaborated by the Grand Chamber of the European Court in *McCann and Others v. UK*.[163] The facts of the case are that authorities in the UK had intelligence that the Irish Republican Army was planning a terrorist attack on Gibraltar. An operation was then planned to foil the planned terrorist attack and to arrest and secure the safe custody of the suspects. The UK authorities' operational plans included conducting surveillance in order to gather as much evidence as possible against the suspects. The suspects were observed over a long period of time and their identities were established. It was believed that the suspects had planted an explosive device and would detonate it. On the material day, the three suspects were spotted as they crossed the Spanish border and were under surveillance. As two soldiers approached two of the suspects, they appeared to reach for something which the soldiers thought was the detonation device. Both suspects were shot multiple times and died at the scene of the shooting. The third suspect suffered the same fate. It was later determined that the three suspects were unarmed and had no remote detonation device, contrary to the beliefs of the authorities. The families of the three suspects sought the European Court's intervention, alleging that their right to life had been violated. The UK, on the other hand, argued that the use of force was necessary in the circumstances to protect the lives of other civilians. The Court agreed with the argument that it was necessary for the soldiers to shoot to kill the suspects, given the information they had about the planned terrorist attack.[164] The Court, however, took issue with the manner in which the anti-terrorist operation was planned and noted that the authorities should have arrested the suspects as soon as they were sighted at the Spanish border in order to prevent them from entering Gibraltar to execute their bombing mission. The Court had to '…carefully scrutinize…not only whether the force used by the soldiers was strictly proportionate

[161] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 63.
[162] n. 161, para. 64.
[163] ECtHR, *McCann and others v. UK* [GC], App no. 18984/91, 27 September 1995.
[164] *McCann and others v. UK* (n. 163 above), para. 200.

to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.'[165] It was further stated that '...the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.'[166] The court therefore found that there had been a violation of the right to life of the three suspects.

The *McCann case* set a very high standard for the lawful use of lethal force by law enforcement officials in planned operations. Even in cases where the need to use force is apparent, the conduct of law enforcement officials before an event must be carefully scrutinized to determine whether all appropriate measures were taken to minimise the risk of death or injury. The reasoning in *McCann* is also reflected in *Rehbock v. Slovenia*[167] where a suspected drug-dealer sustained an injury during an arrest that he had resisted. A chamber of the European Court found that the police had violated the applicant's right to be free from ill-treatment.[168] The Court noted that the arrest in question was planned in advance and therefore the authorities needed to evaluate the possible risks and take necessary measures to safely arrest the applicant.[169]

The principle of precaution is also crucial in the context of assemblies where planning is necessary to enable law enforcement officials to take measures in advance to minimise the likelihood of resorting to the use of force. This is especially the case if a large number of people are expected. In the case of *Giuliani and Gaggio v. Italy*[170] where the applicant's son was fatally shot during protests at the G8 Summit held in Genoa, Italy in 2001, one of the allegations the applicant made was that the planning of the policing operatipons had not been compatible with the obligation to protect life.[171] Although the the Grand Chamber of the European Court found

[165] *McCann and others v. UK* (n. 163 above), para. 194.
[166] n. 165, para. 211.
[167] ECtHR, *Rehbock v. Slovenia*, App no 29462/95, 28 November 2000.
[168] n. 167, para. 78.
[169] *Rehbock v. Slovenia* (n. 167 above), para. 72.
[170] ECtHR [GC], *Giuliani and Gaggio v. Italy* App no. 23458/02, Judgment of 24 March 2011.
[171] n.170, para. 3.

that the planning of the policing operations had not breached the obligation to protect life, it stated that States had a duty '…to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens.'[172] The Grand Chamber, however, went on to state that the safety of the public could not be absolutely guaranteed and that law enforcement officials enjoyed a wide discretion on what measures they employed to ensure the peaceful conduct of demonstration. In this regard, the Court arguably extended to the Italian police leniency that it should not have in the circumstances of the case. Given that the G8 Summit was a high-level event, the police ought to have anticipated and prepared adequately for large crowds. Notably, the dissenting judges observed that there had been a lack of coordination and effective control of the policing operation and found that there had been a violation of Article 2 of the European Convention.[173] Law enforcement officials should be able to anticipate and prepare for challenges that may arise during an assembly. As part of their duty to plan law enforcement operations well, States must also provide law enforcement officials with adequate and appropriate less-lethal weapons and protective equipment to reduce the possibility of force being resorted to. In the *Giuliani* case, the dissenting judges observed that the officer who fatally shot the applicant's son had been left in a vehicle that was not adequately protected and with a gun loaded with live ammunition as his only means of defence.[174] To this extent, the policing operation did not meet the principle of precaution and the Court should have found a violation of the right to life.

### 3.6.3 Necessity

Under the principle of necessity, law enforcement officials are only allowed to use the *minimum necessary force* for a *legitimate law enforcement purpose*.[175] If force is considered to be necessary, law enforcement officials must use only the minimum force needed to avert a threat.[176] This was stated by the HRCttee in the case of *Suarez de Guerrero v. Colombia*[177] where

[172] *Giuliani and Gaggio v. Italy* (n. 170 above), para. 251.
[173] n.172, dissenting opinion of Judges Rozakis, Tulkens, Zupančič, Gyulumyan, Ziemele, Kalaydjieva and Karakaş, para.7.
[174] n. 173, para. 11.
[175] Code of Conduct for Law Enforcement Officials (n. 14 above), Article 3.
[176] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p. 86.
[177] *Suarez de Guerrero v. Colombia,* Communication No. 45/1979, CCPR/C/15/D/45/1979, Views adopted 31 March 1982.

police officers raided a house believing that a former ambassador who had been kidnapped was being held captive there.[178] The police who participated in the raid searched the house in question but did not find the kidnapped ambassador.[179] They decided to hide in the house and await the suspected kidnappers.[180] Seven people were shot dead as they entered the house at various intervals, and some of the dead were shot in the back, indicating that they may have been trying to flee.[181] According to a forensic report, one of the victims was shot several times after she had died from a heart attack.[182] The Committee noted that '…the police action was…taken without warning to the victims and without giving them any opportunity to surrender…or to offer any explanation of their presence.´[183] As such, the police had failed to use alternative non-violent means that could have prevented the loss of life. The Committee further stated that there was no evidence to show that the suspects posed a threat to the lives of the police or other third parties and therefore their shooting could not be justified.[184] It therefore found that the deprivation of life in the circumstances was arbitrary.[185]

The Grand Chamber of the European Court also considered the question of necessity of use of force in the case of *Bouyid v. Belgium*[186] where one of the applicants was slapped on the face for protesting against his arrest over his failure to produce an identity card.[187] The second applicant had also been slapped on the face on a different occasion for being difficult and rude during an interview by police officers.[188] The two lodged a complaint alleging a violation of their right not to be subjected to torture or to inhuman or degrading treatment or punishment. Finding that the use of force in the circumstances was in violation of Article 3 of the European Convention, the Court stated that in a case where a person is confronted with law enforcement officials, any use of force that has not been made strictly necessary by the person's conduct is an

[178] *Suarez de Guerrero v. Colombia* (n. 177 above), para. 1.2.
[179] n. 178.
[180] n. 178.
[181] n. 178.
[182] n. 178.
[183] n.178.
[184] n. 178, para. 13.2.
[185] n. 178, para. 13.3.
[186] ECtHR [GC] *Bouyid v. Belgium,* App no. 23380/09, Judgment of 28 September 2015.
[187] n. 186, para. 1.
[188] n. 186, para. 7.

infringement of the right not to be subjected to torture or ill-treatment.[189] So, while a slap may generally be consider to be minimal force that is unlikely to cause serious injuries, it was not the least amount of force that could have been applied. Neither was it necessary in the circumstances of the case.

There are cases where law enforcement officials may find themselves in situations where decisions have to be made quickly to save lives or prevent serious injury, without the benefit of prior planning. The European Court stated in *Finogenov and others v. Russia*[190] that in some cases, it is prepared to grant authorities a margin of appreciation even if it appears that better decisions could have been made.[191] The case involved a hostage-taking situation where a group of heavily armed terrorists took charge of a theatre in Moscow where there were about 900 people. Three days into the crisis, Russian security forces pumped an undisclosed narcotic gas into the building. Both the hostages and the terrorists were affected by the gas, and at least 102 hostages died as a result of its toxic effects. The Court stated that the positive obligation of the State to protect life '…must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'[192] Taking into account the fact that sometimes police officers have to act under 'tremendous time pressure' in situations over which they have minimal control, the European Court seems to have recognised the need to allow room for mistakes. The Court had also affirmed this in the *McCann case* where it recognised that in some cases the use of force by law enforcement officials may be justified if the circumstances of the case made a law enforcement official to reasonably, but mistakenly, believe that there was need to use the level of force used.[193] Maslen and Connolly note, however, that the *Finogenov case* was decided by a section of the Court and not the Grand Chamber, and this has an impact on its normative value.[194] They also argue that international law does not widen the margin of appreciation beyond what is contained in the principles of necessity and proportionality.[195]

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[189] *Bouyid v. Belgium* (n. 186 above), para. 46.
[190] ECtHR, *Finogenov & others v. Russia*, App. No 27311/03, Judgment of 20 December 2011.
[191] n. 190, para. 213.
[192] *Finogenov & others v. Russia* (n. 190 above), para. 209.
[193] *McCann and others v. UK* (n. 163 above), para. 200.
[194] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p. 87.
[195] n. 194.

The HRCttee's earlier decision in *Burrell v. Jamaica*[196] shows that the circumstances of the use of force count for much in the assessment of the necessity of the level of force used. In the case, a prisoner, Rickly Burrell, had been killed by a warder during a disturbance in a prison, in the course of which some warders were taken hostage by some prisoners. The Committee noted that Mr. Burrell was shot after the warders had been rescued, hence there was no need for force, and Jamaica had failed to take effective measure to protect Mr. Burrell's life.[197] But even if he had been shot before the warders were rescued, the authorities would still have needed to assess whether using a firearm was the least amount of force that could be employed to rescue the warders.

A second element of the principle of necessity is that force must only be used to achieve a legitimate law enforcement objective.[198] In the context of an assembly, the legitimate aims are those set out in the second sentence of Article 21, namely: national security, public safety, public order, public health, public morals and the protection of the rights and freedoms of others. As the HRCttee has stated before, it is not enough for States to simply cite one of these grounds as the basis for interfering with an assembly.[199] It has to be demonstrated that the interference was necessary in a democratic society. This was the Committee's position in *Abildayeva v. Kazakhstan*[200] where the author had been detained for participating in a spontaneous assembly. Similarly, if police officers use force to, say, protect public order, they have to demonstrate that public order was endangered and their intervention was necessary in a democratic society. If the use of force is based on a narrow interpretation of the meaning of public order, then such use of force would not be legitimate or necessary in a democratic society. If police officers, for instance, order participants to disperse and the participants comply, the arrest and detention or even dispersal of the participants using force will not be in pursuit of any legitimate objective.

[196] *Burrell v. Jamaica*, Communication No. 546/93, CCPR/C/57/546/1993, 18 July 1996.
[197] n. 196, para. 9.5.
[198] Code of Conduct for Law Enforcement Officials (n. 14 above), Article 3.
[199] *Abildayeva v. Kazakhstan,* Communication No. 2309/2013, 4 April 2019, CCPR/C/125/D/2309/2013.
[200] n. 199, para. 8.7.

### 3.6.4 Proportionality

The proportionality principle presupposes that the circumstances of a case make the use of force necessary and therefore the question that remains is how much force should be used. Article 3 of the Code of Conduct stipulates that law enforcement officials may use force only to the extent necessary to perform their duties.[201] In the official commentary to Article 3 of the Code of Conduct, it is cautioned that the provision does not authorise the disproportionate use of force. The Basic Principles also provide that whenever the use of force is unavoidable, law enforcement officials must '…act in proportion to the seriousness of the offence….'[202] This provision sets a ceiling on force that may be used based on the threat posed by a person.[203] Proportionality does not mean that force must be used 'in strict accord with any use of force continuum…or as a tit-for-tat response to violence from a criminal suspect.'[204] It has also been noted that proportionality refers, not to the minimum amount of force that can be used in a particular circumstance, but the maximum level of force that may lawfully be used depending on the threat posed and the seriousness of the offence.[205]

The principle of 'minimum level of force' implies that force has to be used in some way while the 'maximum level of force' principle contemplates situations where no force may be used at all, even if the use of force might be necessary. For instance, in the case of a fleeing suspect who poses no imminent threat to anyone's life, it would be necessary to stop the suspect from escaping, but if the only weapon available to an officer is a firearm, then firing at the suspect would not meet the test of proportionality. This was the case in *Nachova v. Bulgaria*[206] where the European Court stated that an escaping suspect may not be shot 'even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.'[207]

The assessment of reasonableness depends mainly on the threat posed and other contextual factors that may influence the use of force. In the case of *Landaeta Mejías Brothers*

[201] Code of Conduct for Law Enforcement Officials (n. 14 above), Article 3.
[202] Basic Principles on the Use of Force and Firearms (n. 15 above), Principle 5.
[203] Joint report on the proper management of assemblies (n. 8 above), para. 58.
[204] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p. 92.
[205] n. 204, page 93.
[206] ECtHR [GC], *Nachova v. Bulgaria*, App nos. 43577/98 and 43579/98, 6 July 2005.
[207] n. 206, para. 95.

*et al. v. Venezuela*,[208] the Inter-American Court stated that the reasonableness of the response of a law enforcement official can be measured against a number of factors, among them, '…the level of intensity and danger of the threat; the attitude of the individual; the conditions of the surrounding area, and the means available to the agent to deal with the specific situation.'[209] Indeed, the means available to a police officer plays an important role in determining how they react to a situation. However, this does not mean a police officer who is only armed with a firearm is allowed to use it in circumstances that international law does not permit. As said earlier, measures should be taken 'upstream' to minimise the need to resort to force.

### 3.6.5 Non-discrimination

The obligation not to discriminate is reflected in Article 2(1) of the Covenant which requires States parties to respect and ensure all the rights in the Covenant without distinction of any kind. In General Comment 36, the HRCttee has stated that all individuals are entitled to equal protection of their right to life and states must provide effective guarantees against all forms of discrimination.[210] It adds that any form of deprivation of life on the basis of discrimination is arbitrary.[211] General Comment 37 also emphasises that States have an obligation to respect and ensure the right of peaceful assembly without discrimination.[212]

In the context of law enforcement, discrimination may manifest through the excessive use of force against certain groups, or a disproportionate number of arrests, among other measures. The Black Lives Matter Movement, for example, started in response to what was perceived as the high incidence of police brutality and racially motivated violence against African Americans.[213] The existence of discrimination in law enforcement was also highlighted in a report on the protection of the right to life in law enforcement prepared by the former Special Rapporteur on extrajudicial, summary or arbitrary executions. The report observed that the police at times exercise higher levels of violence against some groups based on ethnic or racial

[208] IACtHR, *Case of Landaeta Mejías Brothers et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs, Series C No. 281 Judgment of 27 August 2014.
[209] *Case of Landaeta Mejías Brothers et al. v. Venezuela* (n. 208 above), para. 136.
[210] General Comment 36 (n. 35 above), para. 61.
[211] n. 210.
[212] General Comment 37 (n. 21 above), para. 8.
[213] Black Lives Matter Movement, Accessed at https://blacklivesmatter.com/about/.

discrimination.[214] This can also be the case in the context of assemblies, where, for example, law enforcement officials use excessive force against anti-government protesters.[215]

Schabas has noted that, in practice, proving that the use of force was motivated by discrimination is difficult. As of 2015 when his Commentary on the European Convention was published, he observed that the European Court had not made a finding of a violation of the right to life in conjunction with a violation of the freedom from discrimination.[216] His observation finds support in the partly dissenting opinion of Judge Bonello in the case of *Anguelova v. Bulgaria*[217] in which the applicant alleged that her son, who died in police custody, had been discriminated against on the basis of his Roma/Gypsy origin. The Judge observed that in over 50 years, the European Court had not found a single instance of violation of the right to life or the freedom from torture and ill-treatment induced by the race, colour or place of origin of the victim.[218] He blamed this 'injurious escape from reality' on the Court's evidentiary rule that allegations have to be proved beyond reasonable doubt.[219]

### 3.6.6 Accountability

The principle of accountability is an important procedural component of the protection of the right to life and the right to freedom from torture and ill-treatment.[220] It is founded on Article 2(3) of the Covenant which requires States parties to ensure that persons whose rights are violated '…have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity.' Both the UN General Assembly and the Human Rights Council

[214] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 74.
[215] There have been several media reports on crackdowns on anti-government protesters. See BBC News, 'Violent crackdown on anti-government protests in Syria' 25 April 2011, available at https://www.bbc.com/news/av/world-middle-east-13185422; VOA, 'Police Continue to Crackdown on Anti-government Protesters in Minsk' 1 November, 2020, available at https://www.voanews.com/europe/police-continue-crackdown-anti-government-protesters-minsk; Al Jazeera, 'Amnesty slams Guinea's lethal protest crackdown' 1 October 2020, available at https://www.aljazeera.com/news/2020/10/1/amnesty-denounces-guineas-lethal-protest-crackdown.
[216] W Schabas, 'The European Convention on Human Rights: Oxford Commentaries on International Law' (Oxford University Press 2015) (Kindle Edition), p. 159.
[217] ECtHR, *Anguelova v. Bulgaria*, App no. 38361/97, 13 June 2002.
[218] n. 217, partly dissenting opinion of Judge Bonello, para. 2.
[219] n. 217, partly dissenting opinion of Judge Bonello, para. 4.
[220] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p. 377. Also see Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 78.

have stressed the importance of accountability, including in relation to violations committed during protests.[221] The Special Rapporteur on the rights to freedom of peaceful assembly and of association has also stressed the need to ensure clear accountability mechanisms for any human rights violations committed in the context of assemblies.[222]

As stated earlier, whenever law enforcement officials use force which results in injury or death, an investigation that meets the standards set out in the Minnesota Protocol has to be conducted.[223] In many of its concluding observations, the HRCttee has consistently called on States to conduct investigations into cases of excessive use of force by law enforcement officials and ensure that victims receive remedies.[224] Similarly, in General Comment 3 on the right to life under the African Charter, the African Commission has stated that 'States must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations…holding those responsible to account and providing for an effective remedy and reparation for the victims.'[225] Where violations have been committed by private individuals, the duty to investigate persists.

An effective accountability mechanism is a key element in ensuring the proper use of force during assemblies. This is because the other principles governing the use of force by law enforcement are inconsequential in the absence of accountability.[226] It is therefore important that States establish effective accountability mechanisms which can adequately exercise oversight over the use of force by law enforcement officials in all contexts.

### 3.6.7 Comment on the practical application of the principles

Although the principles governing the use of force are firmly established at the international level, law enforcement officials are more likely to rely on domestic regulations on the use of force

[221] See for example, UN General Assembly Resolution 73/173 (n. 28 above), para.7 and UN Human Rights Council Resolution 38/11 (n. 29 above), preamble.
[222] UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/23/39/Add.1, paras. 7, 54.
[223] General Comment 36 (n. 35 above), para. 19. Also see the Minnesota Protocol (n. 59 above), para. 20.
[224] See for example, UN Human Rights Committee, 'Concluding Observations, Mauritania' CCPR/C/MRT/CO/2 (n.50 above), para. 45.
[225] ACHPR General Comment 3 (n. 54 above), para. 7.
[226] See *McCann v. UK* (n. 163 above), para. 161.

than international standards. Thus, to give meaning to these principles, it is important that states align their domestic laws to international standards, as the HRCttee has regularly recalled. As was stated in the *Makaratzis case*, States also need to ensure that law enforcement officials have specific guidance or regulations on the use of certain kinds of weapons.

In relation to accountability, in many cases, States do not effectively investigate incidents of unlawful use of force during assemblies. Where deaths occur, investigations may be conducted but their outcomes may not be disclosed especially in cases where the investigations have not been conducted by an independent accountability mechanism. Even where such independent mechanisms exist, their ability to ensure accountability is greatly diminished if they depend on law enforcement agencies for support in the collection and analysis of evidence. The obstacles are particularly great if impunity is entrenched within the security agencies. In Kenya, for example, out of more than 19,000 cases reported between 2012 and 2022 involving various forms of police misconduct, including deaths and injuries by police action, only 13 police officers had been convicted as of January 2023.[227] None of these convictions related to violations committed during assemblies.

In cases where crowd-control weapons are used in an unlawful manner, and no deaths are reported, more often than not investigations are not conducted. For example, in South Africa, between 2002 and 2011, the Independent Complaints Directorate (later known as the Independent Police Investigative Directorate) received 204 complaints related to public order management.[228] Complaints alleging murder numbered 52, attempted murder numbered 55, and assault causing grievous bodily harm numbered 57.[229] From the 204 cases, 85 investigations were initiated and 4 prosecutions carried out, with a sole conviction obtained.[230] The failure to investigate cases that are not deemed serious may entrench the belief that the police can apply

[227] See, https://www.ipoa.go.ke/convictions/.
[228] Independent Complaints Directorate, 'Presentation to the Portfolio Committee on Police: Briefing on Crowd Control' 30 August 2011. Available at http://www.ipid.gov.za/sites/default/files/Crowd%20Control%20Presentation.pdf.
[229] Briefing on Crowd Control (n. 228 above), p. 9.
[230] n. 229, p. 18.

any amount of force, and questions may only arise if deaths or serious injuries occur. This, in turn, has an impact on the willingness of the public to participate in assemblies.

### 3.7 Specific Standards on the Use of Firearms

In all cases where firearms are used, the principles governing the use of force, discussed above, apply. The use of firearms should, in particular, be strictly controlled due to the threat firearms pose to the right to life and the right to bodily integrity. In the context of assemblies, the need to take precaution is arguably greater. This is because assemblies are generally made up of crowds and apart from causing life-threatening injuries to multiple participants, the use of firearms may trigger a violent reaction from the participants and this may escalate a violent confrontation which may threaten public order and safety.

#### 3.7.1 General Prohibition on the use of firearms to disperse assemblies

Basic Principle 14, read alongside Principle 9 which sets out the circumstances when firearms may be used, prohibits the use of firearms merely to disperse assembly participants. This position has been echoed by the Committee in General Comment 37.[231] If they have to be used, their use must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat of death or serious injury.[232] Various resolutions of the Human Rights Council also reflect this position. For example, the Council's Resolution 38/11 on the promotion and protection of human rights in the context of peaceful protests calls upon States to ensure that their domestic laws on the use of force in law enforcement are consistent with international standards and reminds them that '…lethal force may not be used merely to disperse a gathering.'[233] Regional human rights mechanisms have similarly affirmed that firearms should never be used to disperse assemblies.[234]

#### 3.7.2 Circumstances when firearms may be used

Both the 1979 Code of Conduct and the 1990 Basic Principles set out the circumstances under which firearms may be used. In the commentary to Article 3 of the 1979 Code of Conduct it is

[231] General Comment 37 (n. 21 above), para. 88.
[232] n. 226.
[233] UN Human Rights Council Resolution 38/11 (n. 29 above), para. 11.
[234] See, for example, General Comment 3 (n. 54 above), para. 28.

stated that states should make effort to avoid the use of firearms. It is further added that '…firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.' Thus, not every resistance from a suspect should warrant the use of firearms. According to the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, '…only the protection of life can meet the proportionality requirement where lethal force is used intentionally, and the protection of life can be the only legitimate objective for the use of such force.'[235] This has been described as the 'protect life'[236] principle. Thus, the protection of property does not warrant the use of firearms.[237] The circumstances under which firearms may be used are discussed next.

#### 3.7.2.1 Self-defence or defence of others against imminent threat of death or serious injury

Lethal force in self-defence or defence of others can only be justified '…if a serious threat of death or serious injury is perceived.'[238] The threat in question must be imminent, meaning, 'a matter of seconds and not hours.'[239] The HRCttee has stated that whenever lethal force is used by both private individuals and law enforcement officials in self-defence or defence of others, such use of force must be 'strictly necessary' to respond to a threat of imminent death or serious injury.[240] The Committee has further emphasised that the intentional taking of life must be 'strictly necessary'.[241]

The test of 'strict necessity' is reflected as 'absolute necessity' in the European Convention. It has been stated that these terms portray a stricter and more compelling test of necessity. In a report on the protection of the right to life in law enforcement, the former Special

[235] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), paras. 72-73.
[236] n. 235, para. 70.
[237] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28 (n. 3 above), para. 61.
[238] W Schabas, The European Convention on Human Rights (n. 216 above), p. 148.
[239] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 59.
[240] General Comment 36 (n. 35 above), para. 12.
[241] n. 240.

Rapporteur on extrajudicial, summary or arbitrary executions observed that the standard on the use of firearms set out in Basic Principle 9 '…poses a higher threshold for the use of firearms than for force in general.'[242] Similarly, the Grand Chamber of the European Court reiterated in its judgment in the case of *Giuliani and Gaggio v. Italy*[243] that '…the use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society".'[244] It further added that force used '…must be strictly proportionate…' and that when assessing the circumstances of the use of lethal force '…the Court must…subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used.'[245]

The African Commission has also considered the question of when firearms may be used in the context of law enforcement. In *Chitsenga and others (represented by Zimbabwe Human Rights NGO Forum v. Zimbabwe*[246] 4 civilians were killed by Zimbabwean security forces in two different sets of circumstances, with two of the victims having been shot dead and the other two beaten to death. In one of the incidents, police officers fired at a vehicle which was being test-driven and as the driver fled from the vehicle the police officers shot at him but missed him.[247] As he tried to seek refuge from a neighbouring home by jumping over the fence, one of the police officers caught him and pulled him back. He was then shot in the head at point-blank range.[248] In another incident, police officers in civilian clothes and in an unmarked vehicle fired shots at another vehicle which had the deceased person. The driver of the vehicle who was the father of the deceased had defied orders to stop, thinking that the police officers were carjackers. In both cases, the African Commission assessed the necessity and proportionality of the use of firearms in the circumstances. Among the questions the Commission sought to answer was whether the use of firearms was '…motivated by a situation of "self-defence of the law enforcement officials

[242] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 66 above), para. 69.
[243] ECtHR [GC], *Giuliani and Gaggio v. Italy* App no. 23458/02, Judgment of 24 March 2011.
[244] n. 243, para. 176.
[245] *Giuliani and Gaggio v. Italy* (n. 243above), para. 176.
[246] *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, April 2012, ACHPR, 295/04, 51st Ordinary Session.
[247] n. 246, paras. 6 and 7
[248] *Noah Kazingachire and others v. Zimbabwe* (n. 246 above), paras. 6 and 7.

effecting the arrest or in the defence of other citizens against the imminent threat of death or serious injury".'[249] In assessing the proportionality of the decision to use firearms, the Commission stated that '…the potential taking of life…is placed on one side of the scale, and, since the right to life is at stake, only the protection of life… will carry any weight, on the other.'[250] The Commission determined that the lives of the police officers involved was not threatened in any way. Neither did the deceased persons pose a threat to the lives of others and therefore the use of firearms was unjustified in the circumstances.[251]

Although the standards are strict, if firearms are used under an honest but mistaken belief that a life is threatened, a deprivation of life may be found to be non-arbitrary. In *Bubbins v. UK*,[252] one Michael Fitzgerald was shot dead by a police officer following a siege at his home. The deceased had a replica gun which he aimed at a police officer who then shot him. The question arose whether the use of a firearm in the circumstances was justified. A chamber of the European Court determined that the officer who shot the deceased honestly believed that his life was in danger when Michael aimed a gun at him, and it was therefore necessary to open fire on Michael in order to protect himself and his colleagues.[253] The Court noted that 'the use of force…in pursuit of the aims …in paragraph 2 of Article 2 of the Convention may be justified…where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken.'[254]

#### 3.7.2.2 The prevention of a serious crime involving a grave threat to life

Basic Principle 9 permits the use of firearms '…to prevent the perpetration of a particularly serious crime involving grave threat to life.' Firearms may also be used against a person who has escaped lawful custody and who presents this danger.[255] Imminence is therefore not a requirement. The text of Basic Principle 9 suggests that under this scenario, what is referred to is a crime that has not been committed. One would ask whether firearms can be used against a

[249] *Noah Kazingachire and others v. Zimbabwe* (n. 246 above), para. 115.
[250] n. 249, para. 116.
[251] n. 249, para. 122.
[252] ECtHR, *Bubbins v. UK*, App no. 50196/99, 17 March 2005.
[253] n. 252, para. 138.
[254] n. 253.
[255] Basic Principles on the Use of Force and Firearms (n. 15 above), para. 16.

person who has just stabbed another to death, dropped the knife and fled. At the point when they fled, they may not be posing a threat to any other person's life. Therefore, using a firearm against such a person would appear to be disproportionate, and may further be a violation of their right to due process. The former Special Rapporteur on the question of torture stated that firearms may be used against a person who has, for example, committed murder and fled, if less harmful methods are not effective.[256] In the face of development in international law, this position is no longer tenable. Unless the suspect in question poses an imminent threat to life, firearms should not be used. As stated earlier, proportionality does not mean that force should be used as a tit-for-tat response to a violent criminal. Neither should force be used as a form of punishment. Thus, no matter how reprehensible the crime is, the consideration that should be given is whether a grave threat to life still exists and there are no alternatives to the use of firearms.

### 3.7.3 Accountability for the use of firearms

In accordance with Basic Principle 22, the use of firearms must be subject to administrative review and judicial control. Principle 11(f) also provides that rules and regulations on the use of firearms should have guidelines that provide for a system of reporting on the use of firearms in the context of law enforcement operations. The objective of such a reporting system is to ensure that the circumstances of the use of firearms is subjected to review in order to determine whether the deprivation of life was arbitrary or non-arbitrary. The nature of use is not necessarily limited to firing at a person in self-defence or in the prevention of a crime posing a grave threat to life. The reports should also include circumstances where firearms are discharged unintentionally, or shot in the air.[257]

Whenever the use of a firearm results in death or serious injury, investigations must be initiated, in line with the Minnesota Protocol, 2016. In *Dominguez v. Paraguay*[258], the Committee took issue with the fact that Paraguay had not conducted investigations into the author's fatal

[256] UN Economic and Social Council, 'Report of the Special Rapporteur on the question of torture, Manfred Nowak' E/CN.4/2006/6, note 2.
[257] The Human Rights Committee has stated that law enforcement officials should be accountable for each use of force. See General Comment 37 (n. 21 above), para. 78.
[258] *Dominguez v. Paraguay*, Communication No. 1828/08, CCPR/C/104/D/1828/2008, 22 March 2012, para. 7.5.

shooting during a demonstration. The Committee also noted that given that the author and the State party did not have equal access to the evidence and that in most cases it is the state authorities that have access to the evidence, the burden of proof could not rest on the author alone.[259] The Committee found that there had been a violation of the right to life. As was mentioned earlier, investigations should be prompt, impartial and thorough.

### 3.8 Tactical Options for Law Enforcement Officials During Assemblies

Before resorting to the use of force during assemblies, there are a number of tactical options that police officers may adopt in order to minimise the risk of using force and enhance the protection of the right to life and bodily integrity. Several of these options are discussed below.

#### 3.8.1 De-escalation

To avert violence, law enforcement officials should aim to ease tensions and eliminate situations that are likely to lead to violence during an assembly. De-escalation does not mean officers should remain completely passive as doing so may amount to a breach of their obligation to protect. It has been recommended that law enforcement officials should be trained to use various forms of communication to de-escalate tension and minimise risk.[260] For example, instead of positioning water cannon within the sight of the participants, the police may instead have ambulances positioned within their sight. A practical recommendation that has been made is that in the context of assemblies, law enforcement agencies should have a liaison officer who engages directly with assembly organizers.[261] This can help ensure better planning and facilitation of assemblies.

#### 3.8.2 Selective arrest

As stated before, in cases where some participants engage in unlawful conduct, police officers should isolate and selectively arrest such participants instead of dispersing the entire assembly. Where arrests have been made, the rights of arrested persons must be ensured, especially their freedom from torture and ill-treatment and the procedural rights of arrested persons.[262] If it is

[259] *Dominguez v. Paraguay* (n. 258 above), para. 7.5.
[260] Joint report on the proper management of assemblies (n. 8 above), para. 42.
[261] n. 260, para. 49(d).
[262] n. 260, para. 46.

necessary to use force during the arrest, the force used should be proportionate to the threat faced.[263] One challenge with this method is that it may expose police officers to attacks since they have to get close to the offenders to be able to arrest them. It may also escalate tension between the assembly participants and the police.

### 3.8.3 Containment/Kettling

Kettling involves the cordoning of a group of protestors for a long period to prevent other protestors from joining them.[264] Presumably, those who are kettled should be protestors who are or have the intention of engaging in violence. However, as the former Special Rapporteur on the rights to freedom of peaceful assembly and of association once observed, it may be used indiscriminately and therefore peaceful protestors and other third parties may also be contained.[265] If used indiscriminately, kettling can be a violation of various fundamental rights and freedoms including the right of peaceful assembly and the freedom of movement.

The appropriateness of this technique was considered by the Grand Chamber of the European Court in the case of *Austin and others v. UK*.[266] In the case, the applicants were contained within a police cordon during a demonstration in London. One of the applicants had needed to leave the cordon in order to collect her infant daughter but the police did not allow her to leave until late in the night, about 7 hours after she had been contained. In assessing whether the cordon was a proportionate response, the Grand Chamber stated that in certain cases, the obligation to protect life implies an obligation to take preventive operational measures to prevent harm from being caused to individuals by the criminal conduct of others.[267] The Court further stated that the police must be given a '…degree of discretion in taking operational decisions.'[268] It found that the actions of the police were proportionate and therefore there had been no deprivation of liberty. In their joint dissenting opinion, Judges Tulkens, Spielmann and

[263] Statement of Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, 66th Session of the General Assembly, Third Committee, 20 October 2011, p. 2.
[264] UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland' A/HRC/23/39/Add.1, 17 June 2013, para. 36.
[265] n. 264, para. 37.
[266] ECtHR, *Austin v. UK* [GC], App Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.
[267] n. 266, para. 55.
[268] n. 266, para. 56.

Garlicki faulted the indiscriminate nature of the containment.[269] The judges also observed that the applicants' freedom of movement was restricted for close to 7 hours, and this amounted to a deprivation of liberty.[270] They compared the *Austin case* with an earlier decision where the Court had stated that a 'coercive restriction on freedom of movement amounted to a deprivation of liberty.'[271]

Although kettling involves restriction of the right to liberty, it is a legitimate law enforcement measure, and one which is arguably less harmful than the use of lethal or less-lethal weapons. However, it may be indiscriminately and arbitrarily used, thereby violating the right to liberty and the right of peaceful assembly. It appears that the length of the containment in the *Austin case* was a key factor in the dissenting judges' opinion that there had been an arbitrary deprivation of liberty. According to the HRCttee, the duration of the containment should be limited to the minimum necessary.[272]

### 3.8.4 Dispersal

As mentioned earlier, an assembly may be dispersed if there is widespread violence that can only be effectively handled through a dispersal. For example, in *Primov and Others v. Russia*[273] where police dispersed assembly participants who had blocked a major road and who pelted the police with stones when asked to make way, the Court noted that the protesters had no right to block a federal road and attack police officers.[274] The Court therefore found that in the circumstances, the dispersal of the assembly was justified.

Aside from dispersing an assembly that has turned violent, law enforcement officials may also disperse an assembly if the disruption it is causing is extreme and cannot be fairly balanced against the rights and freedoms of others.[275] In all cases where dispersal is considered, law

[269] *Austin v. UK* (n. 266 above), joint dissenting opinion of Judges Tulkens, Spielmann and Garlicki, para.10.
[270] n. 269, joint dissenting opinion of Judges Tulkens, Spielmann and Garlicki, paras. 11-12.
[271] *Austin v. UK* (n. 266 above), joint dissenting opinion of Judges Tulkens, Spielmann and Garlicki, para. 13. The Judges referred to the case of *Gillan and Quinton v. UK*, App no. 4158/05, Judgment of 12 January 2010.
[272] General Comment 37 (n. 21 above), para. 84.
[273] ECtHR, *Primov v. Russia*, App no. 17391/2006, 12 June 2014.
[274] n. 273, para. 160.
[275] Joint report on the proper management of assemblies (n. 8 above), para. 62. Also see General Comment 37 (n. 21 above), para. 85.

enforcement officials should also take into account the diversity of participants and ensure that the use of specific weapons do not disproportionately affect vulnerable groups within the assembly.[276]

### 3.9 The use of less-lethal weapons

As earlier noted, Basic Principle 2 requires States and their law enforcement agencies to develop less-lethal weapons for use in appropriate cases. Although they may also cause injuries or death, they constitute a generally less-harmful means of managing threats.

#### 3.9.1 General principles

The general principles discussed above also guide the use of less-lethal weapons. States have an obligation to equip law enforcement officials with such weapons.[277] This is particularly important for law enforcement officials involved in the policing of assemblies. In the absence of less-lethal weapons, law enforcement officials can easily resort to the disproportionate use of lethal force. The duty to equip the police with less-lethal weapons has been underscored in various contexts. For example, in *Simsek v. Turkey,* a chamber of the European Court held that police officers must have access to a range of equipment to manage public order. It noted that the absence of such equipment would mean the police have to resort to lethal force in circumstances where less-lethal weapons may have been more appropriate.[278] The use of less-lethal weapons should also be restricted to officers who have been trained on how and when to use them.[279] This is because the inappropriate use of such weapons may of course have fatal consequences.

Basic Principle 3 provides that 'the development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.' The Guidance on Less-lethal Weapons also states that less-lethal weapons…which present undue risk of loss of life or serious injury to anyone…shall not be authorized for procurement,

[276] Guidance on Less Lethal Weapons (n. 102 above), para. 2.11.
[277] Basic Principles on the Use of Force and Firearms (n. 15 above), Principle 2.
[278] ECtHR, *Simsek and others v. Turkey*, App nos. 35072/97 and 37194/97, 26 July 2005, paras. 108, 109 and 111.
[279] Joint report on the proper management of assemblies (n. 8 above), para. 55.

deployment or use.'[280] These provisions demonstrate the need to ensure the appropriate and proportionate use of less-lethal weapons. The fact that a weapon is classified as less-lethal does not mean it can be used in any context. According to the HRCttee, the deployment of such weapons must be in accordance with the principles of necessity and proportionality.[281] The need for effective testing of less-lethal weapons has also been emphasised.[282] What follows is a discussion of certain less-lethal weapons commonly used during assemblies.[283]

### 3.9.2 Tear gas

In the context of policing assemblies, tear gas is commonly used to disperse participants. Although it is a less-lethal alternative, its use may nonetheless lead to violations of the right to life as well as the right to freedom from torture and ill-treatment. For example, in *Abdullah Yasa and Others v. Turkey*,[284] the applicant was hit in the face by a tear-gas canister which had been fired directly into a crowd by a police officer during a protest. Turkish authorities argued that the police had used necessary force to disperse a hostile crowd and maintain public order. A chamber of the European Court examined the events that occurred during the demonstration in question and determined that indeed the protest had not been peaceful and therefore the use of tear gas to disperse the participants was justified. However, the court also stated that the fact that the participants were not peaceful did not justify the firing of canisters directly at them.[285] The actions of the police had occasioned a serious injury upon the applicant, amounting to a violation of his freedom from torture and ill-treatment as guaranteed in Article 3 of the European Convention.

Similarly, in the case of *Ataykaya v. Turkey*[286] a member of the public died after being struck in the head by a tear gas canister fired by law enforcement officials during a demonstration in which the deceased was caught up as he was leaving his place of work. Both cases highlight

[280] Guidance on Less-lethal Weapons (n. 102 above), para. 4.2.3.
[281] General Comment 36 (n. 35 above), para. 14.
[282] n.281.
[283] OSCE/ODIHR and Omega Research Foundation, 'Guide on Law Enforcement Equipment Most Commonly Used in the Policing of Assemblies' (2021).
[284] ECtHR, *Abdullah Yasa and Others v. Turkey,* App no. 44827/08, Judgment of 16 July 2013.
[285] n. 284, para. 48.
[286] ECtHR, *Ataykaya v. Turkey*, App no. 50275/08, Judgment of 22 July 2014.

the need for clear guidelines on the use of tear gas, especially during demonstrations.[287] The need for appropriate training and instructions was also emphasised.

As seen in the above two cases, tear gas canisters should not be fired directly at protesters. In addition, they should never be used in confined spaces since there may be a risk of asphyxiation or chemical poisoning.[288] There may also be a stampede leading to deaths or serious injuries. For example, in 2009, over 156 demonstrators in Guinea were killed after they were attacked in a stadium by security forces and a pro-government militia. Some of those who died suffocated or were crushed during a stampede which was provoked or at least aggravated by the use of tear gas. [289]

It has also been stated that the use of chemical irritants makes the body more susceptible to viral infections.[290] Further they cause people to cough and sneeze and may therefore lead to the spread of infections such as COVID-19.[291] It is therefore advisable that in the face of a pandemic, the use of such weapons should be avoided unless absolutely necessary. Further, they should not be fired from behind protesters since this may force the protesters to move towards the police, thereby increasing the risk of a violent confrontation.[292]

### 3.9.3 Less-lethal projectiles

Less-lethal kinetic impact projectiles such as rubber-coated or plastic bullets are also sometimes used during assemblies. The use of such weapons is meant to inflict pain and temporarily incapacitate the person against whom they are used. However, they can equally cause serious injury or even death.[293] Due to their potential for serious injury or death, the use of rubber-coated

[287] *Abdullah Yasa and Others v. Turkey* (n. 284 above), para. 49.
[288] Omega Research Foundation, 'Position Paper: Lowering the risk-Curtailing the use of chemical irritants during the COVID-19 pandemic' 2020. Available at https://omegaresearchfoundation.org/sites/default/files/uploads/Publications/Position%20Paper%20-%20Lowering%20the%20Risk_Nov%202020.pdf.
[289] See, UN Security Council, 'Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea' S/2009/693, annex, para. 84.
[290] Omega Research Foundation, Curtailing the use of chemical irritants during the COVID-19 pandemic (n. 288 above).
[291] n. 290.
[292] Maslen and Connolly, Police Use of Force under International Law (n. 10 above), p. 200.
[293] For example, in South Africa, one Andries Tatane died when a police officer shot him at close range with rubber bullets during a protest. See, ISS, 'Rubber bullets are high risk when used at close range' 28 November 2019. Available at https://issafrica.org/iss-today/rubber-bullets-are-high-risk-when-used-at-close-range.

bullets as a crowd control weapon has raised concern. In one of its Concluding Observations on the periodic report of the UK and Northern Ireland, the Committee against Torture expressed concern about the use of plastic bullet rounds in Northern Ireland as a crowd-control weapon.[294] It recommended the abolition of the use of plastic bullet rounds to control crowds.[295] Similarly, in 2007 the then Acting Director for Justice of the United Nations Interim Administration Mission in Kosovo (UNMIK) called on the UN to review the use of rubber bullets as crowd-control weapons during peace-keeping missions.[296] This was after 2 demonstrators died from wounds to the head caused by rubber bullets.[297]

### 3.9.4 Water cannon

Water cannon are '…vehicles designed to project water at a variety of pressures and in a variety of forms for the purposes of dispersing groups, protecting property or putting an end to violent behaviour.'[298] Like tear gas, its effects can be indiscriminate. Since they are ordinarily mounted on huge trucks, the mere presence of a water cannon may intimidate participants in an assembly and elevate tensions. When using a water cannon, attention should be paid to the pressure used to discharge the water since pressure that is too high may cause people to fall or cause debris to hit them, thereby potentially causing serious injuries.

### 3.9.5 Acoustic weapons

Acoustic weapons are designed to emit high levels of noise. In the context of an assembly they may be used to warn people or order them to disperse. If used at close range, they may cause hearing damage or other long-term effects.[299] For example, a journalist who covered demonstrations in Manhattan, New York, in the US sued the New York Police Department (NYPD)

[294] UN Committee Against Torture, 'Concluding Observations, United Kingdom of Great Britain and Northern Ireland' A/54/44 (SUPP), 17 November 1998, paras. 72-7.
[295] n. 294, para. 77(d).
[296] UN News, 'Probe of killing of Kosovo protesters leads to call for UN review of rubber bullets' 2 July 2007. Available at https://news.un.org/en/story/2007/07/224352-probe-killing-kosovo-protesters-leads-call-un-review-rubber-bullets.
[297] UN Security Council, 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo' S/2007/134, para. 4.
[298] Guidance on Less-lethal Weapons (n. 102 above), para. 7.7.1.
[299] n. 298, para. 7.8.3.

over what he termed as excessive use of force.[300] The NYPD had used a sound cannon during the protest, and this caused the journalist to experience migraines which persisted for more than a week. The US Court of Appeals for the Second Circuit faulted the purposeful use of a long-range acoustic device in a manner capable of causing serious injury.[301]

#### 3.9.6 Close-in options (batons, pepper spray, Taser etc.)

Close-in options such as batons and Tasers may be used to target specific individuals in assemblies. Batons can be used to restrain or strike individuals. If used to strike, they can cause life-threatening injuries, permanent disability or even death. In relation to Tasers, the Committee against Torture has, in its various concluding observations, highlighted the inappropriate or excessive use of Tasers.[302] In its concluding observations on Australia, the Committee recommended that Australia should ban outright the use of Tasers.[303] It further recommended that if Tasers are not banned, then they should only be used in limited circumstances where there is an imminent threat to life or risk of serious injury. It went ahead to state that the use of Tasers against children and expectant women should be outlawed.[304]

### 3.10 Use of force in the context of assemblies in situations of armed conflict

The existence of an armed conflict does not preclude the application of the ICCPR or human rights obligations generally.[305] Thus, the right of peaceful assembly can be exercised in situations of armed conflict. According to the HRCttee, if assemblies are held in such a context, the rules governing the use of force by law enforcement officials in peacetime apply.[306] In relation to the use of lethal force, civilians participating in an assembly may not be targeted unless they are direct participants in hostilities.[307] Further the use of force during armed conflict should be restrained by international humanitarian law principles of distinction, precaution and

[300] *Edrei v. Bratton*, No. 17-2065 (2nd Cir. 2018). Available at https://cases.justia.com/federal/appellate-courts/ca2/17-2065/17-2065-2018-06-13.pdf?ts=1528900214
[301] n. 300, p. 3.
[302] Committee against Torture, 'Concluding observations, Australia' CAT/C/AUS/CO/4-5, 23 December 2014, para. 13.
[303] n. 302.
[304] n. 302.
[305] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ. Reports 1996, p. 226, paras. 25-6.
[306] General Comment 37 (n. 21 above), para. 97.
[307] n. 306.

proportionality. Therefore, indiscriminate attacks on assembly participants may constitute a violation of both humanitarian law and human rights law.

In *Isayeva v. Russia*,[308] the applicant lost her son and three nieces as a result of what she termed as the indiscriminate bombing of her village by the Russian military. The applicant's village had been infiltrated by hundreds of Chechen fighters who were the targets of the bombing. A chamber of the European Court examined whether the operation of the Russian military was '…planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.'[309] The Court also referred to the *McCann* case in assessing whether there was negligence on the part of the Russian authorities. The Court stated that 'the State's responsibility…may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.'[310] In the circumstances, the Court found that the Russian authorities had not planned and executed their operation with requisite care for the civilian population and therefore there had been a violation of Article 2 of the European Convention.[311] Similar principles would apply in the context of use of lethal force in an assembly. As Schabas has noted, even if the use of lethal force can be justified as a legitimate military purpose, the proportionality of the use of force should still be assessed.[312] Further, the principle of precaution should also be complied with.

### 3.11 Conclusion

This chapter has set out the established international legal standards on the use of force by law enforcement officials, delineating the responsibilities of law enforcement officials in relation to various rights that can be impacted directly as a result of the use of force during an assembly. Law enforcement officials have a general duty not to interfere with peaceful assemblies. Indeed, they have an obligation to facilitate and protect lawful assemblies. For these obligations to be discharged, States must put in place measures to provide legal guarantees for the exercise of the

[308] ECtHR, *Isayeva v. Russia*, App no. 57950/00, 24 February 2005.
[309] n. 308, para. 175.
[310] n. 308, para. 176.
[311] n. 308, paras. 200-01.
[312] W Schabas, The European Convention on Human Rights (n. 216 above), p. 157.

right of peaceful assembly and they must also enable law enforcement officials to effectively facilitate and protect assemblies. In this regard, training and the provision of appropriate less-lethal weapons and protective equipment are some of the steps States can take to enhance the capacity of law enforcement officials to police assemblies within a human-rights framework.

This could mean that assembly participants in less-resourced States may be more exposed to violence than those in States whose police officers are better trained and equipped. But of more consequence is the reality that, the more repressive and unresponsive a regime is, the higher the likelihood is of violence against protesters. From the examples of protests in Nigeria, Iraq, Nicaragua and Iran, it is evident that the protective role of international human rights standards on assemblies and on the use of force by law enforcement officials may not be felt in domestic settings where resources are scarce and the democratic space is constrained. The question then is what ought to be done to ensure the right of peaceful assembly in situations where such challenges exist? Of course, challenges do not absolve States from their human rights obligations under international law. Furthermore, in most cases assemblies are peaceful events and there is rarely a need for heavy police presence or involvement. In cases where law enforcement officials are involved, they are under an obligation to exhaust non-violent means before resorting to the use of force where necessary. For example, tactical options such as de-escalation and selective arrest may be used.

In order to ensure the proper management of an assembly, law enforcement officials should establish channels of communication with organizers. This enables them to identify the needs of the participants, anticipate law enforcement challenges and prepare to handle them within a human rights framework. Making these plans are not necessarily resource intensive and therefore there would be no excuse for failing to plan law enforcement operations in a manner that minimizes the risk of harm to assembly participants and other parties. As was seen in the *McCann* judgment, a failure to take precautions to avoid, or at least minimise, the use of lethal force may amount to an arbitrary deprivation of life.

The principle of legality was also discussed. It was noted that states have an obligation to establish a clear legal framework governing the use of force by the police. As was shown in the

*Nadege Dorzema case*, failure to enact legislation governing the use of force may amount to a breach of the duty to protect life. Enacting legislation that falls short of international standards may also be considered to be a breach of the obligation to protect if a deprivation is based on such inadequate laws. This is important given the observation by the Human Rights Committee that most domestic laws on the use of force by law enforcement officials do not comply with international standards. In practice also it is crucial for domestic laws to clearly set out and reflect international standards on the use of force since law enforcement officials are more likely to refer to national laws than they are to international law.

Through the Committee's decision in the *Chongwe case* and its General Comment on the right to life, it has been demonstrated that, in exceptional circumstances, the right to life may be violated even if there is no actual loss of life. The regional human rights systems also reflect the same position. In most cases, the right to life is violated under domestic laws only when there has been an actual loss of life. Since the ICCPR has been ratified by an overwhelming majority of States (173 in total), the Committee's interpretation of its provisions can be relied on by the domestic courts of the States that have ratified the Covenant. Thus, the expanded meaning of the right to life in General Comment 36 can be applied by domestic courts in the context of violations committed during assemblies.

Every use of force must meet the test of necessity and proportionality. Thus, in relation to peaceful participants, the use of force should generally be avoided even if the assembly is considered unlawful under domestic law. In relation to violent participants, they may lose protection under Article 21 but they retain all the other rights in the Covenant. In relation to the use of firearms, the Human Rights Committee and the European Court of Human Rights use the test of strict necessity and absolute necessity, respectively. As was stated, this is a more compelling standard than the test of necessity used in other circumstances. Thus, the actions of law enforcement officials that lead to the deprivation of life should be subjected to careful scrutiny. That said, if firearms are used under an honest but mistaken belief that a life is threatened, the deprivation of life may be justified. Room for reasonable mistakes such as the given example enables police officers to make quick decisions in intense situations.

In relation to proportionality, it was recalled that the force applied should be proportionate to the threat and reasonable in the circumstances. It was further stated that each use of force should be reviewed to determine its lawfulness. Cases of deaths or serious injuries must be promptly, thoroughly and effectively investigated, and where appropriate perpetrators criminally punished. In this regard, it is important for law enforcement agencies to have within them effective reporting and review procedures.

The next chapter analyses the extent to which Kenya's domestic legal framework on both the right of peaceful assembly and the use of force by law enforcement officials in Kenya comply with international standards.

# Chapter 4: The Kenyan Legal Framework on the Right of Peaceful Assembly and the Use of Force in the Policing of Assemblies

## 4.1. Introduction

For several years, international media have widely reported on various mass protests across the world and the State responses to these protests. In some of them, States, through law enforcement agencies, have brutally suppressed dissent,[1] while in others, they have been generally tolerant.[2] In either case, the majority of the States involved have ratified the International Covenant on Civil and Political Rights[3] (hereinafter, the ICCPR or the Covenant)[4] and are thus bound by the obligation to respect and ensure the right of peaceful assembly as guaranteed under Article 21 of the Covenant. The question then, is, what accounts for the differences in how States interpret their obligations under Article 21? Multiple factors may explain this, one of them being the extent of protection of the right of peaceful assembly by national laws.

While ratification of an international human rights instrument gives rise to binding legal obligations under international law, it is not always enough to ensure their implementation in practice. The effective protection and implementation of the rights guaranteed in the Covenant depends to a great extent on the domestic legal system.[5] Indeed, Article 2(2) of the ICCPR

[1] For instance, see the UN's condemnation of the use of excessive force against peaceful protesters in Sudan in 2019. UN News, 'UN Human Rights Chief deplores killings and detentions amid peaceful protests in Sudan' 3 June 2019. Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24672&LangID=E. And in Myanmar, following the March 2021 military coup and countrywide protests against the coup, at least 68 people had been killed and several more injured by Myanmar security agencies during a violent crackdown on protesters. See UN News, 'Myanmar: UN rights office 'deeply disturbed' over intensifying violence against protesters' 17 March 2021. Available at https://news.un.org/en/story/2021/03/1087422.

[2] See for example the nearly weekly protests in Israel calling for the resignation of Prime Minister Benjamin Netanyahu and which were ongoing for more than 30 weeks. In spite of the length of the protests, no known deaths or serious injuries have been reported to have occurred in the context of the protests. See Al Jazeera News, 'Israelis restart Netanyahu protests amid third virus lockdown' 10 January 2021. Available at https://www.aljazeera.com/news/2021/1/10/israeli-protests-against-netanyahu-as-third-virus-lockdown-looms.

[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[4] As of writing, 173 States were party to the ICCPR. See UN Treaty Collection, at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

[5] S Joseph and M Castan, 'The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary' (3rd Edition, Oxford University Press 2013), p. 13, para. 1.30.

requires its States parties to adopt 'legislative or other measures' to give effect to the Covenant rights.

As noted in chapter 2, the right of peaceful assembly is protected in the constitutions of at least 184 countries worldwide, and Kenya is one of them. The regulation of its exercise typically involves law enforcement agencies, before, during and after an assembly. In some cases law enforcement officials may be compelled to use force to ensure public order, public safety and to protect the rights of others. Thus, in addition to guaranteeing the right of peaceful assembly, States should also have laws regulating the use of force by law enforcement officials in the context of assemblies.[6] Notably, domestic standards may vary in how they define the scope of State obligations in relation to the rights guaranteed in the ICCPR. However, in line with the customary law principle *pacta sunt servanda* codified in the Vienna Convention on the Law of Treaties[7] (hereinafter, VCLT), States that have ratified the ICCPR must honour their obligations thereunder.[8] Further, they cannot invoke domestic law as a basis for failure to comply with treaty obligations.[9] Kenya has not ratified the VCLT, but it is a signatory. Therefore, while it is not bound by all the terms of the treaty, it must not act to frustrate its object and purpose.[10]

Having discussed the international legal framework on the right of peaceful assembly and on the use of force by law enforcement officials in chapters 2 and 3, respectively, this chapter evaluates the Kenyan legal framework on both the right of peaceful assembly and the use of force by law enforcement officials during assemblies, and assesses the extent to which the framework complies with international standards. It first provides a background to the protection of the right of peaceful assembly in Kenya, followed by an overview of the key pieces of legislation that govern the exercise of the right. Thereafter, it discusses various aspects of the right as covered under Kenyan law, including its scope, the nature of the State obligations as framed under the

[6] See UN Human Rights Committee, General Comment 36: Article 6 (The Right to life), 2018, CCPR/C/GC/36, para. 13; and UN Human Rights Committee, General Comment 37: Article 21 (The Right of Peaceful Assembly), 2020, CCPR/C/GC/37, para. 78.
[7] United Nations, 'Vienna Convention on the Law of Treaties' (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[8] n. 7, Article 26.
[9] n. 7, Article 27.
[10] n. 7, Article 18.

constitutional and statutory framework, procedural requirements regarding the right and restrictions on the right. Taking into account the fact that law enforcement officials in Kenya play a fundamental role in the regulation of assemblies, the chapter also discusses the powers of the police as defined in public order laws and analyses how theese laws influence interactions between the police and the public during assemblies. This is followed by a discussion on the laws governing the use of force and the principles governing such use of force as interpreted by Kenyan courts. Thereafter, the conditions under which firearms may be used under Kenyan law are discussed and their compatibility with international standards analysed. Lastly, the chapter considers the use of less-lethal weapons during assemblies. The terms 'police' and 'law enforcement officials' are used interchangeably throughout the chapter.

**4.2 Background to the Legal Protection of the Right of Peaceful Assembly in Kenya**

The protection of the right of peaceful assembly has been a part of Kenya's constitutional order since independence in 1963. Before then, colonial legal instruments, including the 1954 Lyttleton Constitution and the 1958 Lennox-Boyd Constitution, were primarily concerned with administration of the Kenyan colony, and not the fundamental rights and freedoms of the public.[11] In fact, the administrative and legal structures of the time were designed to repress the natives.[12] The entrenchment of the Bill of Rights in the Constitution of Kenya, 1963 (henceforth, the 1963 Constitution) was therefore one of the significant differences between the pre-independence and the post-independence legal instruments.

Section 24 of the repealed 1963 Constitution guaranteed the right of peaceful assembly. The provision read as follows: 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other association for the protection of his interests.' These freedoms could be restricted on the grounds of defence of the republic, public safety, public order, public morality, public health or the

[11] Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001)23, Human Rights Quarterly 96, p. 97.
[12] n. 11.

protection of the rights of others.[13] In addition, restrictions could be imposed on public officers.[14] Section 24, and the entire Bill of Rights in the 1963 Constitution, was to a large extent influenced by the global developments in human rights at the time, particularly the adoption of the European Convention on Human Rights[15] (hereinafter, the European Convention) in 1950.[16] Thus, it is significantly similar to Article 11 of the European Convention. In both cases, a single provision protects both the right of peaceful assembly and the freedom of association. Further, in both cases, there is specific mention of the right to form or join trade unions. However, where the European Convention uses the terms '…*including* the right to form and to join trade unions…', the 1963 Constitution uses the terms '…the right…*in particular* to form or belong to trade unions…'. This difference could be interpreted to mean that under the 1963 Constitution, there was greater emphasis on protection of the right to form or join trade unions, as opposed to the protection of the right of peaceful assembly.

Though the 1963 Constitution only referred to the 'freedom of assembly' and not 'freedom of peaceful assembly', the grounds for restrictions set out in section 24(2) suggest that the exercise of the right have to be within the limits of the law and must remain peaceful to enjoy constitutional protection. Worth noting is that the limitation clause provided that any law that restricted the exercise of the right of peaceful assembly and of association on the grounds stipulated could not be considered to be inconsistent with the Constitution. At the time of the promulgation of the 1963 Constitution, the Penal Code[17] and the Public Order Act[18] were already in place and were used to regulate assemblies. As will be seen later, this reasoning has persisted, with Kenyan courts reiterating that the provisions of the Public Order Act that regulate assemblies are consistent with constitutional standards.

[13] Constitution of the Republic of Kenya, 1963, s. 24(2) (a) & (b).
[14] n. 13, s. 24(2) (c).
[15] Council of Europe, 'Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)' (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222; 312 ETS 5.
[16] HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' Journal of African Affairs, Vol. 71, No. 282 (Jan. 1972), pp. 9-34, at p. 15, fn. 24. Also see Christof Heyns, 'African Human Rights Law and the European Convention' (1995) South African Journal of Human Rights, 252.
[17] Penal Code, Cap. 63, 1930 (Revised 2014) Laws of Kenya.
[18] Public Order Act, Cap. 56, 1950 (Revised 2018) Laws of Kenya.

In spite of the entrenchment of the right of peaceful assembly in the 1963 Constitution, the political environment in Kenya shortly after independence did not encourage the actual exercise of the right. Constitutional limitations on the exercise of powers by the Executive were gradually dismantled through various amendments of the Constitution.[19] For example, in 1966 significant amendments touched on the independence of the then Kenya Police Force, and which had an impact on how the police reacted especially to the political activities of opposition parties and civil society groups.[20] Previously, the 1963 Constitution had provisions that secured the independence of the police by establishing a Police Service Commission, whose membership included the chairperson of the Public Service Commission.[21] It also provided for the appointment of an Inspector-General of Police who was to be appointed by the Governor-General '…acting in accordance with the advice of the Police Service Commission.'[22] The Constitution also had detailed provisions on the process of removal of the Inspector-General from office.[23] Through the 1966 amendment, the Police Service Commission was abolished. Further, in place of the Inspector-General of Police, there was a Commissioner of Police who was appointed by the President, without reference to either Parliament or any other organ. Moreover, the Commissioner of Police did not have security of tenure. Consequently, the Police Force was highly politicized and was frequently used to suppress dissent against the regime in power.[24]

In 1969, a revised Constitution which consolidated the amendments to the 1963 Constitution was reproduced. Under the revised Constitution, the right of peaceful assembly was protected under section 80, and was drafted in similar terms as section 24 of the 1963 Constitution. The difference was that the limitation clause expanded the category of persons who could be prohibited from exercising their freedom of assembly and of association, and also included a further provision regulating the registration of trade unions and associations.

[19] Okoth-Ogendo, The Politics of Constitutional Change in Kenya (n. 16 above), pp. 20-9.
[20] n. 19, p. 20.
[21] Constitution of Kenya, 1963, s. 161.
[22] n. 21, s. 162.
[23] n. 21, s. 162(4)-(7).
[24] Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (2005), p. 30.

In addition to amendments to the Constitution, other statutes were also being amended to serve the interests of those in power. For example, in 1968, an amendment was made to the Public Order Act prohibiting persons participating in public meetings or processions from displaying or wearing any '…flag, banner, badge or other emblem signifying association with or support for the promotion of a political object….'[25] The provision (section 10 of the Public Order Act) remained in force until 1997 when it was repealed.[26] Further, section 5 of the Public Order Act, which regulates public meetings and 'processions', was introduced.[27]

Taking into consideration the politicisation of the Police Force, the broad powers of the Executive and the extensive limits to the exercise of the right of peaceful assembly; the actual enjoyment of the right faced significant challenges, especially in the context of assemblies that pursued political causes, where participants were often subjected to violence by State security agencies.[28] In an environment where there was little room for dissent, most of the incidents of violence perpetrated by the police against assembly participants were generally ignored by the authorities.[29] It was not until the violence that marked the disputed presidential elections of 2007 that the urgent need to initiate concrete legal and institutional reforms was appreciated. With 405 civilians having been fatally shot, the manner in which the police dealt with protests across the country was particularly condemned.[30]

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[25] The Public Order (Amendment) Act, No. 12 of 1968, clause 2.
[26] The Statute Law (Repeals and Miscellaneous Amendments) Act, No. 10 of 1997.
[27] n. 26.
[28] For example, in 1991, protests held on 7 July by opposition and civil society groups (popularly known as the *Saba Saba* protests) were violently suppressed by police officers, leading to the deaths of at least 14 pro-democracy protesters. See US Department of State, 'Kenya Report on Human Rights Practices for 199' 30 January 1998. Available at https://1997-2001.state.gov/global/human_rights/1997_hrp_report/kenya.html. And in 1997 the National Convention Executive Council (NCEC), an umbrella organization of religious groups, civil society groups and, and opposition politicians, organised a protest to call for electoral reforms. The planned protest was prohibited, but the organizers went ahead to hold it. The police responded with brutal force, killing at least 13 protesters and wounding several others. About 500 people were also arrested. See, Human Rights Watch, 'Human Rights Watch World Report 1998 – Kenya' 1 January 1998, available at https://www.refworld.org/docid/3ae6a8b124.html.
[29] The consistent failure by Kenya to ensure accountability of police officers for human rights violations has been highlighted by the UN Human Rights Committee. See for example, 'Concluding Observations, Kenya' CCPR/CO/83/KEN, April 2005, paras. 16 and 18; 'Concluding Observations, Kenya' CCPR/C/KEN/CO/3, August 2012, para. 11.
[30] See Report of the Commission of Inquiry into Post-Election Violence, p. 417. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf.

The Constitution of Kenya, 2010 (hereinafter, the 2010 Constitution or the Constitution) was promulgated as part of the reform process. The right of peaceful assembly is guaranteed under Article 37 of the Constitution, independent of the freedom of association which is guaranteed under Article 36. This is a marked difference as it gives prominence to the right of peaceful assembly. The Constitution also introduced changes within the security sector, and established the National Police Service Commission (NPSC) and the National Police Service (NPS). The NPS is led by an Inspector-General (IG-NPS) appointed by the President in accordance with the recommendation of the NPSC. This was also a significant change since it reintroduced the security of tenure of the IG-NPS and limited the powers of the President in relation to his/her appointment, thereby granting the IG-NPS a degree of independence from influence by the Executive. The National Police Service Act, No. 11 of 2011 (hereinafter, the NPS Act) was also enacted to reflect these changes. Together with the Public Order Act and the Penal Code, the 2010 Constitution and the NPS Act form the main legal framework governing the conduct of assemblies in Kenya. What follows is a discussion of the applicable laws in the context of assemblies.

### 4.3 The Legal Framework on Peaceful Assembly in Kenya

As already mentioned above, the protection of the right of peaceful assembly is anchored in the 2010 Constitution, which also provides for the application of international law in Kenya. The regulation of assemblies is also guided by provisions in the Public Order Act and the Penal Code.[31] In cases where a state of emergency is declared, the Preservation of Public Security Act[32] may also be applied. Next is an overview of the relevant provisions in these laws.

[31] Aside from the Penal Code, there are other laws that provide for the development of regulations that may have an impact on the right of peaceful assembly. For example, the Preservation of Public Security Act, Chapter 57, Laws of Kenya, which allows the President to make regulations for the preservation of public security, including regulations for the '…the control or prohibition of any procession, assembly, meeting, association or society,' in pursuit of national security interests. Regulations may also be made under the Public Health Act, Chapter 242, Laws of Kenya, as was the case with the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020 which restricted gatherings in the light of the COVID-19 pandemic.

[32] Preservation of Public Security Act, Cap 57, 1960, Laws of Kenya.

### 4.3.1 Applicable International Laws

Kenya has ratified the ICCPR and the African Charter on Human and Peoples' Rights[33] (hereinafter, the African Charter), both of which protect the right of peaceful assembly: under Article 21 and Article 11, respectively. Thus, the obligations under these treaties bind Kenya. The question is what their place is in the Kenyan legal system and how courts interpret obligations under these treaties vis-à-vis those under national laws.

The status of international law in Kenya's post-2010 constitutional order has been a subject of much debate. Article 2(5) and (6) of the 2010 Constitution provide respectively that 'the general rules of international law shall form part of the law of Kenya' and 'any treaty or convention ratified by Kenya shall form part of the law of Kenya.' On the one hand, it has been argued that the effect of these provisions is to make international law automatically applicable in the Kenyan legal system, without the need for domestication. This is an argument that has been upheld in a number of decisions of the superior courts in Kenya. For example, in *Re Zipporah Wambui Mathara*,[34] which concerned the issue of imprisonment of civil debtors, the High Court stated that under Article 2(6) of the 2010 Constitution international treaties ratified by Kenya '…are imported as part of the sources of the Kenyan Law.'[35] The Court held that a statutory provision that permitted the imprisonment of civil debtors went against Article 11 of the ICCPR which prohibits the imprisonment of persons for the mere failure to fulfil contractual obligations. The position the Court in this case took is that where there is a conflict between the provisions of an international treaty ratified by Kenya and statutory provisions, the former takes precedence.

Using the interpretation in *Re Zipporah*, if statutory provisions regulating assemblies are in conflict with Article 21 of the ICCPR as interpreted by the UN Human Rights Committee (hereinafter, the HRCttee or the Committee), then the obligations under the Convention are given priority. Worth noting is that the Court in this case was dealing with the provision of a

[33] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[34] *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR.
[35] n. 34, para. 9.

statute and not the Constitution. It would probably have made a different conclusion if Article 11 of the ICCPR conflicted with a provision in the Constitution. This is because Article 2(4) of the 2010 Constitution provides that 'any law' that is inconsistent with the Constitution is void to the extent of the inconsistency.

Turning back to the arguments on the place of international law in Kenya, the alternative view, which largely reflects the position before the 2010 Constitution, is that in spite of Article 2(5) and (6), the Constitution is still superior to treaties and general principles of international law, and therefore their application is subject to their consistency with the Constitution. It has also been argued that the general principles of international law referred to and treaties rank below domestic statutes and final judicial pronouncements of Kenyan Courts in the hierarchy of sources of law.[36] In *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others*[37] the Supreme Court of Kenya interrogated the meaning of the terms 'part of the law of Kenya' as used in Article 2(5) and (6). It stated as follows:

> '…The expression *"part of our law"* means that domestic Courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that *the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement*.'[38]

The Court further stated that in the event that there is a lacuna in domestic laws, international law has to be applied as it forms part of Kenyan law.[39] In addition, international law norms could be relied on to guide the interpretation of a constitutional provision.[40] Essentially, the Court was affirming the position that Kenya is still a dualist state and that in domestic courts the Constitution and domestic statutes have primacy over international treaties that have not been incorporated into the law of the land. In so far as the Constitution is concerned, this position has a basis in Article 2(4) of the 2010 Constitution mentioned above. One challenge with the Court's

[36] *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),* [2021] eKLR, paras. 130-32.
[37] n. 36.
[38] n. 36, para. 130.
[39] n. 36, para. 132.
[40] n. 39.

position is that placing Acts of Parliament and judicial interpretations of laws above international law may negate some of the human rights protections afforded by international law. For example, in the context of the right of peaceful assembly, states may have statutory provisions that require organizers to obtain permission before holding an assembly. There may also be courts that adopt retrogressive interpretations of rights and obligations.[41] If a State were to argue that its domestic laws are superior to the ICCPR, then the scope of protection under Article 21 will be greatly diminished at the national level. Given that Convention responsibilities are engaged at the international level, if domestic standards fall short of its requirements, there may be no recourse at the national level.

Since the *Mitu-Bell Welfare* decision was made by the Supreme Court, it is binding on all lower courts. Predictably, it will have implications on how courts interpret state obligations under various treaties that Kenya has ratified, as well as customary international law. In relation to the right of peaceful assembly in Kenya, it serves as a reinforcement of the validity of the provisions of the Public Order Act, which will be discussed later in this chapter.

#### 4.3.2 The Constitution of Kenya, 2010: Scope of Protection under Article 37

Article 37 of the 2010 Constitution provides that 'every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities.' As the language of Article 37 shows, only peaceful assemblies are protected. In addition, assembly participants must not be armed. This formulation is similar to Article 15 of the American Convention on Human Rights[42] (American Convention), which also restricts the carriage of arms in addition to requiring assemblies to be peaceful. As previously discussed in chapter 2, what this means is that the State may interfere with an otherwise peaceful assembly if the participants are armed. Read alongside section 6 of the Public Order Act, arms could be taken to mean any offensive weapon. An offensive weapon is then defined under section 2 of the Public Order Act

[41] See, for example, the High Court of Kenya's decision in *Ngunjiri Wambugu v. Inspector General of Police, & 2 others* [2019] eKLR where the Court made an order requiring the IG-NPS and the Attorney General to formulate or amend public order laws and regulations that prescribe, among others, demarcation of demonstration zones, responsibilities for clean-up costs, maximum numbers and consents of persons/entities adjacent to demonstration zones.

[42] OAS, American Convention on Human Rights (adopted 22 January 1969, entered into force 18 July 1978) 1144 UNTS 123.

as '…any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use.' In addition to objects that may be used as weapons, assembly participants may not carry certain protective equipment. This was stated by the High Court in *Ngunjiri Wambugu v. Inspector General of Police & 2 others*[43] where the Court observed that participants in assemblies, demonstrations and pickets must not carry '…weapons as well as defensive or protective contraptions, which breed or stimulate aggression.'[44] Given that assemblies can sometimes turn violent, the restriction on the carriage of arms is an acceptable limitation because the presence of weapons may present greater threats to public order, public safety and the rights and freedoms of others. In contrast, the HRCttee has stated that the carrying of weapons or objects that could be viewed as such or of protective equipment does not necessarily make an assembly non-peaceful.[45] According to the Committee, each case is to be determined by its own circumstances, and considerations may include cultural factors.[46] Thus, a protest by construction workers in which the protesters have helmets and other tools of the trade should not be excluded from protection under Article 37. In the Kenyan context where some communities, as part of their culture, ordinarily carry items that may be considered as weapons, the HRCttee's position is particularly relevant.[47]

Article 37 of the Constitution not only protects the right of peaceful assembly, but also expressly affirms the right to demonstrate, picket and present petitions. This distinction is not found in any of the key international instruments, and was also not reflected in the 1963 Constitution, but can be found in the Constitutions of some states, such as South Africa.[48] The right of peaceful assembly, as understood in international law, is multifaceted and includes

[43] *Ngunjiri Wambugu v. Inspector General of Police, & 2 others* [2019] eKLR.
[44] n. 43, para. 38.
[45] UN Human Rights Committee, 'General Comment 37: Article 21 (The Right of Peaceful Assembly)' 2020, CCPR/C/GC/37, para. 20.
[46] n. 45.
[47] For instance, male members of the Maasai and Samburu communities ordinarily carry clubs and swords in their person, as part of their culture. Were they to participate in a peaceful assembly, such carrying of weapons should not negate the peaceful nature of their assembly.
[48] The Constitution of the Republic of South Africa, 1996. Section 17 of the Constitution of the Republic of South Africa states that: 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

demonstrations, sit-ins, meetings, processions and pickets.[49] The language of Article 37 can be attributed to the fact that the 2010 Constitution's Bill of Rights was to a great extent inspired by the South African Constitution.[50] The drafters may have also taken into account the historical negative perception[51] and consequential suppression of demonstrations in Kenya. Nevertheless, whenever courts interpret issues touching on demonstrations, reference is often made to Article 21 of the ICCPR and Article 11 of the African Charter, and the terms 'assembly' and 'demonstration' are also used interchangeably.[52] There is therefore a recognition that the right to demonstrate is part of the right of peaceful assembly.

Other than the requirement of peacefulness and the prohibition on carrying of arms, Article 37 does not expressly stipulate any other limitation on the right of peaceful assembly. Instead, limitations on this right are provided for under Article 24 of the Constitution, which is a general limitation clause that applies to all the rights and fundamental freedoms guaranteed in the Constitution, save for those that are absolute.[53] Under Article 24, a right may be limited only by law and '…only to the extent that the limitation is reasonable and justifiable in an open and democratic society….' Among the factors to be considered in the limitation of rights is the need to ensure that the exercise of rights by a person does not prejudice the rights and freedoms of others, and the need for the State to adopt the least restrictive means that would achieve the legitimate purpose of the limitation.[54] Thus, Kenyan courts have consistently affirmed that any

[49] General Comment 37 (n. 45 above), para. 6. Also see UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/23/39, para. 43.
[50] C Glinz, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?' Verfassung Und Recht in Übersee/Law and Politics in Africa, Asia and Latin America, vol. 44, no. 1, 2011, pp. 60–80. Available at www.jstor.org/stable/43239778.
[51] For example, following the dispute over the results of the 2007-2008 presidential election, the then opposition leader called for mass demonstrations across the country. He was later to be blamed by both government officials and sections of the public for the mayhem that followed. The call for mass demonstrations was interpreted to mean a call for violent action.
[52] See, for example, the case of *Wilson Olal & 5 others v. Attorney General & 2 others* [2017] eKLR.
[53] Article 25 of the 2010 Constitution sets out the rights which cannot be limited and they include the freedom from torture and ill-treatment, the freedom from slavery and servitude, the right to fair trial and the right to an order of *habeas corpus*.
[54] Constitution of Kenya, Article 24(1) (d) and (e).

restrictions on the right of peaceful assembly must meet the tests of legality, necessity and proportionality.[55]

### 4.3.3 The Public Order Act, 1950: Overview of Section 5 of the Act

The Public Order Act is the primary legislation that governs the conduct of assemblies in Kenya. Although the Act does not specifically refer to the right of peaceful assembly, it governs, under section 5, the conduct of 'public meetings and processions' which are forms of assembly. Courts also refer to the Public Order Act when adjudicating cases touching on the right of peaceful assembly, irrespective of the form the assembly took. For the purpose of this chapter, the term 'right of peaceful assembly' will be used interchangeably with the terms 'public meetings and processions.'

Section 5(2) of the Act requires any person intending to convene a public meeting or procession to give the police notice of between three to fourteen days before the planned assembly.[56] The Act requires the notice to be in the prescribed form,[57] which must indicate the time when the assembly will be held. Under the Act, an assembly can only be held between six o'clock in the morning and six o'clock in the evening.[58] In addition, the submitted form must indicate the place or route that will be used by the assembly organizers and participants.[59] The purpose of the notice should be to enable the police to make the necessary arrangements to facilitate the assembly. However, as will be seen later, the enforcement of this requirement is not always guided by the objective of facilitating peaceful assemblies.

The Public Order Act requires assembly organisers to be present throughout an assembly and to assist the police in the maintenance of order during the assembly.[60] A refusal by an organiser to comply with any instruction from the police to be present and to assist in the

[55] See for example, *Wilson Olal v. Attorney General* (n. 52 above), p. 6.
[56] Note that the language of the Act presumes that all gatherings are convened or organised by a particular person or group, which is not always the case. To this extent, it does not cater for gatherings such as protest movements that have no particular leader who can take steps to comply with procedural requirements under the Public Order Act.
[57] Public Order Act, s. 5(3).
[58] n. 57, s. 5(3) (b).
[59] n. 57, s. 5(3) (c).
[60] n. 57, s. 5(7).

maintenance of order is an offence.[61] As the Committee has stated, while it is good practice for organisers to assist authorities by, for example, appointing marshals, doing so should not be a legal requirement.[62] Further, in the absence of an indication of a threshold of assistance required of organisers, this provision may be abused by the authorities. A qualification to the effect that organisers should only be required to take steps that are within their powers would guard against abuse of this provision.[63]

Section 5 further empowers the police to prevent the holding of an assembly or stop an ongoing one if it is held contrary to the provisions of the Public Order Act.[64] In addition, the police may prohibit or stop an assembly if '…there is clear, present or imminent danger of a breach of the peace or public order.'[65] In both cases, the police have the discretion to disperse the assembly or issue other orders as are reasonable.[66] Thus, an assembly held in the absence of a notice may be dispersed, and this includes spontaneous assemblies which should be exempt from notification requirements.[67] As will be discussed later, the term 'breach of the peace' can be broadly and subjectively interpreted by the police, thereby leading them to interfere with assemblies that are considered peaceful under international law.

The Act considers any assembly held in contravention of the procedural requirements to be unlawful.[68] Any person who participates in or organises such an assembly is deemed to be guilty of the offence of taking part in an unlawful assembly, contrary to section 79 of the Penal Code, and upon conviction may be imprisoned for a year.[69] Unlike international law, the focus of

[61] Public Order Act, s. 5(9).
[62] General Comment 37 (n. 45 above), para. 65.
[63] See, for example, *South African Transport and Allied Workers Union and Another v. Garvas and Others,* 2012 (8) BCLR 840 (CC), para. 45. The Court considered the role of organizers in assemblies and observed that organizers should take steps before and during an assembly to prevent foreseeable damage, but the steps in question must be within their power.
[64] Public Order Act, s. 5(8) (a).
[65] n. 64, s. 5(8) (b).
[66] n. 64, s. 5(8).
[67] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns' A/HRC/31/66, 4 February 2016, para. 23.
[68] Public Order Act, s. 5(10).
[69] Public Order Act, s. 5(11). Section 79 of the Penal Code provides for the ingredients of the offence of participating in an unlawful assembly.

the Public Order Act is not on whether the assembly was peaceful or not. Instead, attention is given to compliance with domestic notification requirements. In this regard, the HRCttee has affirmed that, regardless of their domestic laws, States have an obligation to respect and ensure all peaceful assemblies. For example, in *Ukteshbaev v. Kazakhstan,*[70] wherein the author was charged with the offence of participating in an unauthorised assembly, the Committee stated that even where an assembly is held in the absence of a notice or an authorisation, any interference with the right of peaceful assembly must be justified under Article 21.[71]

In a number of cases, courts in Kenya have affirmed the constitutionality of section 5 of the Public Order Act, noting that the limitations under the provision are necessary for the preservation of order and protection of the rights of others. For example, in *Hussein Khalid & 16 others v. Attorney General & 2 others*[72] the petitioners who had been charged with engaging in offensive conduct conducive to a breach of peace and taking part in a riot had challenged the constitutionality of the decision of the police to stop their assembly in exercise of their powers under section 5. The High Court determined that such a stoppage was not a violation of Article 37 of the 2010 Constitution and that the provisions of the Public Order Act and the Penal Code under which the assembly was stopped were in line with the Constitution.[73] In the judgment of subsequent appeals, this determination was affirmed by the Court of Appeal[74] and the Supreme Court of Kenya.[75]

In line with Article 37 of the 2010 Constitution, section 6 of the Act provides for the prohibition of the carriage of offensive weapons. Section 7 concerns the power of the police to prohibit sporting or entertainment events if serious public disorder is likely to arise from such events. Unlike other gatherings under the Act, sporting and entertainment events are not subject to notification requirements. Notably, in the context of entertainment and sporting events, there must be a threat of 'serious public disorder' for the police to stop the event. On the other hand,

[70] *Ukteshbaev v. Kazakhstan,* Communication No. 2420/2014, 17 July 2019, CCPR/C/126/D/2420/2014.
[71] n. 70, para. 9.5.
[72] *Hussein Khalid & 16 others v. Attorney General & 2 others* [2014] eKLR.
[73] n. 72, paras. 70-5.
[74] *Hussein Khalid & 16 others v. Attorney General & 2 others* [2017] eKLR, p.7.
[75] *Hussein Khalid & 16 others v. Attorney General & 2 others* [2019] eKLR, paras. 103-07.

in relation to gatherings under section 5, the terms 'breach of the peace and public disorder' are used. Arguably, section 5 presents a much lower threshold for interference than section 7. This could be because sporting and entertainment events are generally not controversial from a political perspective while the other types of assembly contemplated under section 5 may be controversial and may attract hostile reactions from other members of the public. The State may therefore have an interest in restricting such assemblies to a greater extent.

#### 4.3.4 The Penal Code, Chapter 63 Laws of Kenya

The Penal Code restricts the manner in which assemblies may be conducted and provides for various offences relating to unlawful assemblies, riots and other offences against public order. According to section 78(1), an assembly is said to be unlawful when '…three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace….' It is further stated that even if an assembly was initially lawful, it becomes unlawful if the participants conduct themselves in the manner described in section 78(1).[76] In addition, under section 78(3), if an assembly's purpose is executed 'by a breach of the peace and to the terror of the public the assembly is called a riot, and the persons assembled are said to be riotously assembled.'

Of relevance under section 78(1) are assemblies held with intent to carry out a common purpose since it is under this head that the right of peaceful assembly is implicated. This provision requires assembly participants not to engage in conduct that may cause others to reasonably fear that a breach of the peace may be committed. For example, in the *Hussein Khalid* case cited above, the participants poured blood on pavements near Parliament buildings, let loose pigs outside Parliament and also occupied the streets, thereby blocking access by other road users.[77] It is for those reasons that the assembly participants were dispersed and the organisers arrested and later charged with various offences, including taking part in a riot contrary to section 78(1) and (2) as read with section 80 of the Penal Code. It did not matter to the court that the organisers

[76] Penal Code (n. 17 above), s. 78(2).
[77] *Hussein Khalid v. Attorney General* (n. 72 above), para. 3.

had notified the police about the assembly and had in fact been escorted to the venue by the police. Whether or not the conduct of the participants in the *Hussein Khalid* case was peaceful under international law standards will be discussed later.

The classification of an assembly as a riot under section 78(3) has significant legal implications, particularly on the use of force by the police during the riot and on the State responsibility to facilitate peaceful assemblies. Section 81 of the Penal Code provides that an authorised officer (the police, a magistrate, a local administration officer or a military officer) '…in whose view twelve or more persons are riotously assembled, or who apprehends that a riot is about to be committed by twelve or more persons assembled within his view, may make or cause to be made a proclamation, in such form as he thinks fit, commanding the rioters or persons so assembled to disperse peaceably.' If participants do not disperse within a reasonable time after the proclamation is made, the police or other authorised officers may do 'all things necessary' to disperse the participants. If any participant resists the dispersal, all such force as is reasonably necessary to counter the resistance may be used.[78] Under section 83, if the use of such force results into death or injury, the officer who used the force cannot be liable in any criminal or civil proceedings. It is true that in spite of this provision, the use of force by the police is governed by the NPS Act which provides for certain steps which should be taken where force has resulted into death or serious injury. However, the fact that the Penal Code expressly excludes liability for the use of force against riotous assembly participants who defy orders to disperse could mean that the police have carte blanche to use force however they want.

Section 83 also states that persons who refuse to disperse after a proclamation has been made may be imprisoned for life. Section 84, on the other hand, provides for the offence of obstructing the making of a proclamation, an offence which can attract a maximum penalty of life imprisonment should one be found guilty. The provision further states that every person who knows that the making of a proclamation has been prevented but continues to participate in the riot or assembly may be imprisoned for life. Such steep penalties may have the effect of discouraging the public from participating in assemblies, given that State authorities have a lot

[78] Penal Code (n. 17 above), s. 82.

of latitude in deciding whether or not an assembly is a riot. As the HRCttee has stated, sanctions must be proportionate and must not suppress conduct that is protected under Article 21 of the ICCPR.[79]

The constitutionality of these provisions of the Penal Code has been questioned in a number of cases, including in the *Hussein Khalid* case and in *Wilson Olal and others v. AG.*[80] In the *Wilson Olal* case, the petitioners organized a demonstration to protest against corruption and unemployment, among other concerns. Though they duly notified the police, on the day of the protest they were denied access to the venue and were later violently dispersed, while some of the organisers were arrested and charged with the offence of rioting after a proclamation contrary to section 83 of the Penal Code. Given the seriousness of the charges, bail was set at about 5,000 US dollars. In their petition to the High Court seeking, among others, a stay of the criminal proceedings against them and a review of the bail terms, the petitioners argued that the offence of rioting after a proclamation under section 83 of the Penal Code was unconstitutional and that sections 83 and 78(1), (2) and (3) of the Penal Code were void since they were ambiguous.[81] The High Court did not find fault with the said provisions, stating that they were not ultra vires the Constitution on the basis that they satisfied the requirements of limitations under Article 24 of the 2010 Constitution.[82]

### 4.4 The Scope of the Right of Peaceful Assembly under Kenyan Law

This section focuses on the nature of gatherings that are protected by the right of peaceful assembly, and on how the peacefulness requirement has been interpreted.

#### 4.4.1 Definition of 'assembly'

Like the ICCPR and the African Charter, Article 37 of the 2010 Constitution does not define an assembly, although it separates it from demonstrations, pickets and petitions. However, as stated earlier, in practice, whenever Kenyan courts adjudicate over matters concerning demonstrations, pickets or any other form of an assembly, reference is usually made to the right of peaceful

[79] General Comment 37 (n. 45 above), para. 67.
[80] *Wilson Olal and 5 others v. Attorney General and 2 others* [2017] eKLR.
[81] *Wilson Olal v. AG* (n. 80 above), p. 4.
[82] n. 81, p. 10.

assembly as protected under Article 21 of the ICCPR and Article 11 of the African Charter. The text of the 2010 Constitution is therefore of little or no significance in understanding what forms of expression are covered by the right of peaceful assembly. In any event, the right covers more forms of collective expression than those listed in Article 37.

According to the HRCttee, the right of peaceful assembly '…protects the non-violent gathering of persons for a specific purpose, principally expressive ones.'[83] Further, peaceful assemblies are protected wherever they take place.[84] These elements are also reflected in the Public Order Act, which predominantly uses the terms 'gatherings', 'meetings' and 'processions', as opposed to assemblies. The Act defines a public gathering as '…a public meeting, a public procession, and any other meeting, gathering or concourse of ten or more persons in any public place.'[85] A public place is then defined as any place that can be accessed by the public, with or without payment.[86] In this regard, privately owned spaces that are publicly accessible are included in the definition. The Act also defines a public meeting as '…any meeting held or to be held in a public place, and any meeting which the public or any section of the public or more than fifty persons are…permitted to attend.'[87] By these definitions, an assembly, whatever form it takes, must involve at least ten people. In addition, they can be held in public or private spaces that can be accessed by the public. Section 5 of the Public Order Act does not, however, expressly indicate whether the gatherings must be held for a specific purpose. This element may nevertheless be presumed since the Act requires any person intending to hold a public meeting or procession to notify the police. This effectively excludes accidental gatherings.

#### 4.4.2 The peacefulness requirement as interpreted by Kenyan Courts

Only peaceable assemblies are protected under the 2010 Constitution. Of importance, therefore, is how the term 'peaceful' is interpreted under domestic law, since this has an impact on how law enforcement officials respond to assemblies. Going by the provisions in both the Penal Code and the Public Order Act, and how these have been interpreted by courts, there is a wide range

[83] General Comment 37 (n. 45 above), para. 4.
[84] n. 83, para. 6.
[85] Public Order Act, s.2.
[86] n. 85.
[87] n. 85.

of conduct that would be considered non-peaceful during assemblies in Kenya. Under the Public Order Act, an assembly may be prohibited or dispersed if there is an imminent threat of a 'breach of the peace' or public order. The Penal Code also provides that using threatening, insulting or abusive words at a public place or public gathering in a manner likely to cause a breach of the peace is an offence.[88] Neither statute, however, defines what amounts to a breach of the peace. Thus, it is left to law enforcement officials to determine what state of affairs would amount to a threat to the peace and justify an interference with the right of peaceful assembly. Using the broad definition in *Black's Law Dictionary*, a breach of the peace is 'a violation or disturbance of the public tranquillity and order.'[89] Left to the subjective assessment of police officers, disruptions that are usually associated with peaceful assemblies may be interpreted as breaches of the peace, thereby leading to the exclusion of disruptive assemblies from the scope of protection of the right of peaceful assembly.

Kenyan courts have also not provided guidance on how the term 'peaceful' is to be interpreted in the context of assemblies. In fact, the language used by the Courts has leaned towards a more restrictive interpretation of the term than that of the HRCttee. In the *Hussein Khalid case*, the demonstrators had notified the police about their demonstration and even received police escort. In the words of the Court, the demonstration was peaceful until matters took a 'rowdy and unruly turn' when the demonstrators engaged in disruptive conduct such as sitting on a street and blocking other road users from accessing it. The seventeen demonstrators who were charged petitioned the High Court seeking orders to have the criminal proceedings against them quashed since they had been arrested and charged principally for exercising their constitutionally protected right of peaceful assembly. They sought to have the High Court determine that their acts of sitting on the streets, pouring blood on pavements and unleashing pigs outside Parliament's gate were peaceful and protected by Article 37 of the 2010 Constitution. The Court declined to delve into the question of whether or not the petitioners'

[88] Section 94 of the Penal Code provides that 'any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.'
[89] HC Black, *Black's Law Dictionary*, 4th Edition (West Publishing Co. 1968).

conduct was peaceful, stating that the question was to be determined during the criminal trial. On the question of their arrest, the Court stated that the arrests were constitutional and the petitioners were rightfully before the lower court to face the criminal charges. It observed that '…the petitioners had at the beginning of the demonstration, been peaceful and…it is their alleged acts of blocking a section of Harambee Avenue and thereby causing fear of terror to motorists, confining a pig with several piglets at the gate of Parliament, among others, that led to the stoppage of the demonstrations.'[90] What the Court's statement communicates is that acts such as blocking streets are not considered peaceful and warrant the stopping of an assembly. Considering that section 54(1)(b) of the NPS Act requires the police to '…prevent unnecessary obstruction during assemblies, meetings and processions on public roads and streets…', the police may easily use this provision as a basis for declaring a merely disruptive assembly non-peaceful, as they did in *Hussein Khalid*. As the HRCttee has stated in General Comment 37, the fact that an assembly has caused or is likely to cause disruptions to ordinary life does not place it outside the scope of protection of Article 21.[91]

The High Court in the *Ngunjiri Wambugu case*, mentioned earlier, equally did not analyse the nature of conduct that would be considered non-peaceful in the context of assemblies. However, in agreeing with the petitioners about the violent nature of the demonstrations in question, the Court noted that during the demonstrations public and private property had been destroyed, roads were blocked, businesses were interrupted and some looted, and members of the public were harassed by the demonstrators.[92] The Court expressed concern that nobody had been arrested or charged for 'the said acts of violence'.[93] Many of the examples of reprehensible conduct the Court cited were indeed acts of violence. However, by lumping interruptions to businesses and pedestrian or vehicular traffic together with actual violent conduct, and referring to them collectively as acts of violence, the Court created the impression that under Kenyan law, disruptive assemblies ought not to be protected. It would have been useful for the Court to

[90] *Hussein Khalid v. Attorney General* (n. 72 above), para. 74.
[91] General Comment 37 (n. 45 above), para. 7.
[92] *Ngunjiri Wambugu v. Inspector General of Police* (n. 43 above), para. 12.
[93] n. 92, para. 13.

distinguish between disruptive conduct, which should be tolerated to an acceptable degree,[94] and violent conduct which is not protected.

A restrictive interpretation of peacefulness may also lead authorities, including courts, to impose prior restraints on the exercise of the right of peaceful assembly. In *Fredrick Ngari Muchira and 99 others v. Pyrethrum Board of Kenya*[95] the claimants had held a procession to the premises of the Pyrethrum Board of Kenya (PBK) and demanded payment of their pension dues. They were planning to hold another demonstration when PBK sought an injunction to stop them from accessing its premises and disrupting operations therein. In allowing PBK's application for an injunction, the Court observed that the sheer numbers of the claimants was sufficient to disrupt PBK's operations even if they were peaceful.[96] The Court also noted that the claimants had been described as a 'financially hopeless and a desperate lot' and stated that such people could not be expected to hold a peaceful demonstration at PBK's premises, considering their belief that PBK was insensitive to their claims.[97] The Court added that the claimants could not '…hide behind their constitutional right of assembly to disrupt the operations of the Respondent.'[98] The reasoning of the Court in this case reinforces the perception that disruptions during assemblies are unacceptable and are not protected. Even more disconcerting is the Court's perception that persons who are desperate and greatly aggrieved cannot conduct themselves peacefully during a demonstration. While every person is entitled to the right of peaceful assembly, it is an especially important tool for vulnerable persons who may have no effective alternative means of advancing their causes.

From the foregoing, it can be concluded that Kenyan courts and law enforcement agencies have generally adopted a very restrictive interpretation of the peacefulness requirement. In the absence of clear guidance on this requirement, whether or not an assembly

[94] According to the HRCttee, assemblies that cause a high level of disruption should only be stopped or dispersed if the disruption is serious and sustained. See Human Rights Committee, General Comment 37 (n. 44 above), para. 85.
[95] *Fredrick Ngari Muchira and 99 others v. Pyrethrum Board of Kenya* [2012] eKLR.
[96] n. 95, para. 8.
[97] n. 95, para. 9.
[98] n. 97.

is considered peaceful depends greatly on the subjective assessment of the authorities, thereby leaving room for arbitrariness.

### 4.4.3 Compatibility of the interpretations with international standards

As discussed in chapter 2, the international and regional human rights systems have adopted a much broader interpretation of the peacefulness requirement. A significant difference is how disruptions caused by assemblies are perceived. As discussed above, disruptive behaviour such as blocking of roads generally constitute non-peaceful conduct under Kenyan law. On the other hand, according to the HRCttee, violence in the context of an assembly involves the use of physical force that may cause death, injury or destruction of property.[99] Thus, disruptions do not constitute violent conduct and must be accommodated unless they impose a disproportionate burden on the rest of the public.[100] The regional human rights systems are also generally accommodative of disruptions. For example in *Kudrevicius and others v. Lithuania,*[101] where the demonstrators blocked a major highway for more than 48 hours, the Grand Chamber of the European Court observed that disruptions, including of traffic, are expected consequences of demonstrations and should be tolerated.[102] While the Grand Chamber found the blocking of a major highway for a long period objectionable, it held that such conduct did not amount to violence.[103]

Another distinction in the interpretation of the peacefulness requirement lies in the question of when violence is significant enough to render an entire assembly violent. In Kenya, it is evident that authorities generally attribute the violent conduct of a few participants to an entire assembly. For example, in the *Ngunjiri Wambugu* case, the High Court made general remarks to the effect that demonstrations in Kenya are often violent, and attributed the violence to the participants.[104] This was in spite of the fact that, according to the independent oversight instituion monitoring the protests, the violence in the demonstrations in question mainly

[99] General Comment 37 (n. 45 above), para. 15.
[100] n. 99, paras. 15 and 47. Also see, *Stambrovsky v. Belarus* (CCPR/C/112/D/1987/2010), para. 7.6.
[101] ECtHR [GC], *Kudrevicius & others v. Lithuania*, Application no. 37553/05, Judgment of 15 October 2015.
[102] n. 101, para. 155.
[103] n. 101, para. 174.
[104] *Ngunjiri Wambugu v. Inspector General of Police* (n. 43 above), para. 12.

originated from the police, with five people having been fatally shot and more than sixty wounded by gunfire.[105] Although the remarks were only *obiter dictum*, they are indicative of the tendency of authorities to justify interference with an assembly on the basis of the violent conduct of a few. Conversely, according to the HRCttee, the violent conduct of some assembly participants cannot render an entire assembly violent.[106] The Committee has further stated that it is only when the violence is widespread that an assembly would not be protected under Article 21 of the ICCPR.[107] In addition, it has clarified that only violence that originates from participants can render an assembly non-peaceful.[108]

In addition to the judicial pronouncements, the provisions of the Penal Code and the Public Order Act also grant law enforcement officials broad discretion to stop or disperse an entire assembly even if only a few participants are violent. Article 20(3)(b) of the 2010 Constitution requires Courts to 'adopt the interpretation that most favour the enforcement of a right' when applying a provision in the Bill of Rights. Thus, when considering the meaning of peacefulness in the context of an assembly, instead of relying on the provisions of the Public Order Act or Penal Code, the question that the Court should ask is whether a particular interpretation facilitates or hinders the enjoyment of the right of peaceful assembly. In this sense, conduct that may be considered criminal by penal laws may be protected to a certain degree. As seen from the cases cited above, courts greatly defer to statutes. Generally, therefore, the domestic interpretation of the peacefulness requirement is incompatible with its interpretation under international law.

**4.5 State Obligations as framed under the Constitutional and Statutory Framework**

States have an obligation under international law to respect and fully protect the right of peaceful assembly, online and offline.[109] As discussed before, the 2010 Constitution recognises

[105] See IPOA, 'Monitoring Report on Police Conduct during Public Protests and Gatherings' (2017), at p. 15. Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf.
[106] General Comment 37 (n. 45 above), para. 19.
[107] n. 106.
[108] n. 106, para. 18.
[109] See UN Human Rights Council, 'Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/38/11, adopted without a vote on 6 July 2018; also see UN Human Rights Council,

international law as part of Kenyan law and requires the State to enact legislation to fulfil its human rights obligations under international law.[110] It also imposes on the State and all its organs the duty to observe, respect, protect, promote and fulfil the rights in the Bill of Rights under the Constitution.[111] Next is a discussion of specific obligations in relation to assemblies.

#### 4.5.1 Obligations under the ICCPR

The ICCPR requires States parties to 'respect and ensure' all the rights guaranteed in the Covenant[112] and to take legislative or other measures necessary to give effect to the rights recognized therein,[113] and to provide effective remedies where violations have been committed.[114] With respect to the right of peaceful assembly, Kenya has an obligation to adopt legislation that give effect to Article 21 of the Covenant. In that regard, the 2010 Constitution of Kenya guarantees the right. In addition, the Public Order Act also protects peaceful assemblies and regulates their conduct.

Regarding the duty to respect, Kenya has an obligation to refrain from interfering with peaceful assemblies unnecessarily.[115] It is true that the right of peaceful assembly is not absolute and States may need to impose restrictions in order to balance the rights of assembly participants with those of the rest of the public. However, when imposing restrictions, authorities have to ensure that they pursue one or more of the legitimate aims set out in the second sentence of Article 21. Further, restrictions must not negate the essence of the right of peaceful assembly, but must comply with the principles of necessity and proportionality.[116] As discussed in chapter 2, this position has been affirmed by both the HRCttee and the regional human rights systems.[117]

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'Resolution 24/5, The rights to freedom of peaceful assembly and of association' A/HRC/RES/24/5, adopted without a vote on 8 October 2013, para. 2.

[110] Constitution of Kenya, Article 21(4).

[111] Constitution of Kenya, Article 21(1).

[112] ICCPR, Article 2(1).

[113] n. 112, Article 2(2).

[114] n. 112, Article 2(3).

[115] General Comment 37 (n. 45 above), para. 8.

[116] *Media Rights Agenda (on behalf of Malaolu) v. Nigeria,* ACHPR Communication No 224/98, 28th Ordinary Session (23 October-6 November 2000), para. 65.

[117] For example, see *Strizhak v. Belarus,* Communication No. 2260/2013, 1 November 2018, CCPR/C/124/D/2260/2013, para. 6.6 wherein the author was denied permission for a picket. The HRCttee emphasised the need for states to justify any restriction imposed on the exercise of the right of peaceful assembly.

Therefore, interferences from law enforcement officials, such as dispersal of assemblies that are peaceful on account of failure by the organizers to notify the authorities about the assembly, would amount to a violation of the obligation to respect. This is in spite of the fact that, under domestic law, there would be no such violation since the Public Order Act empowers the police to stop or prohibit assemblies that do not comply with its requirements.

Similarly, sanctions against participants in peaceful but unlawful assemblies should generally not be imposed unless the benefit of sanctioning the participants is greater than the harm caused by their participation in an unlawful assembly.[118] On this front, Kenyan law once again falls short of international standards, especially the requirements of necessity and proportionality. This is because the Public Order Act and the Penal Code both provide for the offence of participation in an unlawful assembly, which is punishable by up to a year's imprisonment.[119] Thus, police officers may arrest and charge participants in such assemblies even if the assembly was entirely peaceful and no harm or inconvenience was suffered by the public. The Penal Code's provisions on riots also prescribe disproportionate penalties, as described earlier in Section 4.3.4.

There is also an obligation to respect the freedom of expression in the context of peaceful assemblies. This calls for content neutrality in the regulation of assemblies.[120] It should not matter that the assembly participants express views that most find disagreeable. Provided that the views expressed are not prohibited under Article 20 of the Covenant and equivalent provisions in Kenyan law, authorities should not interfere with the conduct of an assembly either by imposing prior restraints or stopping the assembly. This was affirmed by the High Court in *Ferdinand Ndung'u Waititu and 4 others v. Attorney General and 12 others*[121] in which the petitioners sued an opposition political party for organising countrywide demonstrations calling for removal of officials of the national electoral body through unconstitutional means. The Court

[118] General Comment 37 (n. 45 above), para. 71. Also see *Popova v. Russian Federation*, Communication No. 2217/2012 Views adopted 6 April 2018, CCPR/C/122/D/2217/2012, para. 7.4.
[119] Penal Code (n. 17 above), s.79.
[120] Joint report on the proper management of assemblies (n. 67 above), paras. 15-16.
[121] *Ferdinand Ndung'u Waititu and 4 others v. Attorney General and 12 others* [2016] eKLR.

emphasized that unpopular opinions must be respected even if they appear contrary to the law.[122]

Aside from the duty to respect, States also have a duty to protect. This obligation requires states to take all reasonable measures to prevent violations against those exercising their right of peaceful assembly.[123] As the HRCttee has underlined, the likelihood of assembly participants facing violence from hostile members of the public should not be the sole basis for prohibiting an assembly.[124] It is the State's duty to ensure that the participants are adequately protected. However, this duty is not without limits. Kenyan courts have also recognised that expectations regarding the duty to protect must be reasonable. In *Charles Murigu Muriithi and 2 others v. Attorney General*[125] the petitioners sued the state for what they termed as the failure by the police to protect them and their property during the 2007/2008 post-election violence. The Court noted the poor ratio of police officers to the population in Kenya and stated that expecting the police to guard individual homes and property throughout was unreasonable.[126] It further noted that the attacks were 'spontaneous and sporadic' and stated that what the police needed to show is that having known about the existing specific threat against the petitioners, they made arrangements to offer protection.[127]

In circumstances where the police knew or ought to have known about a threat or a violation but failed to act, they may be held liable. In *Gullid Mohamed v. OCPD Isiolo Police Station & 2 others*,[128] the complainant accused the police of gross negligence in failing to provide him with security to enable him to recover his stolen livestock. The complainant's livestock, numbering over a thousand, had been stolen by raiders and he managed to trace the place where the livestock had been driven to. He immediately reported the theft to the police, seeking their help in recovery of the stolen livestock. The police however refused to assist him, claiming that

[122] *Ferdinand Ndung'u Waititu v. Attorney General* (n. 121 above), para. 45.
[123] General Comment 37 (n. 45 above), para. 27.
[124] n. 123. Also see *Alekseev v. Russian Federation*, Communication No. 1873/2009, 25 October 2013, CCPR/C/109/D/1873/2009, para. 9.6.
[125] *Charles Murigu Muriithi & 2 others v. Attorney General* [2019] eKLR.
[126] n. 125, p. 7-8.
[127] n. 126.
[128] *Gullid Mohamed Abadi v. OCPD Isiolo Police Station & 2 others* [2006] eKLR.

not enough police officers were available to be assigned to the case. Repeated requests for assistance were ignored, and ultimately the complainant did not recover his lost property. The High Court stated that by refusing to act on the complainant's requests for help, the police had breached the duty of care they owed to him.[129] Applying the reasoning in *Charles Murigu* to the context of peaceful assemblies, the State may, in exceptional cases, prohibit an assembly if, in spite of all possible measures, it is still unable to ensure the protection of the participants and the public.[130] If the police are aware of a specific threat of violence to the participants and take all reasonable measures to protect them during the assembly, they may not be held liable for violations that are committed against participants by private individuals in spite of the measures taken. And by the reasoning in the *Gullid* judgment, if the police knew or ought to have known about the potential for violation of the rights of assembly participants by third parties but failed to take action to prevent them, the obligation to protect is breached.

The obligation to protect further requires states to prevent arbitrary deprivation of life by both law enforcement officials and private actors. As discussed in chapter 3, the use of force by law enforcement officials has been of particular concern in the international human rights system. The HRCttee's General Comment 36 on the right to life requires States to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including by adopting legislation regulating the use of force and equipping law enforcement officials with appropriate less-lethal weapons.[131] In the event that a death occurs during an assembly, there is an obligation to investigate and prosecute if sufficient incriminating evidence is gathered.[132] According to the Minnesota Protocol on the Investigation of Potentially Unlawful Death (Minnesota Protocol), the obligation is triggered if the State knew or ought to have known of a potentially unlawful death. [133] The duty is also triggered if lethal force was used, for example during a protest, even if it did not result to death.[134] The Minnesota Protocol requires

[129] *Gullid Mohamed Abadi v. OCPD Isiolo Police Station* (n. 128 above), p. 9.
[130] General Comment 37 (n. 45 above), para. 52.
[131] UN Human Rights Committee, 'General Comment 36: Article 6 (The Right to life)' 2018, CCPR/C/GC/36, para. 13.
[132] W Schabas, UN Covenant on Civil and Political Rights: Nowak's CCPR Commentary (3rd Revised Edition, N.P. Engel, 2019), p. 128, para. 16.
[133] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death' (2016), paras. 15-6.
[134] W Schabas, Nowak's CCPR Commentary (n. 132 above) p. 129, para. 16.

investigations into violations of the right to life to be prompt, effective and thorough, independent and impartial, and transparent.[135]

In addition to protecting participants in assemblies, States also have an obligation to facilitate the exercise of the right. This involves taking positive measures to enable assembly participants to effectively exercise their right. Facilitative measures may include re-routing traffic, and providing spaces within which the right can be exercised, among other positive measures. The obligation to facilitate also covers preparatory activities, such as the dissemination of information about an assembly online and offline.[136] Under international law, the obligation to facilitate applies even in the context of assemblies held in contravention of domestic procedural requirements, provided that the assemblies are peaceful.

#### 4.5.2 Obligations under International Customary Law

The applicability of customary international law in Kenya is recognised in Article 2(5) of the 2010 Constitution. In the context of the right of peaceful assembly, an important customary law norm is the prohibition of torture, which is further recognised as a *jus cogens* norm.[137] Its prohibition is codified in the ICCPR, the African Charter, and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[138] (Convention against Torture or CAT), all of which have been ratified by Kenya. Domestically, Article 29 of the 2010 Constitution and the Prevention of Torture Act[139] duly prohibit torture in absolute terms. In addition, the NPS Act specifically prohibits torture by police officers.[140] From these provisions, the obligation to prevent, investigate and prosecute torture is derived.

The use of force and firearms invariably presents a threat, particularly, to the right to life and the freedom from torture or cruel, inhuman or degrading treatment or punishment. Consequently, as a preventive measure, States have an obligation to develop laws on the use of

[135] Minnesota Protocol (n. 133 above), para. 22.
[136] General Comment 37 (n. 45 above), para. 33.
[137] International Law Commission, 'Report of the International Law Commission on the work of its 71st Session, 29 April-7 June and 8 July-9 August 2019' A/74/10, p. 146, para. 56, draft conclusion 23.
[138] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), UNTS vol. 1465, p. 85.
[139] Prevention of Torture Act, 2017, Laws of Kenya.
[140] National Police Service Act, No. 11 of 2011, s. 95.

force that comply with international human rights standards.[141] Specifically, States should develop laws that prohibit torture and other ill treatment in all settings.[142] This includes in the context of the use of force by the police in extra-custodial settings.[143] In its concluding observations on Kenya's second periodic report, the UN Committee against Torture (CAT Committee) called on Kenya to regulate the use of firearms by law enforcement officials and ensure compliance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[144] (Basic Principles).[145] The CAT Committee specifically referred to the use of firearms during 'special operations,'[146] which would normally include anti-riot operations.

The question of how the prohibition of torture should be interpreted in the context of assemblies has been explored by various mechanisms within the UN human rights system. Noting that the offence of torture and ill-treatment was predominantly examined in the context of persons in custodial settings, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment presented a report to the UN General Assembly analyzing the extent to which the prohibition of torture and ill-treatment applies in the context of use of force by State agents in extra-custodial settings such as during the policing of assemblies.[147] The Special Rapporteur recalled that the obligation to protect against torture and ill treatment applies always, including in the context of violent riots or unlawful protests.[148] He further stated that 'any use of force by State agents exceeding what is necessary and proportionate in the circumstances to achieve a lawful purpose is regarded as an attack on human dignity amounting to cruel, inhuman or degrading treatment or punishment, irrespective of whether that excess

[141] General Comment 37 (n. 45 above), para. 78.
[142] Convention against Torture (n. 138 above), Articles 2 and 16.
[143] UN General Assembly, 'Extra custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer' A/72/178, 20 July 2017, paras. 19 and 36.
[144] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), UN General Assembly Resolution 45/166.
[145] UN Committee against Torture, 'Concluding Observations, Kenya' CAT/C/KEN/CO/2, 19 June 2013, para. 9(b).
[146] n. 145.
[147] Extra custodial use of force and the prohibition of torture, A/72/178 (n. 143 above), paras. 1 and 34.
[148] n. 147, para. 15.

occurred intentionally or inadvertently.'[149] Thus, acts such as opening live fire on protesters[150] and launching tear gas directly at them[151] have been said to amount to ill-treatment, and to torture if the injuries sustained are severe.

The European Court has also severally determined that police use of force in extra-custodial settings can violate the prohibition of torture. For example, in *Cestaro v. Italy*[152] police officers invaded a school in search of some demonstrators at an anti-globalisation demonstration who had allegedly caused riot damage and occupied the school. While conducting their search, the police punched, kicked, clubbed and threatened anyone they found in the building, including the applicant.[153] A section of the European Court noted that the violence the applicant and others had been subjected to was committed '…for punitive purposes, for retribution, geared to causing humiliation and physical and mental suffering on the part of the victims.'[154] Considering other circumstances of the case, such as the fact that the use of force was not necessitated by the applicant's conduct and the severe injuries sustained by the applicant, the Court concluded that the ill-treatment of the applicant amounted to torture.[155] Italy's arguments that the severity of the ill-treatment perpetrated by the police should be seen in the light of the 'highly exceptional public-order protection requirements' were dismissed on the ground that torture and ill-treatment is prohibited in absolute terms.[156]

In the *Cestaro* case, the applicant and other demonstrators were under the direct physical control of the police, having been in an enclosed space which the police had stormed. Worth considering is whether torture can occur where there is considerable physical distance between

[149] A/72/178 (n. 143 above) , para. 46. Also see UN Economic and Social Council, 'Report of the Special Rapporteur on the question of torture, Manfred Nowak' Commission on Human Rights, E/CN.4/2006/6, 23 December 2005, where it was stated that the excessive use of force by the police during peaceful and non-peaceful assemblies breach Article 7 of the ICCPR. See para. 38.
[150] UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' Addendum: Mission to the Gambia, A/HRC/28/68/Add.4, 16 March 2015, para. 27.
[151] ECtHR, *Abdullah Yaşa and Others v. Turkey*, Application No 44827/08, Judgment of 16 July 2013, paras. 48-50.
[152] ECtHR, *Cestaro v. Italy*, Application No 6884/11, Judgment of 7 April 2015, paras. 170-90.
[153] n. 152, paras. 31-35.
[154] n. 152, para. 177.
[155] n. 152, paras. 177-90.
[156] n. 152, paras. 185-88.

the perpetrator and the victim, for example in the context of the use of force to disperse protesters. Under Article 1 of the Convention against Torture, the elements of torture include the intentional infliction of severe pain or suffering on a person by a public official in order to, among other reasons, punish or intimidate them. Thus, in the context of extra-custodial use of force, the severity of harm and the purpose of its infliction are key elements in determining whether the use of force constitutes torture or other forms of ill-treatment. In his 2010 report to the UN Human Rights Council, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, speaks of the element of 'powerlessness of the victim' as a distinguishing factor between cases of torture and those of other forms of ill-treatment.[157] According to Nils Melzer, a later Special Rapporteur, a powerless victim is one who '…has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or escape the infliction of pain or suffering.'[158]

In a context where there is considerable distance between a perpetrator and the victim, the victim may not necessarily be powerless since they can escape. Consequently, the unlawful use of force in such a case could constitute inhuman or degrading treatment, but not torture. However, this distinction is not always made. In *Abdullah Yaşa and Others v. Turkey* wherein one of the applicants had suffered severe injuries to his head after police launched tear gas directly at demonstrators, a section of the European Court found that there had been a violation of Article 3 of the European Convention.[159] The Court noted that the manner in which the tear gas had been used was incompatible with the obligation to protect the demonstrators' physical integrity.[160] Notably, the Court did not specify whether the conduct in question amounted to torture or inhuman or degrading treatment. On the other hand, in the case of *Ali Güneş v. Turkey* where the applicant's face was sprayed with pepper gas, the European Court specified that the

[157] UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' A/HRC/13/39, 9 February 2010, para. 44.
[158] Extra custodial use of force and the prohibition of torture, A/72/178 (n. 143 above), para. 31.
[159] *Abdullah Yaşa v. Turkey* (n. 151 above), paras. 50-51.
[160] n. 159, para. 49.

applicant had been subjected to inhuman and degrading treatment contrary to Article 3 of the European Convention.[161]

A key difference in these two cases is the severity of harm suffered by the respective applicants. Another difference is that in the *Ali Güneş* case the applicant was under the power and control of the police. This was not necessarily the case in *Abdullah Yaşa* where the demonstrators had the capacity to flee and were therefore not powerless. Applying Melzer's and Nowak's reasoning, had the European Court distinguished whether the conduct of the police in *Abdullah Yaşa* amounted to torture or not, it would have probably found that the conduct constituted cruel, inhuman and degrading treatment but not torture. If, on the other hand, the demonstrators were surrounded with little or no room for escape, the elements of torture would have been met as follows: a police officer (public official), intentionally inflicted severe harm (the police knew or ought to have known that launching tear gas directly at a crowd can potentially cause severe harm) on a powerless person (surrounded, hence no room for escape) in order to punish them (for participating in an unlawful demonstration).

It should also be noted that some weapons, such as firearms or Tasers, can render a person powerless irrespective of the physical distance. Given that the unlawful use of a firearm can constitute a violation of the right to life, it might constitute a violation of the prohibition of torture in the event that life is not lost.

Still as part of its duty to prevent torture, there is an obligation to take precautionary measures to forestall the need to resort to the use of lethal and less-lethal force during assemblies.[162] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that failure to put in place precautionary measures is, in principle, a breach of the obligation to prevent.[163] Such measures would include equipping law enforcement officials with appropriate less-lethal weapons and providing adequate training on crowd control.[164]

[161] ECtHR, *Ali Güneş v. Turkey*, Application No 9829/07, Judgment of 10 April 2012, para. 43.
[162] Extra custodial use of force and the prohibition of torture, A/72/178 (n. 143 above), para. 46.
[163] n. 162.
[164] n. 162, para. 58.

In the event that allegations of torture and ill-treatment are made, there is an obligation to investigate,[165] and if it is found that acts of torture or ill-treatment were committed, the perpetrators should be prosecuted and punished.[166] In this context, specific legislation criminalizing torture is important. The CAT Committee has in the past expressed concern that law enforcement officials in Kenya who commit acts of torture were generally not charged with torture but were instead charged with offences such as assault or murder, which do not necessarily take into account the gravity of the offence of torture.[167] At the time the concluding observations were made in 2013, there was a Prevention of Torture Bill, which has since been enacted.

The Prevention of Torture Act, 2017 defines torture in similar terms as Article 1 of the Convention against Torture.[168] It also creates a distinction between torture and cruel, inhuman or degrading treatment or punishment, with the main distinguishing features being the severity of pain and the purpose of its infliction.[169] Kenyan courts generally rely on the Convention against Torture to define torture, with the elements of the offence under the Convention being reflected in most of the case law on torture. For example, in the case of *Irene Wambui Muchai and 5 others v. Attorney General* the High Court stated that the elements of torture are: '…the severity of pain and suffering; …an intent in reckless indifference to the possibility of causing pain and suffering; …and the act of torture must involve a public official.'[170] The Court also stated that acts that do not cause severe pain do not constitute torture.

A review of several precedents on torture shows that the majority of claims before Kenyan courts involve torture that occurred in custodial settings. However, a few of the precedents show that the question of torture can also be examined in extra-custodial settings, as was the case in *Irene Wambui,* cited above. The case involved demonstrators who were allegedly beaten, kicked, slapped and tear-gassed by police officers, and who claimed a violation

[165] UN Human Rights Committee, 'General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' 1992, para. 14.
[166] W Schabas, Nowak's CCPR Commentary (n. 132above) p. 208, para. 60.
[167] CAT/C/KEN/CO/2 (n. 145 above), para. 7.
[168] Prevention of Torture Act, No. 12 of 2017, s. 4. The NPS Act also has a similar definition. See s. 2 of the Act.
[169] Cf. ss. 4 and 7, Prevention of Torture Act, 2017.
[170] *Irene Wambui Muchai and 5 others v. Attorney General* [2017] eKLR, para. 49.

of their freedom from torture and ill-treatment. The claim, however, failed since the petitioners did not produce sufficient evidence to back their claims. The Court stated that even if medical evidence had been produced, the acts of slapping, kicking and beating the petitioners would not have satisfied the elements of torture.[171] Apparently, the main focus of the Court was on the element of severity of harm.

The Prevention of Torture Act has a non-exhaustive list of acts that constitute torture, including gunshots.[172] Consequently, the unlawful use of firearms in both custodial and extra-custodial settings may constitute torture under the Act.

### 4.5.3 Obligations in relation to assemblies generally

As stated earlier, the State has an obligation to respect, protect and facilitate peaceful assemblies. The performance of these obligations involve refraining from unwarranted interference with peaceful assemblies, the protection of participants and the creation of an enabling environment for the exercise of the right of peaceful assembly. Since Kenya has ratified the ICCPR and given that the 2010 Constitution also protects the right, the obligations under the ICCPR, discussed above, apply in the context of assemblies. These obligations have also been acknowledged by Kenyan courts. For example, in the *Ferdinand Waititu* case the High Court emphasized that there is a positive obligation on the State to facilitate and protect a peaceful exercise of the right of peaceful assembly.[173] This duty requires law enforcement officials to take positive measures such as clearing public streets and ensuring that such streets and other public areas can be used by assembly participants.[174]

In line with the Supreme Court's reasoning in the *Mitu Bell case*, the performance of these obligations is subject to the provisions of the Public Order Act. Thus, assemblies held in contravention of section 5 of the Act are considered unlawful and do not necessarily impose the duty to respect or facilitate. Nevertheless, section 5 of the Public Order Act should be read alongside Article 24 of the 2010 Constitution which sets out the conditions for limitation of rights,

[171] *Irene Wambui Muchai v AG* (n. 170 above), para. 50.
[172] Prevention of Torture Act, Schedule to s. 4.
[173] *Ferdinand Ndung'u Waititu v. Attorney General* (n. 121 above), para. 38.
[174] n. 173, para. 40.

including the requirement that a limitation be 'reasonable and justifiable in an open and democratic society.' Therefore, before stopping or dispersing a peaceful assembly, authorities ought to consider the necessity and proportionality of such a response. Considering that section 5(8) of the Public Order Act is not worded in mandatory terms,[175] police officers have the discretion to choose not to interfere at all with an unlawful but peaceful assembly, and to facilitate them. The challenge is that since the discretion is broad, it may be exercised arbitrarily.

An assembly that is no longer considered peaceful may also not be facilitated, even if the assembly was initially lawful. This was the position in the *Hussein Khalid* case discussed earlier where an initially lawful assembly was facilitated up to the point where the participants started acting in a manner considered 'rowdy and unruly'. How authorities interpret the peacefulness requirement is of particular significance in determining whether or not they have an obligation to protect and facilitate a particular assembly. In *Hussein Khalid*, for example, the disruptive conduct of the participants was interpreted as a breach of the peace, thereby warranting the dispersal of the assembly and arrest of the organizers and some participants.

Irrespective of the character of an assembly, the duty to respect and protect other rights persist.[176] In particular, substantive and procedural obligations in relation to the right to life and the freedom from torture and ill-treatment must still be observed.[177]

#### 4.5.4 Obligations in relation to counter-demonstrations

The State has an obligation to protect and facilitate counter-demonstrations.[178] However, this obligation is subject to limitations. According to the HRCttee, while counter-demonstrations should also be respected and ensured, they should not unduly interfere with or inhibit the effective exercise of the right of peaceful assembly by those they oppose.[179] Due diligence must be exercised to ensure that the rights of the first group are effectively protected. Kenyan law, on

[175] Section 5(8) reads 'The regulating officer or any police officer of or above the rank of inspector *may* stop or prevent the holding of….'
[176] General Comment 37 (n. 45 above), para. 9.
[177] n. 176, para. 21.
[178] n. 176, para. 26.
[179] n. 176, para. 30. Also see ECtHR, *Plattform "Arzte fur das Leben" v. Austria,* Application No. 10126/82, Judgment of 21 June 1988, para. 32.

the other hand, leaves little room for counter-demonstrations though it does not prohibit them. Under section 5(4) of the Public Order Act, the police may refuse to allow an assembly to take place at a particular place and time if another group had already issued a notice about an assembly to be held at that same place and time. The implication of this provision is that counter-demonstrations may only be facilitated if the venue and time chosen do not clash with the initial demonstration. In line with the 'sight and sound' principle, a counter-demonstration should be held within the vicinity of the assembly to which it is opposed. Holding it at another place or time may defeat its purpose.

#### 4.5.5 Obligations in relation to peaceful but unlawful assemblies

Unlike international law which distinguishes between peaceful and non-peaceful assemblies, Kenyan laws distinguish between lawful and unlawful assemblies. Regardless of this dichotomy, the principles of necessity and proportionality should still guide the imposition of any restrictions. As stated earlier, according to the HRCttee, even where an assembly is held in the absence of a notice or an authorisation, any interference with the right of peaceful assembly must be justified under Article 21.[180] The European Court has similarly held that States parties to the European Convention should '…show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly … is not to be deprived of all substance.'[181] Thus, the provisions of the Public Order Act and the Penal Code should not be applied so strictly as to unduly restrict the exercise of the right of peaceful assembly. In practice, however, unlawful assemblies are usually dispersed and some participants arrested, even in cases where such assemblies are peaceful and minimally disruptive.[182] Essentially, unlawful assemblies are not protected under Kenyan law.

Certainly, participants in unlawful assemblies retain other rights under the Covenant and the 2010 Constitution. Thus, obligations in relation to those rights, particularly the rights to life and to freedom from torture and ill-treatment must still be observed.

[180] *Ukteshbaev v. Kazakhstan* (n. 70 above), para. 9.5.
[181] ECtHR, *Frumkin v. Russia,* Application No. 74568/12, Judgment of 5 January 2016, para. 97.
[182] See Article 19 Submission to the UN Human Rights Committee's List of Issues, Kenya, 128th Session, March 2020, INT/CCPR/ICO/KEN/40935, paras. 54-8.

### 4.5.6 Evaluation of compliance with international standards

To a large extent, the scope of State obligations in relation to assemblies provided for under Kenyan law reflects international standards. For instance, under both Kenyan and international law, arbitrary deprivation of life is prohibited. Similarly, the freedom from torture and ill-treatment is an absolute right. However, certain aspects of Kenyan law do not comply with international standards on the protection of the right of peaceful assembly.

First, while international standards require the protection and facilitation of all peaceful assemblies regardless of their legal status under domestic law, Kenyan law only protects assemblies held in compliance with domestic laws. In particular, the Public Order Act imposes a notification requirement on all assemblies and declares non-compliance unlawful. The implication is that the obligation to respect and ensure the right of peaceful assembly does not arise if the assembly is unlawful, though obligations in relation to other rights remain. Indeed, the Public Order Act gives authorities discretion on how to respond to unlawful assemblies, and they may in fact allow them to proceed. However, the fact that participation in such assemblies is considered unlawful and punishable by up to a year's imprisonment creates a chilling effect on the exercise of the right. Further, the discretion may be abused and used in a discriminatory manner. The notification requirement also means that spontaneous assemblies are unlawful from the outset and there is no obligation to facilitate such assemblies. It is therefore not unusual for Kenyan police to disperse spontaneous assemblies, whether or not they are peaceful. This is contrary to the HRCttee's position that the enforcement of such requirements should not be an end in itself.[183] The Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions affirmed in their joint report in 2016 that notification requirements should not be enforced if the expected impact of an assembly is minimal and therefore the involvement of the police does not require a lot of preparation.[184] Further, in international law, the failure to notify does not absolve

[183] General Comment 37 (n. 45 above), para. 70.
[184] Joint report on the proper management of assemblies (n.67 above), para. 21.

authorities from their obligation to facilitate and protect assemblies.[185] No such protections are expressed in Kenyan law.

Secondly, Kenyan law greatly restricts counter-demonstrations and simultaneous assemblies. The provision in the Public Order Act that allows the police to prohibit an assembly if notice about another assembly to be held at the same place and time had already been received effectively excludes the obligation to facilitate counter-demonstrations.

### 4.6 Procedural requirements under the Public Order Act

Most domestic legal regimes on assemblies have notification or authorisation requirements. The HRCttee has acknowledged that such notification requirements may be permissible to the extent that their objective is to enable the police to facilitate the exercise of the right of peaceful assembly and to take measures to protect public order, public safety and the rights and freedoms of others.[186] Notification regimes, though generally permissible, may in practice function as authorisation regimes. As will be seen below, in addition to police interpreting the notification requirement to mean authorisation, the language used by courts in Kenya also seems to suggest that what is required is permission from the authorities and not a simple notice.

#### 4.6.1 Notification or authorisation? Analysis of Section 5(2) and its practical implications

Section 5(2) of the Public Order Act requires organizers of peaceful assemblies to give the police at least three days' notice. Upon receiving a notice about an upcoming assembly, the police may inform the organisers of the assembly that it is not possible to hold the assembly at the date, time and place suggested. In such a case, the assembly cannot be held as proposed but the police may ask the organisers to propose an alternative date and place.[187] This language is broad and has been severally interpreted by both police officers and courts as requiring permission.

In the case of *Boniface Mwangi v. Inspector General of Police and 5 others*,[188] the petitioner organised a demonstration and issued a notice to the Officer Commanding the Police Station (OCS) in the area where the demonstration was to be held. The OCS then referred the

[185] General Comment 37 (n. 45 above), para. 71.
[186] n. 185, para. 70.
[187] Section 5(4) and (6), Public Order Act.
[188] *Boniface Mwangi v. Inspector General of Police & 5 others* [2017] eKLR.

petitioner to the Officer Commanding the Police Division (OCPD), who was the OCS's superior and who declined to 'authorise' the planned protest without giving any reasons. Aggrieved with the OCPD's decision, the petitioner filed a constitutional petition in the High Court arguing that the OCPD was not the officer authorized by law to '…accept or decline the holding of a public gathering.'[189] The High Court clarified the difference between the role of a regulating officer and that of a non-regulating officer under the Public Order Act, holding that the OCPD '…had no authority to reject the Notice by the Petitioner … seeking authorisation to conduct a demonstration…' and that such authority lay with the OCS.[190] Of significance here is the choice of words by both the petitioner and the Court. The language the court used suggests that, in the Court's mind, an OCS can authorise or refuse the conduct of an assembly. The petitioner's complaint also lay in the fact that it was the OCS, and not the OCPD, who had the authority to accept or decline the holding of a demonstration. In a notification regime, no such authority exists in general. The police may only prohibit the holding of an assembly in exceptional cases where authorities will not be able to protect assembly participants from a severe threat to their safety,[191] in which case reasons should be communicated and alternatives provided.

Similar language was used by the Court in *Jacob Mbugua Njagi & 36 others v. Attorney General*[192] where the complainants who had been at a birthday party were arrested and charged with taking part in an unlawful assembly. The complainants were acquitted and thereafter sued for malicious prosecution. During examination in chief, police officers tried to justify the arrest by claiming that the complainants were taking part in an unlawful assembly because 'they did not have a permit' for the gathering and the security agencies did not know about the gathering.[193] The Court recognised that the birthday party was not a public meeting and therefore the interpretation of what an unlawful assembly is under the Public Order Act could not apply. What is significant about this case is that in clarifying whether or not a permit was necessary, the court stated that '…a permit is issued for public meetings under section 5 of the

[189] *Boniface Mwangi v. Inspector General of Police* (n. 188 above), para. 9.
[190] n. 189, para. 37.
[191] General Comment 37 (n. 45 above), para. 52.
[192] *Jacob Mbugua Njagi & 36 others v. Attorney General* [2019] eKLR.
[193] n. 192, para. 33.

Public Order Act….' These two cases show that while section 5 of the Public Order Act only provides for the requirement of notification, in practice what is in place is an authorisation regime, which has been, perhaps inadvertently, endorsed by the courts. This observation was also made by the HRCttee in its concluding observations on the fourth periodic report of Kenya, where it expressed concern that the requirement of notification under the Public Order Act is in practice used to deny permission to hold assemblies.[194]

Section 5(4) provides that a regulating officer may notify an organiser that it is not possible to hold an assembly at a particular place, date and time if notification in respect of the same proposed venue, date and time of the assembly had already been received. Essentially, what this means is that a regulating officer may refuse to allow an assembly to proceed as planned. Admittedly, this restriction may be necessary if the venue chosen is not big enough to safely accommodate the expected number of participants. But it is also important that there be an opportunity to subject the decision of the regulating officer to review. In General Comment 37, the HRCttee notes that parties aggrieved by decisions of authorities to impose restrictions should have access to courts and other tribunals, including the possibility of appeal or review.[195] The Public Order Act does not provide for appeals against any decision made by the regulating officer. In the absence of a clear appeal procedure, the only opportunity for review would be through a court, and this has cost implications. Noting that the right of peaceful assembly is a particularly useful tool for vulnerable groups, and may in fact be the only means they have to air their grievances, having courts as the only recourse may not count as an effective remedy, especially having regard to the question of economic accessibility.

#### 4.6.2 Compatibility of Section 5(2) with constitutional and international standards

In most cases, whenever questions concerning the right of peaceful assembly are considered, the Courts tend to read Article 37 of the 2010 Constitution in the light of the provisions of the Public Order Act. Time and again, both the High Court and the Court of Appeal have stressed that section 5(2) of the Public Order Act, among other provisions that regulate assemblies, is compatible with

[194] UN Human Rights Committee, 'Concluding Observations, Kenya' (CCPR/C/KEN/CO/4), April 2021, para. 44.
[195] General Comment 37 (n. 45 above), para. 69.

constitutional standards. While that may be the case at the domestic level, international standards require more of States.

The UN human rights system generally considers the requirement of notification as a restriction on the exercise of the right of peaceful assembly.[196] As stated before, it also recognises that notification requirements may be justified in some cases, especially since they enable states to more effectively discharge their obligation to facilitate.[197] The Committee has further emphasized that notification systems should not, in practice, function as an authorisation system.[198] Further, the enforcement of such requirements should not be the primary objective of State authorities. For example, if an assembly is unlikely to cause great disruptions authorities should not disperse or arrest participants as doing so would be a breach of Article 21 of the Covenant. The European Court also took this position in *Balcik and Others v. Turkey* where the authorities had disrupted a demonstration which had been held in the absence of prior notification and had arrested some participants. A section of the Court noted that the demonstrators were only 46 in number and they did not present a threat to public order or the rights of others.[199] As such the disruption of the demonstration and the arrest of some participants within 30 minutes of its commencement was said to be an unnecessary and disproportionate response.[200] These standards are not reflected in the laws and practice of Kenyan authorities.

According to the UN Special Rapporteur on the freedom of assembly and of association and the Special Rapporteur on extrajudicial, summary and arbitrary executions, where it is necessary to impose restrictions on simultaneous assemblies, the restrictions should be determined through mutual agreement or, where this is not possible, through a process that does not discriminate between the proposed assemblies.[201] This does not seem to be the case in

[196] General Comment 37 (n. 45 above), para. 70.
[197] For example in *Kivenmaa v. Finland*, the Committee accepted that '…a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant.'
[198] General Comment 37 (n. 45 above), para. 73.
[199] ECtHR, *Balcik and others v. Turkey*, Application No. 25/02. Judgment of 29 November 2007, para. 53.
[200] n. 199.
[201] Joint report on the proper management of assemblies (n. 67 above), para. 28.

Kenya since the regulating officer is only required to notify the organisers that it is not possible to hold their assembly at the proposed venue, date and time. The Special Rapporteurs also emphasised that notification requirements should not be enforced if the expected impact of an assembly is minimal and therefore the involvement of the police does not require a lot of preparation.[202] Where a notification regime exists, it should exclude assemblies with minimal impact from such requirements.[203] Kenyan law, on the other hand, does not exclude the requirement of notification for any assembly, irrespective of the potential impact.

In the context of spontaneous assemblies, the requirement of notification would be impractical and should not be enforced.[204] The Public Order Act does not exempt spontaneous assemblies from the requirement of notification, thereby making all spontaneous assemblies unlawful under Kenyan law. In general, therefore, the interpretation and application of the notification requirement under the Public Order Act is largely incompatible with international standards.

### 4.7 Restrictions on Peaceful Assembly under Kenyan Law

Like international law, Kenyan law also imposes restrictions on the exercise of the right of peaceful assembly. The restrictions are contained in the 2010 Constitution and the Public Order Act, as discussed below.

#### 4.7.1 Restrictions under the Constitution of Kenya

Article 37 of the 2010 Constitution has an internal limitation on assemblies in the sense that it requires participants to be peaceful and unarmed. Aside from the limitation contained in the definition of the right, it does not specifically set out the grounds for restricting the right of peaceful assembly, as is the case in the ICCPR. However, Article 24 sets out the standards that any limitation on any right in the Constitution must meet. Under the provision, a limitation must be prescribed by law, and must be reasonable and justifiable in a democratic society. This provision is to be read alongside Article 21 of the ICCPR, which specifies permissible grounds for

[202] Joint report on the proper management of assemblies (n. 67 above), para. 21.
[203] General Comment 37 (n. 45 above), para. 72.
[204] n. 203. Also see *Popova v. Russian Federation*, Communication No. 2217/2012, 6 April 2018, CCPR/C/122/D/2217/2012, para. 7.5.

the restriction of assemblies.[205] Thus, restrictions could be imposed in the interest of national security, public safety, public order, public health and the protection of the rights and freedom of others.[206] At domestic level, the question of whether a restriction is reasonable and justifiable is governed by, among others, the factors set out in Article 24 of the 2010 Constitution. These include the importance of the purpose of the limitation and whether there are less restrictive means to achieve the purpose. Essentially, the Constitution requires limitations on rights to be necessary and proportionate. It has been held that a restriction that goes beyond what is necessary or proportionate is unconstitutional.[207]

In the *Wilson Olal* case, demonstrators were violently dispersed and some arrested as soon as they arrived at the venue of the demonstration, on the ground that the demonstration had been cancelled due to national security concerns. The High Court held that any limitation on the right of peaceful assembly must be prescribed by law, necessary and proportionate, and imposed in pursuit of a legitimate aim.[208] The Court also affirmed that the police must observe these requirements at all times.[209] It found that the cancellation of the demonstration and dispersal of the participants did not meet the test of necessity and observed that less restrictive measures could have been taken which would not have eroded the essence of the right of peaceful assembly. In this regard, it stated that '…the level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.'[210]

### 4.7.2 Restrictions under the Public Order Act

The Public Order Act provides for restrictions on public gatherings. The following is a discussion of some of the restrictions that are commonly imposed by authorities on the basis of the provisions in the Act.

[205] *Ngunjiri Wambugu v. Inspector General of Police* (n. 43 above), para. 21.
[206] n. 205.
[207] *Wilson Olal v. Attorney General* (n. 80 above), p. 11.
[208] n. 207, p. 6.
[209] n. 208.
[210] n. 207, p. 11.

#### 4.7.2.1 Restrictions on time, place and manner

Section 5(3) (b) requires assemblies to be held between six o'clock in the morning and six o'clock in the evening. Any assembly held outside that time-frame is considered unlawful. The time frame given in the Act is arguably reasonable. This is because a balance has to be struck between the right of assembly participants and those of other members of the public. At the same time, since law enforcement officials are required to facilitate assemblies, holding them at night or before dawn may present significant security challenges to the participants, the police and the public. However, restricting assemblies to a particular time frame may also reduce the impact of an assembly, and may exclude spontaneous assemblies held outside the prescribed time frame in response to particular events. In General Comment 37, the HRCttee states that assembly participants must have sufficient opportunity to express their views.[211] Therefore, restricting assemblies by time may deny participants an adequate opportunity to manifest their views.

Restrictions may also be imposed on place. For example, in the *Boniface Mwangi* case, the petitioner sought to hold a demonstration which would end at the gate of the President's official residence. Citing the European Court's decision in *Sáska v. Hungary,*[212] the petitioner argued that the right to peacefully assemble could only be effective if he was allowed to choose the venue of the demonstration. The respondents argued that the venue chosen was restricted by law. Although the High Court recognised the importance of assembly participants' ability to choose a venue, it noted that in some cases, the choice of venue could be limited by virtue of an existing law prohibiting access to the chosen venue. The Court found the limitation reasonable, particularly in the circumstances of the case, arguing that the petitioners could present their grievances at the President's offices and not residence. The Court nevertheless emphasized that '…the fundamental principle that the right to assemble and demonstrate logically necessitates that a venue must be chosen by the organisers and not the Regulating Officer.'[213]

In terms of manner, the narrow construction of the term 'peaceful' may mean conduct considered disruptive is excluded from protection. Thus, acts like staging a sit-in in a street,

[211] General Comment 37 (n. 45 above), para. 54.
[212] ECtHR, *Sáska v. Hungary,* Application no. 58050/08, Judgment of 27 November 2012.
[213] *Boniface Mwangi v. Inspector General of Police* (n. 188 above), para. 62.

blocking a highway or generally behaving in a disruptive manner, thereby causing a 'breach of the peace', have led law enforcement authorities to disrupt and disperse peaceful assemblies.[214]

#### 4.7.2.2 Content-based restrictions

According to the HRCttee, assembly participants should be free to determine the content of their message and the imposition of restrictions should be content-neutral.[215] Restrictions on content may also be based on the prohibitions under Article 20 of the ICCPR. These prohibitions are reflected in Article 33(2) of the 2010 Constitution which sets out restrictions on the freedom of expression. The Public Order Act does not expressly provide for restrictions on the basis of content. However, in practice, authorities have in the past banned assemblies on the ground that their cause could be pursued using alternative means. In the case of *Ferdinand Waititu* case, where demonstrators demanded for the resignation of commissioners of the national electoral body, the petitioners argued that the 2010 Constitution had prescribed the procedure for removal of the said commissioners and therefore the demonstrators' attempts to force the officials out of office through demonstrations was unconstitutional. The High Court considered whether the organisers of and participants in the demonstrations were prevented from expressing their opinions through demonstrations, given that there was a set procedure for removal of the commissioners from office. The Court stated that the respondents were '…within their rights to picket for the removal of the commissioners…as Article 37 does not limit the picket content.'[216] It further stated that the Constitution protects controversial opinions, no matter how they are expressed and regardless of the disagreements they invite. It clarified that '…the Constitution thus far declines to stifle even the most unpopular view unless it is intended to incite persons to violence, propagates hate speech, is propaganda for war or advocates hatred through ethnic incitement.'[217]

[214] See, for example, *Hussein Khalid v. Attorney General* (n. 72 above).
[215] General Comment 37 (n. 45 above), paras. 22 and 48.
[216] *Ferdinand Ndung'u Waititu v. Attorney General* (n. 121 above), para. 45.
[217] n. 216.

#### 4.7.2.3 Sanctions against organisers and participants

Section 5(7) of the Public Order Act states that the organiser of a public meeting or procession 'shall be present throughout the meeting or procession and shall assist the police in the maintenance of peace and order at the meeting or procession.' The provision is worded in mandatory terms, thereby imposing on organizers a legal responsibility to assist the police in the maintenance of order during an assembly. Failure to assist the police if ordered to do so is an offence punishable by up to one year's imprisonment.[218] Indeed, the role of organisers in an assembly is important and may play a crucial role in enabling law enforcement officials to effectively facilitate assemblies. In South Africa, for example, the Regulation of Gatherings Act provides for consultations and negotiations between conveners, law enforcement officials and local authorities.[219] Such discussions are important as they provide an opportunity for the conveners and the authorities to discuss various aspects of an intended gathering with a view to ensuring that a gathering is effectively facilitated and a proper balance is struck between the rights of the assembly participants and those of the public. The HRCttee has also recognised the need for organizers to collaborate with authorities. However, it has also affirmed that organisers and participants should not be *required* to engage with the authorities.[220]

Organisers also face sanctions, mostly in the form of arrests and fines for participating in unlawful assemblies. The question of responsibility of organisers for damages caused during assemblies has been further considered in recent times and was addressed in the *Ngunjiri Wambugu case* cited earlier. The petitioners in the case sought an order requiring the Inspector General of Police and the Attorney General to develop regulations outlining, among others, the responsibility of organisers and participants for damages to property and loss of lives in the context of assemblies. The Court noted that the Public Order Act did not provide for compensation for damages resulting from demonstrations and that such provisions were necessary. It issued an order directing the Inspector General of Police and the Attorney General '…to formulate a Code of Conduct for conveners of demonstrations that includes detailed

[218] Public Order Act (n. 18 above), s. 5(9).
[219] Regulation of Gatherings Act, 1993 (Act 205 of 1993), s. 4.
[220] General Comment 37 (n. 45 above), para. 75.

explanations of how they intend to ensure non-demonstrators are not adversely affected by such demonstrations and that provide a clear line of responsibility of who is liable in case of loss to life or property, or for injury, when a member of the public is aggrieved due to such demonstration.'[221] The Code of Conduct, if formulated in the terms ordered by the Court, may impose onerous obligations on organisers and may ultimately have a chilling effect on the exercise of the right of peaceful assembly. Proposals of the same nature were made in the Public Order (Amendment) Bill of 2019 which sought to penalise organisers for damages that occur during assemblies. The Bill was, however, rejected during its second reading.

#### 4.7.3 Compatibility of the restrictions with international standards

The restrictions imposed under Kenyan law, particularly the Public Order Act, raise concern as to their compatibility with international standards. For example, the restrictions on time, while reasonable, may not be compatible with international standards if they are too strictly applied since this may deny assembly participants sufficient opportunity to express their views. This is in addition to excluding spontaneous assemblies that take place outside the specified timeframe. A better way to balance the rights of the assembly participants and those of the public is to avoid prescribing the timeframe and instead require assembly organizers to indicate when they intend to hold their assembly, as is the case in South Africa's Regulation of Gatherings Act.[222] In the case of assemblies that have organisers and where authorities are involved prior to the conduct of the assembly, the organisers and the authorities may engage in negotiations on when the assembly is to be held and for how long. However, any conditions imposed must not defeat the essence of the assembly and should also meet the tests of necessity and proportionality.

Sanctions against organisers for offences such as taking part in unlawful assemblies are also generally incompatible with international standards. Authorities ought to be satisfied that imposing such sanctions is necessary in a democratic society and proportionate to the legitimate aims they seek to achieve. Further, organisers should not be held responsible for damages caused by assembly participants (unless they have incited violence or destruction), but rather should only be held criminally responsible for their own unlawful conduct. In exceptional cases where

[221] *Ngunjiri Wambugu v. Inspector General of Police* (n. 43 above), para. 50 (d).
[222] See Regulation of Gatherings Act (Act 205 of 1993), s. 3.

organisers are held liable for the unlawful conduct of participants, it must be shown that the organisers could reasonably have foreseen and prevented the damages caused.[223] Kenyan law does not provide for liability of organisers for damage that results from assemblies. However, the High Court in *Ngunjiri Wambugu* ordered that regulations providing for liability of organisers be developed.

The requirement that organisers must assist the police to maintain peace and order during an assembly is also not compatible with international standards because the primary responsibility to maintain peace and order lies with the State. Organisers may assist, by for example appointing marshals or stewards where necessary, but this should not be a legal requirement.[224]

### 4.8 The Powers of the Police During Assemblies as Framed under Kenyan Law

The obligations of the police during assemblies are anchored on the State obligation to respect and ensure human rights and fundamental freedoms. In the context of assemblies, the police have an obligation to respect and protect, among others, the right of peaceful assembly, the right to life, the right to freedom from torture and ill-treatment, and the right to liberty and security of person. To effectively protect the rights of assembly participants and the general public, police have certain powers, the exercise of which is guided by various binding and non-binding international human rights instruments, especially the ICCPR, the Convention against Torture, the 1979 Code of Conduct for Law Enforcement Officials[225] (Code of Conduct), the Basic Principles, and the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement[226] (Guidance on LLWs). The African Commission has also adopted the Guidelines on the Policing of Assemblies in Africa which elaborates the responsibilities of law enforcement officials and the expected standards of policing assemblies. Although the Guidelines are not binding, they offer

[223] General Comment 37 (n. 45 above), para. 65.
[224] n. 223.
[225] Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly, 17 December 1979, A/RES/34/169.
[226] OHCHR, 'UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement' (2020).

guidance on what is expected of the police in the light of their obligations under the African Charter.

In Kenya, the Public Order Act, the Penal Code, and the NPS Act grants the police powers to take certain measures when regulating assemblies. The NPS Act is supplemented by the National Police Service Standing Orders (NPSSO or Standing Orders). These are discussed next.

#### 4.8.1 The power to stop or prohibit an assembly

Section 8 of the Public Order Act empowers the police to stop or prevent the holding of an assembly for various reasons, including the failure by organisers to issue a notice in accordance with section 5(2) of the Act, and the presence of a clear and imminent danger of a breach of the peace or public order. Further, as mentioned earlier, the police may prohibit the holding of an assembly if the venue, date and time of the assembly clashes with that of another for which notice had already been issued.

The power to stop or prohibit an assembly is an exceptional measure that should only be used as a last resort.[227] The 2010 Constitution requires authorities to consider the purpose of a restriction and to use the least intrusive means to achieve the intended legitimate purpose.[228] In practice, these powers are often abused, with the reason for stopping or preventing the holding of an assembly rarely meeting the threshold for prohibition under international law. The explanation for this could be the broad grounds upon which the decision to stop or prohibit an assembly can be based. Take, for example, the presence of a clear and imminent danger of a breach of the peace or public order. It was discussed earlier that without a clear definition of what amounts to a breach of the peace, disruptive conduct that is protected under international law may be interpreted as non-peaceful and may therefore warrant the stoppage of an assembly. Under international law, even where there is a likelihood that an assembly will attract a violent reaction from the public, it may not be prohibited only on this ground.[229] Instead, the State has

[227] General Comment 37 (n. 45 above), para. 37.
[228] Constitution of Kenya, Article 24(1)(e).
[229] General Comment 37 (n. 45 above), para. 27.

an obligation to take adequate measures to facilitate the assembly and protect its participants. The Public Order Act, on the other hand, is not as restrictive of the power to prohibit.

Stopping an assembly over a failure to notify is also incompatible with international standards.[230] Taking such measures in order to maintain law and order has also been held to be incompatible with constitutional and international standards. In the earlier cited case of *Ferdinand Waititu* the High Court noted that 'it is not the stopping or breaking up of the protest marches and demonstrations which should help in maintaining law and order but rather the involvement of the police from the get go that may assist in the maintenance of law and order.'[231] In this sense, the Court recognised that while the law allows the police to stop an assembly in certain circumstances, precaution should be taken to ensure that an assembly is facilitated to the greatest extent.

#### 4.8.2 The power to disperse an assembly

Under the Public Order Act an assembly may be dispersed for two reasons. First, a dispersal may be based on the failure by organisers to notify the relevant authorities. It would not matter that the assembly in question is peaceful. Under international law, a failure to issue a notice should not be the basis of a dispersal.[232] To this extent the Public Order Act falls short of international standards. Secondly, where notice was issued but the participants engage in conduct likely to cause a breach of the peace, the police may disperse the entire assembly.[233] The Act does not provide for an individualised assessment of the conduct of assembly participants. It may be the case that only a section of participants are violent. Yet the broad discretionary powers of the police to disperse means that the unlawful actions of a few may be attributed to an entire assembly. In addition, the determination of the nature of conduct that constitutes a breach of the peace or a threat to public order is dependent on the perceptions of the police. Again, it is not possible to tell how the police perceive disruptive conduct. In fact, it appears any level of disruption may prompt the police to classify an assembly as a riot, and therefore disperse it.

[230] General Comment 37 (n. 45 above), para. 37.
[231] *Ferdinand Ndung'u Waititu v. Attorney General* (n. 121 above), para. 54.
[232] Joint report on the proper management of assemblies (n. 67 above), para. 62.
[233] Public Order Act (n. 18 above), s. 5(8).

Under the Penal Code, an assembly becomes riotous if its purpose is executed by a 'breach of the peace and to the terror of the public'.[234] A crowd of hundreds of people shouting slogans and waving placards may reasonably terrify some members of the public. But that alone does not make the assembly non-peaceful or turn it into a riot.

In the discussion on the interpretation of the peacefulness requirement, it was shown that there is yet no clear guidance from the domestic courts on conduct that is protected. In the *Hussein Khalid case*, the High Court, the Court of Appeal and the Supreme Court all declined to address the question of whether the conduct of the demonstrators of blocking a street, pouring blood on pavements and unleashing pigs at the gates of Parliament were peaceful or not. Instead, the three superior courts determined that that was a question to be considered by the criminal court where the demonstrators were being tried for various offences, including taking part in a riot. Had the Courts addressed the issue of what conduct is considered peaceful or not, they would have provided much needed guidance to the police. In the absence of clear guidance, the situation that prevails is that the police have wide discretion to interfere with assemblies and take criminal action against participants. Irrespective of the outcome of such criminal cases, they have a chilling effect on the exercise of the right of peaceful assembly. In general, therefore, the standards for dispersal under Kenyan law are far lower than international standards.

#### 4.8.3 The influence of the Public Order Act on interactions between the police and assembly participants

In July 2020, hundreds of activists took to the streets in Nairobi to protest against police brutality in the enforcement of COVID-19 containment measures.[235] Using tear gas, the police quickly broke up the protests and arrested some of the activists. Their reason for dispersing the protesters was that notification about the protest had not been issued, and that gatherings were restricted in the light of the COVID-19 pandemic. This response was not unique. The provisions of the Public Order Act, particularly the procedural requirements and the broad discretionary powers granted to the police have had a significant influence on how they respond to assemblies.

[234] Penal Code (n. 17 above), s. 78(1).
[235] See A Mersie, 'Kenyan police fire teargas, arrest marchers protesting at brutality' Reuters, 7 July 2020. Available at https://www.reuters.com/article/us-kenya-protests-idUSKBN2481DR.

The Act has a strong focus on the preservation of public order, which in many cases is narrowly interpreted by the police. Consequently, the potential for interferences with assembly participants in circumstances not permitted by international human rights standards is great. In a report on protests in Kenya, an international non-governmental organisation monitored 152 protests held between January 2018 and July 2019 and established that in 20% of the protests, there had been unwarranted interferences, including the excessive use of force.[236] It is true that in some cases assembly participants may engage in violent conduct, thereby necessitating interventions by the police. However, assemblies that start off as peaceful may turn violent due to the manner in which the participants are handled by the police. For example, in a tense environment, police use of force may escalate violence.

The Public Order Act's criminalisation of participation in an assembly for which notification was not issued means any participant in such an assembly is perceived to be an offender and can be arrested. Further, the police are unlikely to facilitate and protect an assembly they consider unlawful. It is therefore not surprising that police officers often disperse such assemblies and arrest participants. As discussed earlier, the manner in which the notification requirement has been implemented suggests that the police, and in some cases courts, routinely assume that what is required is permission and not mere notice.

It was said before that the Public Order Act gives the police wide discretion to stop or prevent the holding of assemblies if the procedural requirements are not complied with or if there is an imminent threat of a breach of the peace or public order. The effect of this broad discretion is that an assembly may be stopped on the basis of the subjective whims of a police officer. Where this happens, participants who consider their conduct to be peaceful may resist orders to disperse. Such resistance gives rise to an even more serious offence under the Penal Code, in addition to providing the police with a reason to use force against those who defy orders to disperse. This may in turn escalate violence in an otherwise peaceful assembly. The discretion could be narrowed if the stoppage of an assembly is limited to cases where there is an imminent threat of a 'serious' breach of the peace or public order. This would then exclude the possibility

[236] Article 19, 'Right to Protest in Kenya' September 2019, p. 4. Available at https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf.

of interfering with an assembly for the simple reason that a notice was not issued, especially if the assembly causes only limited or no disruption.

### 4.9 The use of force in the policing of assemblies in Kenya

In the exercise of their powers to regulate assemblies, law enforcement officials may be forced, and even required, to use force or firearms. However, they are obliged to use non-violent means first before resorting to the use of force. But this does not always happen. In practice, police officers often violate both international and domestic laws on the use of force. Further, in some cases, domestic laws regulating the use of force may be too permissive. In its concluding observations on Kenya's fourth periodic report, the HRCttee expressed concern about the excessive use of force by the police during assemblies and recommended that Kenyan laws governing the use of force be aligned with international standards, particularly the Basic Principles and the Guidance on LLWs.[237] Next is a discussion on Kenya's general obligations under international law in relation to the use of force by the police, followed by an overview of the legal framework on the use of force.

#### 4.9.1 Obligations under international law

Kenya has obligations under the ICCPR, CAT and the African Charter to regulate the use of force by law enforcement officials. These obligations are primarily drawn from the duty to respect and ensure the right to life and the right to freedom from torture and ill-treatment. According to the HRCttee, the right to life entitles individuals to be free from 'acts and omissions that are intended or may be expected to cause their unnatural or premature death.'[238] The use of both lethal and less-lethal force can pose a threat to the right to life, hence the need to carefully control the circumstances under which force may be used. In the context of an assembly, the threat to life as a result of the use of force is arguably higher since assemblies can be tense environments and the sheer numbers of people involved means more people are exposed to the risk of losing their lives or incurring serious injuries.

[237] CCPR/C/KEN/CO/4 (n. 195 above), paras. 44-5.
[238] General Comment 36 (n. 131 above), para. 3.

The HRCttee's General Comment 36 recalls that the obligation to respect the right to life includes the duty not to engage in conduct that may lead to the arbitrary deprivation of life.[239] As discussed in chapter 3, a deprivation of life is considered to be arbitrary if it has elements of inappropriateness, injustice, lack of predictability and due process of law, and lacks elements of reasonableness, necessity and proportionality. For example, firing tear gas into an enclosed space may lead to a violation of the right to life. It does not matter that there was no intention to cause death. Provided that it is reasonably expected that using a particular type of force against a person may cause their premature death, a violation of the right to life may be found.[240]

One of the important measures States are to take is to ensure that domestic legislation adequately regulates the use of force by the police.[241] It has been established that a deprivation may be arbitrary even if it is lawful under domestic law.[242] Therefore, deficiencies in domestic law cannot be used to justify a deprivation of life that is considered arbitrary under international law.

The obligation to prevent arbitrary deprivation of the right to life includes the obligation to protect individuals from such deprivations by private actors.[243] In the context of assemblies, there is an obligation to protect the participants from attacks by counter-demonstrators or other third parties. Noting that assembly participants can also pose a threat to the lives of others, the obligation to protect covers both participants and non-participants.

With respect to some vulnerable groups, additional measures may need to be taken. In relation to the protection of the life of persons with disabilities, General Comment 36 provides that States have an obligation to take specific measures to ensure that persons with disabilities enjoy the right to life on an equal basis with others.[244] Such measures would include complying

[239] General Comment 36 (n. 131 above),, para. 7.
[240] n. 239, para.3.
[241] n. 239, para. 20.
[242] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/26/36, para. 56.
[243] General Comment 36 (n. 131 above), para. 7. Also see UN Human Rights Committee, 'General Comment 31 (the nature of the general legal obligation imposed on States parties to the Covenant)' 2004, CCPR/C/21/Rev.1/Add. 13, para. 8.
[244] General Comment 36 (n. 131 above), para.24.

with the principle of reasonable accommodation even in the context of the use of force. For example, if the use of a particular weapon may have a disproportionate impact on a person with disability as compared to other people, care should be taken to minimize the disproportionate impacts.[245]

General Comment 37 also provides that law enforcement officials involved in policing assemblies must respect and ensure the right of peaceful assembly, while at the same time protecting neutral parties in the assembly such as journalists and observers, and public and private property.[246] On the use of force, the General Comment provides that before using force, law enforcement officials have an obligation to exhaust non-violent means and to give prior warning if it becomes absolutely necessary to use force.[247] Further, any use of force must be clearly defined in domestic law which must be in compliance with international law.[248] In addition, it provides that the use of force must comply with the principles of legality, necessity, proportionality, precaution and non-discrimination.[249]

**4.9.2 The Kenyan regulatory framework on the use of force.**

In addition to the international legal framework, the use of force by law enforcement officials in Kenya is regulated by various laws, with the 2010 Constitution providing a general framework by virtue of its protection of fundamental rights and freedoms, including the right to life and the freedom from torture and ill-treatment. The Constitution also requires national security organs, including the NPS, to pursue national security '…in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.'[250] Further, one of the objects of the NPS is to comply with constitutional standards of human rights and fundamental freedoms in the performance of their duties.[251] Consequently, the protection of human rights should inform any response to both peaceful and non-peaceful assemblies by law enforcement officials. The primary legislation that governs the use of force by the police is the

[245] Guidance on Less-lethal Weapons (n. 226 above), para. 2.7.
[246] General Comment 37 (n. 45 above), para. 74.
[247] n. 246, para. 78.
[248] General Comment 37 (n. 45 above), para. 78.
[249] n. 248.
[250] Constitution of Kenya, Article 238(2) (b).
[251] n. 250, Article 244(c).

NPS Act, augmented by the Standing Orders. The Public Order Act and the Penal Code also permit the use of force in certain circumstances. These instruments are discussed next. It should be noted, though, that there are other key laws that regulate the use of force by law enforcement officials in various contexts. For example, the Prisons Act, the Wildlife Conservation Act and the Kenya Forests Conservation Act, all have provisions on the use of lethal force. However, since these Acts are not relevant in the context of peaceful assemblies, they are not discussed.

#### 4.9.2.1 The National Police Service Act No. 11A of 2011

The NPS Act was enacted in 2011, after the promulgation of the 2010 Constitution as part of the reforms initiated in the security sector on the recommendation of the National Taskforce on Police Reforms.[252] Previously, the Police Act[253] and the Administration Police Act,[254] both of which have been repealed, laid down the functions and powers of the police.

Section 61 of the NPS Act requires police officers to use non-violent means in the performance of their functions, and only resort to the use of force and firearms in accordance with the rules set out in the sixth schedule of the Act. Paragraph 1 of the Sixth Schedule provides that force shall only be resorted to when non-violent means are ineffective. The second paragraph requires the use of force to be '…proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary….'[255] If the use of force results in injuries, the police have an obligation to immediately provide medical assistance, unless there are good reasons for failing to do so.[256] Wilful failure to provide assistance to the injured is an offence under the Act.[257] Further police officers are required to inform the relatives of the injured persons.[258] As an accountability measure, any police officer who uses any form of force has an obligation to report to their superior explaining why the use of force was necessary, after which further action may be taken

[252] Report of the National Task Force on Police Reforms (2009), p. 267. Available at https://www.scribd.com/doc/245815329/Ransley-Report.
[253] Police Act (1961), Cap 84, Laws of Kenya (Repealed).
[254] Administration Police Act (1958), Cap 85 Laws of Kenya (Repealed).
[255] National Police Service Act, Sixth Schedule, Part A, para. 2.
[256] n. 255, para. 3(a).
[257] n. 256.
[258] n. 255, para. 3(b).

depending on the superior's assessment of the rightfulness of the use of force.[259] It is worth noting that the reports are to be made in respect of 'any' use of force and not just force that results in serious injury.

Where the use of force results in death or serious injury, the superior of the officer who used force must immediately report the incident to the Independent Policing Oversight Authority (IPOA) for purposes of independent investigation.[260] Such an officer is required to secure the scene of the incident and promptly notify the kin of the injured or deceased person about the incident.[261] Failure to report cases of deaths or serious injuries to IPOA is a disciplinary offence.[262] The conditions on the use of force also require police officers to have their identification tags affixed to a visible part of their uniform at all times.[263] It is also emphasized that following the orders of a superior is not an excuse for unlawful use of force.[264] The above provisions mirror those in the Basic Principles.

#### 4.9.2.2 The National Police Service Standing Orders, 2017

Though not a statute, the Standing Orders guide the work of the police, and the NPS Act requires the police to abide by the provisions of the law and the Standing Orders.[265] The NPSSO have specific guidance on various aspects of policing, including on the use of force and firearms, and on public order management. To a great extent, they reflect the standards in the NPS Act, only that certain other provisions may have implications on how the police exercise the discretion to use force.

Chapter 47 of the Standing Orders provides that force may be used for the following purposes: to protect an officer or other parties from a threat of death or serious bodily harm; to protect life and property; to prevent the escape of a person charged with a felony from lawful custody; or to disperse a riotous mob presenting a risk to life or property.[266] Apart from

[259] National Police Service Act, Sixth Schedule, Part A, 255, para. 4.
[260] n. 259, para. 5.
[261] n. 259, para. 7.
[262] n. 259, para. 8.
[263] n. 259, para. 9.
[264] n. 259, para. 10.
[265] n. 264.
[266] National Police Service Standing Orders, 2017, chapter 47, para. 1(1).

cautioning that 'firearms shall not be discharged when it is likely to injure an innocent person,'[267] Paragraph 1 of chapter 47 does not specify the nature of force that is to be used to achieve the said purposes. It is therefore presumed that both lethal and less-lethal force may be used. Consequently, the potential to use lethal force in circumstances where no imminent threat to life or of serious injury exists. If, for example, persons taking part in a riot pose an imminent threat of death or serious injury to any person, lethal force may be used if it is the only means through which the objective of preserving life can be achieved. However, given the narrow interpretation of the peacefulness of an assembly and the likelihood of generally peaceful assemblies being considered to be riotous, the use of lethal force to disperse such riots may be justified under the NPSSO. Further, the qualification that firearms may not be used if it may injure an innocent person begs the question of who the police perceive as an innocent person. For example, in the context of an assembly, the police may not consider participants in an unlawful assembly as innocent persons.

Notably, the NPSSO later, in paragraph 13 of chapter 47, sets out two circumstances when firearms may be used. These are: protecting the life of an officer or other person; and in self-defense or in defense of others against imminent threat of death or serious injury. While this provision reflects international standards, it is diluted by paragraph 1 which only seems to caution against the use of firearms if innocent persons may be injured as a result.

In relation to public order management, paragraph 1 of chapter 58 of the Standing Order requires the police to ensure the protection of the right of peaceful assembly. Where there is serious disorder or riots, the police are to refer to their operational manuals on how to respond to such situations.[268] These manuals are however not publicly accessible. Nevertheless, the NPPSO also emphasizes that non-violent means should always be employed before resort to the use of force, and further that the use of force and firearms must comply with the provisions of the NPS Act.[269] In relation to steps to be taken after the use of force, the NPSSO's requirements are similar to those in the NPS Act, highlighted above.

[267] National Police Service Standing Orders (n. 266 above), chapter 47, para. 1(2).
[268] n. 267, chapter 58, para. 2.
[269] n. 267, chapter 58, para. 3.

#### 4.9.2.3 The Public Order Act, 1950 & the Penal Code

Section 14 of the Public Order Act provides that whenever force for any purpose under the Act, '…the degree of force which may be so used shall not be greater than is reasonably necessary for that purpose….' Thus, irrespective of the character of an assembly, any use of force must comply with the principles of necessity and proportionality.

Provisions under the Penal Code on the management of riots also have implications on the use of force. Where an assembly is classified as a riot and a proclamation to disperse has been issued, the police may use force to disperse any person who does not comply with their orders. Section 82 of the Penal Code provides that a police officer may do all things necessary do disperse such persons, and if force is used resulting into death or serious injury, an officer may not be held liable in civil and criminal proceedings. As stated earlier, the effect of this provision is to give the police broad powers to use force against persons they perceive as disobedient, and to exclude liability for any deaths or injuries that occur as a result of the use of force in such circumstances. Further, by stating that the police may use 'all such force as is reasonably necessary', the Penal Code does not specifically exclude the use of lethal force to disperse a riot. It is true that it adds the qualifier that the force used must be reasonable and necessary. However, this does not provide an adequate shield against the use of lethal force to disperse an assembly. This is because what is considered reasonable depends on the circumstances of a case, and therefore leaves the police with a wide discretion to determine what level of force to use.[270] According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, terms such as 'all such force as is reasonably necessary' should be subject to the requirements of necessity and proportionality.[271] A more protective standard would be an express requirement that lethal force should only be used when strictly necessary in order to protect a person's life or bodily integrity.[272]

[270] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para. 89.
[271] n. 270.
[272] General Comment 36 (n. 131 above), para. 12.

### 4.10 Principles on the Use of Force by Law Enforcement Officials in Kenya

Under international law, the use of force by law enforcement officials is guided by the principles of legality, precaution, necessity, proportionality, non-discrimination and accountability. As stated above, these principles are also reflected in Kenyan law. Having discussed the substance of these principles in chapter 3, what follows is a discussion on how they apply in the Kenyan context.

#### 4.10.1 Legality

In Chapter 3 it was elaborated that this principle requires the use of force by law enforcement to be backed by domestic law. Thus, any use of force by a police officer must comply with the law, particularly the guidelines set out in the Sixth Schedule of the NPS Act. Given the multiplicity of laws that have provisions on the use of force, the question of the quality of the laws is important. Although the Penal Code and the Public Order Act have arguably broader provisions, the NPS Act is the primary statute that governs the conduct of the police. Kenyan courts have also stressed the primacy of the NPS Act in matters touching on the use of force by the police. In *I.P. Veronica Gitahi & another v. Republic,*[273] the appellants who were both police officers had fatally shot a 14-year-old child and had been convicted of manslaughter. In their appeal, they argued that the High Court had failed to consider section 17 of the Penal Code which stipulates that '…criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.' Under Common Law, if a person believed that they were in imminent danger and acted in self-defence, the unreasonableness of their belief was irrelevant to the question of their guilt or innocence.[274] In this regard, the appellants argued that they believed they were in danger and that the common law principles relating to use of force in self-defence should apply. The Court of Appeal expressed itself as follows:

> 'In light of the…express provisions of the National Police Service Act regarding use of force and firearms by the police in self defence, there is no room for invoking section 17 of the Penal Code and applying the principles of the Common Law on self defence. The provisions of the Act are a complete and exhaustive code and demand that a police officer

[273] *I.P. Veronica Gitahi & another v. Republic* [2017] eKLR.
[274] n. 273, p. 8, citing *Solomon Beckford v. The Queen* [1987] 3 All ER 425.

must resort to non-violent means as the first option and to use force only when non-violent means are ineffective.'[275]

This case importantly affirmed that irrespective of the provisions of any other law, the NPS Act stipulates a 'complete and exhaustive' guide on the use of force by the police. Thus, in the context of assemblies, the more permissive provisions of the Public Order Act and the Penal Code may not be relied on to justify the use of force or force or firearms.

#### 4.10.2 Precaution

As shown in chapter 3, this principle is well established in the international human rights system, as reflected in the jurisprudence of the HRCttee and regional courts, as well as in various reports of the Human Rights Council's special procedures.[276] In relation to assemblies, it requires law enforcement officials to put in place plans to address potential law enforcement challenges in order to reduce the need to resort to the use of force. If lives are lost in a context where such loss could have been prevented if precautionary measures had been taken, the failure to take precaution would amount to a violation of the right to life.[277] Although the principle is not expressly provided for under Kenyan law, it can be implied in the fact that the NPSSO requires the police to '…do everything possible to ensure that all demonstrations are conducted peacefully.'[278] It further provides that the police shall debrief after every public order event to identify deficiencies in planning.[279] This presupposes that there should be adequate planning before policing a public order event, and such plans should include how to minimise the need to use force.

There is limited jurisprudence on how this principle has been interpreted by Kenyan courts. However, in *Florence Omukanda & another v. Attorney General & 2 others*[280] where an

[275] *I.P. Veronica Gitahi & another v. Republic* (n. 273 above), p. 10.
[276] See for example, UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/17/28), para. 22; ECtHR, *McCann and others v. UK* [GC], App no. 18984/91, 27 September 1995.
[277] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para. 64.
[278] National Police Service Standing Orders, 2017, chapter 58, para. 1(7).
[279] n. 278, para. 4.
[280] *Florence Amunga Omukanda & another v. Attorney General & 2 others* [2016] eKLR.

issue arose as to whether adequate measures had been taken to protect the first petitioner against violence during the 2007/2008 post-election violence, the High Court noted that there was a limit to the measures the State could take to protect the public. In the case, the State admitted that it had intelligence that there would be violence if the election results did not favour a particular group, but added that measures to counter the violence, such as deployment of General Service Unit and Administration Police officers and regular patrols in hotspot areas, had been taken.[281] The Court observed that the police had done their best to contain the violence and further stated that '…what is required is to demonstrate that the police organized…to offer the required protection.'[282] It should be noted, however, that the protection referred to in this case was against violence from private parties and not the police. Nevertheless, this reasoning could still be applied in the context of the use of force by the police during assemblies, since this may be necessitated by the conduct of either the assembly participants or other private individuals. Thus, if violence is anticipated, the police should organise themselves in a way to ensure that the right to life and bodily integrity is, to the greatest extent, preserved.

#### 4.10.3 Necessity

Under this principle, law enforcement officials are only allowed to use the minimum necessary force for a legitimate law enforcement purpose, and only for as long as is necessary.[283] The principle is reflected in the National Police Service Act and the Standing Orders and has been elaborated in various cases. For example, in the *Florence Omukanda* case referred to above, the second petitioner was shot by the police. He had seen some police officers assault a woman and then went to inquire why the woman was being assaulted.[284] The High Court held that the second petitioner had not done anything that necessitated the shooting.[285] Finding that the shooting was unlawful, negligent and excessive, the Court stated that '…the police do not have an unqualified licence to resort to shooting…' and that they can only resort to such use of force when it is

[281] *Florence Omukanda v. Attorney General* (n. 280 above), para. 57.
[282] n. 281, para. 58.
[283] Code of Conduct for Law Enforcement Officials (n. 225 above), Article 3.
[284] *Florence Omukanda v. Attorney General* (n. 280 above), para. 88.
[285] n. 284, para. 89.

necessary.[286] Similarly, in the case of *Charles Kimiti v. Joel Mwenda*,[287] police officers who had been pursuing robbers who had carjacked a vehicle fired live ammunition at it multiple times when it was already stationary, thereby killing a victim of the carjacking who was inside the vehicle. The police had argued that one of the occupants drew a pistol, which later turned out to be a toy gun. However, no evidence was produced to support this claim. The High Court observed that the police could see the occupants of the vehicle and were in a position to arrest them without resorting to lethal force.[288] It also stated that the police may not use greater force than is necessary in a particular situation. Further, it observed that in the circumstances of the case, the police '…had no reasonable apprehension of danger to themselves and that the shooting to death of the deceased was unreasonable use of force, unnecessary and unlawful….'[289]

It was established in chapter 3 that when assessing whether in a particular situation the use of force was necessary, courts may grant law enforcement officials a margin of appreciation.[290] Therefore, in some circumstances, liability for the use of force may not arise even if it is subsequently shown that the use of force was not necessary. For example in *Leonard Munyao v. Attorney General*,[291] the petitioner was accidentally shot by police officers while at a bus station. The police were pursuing armed robbers who shot at them while fleeing towards the bus station. Two police officers and two suspected robbers were killed in the exchange of fire. The petitioner had argued that by shooting in a crowded area, the police had used excessive and unreasonable force. The High Court disagreed, stating that nothing prohibits police officers from using firearms in crowded areas, provided that they exercise extra caution.[292] It also affirmed that '…an accidental shooting does not attract liability.'[293]

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[286] *Florence Omukanda v. Attorney General* (n. 280 above), para. 91.
[287] *Charles Munyeki Kimiti v. Joel Mwenda & 3 others* [2010] eKLR.
[288] n. 287, p. 7.
[289] n. 288.
[290] See, for example, ECtHR, *Finogenov & others v. Russia*, Application No 27311/03, Judgment of 20 December 2011. A section of the Court stated that the positive obligation of the state to protect life '…must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.' See para. 213.
[291] *Leonard Mutua Munyao & another v. Attorney General & another* [2014] eKLR.
[292] n. 291, para. 24.
[293] n. 291, para. 25.

Under the principle of necessity, force must only be used to achieve a legitimate law enforcement objective.[294] In the context of an assembly, the legitimate aims are those set out in the second sentence of Article 21, namely: national security, public safety, public order, public health, public morals and the protection of the rights and freedoms of others. As the HRCttee has stated before, it is not enough for states to simply cite one of these grounds as the basis for interfering with an assembly.[295] It has to be demonstrated that the interference was necessary in a democratic society. This was also affirmed by the High Court in the *Wilson Olal* case mentioned earlier. The High Court noted that the State had not presented any evidence that the demonstrators were armed or violent. As such, the violence meted against the demonstrators by the police could not be justified.[296] Lastly, force may only be used for as long as necessary. Once the law enforcement objective is achieved, any use of force beyond that point is considered unlawful.[297]

#### 4.10.4 Proportionality

The NPS Act and the NPSSO both provide that whenever the use of force is deemed necessary, the force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used. These standards are also reflected in the Code of Conduct, [298] the Basic Principles[299] and the Guidance on LLWs.[300] The principle has been reiterated in a number of cases. For example, in *Jeremiah Pallangyo v. Attorney General*,[301] the petitioner was shot and wounded when police officers violently dispersed persons who were protesting against a forced eviction. Police officers were supervising the demolition of houses when angry residents who sought to stop the demolitions dared the police to shoot them.[302] Indeed, the police fired at least 130 live rounds to disperse the

[294] Code of Conduct for Law Enforcement Officials (n. 225 above), Article 3.
[295] *Abildayeva v. Kazakhstan,* Communication No. 2309/2013, 4 April 2019, CCPR/C/125/D/2309/2013.
[296] *Wilson Olal v. Attorney General* (n. 80 above), pp. 9-10.
[297] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para.60.
[298] Code of Conduct for Law Enforcement Officials (n. 225 above), Article 3.
[299] Basic Principles on the Use of Force and Firearms (n. 143 above), Principle 5.
[300] Guidance on Less-lethal Weapons in Law Enforcement (n. 226 above), para. 2.10.
[301] *Jeremiah ole Dashii Pallangyo v. Attorney General & 4 others* [2021] eKLR
[302] n. 301, para. 6.

protesters.[303] Upon regaining strength after seeking medical attention, the petitioner reported the incident to the police, but was instead arrested and charged with various offences, including taking part in an unlawful assembly.[304] The petitioner subsequently lodged a constitutional petition against the State, arguing that the use of live ammunition against the protesters violated their constitutional rights, including the right to freedom and security of the person, and the right of peaceful assembly. The High Court found in the petitioner's favour, stating that the force used in the context of the case was unlawful and unjustified.[305] It further observed that even if the protesters were violent, the police should have used less-lethal weapons, such as rubber bullets or batons.[306]

#### 4.10.5 Non-discrimination

In a report on the protection of the right to life in law enforcement, the Special Rapporteur on extrajudicial, summary or arbitrary executions observed that the police sometimes exercise higher levels of violence against some groups based on ethnic or racial discrimination.[307] The use of force in the context of assemblies may also be based on discriminatory grounds, such as the content of the message of the assembly participants or their perceived political affiliation.

General Comment 37 emphasises that States have an obligation to respect and ensure the right of peaceful assembly without discrimination.[308] The NPS Act and the Standing Order do not specifically provide for the principle of non-discrimination in the use of force by law enforcement officials. However, the obligation not to discriminate is reflected in Article 27 of the 2010 Constitution which provides that the State shall not discriminate directly or indirectly against any person on any ground.[309] The Constitution also lists non-discrimination as one of the national values and principles of governance.[310] Further, Article 239(3) provides that in the performance of their functions, the members of the national security organs, which includes the

[303] *Jeremiah Pallangyo v. Attorney General* (n. 301 above), para. 37.
[304] n. 303, para. 11.
[305] n. 303, para. 78.
[306] n. 305.
[307] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para. 74.
[308] General Comment 37 (n. 45 above), para. 8.
[309] Constitution of Kenya, Article 27(4).
[310] n. 309, Article 10(2)(b).

NPS, must not act in a partisan manner, further any interest of a political party, or prejudice a legitimate political interest or cause. This is relevant in the context of assemblies given that some assemblies pursue anti-government ideas and unless the police are fiercely independent, they may be used to suppress political dissent.

#### 4.10.6 Accountability

The importance of accountability, including in relation to violations committed during protests has been underscored in the UN human rights system.[311] Under this principle, States should have mechanisms for holding law enforcement officials accountable for their acts or omissions, in addition to ensuring that victims of unlawful use of force obtain a remedy.

Kenya has both internal and external police accountability mechanisms. As stated earlier, the NPS Act requires a police officer to report any use of force incident to their superior who shall then determine the lawfulness of such use of force. It further obliges any police officer who uses force that results to death or serious injury to report the incident to their superior, who is then required to notify IPOA which should subsequently initiate independent investigations. In spite of the existence of these mechanisms, violations committed in the context of assemblies are rarely investigated. In its concluding observations on Kenya's second periodic report, the Committee against Torture expressed concern about the persistent failure to investigate and prosecute police officers accused of committing acts of torture or ill-treatment.[312] The HRCttee has also in the past expressed similar concerns.[313]

The duty to investigate the use of force has equally been emphasized in various cases. For example, in the *Jeremiah Pallangyo* case discussed above, the High Court stressed that the State has an obligation to investigate human rights violations and noted that in the case, the police had not demonstrate the steps that had been taken to address the petitioner's complaint.[314]

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[311] See, for example, UN General Assembly, 'Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association' A/RES/73/173, adopted on 17 December 2018, para. 7 and UN Human Rights Council, 'Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests' A/HRC/RES/38/11, adopted on 6 July 2018, preamble. Also see General Comment 37 (n. 45 above), para. 89.
[312] CAT/C/KEN/CO/2 (n. 145 above), para. 11.
[313] CCPR/CO/83/KEN (n. 29 above), paras. 16 and 18; CCPR/C/KEN/CO/3 (n. 29 above), para. 11.
[314] *Jeremiah Pallangyo v. Attorney General* (n. 301 above), para. 77.

Similarly, in *Citizens against Violence v. Attorney General*,[315] the High Court held that the State has an obligation to 'expeditiously and effectively' investigate incidents involving the use of excessive or lethal force.[316] Although the High Court specifically referred to cases of use of lethal force, the duty to conduct prompt, impartial and effective investigations applies even in contexts where less-lethal force is used.[317]

### 4.11 The use of firearms under Kenyan law

Owing to their potential to cause death or serious injury, the use of firearms in law enforcement is strictly controlled under international law. [318] In the context of assemblies, the HRCttee has stated that firearms may only be used to target specific individuals posing an imminent threat to life or of serious injury, and only if less-lethal alternatives have been exhausted or would be inadequate.[319] It has also been repeatedly emphasised that firearms may never be used simply to disperse an assembly.[320] As will be shown next, these standards are not fully reflected in Kenyan law.

#### 4.11.1 Conditions on the use of firearms

The NPS Act and the Standing Orders set out the specific conditions under which firearms may be used. As enacted in 2011, the conditions under which firearms could be used under the NPS Act were restricted to situations where there is a threat of death or serious injury. However, through an amendment in 2014, the conditions were broadened to include situations where there is no imminent threat to life. Section 14 of the Public Order Act also provides for when firearms may be used. These conditions are discussed next.

[315] *Citizens against Violence (CAVI) & 14 others v. Attorney General & 3 others* [2020] eKLR.
[316] n. 315, para. 100.
[317] Guidance on Less-lethal Weapons in Law Enforcement (n. 226 above), para. 3.5.
[318] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para. 69.
[319] General Comment 37 (n. 45 above), para. 88.
[320] n. 319.

#### 4.11.1.1 Self-defence or defence of others against imminent threat of death or serious injury

Kenyan law, like international law, permits law enforcement officials to use force in self-defence or defence of others against imminent threat of death or serious injury.[321] It has been stated that imminence means the threat in question may materialise in a matter of seconds. [322] The Act also requires the police to make every effort to avoid the use of firearms, particularly against children.[323] This was also underlined by the High Court in the *I.P. Veronica* case where the police shot and killed a minor. In the case, the Court evaluated the circumstances under which firearms were used to determine whether it was the last option, was proportionate to the threat faced and whether all effort had been made to avoid using firearms against the child in question.[324] The police officers had claimed that the child had attacked them with a machete. Noting that the number of the police officers involved, their training and the fact that all of them were armed with firearms, the Court found that under the circumstances, the use of firearms was not justified.

#### 4.11.1.2 Protection of life and property through justifiable use of force

The NPS Act and the Public Order Act both permit the use of firearms to protect property. This is contrary to rules under international law, which do not permit the use of firearms purely to protect property. During assemblies, some participants may engage in acts of violence, including the destruction of property. Indeed, the police have an obligation to protect the lives and property of the public and should therefore not condone such actions. However, using firearms to defend property is disproportionate under international law. Recalling the African Commission's decision in *Chitsenga and others v. Zimbabwe,*[325] discussed in chapter 3, where the

[321] National Police Service Act, Sixth Schedule, Part B, para. 1(b).
[322] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36 (n. 242 above), para. 59.
[323] n. 322, para. 3.
[324] *I.P. Veronica Gitahi v. Republic* (n. 273 above), p. 10.
[325] *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, April 2012, ACHPR, 295/04, 51st Ordinary Session.

right to life is at stake, only the protection of life can be weighed against the potential of taking life.[326]

#### 4.11.1.3 Preventing a person charged with a felony from escaping lawful custody and preventing their rescue

The NPS Act and the Standing Orders permit the use of firearms against a person charged with a felony from escaping lawful custody, and also to prevent the rescue of such persons. Unlike the Basic Principles which permit the use of force in such circumstances in order to prevent the commission of a crime involving a grave threat to life, the text of both the NPS Act and the Standing Orders includes situations where a felony has already been committed. Seemingly, therefore, it would not matter that the suspect no longer poses a grave threat to life. Further the Standing Order specifically state that '…it would be unlawful to shoot at a person escaping, who has committed a petty offence, the police officer may only shoot if the person is wanted for a serious crime of violence.'[327] In the NPS Act, the term 'felony' is used in place of 'serious crime of violence'. In either case, the circumstances under which firearms may be used have been broadened beyond the scope permitted by international law. A felony under Kenyan law is any offence that attracts a penalty of at least three years' imprisonment,[328] and there are several offences that would attract such a penalty. For example, in the context of assemblies, a person who, after a proclamation to disperse, continues to take part in a riotous assembly, commits a felony and may be imprisoned for life. If such a person attempts to escape lawful custody or a third party attempts to rescue them, the police officers can justify the use of firearms against them.

#### 4.11.1.4 When weapons less likely to cause death have previously been used without achieving the desired law enforcement objective

Section 14 of the Public Order Act states that '…whenever the circumstances so permit, firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose aforesaid; and firearms and other weapons likely to cause death or serious

[326] *Noah Kazingachire v Zimbabwe* (n. 325 above), para. 116.
[327] National Police Service Standing Orders, Chapter 47, para. 2(ii).
[328] Penal Code (n. 17 above), s. 4.

bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence….' A similar provision is found in the Standing Orders which states that '…a police officer may be compelled to use his or her firearm if he or she cannot, in any way, with the other means available to him, carry out his or her duty of protecting life, suppressing rioters or effecting the arrests preventing the rescue or escape…of a person who has committed a felony.'[329]

This condition falls outside the scope of the conditions permitted by international law. Effectively, it encourages law enforcement officials to resort to the use of firearms, not because it is strictly necessary and proportionate, but because other methods have not worked before.

#### 4.11.2 Accountability for the use of firearms

Under the NPS Act, a police officer is under an obligation to identify themselves before using firearms.[330] Further, any incident involving the use of firearms must be reported to a superior, even if no injury is occasioned.[331] If the use of firearms results in death or serious injury, a superior officer must report the incident to IPOA for purposes of independent investigations.[332] The NPS may also conduct its own investigations into such case.[333] These procedural requirements are also reflected in the NPSSO.The failure by a superior officer to report to IPOA incidents of death or serious injuries amounts to an offence.[334] On the other hand, neither the NPS Act nor the NPSSO provides for consequences for the failure to report incidents of use of firearms that do not result in any injuries or deaths.

Notably, section 82 of the Penal Code provides that in the dispersal of rioters who defy orders to disperse, a police officer '…may do all things necessary for dispersing the persons so continuing assembled…and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.'[335] This

[329] National Police Service Standing Orders, Chapter 47, para. 2(3).
[330] National Police Service Act, Sixth Schedule, Part B, para. 2.
[331] n. 330, para. 4.
[332] n. 330, para. 5.
[333] n. 330, para. 6.
[334] National Police Service Act, Sixth Schedule, Part C, para 1(3) (d).
[335] Penal Code (n. 17 above), section 82.

provision expressly excludes accountability for deaths or injuries caused to rioters who defy orders to disperse and resist arrest. As discussed earlier, whether or not an assembly is classified as a riot depends to a great extent on the subjective perspective of police officers involved in an assembly. Section 82 of the Penal Code can therefore serve as an excuse for causing serious injuries or deaths to protesters without risking any repercussions. Indeed, the NPS Act has different provisions aimed at ensuring accountability. However, in the face of another existing legal provision that specifically excludes civil or criminal liability, the furthest an intervention may go is an investigation, especially if the investigation is done by the NPS. Again, such an investigation may be conducted only to fulfil a legal obligation. Taking into account the fact that the NPS has consistently failed to comply with its obligation to notify the IPOA about deaths or serious injuries,[336] the possibility that the NPS may interpret section 82 of the Penal Code in their favour cannot be ruled out. It may explain the consistent failure by the police to investigate and prosecute police officers who use excessive force during public order operations.

#### 4.11.3 Evaluation of compliance with international standards

From the foregoing, it is evident that the Kenyan rules on the use of firearms are more permissive than are the conditions set under international law. One important distinction is that while in international law the requirement of an imminent threat of death or serious injury or a grave threat of death is mandatory, this is not a requirement in Kenyan law. At least, this is not the case with respect to all the conditions set out under the Sixth Schedule of the NPS Act and section 14 of the Public Order Act.

In addition, while under international law, firearms may not be used purely to protect property, Kenyan law explicitly permits the use of firearms to protect property. Some demonstrations in Kenya have involved considerable violence from both demonstrators and law enforcement officials who use force in response. During such demonstrations, both public and private property have been destroyed. Certainly, that kind of conduct is not protected under

[336] T Probert, B Kimari & M Ruteere, 'Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action' (CHRIPS, October 2020), p. 24. Available at https://www.chrips.or.ke/wp-content/uploads/2020/12/Strengthening-policing-oversight-and-investigations-in-Kenya.pdf.

Article 21 of the Covenant. However, as the Committee has repeatedly stressed, violent assembly participants may lose protection under Article 21, but not under other relevant provisions of the ICCPR. In particular, the right to life must be protected from arbitrary deprivation. Thus, the use of firearms against assembly participants who pose a threat to or actually destroy property may amount to a violation of Articles 6 and 7 of the Covenant, even if domestic law permits it. Similarly, in relation to fleeing suspects who pose no imminent threat to anyone's life, international standards do not permit the use of firearms against such persons. In *Nachova v. Bulgaria*[337] the European Court stated that an escaping suspect may not be shot 'even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.'[338] To the extent that Kenyan laws permit the use of firearms in such circumstances, they do not comply with international standards.

Importantly, in a 2022 decision in the case of *Katiba Institute and AFRICOG v. Attorney General and others*,[339] the High Court of Kenya found the 2014 amendments to the NPS Act which broadened the circumstances under which firearms may be used to be unconstitutional. This decision marked an important shift towards domestic compliance with international standards. While the NPS Act is yet to be amended, the additional circumstances under which firearms may be used can no longer form the basis for a decision to use firearms, at least not in theory.

With regard to accountability for the use of firearms, the NPS Act has established a reporting mechanism which can safeguard against arbitrary use of firearms and ensure accountability. In addition, there are both internal and external police oversight mechanisms. However, as stated earlier, the reporting procedures are not always complied with. Consequently, there may be many cases involving the use of firearms by the police which are not independently investigated. If at all investigations are done by the NPS, the outcomes of those investigations are not usually made public. Thus, in spite of the legal provisions, an accountability gap remains.

[337] ECtHR [GC], *Nachova v. Bulgaria,* App nos. 43577/98 and 43579/98, Judgment of 6 July 2005.
[338] n. 337, para. 95.
[339] *Katiba Institute & AFRICOG v. Attorney-general & others*, High Court Nairobi Petition No. 379 of 2017 (unreported, as of writing).

### 4.12 The use of less-lethal weapons during assemblies

The use of less-lethal weapons is subject to the same principles that guide the use of any type of force by law enforcement officials. Though ostensibly less-lethal, they may still cause death or serious injury. Consequently, their use should be carefully controlled[340] and their deployment must be in accordance with the principles of necessity and proportionality.[341] Though not binding, the Guidance on LLWs provides guidance on the use of such weapons in various contexts, including during assemblies, in accordance with a State's human rights obligations. It provides that where the use of force is necessary and proportionate to the aim, police officers should still take precaution to avoid or minimize the risk of death or injury.[342] It further provides that in cases where a section of participants are violent and the police decide to use less-lethal weapons against them, care should be taken to safeguard the rights of those near the violent participants.[343] In addition, it is provided that less-lethal weapons should only be used to disperse assemblies as a last resort.[344] The HRCttee has stated that States have an obligation to ensure that law enforcement officials involved in the policing of assemblies are equipped with appropriate less-lethal weapons.[345] Further, the use of less-lethal weapons should be restricted to officers who have been trained on how and when to use them.[346]

#### 4.12.1 The gap in domestic regulation of the use of less-lethal weapons and its implications on the right of peaceful assembly

Kenyan law on the use of force does not provide specific detailed guidance on the use of less-lethal weapons. In the absence of such guidance, police officers may deploy them in contravention of the principles of the principles governing the use of force. In practice, for instance, police officers commonly use tear gas irrespective of whether an assembly is peaceful or not. There have also been cases where tear gas was used against children protesting peacefully

[340] Basic Principles on the Use of Force and Firearms (n. 144 above), Principle 3.
[341] General Comment 36 (n. 131 above), para. 14.
[342] Guidance on Less-lethal Weapons in Law Enforcement (n. 226 above), para. 6.3.1.
[343] n. 342, para. 6.3.2.
[344] n. 342, para. 6.3.3.
[345] General Comment 37 (n. 45 above), para. 81.
[346] Joint report on the proper management of assemblies (n. 67 above), para. 55.

or against persons with disability.[347] It could be that the NPS has operational manuals that regulate the use of less-lethal weapons. However, those manuals are not laws and they are also not publicly accessible. The Guidance on LLWs requires States to be '…transparent about the regulation of the use of less-lethal weapons…and the policies on and criteria for their lawful use.'[348] In the absence of such information, the public cannot effectively interrogate the legality of the use of less-lethal weapons.

### 4.13 Conclusion

This chapter sought to analyse the Kenyan legal framework on the right of peaceful assembly and on the use of force by law enforcement officials, and to compare this framework against the international legal frameworks discussed in chapters 2 and 3. First it established that the right of peaceful assembly is guaranteed under the Constitution of Kenya and its exercise is primarily regulated by the Public Order Act. Noting the applicability of international treaties that Kenya has ratified, it was explained that following the Supreme Court of Kenya's decision in the *Mitu Bell* case, treaties and general rules of international law fall below the Constitution, statutes and judicial pronouncements in the hierarchy of laws at domestic level. Consequently, if domestic laws conflict with international law, domestic laws take precedence. This may present problems in relation to the full enjoyment of human rights at the domestic level, especially if domestic laws are not as protective as international law.

On specific aspects of peaceful assemblies, it was elaborated that the peacefulness requirement is generally interpreted in a highly restrictive manner by both the police and some courts. In particular, conduct that is disruptive is perceived as non-peaceful and therefore assemblies that would pass the peacefulness test under international law can be easily classified as non-peaceful under Kenyan law. The notion of a 'breach of the peace' has also not been clearly defined, thereby leaving its interpretation mainly to the police. While courts may intervene, this would only happen after an assembly has been dispersed and participants arrested and prosecuted. Court processes can be costly and even intimidating bearing in mind the threat of

[347] See for example, N Feeney, 'Police Use Tear Gas on Protesting Schoolchildren' Time, 19 January 2015. Available at https://time.com/3673741/kenya-schoolchildren-land-grab-protest-photos/.
[348] Guidance on Less-lethal Weapons in Law Enforcement (n. 226 above), para. 4.4.1.

conviction. It is therefore expected that some members of the public may shy away from exercising their right of peaceful assembly if the possibility of being arrested is high. In the *Hussein Khalid* case where the Petitioners wanted the High Court to interpret whether their conduct during an assembly was peaceful or not, the Court declined to offer that interpretation and instead argued that it was the court hearing the criminal case against the protesters that could make that determination. Both the Court of Appeal and the Supreme Court agreed with this position. This, arguably, was a missed opportunity. A clear definition of what constitutes peaceful conduct in the context of an assembly can help to enhance legal protections for the right of peaceful assembly.

It was also demonstrated that the right of peaceful assembly is constrained by the provisions of the Public Order Act and the Penal Code. It was shown that in spite of the consistent affirmations that the Public Order Act meets constitutional standards, it does not fully comply with international standards. For example, on the requirement of notification, the Act does not exempt any assembly from the requirement, and considers any assembly held without notice as unlawful. Thus spontaneous assemblies are inherently unlawful. So is an assembly whose impact is minimal and which is held without notice. International law, in contrast, exempts such assemblies from this requirement.

As was stated, if an assembly is unlawful, the police may not facilitate it even if it is peaceful. Instead, they may stop it, and this is their more common response. It was also demonstrated that the provisions in the Penal Code on riots may inhibit the effective exercise of the right of peaceful assembly. First, because the police enjoy a wide discretion when deciding whether an assembly is a riot or not, and second, the penalties associated with assemblies classified as riots are quite punitive and include life imprisonment. It is no wonder that in the *Wilson Olal* case, the court hearing the criminal case against the demonstrators set bail at approximately 5,000 US dollars per person. Had the High Court not intervened and quashed the criminal proceedings, the demonstrators would have spent months or even years in remand had they not been able to raise bail.

On the use of force by law enforcement officials, it was shown that the principles governing the use of force under international law are to a great extent reflected in Kenyan laws, particularly the NPS Act. However, it was also shown that with regard to the use of firearms, Kenyan laws are more permissive than international law allows. Concluding observations of the HRCttee and the Committee against Torture have also consistently recommended that the laws on the use of force be brought in line with international standards, and accountability be ensured in cases where police officers use unlawful and excessive force.

Certainly the gaps in the legal framework on both the protection of the right of peaceful assembly and on the use of force contribute to violations of human rights by law enforcement officials when policing assemblies. However, this is not the only factor. It has been demonstrated before that a legal framework that is fully compatible with international standards may not by itself prevent violations during assemblies. Article 2(2) of the ICCPR requires States to take legislative or 'other measures' to ensure rights in the Covenant. In the context of Article 21, other measures include ensuring that law enforcement agencies involved in the policing of assemblies have adequate training and resources to enable them to police assemblies within international human rights standards.

The next chapter focuses on the operational and organizational structures of the NPS and assesses the extent to which it supports a human rights-centred approach to the policing of assemblies.

# Chapter 5: The Organisational and Operational Structures of the National Police Service and their Influence on the Policing of Assemblies in Kenya

## 5.1 Introduction

While most States guarantee the right of peaceful assembly in their national laws, police violence during assemblies still remains a persistent problem.[1] This demonstrates that although the legal guarantee of the right of peaceful assembly is an important step towards its protection, it is not always sufficient. The full enjoyment of the right is only possible if, in line with Article 2(2) of the International Covenant on Civil and Political Rights[2] (hereinafter 'ICCPR' or 'the Covenant'), other measures are taken to create an enabling environment for its exercise. Such measures include action to facilitate and protect assemblies,[3] a task which is primarily entrusted to law enforcement officials.[4] It is important for law enforcement agencies to have operational plans and structures that enable law enforcement officials to police assemblies in a manner that respects and upholds human rights.

In their joint report on the proper management of assemblies of 2016, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions set out measures that States ought to put in place to ensure that law enforcement officials effectively facilitate and protect assemblies.[5] The measures include: proper planning by law enforcement authorities;[6] effective communication and dialogue between the authorities and organizers or participants;[7] adequate

[1] See, for example, the joint statement by UN human rights experts stating the widespread violence in the context of assemblies. OHCHR, 'UN experts call for end to police brutality worldwide' 13 August 2021. Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27376&LangID=E. Also see ACHPR, 'Resolution 281/2014, Resolution on the Right to Peaceful Demonstrations' ACHPR/Res.281 (LV) 2014, adopted at the 55th Ordinary Session held from 28 April to 12 May 2014, Luanda, Angola. The African Commission on Human and Peoples' Rights raised concern about the use of excessive force to suppress demonstrations.
[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[3] UN Human Rights Committee, 'General Comment 37: Article 21 (The Right of Peaceful Assembly)' 2020, CCPR/C/GC/37, para. 8.
[4] As in previous chapters, the term 'law enforcement officials' is used interchangeably with 'police officers'.
[5] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns' A/HRC/31/66, 4 February 2016.
[6] n. 5, para. 37.
[7] n. 5, para. 38.

training on facilitating assemblies, including on soft skills, the use of force, crowd facilitation tactics, and the legal framework governing assemblies and the use of force by law enforcement officials;[8] ensuring availability of appropriate and adequate law enforcement equipment, including less-lethal weapons and protective gear;[9] and establishing post-event debriefing mechanisms for purposes of learning.[10] These measures have also been emphasised by the UN Human Rights Committee (HRCttee or the Committee) in General Comment 37 on the right of peaceful assembly.[11] Where such measures are unavailable or inadequate, for example if police officers are not properly trained on their duty to facilitate, violations in the context of assemblies are likely.[12]

In chapter 4, it was shown that the legal protection of the right of peaceful assembly in Kenya is anchored in Article 37 of the Constitution of Kenya, 2010 (hereinafter 'the Constitution' or the 2010 Constitution) and its regulation provided for under the Public Order Act[13] and the Penal Code.[14] In spite of the protections in these instruments, the use of excessive force by Kenyan police during assemblies continues to be a cause for concern.[15] Indeed, as demonstrated in chapter 4, there are gaps in the Kenyan legal framework governing assemblies and the use of force by law enforcement officials. The gaps certainly contribute to violations of human rights in the context of assemblies. However, inadequate laws are not the only explanation for the unlawful use of force during assemblies in Kenya. There are many examples of cases where the use of force in the context of an assembly did not meet either domestic or international

[8] Joint report on the proper management of assemblies (n. 5 above), paras. 43 and 52.
[9] n. 8, paras. 53-4.
[10] n. 8, para. 49 (e).
[11] General Comment 37 (n. 3 above), paras 35, 75, 77, & 80-1.
[12] For example, in relation to protests in Iraq that occurred between October 2019 and April 2020, the United Nations Assistance Mission for Iraq and the Office of the High Commissioner for Human Rights reported that there had been widespread and gross human rights violations committed by State security forces. One of the findings of the mission was that the security forces in Iraq lacked proper training and resources that could enable them to police assemblies within human rights standards. See, UNAMI/OHCHR, 'Human Rights Violations and Abuses in the Context of Demonstrations in Iraq October 2019 to April 2020' (August 2020), pp. 7 & 51. Available at https://www.ohchr.org/Documents/Countries/IQ/Demonstrations-Iraq-UNAMI-OHCHR-report.pdf.
[13] Public Order Act, Cap. 56, 1950 (Revised 2018), Laws of Kenya.
[14] Penal Code, Cap. 63, 1930 (Revised 2014), Laws of Kenya.
[15] UN Human Rights Committee, 'Concluding Observations, Kenya' (CCPR/C/KEN/CO/4), April 2021, para. 44.

standards.[16] The question then is, aside from the restrictive public order laws and overly permissive laws on the use of firearms, what else accounts for the unlawful use of force by the police during assemblies?

To answer this question, this chapter analyses the organisational and operational structures of Kenya's National Police Service (NPS) and assesses how they influence the manner in which police officers in Kenya approach assemblies. The chapter begins by setting out the methods used to obtain the relevant information and the limitations thereto. This is followed by a brief contextual background on the culture of policing of assemblies in Kenya. The chapter then discusses the institutional framework for the policing of assemblies in Kenya. The primary focus is on the NPS and its constituent formations, as well as its command structure. In addition to the domestic legislation governing the conduct of assemblies and the use of force discussed in chapter 4, the NPS is also in the process of developing internal policy guidelines on public order management and the use of force and firearms. These guidelines were drafted and finalised in 2018, but, as of early 2023, were still awaiting validation and final approval of the Inspector-General. They are also discussed in order to assess their compliance with national and international law, and their potential impact on the exercise of the right of peaceful assembly. The discussion of these draft policy documents is also relevant because they are indicative of the general approach of the NPS towards assemblies.

Thereafter, the chapter discusses various aspects of the NPS's operational structures for public order management. This involves a discussion of the training of officers, planning of public order operations, briefing and deployment, available public order equipment, command and control of public order operations, the existence of mechanisms for post-event debriefing, and oversight over public order operations. Gaps in the existing structures and their implications are then analysed.

[16] For example, during weekly protests in 2016 against the Independent Electoral and Boundaries Commission where at least four people were fatally shot, the Independent Policing Oversight Authority, which is a civilian police oversight body, found that the use of force and firearms by the police contravened both national and international standards. IPOA, 'Monitoring Report on Police Conduct during Public Protests and Gatherings' (2017), p. 15-7. Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf.

### 5.2 Methods and limitations

As stated earlier, the objective of this chapter is to assess how the organisational and operational structure of law enforcement agencies in Kenya influence the manner in which they police assemblies. This requires an analysis of the operational structures the NPS has in place, a comparison between the structures as they are and what they ought to be, identifying the gaps and evaluating the potential impact of those gaps. In order to achieve this, mixed methods comprising both desk research and qualitative empirical research were used to gather the relevant information. To set out the organisational structure of the of the NPS in relation to the management of assemblies, this chapter relies on secondary literature comprising of legislation establishing the NPS, information on the official websites of the NPS and its various components, and their periodic reports. Other secondary sources including court records, reports from human rights institutions and non-governmental organisations, monitoring reports of the Independent Policing Oversight Authority ('IPOA'), and media reports are also relied on. When comparing the NPS operational guidelines against international standards, the chapter relies on data sources from the international human rights system consisting primarily of reports of UN special procedure mandate holders and soft-law instruments within the UN and regional human rights systems.

In relation to the empirical aspect of the research, ethical approval was granted by the University of Pretoria's Research Ethics Committee for interviews with officials from IPOA and the NPS. In addition, a research permit was also obtained from the National Commission for Science, Technology and Innovation (NACOSTI) which is the national body responsible for overseeing research in Kenya. Further permission was to be obtained from the respective heads of IPOA and the NPS. With regard to IPOA, permission was granted and the heads of the Research, Inspections and Monitoring Directorate; the Investigations Directorate; and the Complaints and Legal Directorate were interviewed. The key informants were selected on the basis of the roles their directorates play in monitoring assemblies, making recommendations for improvement of police practices, investigating cases of suspected violations and ensuring accountability for any violation. The interviews were semi-structured and were conducted virtually.

In relation to the NPS, the sample size was 40 officials comprising operational commanders at the national and county level, trainers at five police training institutions, five station commanders and 25 frontline officers. The interviews were to address four themes, namely: training on public order management, planning of public order operations, the use of force, and internal accountability mechanisms. The Office of the Inspector General of the NPS (Inspector-General), however, declined to authorise the conduct of the interviews, stating that the information sought was confidential. This was in spite of attempts to explain the nature, purpose and intended use of the information required. Nevertheless, the Directorate of Reforms at the NPS shared copies of draft internal guidelines on public order management and on the use of force and firearms that had been developed by the NPS and were awaiting validation and final approval of the Inspector-General. The guidelines provide an indication of the operational arrangements the NPS has for public order management and the permissible circumstances for the use of force and firearms. Two additional guidelines, namely the 'Use of Armed Force in Public Disorder and Civil Disturbances, 2018' and the 'Riot Drill and Training, 2018'[17] were not shared since they are classified as confidential documents.

The failure to interview the targeted key informants was a significant limitation of the research since official data from the NPS on its operational capacity to police assemblies within international human rights standards could not be obtained. In addition, the classification of key policy documents of the NPS as confidential meant the guidance they contained could not be evaluated or scrutinised for compliance with national and international human rights standards. To mitigate this gap, where feasible, questions that would have been posed to the police were also shared with key informants from IPOA who could draw conclusions from observations they had made while monitoring and investigating past public order management operations. The reports of non-governmental organisations were also relied on. In addition, court records in a case where several police officers testified on the planning and execution of a public order operation that led to the death of an infant and injuries to several members of the public were examined.

[17] The guidelines are cited in the National Police Service Draft Guidance on Public Order Management, which is yet to be made publicly available.

An interview was also held with the deputy director of the NPS's Internal Affairs Unit (IAU) which is an internal police oversight mechanism. The Inspector-General's authorisation was not required since the IAU operates autonomously. The information obtained was, however, limited to internal accountability processes since the IAU does not monitor public order or other police operations. To assist in evaluating the information obtained from IPOA and secondary sources, two police station commanders and six frontline police officers were informally interviewed after their informed consent was obtained. The participants were informed that the research had been authorised by NACOSTI but since the Inspector-General had not permitted interviews with police officers, they could only share information they had on an informal basis and the same would not be attributed to the NPS. The participants were drawn from two police stations and the frontline officers were selected by their station commanders based on their experience in policing assemblies. Admittedly, the sample size of eight police officers from one county against an approximate total of over 100,000 police officers spread across 47 counties is small. A larger and more diverse sample could have been selected as had been planned if the Inspector-General's permission had been obtained.

### 5.3 General Overview of Police Response to Assemblies in Kenya

Historically, the policing of assemblies in Kenya has been characterised by the excessive use of force by law enforcement officials.[18] This has especially been the case for large assemblies. As explained in chapter 4, politically motivated amendments to the 1963 Constitution of Kenya contributed to the politicisation of the then Kenya Police Force through the erosion of the independence of the Force.[19] Having a police force that was commanded by a presidential appointee with no security of tenure left room for the Police Force to do the reigning Government's bidding. As a result, the violent suppression of the right of peaceful assembly was common, especially in cases where the assemblies pursued political causes or otherwise criticised the Government.[20] In addition to the lack of independence of the Police Force, the domestic legal

[18] This has been captured in concluding observations of UN treaty bodies, several reports of human rights organisations, media reports, among other sources.
[19] See section 4.2 of chapter 4 on the background of the legal protection of the right of peaceful assembly in Kenya.
[20] Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (2005), p. 30.

regime on assemblies was also restrictive.[21] This, combined with a dearth of accountability, meant that violations in the context of assemblies did not stop. The fatal shooting of more than 400 civilians protesting the results of a presidential election in 2007 brought to the fore the seriousness of the problem of excessive use of force by the police, especially in the context of assemblies.[22]

The events of 2007 hastened the then ongoing constitutional reform process, culminating in the promulgation of the 2010 Constitution. Conversation around police reforms also gained traction, and in 2009 the National Taskforce on Police Reforms was established.[23] One of its functions was to analyse the operational policies and the legal framework governing the work of the police and recommend reforms that would enhance accountability of the police to the public.[24] One result of the reform process was the establishment of the National Police Service and the National Police Service Commission under the 2010 Constitution. Notably, the institution of the police in Kenya was no longer a 'force' but a 'service'. The change of name was meant to change police and public perception about the work of the police and to reinforce the idea that the police existed to serve and not to subdue the public.[25] Whether or not the shift from 'police force' to 'police service' actually led to changes in police attitudes is a subject of continued debate.

The police reforms have arguably yielded fruit in terms of enhancing police accountability. However, in relation to the policing of assemblies, it can be argued that not much has changed. As explained in chapter 4, the laws governing public order have not changed at all and police officers in many cases adopt restrictive interpretations of these laws. Consequently, the scope of interference with the exercise of the right remains wide. Further, police use of excessive force, sometimes leading to deaths, continues to plague assemblies. For instance, during election-related protests in 2017, at least 37 people were fatally shot or beaten by police officers in the

[21] For an explanation of the specific restrictions on peaceful assemblies under Kenyan law, see sections 4.2 and 4.7 of chapter 4.
[22] See Report of the Commission of Inquiry into Post-Election Violence, p. 417. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf.
[23] Kenya Gazette Notice No. 4790 of 8 May 2009.
[24] Report of the National Task Force on Police Reforms (2009), p. 3.
[25] n. 24, p. xxvii.

span of three days.[26] In August 2021, a protest against the police over the death of two brothers in police custody saw one protester lose his life after being fatally shot by the police.[27] Such incidents are not isolated and are an indication that the use of excessive force continues to be a prominent feature of policing assemblies in Kenya.

### 5.4 The Institutional framework for the policing of assemblies

The NPS has the primary duty of policing assemblies in Kenya. In some cases, particularly when policing large assemblies, it may seek reinforcement from other law enforcement agencies such as the Kenya Prisons Department, the Kenya Forest Service, and the Kenya Wildlife Service. However, whenever such agencies are involved, they work under the command and control of the NPS. What follows is a discussion of how the NPS is organised and its command structure.

#### 5.4.1 Organization and Command of the National Police Service

The National Police Service was established under Article 243 of the 2010 Constitution of Kenya, which provision was given effect through the enactment of the National Police Service Act, No.11A of 2011 (hereinafter, 'NPS Act'). The NPS consists of the Kenya Police Service and the Administration Police Service. [28] Article 247 of the Constitution empowers Parliament to create other police services under the NPS. In this regard, the Directorate of Criminal Investigations (DCI) was established in 2011 through the NPS Act. Under Article 244 of the Constitution, the objects and functions of the NPS include complying with constitutional standards of human rights; training staff and ensuring their competence to respect and uphold human rights and fundamental freedoms; and fostering and promoting police-public relations.

The NPS is under the overall command of the Inspector-General who is appointed by the President with the approval of Parliament.[29] The procedure for appointment is that the President

[26] KNCHR, 'Mirage at Dusk: A Human Rights Account of the 2017 General Election, 2017' p. 16. Available at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457.
[27] Al Jazeera News, 'Kenya: One killed in protests over brothers' deaths in custody' 5 August 2021. Available at https://www.aljazeera.com/news/2021/8/5/one-dead-in-kenya-protests-over-brothers-death-in-custody.
[28] Constitution of Kenya, Article 243.
[29] n. 28.

nominates a person after which their name is submitted to Parliament for consideration of their suitability for the position.[30] Parliament may either approve or reject the nominee within 14 days of receiving their name.[31] The involvement of Parliament in the appointment process is a significant departure from past practice under the repealed Constitution where the President exercised exclusive powers to appoint the Commissioner of Police who was the equivalent of the Inspector-General.[32] It should be noted that the current procedure for appointment was the result of an amendment to the NPS Act in 2014.[33] Previously, whenever a vacancy arose in the Office of the Inspector-General, the National Police Service Commission[34] (hereinafter 'NPSC') had a significant role to play. The NPSC had the obligation to advertise the vacancy, shortlist applicants, interview them, and submit the names of at least three persons to the President who would then nominate one of them for appointment.[35] Parliament would then 'vet and consider' the nominee and either reject or approve their appointment.[36] The 2014 amendments completely removed the NPSC from the recruitment process. Thus, the President exercises exclusive powers to nominate a person for appointment. This, to some extent, reflects the position under the repealed Constitution of Kenya, 1969, only that under the current legal regime the President's nominee has to be approved by Parliament. The more transparent and competitive recruitment process set out in the NPS Act before the 2014 amendments could arguably ensure greater independence of the Inspector-General. The more independent the Inspector-General is, the lower the likelihood of the NPS succumbing to external influences.

In terms of the role of Parliament, the language used under the amended NPS Act was 'vet and consider' the nominee. After the 2014 amendments, the language changed to 'consider the suitability' of the nominee,[37] with no express provision on vetting. It could be that the

[30] National Police Service Act, No. 11A of 2011 (Rev.2016) s. 12.
[31] n. 30, s. 12(7).
[32] Constitution of Kenya, 1969 (repealed) s. 108.
[33] The Security Laws (Amendment) Act 2014, s. 86.
[34] The National Police Service Commission is an independent Commission established under Article 246 of the Constitution of Kenya. Its role is to recruit and appoint members of the NPS and exercise disciplinary control over them.
[35] National Police Service Act, No. 11A of 2011 (Rev.2012), s. 12(1)–(6).
[36] n. 35, s. 12(7).
[37] n. 36.

amendment was meant to limit Parliament's role in the process. However, one could also argue that considering a person's suitability for a position involves vetting them. In fact, when the current Inspector-General was nominated in 2019, he was vetted by Parliament.[38]

In general, the 2010 Constitution goes to great lengths to insulate the Inspector-General from external interference. Article 245 specifically provides that the Inspector-General '…shall exercise independent command of the National Police Service….'[39] It goes further to state that while the Cabinet Secretary responsible for police services may give policy direction to the Inspector-General, no person may direct the Inspector-General with respect to '…the investigation of any particular offence or offences; the enforcement of the law against any particular person or persons; or the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.'[40] Considering the history of politicisation of the police, these guarantees of operational independence can help to ensure an approach to policing assemblies based on legality rather than political expediency.

Article 245 further sets out specific grounds upon which the Inspector-General may be removed from office by the President.[41] These include serious contraventions of the Constitution, gross misconduct, physical or mental incapacity, incompetence, bankruptcy or any other just cause. Neither the Constitution nor the NPS Act provide for the procedure for removal of the Inspector-General. It appears the President can unilaterally remove the Inspector-General based on one of the aforementioned grounds without offering further explanation to any other authority. Prior to the 2014 amendments to the NPS Act, any person seeking the removal of the Inspector-General had to present a petition to the NPSC.[42] If at least two-thirds of the members of the NPSC agreed that any of the grounds for removal had been satisfied, they would recommend to Parliament the removal of the Inspector-General.[43] Parliament, on being satisfied that the petition for removal disclosed at least one of the grounds set out in the Constitution,

[38] D Mwere, 'IG nominee Hilary Mutyambai faces joint House teams' Daily Nation 28 March 2019. Available at https://nation.africa/kenya/news/ig-nominee-hilary-mutyambai-faces-joint-house-teams-152682.
[39] Constitution of Kenya, Article 245(2)(b).
[40] n. 39, Article 245(4).
[41] n. 39, Article 245(7).
[42] National Police Service Act (Rev.2012) (n. 35 above), s. 15(2).
[43] n. 42, s. 15(3).

would establish a tribunal to '…investigate the matter…and make a binding recommendation to the President.'[44] This was a more elaborate and inclusive process, which better protected the tenure of the Inspector-General, and by extension their independence. It can therefore be argued that in spite of the constitutional guarantee of the Inspector-General's operational independence, the same was watered down by the 2014 amendments of the NPS Act. The Executive sought to regain as much control over the police as possible. This has implications on how law enforcement officials respond to assemblies. With near unquestionable powers to remove the Inspector-General from office, it is likely that the Inspector-General would not hesitate to suppress dissent against the Government in power.[45]

#### 5.4.1.1 The Kenya Police Service

Article 243 of the 2010 Constitution sets out the Kenya Police Service (KPS) as one of the components of the NPS. It is headed by a Deputy Inspector-General of the KPS who is appointed by the President on the recommendation of the NPSC.[46] Under section 17 of the NPS Act, 'the President may remove, retire or redeploy a Deputy Inspector-General at any time before the Deputy-Inspector General attains the age of retirement.' Prior to the 2014 amendments of the NPS Act, the Deputy Inspector-General could only be removed from office by the President on the recommendation of the NPSC.[47] Again, the almost unfettered powers of the President to remove the Deputy Inspector-General from office dilutes the independence of the Office.

The KPS has presence in all the 47 counties[48] and 290 sub-counties in Kenya. It also has 1,151 police stations across the 47 counties.[49] Prior to 2010, Kenya was administratively divided

[44] National Police Service Act (Rev.2012) (n. 35 above), s. 15(4)–(7).
[45] In 2017, for example, the then Inspector-General, Joseph Boinnet, stood alongside the Cabinet Secretary for Interior during a press briefing on the alleged killings and beatings of demonstrators, as the Cabinet Secretary condemned demonstrators and branded those killed during protests as criminals. See J Wakaya, 'Matiangi Denies Protesters Killed By Police, Warns Violence Will Be Crushed,' Capital News, 12 August 2017. Available at https://www.capitalfm.co.ke/news/2017/08/matiangi-denies-protesters-killed-by-police-warns-violence-will-be-crushed/.
[46] Constitution of Kenya, Article 245(3).
[47] National Police Service Act (Rev.2012) (n. 35 above), s. 17.
[48] For a list of the counties, see the First Schedule of the Constitution of Kenya, 2010.
[49] Kenya Gazette Notice No. 1288, Vol. CXXII- No. 32, 14 February 2020. Available at http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXXII-No_.32_.pdf.

into 8 provinces.[50] Although, the 2010 Constitution did away with the provinces and created the counties, the KPS retained the division of the 8 regions for administrative purposes. Each region therefore has a Regional Police Commander who reports to the Deputy Inspector-General of the KPS. At the county level, the KPS is headed by a County Police Commander while the sub-counties are headed by sub-county police commanders. Below the sub-county commanders are the station commanders who are in charge of police stations. In some areas, there are police posts whose senior-most officers report to the station commanders of their respective areas. At the lowest level of the KPS are patrol bases.

The key functions of the Kenya Police Service as provided for in the NPS Act include providing assistance to the public, maintaining law and order, preserving the peace, protecting life and property, detecting, preventing and investigating crime, enforcing laws and regulations, among other functions.[51] In terms of the regulation of assemblies, the KPS has greater administrative powers than other components of the NPS. This is because under the Public Order Act, any person intending to hold an assembly must notify the 'regulating officer' who is defined under the Act as the officer-in-charge of the police station in the area where the assembly will be held.[52] Further, the officer-in-charge of a police station is the one who leads in arranging for the facilitation of an assembly. They also have the power to stop an assembly or prevent one from being held, though this power may also be exercised by any police officer above the rank of an inspector.[53]

Section 10 of the NPS Act empowers the Inspector-General to organise the NPS to various formations or units. In this regard, the KPS was organised into various units, which include Marine Police Unit, the Airport Police Unit, the General Service Unit (GSU), among other units.[54] In the context of assemblies, the GSU is of particular significance since one of its specific functions is controlling riots and civil disturbances.[55] While in most cases, assemblies are policed by general

[50] The provinces were Nairobi, Coast, Western, North Eastern, Eastern, Central, Rift Valley and Nyanza.
[51] National Police Service Act (Rev. 2016) (n. 30 above), s. 24.
[52] Public Order Act (n. 13 above), s. 5 (2).
[53] n. 52, s. 5(8).
[54] National Police Service Standing Orders, 2017, chapter 7, paras. 4-14.
[55] n. 54, para. 12.

duty police officers of the KPS, whenever large assemblies are anticipated, GSU officials are also deployed to help control crowds. GSU camps are not as widely spread across Kenya as police stations. Therefore, whenever they are required, they are mobilised and transported to the relevant location. Since the GSU has the duty to control riots and civil disturbances, whenever they are called upon to assist general duty KPS officers in the policing of assemblies, their objective would be to control the 'riots' including through the use of force. As explained in chapter 4, a peaceful assembly can be easily classified as a riot due to the restrictive interpretation of what peacefulness means. Since Kenyan law permits the use of force to disperse riots and the Penal Code explicitly excludes liability for deaths and injuries that arise from the use of force during the dispersal of a riot,[56] the possibility of police officers from the General Service Unit wantonly using excessive force to control riots cannot be excluded.

#### 5.4.1.2 The Administration Police Service

The Administration Police Service (APS) is the second component of the NPS and it is headed by the Deputy Inspector-General of the APS.[57] The procedure for appointment and removal of the Deputy Inspector-General of the APS is the same as that of the Deputy Inspector-General of the KPS. The functions of the APS as set out in the NPS Act are largely similar to those of the KPS, except that in addition to regular policing duties, the APS is involved in the protection of government property and critical infrastructure, the support of government agencies in the performance of administrative duties and peace-building activities.[58] In a restructuring process initiated in 2018, some of the functions of the APS were merged with those of the KPS and general duty APS officers were integrated into the KPS.[59] Under the restructured NPS, the KPS focuses on public security and safety while the APS focuses on protective and border security.

The APS is made up of four formed units, namely the Rapid Deployment Unit (RDU), the Critical Infrastructure Protection Unit (CIPU), the Border Police Unit (BPU) and the APS Stock

[56] Penal Code (n.14 above), ss. 82-3.
[57] Constitution of Kenya, Article 245(3).
[58] National Police Service Act (Rev. 2016) (n. 30 above), s. 24.
[59] National Police Service, 'Information Pack- Policy Framework and Strategy for Reorganization of the National Police Service and Provision of Decent and Affordable Housing for Police Officers and Integration with Communities and Neighborhoods' (2018). Available at https://www.nationalpolice.go.ke/downloads/category/22-nps-information-restructuring-pack.html?download=51:nps-information-pack.

Theft Prevention Unit (APS-ASTU). Each of these units have commanders who report to the Deputy Inspector-General of the APS. Although the members of all four units may be involved in the policing of assemblies, the functions of the Rapid Deployment Unit are most relevant in that context. Under the NPS Service Standing Order, 2017, the functions of the Rapid Deployment Unit include restoring peace and public order management.[60]

#### 5.4.1.3 The Directorate of Criminal Investigations

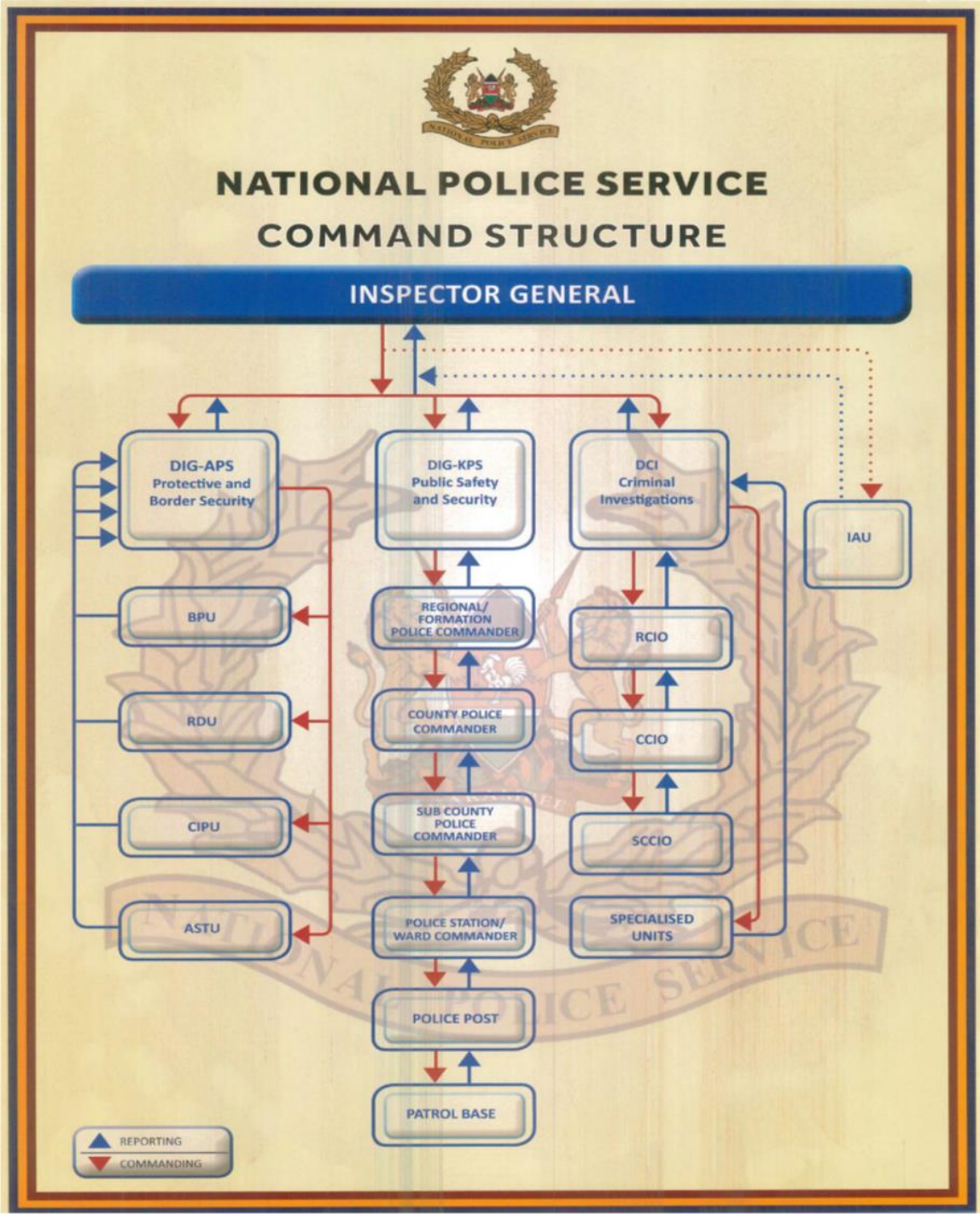
The Directorate of Criminal Investigations (DCI) is not expressly established in the 2010 Constitution as a component of the NPS. However, as stated earlier, Article 247 empowers Parliament to enact legislation to establish other police services under the NPS. Relying on Article 247, the NPS Act provided for the establishment of the DCI under section 28 of the Act. It is headed by a Director of Criminal Investigations who is appointed by the President on the recommendation of the NPSC.[61] Like the Deputy Inspector-Generals of the KPS and APS, the Director of Criminal Investigations may be removed from office by the President at any time. The DCI has presence in all regions, counties, and sub-counties. At the regional level, the DCI is headed by a Regional Criminal Investigations Officer (RCIO) who reports to the Director of Criminal Investigations. Counties are headed by County Criminal Investigation Officers (CCIO) while sub-counties are headed by Sub-county Criminal Investigation Officers (SCCIO).

The functions of the DCI include gathering criminal intelligence, investigating serious crime, maintaining law and order, apprehending offenders, among others.[62] Given their role in gathering intelligence, the DCI can play a critical role in facilitating assemblies by providing law enforcement officials directly involved in policing assemblies with the information they need to make necessary arrangements to facilitate and protect assemblies and the public. Officers from the DCI may also be called upon to support other law enforcement officials in policing assemblies. As will be discussed later, one of the disadvantages of drawing officers from across the NPS during public order operations is the lack of clarity in command and control. While the KPS, APS and DCI

[60] NPS Service Standing Orders (n. 49 above), Chapter 7, paras. 16(d) and (f).
[61] National Police Service Act (Rev. 2016) (n. 30 above), s. 30.
[62] n. 61, s. 35.

are all under the command and control of the Inspector-General, each component has different commanders at different levels. The command structure of the NPS is shown in the figure below:

**Figure 1: Command Structure of the National Police Service**




Source: NPS Website. https://www.nationalpolice.go.ke/nps-command-structure.html.

It is worth noting that although officers involved in policing assemblies may be drawn from any of the units within the three components of the NPS, they are trained in different colleges. For instance, within the Kenya Police Service, general duty police recruits are trained separately from General Service Unit recruits.[63] There is also a separate college for Administration Police Service recruits.[64]

### 5.4.2 Other law enforcement agencies

In addition to the NPS officials, where the need arises, other law enforcement agencies may also be involved in large-scale crowd management operations. Such officials ordinarily include prison officers, officers from the Kenya Forest Service, the Kenya Wildlife Service and the National Youth Service. In exceptional cases, members of the Kenya Defence Forces may also be relied on. Whenever officers other than those form the NPS are involved in the policing of assemblies, they operate under the command of the NPS.

### 5.4.3 Police oversight institutions

Oversight is an important element of the policing of assemblies since several human rights are implicated whenever law enforcement officials are involved in assemblies. Official oversight over the NPS is conducted by the Internal Affairs Unit (IAU) and the Independent Policing Oversight Authority (IPOA). The IAU is an internal police oversight mechanism established under section 87 of the NPS Act. Its functions are to receive and investigate complaints and to promote discipline amongst members of the NPS. IPOA, on the other hand, is an independent civilian police oversight body established by the IPOA Act.[65] In relation to their roles in the context of assemblies, IPOA has the mandate to monitor and investigate all police operations affecting the public, such as public order management operations.[66] This is in addition to receiving and investigating complaints about violations committed in the context of such operations. The IAU,

[63] The general duty police are trained at the National Police Training College-Kiganjo Campus while GSU recruits are trained at the National Police College-Embakasi B Campus. For tactical GSU training, GSU recruits are further trained at the National Police Service College-Magadi Field Campus. See NPS Information Pack- Policy Framework and Strategy for Reorganization of the NPS (n. 59 above).
[64] NPS Information Pack- Policy Framework and Strategy for Reorganization of the NPS (n. 59 above).
[65] Independent Policing Oversight Authority Act, No. 35 of 2011.
[66] n. 65, s.6.

on the other hand, does not monitor police operations but handles complaints made against police officers.

In addition to these institutions, the Kenya National Commission on Human Rights, which is a national human rights institution, also exercises oversight over the police by virtue of its human rights mandate. Like IPOA, it conducts investigations into human rights violations alleged to have been committed by law enforcement officials.

### 5.5 NPS Policy guidelines on the policing of assemblies

To complement the NPS Act and the NPS Standing Orders 2017 discussed in chapter 4, the NPS also has additional internal policy guidelines used in the context of assemblies. Two of them, namely the 'Instructions on the Use of Armed Force in Public Disorder and Civil Disturbances 2018' and the 'Riot Drill and Training 2018', are in use but are classified as confidential documents. This is contrary to international standards, which stipulate that guidelines regulating the use of force by law enforcement officials should be publicly available.[67] The NPS is also in the process of developing further internal guidelines on public order management and the use of force and firearms. Although the documents are still in draft form, the operational guidance contained therein arguably reflects the general practice of the NPS in relation to how they police assemblies. The contents of the guidelines are analysed next.

#### 5.5.1 NPS Draft Manual of Guidance on Public Order Management

Under the 2017 NPS Standing Orders, the NPS is required to develop and publish guidance or operational manuals on various aspects of policing. The manuals are meant to ensure that standards of practice of the various components of the NPS and their formations or units are uniform.[68] In this regard, in 2018 the Office of the Inspector-General began the process of developing guidance on public order management to 'establish consistency of approach in the planning, management and command for the policing of public order incidents/operations, pre-

[67] Joint report on the proper management of assemblies (n. 5 above), para. 67. Also see General Comment 37 (n. 3 above) para. 94.
[68] NPS Service Standing Orders (n. 49 above), Chapter 73, Part IV, p. 1161, paras. 1-2.

planned events and incidents of spontaneous public disorder.'[69] As of 2023, the first draft of the NPS Draft Manual of Guidance on Public Order Management (hereinafter, 'the Manual' or 'the Manual on Public Order Management') had been finalised and approved by Inspector-General, and was awaiting validation and approval of the final draft. Once approved, all public order events must be managed in accordance with the guidance in the manual.[70] Although the level of detail in the manual is helpful in clearly defining the roles and powers of the police, several aspects of the guidance do not meet international human rights standards. For instance, in relation to using force to disperse riotous crowds, the Manual instructs the police to use 'all such force including armed force' as is reasonably necessary.[71] This language contravenes the principles of necessity and proportionality in the use of force since it gives the police broad discretion to use any kind of force, including firearms to disperse assemblies. The principle of necessity requires that only the minimum necessary force should be used to disperse an assembly if non-violent means would be ineffective.[72] Further, the force used must be proportionate to the legitimate objective to be achieved.[73] The use of firearms merely to disperse assemblies is an inherently disproportionate act and is thus prohibited under international law.[74]

The Manual also states that firearms may be resorted to if batons and tear gas prove ineffective.[75] Further, it states that when firearms are used to disperse assemblies, the police should target prominent persons in the crowd. Again, such guidances runs counter to the principles governing the use of force and firearms, and may in fact encourage the violation of the rights of assembly participants while also endangering the public.

The Manual does not include specific guidance on public order management training and public order equipment. It indicates that such guidance are contained in the 'Instructions on the Use of Armed Force in Public Disorder and Civil Disturbances Guidance, 2018' and the 'Riot Drill

[69] NPS 'Draft Manual of Guidance on Public Order Management' (2018) p. 3.
[70] n. 69, p. 4.
[71] n. 69, p. 12.
[72] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, Principle 13. Also see General Comment 37 (n. 3 above), para. 86.
[73] Basic Principles on the Use of Force and Firearms (n. 72 above), Principle 5.
[74] General Comment 37 (n. 3 above), para. 88.
[75] Manual of Guidance on Public Order Management (n. 69 above), p. 12.

and Training Guidance, 2018' which, as stated earlier, are confidential. It highlights, however, the importance of training for police officers on laws and regulations governing their conduct during public order operations.[76] It also states that riot drill parades should form part of the training of all police officers.[77] Key aspects of the Manual that have implications on how assemblies are policed are discussed next.

#### 5.5.1.1 Crowd management and crowd control

The Manual defines crowd management as 'techniques to be used to address lawful public assemblies before they begin and during the event for the purpose of guaranteeing a safe and lawful assembly.'[78] On the other hand, crowd control is defined as 'techniques used to protect lawful public assemblies and prevent unlawful assemblies or riots….'[79] Such techniques include dispersal and arrests of groups or individuals.[80] In chapter 4, it was noted that unlike international law which distinguishes between peaceful and non-peaceful assemblies, Kenyan law creates a distinction between lawful and unlawful assemblies. The latter are not protected under the Public Order Act, which is the primary statute that regulates the conduct of assemblies in Kenya. From the aforementioned definitions of crowd management and crowd control, it can be concluded that the NPS does not facilitate unlawful assemblies. Instead, the Manual instructs police officers to prevent them regardless of whether they are peaceful or not. Indeed, in practice the police routinely disrupt and disperse assemblies that are held in contravention of the Public Order Act.[81] Participants may also be arrested and prosecuted for participating in an unlawful assembly.

[76] Manual of Guidance on Public Order Management (n. 69 above), p. 4.
[77] n. 76, p. 13.
[78] n. 76, p.5.
[79] n. 78.
[80] n. 78.
[81] For instance, in August 2020 six human rights defenders who took part in a demonstration against the misappropriation of COVID-19 relief funds were arrested and charged with participating in an unlawful assembly. They were tried and found guilty of the offence. See Article 19, 'Kenya: Court judgment threatens free expression of protesters' 18 February 2022. Available at https://www.article19.org/resources/kenya-court-judgment-threatens-free-protests/. Also see T Odula, 'Kenyan police tear gas anti-corruption protesters in Nairobi' Washington Post, 21 August 2022. Available at https://www.washingtonpost.com/world/africa/kenyan-police-tear gas-anti-corruption-protesters-in-nairobi/2020/08/21/bb4cd452-e3ab-11ea-82d8-5e55d47e90ca_story.html.

#### 5.5.1.2 Procedures in relation to lawful assemblies

Lawful assemblies under Kenyan law are those that comply with the requirements of section 5 of the Public Order Act.[82] One of the foremost requirements is that the police must be notified about an upcoming assembly. While the notification requirement is not equivalent to a request for permission, in practice the police believe they must grant permission.[83] In fact, the Public Order Act allows the regulating officer to stop or prevent the holding of an assembly if there is likely to be a breach of the peace or public order.[84] In addition, the regulating officer may also inform an organiser that a proposed assembly cannot be held at the place, date, and time proposed.[85] Thus, when the Manual refers to lawful assemblies, what is contemplated are those that not only comply with section 5 of the Public Order Act, but have also been authorised by the police.

In relation to such assemblies, the Manual provides that an Operation Order[86] should be prepared in advance and must take into account the need to protect the rights and freedoms of participants, particularly the right of peaceful assembly and the freedom of expression.[87] The Operational Order should also be prepared if the police are aware of an intended event, even where notice of the same has not been issued.[88] In addition, such plans should take into account the need to protect the rights of opposing groups and the public.[89] The commanding officer of the relevant area where an assembly will be held is required to assess the potential requirements for the proper facilitation of the assembly and ensure that there are adequate personnel and

[82] For a discussion of the requirements under the Act, see section 4.3 of chapter 4 of this thesis.
[83] This observation was made by the HRCttee in its concluding observations to Kenya in 2021. See, UN Human Rights Committee, 'Concluding Observations, Kenya (CCPR/C/KEN/CO/4)' April 2021, para. 44. For a more comprehensive discussion on how the police and courts interpret the notification requirement, see section 4.6.1 of chapter 4 of this thesis.
[84] Public Order Act (n.13 above), s. 5(8).
[85] n. 84, s. 5(6).
[86] An Operation Order '…is a document that links basic information regarding an event or incident with the structure of the police response and, primarily, the operational resource requirement. Its purpose is to…coordinate the police response towards specific objectives, by describing how resources are to be deployed.' https://www.college.police.uk/app/operations/briefing-and-debriefing. For a template of an Operation Order, see Manual of Guidance on Public Order Management (n. 69 above), p. 18.
[87] Manual of Guidance on Public Order Management (n. 69 above), p. 16.
[88] n. 87.
[89] n. 87.

resources to manage the assembly.[90] The commanding officer should also engage the organisers of the assembly in the planning process.[91]

For spontaneous assemblies, an 'Appreciation Plan' is to be prepared by the police officer in charge of the area where the assembly is being held.[92] This is a plan that is promptly made to ensure proper coordination in response to spontaneous gatherings. Preparing such a plan involves assessing the nature of the gathering, determining the operational needs of law enforcement, and deciding the best course of action in response to the gathering.[93] The contents of the Appreciation Plan include, among others, a review of the situation, the objective to be achieved, factors that may affect the achievement of the objective, a plan of action detailing the command of the operation, strength of the command, their tasks and equipment.[94]

The Manual provides that where the police reasonably believe that no alternative mechanisms exist to prevent a breach of the peace then they may restrict the right of peaceful assembly.[95] As is the case with the Public Order Act, the language of the Guidance leaves the police considerable discretion in their decision whether or not to restrict the right of peaceful assembly. At the end of a public order event, the most senior officer is required to debrief the other officers and note the failures and successes of the exercise.[96] Two station commanders interviewed by the author stated that after every public order operation, a debriefing is done and a report of the event is also prepared. Whether or not the police officers actually draw lessons from past operations can be questioned. If they were indeed learning from post-event debriefings, their practice should have continually improved. However, not much has changed for the better in how law enforcement officials police assemblies in spite of the fact that for over 10 years, the NPS has been operating under the 2010 Constitution which protects the right of peaceful assembly more robustly than the repealed 1969 Constitution. Arguably, bad practice

[90] Manual of Guidance on Public Order Management (n. 69 above), p. 16.
[91] n. 90, p. 17.
[92] n. 91.
[93] For a template of a written Appreciation Plan, see Manual of Guidance on Public Order Management (n. 69 above), p. 20.
[94] n. 93.
[95] Manual of Guidance on Public Order Management (n. 69 above), p. 16.
[96] n. 95, p. 21.

has also been reinforced by statements from government officials and members of parliament appearing to dismiss concerns about excessive use of force by the police during assemblies. For example, in October 2017 a Senator sought an explanation from the Government on allegations of excessive use of force against protesters at a university in Nairobi.[97] Among the questions he raised were: why police officers responding to the protest raided students' hostels; whether the rights of the students, especially their right to be free from torture and ill treatment, were violated; and what action had been or would be taken against the police officers who violated the students' rights.[98] Responding on behalf of the Government, the Senate Majority Leader stated that the Government was not aware of any invasion of the students' hostels by the police.[99] In relation to whether the students' right to freedom from torture and ill-treatment had been violated and whether action had been taken against police officers, the response was that no one had lodged a complaint with the police regarding excessive use of force.[100] That there were serious violations by the police during the demonstrations was well documented by the media,[101] and should have been captured in debriefing reports which would have informed the Majority Leader's response. Such casual dismissals of serious concerns about excessive use of force by senior government officials can inhibit law enforcement officials' desire to learn from past failures.

#### 5.5.1.2 Procedures in relation to unlawful assemblies and riots

The language of the Manual, generally, does not tolerate unlawful assemblies. It provides for the manner in which unlawful assemblies and riots are to be dispersed and states that the means used to disperse such assemblies vary depending on the circumstances.[102] In terms of what constitutes an unlawful assembly or a riot, the Manual reproduces section 78 of the Penal Code. Under the Penal Code, where persons who have assembled for a specific purpose conduct

[97] Parliament of Kenya, The Senate, the Hansard, 30 November 2017, p. 13. Available at http://www.parliament.go.ke/sites/default/files/2017-05/Thursday_30th_November_2017.pdf.
[98] n. 97, p. 14.
[99] n. 98.
[100] n. 98.
[101] See, for example, R Rajab, 'Uproar over police brutality, as students ask IG, IPOA, VC to act' The Star Newspaper, 30 September 2017. Available at https://www.the-star.co.ke/news/2017-09-30-uproar-over-police-brutality-as-students-ask-ig-ipoa-vc-to-act/.
[102] Manual of Guidance on Public Order Management (n. 69 above), p. 24, para. 1.

themselves in a manner likely to cause other persons to fear that a breach of the peace is likely to be committed, the assembly is unlawful.[103] As per section 78(3) of the Penal Code, such an assembly becomes a riot if a breach of the peace is actually committed. As discussed in chapter 4, whether or not an action amounts to a breach of the peace is left to the subjective assessment of police officers. Disruptions that come with assemblies can be interpreted as breaches of the peace and therefore an assembly that is peaceful by international standards can be classified as a riot under Kenyan law.

The Manual directs the police to first arrest participants in an unlawful assembly or a riot before declaring an assembly as unlawful or riotous. It also provides that force may be used to disperse unlawful assemblies or riots, but the force used should be applied in a '…controlled and specified manner.'[104] Controlled force here means force that is used in accordance with the principles governing the use of force as set out in the NPS Act and the NPS Service Standing Orders.[105] The Manual further requires the police to maintain professionalism even when handling riots and unlawful assemblies, and to use persuasion and warnings where practicable before resorting to force.[106] Going by the subsequent provisions of the Manual, there is not much control expected of the police when responding to unlawful assemblies and riots.

#### 5.5.1.3 Specific guidance on the use of batons, tear gas and firearms

In the event that participants in an unlawful assembly or a riot refuse to disperse after being ordered to do so, the police can use force to disperse them.[107] The order to use force can only be made by a Gazetted officer[108] or an officer holding the rank of an Inspector. Once the order is made, the senior-most officer can determine the nature of force that is to be used. The Manual provides for a graduated use of force, but only focuses on three types: tear gas, batons and

[103] Penal Code (n. 14 above), s. 78(1).
[104] Manual of Guidance on Public Order Management (n. 69 above), p. 24, para.3.
[105] n. 104, p. 25, para. 6.
[106] n. 104, pp. 24-5, paras. 5 and 7.
[107] n. 104, p. 25, para. 8.
[108] A Gazetted Officer is defined in the National Police Service Act as '…a police officer holding the rank of an Inspector and above.' See National Police Service Act (Rev. 2016) (n. 30 above), s. 2.

firearms.[109] The provisions then gravely contravene international standards on the use of force in certain respects.

In relation to the use of tear gas, the Manual does not provide detailed guidance on circumstances when and the manner in which they can be used. It only provides that the tear gas used should not cause injuries to affected persons and should also allow them to recover from the effects. This is primarily in reference to the chemical composition of the tear gas. What this means is that once police are provided with tear gas that is not chemically potent, there are no restrictions imposed on the manner of their use. It is thus unsurprising that police officers have in the past fired tear gas into enclosed spaces where people are gathered.[110]

The Manual further states that where an assembly is large and tear gas is likely to be ineffective, the police may resort to baton charge after clearly warning the participants.[111] A baton charge may be resorted to without warning if the officer commanding an operation determines that it is not practical to issue one.[112] During a baton charge, police officers collectively advance towards assembly participants to force them towards a certain direction. It may involve only threatening the participants or actually striking them. The Manual provides that '…button (*sic*) blows should be aimed at soft portions of the body and contact with the head or collarbone should be avoided as far as practicable.'[113] It further states that the blows must not stop until the assembly has been completely dispersed.[114] Batons are typically used when police officers need to defend themselves or others against violent persons, or when arresting a person who is violently resisting arrest[115] and they can potentially cause serious injuries or death. Consequently, the use of batons to inflict physical pain should be resorted to only when strictly necessary and for a legitimate law enforcement purpose. Thus, unless an assembly participant is

[109] Manual of Guidance on Public Order Management (n. 69 above), p. 25, para. 9.
[110] For example, during a protest by University students in Nairobi, police officers pursued the students all the way to their halls of residence and threw tear gas canisters into their rooms to smoke them out. Their actions were condemned by members of Parliament who decried the habitual abuse of authority and use of excessive force by police officers. See Parliament of Kenya, The Senate, the Hansard, 30 November 2017, p. 17. Available at http://www.parliament.go.ke/sites/default/files/2017-05/Thursday_30th_November_2017.pdf.
[111] Manual of Guidance on Public Order Management (n. 69 above), p. 25, para. 9.
[112] n. 111.
[113] n. 111.
[114] n. 111.
[115] OHCHR, 'UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement' (2020), para. 7.1.2.

using violence or threatening to use violence against a police officer or another member of the public, baton strikes should be avoided.

In practice, police officers often use the batons to assault assembly participants even when the participants are not violent. In some cases, innocent bystanders who get caught up in the chaos that ensues once the police start using force also get beaten by the police. There are several examples of police in Kenya misusing batons and inflicting serious or fatal injuries on victims. For instance, in September 2017 students of a university in Nairobi started a protest over the arrest of one of their former student leaders who was at the time a member of parliament. Police officers who had been called to quell the protest started using force as soon as they got to the location of the protest.[116] Tear gas canisters were thrown at the protesters and those who were within striking distance were repeatedly hit with batons. The police even pursued protesters that were fleeing and beat up those they caught up with. There were also reports that students who had sought refuge in their hostels were removed from the hostels and assaulted with batons. A video that was circulated online depicted several police officers repeatedly striking students lying on the ground with batons as the students screamed in pain.[117] In this incident, force was being used to punish the protesters, contrary to the requirement that the use of force must be aimed at achieving a legitimate law enforcement objective.

The Manual's guidance that baton blows should not stop until an assembly has been completely dispersed also falls well short of international standards on the use of force. Essentially, the Manual seems to instruct police officers to randomly assault assembly participants for as long as they are still at the assembly site. This is reflected in practice where police officers dispersing assemblies often randomly strike anyone they come across. In one case in 2017 where police officers dispersing protesters pursued them to their homes, an infant was

[116] KNCHR, 'You got brains, we got brawn: Report of the Kenya National Commission on Human Rights on Investigations into Police Brutality Committed at the University of Nairobi on 28 September 2017' (November 2017) pp. 5–6. Available at https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20on%20Police%20Brutality%20at%20the%20University%20of%20Nairobi_2.pdf.

[117] See IPOA YouTube Channel 'IPOA says police assaulted University of Nairobi students', https://www.youtube.com/watch?v=Zu51tkOr7zw. Uploaded by IPOA, 14 June 2018.

fatally struck on her head with a baton.[118] The six-month old infant was hit when police officers repeatedly struck her mother who was holding her. Prior to the assault of the mother and her infant, the police who were searching for protesters had thrown tear gas into their home to force them out.[119] Although the Manual was not in use at the time, its contents reflect and reinforce general police practice.

Of particular concern, also, is the Manual's instructions on the use of firearms. According to the Manual, 'if the crowd fails to disperse through the button (*sic*) charge, the commanding officer may order firing.'[120] This provision is unlawful under international law which does not permit the use of firearms simply to disperse an assembly.[121] Firearms may only be used to protect a person against an imminent threat of death or serious injury and less-lethal alternatives would be ineffective, therefore making their use necessary and proportionate.[122] Although Kenyan laws on the use of firearms are more permissive than international law, the NPS Act provides an exhaustive list of circumstances under which firearms may be used by the police. The dispersal of assemblies is not one of them. The Manual's provision that that before firearms are used to disperse crowds a warning must be issued is of no consequence since any use of firearms to disperse an assembly, from the outset, fails the test of necessity and proportionality.

The Manual also provides that 'once the decision to use firearms has been taken it is essential that the volume of fire, whilst not being excessive, should from the first be sufficient to ensure that maximum effect is obtained in the shortest possible time.'[123] Further, it states that the number of shots fired is at the discretion of the police officer commanding the public order operation.[124] In addition, the Manual states that shots should be aimed at 'prominent members' of the crowd and the most threatening sections of a crowd, and once the crowd has started

[118] M Fick, 'Baby girl 'teargassed, beaten by Kenyan police' dies: doctor,' Reuters, 15 August 2017. Available at https://www.reuters.com/article/us-kenya-election-police-idUSKCN1AV1UP.
[119] n. 118.
[120] Manual of Guidance on Public Order Management (n. 69 above), p. 26, para.9.
[121] General Comment 37 (n. 3 above), para. 88.
[122] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/17/28, para. 60. Also see General Comment 37 (n. 3 above), para. 88; and ACHPR, 'Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa' (2017), para. 21.1.4.
[123] Manual of Guidance on Public Order Management (n. 69 above), p. 12.
[124] n. 123.

dispersing, the use of firearms should immediately cease.[125] Undoubtedly, these provisions violate the principles governing the use of force and firearms by law enforcement officials. They effectively give law enforcement officials permission to use firearms in situations where their use is unnecessary and disproportionate, and therefore unlawful. Once an order to fire at assembly participants is issued, there are virtually no limits on how much lethal force the police can use and against whom. Under international law, once it is determined that the use of lethal force is necessary and proportionate to the objective to be achieved, it should be targeted at the specific individual posing an imminent threat to another person's life.[126] Targeting 'prominent members' or 'the most threatening sections of a crowd' would be indiscriminate. During interviews with eight police officers from two police stations in Kisumu County in Western Kenya, the officers were asked under what circumstances they use firearms during assemblies. They indicated that firearms could be used whenever assemblies are violent. Their interpretation of violence included destruction of property, harassment of the public, the lighting of bonfires, behaving in a manner that scares the public, assault of police officers or other members of the public, and blocking roads. Echoing the guidance in the Manual, the officers stated that if a decision to use firearms was made, only prominent members of the assembly would be targeted. When asked what their understanding of prominent members of a crowd was, they invariably indicated that those would be the loudest and rowdiest people in the crowd. Seemingly, it would not matter that the prominent members of the crowd did not pose an imminent threat of death or serious injury to anyone. In a follow-up interview with three of the eight police officers on whether targeting prominent assembly participants formed part of their training, they stated that it did not, but that it was a general instruction they receive when dealing with crowds deemed to be rowdy.

Outrageous as this may seem, the Manual's guidance on the use of firearms reflects what all too often happens in practice. For example, in February 2018, students of a university in Meru County in Eastern Kenya staged a protest against their University's increment of tuition fees. Police officers who were called to disperse the protesters used tear gas, batons and firearms. It

[125] Manual of Guidance on Public Order Management (n. 69 above), p. 12.
[126] General Comment 37 (n. 3 above), para. 88.

was reported that the secretary-general of the students union, who appeared to be the organiser of the protest, was pursued by police officers and fatally shot at close range as he fled.[127] Students who also participated in the protest stated that the police seemed to be targeting their secretary-general and chairperson who were the most vocal.[128] Earlier in 2016, Human Rights Watch reported that police officers responding to demonstrations against the national electoral body fatally shot at least five people and wounded more than 60.[129] In 2017, when sections of the public protested against the results of the 2017 general election, it was reported that at least 99 people were killed, with most of them having been fatally shot and a few fatally injured after being hit with batons.[130] The National Commission on Human Rights attributed all the deaths to the police.[131]

### 5.5.2 NPS Draft Manual of Guidance on the Use of Force and Firearms

In addition to the Draft Manual of Guidance on Public Order Management, the NPS also developed a Draft Manual of Guidance on the Use of Force and Firearms in 2018 (hereinafter, 'the Guidance on Use of Force and Firearms' or 'the Guidance'). Like the Manual of Guidance on Public Order Management, the first draft of the Guidance had been finalised and approved by the Inspector-General. As of 2023, the first draft was awaiting validation by other stakeholders and final approval by the Inspector-General. The Guidance provides instructions on the use of force and firearms in various contexts and complements the NPS Act, the NPS Standing Orders, the Penal Code, the Public Order Act and other relevant legislation that provide for the use of force and firearms by the police. It focuses on various aspects of the use of force and firearms,

[127] D Manyara, 'Merciless: Student leader gunned down during protests at Meru University' The Standard Newspaper, February 2018. Available at https://www.standardmedia.co.ke/entertainment/local-news/2001271437/merciless-student-leader-gunned-down-during-protests-at-meru-university.
[128] n. 127.
[129] Human Rights Watch, 'Police Killings during Protests: Investigate Use of Excessive Force in Western Region' HRW News, 20 June 2016. Available at https://www.hrw.org/news/2016/06/21/kenya-police-killings-during-protests.
[130] KNCHR, 'Report to the Committee Against Torture on the Review of Kenya's Third Periodic Report on the Implementation of the Provisions of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and/or Punishment' February 2020, p. 15, para. 32. Available at https://www.knchr.org/Portals/0/KNCHR%20Altrenative%20Report%20on%20Implementation%20of%20The%20CAT.pdf.
[131] n. 130.

including principles governing the use of force and firearms, the prevention of abuse of firearms and accountability for the use of force and firearms.

The Guidance recognises the powers of the police to use force and firearms in the performance of their duties but emphasises their obligation to respect and protect human rights.[132] It further states that while the nature of the work of the police necessarily requires them to exercise discretion on the use of force, such discretion must be exercised within the confines of the law.[133] In particular, the use of force and firearms must in all circumstances be guided by the principles of legality, necessity, proportionality and accountability.[134] Unlike the Manual on Public Order Management, the Guidance specifically states that firearms should only be used where there is a serious threat of death or serious injury.[135] In a departure from provisions in the NPS Act, the Guidance provides that 'the mere fact a person flees from arrest or escapes from custody does not justify the use of a firearm, unless the person in question presents an ongoing grave threat to the life of another person that can be realized at any time.'[136] The Guidance further requires police officers to exercise precaution with a view to preventing the loss of life whenever they use firearms. To this extent, the Guidance better reflects international standards on the use of firearms. However, given that it contradicts the Manual on Public Order Management, its protective standards may not be relied on in the context of public order management. This is because police officers are more likely to rely on the Manual which specifically addresses public order situations and not the Guidance, which is more generalised.

The Guidance also provides for police accountability for the use of force and firearms. It clarifies that the execution of unlawful orders does not exempt an officer from liability for the unlawful use of force and firearms.[137] Further, it states that liability may extend to a commanding officer who issued an unlawful order or failed to prevent the unlawful use of force.[138]

[132] NPS Draft Manual of Guidance on the Use of Force and Firearms (2018), p. 5.
[133] n. 132, p. 8.
[134] n. 132, pp. 8–9.
[135] n. 132, p. 10.
[136] n. 135.
[137] n. 135.
[138] n. 132, p. 11.

Commanders may also be held accountable for failing to take action against police officers under their command who use force unlawfully.[139]

In relation to assemblies, the guidelines provide that police officers should always be guided by the objective of facilitating assemblies and should work towards preventing the need to resort to the use of force.[140] The Guidance further provides that police officers should have in place precautionary measures for both planned and spontaneous police operations,[141] including assemblies. Among the measures outlined include: gathering relevant intelligence; anticipating scenarios and making plans to intervene appropriately and lawfully; providing police officers with protective equipment and weapons that allow for a differentiated response; and ensuring the availability of medical assistance.

Specific provisions on the use of force during assemblies to a great extent reflects international standards. First, the Guidance provides that as a general rule, force should not be used during assemblies unless the police are apprehending those committing criminal offences or preventing an assembly from taking place.[142] Further, the guidelines provide that force should not be resorted to merely because an assembly is unlawful; instead there must be compelling reasons to use force.[143] Moreover, where force has to be used, the police must distinguish between peaceful participants and participants engaged in violence or other criminal offences.[144] Force should only target violent participants. According to the Guidance, the fact that some assembly participants are violent is not sufficient reason to render an entire assembly violent and use force against all participants.[145] In addition, before using force, police must consider that any use of force can escalate tensions in an assembly and make it more volatile. Restraint should therefore be exercised and where appropriate, a tactical retreat should be used as an option.[146] Again, these provisions completely contradict those of the Manual on Public Order Management.

[139] Manual of Guidance on the Use of Force and Firearms (n. 132 above), p. 11.
[140] n. 139, p. 12.
[141] n. 139, p. 11.
[142] n. 139, p. 12.
[143] n. 142.
[144] n. 142.
[145] n. 142.
[146] n. 142. The Guidance states that Operation Orders must provide for the option of retreating if the harm that may be caused by continued use of force outweighs the benefit of achieving the objective sought by the police.

While the Manual seems to focus on escalation of force from tear gas to batons to firearms and instructs officers to use force and firearms until their objective is achieved, the Guidance on Use of Force and Firearms carefully restricts the use of force and firearms and emphasises the need for de-escalation. Further, while the Manual does not leave room for facilitation of unlawful assemblies, the Guidance lays emphasis on the need for police officers to be guided by the objective of facilitating assemblies provided that they are peaceful.

The rest of the Guidance outlines the protocols in relation to the issue, care and maintenance, safe custody and storage of firearms. The disciplinary measures to be taken when police officers abuse or misuse firearms are also outlined. The penalties listed for unlawful use of force are mainly administrative sanctions and do not include the institution of criminal proceedings.[147] Nevertheless, the Guidance provides that where investigations establish that a criminal offence was committed, the investigation file should be forwarded to the Office of the Director of Public Prosecutions for further action.[148] In general, the standards in the Guidance on the policing of assemblies comply with international standards.

### 5.5.3 Remarks on the potential implications of the Drafts on the policing of assemblies

The Manual on Public Order Management and the Guidance on the Use of Force Firearms were both drafted in 2018 by the NPS, yet, as already highlighted above, they have sharply contradicting guidance on the use of force and firearms in the context of public order management. One may argue that the retrogressive provisions in the Manual are cured by the provisions of the Guidance on the Use of Force and Firearms which comply with international law. However, as stated before, the Manual on Public Order Management is specifically tailored for public order operations. Consequently, it would be the more likely reference document for the NPS in the context of policing assemblies.

Admittedly, given the practice of the police as illustrated in some of the examples given above of incidents of unlawful use of force and firearms by the police, nothing contained in the Manual is new. It only serves to reinforce unlawful practices of the police in the context of

[147] Manual of Guidance on the Use of Force and Firearms (n. 132 above), p. 23.
[148] n. 147, p. 24.

assemblies. A combination of the Manual and the NPS Act, the NPS Service Standing Orders, the Public Order Act and the Penal Code, all of whose problematic provisions were discussed in chapter 4, create an environment that does not support the effective exercise of the right of peaceful assembly. In particular, the immense powers police have to use force and firearms in Kenya create room for serious violations to be committed especially against the right to life, the freedom from torture and ill-treatment and the right of peaceful assembly. The procedural aspect of the right to life requires States to ensure that they have clear domestic laws and regulations governing the use of lethal force.[149] Such laws and regulations must comply with international standards. Hence, any loss of life resulting from the use of firearms based on the retrogressive guidelines in the Manual on Public Order Management can be considered arbitrary.

The 'Instructions on the Use of Armed Force in Public Disorder and Civil Disturbances 2018' and the 'Riot Drill and Training 2018', which are confidential documents, may, it is feared, contain worse provisions. They should be made public. Otherwise, applied together with the Manual on Public Order Management, the use of excessive force during assemblies will in all likelihood continue to define interactions between the police and assembly participants.

### 5.6 Operational structures for the policing of assemblies in Kenya

In order for assemblies to be policed in a way that is human rights compliant, certain operational structures should be in place to enable the police meet the required standards. These include proper training of police officers; advance planning; pre-deployment briefings; provision of public order equipment; effective command and control of public order operations; and post-event management and review.[150] This section analyses each of these aspects in relation to the NPS and assesses to what extent the NPS enables its officers to police assemblies within international human rights standards. The structures the NPS has in place are also compared against

[149] UN Human Rights Committee, 'General Comment 36: Article 6 (The Right to life)' 2018, CCPR/C/GC/36, para. 13; Also see, ACHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 10.

[150] See General Comment 37 (n. 3 above), paras. 76-7 and 80-1; Joint report on the proper management of assemblies (n. 5 above), paras 42, 49, 52-4, and 65; ACHPR, Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), paras 5, 7, 9-12, 21.3.1, 14 and 24; and OSCE/ODHIR, Guidelines on freedom of peaceful assembly (3rd Edition, 2019), paras. 158, 161-2, 164 and 184.

international standards that are mainly drawn from instruments within the UN human rights system and the regional human rights systems.

### 5.6.1 Training

In General Comment 37, the HRCttee states that only law enforcement officials who have been trained on the policing of assemblies should be involved in such operations.[151] According to the African Commission on Human and Peoples' Rights (hereinafter, 'the African Commission'), such training should include, among others: the content of the right of peaceful assembly and the general human rights framework; soft skills, such as communication skills and negotiation; conflict management; risk mitigation; the use of force and firearms, including the use of specific lethal and less-lethal weapons; the protection of vulnerable groups; and internal and external accountability mechanisms.[152] The training should be regular and continuous.[153]

From interviews held with 8 NPS officers, it was established that in Kenya, training on public order management is done during the initial training course for all police officers. This is usually at the recruitment stage and the training is both class-based and scenario-based. It was also stated that the NPS also organises refresher courses that have aspects on public order management, though only to a limited extent. According to the officers interviewed, there is only limited focus on training on soft skills such as mediation and negotiation.

Since no interview was conducted with any of the officials of the police training institutions in Kenya, the current practice in relation to training of police officers could not be sufficiently ascertained. However, it is telling that of the 6 junior police officers interviewed, the only training on public order management they had undertaken was the training they participated in during their induction course. One officer interviewed who had been in the police service for more than 20 years had only been trained once, even though he had participated in several public order management operations. Over that period, there had been developments at

[151] General Comment 37 (n. 3 above), para. 80.
[152] ACHPR, Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), para. 7.2.
[153] n. 152, para. 7.2.

the national and international level around the protection of the right of peaceful assembly and the right to life, which the officer was largely unaware of.

It is also possible that the General Service Unit and the Rapid Deployment Unit have specialised training in public order management, given their specific role in riot control. Though the content of their training is not available for public scrutiny, concerns have been expressed about the nature of their training. In a monitoring report on police handling of demonstrations in 2016, IPOA noted that officers from the General Service Unit were particularly violent. It observed that the nature of their training appeared to reinforce a negative attitude towards the public.[154] Taking note of past and subsequent large assemblies where the General Service Unit was involved and which resulted in several cases of deaths and serious injuries, this observation appears to be accurate. IPOA's observation was further confirmed in December 2021 when new General Service Unit graduates were captured in a video threatening the public.[155] In the video, the graduates make statements to the effect that they were the 'bad ones' and they were coming out.[156] Condemning the graduates, the NPS termed the statements as reckless and assured the public that they did not represent the values of the NPS.[157] Still, the video said a lot about the attitudes instilled in the General Service Unit officers during training. In a way, it explained why documents touching on their training and use of force are kept strictly confidential. The public and expert observers should be invited to witness actual police training sessions.

As explained earlier in the chapter, the various units in the NPS are trained in different institutions. In cases of large assemblies, police officers are usually drawn from any of the units. Consequently, their response to assemblies may not be uniform if their training is different.

### 5.6.2 Advance planning

As discussed in previous chapters, States generally have domestic laws that require assembly organisers to notify authorities before holding assemblies. According to the HRCttee, notification

[154] IPOA, 'Monitoring Report on Police Conduct during Public Protests and Gatherings' (2017), at p. 13. Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf.
[155] M Juma, 'Kenya police recruits brag: 'We are the bad ones,' BBC News, 9 December 2021. Available at https://www.bbc.com/news/world-africa-59598455.
[156] n. 155.
[157] n. 155.

should not be required for assemblies whose impact are expected to be minimal.[158] In Kenya, no such exception is provided for in law. The purpose of the notification requirement should be to enable law enforcement authorities to make advance plans to ensure the safety of participants and the public.[159] Planning in advance is also a means through which the principle of precaution in relation to the use of force and firearms can be met. Assemblies that consist of small crowds and last a short time generally cause little to no inconvenience to the rest of the public, and therefore not much planning would be required of State authorities. However, such assemblies may still require facilitation and protection and therefore States should plan in advance for any eventuality. In the case of assemblies where large crowds are anticipated, the need for advance planning is crucial. In their joint report on the proper management of assemblies, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions recommended that States should have in place '…consistent planning approaches for all assemblies that follow a model based on assessing threat and risk and that incorporate human rights laws and standards….'[160] To be able to do a thorough risk assessment, police officers would need information on the approximate number of participants expected, the location and time of the assembly, and the purpose of the assembly. Such information can enable the authorities make decisions on the number of law enforcement personnel required, the equipment they need, the steps that should be taken to facilitate the assembly and any other measures that may be required to facilitate and protect the assembly.[161] This is information that police officers can obtain from organizers during the planning process.

Kenya's Public Order Act requires organisers of assemblies to submit to the police notices specifying their names and addresses, the date and time of the assembly, and its planned location.[162] Once they receive the notice, law enforcement officials should establish clear channels of communication with the organisers and make the necessary plans to facilitate the

[158] General Comment 37 (n. 3 above), para. 72.
[159] n.158, para. 70.
[160] Joint report on the proper management of assemblies (n. 5 above), para. 49 (b).
[161] OSCE/ODHIR, Guidelines on freedom of peaceful assembly (3rd Edition, 2019), para. 161.
[162] Public Order Act (n. 13 above), s. 5 (3).

assembly. This would help in designing effective responses to any eventualities that may arise. Engagement with organisers should be collaborative and continuous communication should be ensured in order to facilitate the effective policing of assemblies. As for assemblies where no notification was issued, and therefore the opportunity to engage with organisers before the assembly is lost, authorities should nevertheless strive to communicate with the participants or their apparent leaders during the assembly.

In practice, communication between the police and organisers is usually limited. In an interview with IPOA's Director of Inspections, Research and Monitoring,[163] he indicated that interactions between police officers and organisers of assemblies are in most cases limited to depositing of notifications followed by the granting or denial of permission to proceed with the assembly.[164] He further stated that, provided that police officers are aware of a planned assembly, commanding officers are required to prepare operation orders that contain, among others, the areas to be covered, the number of officers to be deployed in specific areas, the equipment required, the mode of dress, and command and control of the operation. This obligation was also highlighted by the two station commanders who were interviewed.

In relation to spontaneous assemblies, law enforcement agencies are required to have a generic contingency plan to guide such operations.[165] While precautionary measures do not have to be perfect, States will be required to demonstrate that they did everything possible to minimise risk and enhance protection of assembly participants and the public.

### 5.6.3 Briefing and Deployment

Prior to their deployment, police officers must be adequately briefed on the operational plans, risk assessment and what is expected of the deployed officers.[166] Regarding the NPS practices, an official from IPOA observed that police officers do not ordinarily have adequate briefings

[163] This is the directorate that monitors police operations affecting the public.
[164] Note that the Public Order Act does not require organizers to seek permission from the police. However, as explained in chapter 4, the police generally interpret the notification requirement as a requirement for authorisation.
[165] General Comment 37 (n. 3 above), para. 77.
[166] ACHPR, Guidelines for the Policing of Assemblies (n. 152 above), para. 12.5.

whenever they are deployed to police assemblies.[167] Consequently, they may get to an assembly armed but unprepared. Without prior information on risk assessment or what to expect, the officers may overestimate the risk to themselves and the public. In most cases, their immediate response would then be to disperse the assembly. This was demonstrated in the manner in which police officers reacted to countrywide demonstrations against the Independent Electoral and Boundaries Commission in 2016. In its monitoring report, IPOA noted that there had been several cases of excessive use of force, harassment of demonstrators and general police brutality against protesters and in a few cases, bystanders.[168] During their investigations, IPOA learnt that the police officers who were involved had not been briefed at all prior to deployment.[169] It also observed that, instead of facilitating the peaceful conduct of the assemblies, the approach of the police was to immediately use force to disperse the protesters.[170] This led to violent confrontations between the two groups. Ultimately, at least four people were fatally shot and at least 60 wounded by gunfire.[171] Arguably, the complete absence of pre-deployment briefing for the police officer involved contributed to their mishandling of the protests.

In terms of deployment, any police officer can be involved in the policing of an assembly. Where an assembly is to be held in a particular area, the officer in charge of the police station in the area may deploy an adequate number of general duty police officers to police the assembly. In the restructured NPS where general duty Kenya Police Service officers have been integrated with general duty Administration Police Service officers, the officers deployed may be from both the Kenya Police Service and the Administration Police Service. Where a large assembly is anticipated, police officers from the General Service Unit and the Rapid Deployment Unit may also be deployed. Nevertheless, whenever officers are drawn from various units of the NPS to support in the policing of assemblies, the senior-most police officer in the affected area commands the entire operation. Before deployment, the commanding officer must have done an assessment to determine the resource needs for a particular operation in order to ensure that

[167] Interview with IPOA Director of Inspections, Research and Monitoring held virtually on 20 May 2021.
[168] IPOA, Monitoring Report on Police Conduct during Public Protests (n. 154 above), p. 8.
[169] n. 168, p. 22.
[170] n. 168, p. 8.
[171] n. 168, p. 15.

an adequate number of officers are deployed and appropriate public order equipment is available.

A station commander who was interviewed stated that the contingent of police officers deployed is usually divided into three teams. Two teams are usually in police uniform while one special team is usually in civilian clothes. The objective of the civilian team is to gather intelligence, identify leaders within an assembly and relay relevant information in real time to the officer commanding the operation. The practice of having police in civilian clothes penetrate an assembly is not always appropriate. According to two UN Special Rapporteurs, '…the use of undercover officers is highly intrusive and carries a high risk of rights violations and therefore should not be allowed unless reasonable grounds exist to suspect that a serious criminal act is likely to be committed.'[172]

### 5.6.4 Public order equipment

Law enforcement officials involved in the policing of assemblies must be properly equipped with appropriate less-lethal weapons and protective equipment.[173] In the absence of less-lethal weapons, law enforcement officials can easily resort to the disproportionate use of lethal force. The duty to equip the police with less-lethal weapons has been emphasised in various contexts. For example, in *Simsek v. Turkey,* a chamber of the European Court held that police officers must have access to a range of equipment to manage public order. It noted that the absence of such equipment would mean the police have to resort to lethal force in circumstances where less-lethal weapons may have been more appropriate.[174] Less-lethal weapons may also have fatal consequences if used inappropriately. Consequently, their use should be restricted to officers who have been trained on how and when to use them.[175]

As per the Manual on Public Order Management, standard public order equipment include: steel helmets, shields, respirators, riot batons, gas pistols, cartridges, riot guns,

[172] Joint report on the proper management of assemblies (n. 5 above), para. 77.
[173] General Comment 37 (n. 3 above), para. 81.
[174] ECtHR, *Simsek and others v. Turkey*, App. nos. 35072/97 and 37194/97, 26 July 2005, paras. 108, 109 and 111.
[175] Joint report on the proper management of assemblies (n. 5 above), para. 55.

grenades, tear gas, first aid boxes, pistols, rifles, and weapons firing rubber bullets.[176] In an interview with the director of inspections, research and monitoring at IPOA, it was indicated that police officers involved in assemblies are ordinarily armed with batons, tear gas and firearms. However, firearms are not usually issued to all the officers. The number of officers issued with firearms depends on the scale of an assembly and the risk of violent conduct by participants.[177]

In terms of protective equipment, police officers involved in assemblies are required to have shields, helmets and protective clothing. However, IPOA has observed that most officers are not provided with adequate protective equipment. Police officers who were interviewed also stated that protective equipment were inadequate. If such equipment are not provided, the police could easily resort to the use of force in the event that they are faced with a threat.

#### 5.6.5 Command and control

It is important for law enforcement agencies to put in place clear command structures for the policing of assemblies.[178] This not only ensures effective command and control of public order operations but also enhances accountability. The responsibilities of officers within a single chain of command should also be clearly defined.[179] A police officer commanding a public order operation is under an obligation to ensure that the operation is commanded with a view to enhancing the protection of fundamental rights and freedoms.[180] They must also ensure that officers are provided with orders that contain clear instructions on dealing with different kinds of situations and the need to avoid the use of force must be emphasised.

According to the Manual on Public Order Management, the command of a public order event lies with the most senior officer in the area where the event is held.[181] This is determined by the magnitude of the event.[182] At the lowest level, the command of an operation lies with the station commander of the relevant area. If the assembly spills over to a bigger area than a police

[176] Manual of Guidance on Public Order Management (n. 69 above), pp. 8-9.
[177] Interview with NPS official held in Kisumu, Kenya on 13 August 2021.
[178] General Comment 37 (n. 3 above), para. 77. Also see, Joint report on the proper management of assemblies (n. 5 above), para. 65.
[179] ACHPR, Guidelines for the Policing of Assemblies (n. 144 above), para. 5.1.
[180] NPS Service Standing Orders (n. 49 above), chapter 58, para. 1.
[181] Manual of Guidance on Public Order Management (n. 69 above), p. 21.
[182] n. 181.

station's jurisdiction, the immediate superior of the station commander is required to command the operation. Command may then be cascaded to the County Police Commander, the Regional Police Commander, the Deputy-Inspector General, and finally to the Inspector-General where necessary.

As discussed before, under the Public Order Act the responsibility to regulate assemblies lies with police station commanders. Thus, though the NPS has three different components (Kenya Police Service, Administration Police Service and Directorate of Criminal Investigations) with different chains of command, the applicable chain of command in the context of assemblies would be that of the Kenya Police Service, under which police station commanders fall. In the event that police officers are drawn from units within the Administration Police Service or the Directorate of Criminal Investigations, they should operate under the overall command of the most senior police officer within the Kenya Police Service's command structure, depending on the scale of an assembly.[183]

From past experiences, command and control of public order operations that involve police officers from across the three components of the NPS has not always been effective. For example, following the protests that ensued across Kenya after the release of the results of the 2017 presidential elections, police officers from the various units within the Kenya Police Service and the Administration Police Service were deployed to suppress the protests.[184] Excessive force was used, leading to several deaths and serious injuries.[185] An inquest was instituted to investigate culpability for the death of a six-month-old infant in Kisumu County in Western Kenya.[186] From the evidence of the police officers who testified, it was apparent that there was no clear command and control of the public order operations. While there was an operation order prepared by the County Police Commander who had the overall command of the operation, the operation had been divided into sectors (areas to be covered) which had their separate

[183] Interview with NPS official held in Kisumu, Kenya on 13 August 2021.
[184] Human Rights Watch & Amnesty International, '"Kill Those Criminals" Security Forces Violations in Kenya's August 2017 Elections' 2017, p. 1. Available at https://www.hrw.org/sites/default/files/report_pdf/kenya1017_web.pdf.
[185] n. 184.
[186] Chief Magistrate's Court at Kisumu, *In the Matter of Baby Samantha Pendo*, Inquest No. 6 of 2017 (unreported).

commanders.[187] One sector commander denied knowledge of the operation order that deployed her to a particular area and placed her as the commander of the operations in the area.[188] Another senior officer also denied knowledge of the operation order that placed him in command of officers deployed at another area and testified that he was in his house at the time of the protests.[189] That persons who were charged with the responsibility of commanding operations in particular areas did not know that they had those responsibilities was a significant lapse in command and control of the operations. In the absence of a clear command, the likelihood of police officers committing human rights violations rose.

#### 5.6.6 Post-event debriefing and review

In their 2016 report on the proper management of assemblies, two UN Special Rapporteurs recommended that law enforcement agencies should ensure that '…post-event debriefing mechanisms for assemblies are established permanently to facilitate learning and ensure the protection of rights.'[190] The debriefing process should include an evaluation of the operation as a whole, identification of failures and successes of the police response, the effectiveness of the operational plans, an evaluation of the use of force, the safety and welfare of the police officers, and future training requirements.[191] The African Commission has recommended that the debriefing report should be publicly accessible.[192]

The NPS Service Standing Order requires operation commanders to hold a debriefing exercise after every public order operation.[193] As confirmed by the police officers who were interviewed, this happens in practice. One station commander stated that a report is usually prepared by the station commander and shared with other senior police officials. The report normally includes any incidents of note, such as deaths or serious injuries to assembly participants, police officers or other members of the public. It also analyses any gaps in the police response to an assembly. Contrary to the recommendation of the African Commission, the

[187] *In the Matter of Baby Samantha Pendo* (n. 186 above), p. 10.
[188] n. 187, p. 12-3, testimony of prosecution witness number 15.
[189] n. 187, p. 13, testimony of prosecution witness number 16.
[190] Joint report on the proper management of assemblies (n. 5 above), para. 49(e).
[191] ACHPR, Guidelines for the Policing of Assemblies (n. 152 above), para. 24.1.
[192] n. 191, para. 24.2.
[193] NPS Service Standing Orders (n. 49 above), Chapter 58, para. 4.

debriefing reports of the NPS are not publicly accessible. The fact that the police response to assemblies has arguably not improved for several years suggests that the debriefing exercises may not in fact be effective.

### 5.6.7 Oversight and accountability

States have a responsibility to ensure accountability for any violations that may occur in the context of assemblies.[194] As one of the steps towards enhancing accountability, law enforcement agencies must ensure that law enforcement officials involved in policing assemblies have their identifications clearly displayed in their uniforms.[195] States should also establish independent and accessible oversight and accountability mechanisms.[196]

The formal accountability infrastructure in Kenya includes both internal and external accountability mechanisms. Internally, the NPS has the Internal Affairs Unit[197] which is a quasi-independent accountability mechanism whose staff are members of the NPS. The Deputy Director of the Internal Affairs Unit who was interviewed stated that although the Inspector-General has overall command over the Unit, operationally it works independently. The Unit's primary function is to receive and investigate complaints against members of the NPS.[198] It does not monitor police operations and only get involved if the operations give rise to complaints. In addition to the Internal Affairs Unit, the NPS's command structure also serves as an accountability mechanism, with superior officers expected to exercise oversight over their juniors. In the context of an assembly, operation commanders have a responsibility to control and prevent their juniors from committing human rights violations.[199] They may be held liable if they knew or ought to have known that police officers under their command would commit or had already committed violations but failed to take measures to prevent them or take action against the offenders.[200]

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[194] General Comment 37 (n. 3 above), para. 89.
[195] n. 194.
[196] ACHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 16.
[197] Established under s. 87 of the NPS Act.
[198] NPS Act (rev 2016) (n. 30 above), s. 87(4).
[199] Joint report on the proper management of assemblies (n. 5 above), para. 91.
[200] n. 199.

In 2011, the Independent Policing Oversight Authority was established through an Act of Parliament and it started its operations in 2012. One of its key objectives is to ensure accountability of police officers in the performance of their functions.[201] Its functions include investigating complaints against the police and monitoring police operations that affect members of the public.[202] Whenever an incident involving a death or serious injury resulting from contact with the police occurs, a superior police officer is under a legal obligation to notify IPOA about the incident.[203] This does not, however, happen regularly. The number of notifications from NPS to IPOA has consistently reduced: from 162 in 2013 to none in 2020.[204] Given its limited physical presence across Kenya, members of the public cannot easily access IPOA's offices to report violations. Even in cases where IPOA is notified or otherwise becomes aware of deaths in the context of assemblies, securing accountability still remains a challenge. For instance, in relation to deaths and serious injuries in the context of protest suppression by police after the 2017 elections, no police officer was prosecuted. As stated earlier, an inquest into the death of one infant was held. However, in spite of the Court's finding in 2019 that the NPS was culpable for the death, no prosecution had been instituted as of 2022. In an interview with IPOA's head of Complaints and Legal Directorate, he was asked whether any police officer had been charged and prosecuted for deaths or serious injuries resulting from police action during assemblies. He stated that there had been none since IPOA's establishment in 2011.

### 5.7 Analysis of operational gaps and consequential human rights implications

As seen in the discussion above, both the internal policy guidelines and the practices of the NPS have shortcomings that affect how law enforcement officials in Kenya police assemblies. To begin with, in relation to training on public order management, it was established that the training is not regular. While the NPS organises in-service refresher courses, some police officers do not

[201] IPOA Act (n. 65 above), s. 5(a).
[202] n. 201, s. 6(a) and (c).
[203] NPS Act (rev 2016), Sixth Schedule, Part A, para. 5.
[204] T. Probert et al., 'Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action' (CHRIPS, October 2020), p. 24. Available at https://www.chrips.or.ke/wp-content/uploads/2020/12/Strengthening-policing-oversight-and-investigations-in-Kenya.pdf. Also see IPOA Performance Report, January - June 2020. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Performance-Report-Jan-June-2020-Web.pdf; and IPOA Performance Report, July-December 2020. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/08/IPOA-Performance-Report-July-Dec-2020-Web.pdf.

benefit from such courses yet they are still involved in the policing of assemblies. The NPS has recognised the gap in training, and in October 2021, it announced plans to conduct comprehensive training for police officers on the use of less-lethal weapons in public order operations.

Another gap that was noted is the absence of mechanisms to facilitate communication and dialogue between assembly organisers and law enforcement authorities before an assembly. This denies the organisers and the police an opportunity to address any issues that may have a bearing on how an assembly will be managed and any interventions that may need to be put in place after being agreed upon by the parties. In certain jurisdictions, such as South Africa, there is a legal obligation on the part of the authorities to consult with organisers on the need for negotiations on how an assembly is to be conducted once they receive a notice.[205] If, after consultations, the authorities are of the view that the planned gathering can proceed as indicated in the notice, then negotiations are not held.[206] However, if it is determined that negotiations are necessary, the responsible law enforcement authorities are required to convene a meeting with the organisers and other stakeholders to discuss the relevant issues.[207] Such an engagement with organisers provides an opportunity to gather relevant information that enables the police to put in place adequate plans to facilitate an assembly and protect participants and the public. Proactive engagement of organisers does not only aid in facilitation of the assembly but it also helps reduce tension between law enforcement officials and the participants and organisers, thereby reducing the likelihood of police resorting to the use of force.

From the observations and monitoring reports of IPOA, reports from the media and interviews with police officers, law enforcement officials involved in policing assemblies are usually equipped with batons, tear gas and a section of them are armed with firearms. The general view shared by the officers interviewed was that the equipment is not adequate. A station commander observed that water cannons are also available but not easily accessible since armoured water cannon trucks are few and are kept in Nairobi. They are only deployed to other

[205] Regulation of Gatherings Act, 1993 (Act 205 of 1993), s. 4.
[206] n. 205, s. 4(2)(a).
[207] n. 205, s. 4(2)(b).

parts of the country if large assemblies are anticipated. He suggested that water cannon trucks should be made easily accessible especially to officers in areas known to be hotspots for large assemblies. Other equipment said to be inadequate but necessary are temporary barriers to limit movement of assembly participants and Tasers, which could be used in place of weapons that are more lethal, in particular firearms. In addition, it is not in all cases that the police involved are kitted in full protective gear such as shields, helmets, gas masks and bullet-proof jackets. It was stated that the extent to which protective equipment are issued depends on the level of threat anticipated. Still, in practice, police officers do not usually have adequate protective equipment even when dealing with volatile situations. This therefore increases the likelihood of them resorting to the use of force and firearms.

Yet another challenge is poor command and control of operations and inadequate or a complete lack of pre-deployment briefings. In some cases, officers are deployed without prior briefing,[208] and this may include officers who have not been adequately trained on public order management. In effect, this enhances the possibility of officers reacting inappropriately or unlawfully to incidents that may occur during an assembly. Poor communication is also a factor that has impeded effective command and control of operations. Police officers who were interviewed indicated that communication gadgets are not in adequate supply and therefore they rely mainly on the information shared during pre-deployment briefings.

As stated earlier, there are both internal and external police oversight mechanisms. Oversight by the IAU can be said to be generally limited since the Unit does not monitor police operations. Under the NPS Act and IPOA Act, the NPS is under an obligation to notify IPOA about any deaths or serious injuries resulting from police action. However, as explained earlier, the NPS has not been complying with this obligation, and this means that most incidents go unaddressed. In addition, as observed by officials from IPOA, the NPS habitually does not share its operational orders with IPOA for purposes of scrutiny and accountability. Another hindrance to accountability is the fact that police officers clad in riot gear are usually unidentifiable. This may embolden them

[208] IPOA, Monitoring Report on Police Conduct during Public Protests (n. 154 above), p. 8.

to use force liberally. In addition, it makes individual accountability of officers difficult. The problems with the existing accountability mechanisms will be discussed further in chapter 6.

### 5.8 Conclusion

The objective of this chapter was to analyse the organisational and operational structures of NPS and assess how they influence the manner in which assemblies are policed in Kenya. It established that in addition to restrictive public order laws and overly permissive laws on use of force and firearms, the NPS's internal policies and operational arrangements contribute to the violation of human rights by police officers during assemblies.

Through a brief overview of selected police responses to assemblies in the past, the chapter highlighted the fact that the use of excessive force by police officers during assemblies in Kenya was common. It was observed that, although there had been several legislative changes and spirited efforts to reform the institution of the police, not much had changed in terms of how assemblies are policed in Kenya. Through an analysis of two internal policy guidelines of the NPS and its operational structures, the chapter explained why this was the case.

After setting out the organisation and command structure of the NPS, the chapter analysed the Manual on Public Order Management and the Guidance on Use of Force and Firearms. Both documents were drafted by the NPS to complement the Public Order Act, the NPS Act, the Penal Code and other laws relevant in the context of public order management. It was noted that the Manual on Public Order Management had very retrogressive guidelines on the use of force and firearms, which fell short of both domestic and international standards. For example, the Manual provides that when dispersing an assembly, the operational commander may order police officers to fire at participants if tear gas and batons have failed to achieve the set objectives. It further instructs the police to fire at 'prominent' members of a crowd or the most threatening section of the crowd. Under international law, the use of firearms can only be justified if the objective is to protect a person from an imminent threat of death or serious injury, and only if less-lethal alternatives would be ineffective. The broad discretion to use firearms that the Manual gives police officers can be easily abused. On the other hand, the Guidance on the Use of Force and Firearms was found to be largely compliant with international standards on the

use of force and firearms. Although these documents are still in draft form, it was observed that their contents are already reflected in the practice of the police. It is telling that the NPS would develop and the Inspector-General would approve a first draft of a document whose provisions have the potential to greatly suppress assemblies and jeopardise the right to life and the freedom from torture and ill-treatment.

The chapter also discussed the NPS's operational structures for the policing of assemblies. It focused on training, advance planning, briefing and deployment, public order equipment, command and control of operations, post-event debriefing and oversight and accountability. Drawing on information from interviews conducted with IPOA officials and NPS officials as well as secondary sources, a number of observations were made. For example, it was noted that police officers are not regularly trained on public order management. For some, the only training received was the initial training undertaken during their recruitment. Consequently, they were mostly ill-equipped to police assemblies within human rights standards. In relation to pre-deployment briefings, it was noted that there are cases where police officers are deployed without having been briefed. Other issues that were noted include lack of adequate public order equipment, including less-lethal weapons and protective equipment, ineffective command and control especially in cases where police officers are drawn from various units of the NPS, and lack of mechanisms for effective communication and dialogue between police officers and organisers. Taken together, these gaps in the operational arrangements of the NPS leave room for human rights violations, especially through the use of excessive force.

In an environment where violations in the context of assemblies may thrive, the need for strong redress and accountability mechanisms cannot be overemphasised. In the next chapter, the existing accountability mechanisms in Kenya are assessed and their shortfalls explained.

# Chapter 6: Accountability of Law Enforcement Officials for the Use of Force during Assemblies in Kenya

## 6.1 Introduction

In chapters 4 and 5, it was shown that the Kenyan legal framework on the right of peaceful assembly and on the use of force by law enforcement officials, as well as the operational structures within the National Police Service for the policing of assemblies, create an enabling environment for human rights violations during assemblies. Consequently, cases of police use of excessive force leading to loss of lives and serious injuries to assembly participants in Kenya have been common.[1] This has been the case particularly in assemblies involving large numbers of participants and those that pursue causes deemed to be hostile to the Government or the police, regardless of the size of the assembly.[2]

One of the international legal principles governing the use of force by law enforcement officials is accountability. It is expected that whenever the use of force during an assembly results into breaches of the human rights of the participants, accountability has to be ensured. In Kenya, there has been a consistent failure by the State to hold the police accountable for human rights violations committed during assemblies.[3] Indeed, even in other policing contexts where police officers have been accused of causing deaths or serious injuries as a result of the use of force, there has still been an accountability gap. However, there are several examples of cases where

[1] In research on the right to protest conducted by Article 19 in 2022, it was observed that police officers routinely use violence against protesters. A similar observation was made by the same organization in a 2019 report. See Article 19, 'Kenya: Restricting the Right to be Heard' (October 2022), available at https://www.article19.org/wp-content/uploads/2022/11/A19-Protests-Under-Threat_KENYA_FINAL-27-Oct.pdf and Article 19: Right to Protest in Kenya (September 2019), at p.20, available at https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf. The UN Human Rights Committee has also routinely expressed concern about excessive use of force against assembly participants.

[2] Article 19, 'Kenya: Restricting the Right to be Heard (October 2022), p. 30. Available at https://www.article19.org/wp-content/uploads/2022/11/A19-Protests-Under-Threat_KENYA_FINAL-27-Oct.pdf.

[3] The State failure to hold police accountable has been noted by the UN Human Rights Committee. See, for example, 'Concluding Observations, Kenya' CCPR/CO/83/KEN, April 2005, paras. 16 and 18; and 'Concluding Observations, Kenya' CCPR/C/KEN/CO/3, August 2012, para. 11. The Committee against Torture has also expressed concern about the '…persistent failure by the State party to promptly, impartially and effectively investigate all allegations of acts of torture and ill-treatment by police officers, and to prosecute the alleged perpetrators.' See, UN Committee against Torture, 'Concluding Observations, Kenya' CAT/C/KEN/CO/2, 19 June 2013, para.11. A joint submission by civil society groups to the UN Universal Periodic Review of Kenya also cited the persistent lack of accountability for deaths and injuries resulting from police action during protests. See CIVICUS, Article 19 Eastern Africa, et al., 'Joint Submission to the UN Universal Periodic Review' 35th Session of the UPR Working Group, 18 July 2019, para. 5.8.

police officers have been prosecuted and convicted for causing deaths or serious injuries.[4] On the other hand, deaths of and serious injuries to assembly participants attributable to police action have rarely received adequate attention, thus prosecutions—and a fortiori convictions—are few.[5] A search into a database of court cases involving prosecution of police officers for the offence of murder committed in the context of assemblies revealed only 3 cases, with one resulting in a conviction.[6] The database hosts over 200,000 decisions from superior courts[7] in Kenya, and therefore the search was not exhaustive. Nonetheless, the low number of reported decisions on police accountability supports the view that prosecutions of police officers for violations committed in the context of assemblies are extremely rare. Since cases of serious injuries are prosecuted in the subordinate courts and only cases from the superior courts are reported in the database, it is possible that there may be cases where police officers who caused serious injuries to assembly participants were prosecuted and possibly convicted. However, if the police are rarely prosecuted for violations of the right to life of assembly participants, it is unlikely that cases of non-fatal injuries would be taken more seriously. It is also telling that as of December 2022, the Independent Policing Oversight Authority (hereinafter 'IPOA'), which has investigated several cases of violations by police officers, has not reported any convictions for deaths or serious injuries as a result of police action during assemblies. Although it is worth noting that a few prosecutions were pending at the time of writing,[8] the question of why the gap in

[4] For example, in a case digest on police accountability prepared by the Office of the Director of Public Prosecutions, seven criminal cases that arose from the unlawful use of firearms are highlighted. See ODPP, 'Police Accountability Case Digest' Volume I, 2021.

[5] None of the seven cases in the ODPP Case Digest mentioned in footnote 4 concerns the use of force and firearms in the context of assemblies. Further, of the convictions that the Independent Policing Oversight Authority has secured since its establishment in 2022, all concern deaths or serious injuries in contexts other than assemblies.

[6] The cases are: *Republic v. Kipsigei Cosmas Sigei & another* [2009] eKLR (the accused police officers were found guilty of manslaughter); *Republic v. Edward Kirui* [2010] eKLR; and *Republic v. Patrick Wafula Manyasi* [2019] eKLR. The search terms used were 'demonstrations', 'demonstrators', 'protesters', 'use of excessive force', and 'shot by police.'

[7] The superior courts are the High Court (and specialised courts of equal status), the Court of Appeal, and the Supreme Court.

[8] The cases could be less than ten in number. In an interview held virtually on 21 May 2021 with IPOA's Director of Legal Services, he stated that there were two pending murder cases, namely: *Republic v. Police Constable Leakey Maina*, Meru High Criminal Case No. 59 of 2018 where a police officer has been charged with the murder of a student leader who he allegedly fatally shot during a protest; and *Republic v. Ezekiel A. Omollo*, Malindi High Court Criminal Case No. 6 of 2020 where a police officer has been charged with the murder of a member of the public who was shot while police were dispersing demonstrators. Subsequently, IPOA has released media statements on cases filed against police officers charged with causing deaths or serious injuries during protests. For instance, see, IPOA News,

accountability for human rights violations committed in the context of assemblies remains wide still lingers.

In the aftermath of the post-election violence in 2007 where at least 405 deaths out of a total of 1,133 were attributed to the police, the Commission of Inquiry into the Post-election Violence which was established to investigate the circumstances surrounding the violence made several recommendations on the need for police reforms.[9] The Commission found that the Police Service was unable or reluctant to conduct effective investigations into the serious violations that had been committed, including in cases where there was strong evidence.[10] It also faulted the existing accountability mechanisms within the Police Service at the time.[11] Among the recommendations the Commission made were the need for comprehensive reforms of the Police Service (then known as the Police Force) and the need for the establishment of an external police oversight mechanism.[12] These recommendations were also captured in the 2009 report of the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions.[13] Subsequently, the Government started the process of implementing the recommendations, and among the key developments aimed at enhancing police accountability were the establishment of IPOA, the National Police Service Commission, and the Internal Affairs Unit within the National Police Service. Still, the existence of these bodies have not adequately addressed the police accountability gaps in the context of assemblies.

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'Masimba Shootings: Ten GSU Officers Face Murder, Causing Serious Injuries Charges' (4 November 2022), available athttps://ipoa.news/2022/11/04/masimba-shootings-ten-gsu-officers-face-murder-causing-serious-injuries-charges/?fbclid=IwAR2VhSvxJYHR4mimFozfcbblayjLI9ABo3HUBKN1xIYHAA2L0nrc4VIWCRI. Also widely reported is the pending case of *R v. Titus Yoma and 11 others*, Nairobi High Court Criminal Case No. E074 of 2022 where 12 senior police officers have been charged with crimes against humanity committed in the context of the protests that followed the release of the results of the 2017 presidential elections. IPOA has also released several press statements on cases it is investigating involving deaths in the context of protests. In the absence of updates to the public on whether or not charges have been preferred against any police officer, it can be presumed that either the cases are still pending under investigation or a decision not to charge was made by the Office of the Director of Public Prosecutions.

[9] Report of the Commission of Inquiry into Post-Election Violence (CIPEV), pp. 472-81. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf.

[10] n. 9, p. 420.

[11] n. 10.

[12] CIPEV Report (n. 9 above), pp. 477-78.

[13] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' A/HRC/11/2/Add.6, 26 May 2009, para. 92.

The objective of this chapter is to analyse the existing internal and external police accountability mechanisms in Kenya and explore why these mechanisms have not been able to adequately ensure accountability for violations committed by law enforcement officials in the context of assemblies. The chapter first offers a contextual background on police accountability in Kenya, outlining progressive steps that have been taken to enhance accountability. This is followed by a discussion on the Kenyan legal framework on police accountability. Here, the discussion of the relevant legislation is framed around the State duties to investigate, prosecute and punish, and the duty to remedy, as required under both domestic and international law. This is followed by an overview of the internal and external institutional structures for police oversight and accountability in Kenya. It concludes by assessing the barriers to the effectiveness of the structures in addressing human rights violations committed by the police during assemblies.

Noting that accountability is a broad concept, this chapter adopts Mark Bovens' description of accountability as '…being answerable for one's actions to some authority and having to suffer sanctions for those actions.'[14] Police accountability is therefore understood to mean the process of a superior or independent authority reviewing police action against specific legal standards and taking remedial steps where police conduct is found to have breached the standards.[15]

### 6.2 Police accountability in Kenya: A contextual background

Policing in Kenya has historically been characterised by abuse of power, excessive use of force and lack of accountability.[16] As discussed in chapter 4, the Police Force was a highly politicised institution which was frequently used by those in power to suppress dissent.[17] Cases of extrajudicial killings, enforced disappearances, arbitrary arrests and torture and ill-treatment of

[14] M Bovens et al. (eds.), 'The Oxford Handbook of Public Accountability' (Oxford University Press 2014) (Kindle Edition) p. 6.
[15] UNODC, 'Handbook on Police Accountability, Oversight and Integrity' (United Nations 2011), p. 10.
[16] A Osse, 'Set up to fail? Police Reforms in Kenya' The Elephant (2017). Available at https://www.theelephant.info/features/2017/06/01/set-up-to-fail-police-reforms-in-kenya/.
[17] Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission' (2005), p. 30.

persons perceived to be against the Government were common.[18] These violations were also perpetrated in the context of assemblies, especially during anti-government protests in the 1990s.[19]

Amendments to the 1963 Constitution of Kenya ensured that the Commissioner of Police who headed the Police Service served at the pleasure of the President. Thus, the police institution as a whole mainly did the bidding of the Government of the day. As a result, most of the incidents of violence perpetrated by the police against assembly participants were not redressed.[20] There seemed to be a general lack of recognition by the State authorities of the need for police accountability. Impunity within the Police Force therefore flourished, to the detriment of the public's ability to safely exercise their right of peaceful assembly, as well as other civil and political rights.

In 2002, President Mwai Kibaki was elected, replacing President Daniel Moi who had served for 24 years and whose regime had been characterised by suppression of dissent and the commission of gross human rights violations.[21] Recognising the need for reforms across various sectors, the President initiated the Governance, Justice and Law and Order Sector Reform Programme, which focused on a number of thematic areas including human rights and public safety and security.[22] Police reform was one of the priority areas. As a start, the National Taskforce on Police Reforms (2002-2005) was established with the objective of enhancing the effectiveness of the police and ensuring that they comply with human rights standards and are

[18] M. Kagari and S. Thomas, 'The police, the people, the politics: Police accountability in Kenya' (Commonwealth Human Rights Initiative, 2006), pp.19-25 Available at https://gsdrc.org/document-library/the-police-the-people-the-politics-police-accountability-in-kenya/.

[19] See, for example, Human Rights Watch, 'Human Rights Watch World Report 1992 – Kenya' 1 January 1992, available at https://www.refworld.org/docid/467fca3f23.html; U.S. Department of State, 'Kenya Country Report on Human Rights Practices for 1998' 26 February 1999, available at https://1997-2001.state.gov/global/human_rights/1998_hrp_report/kenya.html.

[20] The consistent failure by Kenya to ensure accountability of police officers for human rights violations has been highlighted by the UN Human Rights Committee. See for example, *Concluding Observations*, Kenya CCPR/CO/83/KEN, April 2005, paras. 16 and 18; Concluding Observations, Kenya CCPR/C/KEN/CO/3, August 2012, para. 11.

[21] K. Adar and I. Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001' African Studies Quarterly, Volume 5, Issue 1, 2001. Available at https://asq.africa.ufl.edu/wp-content/uploads/sites/168/Adar-Munyae-Vol-5-Issue-1.pdf.

[22] The Governance, Justice, Law and Order Sector Reform Programme: Final Report (2011), pp. 9-10, para. 21. Available at https://tile.loc.gov/storage-services/service/gdc/gdcovop/2018338332/2018338332.pdf.

accountable.[23] The report of the Taskforce was, however, not made public. Nevertheless, some administrative reforms targeting the improvement of the welfare of the police were implemented.[24] In terms of taking steps to enhance police accountability for rights violations, there was no progress worth noting. This changed after 2007 when police officers fatally shot over 400 civilians during countrywide protests that followed the release of the results of the 2007 presidential election.[25] It became evident that the need for police reforms was urgent and grave.

As stated in the introduction, the Commission of Inquiry into the Post-election Violence and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions both observed a gap in accountability of the police for their conduct and recommended the establishment of an independent oversight mechanism to handle complaints against the police. In addition to an independent oversight mechanism, the Special Rapporteur also recommended the establishment of an internal police oversight mechanism.[26]

In addition to the Commission of Inquiry, the Government also established the second National Taskforce on Police Reforms in 2009.[27] The mandate of the Taskforce was to interrogate the legal, policy, administrative and operational gaps within the Police Service and to make recommendations to enhance effectiveness of the police and entrench a culture of accountability and professionalism within the Police Service.[28] The Taskforce made a host of recommendations on various themes. On the issue of enhancing police accountability, it reiterated the recommendations of the Commission of Inquiry into the Post-Election Violence and also recommended the establishment of an independent police oversight authority to monitor and investigate police conduct.[29] It further recommended that a police service commission be established to take charge of matters touching on recruitment of the police, discipline, terms of

[23] Ministry of Interior and Coordination of National Government, 'Revised Police Reforms Program Document-2015-2018' p. 2. Available at https://www.npsc.go.ke/download/revised-police-reforms-2015-2018/.
[24] n. 23.
[25] CIPEV Report (n.9 above), p. 417.
[26] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/11/2/Add.6 (n. 13 above), para. 92.
[27] Revised Police Reforms Program Document-2015-2018 (n. 23 above), p. 2.
[28] n. 27.
[29] Kenya National Task Force on Police Reforms: Some Key Recommendations Summarised, p. 6. Available at https://www.ipinst.org/wp-content/uploads/2010/01/pdfs_summary_policereformreport.pdf.

service and their general welfare.[30] Both of these institutions were to be anchored in the Constitution.[31] Shortly after the Taskforce submitted its report in October 2009, the Police Reforms Implementation Committee was established to oversee the implementation of the recommendations in the report.[32] It proposed the enactment of five pieces of legislation, including the National Police Service Bill, the IPOA Bill and the National Police Service Commission Bill.[33] Notably, the Taskforce dropped the term 'force' and replaced it with 'service' as an indication of the direction the police were expected to take in their interactions with the public.

The National Police Service (hereinafter 'NPS') and the National Police Service Commission (hereinafter 'NPSC') were later anchored in the Constitution of Kenya 2010 in Articles 243 and 246 respectively. The NPS Act[34] and the NPSC Act[35] were thereafter enacted in 2011. The Independent Policing Oversight Authority, on the other hand, was not anchored in the Constitution. It is not clear why the drafters of the Constitution chose not to provide for the establishment of IPOA in the Constitution as recommended by the 2009 Taskforce. Nevertheless, IPOA was established through the IPOA Act[36] in 2011 and it began its operations in 2012. Collectively, these statutes and the Constitution form part of the legal framework for police accountability as discussed next.

### 6.3 The Kenyan Legal Framework on Police Accountability for Use of Force during Assemblies

The obligation to ensure accountability for rights violations committed in the context of assemblies can be drawn from the human rights obligations of the State as prescribed in the Constitution of Kenya. In addition, in line with Article 2(6) of the Constitution, the obligation can also be drawn from international treaties that Kenya has ratified.

[30] National Task Force on Police Reforms (n. 29 above), p. 8.
[31] n. 30, p. 6-9.
[32] Revised Police Reforms Program Document-2015-2018 (n. 23 above), p. 2.
[33] The other two Bills were the National Coroners Service Bill and the Private Security Industry Regulation Bill. The Private Security Regulation Act was enacted in 2016 while the National Coroners Service Act, 2017 was enacted in 2017.
[34] National Police Service Act, No. 11A of 2011, Laws of Kenya.
[35] National Police Service Commission Act, No.30 of 2011, Laws of Kenya.
[36] Independent Policing Oversight Authority Act, No. 35 of 2011, Laws of Kenya.

Having stated earlier that police accountability involves reviewing police action against set legal standards and taking remedial steps if the standards have been breached, it can be said that accountability for the use of force by the police during assemblies comprises the duty to investigate; the duty to prosecute and punish; and the duty to provide a remedy to the victims. This is the position that the African Commission on Human and People's Rights (hereinafter, 'the African Commission') has taken in its General Comment No. 3 on the right to life wherein it stated that accountability requires investigation and, in appropriate circumstances, also criminal prosecution.[37] The Commission has further stated that accountability also includes measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and reforms.[38] Next is a discussion of what these duties entail and how they are framed under Kenyan law.

### 6.3.1 Duty to investigate

The duty to investigate human rights violations is a core component of the State obligation to respect and ensure human rights, and has been affirmed by various international human rights mechanisms. In its General Comment 31, the UN Human Rights Committee (hereinafter 'HRCttee') notes that States have a '…general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.'[39] The Committee further states that the failure to investigate could itself amount to a breach of the protected right.[40] With respect to the right of peaceful assembly, the HRCttee has stated that States have an obligation '…to investigate effectively, impartially and in a timely manner any allegation or reasonable suspicion of unlawful use of force or other violations by law enforcement officials…in the context of assemblies.'[41]

[37] ACHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' 18 November 2015, para. 17.
[38] n. 37.
[39] UN Human Rights Committee, 'General Comment 31 (the nature of the general legal obligation imposed on States parties to the Covenant)' 2004, CCPR/C/21/Rev.1/Add. 13, para. 15.
[40] n. 39.
[41] UN Human Rights Committee, 'General Comment 37: Article 21 (The Right of Peaceful Assembly)' 2020, CCPR/C/GC/37, para. 90.

As discussed in chapter 4, the use of force by the police in Kenya is primarily regulated by the NPS Act. The duty to investigate can be drawn from the obligations that arise under the Act in cases where force, including firearms, has been used. For instance, paragraph 4 in Part 'A' of the Sixth Schedule of the NPS Act provides that 'a police officer who uses any form of force shall immediately, report to the officer's superior explaining the circumstances that necessitated the use of force and the supervisor shall judge the rightfulness and decide on the next step.'[42] Essentially, it requires a police officer to account for the use of force. The review of the account by a superior officer would involve an investigation.

While this provision is an important accountability measure, it may not in fact translate to actual accountability. It appears that an oral explanation on why force was used may be sufficient. It is also not clear what kind of inquiry the superior officer would make before deciding whether the use of force was lawful or not. Further, the involvement of an independent and impartial authority is not a mandatory requirement. Hence, a decision may be made by a superior officer simply by listening to an officer's account, without more. Presumably, the nature of cases contemplated under this provision are those in which force is used but no serious injuries are suffered. The NPS Act does not define what constitutes a serious injury, but such an injury is generally understood to mean those that pose a severe risk to the health of a person, are life-threatening or may cause a serious or permanent disfigurement.[43] Assemblies generally have many participants and police officers involved in policing them may use varying degrees of force, which may lead to deaths, serious injuries, minor injuries or no injuries at all. As will be seen next, more is expected in cases involving deaths or serious injuries. However, for other injuries such as baton strikes or beatings that are not life-threatening, it is unlikely that this provision would ensure an independent and effective investigation into the lawfulness of the use of force. Further, since all police officers are required to report any form of force used, it is unlikely that a single superior officer would be able to interrogate each report thoroughly.

[42] NPS Act (n. 34 above), Sixth Schedule, Part A, para. 4.
[43] In practice, persons who cause serious injuries are charged with the offence of grievous harm. Section 4 of the Penal Code defines grievous harm as any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense….'

The NPS Act also provides that a superior must immediately report to IPOA any use of force that leads to death or serious injury.[44] Further, the Act makes it mandatory for an officer to report to their superior the use of firearms, whether or not it results in death or serious injury.[45] If the use of firearms results in death or serious injury, a report must also be made to IPOA, which will then investigate the lawfulness of such use of force.[46] In addition, in the event that a person dies or suffers a serious injury as a result of police action or inaction while in custody or while under the control of a police officer, the direct superior of the concerned officer has a responsibility to secure all relevant evidence of circumstances of the death or serious injury, report immediately to IPOA and supply it with all the relevant evidence.[47] In practice, the NPS does not fully comply with its mandatory obligation to inform IPOA about deaths or serious injuries resulting from police action.[48] Consequently, unless the victims, their families or other third parties inform IPOA about such cases, no independent investigation may be conducted. In addition, the failure by the NPS to immediately notify IPOA about incidents of deaths and serious injuries has an impact on the quality of any investigation that may be conducted should IPOA learn about the cases from other sources. This is because the chance to gather crucial evidence at the earliest opportunity would have been lost.

Having explained in chapter 3 that torture or ill-treatment can be committed in the context of an assembly, the State duty to investigate can also be drawn from the Prevention of Torture Act.[49] Section 13 of the Act provides that a complaint under the Act may be reported to the NPS, the Kenya National Commission on Human Rights (hereinafter 'KNCHR') or any other

[44] NPS Act (n. 34 above), Sixth Schedule, Part A, para. 5.
[45] n. 44, Sixth Schedule, Part B, para. 4.
[46] n. 45, para. 5.
[47] NPS Act (n. 34 above), Sixth Schedule, Part C, para. 1(3).
[48] The number of notifications IPOA receives from the NPS has been progressively declining since IPOA's establishment. For instance, 162 notifications were received in 2013 while in 2014 the number reduced to 92. In 2015, 2016 and 2017, the notifications reduced to 24, 9 and 7 respectively, while in 2018 and 2019 no data on notifications is available. And in 2021 there were 16 notifications. See T. Probert, B. Kimari, & M. Ruteere (2020), 'Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action' (CHRIPS), p. 24. Available at https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf. The reduction in the number of notifications received is the result of non-compliance by the NPS with their obligations under the NPS Act and IPOA Act, and not a reduction in cases of deaths or serious injuries.
[49] Prevention of Torture Act, 2017, Laws of Kenya.

relevant institution. The Act also provides that if the complaint is against a police officer, the Internal Affairs Unit and IPOA shall conduct investigations.[50] In the event that a complaint about torture or ill-treatment is raised in court during a trial, the Court must record the complaint and direct the relevant authority to investigate the claim and submit a report within seven days from the date of the court order.[51] This is an important provision given that there are cases where assembly participants are not only subjected to police violence, but are also arrested and charged with various criminal offences under the Public Order Act[52] or the Penal Code.[53] In such cases, prosecutorial authorities generally focus more on prosecuting the participants for the offences they are alleged to have committed than the violations committed against them by the police.[54] The obligation of a trial court to order an investigation into claims of torture or ill-treatment is therefore crucial.

In addition to the NPS Act, the IPOA Act also forms a basis for the duty to investigate. The Act sets out several functions of IPOA, which include investigating complaints against members of the NPS, and monitoring and investigating police operations affecting members of the public.[55] Like the NPS Act, the IPOA Act also requires the police to notify IPOA about cases of deaths or serious injuries.[56] The Constitution and the Kenya National Commission on Human Rights Act[57] establish the KNCHR and one of its functions is '…to monitor, investigate and report on the observance of human rights…in the Republic, including observance by the national security organs.'[58] In this regard, both IPOA and KNCHR can also investigate the use of force by the police

[50] Prevention of Torture Act (n. 49 above), s. 13 (6).
[51] n. 50, s. 13(7)-(9).
[52] Public Order Act, Cap 56, 1950 (Reised 2018), Laws of Kenya.
[53] Penal Code, Cap 63, 1930 (Revised 2014), Laws of Kenya.
[54] In a study by Article 19 on the right to protest in Kenya, several respondents who were interviewed indicated that whenever assembly participants or organisers are arraigned in court, the courts tend to concentrate more on criminal charges against the accused persons than on the violations of their rights. See Article 19: Kenya: Restricting the Right to be Heard (October 2022), p. 39. Available at https://www.article19.org/wp-content/uploads/2022/11/A19-Protests-Under-Threat_KENYA_FINAL-27-Oct.pdf.
[55] IPOA Act (n. 36 above), s. 6(a) and (c).
[56] n. 55, s. 25.
[57] Kenya National Commission on Human Rights Act, No. 14 of 2011, Laws of Kenya.
[58] Constitution of Kenya, Article 59(2)(e).

during assemblies. These institutions, alongside other accountability mechanisms, are discussed later in the chapter.

The National Coroners Service Act,[59] enacted in 2017, also provides for the establishment of the National Coroners Service, which has the responsibility to investigate suspicious deaths.[60] Where a death has occurred while a person is in any form of police custody, the police have an obligation to report the death to the Coroner General who shall investigate and share their report with IPOA.[61] Investigations by the National Coroners Service would complement those of IPOA and enhance accountability. However, the National Coroners Service is yet to be established.

It is not enough to have legal provisions that require the State to investigate cases of suspected unlawful use of force. Investigations should be aimed at establishing the truth about the circumstances of the use with a view to securing redress if violations have been committed. It should not be done merely to fulfil the duty to investigate.[62] On deaths and serious injuries that may amount to torture or ill-treatment, the Minnesota Protocol on the Investigation of Potentially Unlawful Death[63] (hereinafter, 'the Minnesota Protocol') and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[64] (hereinafter, 'the Istanbul Protocol') are instructive. They outline and explain the principles on investigation of deaths and torture and ill treatment respectively. Such investigations are required to be prompt, effective and thorough, independent and impartial, and transparent.[65] These principles are to some extent reflected in the domestic laws discussed above.

[59] National Coroners Service Act, No. 18 of 2017, Laws of Kenya.
[60] n. 59, s. 28.
[61] n. 59, s. 25.
[62] See IACtHR, *Anzualdo Castro v. Peru*, Series C No. 202, Judgment of September 22, 2009, para. 123. Although the case concerned an enforced disappearance, the Court's statement that investigations needed to be conducted in a serious manner would apply in any context.
[63] OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death' (2016).
[64] OHCHR, 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)' (Revised 2022).
[65] Minnesota Protocol (n. 63 above), para. 22; Istanbul Protocol (n. 64 above), paras. 186 and 660.

In relation to the principle of promptness, which requires States to initiate investigations reasonably expeditiously,[66] the NPS Act requires police officers who have used force to immediately report and explain the circumstances of the use of force to their superiors. As stated earlier, the superiors also have an obligation to immediately notify IPOA if the use of force has resulted into a death or serious injury. Thus, in terms of initiation of the investigation process, the requirement of promptness is clear. However, both the NPS Act and the IPOA Act do not prescribe the length of time it should take to undertake and conclude an investigation. Indeed, a prescribed duration may not be desirable given that some investigations could be more complex than others and would require more time in order to be thoroughly and effectively done. Kenyan courts have expressed reservations about prescribing timelines for investigations. For instance, in the case of *Rose Owira and others v. Attorney General and others*,[67] the petitioners whose kin had allegedly been killed by the police sought, among others, a declaration that the Inspector General of the NPS had breached the obligation to investigate the deaths and that such failure was a violation of the petitioners' right to equal protection of the law. Noting that the investigations had been concluded after several years, and there was no reasonable explanation for the delay, the High Court agreed with the petitioners that the requirement of promptness had not been met, but noted that a claim that investigations had not been done could not be accepted.[68] On the petitioners' prayer that the Court directs the Inspector General of the NPS to conclude the investigations and to report to the Court within a period that the Court would set, the Court disagreed with the petitioners and expressed itself as follows:

> '…the 2nd Respondent has not failed in investigating the instances where the use of force by police officers led to death as each case is at different stages of investigation or under inquest. However, there are delays in the conclusion of the investigations. Giving timelines to the 2nd Respondent within which to conclude the ongoing investigations may result in rushed investigations that may be detrimental to the interests of the petitioners. In the circumstances of this case, I find a declaratory order will add impetus to the ongoing

[66] Minnesota Protocol (n. 63 above), para. 23.
[67] *Rose Owira & 23 others v. Attorney-General & another; Kenya National Commission on Human Rights & 4 others* (Interested Parties) [2020] eKLR.
[68] n. 67, para. 57.

> investigations. An order of mandamus is therefore issued directing the 2nd Respondent to promptly and impartially conclude the investigations into the cases still pending investigation in respect of the deaths of 1st to 15th and 17th to 23rd petitioners' kin.'[69]

Since some of the violations complained of in the case had occurred several years before the case was filed, merely directing the NPS to promptly conclude the investigations was not enough. The delays in concluding the investigations were significant and the Court should have made a finding that the obligation to investigate was not discharged.

While it is true that rushed investigations may not be thorough, it would be helpful to have standard timelines that are generally applicable, provided that some room for flexibility as and where necessary is left. For example, under the Prevention of Torture Act, where an investigation into a claim of torture or ill-treatment is directed by a court, an investigation report should be filed within seven days. While the Act does not indicate what would happen if an investigation were not concluded within the said period, it could be presumed that the investigating authority could ask for more time. This is the direction that IPOA also seems to be taking. In the IPOA Draft (General Operations) Regulations 2022, it is indicated that investigations into deaths or serious injuries in police custody or as a result of police action must be finalised within 90 days from when a case is assigned, failing which the officer responsible must render an explanation for not concluding the investigation within the prescribed period.[70]

It should be noted that the failure by a victim or their family to lodge a complaint as soon as a violation occurs does not absolve authorities from their duty to initiate investigations promptly once they become aware of the violation. This was stated by a chamber of the European Court in *Drozd v. Ukraine*[71] where the applicant alleged a violation of his rights under Article 3 of the European Convention on Human Rights. The incident in question had happened on 11 September 1997 but the applicant first reported it to the police on 9 March 1998. When an internal inquiry by the police dismissed his claims, he took no action until July 2002 when he

[69] *Rose Owira & 23 others v. Attorney-General* (n. 67 above), para. 88.
[70] IPOA Draft (General Operations) Regulations 2022, clause 40 (4). Available at http://www.ipoa.go.ke/wp-content/uploads/2022/06/CHAIR_FINAL_EXTERNAL_STAKEHOLDER_IPOA_REGULATIONS_2022_DRAFT_Final_2022-05-22-compressed1-compressed.pdf.
[71] ECtHR, *Drozd v. Ukraine*, App no 12174/03, 30 July 2009, paras. 64-5.

reported his complaint to the Office of the Ombudsman. While noting that there was delay on the applicant's part, the Court observed that such delay alone could not explain the failure by the authorities to establish the facts of the case. The Court also noted that the prosecutor's office had been immediately alerted about the alleged violation on 11 September 1997 and therefore they were in a position to start gathering evidence even before the applicant formally lodged his complaint.[72]

In addition to promptness, investigations must also be effective and thorough. Under the Minnesota Protocol, an effective and thorough investigation is one that '…is capable of ensuring accountability for unlawful death; leading to the identification and, if justified by the evidence and seriousness of the case, the prosecution and punishment of all those responsible….'[73] The Protocol further states that an investigation must, as far as possible, establish the identity of the victim; recover critical evidence relating to the death, including evidentiary material and statements of witnesses; establish the cause and circumstances of a death, and the identity of the perpetrator.[74] It also states that an investigation should aim to identify not only the direct perpetrators, but also superior officers who may be culpable as a result of their failure to take reasonable steps to prevent the violation.[75] In essence, the State must demonstrate that it took reasonable steps to establish what happened. In *George Kajikabi Iyanyori v. Egypt*[76] where law enforcement officials used excessive force against protesters, the African Commission observed that the investigations that had been conducted by the Egyptian authorities were inadequate.[77] The Commission, in particular, faulted the investigation's finding to the effect that since the perpetrators of the violations could not be identified, the charges would be dropped. On this issue, the Commission expressed itself as follows:

> 'The Commission acknowledges that it may not be possible to identify the specific police officers who committed the violations. Further it is inappropriate to expect the protesters

[72] *Drozd v. Ukraine* (n. 71 above), para. 65.
[73] Minnesota Protocol (n. 63 above), para. 24.
[74] n. 73, para. 25.
[75] n. 73, para. 26.
[76] ACmHPR, Communication No. 344/07, *George Iyanyori Kajikabi v. The Arab Republic of Egypt*, 2020.
[77] n. 76, para. 186.

> to identify the specific perpetrators of acts that happened under such chaotic circumstances. However, failure to identify the specific persons responsible does not mean that the investigation should be closed. The Commission finds it hard to envisage a situation where an operation of this magnitude would be undertaken without operational commanders directing the proceedings and the Complainants make mention of orders being given by a specific officer. Where it is not possible to identify the perpetrators in a command structure, such as the police, the commander who issued the orders should be held accountable. Failure to do so allows total impunity to ensue, and violations to go unpunished.'[78]

The NPS Act has provisions that can help facilitate effective investigations. For instance, it requires police officers who use force to '…secure the scene of the act for purposes of investigations.'[79] The Act also prohibits tampering with evidence[80] and requires all police officers to wear name tags or service numbers.[81] These requirements are not always complied with. Investigations into cases of excessive use of force by the police during assemblies many times hit a dead end if victims are not able to identify the perpetrators and there are no alternative mechanisms (such as body-worn cameras) to help identify the perpetrators.

Investigations into cases of unlawful use of force by the police should also be independent and impartial. An independent investigation is one that is free from the undue influence of those being investigated, the institutions they belong to, or other external parties.[82] This can be achieved, for example, by ensuring that the investigative authority is not the same one whose officials are accused of committing violations. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that persons affected by unlawful use of force by law enforcement officials must have access to independent accountability mechanisms, including administrative, prosecutorial and judicial authorities.[83] In the *George Kajikabi case* cited earlier,

[78] *George Kajikabi v. Egypt* (n. 76 above), para. 187.
[79] NPS Act (n. 34 above), Sixth Schedule, Part A, para. 7(a).
[80] n. 79, para. 9.
[81] n. 79, para. 10.
[82] Minnesota Protocol (n. 63 above), para. 28.
[83] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, para. 23.

the African Commission also observed that internal investigations by the police into deaths caused by other police officers did not satisfy the requirements of independence and impartiality.[84] In Kenya, this requirement is to a great extent met, especially in relation to cases involving deaths and serious injuries. As stated earlier, such cases must be immediately reported to IPOA so that they conduct independent investigations. Other less serious cases can also be investigated by IPOA. Although IPOA may sometimes refer such cases to the Internal Affairs Unit, it retains the power to take over those investigations and can also supervise them.

The transparency of an investigation relates to its 'openness to the scrutiny of the general public and of victims' families.'[85] In its General Comment 37, the HRCttee has emphasised that the use of force by law enforcement officials during assemblies should be reflected in a transparent report.[86] Where an investigation is initiated, the State should ensure public access to information on the existence of the investigation, its procedures and findings.[87] This requirement may however be limited if there is need to protect the identity of the victims or their families, and the integrity of the investigation process.[88] This requirement is not adequately provided for under Kenyan law. The Sixth Schedule of the NPS Act which sets out the conditions on the use of force and firearms does not have any provision requiring the NPS to make public any internal inquiries a superior may make to determine whether or not the use of force was lawful. Neither does the Act require the NPS to allow the public to scrutinise the procedures of an investigation or to publicly share the findings. The NPS does not usually share reports on actions it has taken against police officers accused of committing violations against the public. Its annual performance reports mainly contain general information and statistics on crime.[89] The reports of the Internal Affairs Unit are more helpful since they contain statistics on the number and nature of complaints received by the Unit, and the status of complaints that have been

[84] *George Kajikabi v. Egypt* (n. 76 above), paras. 188-89.
[85] Minnesota Protocol (n. 63 above), para. 32.
[86] General Comment 37 (n. 41 above), para. 91.
[87] Minnesota Protocol (n. 63 above), para. 32.
[88] n. 87, para. 33.
[89] See, for example, the 2021 Annual Report of the National Police Service. Available at https://www.nationalpolice.go.ke/annual-report.html?download=94:annual-report.

investigated.[90] The reports also have information on the number of cases in which disciplinary action or criminal prosecution was recommended. However, the reports do not provide further details such as the nature of the disciplinary action taken and in which cases.

Under Section 6 of the IPOA Act, IPOA has a responsibility to publish the findings of its investigations and monitoring exercises. In line with this provision, IPOA publishes bi-annual and annual performance reports which contain information on the number and nature of complaints received, the investigations that have been conducted, any concluded or pending prosecutions including the names of accused persons and the offences they have been charged with, among others.[91] Save for instances where court cases have been concluded, IPOA does not ordinarily publicly share its investigation reports or detailed information on the circumstances under which a violation is suspected to have occurred. IPOA occasionally shares monitoring reports on specific police operations. For instance, in 2016 it published a report on police responses to protests against the Independent Electoral and Boundaries Commission.[92]

The Act also provides that, in appropriate cases, IPOA has the power to provide victims of police misconduct with information that would enable them to pursue civil claims.[93] By stating that the information can be provided only where appropriate, the implication is that victims do not have an automatic right of access to all the information pertaining to investigations of their cases.

### 6.3.2 Duty to prosecute and punish

As stated before, an effective investigation into deaths or serious injuries resulting from police use of force should be able to establish the truth about the circumstances of the case and identify the perpetrators. Once the culpability of any police officer for violations of the right to life or the

[90] See, for example, Internal Affairs Unit, Annual Performance and Statistical Report-2021, available at https://www.iau.go.ke/wp-content/uploads/2022/11/ANNUAL-PERFORMANCE-AND-STATISTICAL-REPORT-2021.pdf.
[91] See, for example, IPOA, Performance Report for July-December 2021. Available at https://ipoa.news/wp-content/uploads/2022/07/ipoa-performance-report-july-december-2021.pdf.
[92] See IPOA, 'Monitoring Report on Police Conduct during Public Protests and Gatherings' (2017). Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf.
[93] IPOA Act (n. 36 above), s. 7(1)(c).

right to freedom and security of the person[94] is established, a criminal prosecution should follow. Article 4 of the Convention against Torture requires States to ensure that acts of torture are criminalised in their laws and made punishable. Article 7 then states that persons who commit acts of torture should be prosecuted. The African Commission has also stated in General Comment 4 on Article 5 of the African Charter that where a State has reasons to believe that torture or other ill-treatment has been committed, it shall prosecute the suspected offenders.[95] A similar position has been taken consistently by the Committee against Torture.[96] In relation to the right to life, the Human Rights Committee has emphasised the State obligation to prosecute persons for arbitrary deprivation of life, including when that occurs through the unlawful use of force and firearms by its agents.[97] The failure to institute criminal prosecutions in cases of violations of the right to life or the freedom from torture and ill-treatment amounts to a violation of the said rights.[98] Prosecutions should be effective and be conducted before an independent and impartial tribunal.[99] Further, all the guarantees of a fair trial should be met.[100] If the prosecution leads to a conviction, punishment should follow.

The duty to prosecute and punish is well provided for under Kenyan law. Violations of the right to life may be prosecuted under the Penal Code while violations of the right to freedom and security of the person may be prosecuted under both the Penal Code and the Prevention of Torture Act. If the scale of the violations meet the threshold of an international crime, the International Crimes Act may also form a basis for prosecution. As per the IPOA Act, once investigations have been concluded, IPOA may make recommendations for prosecution to the

[94] Note that Article 29 of the Constitution of Kenya refers to the 'right to freedom and security of the person' which includes the right not to be deprived of freedom arbitrarily, the right not to be subjected to violence, the right not to be subjected to torture or ill-treatment. This is a different formulation from the ICCPR which guarantees the freedom from torture and ill-treatment in Article 7 and the right to liberty and security of person under Article 9. For the purposes of this chapter, the formulation in the Constitution of Kenya is used.
[95] ACHPR, 'General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' 4 March 2017, para. 25.
[96] UN Committee against Torture, 'General Comment No. 2 (Implementation of article 2 by States parties)' CAT/C/GC/2, 24 January 2008, para. 18.
[97] UN Human Rights Committee, 'General Comment 36: Article 6 (The Right to life)' 2018, CCPR/C/GC/36, para. 27.
[98] D Shelton, 'Remedies in International Human Rights Law' (3rd Edition, Oxford University Press 2015), p. 108.
[99] n. 98, pp. 100-101.
[100] n. 99.

Office of the Director of Public Prosecutions (hereinafter 'ODPP'). [101] The ODPP is an independent office established under Article 157 of the Constitution of Kenya. The decision to charge is independently made by the ODPP. In all cases where police officers are to be prosecuted, the fair trial guarantees under Article 50 of the Constitution of Kenya apply. This includes the right to have the trial concluded within a reasonable time. Concluding a trial expeditiously is beneficial not only to an accused person but also for the victims of the alleged offence. As is the case with investigations, the length of a trial will vary depending on a number of factors, such as the complexity of a case.

Prosecutions do not necessarily have to lead to convictions, but when they do, the relevant legislation upon which charges are preferred usually has a prescribed punishment, and in most cases leave room for judicial officers to exercise discretion in sentencing.

### 6.3.3 Duty to remedy

Ensuring accountability for rights violations goes beyond the criminal prosecution and subsequent punishment of the perpetrators. States must also ensure that victims have access to effective remedies.[102] The right to a remedy is an established norm in international human rights law and it is captured in various important international human rights instruments. The Universal Declaration of Human Rights, for instance, provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights…."[103] Similar provisions, but with binding legal effect, can be found in the ICCPR,[104] the Convention against Torture,[105] and the African Charter on Human and Peoples' Rights,[106] among other instruments. The Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

[101] IPOA Act (n. 36 above), s. 6(a).
[102] UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns' A/HRC/26/36, 1 April 2014, para. 78.
[103] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Article 8.
[104] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2.
[105] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), UNTS vol. 1465, p. 85, Article 14.
[106] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 7.

Humanitarian Law[107] (hereinafter, 'Principles on the Right to a Remedy') list the principal remedies for human rights violations as: access to justice, reparations and the right to information.[108] The same remedies would be expected in the case of human rights violations committed in the context of assemblies.[109]

States thus have an obligation to enact domestic laws through which victims of rights violations can enforce their right to a remedy, and to establish a structured framework for redressing violations.[110] This was emphasised by the African Commission in *Noah Kazingachire and others v. Zimbabwe*[111] where the relatives of persons who were fatally shot by law enforcement officials were unable to lodge a claim for compensation since Zimbabwean law did not recognise compensation as a remedy.[112] The African Commission recommended that the domestic laws be brought in conformity with international standards.[113] It also directed Zimbabwe to pay compensation to the kin of the deceased.

The Constitution of Kenya has provisions for access to remedies in the event that rights are violated. Article 22 permits any person to institute court proceedings claiming a violation of their rights. Notably, the right to lodge such a complaint is not limited to the person whose rights have been violated. Such a right may also be exercised by a person acting on behalf of another, or any person acting in the public interest.[114] To enhance access to justice, the Constitution also provides that no fee may be charged for commencing proceedings seeking enforcement of fundamental rights and freedoms.[115] In practice, however, filing fees are usually charged. A fee assessment schedule for constitutional and human rights cases filed in the High Court of Kenya

[107] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, UN General Assembly, A/RES/60/147 (16 December 2005).
[108] n. 107, para. 11.
[109] UN Human Rights Council, 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns' A/HRC/31/66, 4 February 2016, para. 89.
[110] General Comment 31 (n. 39 above), para. 16.
[111] *Noah Kazingachire and three others (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, April 2012, ACHPR, 295/04, 51st Ordinary Session.
[112] n. 111, para. 52.
[113] n. 111, para. 145.
[114] Constitution of Kenya, Article 22(2).
[115] n. 114, Article 22(3)(c).

indicates Kshs. 6,125 (approximately 60 USD) as the filing fees for a 'petition but not a petition for the enforcement of Article 22 (3) of the Constitution.'[116] This means that a constitutional petition seeking a mere interpretation, say of a legal provision affecting a right or any other provision of the Constitution, would attract filing fees. However, petitions in which a right is alleged to have been infringed or is threatened should not be paid for. In the absence of proper guidance to court registry officials, the incoherence in fee assessment for constitutional petitions may limit the ability of victims of rights violations by the police to seek redress.

In line with the State obligation to remedy rights violations, Article 23 of the Constitution sets out the reliefs a court may grant. They include a declaration of rights, an order of injunction, a declaration of invalidity of any law that unduly limits or infringes on the rights guaranteed in the Constitution, and an order of compensation. These reliefs have been routinely granted by Kenyan courts, including in cases of violation of rights in the context of assemblies. For example, on the remedy of compensation, the High Court in *Wilson Olal and others v. AG*[117] stated that compensation '…may be needed to reflect the sense of public outrage and emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.'[118]

The remedy of compensation may be granted even where the criminal prosecution of a police officer does not lead to a conviction. This is because the compensation would be pursued through a civil case and the standard of proof is on a balance of probabilities, which is considerably lower than the standard required in criminal cases. Further, since the State bears the primary obligation to guarantee human rights, it can be held vicariously liable for violations by its agents. This was affirmed in the case of *Attorney General v. Joyce Wambura Muthogo*[119] where the High Court, citing the Court of Appeal in *Muwonge v. AG*[120] stated that '…the principles of law governing the liability of the Attorney General in respect of acts of a member of the police

[116] See, Judiciary, Court Fees Assessment Schedule, available at http://kenyalaw.org/kl/index.php?id=11116.
[117] *Wilson Olal and 5 others v. Attorney General and 2 others* [2017] eKLR.
[118] n. 117, p. 16.
[119] *Attorney General v. Joyce Wambura Muthogo* (Suing as the Legal Representative of the Estate of David Macharia Muthogo) [2021] eKLR.
[120] *Muwonge v. AG* (1967) EA.

force are precisely the same as those relating to the position of a master's liability for the act of his servant….The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done…within the exercise of the policemen's duty?' Consequently, even in the absence of a criminal prosecution in cases where assembly participants cannot identify individual perpetrators, a claim for compensation and other civil remedies can still be instituted against the State. In contrast, in the earlier case of *John Ngugi Gitau v. Attorney General*[121] where the complainant sought compensation after he was shot by police officers who were pursuing suspected criminals. The Court accepted that the complainant had been shot by the police, but stated that the Attorney General was not liable for the shooting.[122] It therefore dismissed the case. The reason of the Court in this case is problematic. The Attorney General is sued on behalf of the State, which bears the responsibility to respect and ensure human rights. Once the Court determined that the complainant had indeed been unlawfully shot by the police, it ought to have applied the principle of vicarious liability and directed the State to redress the violation.

### 6.3.4 Facilitative measures

Legal provisions on the duty to investigate, prosecute and punish, and remedy may not be effective if structures are not put in place to ensure the full participation of victims in the accountability process. In this regard, the Victim Protection Act[123] and the Witness Protection Act[124] are relevant, particularly in relation to participation of victims in criminal prosecutions of law enforcement officials. Under the Victim Protection Act, victims have the right to share their views and concerns either by themselves or through their legal representatives. This includes the right to cross-examine the accused. This would be in addition to cross-examination by counsel from the ODPP. This was stated in the case of *Joseph Lendrix Waswa v. Republic*[125] wherein the petitioner who had been charged with murder argued that the trial court's decision to permit counsel representing the victim's family to participate in the trial was incompatible with his right

[121] *John Ngugi Gitau v. Attorney General* [2017] eKLR.
[122] n. 121, para. 14.
[123] Victim Protection Act, No. 17 of 2014.
[124] Witness Protection Act, Cap. 79, 2006, Laws of Kenya.
[125] *Joseph Lendrix Waswa v. Republic* [2020] eKLR.

to fair trial. The Supreme Court determined that victims could participate in trial and went on to set out guidelines for their participation. One of the guidelines was that a victim or their counsel could pose questions to witnesses if the questions had not been asked by the prosecution. Such active participation of victims' counsel can help enhance effective prosecution of cases. The Witness Protection Act, on the other hand, serves to ensure that offenders or their sympathisers do not jeopardise the safety and security of critical witnesses. Considering that victims of unlawful use of force by the police may be reluctant to participate in criminal prosecutions due to fears over their safety, the Witness Protection Act can make a critical contribution to the successful prosecution of cases.

Aside from participation in criminal prosecutions, victims of human rights violations may also participate in civil proceedings or constitutional petitions against the State. As noted above, the Constitution of Kenya creates avenues for pursuit of redress for human rights violations and prescribes various reliefs that may be granted. Nevertheless, such avenues may not be utilised at all if victims have no legal representation and are incapable of representing themselves. The enactment of the Legal Aid Act[126] in 2016 presented an opportunity for some of these concerns to be addressed. The Act establishes a Legal Aid Service whose functions include providing legal aid services to indigent members of the public in various cases, including civil matters, constitutional matters and matters of public interest.[127] Unless the Legal Aid Service is adequately resourced, its contribution to ensuring access to justice by indigent victims of police violations may only be a drop in the ocean.

#### 6.3.5 Remarks on the framework's compatibility with international standards

From the foregoing, it is evident that there are relevant provisions under Kenyan law on the State duty to investigate, prosecute and punish, and remedy violations of human rights committed during assemblies. The obligation to investigate is discharged through investigative powers vested in the NPS, IPOA and KNCHR. Although its standards on the use of force and firearms fall below international standards, the NPS Act sets out a reporting procedure for every incident involving the use of force and firearms, as required under international law. It also requires the

[126] Legal Aid Act, No. 6 of 2016.
[127] n. 126, s. 35.

NPS to report all incidents of death and serious injuries to IPOA for purposes of investigations. Being an independent oversight institution, investigations by IPOA into cases of deaths and serious injuries would meet the requirement of independence as outlined in the Minnesota and Istanbul Protocols. Further, the ODPP, which reviews IPOA's recommendations for prosecution, is an independent office under the Constitution and is not subject to the direction or control of any person or body.[128]

It is worth noting that while IPOA has the primary mandate to investigate cases of deaths and serious injuries, there is no bar to the NPS also conducting investigations. The Directorate of Criminal Investigations, in exercise of their mandate to investigate serious crimes, routinely investigates cases that are also being investigated by IPOA. While such investigations may not meet the requirements of independence and impartiality, they can be helpful due to the DCI's better capacity to conduct forensic examinations.

Both the NPS Act and the IPOA Act require reports on incidents of the use of force or firearms to be made immediately so that investigations are initiated promptly. As explained earlier, while investigations can be initiated at an early juncture, the time it takes these institutions to conclude the investigations may not meet the requirement of promptness. In fact, there have been cases where IPOA, the NPS and KNCHR have been accused of not discharging their investigative mandates due to what was considered to be unreasonable delays in concluding investigations.[129]

Prosecutions are also conducted by an independent body and the right to a fair hearing and its elements are well set out in the Constitution. There are also laws that prescribe offences against the right to life and the right to freedom and security of the person. Further, the Constitution secures the independence of the Judiciary. To this extent, the duty to prosecute is adequately provided for under Kenyan domestic law. As will be discussed later, there are

[128] Office of the Director of Public Prosecutions Act, No. 2 of 2013, s. 6.
[129] See for example the case of *Rose Owira v. Attorney General* (n. 67 above). There is also the pending case of *Naomi Anyango Nyakure and Others v. Inspector General and others*, Migori High Court Petition No. 8 of 2021 where the petitioners who were shot by police during protests in 2017 have accused IPOA, KNCHR and the NPS of failing to promptly and effectively investigate the cases.

obstacles to effective investigations and prosecutions of cases involving violations committed during assemblies.

In relation to the right to a remedy, the Constitution provides for various remedies to be available to persons whose rights have been violated. It also prescribes the commencement of proceedings without payment of filing fees. Though there may be gaps in implementation of this provision, it nonetheless enhances access to justice to victims of violations and is of particular importance for assembly participants who may not have the financial means to lodge their claims in court. IPOA may, in appropriate cases, provide victims of unlawful police conduct with information that may enable them to file civil proceedings seeking remedies other than criminal prosecution.

Notably, the Public Order Act is silent on the issue of accountability of police officers for the use of force during assemblies. Section 14 of the Act has a permissive provision on the use of force and firearms under the Act, but nothing on what measures should follow the use of force. As discussed in chapter 4, the Public Order Act is usually applied alongside the Penal Code's provisions on riots, and section 82 of the Penal Code excludes criminal or civil liability of police officers for deaths and serious injuries in the context of a riot. While these two pieces of legislation were enacted long before the NPS Act, their provisions are still valid and may be relied on by police officers when dealing with assemblies classified as riots. Consequently, while there are laws that seek to ensure accountability of police officers for unlawful use of force, there are others that impede such accountability.

### 6.4 Overview of the Institutional Framework for Police Accountability

In addition to putting in place legislation to ensure accountability of police officers for the use of force, States must also establish institutions that are capable of effectively exercising oversight over the police. As already indicated earlier, Kenyan law provides for both external and internal oversight mechanisms. These are discussed next.

### 6.4.1 Internal mechanisms

Internal accountability mechanisms comprise of a clear and effective chain of command and an internal disciplinary system within a police institution.[130] Prior to the enactment of the NPS Act in 2011, neither the Police Act[131] nor the Administration Police Act[132] (both repealed) provided for an internal mechanism through which members of the public affected by police action could lodge complaints. The option available was for persons aggrieved by police conduct to report to any police station. Certainly, such a system was neither independent nor credible. For participants in an assembly that was declared unlawful, reporting to the police station could result in an arrest and prosecution, and was therefore not a welcome option.

The creation of the Internal Affairs Unit under section 87 of the NPS Act was therefore a positive step towards enhancing police accountability for rights violations. The Unit's function is to receive and investigate complaints against the police and to promote discipline within the NPS.[133] It is headed by a director who is appointed by the Inspector General of the NPS. All the members of staff of the Unit are police officers who are selected based on their experience, competence and integrity.[134] The vetting of the selected officers is done by the National Police Service Commission.[135] Since the Unit is part of the NPS, its ability to conduct independent and impartial investigations may be questioned. However, the NPS Act attempts to secure its independence by providing that in the performance of its duties, the Unit shall not be subject to the command or control of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations.[136] The Act also delinks the Internal Affairs Unit from the constituent components of the NPS by providing that the offices of the Unit must be located separately from the rest of the NPS.[137] Presumably, it was thought that the fewer the physical interactions between the staff of the Unit and the rest of the members of the NPS, the lower the

[130] UNODC, Handbook on Police Accountability (n. 15 above), p. 12.
[131] Police Act, Cap. 84 Laws of Kenya (repealed).
[132] Administration Police Act, Cap. 85 Laws of Kenya (repealed).
[133] NPS Act (n. 34 above), s. 87.
[134] Internal Affairs Unit, Operational Manual (2018), p. 6. Available at https://www.iau.go.ke/wp-content/uploads/2019/07/IAU-OPS-MANUAL-.pdf.
[135] n. 134.
[136] NPS Act (n. 34 above), s. 87(11).
[137] See the command structure of the NPS as described in chapter 5.

likelihood of police officers under investigation interfering with the investigation process. Between 2013 and 2021, the Unit received 11,008 complaints, averaging more than 1,000 complaints per year.[138] For an internal mechanism that may presumably suffer from lack of public trust due to its association with the police, the fairly high number of complaints could be an indication that the public has some confidence in the Unit.

The NPS Act does not limit the nature of cases that may be handled by the Internal Affairs Unit. According to the Unit's 2021 annual performance report, it received 919 complaints in the course of the year, of which eight concerned deaths and seven were on serious injuries resulting from excessive use of force. As per its Operational Manual, the Unit classifies cases of deaths or serious injuries as 'very serious complaints' and refers most of them to IPOA.[139] In some cases, it conducts investigations into cases that are also being investigated by IPOA. For example, the Unit investigated the fatal shooting of a university student leader during a demonstration in 2018.[140] Like IPOA, it also recommended murder charges against the police officer who shot the student. A challenge may arise if the two institutions conduct investigations and arrive at different outcomes. If, for instance, IPOA recommends prosecution while the Internal Affairs Unit does not find culpability on the part of an officer, an accused police officer could rely on the Unit's investigation report as exculpatory evidence should the officer be charged by the ODPP. The competing mandates has on some occasions seen IPOA demand that the Internal Affairs Unit stop conducting investigations in certain serious cases.[141]

The Unit may also classify complaints as 'serious matters'. Such cases include misuse of firearms, serious assaults and complaints against senior police officers.[142] Investigations by the Unit have a time limit of 60 days, which may be extended where necessary.[143] If the unit

[138] See IAU, Annual Report-2021, p. 19. Available at https://www.iau.go.ke/wp-content/uploads/2022/11/ANNUAL-PERFORMANCE-AND-STATISTICAL-REPORT-2021.pdf.
[139] IAU Operational Manual (n. 134 above), p. 20.
[140] IAU, Annual Report-2018, pp. 9-10. Available at https://www.iau.go.ke/wp-content/uploads/2019/07/IAU-ANNUAL-REPORT-2018.pdf.
[141] See, G Osen, 'IPOA demands IAU to stop probing disbanded SSU team' The Star Newspaper, 24 October 2022. Available at https://www.the-star.co.ke/news/2022-10-24-ipoa-demands-iau-to-stop-probing-disbanded-ssu-team/.
[142] IAU Operational Manual (n. 134 above), p. 20.
[143] n. 142, p. 23.

determines that a complaint discloses a criminal offence, it forwards the investigation file to the ODPP for further action.[144]

In an interview with the Deputy Director of the Internal Affairs Unit, it was stated that the Unit does not monitor assemblies. However, the Unit can investigate violations committed by the police during the assemblies. The investigation may be done after a complaint is received, upon a referral by IPOA, on the instruction of the Inspector General of the NPS, or by the Unit acting on its own motion.[145] Other than the 2018 annual report which highlights one case of a fatal shooting during an assembly, the other annual reports available online do not have information on investigations or complaints arising from violations committed during assemblies. It is therefore not possible to tell how much of a contribution the Unit has made in enhancing accountability for violations resulting from the unlawful use of force by the police during assemblies.

The Unit has five offices: its headquarters in Nairobi and four regional offices. Its physical accessibility to the public is therefore limited. Nevertheless, it has established various electronic platforms which the public can use. Apart from a having a toll-free number and a short code, the Unit also launched an Anonymous Reporting Information System in 2018.[146] The system can be accessed through an Unstructured Supplementary Service Data (USSD) code or by downloading its mobile online application. These electronic platforms have not been adequately publicised. As demonstrated in the Unit's annual reports, an overwhelming majority of complainants do not use them.

In addition to the Internal Affairs Unit, the NPS' chain of command should also be able to address incidents of suspected violations effectively. As discussed in previous chapters, the command of a public order operation lies with the station commander of the police station in whose jurisdiction an assembly is being held. The station commander therefore has a responsibility to plan public order operations in a way that ensures protection of rights and accountability for violations. It was shown in chapter 5 that, in practice, there might be significant

[144] IAU Operational Manual (n. 134 above), p. 17.
[145] NPS Act (n. 34 above), s. 87(4).
[146] IAU, Annual Report-2018 (n. 140 above), pp. 5-7.

lapses in command and control of operations. In the absence of proper control of operations, police officers may use force unlawfully and fail to report such use as required under the NPS Act. This would then hinder accountability.

### 6.4.2 External mechanisms

External accountability mechanisms include State institutions officially established by law and other unofficial civilian oversight mechanisms such as the media and civil society organisations. As stated earlier, the primary external police oversight mechanism in Kenya is IPOA. Under the IPOA Act the objectives of IPOA include to 'hold the Police accountable to the public in the performance of their functions' and to give effect to Article 244 of the Constitution which requires, among others, transparency and accountability of the NPS.[147] Section 4 of the Act provides that IPOA shall not be subject to the direction of any person or body in the performance of its functions.

Section 6 sets out the functions of IPOA which include: investigating complaints against the police and making recommendations for prosecution or other disciplinary action as may be necessary; investigating complaints by the police; and monitoring and investigating police operations affecting members of the public. In the exercise of its investigative function, IPOA has the power to call for records or documentary evidence from the police, record statements from witnesses, summon police officers whether they are in service or are retired, make recommendations for prosecution of any police officer to the Office of the Director of Public Prosecutions, among other powers.[148] It may also take over or supervise ongoing internal investigations by the Internal Affairs Unit.[149]

IPOA is governed by a Board whose members are appointed through a competitive public process and they serve for one six-year term.[150] Once nominated for appointment by a selection panel comprising of representatives of various government institutions and approved by the President, the nominees are also vetted by the National Assembly.[151] The involvement of multiple

[147] IPOA Act (n. 36 above), s. 5.
[148] n. 147, s. 1(a).
[149] n. 147, s. 1(b).
[150] n. 147, ss. 11, 13.
[151] n. 150.

stakeholders and the public nature of the recruitment process of the Board members can help guarantee their independence, and by extension the independence of the staff of the Authority.

Although IPOA is legally independent and is equipped with relevant legal powers required to facilitate their work, operationally it relies on the support and cooperation of the NPS. This is both in relation to forensic support in investigations and access to crucial evidence in possession of the NPS. As was explained by IPOA's head of investigations during an interview, IPOA usually relies on the Directorate of Criminal Investigations to conduct forensic analysis of some pieces of evidence. It was stated that while the DCI has generally been professional and there have been no concerns about potential interference with evidence, IPOA's investigations are not necessarily prioritised since the DCI investigates several cases of serious crime. Consequently, there may be long delays in the investigations.

IPOA regularly monitors public order operations and investigates cases of unlawful use of force. While its performance reports contain data on the nature of complaints received and number of cases involving deaths or serious injuries, the reports do not indicate in what context the serious injuries or deaths occurred. As such, one cannot tell how many of the cases investigated arose from violations during an assembly. Nevertheless, IPOA occasionally shares press statements about investigations it has initiated into various cases, including fatal shootings during assemblies.[152] However, this happens mostly when an incident is widely covered by the media. Information on convictions can also be obtained from IPOA's website. As of December 2022, IPOA had not reported any conviction of a police officer for a death or serious injuries caused during an assembly. As stated earlier, however, there are several prosecutions that were pending.

Another key external institution is the KNCHR. It was first established as a statutory body in the year 2003.[153] Subsequently, it was entrenched in the 2010 Constitution of Kenya under Article 59. This helped enhance its independence. Its functions as set out in the Constitution and the KNCHR Act of 2011 include receiving complaints on human rights violations, conducting

[152] For a list of some of the press releases, see https://ipoa.news/gallery-2/.
[153] Kenya National Commission on Human Rights Act, No. 9 of 2002, Laws of Kenya.

investigations on its own motion or on the basis of a complaint and monitoring compliance by State and non-State actors with constitutional and international human rights standards. The KNCHR also monitors assemblies, though it mainly focuses on assemblies in the context of elections. Nevertheless, it investigates human rights violations committed in any assembly.[154] Where necessary, it pursues redress for victims of violations through civil processes and may watch brief for victims in criminal cases. In this sense, its role complements that of IPOA.

There are also other external mechanisms that have a limited role to play in addressing violations committed by the police during assemblies. For instance, the NPSC exercises disciplinary control over members of the NPS and may remove them from service if necessary.[155] Though the NPSC Act provides that the NPSC may investigate cases and summon witnesses during investigations, the cases in question would ordinarily not involve investigations into deaths or serious injuries attributable to the police. Should it receive such complaints, it has an obligation to refer them to IPOA, the ODPP or KNCHR.[156] Presumably, therefore, the involvement of the NPSC in a case where a police officer has been accused of causing death or serious injuries would be limited to taking disciplinary action after the relevant investigative authorities have concluded their investigations and made a finding of culpability. The disciplinary action would be in addition to a criminal accountability process and may lead to a police officer being removed from the NPS. The members of the NPSC are civilians and their appointment process is similar to that of the members of the Board of IPOA.[157] Persons who are or have been members of the NPS are disqualified from appointment as members of the NPSC.[158] To this extent, the NPSC can be said to be independent of influence from the NPS.

By virtue of its broad oversight role, the Parliament of Kenya may also contribute to enhancing accountability of security actors through parliamentary debates, directing questions

[154] See, for instance, KNCHR, 'You got brains, we got brawn: Report of the Kenya National Commission on Human Rights on Investigations into Police Brutality Committed at the University of Nairobi on 28 September 2017', November 2017. Available at https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20on%20Police%20Brutality%20at%20the%20University%20of%20Nairobi_2.pdf.
[155] Article 246(3), Constitution of Kenya.
[156] NPSC Act (n. 35 above), s. 10(1) (o).
[157] n. 156, s. 6.
[158] n. 156, s. 5(4)(d).

to the top leadership of the NPS or the Minister in charge of the police, and in some cases conducting their own inquiries.[159] Parliament has in the past held sessions discussing issues concerning excessive use of force by the police during demonstrations and lack of accountability for the violations.[160]

In cases where violations are widespread and prevalent, the President may establish a commission of inquiry if it is in the public interest to do so.[161] For example, in 2008, the Commission of Inquiry into the Post-Election Violence was established to address, among other issues, the question of human rights violations committed by the police in the context of the 2007 general elections and their accountability for the violations. Most of the reforms initiated within the Police Service after the year 2008 were the result of the recommendations of the Commission. The establishment of a commission of inquiry is purely at the discretion of the President. This was stated by the High Court in *Apollo Mboya v. Attorney General and others*[162] wherein the petitioner sought an order directing the Attorney General to advise the President to establish a commission of inquiry to investigate extrajudicial killings and enforced disappearances that had occurred between 2008 and 2017 when the petition was filed. The Court stated that the President could not be compelled to establish a commission of inquiry.[163]

Non-official oversight mechanisms such as civil society organizations, the media, and professional bodies such as the Law Society of Kenya do not bear the legal obligation of ensuring police accountability. However, by highlighting incidents of police violations and calling on the State to act, such informal mechanisms can also enhance accountability for violations.

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[159] For instance, the Parliamentary Standing Committee on Justice, Legal Affairs and Human Rights conducted an inquiry into extrajudicial killings and enforced disappearances in Kenya. It shared its report in October 2021. See 12th Parliament (Senate), Standing Committee on Justice, Legal Affairs and Human Rights, Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya, October 2021. Available at http://parliament.go.ke/sites/default/files/2021-11/Report%20on%20Inquiry%20into%20Extrajudicial%20Killings%20and%20Enforced%20Disappearance%20in%20Kenya_.pdf.

[160] Parliament of Kenya, The Senate, the Hansard, 30 November 2017, pp.13-30. Available at http://www.parliament.go.ke/sites/default/files/2017-05/Thursday_30th_November_2017.pdf.

[161] Commissions of Inquiry Act, Cap 102, Laws of Kenya, s. 3.

[162] *Apollo Mboya v. Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another* [2019] eKLR.

[163] n. 162, para. 22.

## 6.5 An analysis of barriers to the effectiveness of the internal and external police accountability mechanisms

Compared to most countries in Africa, Kenya has an elaborate police accountability framework, which involves several institutions as discussed above. Still, the ability of these institutions to ensure accountability for excessive use of force by the police during assemblies is impeded by legal, structural and socio-political barriers, as is now discussed.

### 6.5.1 Legal barriers

As stated before, when reviewing police action, the standard against which the action is measured is the one set out in law. In previous chapters, it was shown that the Penal Code, the Public Order Act and the NPS Act permit the police to use force and firearms in circumstances that are not permitted under international law. Relying on overly permissive provisions lowers the accountability standards since the relevant mechanisms may effectively be lowering the threshold for accountability if they rely on the domestic standards to judge the lawfulness of the use of force or firearms. For example, in April 2019 police officers shot and injured two people who were allegedly trafficking drugs. Investigations into the case were initiated by IPOA and it was established that the police had received prior information that the two alleged traffickers would use a certain route and had planned to arrest them. When the suspects, who were on a motorbike, spotted the police, they sped past them. The police shot at them, wounding one on his back and the other on the leg. They were later charged with drug trafficking and one was found guilty while the other's case was still pending at the time of writing. According to IPOA, their investigations revealed that the 'police officers were justified to shoot with an aim of immobilizing the escaping suspects who were transporting narcotic drugs.'[164] From the circumstances of the case as shared by IPOA, the suspects were not armed and did not pose an imminent threat to the life or even bodily integrity of the police officers or any other person. Yet IPOA still formed the view that the use of firearms was justified. This reasoning must have been based on the permissive provisions in the NPS Act which allow the use of firearms in circumstances that are not permitted under international law. Although this case did not concern

[164] IPOA, 'Police were Justified to Use Firearms,' Press Release, 30 May 2022. Available at https://ipoa.news/wp-content/uploads/2022/05/261.-police-were-justified-to-use-firearms-investigations-reveal-30.05.2022-2.pdf.

the use of firearms in an assembly, it is possible that IPOA may hold similar views in cases where excessive force is used against assembly participants who engage in violent conduct such as destruction of property.

Importantly, in the case of *Katiba Institute & AFRICOG v. Attorney-General & Others,*[165] the High Court determined that the 2014 amendments to the NPS Act, which introduced additional circumstances under which firearms could be used, were unconstitutional and therefore the provisions were invalid. The case is significant in the sense that it aligns domestic standards on the use of firearms under the NPS Act with international standards. Still, the Penal Code specifically excludes criminal and civil liability in cases where the use of force to disperse riots leads to death or serious injuries. Thus, unless amendments are effected not only to the NPS Act but also the Penal Code and the Public Order Act, police officers may still be able to justify violations of the rights of assembly participants.

### 6.5.2 Structural barriers

One of the challenges that was cited during interviews with officials from IPOA is the difficulty of investigating violations committed during assemblies, especially if the assembly was large. In most cases, victims are not usually able to identify the specific officers who assaulted them or other participants. Apart from the fact that the chaotic circumstances of an assembly may make it difficult for positive identification, police officers involved in assemblies are sometimes clad in riot gear that have no identification tags.[166] Even if an identification parade were to be conducted during investigations, it would still be difficult for a victim to accurately identify a police officer if their entire face could not be seen. This is a challenge that IPOA can surmount with the help and cooperation of the NPS, which is rare.

Considering that the conduct of thorough and effective investigations may be frustrated by superior officers, the African Commission's position in the *George Kajikabi* case – that where

[165] *Katiba Institute & AFRICOG v. Attorney-General & others*, High Court Nairobi Petition No. 379 of 2017. The judgment was delivered on 16 December 2022 and had not been published as of writing.
[166] In its 2018-2019 Annual report, IPOA states that in over 90% of public order operations it monitored, police officers did not wear visible identification badges. See IPOA, Annual Report and Financial Statements for the year ended June 2019, p. 19. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Annual-Report-2018-2019-Web.pdf.

it is not possible to identify perpetrators the responsible superior officers should be charged is of crucial importance. While IPOA has rarely resorted to recommending criminal charges against superiors for the violations committed by their juniors, it did so in the pending case of *R v. Titus Yoma and 11 others.*[167] In this case, twelve senior police officers who commanded public order operations in the period that followed the release of the results of the 2017 presidential elections have been charged with murder and torture as crimes against humanity. The officers have been charged under the International Crimes Act.[168] Even if the crimes against humanity charges are not ultimately proved beyond reasonable doubt, the fact that superior officers will be prosecuted for the offences of their subordinates can still have a deterrent effect.

The policing of an assembly for which the police had prior notice should normally be guided by a detailed operational order. As discussed in chapter 5, such an order usually contains information on who the commander of an operation is, the names and roles of the officers involved in the operation, the weapons and equipment they are given, the section to which each of the officers will be deployed, among other pieces of information. Such an Order would be a critical piece of evidence during an investigation and can help in narrowing focus on specific officers who were deployed in a particular area where violations occurred. However, according to the director of research and monitoring at IPOA, police officers rarely share the operational orders.[169] The NPS's refusal to share these documents adversely impacts any investigation that may be conducted. In most cases, where it is not possible to establish the identity of a perpetrator, the criminal accountability process is stalled. While actionmay be taken against superior officers who intentionally frustrate investigations,[170] they cannot be charged with offences against the right to life and the right to freedom and security of the person unless there is evidence that they committed the offences or aided and abetted them. This is because criminal accountability is generally individual, and therefore before recommending charges against any officer, an investigating authority has to be certain that it has reasonable grounds to charge that

[167] *R v. Titus Yoma and 11 others*, Nairobi High Court Criminal Case No. E074 of 2022 (pending hearing).
[168] International Crimes Act, No. 16 of 2008, Laws of Kenya.
[169] Interview with Director, Research and Monitoring-IPOA held virtually on 20 May 2021.
[170] The action may entail internal disciplinary processes or being charged with conspiracy to defeat justice under section 117(c) of the Penal Code.

officer. It was stated earlier in this chapter that the ODPP had recently charged 12 senior police officers with crimes under the International Crimes Act based on the doctrine of command responsibility. While the step taken by IPOA and the ODPP is laudable, the doctrine of command responsibility cannot be the cure for the inability to identify actual perpetrators of acts amounting to human rights violations.

Should the failure to identify perpetrators make it impossible to institute a criminal prosecution, steps can still be taken to pursue redress through a civil case. Since IPOA does not pursue civil remedies on behalf of victims of police violence, the KNCHR, which is mandated to take steps to secure redress for victims, can file such cases and seek reliefs against the State. Provided that it can be proved that the perpetrators were police officers, the State can still be held vicariously liable as was stated by the Court in the case *Attorney General v. Joyce Wambura Muthogo* cited earlier. It should be noted, however, that the KNCHR rarely files such cases mainly due to resource constraints. Thus, unless civil society organizations take up the cases or the victims file them by themselves, accountability of the State fails on all fronts. Also worth noting is the fact that even where the cases are filed and they succeed, court orders (including orders for compensation) are directed to the State. Consequently, the civil cases have little to no deterrent effect on police officers.

Another barrier relates to the technical and operational capacities of the external accountability mechanisms. As stated earlier, IPOA mostly relies on the Directorate of Criminal Investigations to assist in conducting forensic analysis of evidence. Questions may be raised about the independence and credibility of such investigations. Further, there may be delays in getting feedback from the Directorate of Criminal Investigations. With only a few investigators across its eight offices, investigations can either take an unreasonably long time or not take place at all. A frequent complaint from members of the public has been delays in investigations. In some cases, victims and their witnesses give up on pursuing justice.

As discussed above, the successful prosecution of cases involving deaths or serious injuries in the context of assemblies has been a generally rare occurrence. Other than non-cooperation from the NPS being one of the obstacles to effective and thorough investigation and

prosecution of such cases, the low number of successful prosecutions can also be attributed to lack of capacity to conduct thorough investigations. In the case of *Republic v. Patrick Wafula Manyasi,*[171] the accused was a senior police officer who was charged with fatally shooting a demonstrator. The Court noted that the gaps in the investigation were so serious that there was no need to require the accused to defend themselves. On the testimony of the investigator from IPOA, the Court noted that apart from checking the Arms Movement Register and confirming that the accused was issued with a firearm, nothing more was done. The Court stated that '…he did not investigate the armory to establish which firearm the accused was issued with and if it tallied with what the witnesses alluded to…. The Investigating Officer did not tell the court whether or not any spent cartridges or bullets were found at the scene. If so, what happened to them and which weapons were they fired from.'[172] The accused was acquitted. From the evidence given, the investigation in the case was done by both IPOA and officers from the DCI. As such, it should have been possible for these two institutions to conduct thorough and effective investigations that would have led to the identification of the person who fatally shot the victim.

Another challenge cited was the failure by complainants to cooperate with investigators. It was stated that in many cases, after witnesses have recorded statements, they do not thereafter honour further summonses.[173] In addition, they shy away from court processes. It was explained that the reason for this is the fact that court processes may expose them to the risk of reprisals by the accused officers or their colleagues. Others find attending court inconveniencing and expensive.[174] Although the Witness Protection Agency can facilitate protection of witnesses at risk, it cannot do so in all cases due to resource constraints.

In terms of access to the accountability mechanisms by the public, both IPOA and KNCHR do not have physical presence across the country. The Independent Policing Oversight Authority has nine offices, KNCHR has six while the Internal Affairs Unit has five offices. While all three have online platforms through which the public can lodge complaints, such platforms are not

[171] *Republic v. Patrick Wafula Manyasi* [2019] eKLR.
[172] n. 171, p. 6.
[173] Interview with IPOA's head of investigations held virtually on 20 May 2021.
[174] n. 173.

necessarily accessible to all. From the annual reports of the institutions, it is evident that the majority of members of the public prefer reporting their complaints physically.[175] Noting that the NPS routinely fails to comply with their obligation to notify IPOA about cases of deaths or serious injuries, it is possible that victims who do not have the means to travel to lodge their complaints may not have them addressed at all.

Another challenge is the limited understanding among police officers on the content of the right of peaceful assembly and the limits of police powers to use force during assemblies. Coupled with internal NPS guidelines[176] that are largely aimed at restricting rather than facilitating peaceful assemblies, police officers may normalise some violations such as striking assembly participants with batons.

The lack of dedicated data on deaths and injuries in the context of assemblies has also made it difficult to determine the magnitude of the problem and craft interventions that can adequately address the gaps in accountability. In the absence of comprehensive official data on deaths and injuries during assemblies, the reported cases may be viewed only as isolated incidents rather than a systemic problem with police response to assemblies.

The key police accountability mechanisms all prepare monitoring and investigation reports and share recommendations with the NPS. It is not clear whether these institutions have in place a system of following up with the police on implementation of recommendations that they have accepted. For instance, the IPOA Act requires IPOA to make public responses to recommendations it makes to the relevant authorities after investigations.[177] From its published press releases, IPOA mostly updates the public on decisions to charge made by the ODPP and convictions of police officers. Their annual and bi-annual reports also contain information on implementation of recommendations following inspections of police premises,[178] but no information on responses or status of implementation of recommendations resulting from its

[175] For instance, in the Internal Affairs Unit annual report for the year 2021, 85% of complainants lodged their complaints by physically visiting the offices.
[176] These include the NPS Draft Manual of Guidance on Public Order Management and NPS Draft Manual of Guidance on the Use of Force and Firearms discussed in chapter 5.
[177] IPOA Act (n. 36 above), s. 6(a).
[178] See, for instance, IPOA Performance Report-July-December 2021 (n. 91 above), p. 22.5.

investigations. Also, the annual reports of the KNCHR do not contain information on acceptance and implementation of its recommendations to the NPS touching on violations committed during assemblies. The KNCHR has also not published its annual reports since the 2017-2018 reporting period. Having published three reports on the violations committed by both law enforcement officials and civilians during the 2017 elections, it would have been helpful for it to monitor and share progress on the implementation of its recommendations with the public. Otherwise, the cycle of violence against the public during public order operations will continue.

### 6.5.3 Socio-political barriers

The social and political environment in which the police operate also has an impact on whether or not they are held accountable for violations. Police in Kenya generally perceive assembly participants as disruptors and troublemakers, and in some cases, they are also branded as thugs or criminals.[179] These tags can be believed by sections of the public who may then support police violence against assembly participants.[180] When such hostile attitudes are adopted by top government officials and political leaders, the likelihood of any violation committed in such contexts being addressed is reduced. For example, when protests erupted in 2017 after the release of the results of the presidential elections, more than 80 people were fatally shot or suffered fatal injuries after being beaten with batons.[181] When journalists asked the then minister in charge of internal security about the deaths, he responded that he was not aware of any peaceful demonstrator who had been killed and appeared to imply that those who were killed

[179] M. Ruteere and P. Mutahi, 'Policing Protests in Kenya' (CHRIPS, 2019), p. 29. Available at https://www.chrips.or.ke/wp-content/uploads/2019/08/CHRIPS-Policing-Protests-in-Kenya-full-book.pdf.

[180] For instance, in 2017, the then leading opposition coalition planned to hold protests demanding the resignation of the Chief Executive Officer of the Independent Electoral and Boundaries Commission. A group of people claiming to be businessmen whose businesses had been disrupted by protests by opposition supporters emerged vowing to counter the protests and protect their interests. Some of the members of the group were captured on video armed with clubs. Possibly, their counter-protests were intended to be violent. See Josphat Thiong'o, 'Businessmen vow to 'protect' their businesses ahead of planed NASA protests,' The Standard Newspaper, 25 September 2017. Available at https://www.standardmedia.co.ke/article/2001255611/businessmen-vow-to-protect-their-businesses-ahead-of-planed-nasa-protests?fb_comment_id=1443678902348704_1443996238983637. Also see, NTV, 'Nairobi Business Community members emerge to counter protests' NTV-Kenya YouTube Channel. Available at https://www.youtube.com/watch?v=c-mVcurm-0M.

[181] See KNCHR, 'Mirage at Dusk: A Human Rights Account of the 2017 General Election' (2017). Available at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457.

were violent criminals.[182] As of the time he was addressing the press, there were media reports of at least 12 people having been killed. The Inspector General of the NPS stood alongside the Minister during the press briefing. It was therefore not surprising that the majority of the cases of deaths and serious injuries were not redressed.

Negative media coverage of assemblies can also contribute to the entrenchment of the notion that assembly participants are generally violent. In a study on media framing of *Black Lives Matter* protests in the United States, it was established that how the media reported on the protests had an impact on public attitudes towards the police and the protesters.[183] Where the study particpants were exposed to coverage that focused on the concerns of the protesters, they would be more supportive of the protests and more critical of the police.[184] On the other hand, coverage focusing on violence and confrontation saw most of the study participants criticise the protests while being more supportive of the police.[185] Thus descriptions like 'violent protests erupt…' only serve to criminalise entire assemblies even where only a section of participants are not peaceful or the police are the source of the violence.

Another barrier to accountability is the fact that while police reforms have led to the establishment of important accountability institutions, police attitudes and culture has not reformed as fast as the law. Police officers often normalise and justify the use of force against assembly participants, even in instances where that use of force is unlawful. Further, they still view demands for accountability for human rights violations as interference with their work. For instance, in December 2022 the Inspector-General of the NPS publicly advised the police to use their arms effectively to deal with criminals.[186] He encouraged the police not to fear institutions like IPOA, which he referred to as 'busybodies'.[187] With such attitudes still existing within the top

[182] Al Jazeera News, 'At least 37 people were killed in election violence' 9 October 2017, Available at https://www.aljazeera.com/news/2017/10/9/at-least-37-people-were-killed-in-election-violence.
[183] D Brown & R Mourão, 'Protest Coverage Matters: How Media Framing and Visual Communication Affects Support for Black Civil Rights Protests' Mass Communication and Society (2021), Vol. 24, No.4, pp. 576-96.
[184] n. 183, pp. 587-91.
[185] n. 184.
[186] B Makong, 'Koome Tells Off 'Busybodies' In IPOA, Asks Police to Use Arms Effectively' Capital News, 16 December 2022. Available at https://www.capitalfm.co.ke/news/2022/12/koome-tells-off-busybodies-in-ipoa-asks-police-to-use-arms-effectively/.
[187] n. 186.

leadership of the NPS and amongst police officers generally, much remains to be done. To echo the words of the Independent Commission on Policing in Northern Ireland, '…accountability should run through the bloodstream of the whole body of a police service and is at least as much a matter of the culture and ethos of the service as it is of the institutional mechanisms….'[188]

### 6.6 Conclusion

In previous chapters, the international and Kenyan legal framework on the right of peaceful assembly and rules on the use of force and firearms by law enforcement officials during assemblies were discussed. It was established that while the right of peaceful assembly is well protected under international law, there are some important gaps in its protection under Kenyan law and in the practice of the NPS in relation to policing of assemblies. In addition, it was shown that the domestic rules on the use of force and firearms by the police are more permissive than international standards. Such an environment, it was explained, could enhance the likelihood of violations of the right to life and bodily integrity being violated during assemblies. When such violations occur, accountability should be ensured.

This chapter set out to analyse the police accountability framework in Kenya with a view to determining why cases of police violations of the right to life and the right to freedom and security of the person during assemblies are not adequately addressed. It looked at both the laws and the institutions that form part of the police accountability framework in Kenya and the barriers to accountability.

In relation to the legal framework on police accountability, the discussion was framed around the duty to investigate, prosecute and punish, and remedy as provided for under Kenyan law. It was established that the duty to investigate incidents involving police use of force is provided for under the NPS Act. The Act has a reporting procedure that requires police officers who have used force to report to their superiors who may then judge the lawfulness of the use of force. In the event that the use of force or firearms results into the death of a person, the Act requires a superior officer to immediately report the incident to IPOA for purposes of

[188] Report of the Independent Commission on Policing in Northern Ireland (1999), para. 5.4, p. 22. Available at https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf.

independent investigations. The NPS Act also requires the police to secure the scenes of incidents involving the use of force and to refrain from damaging or tampering with evidence. These requirements are aimed at facilitating thorough and effective investigations.

The Prevention of Torture Act was also highlighted as a basis for the duty to investigate incidents of torture or ill-treatment. It was further shown that the IPOA Act, the KNCHR Act, and the National Coroners Service Act create oversight mechanisms that have the mandate to conduct investigations into cases of suspicious deaths or serious injuries following police encounters. Overall, it was demonstrated that the duty to investigate police use of force is provided for under Kenyan law.

The principles guiding investigations as outlined in the Minnesota and Istanbul Protocols published by the United Nations were also discussed. On the question of promptness, it was shown that the law does require investigations on deaths and serious injuries, or any use of firearms even if the use does not result into a death or serious injury, to be reported to IPOA immediately. However, it was noted that the NPS rarely complies with this requirement. This has a significant impact on the likelihood of an investigation being successful since delays may lead to degradation or destruction of evidence. In some cases, investigations may not be conducted at all if the police fail to notify IPOA and the information does not get to them through any other means. It was also stated that even where IPOA becomes aware of a case and begins investigations, the investigation process could take a long time. While it was accepted that investigations should not be rushed, it was argued that having prescribed timelines with the possibility of extension where appropriate would help to reduce the length of time it takes to conclude a case.

On the requirement that investigations be conducted independently and impartially, it was shown that IPOA and KNCHR are both independent civilian institutions and can therefore conduct investigations that meet this requirement. It was, however, noted that IPOA may be legally independent, but operationally, it relies on the NPS particularly in cases of investigations that require forensic examination. As such the possibility of the NPS frustrating or delaying investigations cannot be ruled out.

In relation to the need for investigations to be effective and thorough, it was explained that investigations must be capable of establishing the circumstances of a violation, identifying the perpetrator and leading to accountability. As was shown, there are a number of factors that may impede the ability of an investigative authority to meet this requirement. In the context of assemblies, one of the main inhibiting factors is the inability of victims to identify police officers who used excessive force against them. Failure by the police to secure and share critical evidence with IPOA was also noted as a hindrance to effective and thorough investigations. Securing evidence in assemblies requires a deliberate effort by the police given that assemblies generally involve large numbers of people and since they are mostly held in public spaces, the likelihood of unintentional interference with evidence can high. If evidence is not properly secured, accountability will likely not be achieved.

On the duty to prosecute and punish, it was explained that Kenyan penal laws provide for offences that one may be charged with in the event that the right to life or the right to freedom and security of the person as guaranteed under the Constitution are violated. It was also demonstrated that, apart from the Penal Code and the Prevention of Torture Act which prescribe punishment for offences under the Acts, the Constitution provides for various remedies that can be pursued by filing a constitutional petition.

The chapter also considered the powers and mandates of the various external police oversight mechanisms, as well as the Internal Affairs Unit which is a mechanism within the NPS. These were discussed with regard to their roles in exercising oversight over police use of force during assemblies. It was then shown that in spite of the existence of these mechanisms, several barriers militate against their ability to hold police accountable for human rights violations committed as a result of the use of force during assemblies. Unless measures are taken to address the barriers to accountability, the existence of police accountability institutions will not do much to create an environment where the public can safely and freely exercise their right of peaceful assembly.

# Chapter 7: Conclusion

## 7.1 Introduction

As discussed in this thesis, the right of peaceful assembly is guaranteed in Article 37 of the Constitution of Kenya and in key international human rights instruments that Kenya has ratified. However, as the research has illustrated, the enjoyment of the right is in some cases hindered, particularly through the unlawful use of force by law enforcement officials. Of particular concern was the general lack of accountability for violations resulting from excessive or indiscriminate use of force by the police during assemblies.

The main research question that guided the research was how human rights violations committed by law enforcement officials in Kenya in the context of peaceful assemblies can be prevented, and accountability for the violations enhanced. To answer this question, the thesis relied on secondary questions seeking to establish: a. the international legal framework on the right of peaceful assembly and on the use of force by law enforcement officials; b. the Kenyan legal framework on the right of peaceful assembly and on the use of force, and how the laws have shaped the interactions between law enforcement officials and assembly participants; c. the organisational and operational structure of law enforcement agencies in Kenya and how they influence the manner in which law enforcement officials police assemblies; and d. the problem with the existing police accountability mechanisms in Kenya.

The thesis began by detailing the international legal frameworks on the right of peaceful assembly and on the use of force by law enforcement officials in the context of assemblies. This provided the basis upon which to assess the level of compliance with international standards of Kenyan laws governing the right of peaceful assembly and the use of force by law enforcement officials during assemblies. In addition, the international legal framework provided a lens through which the practice of the police in relation to assemblies was also assessed. Through the analyses, the research identified gaps in both law and practice, which contribute to human rights violations during assemblies, particularly of the right to life, the right security of the person and the right to freedom of peaceful assembly. What follows is a discussion of the main findings and recommendations to address the gaps identified.

## 7.2 Summary of findings

***a. Gaps in relation to the Kenyan legal framework on the right of peaceful assembly.***

As discussed in chapter 4, the right of peaceful assembly in Kenya is primarily regulated by the Public Order Act, a Statute enacted in 1950 and which has undergone minimal amendments, some of which were retrogressive. The Penal Code also prescribes public order offences, including offences such as participating in an unlawful assembly, committing a breach of the peace, and taking part in a riot. It was shown that the relevant provisions in these statutes do not fully comply with international standards. For example, Kenyan law only extends protection to assemblies that comply with procedural requirements under the Public Order Act. Section 5(8) of the Act allows the police to stop, or prevent the holding of, an assembly if procedural requirements under the Act are not complied with or if the risk of a breach of the peace or public order is clear or imminent. Consequently, even if an assembly is peaceful, it may be dispersed if notification was not duly issued to the relevant authorities. As discussed in this thesis, while the Public Order Act only requires organisers to notify the police, what is in place is an authorisation regime where the police believe they must grant permission for assemblies to proceed. This belief is not entirely misplaced since the Act allows the police to stop or prevent the holding of an assembly if they believe there is an imminent risk of a breach of the peace. Indeed, even courts (such as the High Court in its judgment in the cases of *Boniface Mwangi v. Inspector General of Police and 5 others* and *Jacob Mbugua Njagi & 36 others v. Attorney General*) seem to believe that the police have the power to authorise assemblies.[1]What matters is how the police interpret what constitutes a breach of the peace.

In the absence of clarity on what should be considered a breach of the peace or public order, the police have broad discretion to classify conduct that should be tolerated as non-peaceful, and to ban the conduct of assemblies. Often, authorities equate disruptions associated with assemblies with violence, and as a result disperse and arrest participants in such assemblies. If procedural requirements were not followed, the participants may be charged with participating in an unlawful assembly or participating in a riot, among other public order offences set out in

[1] See section 4.6.1 of this thesis for a discussion of the two cases.

the Penal Code. As explained in chapter 4, the penalties for some of the offences are steep; indeed, they rise to a sentence of life imprisonment upon conviction. The effect of provisions like these is to discourage participation in assemblies. In addition, they also leave room for the State to justify its failure to protect and facilitate the exercise of the right of peaceful assembly.

When assemblies are stopped or dispersed, force is often used, which has led to injuries and even deaths in a number of cases. Since participation in an assembly considered to be unlawful or one that has been classified as a riot is an offence, it is unlikely that victims of unlawful use of force in such contexts would report violations against them and pursue redress. This is because presenting themselves to the police would likely lead to their arrest and prosecution. Consequently, human rights violations committed by the police during such assemblies are rarely addressed.

In line with the Supreme Court of Kenya's reasoning in the *Mitu Bell* case discussed in chapter 4, treaties and general rules of international law can only be applied '…to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement.'[2] This essentially places them below domestic laws and decisions of Kenyan courts in the hierarchy of laws in Kenya. Consequently, provisions in the Public Order Act and the Penal Code relating to assemblies take precedence over international standards. So too would certain judicial decisions, such as that of the High Court of Kenya in the *Ngunjiri Wambugu* case, discussed in this thesis. Unsurprisingly, the retrogressive recommendations made by the High Court in the case have been supported by the Kenyan Government and may in future be reflected in rules governing the conduct of assemblies.[3]

***b. Gaps in relation to the Kenyan legal framework governing the use of force and firearms by law enforcement officials***

[2] *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),* [2021] eKLR, para. 130.
[3] Ministry of Interior-Kenya, Official Twitter handle, 26 March 2023, 2001Hrs EAT. https://twitter.com/InteriorKE/status/1640036351541145600?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1640036351541145600%7Ctwgr%5E30404ed67e4459959edcfe2f0c56f441576b588d%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.theafricareport.com%2F296671%2Fkenya-government-announces-plans-to-amend-laws-on-protest%2F

While Kenyan laws on the use of force by law enforcement officials to a great extent reflect international standards, the rules on the use of firearms as set out in the National Police Service (NPS) Act and the Public Order Act do not. While in international law the requirement of an imminent threat of death or serious injury is mandatory, this is not the only requirement under Kenyan law. Firearms may also be used to protect property (unequivocally unlawful under international rules governing law enforcement) and against fleeing suspects who may have committed a felony but who may present no threat to life. Moreover, if, during an assembly, participants destroy property or commit serious offences that can attract at least three years' imprisonment, Kenyan law permits the police to use firearms against them. It was also shown that section 14 of the Public Order Act allows the police to resort to the use of firearms if less-lethal weapons have previously been used but have not been successful in achieving any intended purpose under the Act. This provision certainly broadens police discretion to use firearms during public order operations.

It was also shown in the thesis that the Penal Code equally has provisions that allow the police to 'do all things necessary' to disperse persons taking part in a riot. The Penal Code goes further to exclude civil or criminal liability for deaths or serious injuries that result from the use of force during a gathering classified as a riot. While the Penal Code requires resort to the use of force (both lethal and less-lethal) to be reasonable and necessary, this requirement cannot sufficiently protect assembly participants when police officers enjoy a wide discretion in determining whether an assembly is a riot or not, and thereafter deciding what level of force to use. If the circumstances under which firearms may be used are not strictly narrowed by law, the police can more easily justify resorting to firearms.

It is worth noting that in the case of *Katiba Institute and AFRICOG v. Attorney General and others*, the High Court of Kenya found that the amendments to the NPS Act which broadened the circumstances under which firearms may be used (to include the protection of property, the prevention of escape of a person charged with a felony, and as a substitute where less-lethal weapons have previously been used unsuccessfully) to be unconstitutional. This decision was an important step towards domestic compliance with international standards governing the use of firearms. While, at the time of writing, the NPS Act had yet to be amended (the judgment was

delivered in December 2022), the additional circumstances under which firearms may be used cannot be relied on as a defence to assault or even homicide, provided that the High Court decision remains undisturbed. It is necessary that the NPS Act be amended to reflect the position of the Court. Notably, the provisions in the Public Order Act and the Penal Code that broaden police discretion to use lethal and less-lethal force are still in force and had not been challenged as of writing.

In relation to less-lethal weapons, other than the guidance that the use of force should meet the test of necessity and proportionality, it was noted there are no publicly available regulations on the use of less-lethal weapons. In the context of assemblies, the use of tear gas to disperse gatherings is quite common in Kenya and often occurs even in cases where the use of force is not necessary at all. The excessive use of tear gas can potentially have adverse health effects on the victims.[4] The same applies to other less-lethal weapons whose use is not properly regulated. In the absence of publicly available information on how and when the police can use such weapons, the legality of their use may not be adequately interrogated and accountability for unlawful use ensured.

***c. Gaps relating to the operational and organisational structures of the NPS***

This thesis analysed the organisational and operational structures of the NPS with a view to determining how they influence police response to assemblies. As set out in chapter 5, this information was meant to be obtained mainly through interviews with various officials with the NPS. But, as explained, it was not possible to obtain official accounts from the police on training on public order management, planning of public order operations, the use of force, and internal accountability mechanisms. However, unofficial interviews were able to be conducted with eight police officers. To a large extent their views on public order operations and the associated use of force and firearms reflected the contents of the Draft Manual on Public Order Management, 2018; and the Draft Guidance on Use of Force and Firearms, 2018, both of which were shared with the author by the NPS. In addition, official interviews with representatives of the

[4] INCLO & PHR, 'Lethal in Disguise 2: How Crowd-Control Weapons Impact Health and Human Rights' March 2023. Available at https://lethalindisguise.org/wp-content/uploads/2022/12/LID2-Main-Report-Pages-Final.pdf.

Independent Policing Oversight Authority (IPOA) and the Internal Affairs Unit (IAU) helped to draw conclusions on the NPS's capacity to police assemblies within international human rights standards.

As noted in this thesis, the Draft Manual on Public Order Management guidelines on the use of force and firearms during public order operations falls far short of both domestic and international standards. For instance, it provides that, when dispersing an assembly, the officer commanding the operation may order police officers to fire live ammunition at participants if tear gas and batons have failed to achieve the set objectives. Although the Manual had not been given a final approval as of writing, it could already be in use given that its contents were not only reiterated by the officers that were interviewed but are also more generally reflective of police practice in Kenya.

It was also noted that there were gaps in training on public order management; planning of public order operations, including their command and control; and limited options in terms of access to less-lethal weapons. On training, for instance, it was established that police officers are not regularly trained on public order management. Tellingly, one police officer who was interviewed stated that in his 20 years in the NPS, he had only undergone the initial training during recruitment and none since, despite having participated in numerous public order operations. Concerns were also raised about the lack of adequate public order equipment, including less-lethal weapons and protective equipment. It was noted that police officers are sometimes forced to resort to lethal force when they run out of less-lethal options (mainly tear gas) and are concerned about their own safety. Other gaps that were noted include ineffective command and control of public order operations and the absence of structures for prior engagement between assembly organisers and law enforcement officials. These gaps increase the likelihood of police committing human rights violations during assemblies, and may also inhibit accountability, as was explained in chapters 5 and 6.

***d. Gaps in the police oversight and accountability framework***

A key concern this thesis sought to address was the persistent lack of accountability for human rights violations committed by law enforcement officials in the context of assemblies. It therefore

analysed the police accountability framework in Kenya, with a focus on the Kenyan legal framework on the duty to investigate, prosecute and punish, and remedy, and the institutional framework for police oversight and accountability. In relation to the legal framework on the duty to investigate, prosecute and punish, and remedy, it was established that Kenyan laws adequately provide for these duties. The question that remained was whether the institutions established to discharge these duties have done so in line with international standards. And if not, what are the obstacles?

It was noted in chapter 6 that Kenya has an elaborate police oversight and accountability institutional framework, with the primary institution being IPOA. In addition, the NPS has its own internal accountability framework. Together, these mechanisms should be able to address cases of violations committed against assembly participants by police officers. However, it was noted that several factors militate against the quest for accountability. One is that police officers rarely notify IPOA about cases of deaths or serious injuries as required by law. Consequently, some cases are not investigated at all while others may be conducted when considerable time has already passed and the gathering of crucial evidence has become more difficult. Another challenge was the inability of victims to identify police officers who used excessive force against them, mainly because typically police in riot gear do not have visible identification numbers or marks. Coupled with the frequent refusal by the police to cooperate with independent investigators, the likelihood of any police officer being held to account reduces significantly. Other barriers to accountability laws such as the Penal Code that impede accountability, the inadequate technical and operational capacities of the external accountability mechanisms, failure by victims to cooperate with investigators due to fear of reprisals from the police, limited physical accessibility of the available external accountability mechanisms, and the absence of dedicated data on deaths and injuries in the context of assemblies.

Collectively, these barriers have made it difficult for incidents of human rights violations resulting from the unlawful use of force by the police during assemblies to be redressed. As demonstrated in chapter 6, prosecutions of police officers for deaths or serious injuries are extremely rare. The accountability gap not only fosters impunity but also has a chilling effect on the exercise of the right of peaceful assembly.

### 7.3 Recommendations

Noting the findings discussed above, this thesis proposes the following recommendations:

*1. Legislative reform*

Domestic laws provide the foundation upon which rights and obligations are interpreted at the domestic level. There is a glaring need to amend the Public Order Act and the Penal Code to bring them in line with international standards. While various courts in Kenya have emphasised that the Act meets constitutional standards on the protection of the right of peaceful assembly, certain elements of the Act do not meet international standards. In particular, the broad discretion that police officers have to stop or prevent the holding of an assembly should be more narrowly defined and should be restricted to circumstances where there is an imminent threat of a serious breach of the peace. The nature of conduct that constitutes a breach of the peace in the context of an assembly should also be defined and should exclude conduct that is merely disruptive. Further, notification requirements should not be strictly applied and should not be required in relation to spontaneous assemblies or small assemblies whose impact on the public is expected to be minimal.

In relation to the use of force and firearms during assemblies, amendments should urgently be made specifically to section 14 of the Public Order Act, Part B of the Sixth Schedule of the NPS Act (on the use of firearms), and section 82 of the Penal Code, all of which broaden the scope within which firearms may be used. It is also necessary to develop and make public specific regulations on the use of less-lethal weapons.

*2. Strengthening the capacity of the NPS to police assemblies within human rights standards*

Strengthening the NPS's ability to police assemblies in accordance with international and domestic human rights standards can be achieved through a range of measures. To begin with, police officers should undergo regular training on public order management and only officers who have been thus trained should be involved in policing assemblies. The training should incorporate human rights principles and standards, and should also equip the police with soft skills that would enable them to address conflict situations without having to resort to the use of

force. Secondly, police officers should be adequately equipped with appropriate less-lethal weapons, and protective equipment. Clear structures for engagement between police officers and assembly organisers should also be established. A collaborative approach would better enable the police to facilitate and protect an assembly. Third, the NPS should have clear command structures in cases where large assemblies are anticipated. As was demonstrated in chapter 6, where police officers involved in an assembly are drawn from various units or components of the NPS, lapses in command and control sometimes occur. In the event that an assembly lasts for long hours or even goes on for several days, officers commanding public order operations in such contexts must ensure that the police officers involved are not overworked as this may have an impact on how they handle assembly participants.

*3. Measures to enhance police accountability*

To ensure that all incidents of deaths or serious injuries are promptly investigated, the NPS should comply with its obligation to notify IPOA about such incidents. Alive to the possibility of continued non-compliance by the NPS, IPOA and other independent oversight institutions should develop modalities for collaboration and sharing of information on such cases. Building networks of grassroots human rights defenders who can report cases to IPOA as soon as they become aware of them would be helpful, especially since IPOA does not have physical presence across Kenya. The NPS should also ensure that all police officers involved in policing an assembly have visible identification numbers on their uniforms. In addition, it NPS should comply with its legal obligation to facilitate IPOA's investigations by sharing operational orders and other relevant documents that may be required. Further, in the event that deaths or serious injuries occur during an assembly, deliberate efforts should be made to secure evidence.

To ensure that investigations into deaths or serious injuries are done in line with international standards, the independent oversight institutions should enhance the capacity of their staff to competently conduct such investigations. To address the issue of lack of cooperation by victims due to fear of reprisals by police officers, oversight institutions should collaborate with the Witness Protection Agency which may offer long-term protection for vulnerable victims.

*4. Data on deaths and serious injuries in the context of assemblies*

To understand the depth of the problem of police violence during assemblies, it would be necessary to have official data on incidents of deaths and serious injuries resulting from the excessive use of force by the police during assemblies. This would help in crafting evidence-based interventions.

### 7.4 Concluding Remarks

The importance of the right of peaceful assembly cannot be overstated. As demonstrated in this thesis, the enjoyment of this right is in some cases inhibited by States through various retrogressive measures, particularly restrictive public order laws and the unlawful use of force and firearms by law enforcement officials. As also shown, the unlawful use of force and firearms against assembly participants is common in Kenya, with accountability for human rights violations resulting therefrom all too rare. The thesis has set out the international standards relevant to the protection of the right of peaceful assembly and the use of force in the context of assemblies, and highlighted the ways in which Kenyan laws and internal regulations of the National Police Service fall short. It also demonstrated how the shortcomings in law are reflected in practice, and how existing police oversight and accountability mechanisms have not adequately addressed violations committed by the police against assembly participants. The thesis has made recommendations aimed at addressing the gaps identified. Implementing the recommendations can contribute to the creation of an environment that fosters the full enjoyment of the right of peaceful assembly in Kenya.

## Table of cases

### National courts

#### *England*

*Solomon Beckford v. The Queen* [1987] 3 All ER 425.

#### *Kenya*

*Apollo Mboya v. Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) & another* [2019] eKLR.

*Attorney General v. Joyce Wambura Muthogo (Suing as the Legal Representative of the Estate of David Macharia Muthogo)* [2021] eKLR.

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

*Charles Munyeki Kimiti v. Joel Mwenda & 3 others* [2010] eKLR.

*Charles Murigu Muriithi & 2 others v. Attorney General* [2019] eKLR.

*Citizens against Violence (CAVI) & 14 others v. Attorney General & 3 others* [2020] eKLR.

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

*Florence Amunga Omukanda & another v. Attorney General & 2 others* [2016] eKLR.

*Fredrick Ngari Muchira and 99 others v. Pyrethrum Board of Kenya* [2012] eKLR.

*Gullid Mohamed Abadi v. OCPD Isiolo Police Station & 2 others* [2006] eKLR.

*Hussein Khalid & 16 others v. Attorney General & 2 others* [2014] eKLR.

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

*Hussein Khalid & 16 others v. Attorney General & 2 others* [2019] eKLR.

*I.P. Veronica Gitahi & another v. Republic* [2017] eKLR.

*In the Matter of Baby Samantha Pendo*, Chief Magistrate's Court at Kisumu, Inquest No. 6 of 2017 (unreported).

*Irene Wambui Muchai and 5 others v. Attorney General* [2017] eKLR.

*Jacob Mbugua Njagi & 36 others v. Attorney General* [2019] eKLR.

*Jeremiah ole Dashii Pallangyo v. Attorney General & 4 others* [2021] eKLR

*John Ngugi Gitau v. Attorney General* [2017] eKLR.

*Joseph Lendrix Waswa v. Republic* [2020] eKLR.

*Katiba Institute & AFRICOG v. Attorney-general & others*, Nairobi High Court Petition No. 379 of 2017 (unreported, as of writing).

*Leonard Mutua Munyao & another v. Attorney General & another* [2014] eKLR.

*Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),* [2021] eKLR, paras. 130-32.

*Muwonge v. AG* (1967) EA.

*Naomi Anyango Nyakure and Others v. Inspector General and others*, Migori High Court Petition No. 8 of 2021 (pending, as of writing).

*Ngunjiri Wambugu v. Inspector General of Police, & 2 others* [2019] eKLR.

*Re The Matter of Zipporah Wambui Mathara* [2010] eKLR.

*Republic v. Edward Kirui* [2010] eKLR.

*Republic v. Ezekiel A. Omollo*, Malindi High Court Criminal Case No. 6 of 2020 (pending, as of writing).

*Republic v. Kipsigei Cosmas Sigei & another* [2009] eKLR.

*Republic v. Patrick Wafula Manyasi* [2019] eKLR.

*Republic v. Police Constable Leakey Maina*, Meru High Criminal Case No. 59 of 2018 (pending, as of writing).

*Republic v. Titus Yoma and 11 others*, Nairobi High Court Criminal Case No. E074 of 2022 (pending, as of writing).

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

***South Africa***

*Khosa and others v. Minister of Defence and others,* 2020 (7) BCLR 816 (GP).

*South African Transport and Allied Workers Union and Another v. Garvas and Others,* 2012 (8) BCLR 840 (CC).

***USA***

*District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Edrei v. Bratton*, No. 17-2065 (2nd Cir. 2018).

*Marsh v. Alabama,* 326 U.S. 501 (1946).

**International courts and treaty bodies**

***African Commission on Human and Peoples' Rights***

*Egyptian Initiative for Personal Rights and Interights v. Egypt,* Communication No. 223/2006, [2011] ACHPR 85.

*George Kajikabi v. The Arab Republic of Egypt,* Communication No. 344/07, [2020] ACHPR.

*International Pen and Others (on behalf of Ken Saro-Wiwa) v. Nigeria*, ACHPR, Communication Nos. 137/94, 139/94, 154/96 and 161/97, (2000) AHRLR 212 (ACHPR 1998)

*Media Rights Agenda (on behalf of Malaolu) v. Nigeria,* Communication No 224/98, (2000) AHRLR 262 (ACHPR 2000).

*Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Communication No. 295/2004 [2012] ACHPR, 51st Ordinary Session.

*Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria,* Communication No. 155/1996 (2001) AHRLR 60 (ACHPR 2001)

***European Court of Human Rights & European Commission of Human Rights***

ECommHR, *Christians against Racism and Fascism (CARAF) v. United Kingdom,* App no. 8440/78, 16 July 1980.

ECommHR, *Pendragon v. United Kingdom,* App no. 31416/96. 19 October 1998.

ECtHR, *Abdullah Yaşa and Others v. Turkey*, App no 44827/08, 16 July 2013.

ECtHR, *Abdullah Yasa and Others v. Turkey,* App no. 44827/08, 16 July 2013.

ECtHR, *Ali Güneş v. Turkey*, App no 9829/07, Judgment of 10 April 2012.

ECtHR, *Anguelova v. Bulgaria*, App no. 38361/97, 13 June 2002.

ECtHR, *Appleby and others v. United Kingdom,* App no. 44306/98, 6 May 2003.

ECtHR, *Ataykaya v. Turkey*, App no. 50275/08, 22 July 2014.

ECtHR, *Austin v. UK* [GC], App nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.

ECtHR, *Balcik and Others v. Turkey,* App no.25/02. 29 November 2007.

ECtHR, *Bouyid v. Belgium* [GC], App no. 23380/09, 28 September 2015.

ECtHR, *Bubbins v. UK*, App no. 50196/99, 17 March 2005.

ECtHR, *Bukta and Others v. Hungary,* App no. 25691/01, 17 July 2007.

ECtHR, *Cestaro v. Italy*, App no. 6884/11, 7 April 2015.

ECtHR, *Cisse v. France,* App no. 51346/99, 9 April 2002.

ECtHR, *Drozd v. Ukraine*, App no. 12174/03, 30 July 2009.

ECtHR, *Eva Molnar v. Hungary*, App no. 10346/05, 7 October 2008.

ECtHR, *Ezelin* v. *France*, App no. 11800/85, 26 April 1991.

ECtHR, *Finogenov & others v. Russia*, App no. 27311/03, 20 December 2011.

ECtHR, *Frumkin v. Russia*, App no. 74568/12, 5 January 2016.

ECtHR, *Gillan and Quinton v. UK*, App no. 4158/05, 12 January 2010.

ECtHR, *Giuliani and Gaggio v. Italy* [GC], App no. 23458/02, 24 March 2011.

ECtHR, *Gulcu v. Turkey,* App no. 17526/10, 19 January 2016.

ECtHR, *Karpyuk and others v. Ukraine*, App nos. 30582/04 and 32152/04, 6 October 2015.

ECtHR, *Kasparov v. Russia*, App no. 21613/07, 3 October 2013.

ECtHR*, Kudrevicius & others v. Lithuania* [GC], App no. 37553/05, 15 October 2015.

ECtHR, *Kudrevicius & others v. Lithuania* [GC], App no. 37553/05, 15 October 2015.

ECtHR, *Lashmankin and others v. Russia,* App no. 57818/09, 7 February 2017.

ECtHR, *Makaratzis v. Greece* [GC], App no. 50385/99, 20 December 2004.

ECtHR, *McCann and others v. UK* [GC], App no. 18984/91, 27 September 1995.

ECtHR, *Nachova v. Bulgaria* [GC], App nos. 43577/98 and 43579/98, 6 July 2005.

ECtHR, *Novikova and Others v. Russia*, App nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, 26 April 2016.

ECtHR, *Osman v. the UK* [GC], App no. 23452/94, 28 October 1998.

ECtHR, *Oya Ataman v. Turkey*, App no. 74552/01, 5 December 2006.

ECtHR, *Ozgur Gundem v. Turkey*, App no. 23144/93, 16 March 2000.

ECtHR, *Plattform "Arzte fur das Leben" v. Austria,* App no. 10126/82, 21 June 1988.

ECtHR, *Primov v. Russia*, App no. 17391/2006, 12 June 2014.

ECtHR, *Rehbock v. Slovenia*, App no. 29462/95, 28 November 2000.

ECtHR, *Roman Zakharov v. Russia* [GC], App no. 47143/06, 4 December 2015.

ECtHR, *S.A.S v. France* [GC], App no. 43835/11, 1 July 2014.

ECtHR, *Sáska v. Hungary,* App no. 58050/08, 27 November 2012.

ECtHR, *Simsek and others v. Turkey*, App nos. 35072/97 and 37194/97, 26 July 2005.

ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* App no. 44709/98, 2 October 2001.

***Human Rights Committee***

*Abildayeva v. Kazakhstan*, Communication No. 2309/2013, 4 April 2019, CCPR/C/125/D/2309/2013.

*Alekseev v. Russian Federation*, Communication No. 1873/2009, 25 October 2013, CCPR/C/109/D/1873/2009.

*Amelkovich v. Belarus,* Communication No. 2720/2016, 29 March 2019, CCPR/C/125/D/2720/2016.

*Burrell v. Jamaica*, Communication No. 546/93, 18 July 1996, CCPR/C/57/546/1993.

*Chebotareva v. Russia*, Communication No. 1866/2009, 26 March 2012, CCPR/C/104/D/1866/2009.

*Chongwe v. Zambia*, Communication No.821/1998, 25 October 2000, CCPR/C/70/D/821/1998.

*Dominguez v. Paraguay*, Communication No. 1828/2008, 22 March 2012, CCPR/C/104/D/1828/2008.

*Gimenez v. Paraguay,* Communication, No. 2372/2014, 25 July 2018, CCPR/C/123/D/2372/2014.

*Govsha, Syritsa and Mezyak v. Belarus,* Communication No. 1790/2008, 27 July 2012, CCPR/C/105/D/1790/2008.

*Kivenmaa v. Finland,* Communication No. 412/1990, 31 March 1994, CCPR/C/50/D/412/1990.

*Kozulina v. Belarus*, Communication No. 1773/2008, 21 October 2014, CCPR/C/112/D/1773/2008.

*Lee v. the Republic of Korea*, Communication No. 1119/2002, 20 July 2005, CCPR/C/84/D/1119/2002.

*Lopasov v. Belarus*, Communication No. 2269/2013, 25 July 2019, CCPR/C/126/D/2269/2013.

*Lozenko v. Belarus*, Communication No. 1929/2010, 24 October 2014, CCPR/C/112/D/1929/2010.

*Nepomnyashchiy v. Russian Federation,* Communication No. 2318/2013, 17 July 2018, CCPR/C/123/D/2318/2013.

*Patrick John Coleman v. Australia,* Communication No. 1157/2003, 17 July 2016, CCPR/C/87/D/1157/2003

*Poliakov v. Belarus*, Communication Number 2030/2011, 17 July 2014, CCPR/C/111/D/2030/2011.

*Popova v. Russian Federation*, Communication No. 2217/2012, 6 April 2018, CCPR/C/122/D/2217/2012.

*Praded v. Belarus*, Communication No. 2029/2011, 10 October 2014, CCPR/C/112/D/2029/2011.

*Severinets v. Belarus*, Communication. No. 2230/2012, 19 July 2018, CCPR/C/123/D/2230/2012.

*Stambrovsky v. Belarus,* Communication No. 1987/2010, 24 October 2014, CCPR/C/112/D/1987/2010.

*Strizhak v. Belarus,* Communication No. 2260/2013, 1 November 2018, CCPR/C/124/D/2260/2013.

*Suarez de Guerrero v. Colombia,* Communication No. 45/1979, 31 March 1982, CCPR/C/15/D/45/1979.

*Toregozhina v. Kazakhstan,* Communication No. 2137/2012, 20 November 2014.

*Tulzhenkova v. Belarus,* Communication No. 1838/2008, 26 October 2011, CCPR/C/103/D/1838/2008.

*Turchenyak et al. v. Belarus,* Communication No. 1948/2010, 10 September 2013, CCPR/C/108/D/1948/2010.

*Ukteshbaev v. Kazakhstan,* Communication No. 2420/2014, 17 July 2019, CCPR/C/126/D/2420/2014.

*Vitaly Amelkovich v. Belarus*, Communication No. 2720/2016, 29 March 2019, CCPR/C/125/D/2720/2016.

***Inter-American Court of Human Rights***

IACtHR, *Anzualdo Castro v. Peru*, Series C No. 202, Judgment of 22 September 2009.

IACtHR, *Caracazo v. Venezuela*, Series C, No. 95, Judgment of 29 August 2002

IACtHR, *Case of Landaeta Mejías Brothers et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs, Series C No. 281, Judgment of 27 August 2014.

IACtHR, *Case of Servellón García et al. v. Honduras*. Merits, Reparations and Costs, Series C No. 152, Judgment of 21 September 2006.

IACtHR, *Lopez Lone et al. v. Honduras*, Series C No. 302, Judgment of 5 October 2015.

IACtHR, *Nadege Dorzema and others v. Dominican Republic*, Series C No. 251, Judgment of 24 October 2012.

IACtHR, The Word 'Laws' in Article 30 of the American Convention on Human Rights, Advisory Opinion OC -06/86, of 9 May 1986.

IACtHR, *Velasquez-Rodriguez v. Honduras*, Series C. No. 4, Judgment of 29 July 1988.

***International Court of Justice***

ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996.

## Bibliography

### Books

Belur J (ed.), *Permission to Shoot: Police Use of Deadly Force in Democracies* (Springer, 2010).

Bossuyt, MJ, *Guide to the 'travaux preparatoires' of the International Covenant on Civil and Political Rights*, (Dordrecht: Nijhoff, 1987).

Bovens M, Goodin R and Schillemans T (eds.), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) (Kindle Edition).

Casey-Maslen S and Connolly S, *Police Use of Force under International Law, Cambridge University Press*, (Cambridge University Press, 2017).

De Schutter O, *International Human Rights Law: Cases, Materials, Commentary*, (Cambridge University Press 2010).

Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn. Oxford University Press, 2013).

King M, *Mahatma Gandhi and Martin Luther King Jr: The Power of Non-violent Action*, (UNESCO 1999).

Schabas W, *The European Convention on Human Rights: Oxford Commentaries on International Law*, (Oxford University Press 2015) (Kindle Edition).

Schabas W, *UN Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd Revised Edition, N.P. Engel 2019).

Shelton D, *Remedies in International Human Rights Law* (3rd edn. Oxford University Press 2015).

Terrill W, *Police coercion: Application of the force continuum* (LFB Scholarly Publishing LLC, 2001).

United Nations Office on Drugs and Crimes (UNODC), *Handbook on Police Accountability, Oversight and Integrity* (United Nations 2011).

**Journal Articles**

Adar K and Munyae I, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001,' African Studies Quarterly, Volume 5, Issue 1 (2001).

Brannen S et al, 'The Age of Mass Protests: Understanding an Escalating Global Trend,' Centre for Strategic and International Studies, (March 2020).

Brod NS, 'Rethinking a Reinvigorated Right to Assemble,' 63 Duke Law Journal 155 (2013).

Brown D & Mourão R, 'Protest Coverage Matters: How Media Framing and Visual Communication Affects Support for Black Civil Rights Protests,' Mass Communication and Society, Vol. 24, No.4 (2021).

Cornell S, 'To Assemble Together for Their Common Good: History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech,' 84 Fordham L. Rev. 915 (2015).

Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye?' Verfassung Und Recht in Übersee/Law and Politics in Africa, Asia and Latin America, Vol. 44, no. 1 (2011).

Hager SE, 'Furthering the Enjoyment of Freedom of Assembly in Sub-Saharan Africa through Its Legal Systems,' Intercultural Human Rights Law Review, Vol. 11 no. 55 (2016).

Heyns C, 'African Human Rights Law and the European Convention,' South African Journal of Human Rights, 252 (1995).

Inazu J, 'Unlawful Assembly as Social Control,' 64 UCLA Law Review, 2(2017).

Mutua M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,' Human Rights Quarterly Vol. 23 no. 96 (2001).

Okoth-Ogendo HWO, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69,' Journal of African Affairs, Vol. 71, No. 282 (Jan 1972).

Osse A, 'Set up to fail? Police Reforms in Kenya,' The Elephant (2017). Available at https://www.theelephant.info/features/2017/06/01/set-up-to-fail-police-reforms-in-kenya/.

S Lentz and R Chaires, 'The invention of Peel's principles: A study of policing 'textbook' history', Journal of Criminal Justice Volume 35, Issue 1, January–February 2007.

**Legal Instruments**

***International instruments (treaties and soft-law instruments)***

ACHPR, Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), adopted at the 21st Extra-ordinary Session of the ACHPR, 23 February-4 March 2017, Banjul, The Gambia.

ACHPR, Guidelines on Freedom of Association and Assembly in Africa (2017), adopted at the 60th Ordinary Session of the ACHPR, 8 - 22 May 2017, Niamey, Niger.

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

ASEAN Human Rights Declaration, 18 November 2012.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, 21 March 2006, A/RES/60/147.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990.

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Code of Conduct for Law Enforcement Officials (1979), adopted by the UN General Assembly, 17 December 1979, A/RES/34/169.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS vol. 85.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 222; 312 ETS 5.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), UN Doc A/61/611.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 9 December 1975) UN General Assembly, A/RES/3452(XXX).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008).

OAS, American Convention on Human Rights (adopted 22 January 1969, entered into force 18 July 1978) 1144 UNTS 123.

OHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (Revised 2022).

OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death (Revised 2016).

OHCHR, UN Human Rights Guidance on Less-lethal Weapons in Law Enforcement (2020).

OSCE/ODHIR, Guidelines on freedom of peaceful assembly (3rd Edition, 2019).

Siracusa Principles on the on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN .4/1985/4.

The Bangalore Code of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002.

Universal Declaration of Human Rights (adopted 10 December 1948) UN General Assembly Res. 217 A (III).

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

***National instruments (constitutions, statutes, regulations & legal notices)***

***Kenya***

Administration Police Act (1958), Cap 85 (Repealed).

Commissions of Inquiry Act, Cap 102, 1962 (Revised 2010).

Constitution of the Republic of Kenya, 1963.

Constitution of the Republic of Kenya, 2010.

Independent Policing Oversight Authority Act, No. 35 of 2011.

International Crimes Act, No. 16 of 2008.

IPOA Draft (General Operations) Regulations, 2022.

Kenya Gazette Notice No. 1288, Vol. CXXII- No. 32, 14 February 2020, Designation of Police Stations.

Kenya Gazette Notice No. 4790 of 8 May 2009, Appointment of Taskforce on Police Reforms.

Kenya National Commission on Human Rights Act, No. 9 of 2002.

Legal Aid Act, No. 6 of 2016.

National Coroners Service Act, No. 18 of 2017.

National Police Service Act, No of 2011.

National Police Service Act, No. 11A of 2011 (Rev. 2016).

National Police Service Act, No. 11A of 2011 (Rev.2012).

National Police Service Commission Act, No.30 of 2011.

National Police Service Standing Orders, 2017.

NPS Draft Manual of Guidance on Public Order Management, 2018.

NPS Draft Manual of Guidance on Use of Force and Firearms, 2017.

Office of the Director of Public Prosecutions Act, No. 2 of 2013.

Penal Code, Cap. 63 (Revised 2014).

Police Act (1961), Cap 84 (Repealed).

Preservation of Public Security Act, Cap 57, 1960.

Prevention of Torture Act, No. 12 of 2017.

Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020.

Public Order (Amendment) Act, No. 12 of 1968.

Public Order (Amendment) Bill 2019.

Public Order Act, Cap. 56, 1950 (Revised 2018).

Security Laws (Amendment) Act, No. 19 of 2014.

Statute Law (Repeals and Miscellaneous Amendments) Act, No. 10 of 1997.

Victim Protection Act, No. 17 of 2014.

Witness Protection Act, Cap. 79, 2006 (Revised 2012).

***Uganda***

Public Order Management Act, Act No. 9 of 2013.

***South Africa***

The Constitution of the Republic of South Africa, 1996.

Regulation of Gatherings Act, No. 205 of 1993.

**Reports/Documents**

ACHPR, General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 18 November 2015.

ACHPR, General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 4 March 2017.

ACHPR, Resolution on the Right to Peaceful Demonstrations, ACHPR/Res.281 (LV) 2014, adopted at the 55th Ordinary Session held from 28 April to 12 May 2014, Luanda, Angola.

Article 19 Eastern Africa, CIVICUS, National Coalition of Human Rights Defenders – Kenya, and Kenya Human Rights Commission, Joint Submission to the UN Universal Periodic Review, 35th Session of the UPR Working Group, 18 July 2019.

Article 19, 'Kenya: Restricting the Right to be Heard,' (2022). Available at https://www.article19.org/wp-content/uploads/2022/11/A19-Protests-Under-Threat_KENYA_FINAL-27-Oct.pdf.

Article 19, 'Right to Protest in Kenya,' (2019). Available at https://www.article19.org/wp-content/uploads/2019/11/Kenya-Free-to-Protest-Article-19.pdf.

Commission on Human Rights, Report of the Special Rapporteur on the question of torture, Manfred Nowak, Commission on Human Rights, E/CN.4/2006/6, 23 December 2005.

Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014.

Committee against Torture, Concluding Observations, Kenya, CAT/C/KEN/CO/2, 19 June 2013.

Committee against Torture, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, A/54/44 (SUPP), 17 November 1998.

Committee against Torture, General Comment No. 2 (Implementation of article 2 by States parties), CAT/C/GC/2, 24 January 2008.

Committee against Torture, Report of the UN Committee against Torture: 25th session (13-24 November 2000) and 26th session (30 April-18 May 2001), A/56/44, 26 October 2001.

Constitution of Kenya Review Commission, 'The Final Report of the Constitution of Kenya Review Commission,' (2005).

Denmark's Submission to the UN Human Rights Committee, on the Revised Draft General Comment No. 37.
Available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.

Extra custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, UN General Assembly, A/72/178, 20 July 2017.

Human Rights Committee, Concluding Observations, Angola (CCPR/C/AGO/CO/2), March 2019.

Human Rights Committee, Concluding Observations, Angola, CCPR/C/AGO/CO/2, March 2019.

Human Rights Committee, Concluding Observations, Azerbaijan, CCPR/C/AZE/CO/4, Nov. 2016.

Human Rights Committee, Concluding Observations, Canada CCPR/C/CAN/CO/6, July 2015.

Human Rights Committee, Concluding Observations, Equatorial Guinea (CCPR/C/GNQ/CO/1), July 2019.

Human Rights Committee, Concluding Observations, Former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3, July 2015.

Human Rights Committee, Concluding Observations, Indonesia, CCPR/C/IDN/CO/1, August 2013.

Human Rights Committee, Concluding Observations, Jordan, CCPR/C/JOR/CO/5, 4 December 2017.

Human Rights Committee, Concluding Observations, Kenya (CCPR/C/KEN/CO/4), April 2021.

Human Rights Committee, Concluding Observations, Kenya CCPR/C/KEN/CO/3, August 2012.

Human Rights Committee, Concluding Observations, Kenya CCPR/CO/83/KEN, April 2005.

Human Rights Committee, Concluding Observations, Kuwait, CCPR/C/KWT/CO/3, July 2016.

Human Rights Committee, Concluding Observations, Liechtenstein, CCPR/CO/81/LIE, July 2004.

Human Rights Committee, Concluding Observations, Mauritania (CCPR/C/MRT/CO/2), July 2019.

Human Rights Committee, Concluding Observations, Netherlands (CCPR/C/NLD/CO/5), March 2020.

Human Rights Committee, Concluding Observations, Tajikistan (CCPR/C/TJK/CO/3), July 2019.

Human Rights Committee, Concluding Observations, Tunisia (CCPR/C/TUN/CO/6), April 2020.

Human Rights Committee, Concluding Observations, Uzbekistan, CCPR/C/UZB/CO/4.

Human Rights Committee, Concluding Observations, Viet Nam, CCPR/C/VNM/CO.R.3, March 2019.

Human Rights Committee, General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), A/44/40, 10 March 1992.

Human Rights Committee, General Comment 25: 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, CCPR/C/21/Rev.1/Add.7, 12 July 1996.

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

Human Rights Committee, General Comment 35: Article 9 (Rights to Liberty and Security of Person), CCPR/C/GC/35, 16 December 2014.

Human Rights Committee, General Comment 36: Article 6 (The Right to life), CCPR/C/GC/36, 3 September 2019.

Human Rights Committee, General Comment 37: Article 21 (The Right of Peaceful Assembly), CCPR/C/GC/37, 17 September 2020.

Human Rights Committee, General Comment 34: Article 19, Freedoms of opinion and expression, CCPR/C/GC/3, 12 September 2011.

Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012.

Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Maina Kiai, Christof Heyns, A/HRC/31/66, 4 February 2016.

Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/17/28, 23 May 2011.

Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/11/2, 27 May 2009.

Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014.

Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/11/2/Add.6, 26 May 2009.

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

Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clement Voule, A/HRC/41/41, 17 May 2019.

Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland, A/HRC/23/39/Add.1, 17 June 2013.

Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, 24 April 2013.

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, 21 May 2012.

Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum: Mission to the Gambia, A/HRC/28/68/Add.4, 16 March 2015.

Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/13/39, 9 February 2010.

Human Rights Council, Resolution 17/4, Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4, 6 July 2011.

Human Rights Council, Resolution 24/5, The rights to freedom of peaceful assembly and of association, A/HRC/RES/24/5, 8 October 2013.

Human Rights Council, Resolution 26/22, Human rights and transnational corporations and other business enterprises, A/HRC/RES/26/22, 15 July 2014.

Human Rights Council, Resolution 38/11, The promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/38/11, 6 July 2018.

Human Rights Council, Resolution on the rights to freedom of peaceful assembly and of association, A/HRC/15/L.23, 27 September 2010.

Human Rights Watch & Amnesty International, '"Kill Those Criminals" -Security Forces Violations in Kenya's August 2017 Elections,' (2017). Available at https://www.hrw.org/sites/default/files/report_pdf/kenya1017_web.pdf.

Human Rights Watch, Human Rights Watch World Report 1992 - Kenya, 1 January 1992. Available at https://www.refworld.org/docid/467fca3f23.html.

Human Rights Watch, Human Rights Watch World Report 1998 - Kenya, 1 January 1998. Available at https://www.refworld.org/docid/3ae6a8b124.html.

IAU, Annual Performance and Statistical Report-2021. Available at https://www.iau.go.ke/wp-content/uploads/2022/11/ANNUAL-PERFORMANCE-AND-STATISTICAL-REPORT-2021.pdf.

IAU, Annual Performance Report-2018. Available at https://www.iau.go.ke/wp-content/uploads/2019/07/IAU-ANNUAL-REPORT-2018.pdf.

IAU, Annual Performance Report-2021. Available at https://www.iau.go.ke/wp-content/uploads/2022/11/ANNUAL-PERFORMANCE-AND-STATISTICAL-REPORT-2021.pdf.

IAU, Operational Manual (2018). Available at https://www.iau.go.ke/wp-content/uploads/2019/07/IAU-OPS-MANUAL-.pdf.

International Committee of the Red Cross, The Use of Force in Law Enforcement Operations, (2019). Available at https://www.icrc.org/en/document/use-force-law-enforcement-operations-0.

International Law Commission, Report of the International Law Commission on the work of its 71st session, 29 April-7 June and 8 July-9 August 2019, International Law Commission, A/74/10.

IPOA, Annual Report and Financial Statements for the year ended June 2019. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Annual-Report-2018-2019-Web.pdf.

IPOA, Monitoring Report on Police Conduct during Public Protests and Gatherings: A Focus on the Anti-IEBC Demonstrations (April – June 2016). Available at http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf .

IPOA, Performance Report for July-December 2021. Available at https://ipoa.news/wp-content/uploads/2022/07/ipoa-performance-report-july-december-2021.pdf.

IPOA, Performance Report: January-June 2020. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/02/IPOA-Performance-Report-Jan-June-2020-Web.pdf.

IPOA, Performance Report: July-December 2020. Available at http://www.ipoa.go.ke/wp-content/uploads/2021/08/IPOA-Performance-Report-July-Dec-2020-Web.pdf.

Kenya National Task Force on Police Reforms: Some Key Recommendations Summarised. Available at https://www.ipinst.org/wp-content/uploads/2010/01/pdfs_summary_policereformreport.pdf.

KNCHR, 'Mirage at Dusk: A Human Rights Account of the 2017 General Election, 2017,' Available at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457.

KNCHR, 'Report to the Committee Against Torture on the Review of Kenya's Third Periodic Report on the Implementation of the Provisions of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and/or Punishment,' February 2020. Available at https://www.knchr.org/Portals/0/KNCHR%20Altrenative%20Report%20on%20Implementation%20of%20The%20CAT.pdf.

KNCHR, 'You got brains, we got brawn: Report of the Kenya National Commission on Human Rights on Investigations into Police Brutality Committed at the University of Nairobi on 28 September 2017', November 2017. Available at https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Report%20on%20Police%20Brutality%20at%20the%20University%20of%20Nairobi_2.pdf.

KNCHR, Mirage at Dusk: A Human Rights Account of the 2017 General Election (2017). Available at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457.

M. Kagari and S. Thomas, 'The police, the people, the politics: Police accountability in Kenya', (Commonwealth Human Rights Initiative, 2006). Available at https://gsdrc.org/document-library/the-police-the-people-the-politics-police-accountability-in-kenya/.

Ministry of Interior and Coordination of National Government, Revised Police Reforms Program Document-2015-2018. Available at https://www.npsc.go.ke/download/revised-police-reforms-2015-2018/.

National Police Service, Annual Performance Report-2021. Available at https://www.nationalpolice.go.ke/annual-report.html?download=94:annual-report.

Norway's Submission to the Human Rights Committee on the Revised Draft General Comment No. 37, Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.

Office of the Director of Public Prosecutions, Police Accountability Case Digest, Volume I (2021).

OHCHR, Human rights violations and abuses in the context of protests in Nicaragua, 18 April-18 August 2018.

Parliament of Kenya, Senate Standing Committee on Justice, Legal Affairs and Human Rights, Report on the Inquiry into Extrajudicial Killings and Enforced Disappearances in Kenya, October 2021. Available at http://parliament.go.ke/sites/default/files/2021-11/Report%20on%20Inquiry%20into%20Extrajudicial%20Killings%20and%20Enforced%20Disappearance%20in%20Kenya_.pdf.

Report of the Commission of Inquiry into Post-Election Violence (2008). Available at https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf.

Report of the Independent Commission on Policing in Northern Ireland (1999). Available at https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf.

Report of the National Task Force on Police Reforms (2009), Available at https://www.scribd.com/doc/245815329/Ransley-Report.

Resolution 73/173, Promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association, UN General Assembly, A/RES/73/173, adopted on 17 December 2018.

Russia's Submission to the Human Rights Committee on the Revised Draft General Comment No. 37, Accessed at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx.

Statement of Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions, 66th Session of the General Assembly, Third Committee, 20 October 2011.

The Governance, Justice, Law & Order Sector Reform Programme: Final Report (2011). Available at https://tile.loc.gov/storage-services/service/gdc/gdcovop/2018338332/2018338332.pdf

Travaux Préparatoires, UN Economic and Social Council, Commission on Human Rights, 60th session, Summary record of the 169th meeting, 5 May 1950, E/CN.4/SR.169.

Travaux Préparatoires, UN Economic and Social Council, Commission on Human Rights, 8th session, Summary record of the 325th meeting, 20 June 1952, E/CN.4/SR.325.

Travaux Préparatoires, UN Economic and Social Council, Drafting Committee on an International Bill of Rights, 1st session, Report of the Drafting Committee to the Commission on Human Rights, 1 July 1947, E/CN.4/21.

Travaux Préparatoires, UN General Assembly, 5th session, 3rd Committee, 314th meeting, 15 November 1950, A/C.3/SR. 290.

UK Parliament, Select Committee on Home Affairs, 7th Report, Session 2007-08. Available at https://publications.parliament.uk/pa/cm200708/cmselect/cmhaff/364/36406.htm.

UN Security Council, Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, S/2009/693, annex, 18 December 2009.

UN Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/134, 9 March 2007.

United Nations Assistance Mission for Iraq/Office of the United Nations High Commissioner for Human Rights, Human Rights Violations and Abuses in the Context of Demonstrations in Iraq October 2019 to April 2020, August 2020.

United Nations Assistance Mission for Iraq/Office of the United Nations High Commissioner for Human Rights, Human Rights Violations and Abuses in the Context of Demonstrations in Iraq October 2019 to April 2020, (August 2020).

US Department of State, Kenya Country Report on Human Rights Practices for 1998, 26 February 1999.
Available at https://1997-2001.state.gov/global/human_rights/1998_hrp_report/kenya.html.

US Department of State, Kenya Report on Human Rights Practices for 1997, 30 January 1998. Available at https://1997-2001.state.gov/global/human_rights/1997_hrp_report/kenya.html.

**News articles/Press releases**

Africa News, 'WHO rejects Sudan's Report on Death Toll of Protesters.' 14 June 2019.
Available at https://www.africanews.com/2019/06/14/who-reject-sudan-s-report-on-death-toll-of-protesters-june-2019//.

Al Jazeera, 'At least 37 people were killed in election violence,' 9 October 2017. Available at https://www.aljazeera.com/news/2017/10/9/at-least-37-people-were-killed-in-election-violence.

Al Jazeera, 'Kenya: One killed in protests over brothers' deaths in custody,' 5 August 2021. Available at https://www.aljazeera.com/news/2021/8/5/one-dead-in-kenya-protests-over-brothers-death-in-custody.

Al Jazeera, 'Israelis restart Netanyahu protests amid third virus lockdown,' 10 January 2021. Available at https://www.aljazeera.com/news/2021/1/10/israeli-protests-against-netanyahu-as-third-virus-lockdown-looms.

Al Jazeera, 'Amnesty slams Guinea's lethal protest crackdown,' 1 October 2020. Available at https://www.aljazeera.com/news/2020/10/1/amnesty-denounces-guineas-lethal-protest-crackdown.

Al Jazeera, 'Hong Kong Protests: All the Latest Updates,' 3 July 2019. Available at https://www.aljazeera.com/news/2019/06/hong-kong-protests-latest-updates-190612074625753.html.

Article 19, 'Kenya: Court judgment threatens free expression of protesters,' 18 February 2022. Available at https://www.article19.org/resources/kenya-court-judgment-threatens-free-protests/.

Reuters, 'Kenyan police fire teargas, arrest marchers protesting at brutality,' 7 July 2020. Available at https://www.reuters.com/article/us-kenya-protests-idUSKBN2481DR.

BBC, 'The People are revolting–the history of protest.' Available at https://www.bbc.com/timelines/ztvxtfr

BBC News, 'Nigeria protests: President Buhari says 69 killed in unrest,' 23 October 2020. Available at https://www.bbc.com/news/world-africa-54666368. Accessed on 24 October 2020.

BBC News, 'Nigeria's #ENDSARS campaign at police brutality video,' 4 December 2017. Accessed at https://www.bbc.com/news/world-africa-42225314.

BBC News, 'Sudan Crisis: What you need to Know,' 16 August 2019. Available at https://www.bbc.com/news/world-africa-48511226.

BBC News, 'Violent crackdown on anti-government protests in Syria,' 25 April 2011. Available at https://www.bbc.com/news/av/world-middle-east-13185422;

Bruhan Makong, 'Koome Tells Off 'Busybodies' in IPOA, Asks Police to Use Arms Effectively,' Capital News, 16 December 2022.
Available at https://www.capitalfm.co.ke/news/2022/12/koome-tells-off-busybodies-in-ipoa-asks-police-to-use-arms-effectively/.

Darlington Manyara, 'Merciless: Student leader gunned down during protests at Meru University,' The Standard Newspaper, February 2018. Available at https://www.standardmedia.co.ke/entertainment/local-news/2001271437/merciless-student-leader-gunned-down-during-protests-at-meru-university.

David Mwere, 'IG nominee Hilary Mutyambai faces joint House teams,' Daily Nation, 28 March 2019. Available at https://nation.africa/kenya/news/ig-nominee-hilary-mutyambai-faces-joint-house-teams-152682.

DW News, 'Coronavirus latest: German anti-lockdown protests enter second round,' 16 May 2020. Available at https://www.dw.com/en/coronavirus-latest-german-anti-lockdown-protests-enter-second-round/a-53460404.

France 24, 'Protests over anti-Islam film turn deadly in Pakistan', 21 September 2012. Available at https://www.france24.com/en/20120921-protests-over-anti-islam-film-turn-deadly-pakistan-prophet-karachi-usa.

Gordon Osen, 'IPOA demands IAU to stop probing disbanded SSU team,' The Star Newspaper, 24 October 2022. Available at https://www.the-star.co.ke/news/2022-10-24-ipoa-demands-iau-to-stop-probing-disbanded-ssu-team/.

Human Rights Watch, 'Police Killings during Protests: Investigate Use of Excessive Force in Western Region,' HRW News, 20 June 2016. Available at https://www.hrw.org/news/2016/06/21/kenya-police-killings-during-protests.

IPOA News, 'Masimba Shootings: Ten GSU Officers Face Murder, Causing Serious Injuries Charges,' 4 November 2022. Available at https://ipoa.news/2022/11/04/masimba-shootings-ten-gsu-officers-face-murder-causing-serious-injuries-charges/?fbclid=IwAR2VhSvxJYHR4mimFozfcbblayjLI9ABo3HUBKN1xIYHAA2L0nrc4VIWCRI.

IPOA, 'IPOA says police assaulted University of Nairobi students', YouTube Video, Uploaded by IPOA, 14 June 2018. Available at https://www.youtube.com/watch?v=Zu51tkOr7zw.

IPOA, 'Police were Justified to Use Firearms,' Press Release, 30 May 2022. Available at https://ipoa.news/wp-content/uploads/2022/05/261.-police-were-justified-to-use-firearms-investigations-reveal-30.05.2022-2.pdf.

ISS, 'Rubber bullets are high risk when used at close range,' 28 November 2019. Available at https://issafrica.org/iss-today/rubber-bullets-are-high-risk-when-used-at-close-range.

Jeremiah Wakaya, 'Matiangi Denies Protesters Killed By Police, Warns Violence Will Be Crushed,' Capital News, 12 August 2017.
Available at https://www.capitalfm.co.ke/news/2017/08/matiangi-denies-protesters-killed-by-police-warns-violence-will-be-crushed/.

Jordan Smith, 'Police Attacks on Protesters With "Less than Lethal" Weapons Result in Life-Threatening Injuries,' The Intercept, 11 June 2020.
Available at https://theintercept.com/2020/06/11/police-less-than-lethal-weapons-protests/;

Josphat Thiong'o, 'Businessmen vow to 'protect' their businesses ahead of planed NASA protests,' The Standard Newspaper, 25 September 2017.
Available at https://www.standardmedia.co.ke/article/2001255611/businessmen-vow-to-protect-their-businesses-ahead-of-planed-nasa-protests?fb_comment_id=1443678902348704_1443996238983637.

Kiprotich Chepkoit, 'CS John Nkaissery Directive Comes to Pass.' Standard Digital, 18 May 2016. Available at http://www.standardmedia.co.ke/article/2000202179/cs-john-nkaissery-directive-comes-to-pass.

Maggie Fick, 'Baby girl 'teargassed, beaten by Kenyan police' dies: doctor,' Reuters, 15 August 2017. Available at https://www.reuters.com/article/us-kenya-election-police-idUSKCN1AV1UP.

Mercy Juma, 'Kenya police recruits brag: 'We are the bad ones,' BBC News, 9 December 2021. Available at https://www.bbc.com/news/world-africa-59598455.

New York Times, '15 Days of Fury: How Puerto Rico's Government Collapsed,' 27 July 2019. Available at https://www.nytimes.com/2019/07/27/us/puerto-rico-protests-timeline.html.

Nike Ching, 'More deaths Reported in Sudan Protests.' Voice of America, 1 July 2019, Available at https://www.voanews.com/africa/more-deaths-reported-sudan-protests.

Nolan Feeney, 'Police Use Tear Gas on Protesting Schoolchildren', Time, 19 January 2015. Available at https://time.com/3673741/kenya-schoolchildren-land-grab-protest-photos/.

NTV, 'Nairobi Business Community members emerge to counter protests,' YouTube Viedo, Uploaded by NTV on 13 October 2017. Available at https://www.youtube.com/watch?v=c-mVcurm-0M.

OHCHR, 'UN experts call for end to police brutality worldwide,' 13 August 2021. Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27376&LangID=E.

Physicians for Human Rights, '"Less-lethal" weapons used with excessive force can cause serious injury, disability, and death.' Available at https://phr.org/issues/weapons/non-lethal-weapons-used-with-excessive-force/.

Ramadhan Rajab, 'Uproar over police brutality, as students ask IG, IPOA, VC to act,' The Star Newspaper, 30 September 2017. Available at https://www.the-star.co.ke/news/2017-09-30-uproar-over-police-brutality-as-students-ask-ig-ipoa-vc-to-act/.

The East African, 'Fresh Protests over Disputed Elections in Malawi,' 4 July 2019. Available at https://www.theeastafrican.co.ke/news/africa/Fresh-protests-over-disputed-elections-in-Malawi/4552902-5182992-146lm61/index.html.

The Star Newspaper, 'Matiang'i denies use of live bullets, deaths in post-election protests,' 12 August 2017. Available at https://www.the-star.co.ke/news/2017/08/12/matiangi-denies-use-of-live-bullets-deaths-in-post-election-protests_c1615392.

Tom Odula, 'Kenyan police tear gas anti-corruption protesters in Nairobi,' Washington Post, 21 August 2022. Available at https://www.washingtonpost.com/world/africa/kenyan-police-tear gas-anti-corruption-protesters-in-nairobi/2020/08/21/bb4cd452-e3ab-11ea-82d8-5e55d47e90ca_story.html.

UN News, 'Arab rights charter deviates from international standards, says UN official,' 30 January 2008. Accessed at https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official.

UN News, 'Myanmar: UN rights office 'deeply disturbed' over intensifying violence against protesters,' 17 March 2021. Available at https://news.un.org/en/story/2021/03/1087422.

UN News, 'Probe of killing of Kosovo protesters leads to call for UN review of rubber bullets,' 2 July 2007. Available at https://news.un.org/en/story/2007/07/224352-probe-killing-kosovo-protesters-leads-call-un-review-rubber-bullets.

UN News, 'Protests around the world: Politicians must address 'growing deficit of trust', urges Guterres,' 25 October 2019. Available at https://news.un.org/en/story/2019/10/1050031.

UN News, 'UN Human Rights Chief deplores killings and detentions amid peaceful protests in Sudan,' 3 June 2019.
Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24672&LangID=E.

Voice of America, 'Police Continue to Crackdown on Anti-government Protesters in Minsk,' 1 November, 2020, available at https://www.voanews.com/europe/police-continue-crackdown-anti-government-protesters-minsk.

**Online databases**

http://kenyalaw.org/kl/index.php?id=11116.

https://covid19.who.int/.

https://metoomvmt.org/about/#history.

https://rightofassembly.info.

https://www.achpr.org/statepartiestotheafricancharter.

https://www.african-court.org/cpmt/decisions.

https://www.african-court.org/wpafc/declarations/.

https://www.ipoa.go.ke/convictions/.

https://www.policinglaw.info/.

https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19.